
(2003) 01 BOM CK 0087

In the Bombay High Court

Case No : Notice of Motion No. 2933 of 2002 in Suit No. 3452 of 2002

Star India Private Limited

APPELLANT

Vs

Laxmiraj Seetharam Nayak and Another

RESPONDENT

Date of Decision : 10-01-2003

Acts Referred:

Contract Act, 1872 — Section 27

Citation : (2003) 3 BomCR 563 : (2003) 3 MhLj 726

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : Ravi Kadam and Sanjay Kadam, instructed by Kadam and Co, for the Appellant; Kapil Sibal, Atul Sharma, S.V. Doijode, Akhil Sibal, P.A. Kabadi and Minakshi Iyer, instructed by Doijode Patharphekar and Associates for defendant No. 1, I.M. Chagla, Atul Sharma, S.V. Doijode, Akhil Sibal, P.A. Kabadi and Minakshi Iyer, instructed by Doijode Phatarphekar and Associates, for the Respondent

Judgement

R.J. Kochar, J.—The plaintiff is a Company incorporated under the Companies Act, 1956 presently known as Star India Private Limited. It carries on a business of acquiring copyrights in cinematographic films, television serials, programmes etc. and it also produces and commissions production of television programmes for various television channels. The plaintiff also claims that it enjoys tremendous popularity amongst television viewers in India and abroad. The plaintiff has an exclusive contract/contracts with Satellite Television Asia Region Ltd., a company incorporated in Hong Kong for advertising and revenue collection in respect of its eight telecast channels.

2. The defendant No. 1 joined the plaintiff company as Area Sales Manager in January 1993 and the graph of his progress shows that he became Sales Manger, Vice President Advertising Sales, Senior Vice President Advertising Sales and on and from July 2002 he became Executive Vice President Advertising Sales under the renewed contract dated 27-6-2001 for a period of three years upto 30th June 2004. The said contract incorporated several terms and conditions of service. His

salary in July 2002 was Rs. 83,42,400/- p.a. It further appears that the aforesaid salary was excluding other perquisites such as company accommodation, chauffeur driven car, club membership, mobile phone, laptop computer, telephone, medical expense reimbursement etc.

3. The 2nd defendant was subsequently impleaded as a party, as according to the plaintiff, the 2nd defendant induced breach of contract by the 1st defendant and purported to employ him in spite of the subsistence of the service contract dated 27th June, 2001 till 30th June 2004. According to the plaintiff, the said 2nd defendant is carrying on a competing business with the plaintiff. The 2nd defendant was closely associated with the plaintiff inasmuch as that the news programmes for STAR News Channel of the plaintiff were produced by the 2nd defendant. According to the plaintiff, the 2nd defendant disassociated with the plaintiff and intends to start its own business of news channel with the help of the 1st defendant by employing him.

4. The 1st defendant tendered his resignation from the service of the plaintiff by a letter dated 16-9-2002 intending to resign from the employment of the plaintiff. The 1st defendant requested the plaintiff by his subsequent letter dated 23-9-2002 to be relieved from employment by 15-10-2002. By a reply dated 26-9-2002 the plaintiff refused to accept the resignation sent by the 1st defendant and insisted that he should continue in service till 30th June 2004 in accordance with the terms and conditions stipulated in the service contract. The 1st defendant by his letter dated 1-10-2002, however, asserted his absolute right to resign from employment and insisted that his resignation would become effective from the date of his letter and that he should be relieved from employment by 15-10-2002. It appears that the 1st defendant discontinued to report for work from 16-9-2002.

5. The plaintiff has approached this Court praying for a decree of declaration that the purported resignation of the 1st defendant to be illegal, null and void and not binding on the plaintiff and that the 1st defendant be restrained by a perpetual order and injunction of this Court from taking up or continuing in any employment or any office or engagement by himself or rendering any consultancy or any other service directly or indirectly with any other company, entity or person in a business similar to or competing with the plaintiff till 30th June 2004. The plaintiff also sought similar injunction against the 1st defendant injunctioning him from in any manner using or disclosing or divulging the confidential information and trade secret and knowledge relating to the plaintiffs business including the plaintiffs business plans, strategies, marketing policies, franchisee agreements, affiliates/joint ventures etc. as set out in schedule being Exhibit-G to the plaint. The plaintiff has prayed for payment of Rs. 1 lakh from the defendant as and by way of damages of his wrongful absence. The plaintiff has prayed for interim orders. The plaintiff has also sought restraining orders against the defendant No. 2 to the effect that it should not employ the services of the defendant No. 1 till 30th June 2004.

6. The plaintiff filed the above notice of motion for interim orders injuncting the defendant No. 1 from taking up or continuing in any employment or any office or engagement by himself or rendering any consultancy or any other service directly or indirectly with any other company, entity or person in a business similar to or competing with the plaintiff till 30th June 2004. The plaintiff has also prayed for interim orders restraining the 1st defendant from in any manner using or disclosing or divulging the confidential information and trade secret and knowledge relating to the plaintiffs business including the plaintiffs business plans, strategies, trade secrets, marketing policies, franchisee agreements, affiliates/joint ventures as set out in Exhibit-G to the plaint or any part thereof.

7. The plaintiff filed an affidavit of one Mr. Ajay K. Sharma, General Counsel and Head of the Legal Affairs of the plaintiff in support of the notice of motion. The plaintiff moved this Court (D.K. Deshmukh, J.) for urgent ad interim orders. After hearing both the sides my learned brother Deshmukh, J. was pleased to pass an ad interim speaking order on 1-11-2002 granting ad interim order in terms of prayer clause (a) and prayer clause (b) excluding bracketed portion. The learned Judge prima facie held that the defendant No. 1 was bound by the contract of service and was therefore obliged to comply with the conditions stipulated in Clause 12 of the contract which obliges him to continue in employment for a period of three years and that during this period he cannot take any employment in any other competing business. The learned Judge made the notice of motion returnable for final hearing.

8. As the first defendant was not satisfied with the ad interim order passed by the learned judge, he preferred an appeal before the Appeal Court of this Court. The Appeal Court by its order dated 16-12-2002 recorded that the appeal was not pressed and was dismissed as withdrawn. It further appears that the 1st defendant (appellant) prayed for expeditious hearing of the notice of motion out of turn. The appeal Court accepted the said prayer and "requested" the learned Single Judge to take up the notice of motion for final hearing peremptorily in the month of January 2003. In deference to the "request" made by the Appeal Court I was constrained to hear the present notice of motion out of turn in spite of heavy board of the notices of motion which are pending for final hearing from 2000 onwards. The bulging purse of 1st defendant with an annual income of more than Rs. One crore emboldened him to challenge the ad interim order against him before the Appeal Court but realising the negative trend of the appeal Court against him prayed for withdrawal of the appeal and begged for a mercy of atleast a direction to the learned single Judge to hear his notice of motion allowing him to jump the queue over all others who have been waiting for their turn of usual course. I have treated the "request" of the appeal Court with respect and I have given top priority to the present notice of motion at the cost of injustice to those who are waiting in queue since long. I have heard all the three learned counsel for their parties from 11 a.m. till 5.15 p.m. of course, with the break of 45 minutes!

9. The 1st defendant has filed his affidavit on 27-12-2002. The 2nd defendant filed its affidavit on the same day. The plaintiff has filed rejoinder to the affidavits of the defendants. The learned counsel on both the sides have relied on the following judgments.

1. Lalbhai Dalpatbhai and Co. Vs. Chittaranjan Chandulal Pandya, . 2. Niranjan Shankar Golikari Vs. The Century Spinning and Mfg. Co. Ltd., : Superintendence Company of India (P) Ltd. Vs. Sh. Krishan Murgai, . 4. Taprogge Gesellschaft MBH Vs. IAEC India Ltd., . 5. M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, . 6. 2000(4) BCR 487 , Jet Airways (I) Ltd. v. Mr. Jan Peter Ravi Karnik.

10. Shri Ravi Kadam, the learned counsel for the plaintiff has prayed for confirmation of the ad interim orders granted by my learned brother Deshmukh, J. The learned counsel strongly pleaded that the defendant No. 1 could not resign from the employment and join the defendant No. 2 which is a competing company in breach of the service contract. Shri Kadam pointed out that as a Vice President of the plaintiff company his Annual Salary including the perquisites crossed Rs. 1 Crore. He was holding the highest responsible post of Executive Vice President of the Advertising Sales Department. He had 138 employees under him. In the capacity of the top Executive of the Company he had come to know several trade secrets, confidential information in the course of his employment and therefore, he must comply with the terms of contract stipulated in the agreement dated 27th June 2001. The learned Counsel pointed out that he could not leave and join the defendant No. 2 which is form to carry on the competing business with the plaintiff before the expiry period of the contract, upto June, 2004. According to Shri Kadam, he is wholly bound by clause 12 of the Contract. The learned counsel further took me through the itemized trade secrets and confidential information acquired by the 1st defendant, at Exhibit-G to the plaint. Shri Kadam submitted that during the course of his employment the 1st defendant was given a training and was also deputed to attend several conferences and seminars to acquire the expertise skill in the profession. The 1st defendant had accepted all the conditions stipulated in the contract including the clause 12 "Non-Completion" of the contract. He was privy to the high level information. He had full knowledge of the policies and strategies in respect of advertisement business of the plaintiff company. The learned counsel, further submitted that he had full knowledge of the method and manner of negotiations with the parties for the advertising business of the company. He was a member of the core committee of the company for taking policy decision and he was a party to such decisions and during the course of discussion he came to know about a number of trade secrets. He was the Head of the Advertising Sale of eight channels. The plaintiff company has proprietary light over all such trade secrets and confidential matters which the 1st defendant acquired while in the employment of the plaintiff. By his joining the competing business of the defendant No. 2 the plaintiff would suffer grave and irreparable damage. He would divulge the trade secrets and confidential information to the defendant No.

2. Shri Kadam has very heavily relied on the judgments of the Supreme Court in the cases of Niranjana Shankar Golikari and Gujarat Bottling Co. Ltd. (supra). The learned counsel has also sought support from the two judgments of the two learned single Judges of this Court (supra). The learned counsel further submitted that the plaintiff will not insist for the six months period after 30-6-2004. Shri Kadam, very vehemently submitted that the defendant No. 1 should be restrained from resigning from the employment of the plaintiff and from joining the defendant No. 2 in violation of subsisting contract of service until 30th June 2004.

11. Shri Kapil Sibal, the learned senior counsel for the defendant No. 1 very vehemently opposed any interim orders being granted to the plaintiff. According to the learned counsel, the plaintiffs have prayed for damages in the suit and if the plaintiff finally succeeds it would be awarded damages for breach of the contract by the defendant No. 1. According to him, there is no case for granting any injunction or any interim order restraining the 1st defendant from resigning from the employment of the plaintiff and from joining the employment of the defendant No. 2. Shri Sibal pointed out that the defendant No. 2 in fact is not a competing business as it was the defendant No. 2 which was giving programme of news channel of the plaintiff. The arrangement between the plaintiff and the defendant No. 2 came to an end and the services of the news channel which were offered to the plaintiff were withdrawn as the defendant No. 2 intended to start its own company. Shri Sibal therefore pointed out that there was no business competition between two. In any event the learned counsel carrying the point further submitted that in the present economy the competition in the market cannot be restricted or discouraged by a decree of the Court. The business of the plaintiff is not news advertisement and it was the NDTV news which was given to the plaintiff and the same having been withdrawn it cannot be said that the defendant No. 2 is a competing business. Shri Sibal further submitted that out of eight channels only news channels would go away and by itself that will not cause any loss of income to the company. In any case the loss for want of the news channels cannot be said to be an irreparable injury warranting an injunction on the defendant No. 1 from joining the defendant No. 2. If such injunction is granted the defendant No. 1 would suffer an irreparable loss, says the learned counsel. Shri Sibal pointed out that the defendant No. 1 has not acquired any trade secrets or confidential information. According to the learned counsel, in the sales business there is no secret and all the rates and information are available in the open market. Shri Sibal pointed out from the affidavit of the defendant No. 1 that the so called confidential information claimed by the plaintiff is a matter of public domain. He further submitted that he was not a party or privy to any decisions which were of confidential or secret nature. Shri Sibal submitted that all the 138 employees working under him in the department were carrying on negotiations with the advertising parties for the advertisement business. The business of the advertisement depended on the popularity of the programmes displayed on the T.V. Channel. Shri Sibal also

submitted that no special knowledge or skills were acquired by him exclusively in any training or in any conferences or seminars, which were attended by several personnel. The information acquired in such open conferences and seminars cannot be said to be a trade secret, says Shri Sibal. As far as the negotiating skill is concerned Shri Sibal submits that it is not the proprietary right of the plaintiff company but is his personal right and therefore, he cannot be restrained from joining even a competing business on the ground that the 1st defendant acquired negotiating skill during the course of his employment. Shri Sibal further submitted that there is absolutely no evidence in respect of trade secrets or confidential informations. The parties have to produce evidence at the time of trial and at this stage it cannot be said that the defendant No. 1 had acquired the knowledge of so called trade secrets of the company. According to Shri Sibal, the 1st defendant was not concerned with the policy and there was no evidence to show to what policy decision he was a privy or he was a party. Shri Sibal submitted that the ratio of the Golikari case cannot be applied to this case at this stage as the Golikari's case was finally decided after evidence was adduced by both the parties. Shri Sibal further submitted that the facts which were brought on record by way of evidence before the trial Court are totally different from the facts in the present case. In that case, says the learned counsel, the employee had certainly come to know about the trade secrets of his employer. That was established by adducing evidence. Shri Sibal further submitted that even the ratio of the Gujarat Bottling cannot be applied to the facts of the present case. It was not a case of employer employee relationship. Shri Sibal analyses the list of the trade secrets and confidential information as given by the plaintiffs at Exhibit-G of the plaint. He tried to bring home his point that there was absolutely nothing to indicate any trade secret in the said list. According to Shri Sibal, applying the well known principles of grant of interim orders the plaintiffs have not shown any prima facie case and irreparable damage if interim orders are not granted. On the contrary the balance of convenience is in favour of the defendant No. 1 who would suffer wholly if injunction is granted in favour of the plaintiff as he would be forced to join the plaintiff or remain idle for the entire period of contract, submits Shri Sibal. The learned counsel therefore prays for dismissal of the notice of motion.

12. Shri Chagla, the learned senior counsel appearing for the defendant No. 2 adopted the submissions of Shri Sibal. According to the learned counsel, public policy and public interest would lie in free and fair competition which is the need of our present economy. Shri Chagla submitted that the best talent could be attracted by the best channels and therefore, the freedom of contract should not be restricted or curtailed.

13. Clause 12 of the contract reads as under :

"12. Non Competition.

You acknowledge that during the course of your employment with the company, you will become familiar with the Company's trade secrets and without (sic :

with) other confidential information concerning the Company and its associates and related Companies and that your services will be of a special, unique and extraordinary value to the Company. You agree that during the term hereof and for six months thereafter, you shall not directly or indirectly own, manage, control, participate in, consult with, render service for or engage in any business competing with the business of the Company or its associates or related Companies within India. For the purpose of this Agreement, the "businesses of the Company" shall mean satellite or cable television,"

14. Shri Sibal has not rightly pressed the point that the service contract was a result of force or coercion exercised by the plaintiff on the first defendant. It is not possible to hold that the said service contract was between the two unequal parties and was as a result of any force or coercion. The 1st defendant had voluntarily accepted the position and promotion to the post of Executive Vice President, Advertising Sale of the plaintiff company. The remuneration and other service condition offered by the plaintiff to the 1st defendant are of excellent nature. The 1st defendant has to be classified as a "diamond collar" employee. So far the highest position employees were called as the "golden collar" employees of any establishment as against the blue collared and white collared classes. There is absolutely no doubt in my mind that the contract entered into between the parties was free and fair. Besides, the 1st defendant has been in employment of the plaintiffs for quite a long period and it is not possible to infer that he was in any vulnerable position to be coerced to accept the assignment which in fact was to a very high position. It was indeed a promotion and not demotion or reversion. Therefore, there is absolutely no substance in the allegations of the 1st defendant. The defendant No. 1 therefore, was bound by all the terms and conditions of service contract including the above quoted Clause 12. The crucial question however is whether there is even a prima facie evidence on record to indicate what trade secrets and confidential information concerning the company the 1st defendant has come to know. There is not even an iota of evidence, even prima facie, to infer that the 1st defendant had come to know certain trade secrets or confidential information concerning the company and its business. The trade secrets and the confidential information has not been even spelled out by the company. By repeating the said terms it cannot be said that the first defendant has certainly come to know certain trade secrets of the company. The best efforts of the company to itemize the so called trade secrets and confidential information is at Exh. G. Even a careful reading of the said exhibit would show that except giving the items there is nothing which can be called trade secret or confidential information. All these items are usual within the knowledge of the concerned persons. Any one in any employment for some period would know certain facts and would come to get some information without any special efforts cannot be said to know trade secrets or confidential information. Every information or general knowledge of facts cannot be labelled as trade secret or confidential information. In my opinion these items cannot be said to be of trade secrets. If we call these items as trade secrets the word secret

would lose its meaning and significance. The basic nature of the business dealings of the plaintiff with its advertisers would be openly known information and it cannot be called a trade secret or a confidential information. The rates of the advertisements are within the public domain and every businessman generally knows the rates of his rival. The concerned people know the rates of the advertisements. Unless they are told the rates and other conditions of the advertisements no business transaction can be done. Such matters are not even open secrets. Fixation of rates etc. as rightly pointed out by Shri Sibal depends on a number of factors including the popularity of the serial and the time-slots of the display of such serials. Mere use of words strategies, policy decisions or crucial policies repeatedly in all the items of the Exh. G. does not acquire the position or character of secrecy. All the decisions in respect of these items are well known to the personnel of the sales department. These are not trade secrets or confidential information the divulgence of which would harm the plaintiff irreparably. The concerned people in the field have the full knowledge of the relevant facts and material and also the so-called crucial strategies decision which are anticipated by the prudent and clever businessman in the field. And unless the concerned personnel do not possess such general and common information they would not be in a position to deal with the customers effectively to strike the fruitful bargain. The 1st defendant has dealt with the Exh. G in minute details to demolish the case of the plaintiff. He has successfully established how the said information cannot be called as trade secret or of confidential nature. On a query from the Court Shri Kadam, did not illustrate even one item of trade secret from the list. Shri Kadam cleverly replied that if that is disclosed it will cease to be a trade secret and that no secret can be revealed or disclosed. If that is so I fail to understand on what basis the plaintiffs are staking their claim under Clause 12 of the contract. The plaintiff must come out with the name or item of the trade secret. To (sic) do not want to know the contents of the trade secret. To (sic) do not want to know recipe of the preparation or the formula of the drug or medicine or any secret of military. We want to know what is the item of trade secret which the defendant No. 1 has acquired during the course of his employment. Today atleast at this stage there is no material to indicate the so called trade secret or the confidential information which is within the knowledge of the 1st defendant. The parties, the contracts, the rates and other items and conditions cannot be called trade secrets. The trade secret is entirely a different phenomena. The plaintiff will have to lead evidence to establish and to identify the head or the caption of the trade secret which the 1st defendant has acquired during the course of his employment. The business pattern of the businessman is universal and well-known. The behaviour of the businessman can also be anticipated by the concerned people in the market. Every player in the field of his game knows the rules of the game and the strategies of the rivals. Such things cannot be called trade secrets. At the best they can be called the human skills acquired by the concerned persons in the field. As a "salesman" the 1st defendant might have acquired negotiating skill while dealing with the customers. Such skill cannot be called a proprietary right

of the plaintiff company. This skill which is acquired by the 1st defendant is his own virtue which he has developed with his personality, with his inheriting qualities and with his hard work and experience. He has acquired the refinement and polish over his skill by experience. It is his own accomplishment and cannot be said to be a mortgaged property of the plaintiffs. On account of all these factors presently he is earning more than Rs. 1 crore annually. He is not paid this sumptuous remuneration on account of his knowledge of some trade secrets or the confidential information. It is for the fact that he has acquired excellence in his field. Acquisition of excellence is a very long process in the career of every one. No one else can have proprietary rights or interest in such acquisition of excellence. Such excellence cannot be acquired merely by possessing a trade secret of any one. No Hospital can prevent a heart surgeon from performing heart surgery in some other hospital by saying that the heart surgeon had acquired skill by performing heart surgeries in that hospital. It is a personal skill which the heart surgeon acquired by experience. Same is the case with the salesman who negotiates with a customer for sale of the product of his employer. He learns from the experience how to talk with the different people differently and how to canvas for the sale of the product successfully. He knows the selling points of a particular product by experience. He acquires good and sweet tongue if he is a salesman dealing with the female folks for the products required by them. He learns the art of tackling the illiterate people. He comes to know how to deal with the old and aged people. He knows the quality of his products. He knows the rates. He might perhaps also be knowing the cost of the products and the profit margin of the employer. All these factors cannot be called trade secrets. As disclosed by the 1st defendant in his detailed affidavit on the basis of the documentary evidence it cannot be said that the advertising business of the plaintiff wholly depended on any trade secret or confidential information as repeatedly and rightly submitted by Shri Sibal that the business of advertisement depended on the popularity of the serial and the programme time during which the serial was displayed. There is no secret in such business which can attract the shackles stipulated in Clause 12 of the contract. If the plaintiff had right to terminate the contract on the ground of misconduct it cannot be said that the 1st defendant had absolutely no right to resign from the employment on account of better prospects or other personal reasons. If he finds a better employment with better remuneration and other service conditions he cannot be tied down under Clause 12 of the Contract. If misconduct can be made a ground of termination of the contract by the plaintiff a better prospect for the 1st defendant can also be a ground for him to relieve himself from the service contract, which is not a warrant to bind him for ever. It is the anxiety of the plaintiff that if the 1st defendant joins the defendant No. 2 its business would suffer. This however cannot be a ground to prevent the 1st defendant from joining the second defendant. Factually in my opinion there is no evidence, even prima facie, shown by the plaintiff that the first defendant should be enjoined from leaving the employment of the plaintiff and joining the defendant No. 2 on the ground of the 1st defendant having come to know the trade secrets or the confidential

information in respect of the business of the plaintiff. It is open for the defendant No. 2 to engage or employ any one on any terms and conditions. The balance of convenience is not in favour of the plaintiff, as, if the first defendant is enjoined from joining the 2nd defendant the 2nd defendant will have to come back to the plaintiff as a disgruntled employee. It will not be conducive for either the plaintiff or the 1st defendant. The 1st defendant cannot join or do any other business or work as suggested on behalf of the plaintiff, if he has acquired the skill in the field of salesmanship and advertisement. He cannot do the work in any other field. In no case fair competition in the economy can be killed or discouraged or restricted.

15. I have already observed that the decision of the Supreme Court in the case of Golikari was based on the concurrent findings of facts by the trial Court and by the High Court after a full-fledged trial wherein the employer had established its case of trade secret and technique of know-how imparted specially to the employee by a special training in respect of manufacture of the product which also was a product of the rival company, which was intended to be joined by the employee. I am afraid the ratio of the said judgment can be applied only after the full-fledged trial of this case takes place wherein the ingredients which are disclosed by the Supreme Court in Golikari's case are established by the plaintiff. It would be for the plaintiffs to establish that the 1st defendant acquired any trade secrets and was imparted as special training and was given or was in possession of confidential information of the nature which would not be acquired otherwise than a special communication or a special training or a special discussion. Unless these ingredients are established to the hilt by the plaintiffs the ratio of the Golikari's case may not be of full assistance to the plaintiff. The Supreme Court has further discussed in the following paragraph under what circumstances the injunctions of the nature which are sought by the plaintiff can be granted or cannot be granted.

"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 serving 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 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."

In the case of Gujarat Bottling Co. Ltd. (supra) the Supreme Court was dealing with the case of two manufacturing companies competing with each other. It was not a case of service contract. However, the Supreme Court has reiterated the principles while granting interlocutory injunctions during the pendency of legal proceedings. Paragraph 43 needs to be quoted, which reads as under:

43. The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the Court. While exercising the discretion the Court applies the following tests - (i) whether the plaintiff has a prima facie case : (ii) whether the balance of convenience is in favour of the plaintiff, and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the "balance of convenience" lies, See : *Wander Ltd. v. Antox India (P) Ltd.*, (SCC at pp. 731-32). In order to protect the defendant while granting an interlocutory injunction in his favour the Court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial."

In the case of *Lalbhai Dalpatbhai* (supra) the Division Bench of the Gujarat High

Court has considered all the fundamental principles concerning the negative stipulation in the contract of service during the service period and after the service period. With respect to the learned Judges I must say that they have dealt with the problem with utmost clarity and a great vision. In fact this should be a guiding judgment on the point. While considering the freedom of contract and the freedom of occupation the learned judges have laid down the fundamental principle that the freedom of contract must yield to the freedom of occupation in public interest. I am in respectful agreement with the said observation of the learned judges. Public interest must prevail over the individual interests of the parties. The learned judges have further observed as a guiding principle in such matters. It is observed in paragraph 9 as under:

"It must, therefore, be seen whether the enforcement of the negative stipulation is reasonably necessary for the protection of the legitimate interests of the employer. If it is not going to benefit the employer in any legitimate manner, the Court would not injunct the employee from exercising his skill, training and knowledge merely because the employee has agreed to it."

The learned Judges have very exhaustively discussed the guiding principles for the Court to exercise a discretion in such matters. I cannot do any better than to wholly reproduce paragraph 6 of the said Judgment. Paragraph 6 reads as under : 6. What then are the rules which should guide the Court in the exercise of this discretion? Now in the matter of exercise of the discretion in such cases there is one rule which has always been recognized by Courts of Equity in England and which has also found favour with Courts in India. The rule is that the Court will not grant an injunction to restrain the breach of a negative stipulation in a contract of a personal service where the effect of doing so would be to compel the defendant to specifically perform the contract. This rule is based upon the principle that the Court will not do indirectly that which it cannot do directly. The Court cannot for reasons which we have pointed out above grant a decree for specific performance of a contract of personal service. But the Court cannot escape that inhibition by granting instead an injunction to restrain the breach of a negative stipulation contained in the contract if the effect of the injunction would be to compel specific performance of the contract by the defendant. As observed by Lindley, L.J., in *Whitwood's case*, 1891 2 Ch 416 (supra) "the Court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction, appears to me to be immaterial". What the law denounces is compelling an employee to work against his will for a particular employer and whether it is sound to be achieved by a decree for specific performance or by an injunction does not make any difference; the mischief remains the same and the law insists that the mischief shall be avoided. Even in the case of (1852) 1 D G.M. and G. 604 which the Courts in England have always regarded as an anomaly not to be extended, Lord St. Leonards while issuing an injunction to

prevent the breach of a negative stipulation disclaimed doing indirectly what he could not do directly. The learned Law Lord recognized that he could not issue an injunction if by doing so he would in fact effect be granting specific performance of the contract of personal service but since in his view the injunction issued by him would not have that effect, he granted the injunction of course in determining whether the effect of granting the injunction would be to compel the defendant to specifically perform the contract of personal service, regard would have to be paid to the practical realities of the situation and it would have to be seen whether in the circumstances of a particular case the practical effect would be that the defendant would be rendered virtually idle and would have to starve as an alternative to going back to his employer. If that is the effect of granting the injunction, the Court will not exercise its discretion in favour of granting the injunction, for the Court will not allow its process to be utilised as an instrument for compelling the employee to specifically perform the contract of personal service. This was the rule on which the Court refused to grant injunction in 1898 1 Ch 671 (supra) and 7926 Ch 609 (supra) and gave an injunction in a limited form in 1937 1 KB 209 (supra). This rule is in our opinion equally applicable in India. This rule being merely a corollary of the main rule that the Court would not specifically enforce a contract of personal service must be held applicable in India when we find that the main rule has received statutory recognition in India in Section 21 Clause (b) of the Specific Relief Act, 1877 and Section 14(1)(b) of the Specific Relief Act, 1963. Section 38(2) read with Section 14(1)(b) of the Specific Relief Act, 1963 also supports the applicability of this rule. As a matter of fact there are decided cases in India where this rule has been applied to guide the Court in the exercise of its discretion. Candy, J. affirmed this rule in ILR (1899) 23 Bom 103 (supra) and observed that the case before him did not come within the mischief of the rule since it was not a case in which the Court was "asked to indirectly decree specific performance of the contract of personal service." A Division Bench of the Bombay High Court in ILR (1894) 18 Bom 702 (supra) also recognized the validity of this rule and we find that in a recent decision given by Shelat, J., as he then was in *Sunilchand v. Aryodaya Mills Co. Ltd.* (1963) 4 Guj. LR 795 : AIR 1964 Guj. 115 the correctness of this rule has been accepted in its application to India. It is, therefore, clear both on principle and authority that even where a negative stipulation in a contract of personal service is sought to be enforced, the Court has a discretion in the matter and one of the principles which must guide the discretion of the Court is that if the effect of granting the injunction would be to indirectly compel the defendant to specifically perform the contract of personal service, the Court would not grant such injunction."

16. Considering all the facts and circumstances of the present case and the principles laid down particularly by the Gujarat High Court in the case of *Lalbhai Dalpatbhai* (supra) I am of the opinion that there is nothing on record to show in what manner the plaintiff would suffer an irreparable injury if the 1st defendant is not enjoined from leaving the employment and from joining the defendant No.

2. Besides, the fact that there is nothing on record to show what trade secrets were confided exclusively or specially in the 1st defendant. There is no material to consider in what manner the plaintiffs business would suffer in the absence of the 1st defendant. The plaintiff would be following its usual business pattern of selling its airtime in accordance with the rates and the popularity of the serials. The plaintiff would perhaps need the negotiating skill of the 1st defendant. However, as pointed out by Shri Sibal the learned counsel for the 1st defendant that there were 138 subordinates who were in the process of negotiations based on the standard rate tables which were well known in the market. Merely because for sometime the plaintiff might face some inconvenience the 1st defendant cannot be forced to come back for the pleasure of the management of the plaintiff or to satisfy the ego of the higher-ups. In fact what the plaintiff really is afraid of the competition that would be offered by the 2nd defendant with the help of the defendant No. 1 in its own. It is not in the interest of public to restrict healthy competition. By granting an injunction in favour of the plaintiff to enforce the negative covenant of Clause 12 of the agreement I would be indirectly forcing the contract in respect of personal service, which otherwise cannot be granted as discussed by the learned Judges of the Gujarat High Court. The grants of injunction would cause greater harm and injury to the 1st defendant than the benefit which would accrue to the plaintiff.

17. The notice of motion therefore deserves to be dismissed and the same is dismissed with no order as to costs.

18. The 1st defendant however shall not disclose or divulge the plaintiffs business plans and franchisee agreements which he has come to know during his employment.

19. At the request of Shri Kadam, the ad interim order granted by my learned brother Deshmukh, J. is continued for a period of two weeks. I have granted this respite to the plaintiffs not on the merits of the case but only with a view to enable them to avail of the right of appeal if they so desire.

20. All concerned to act on an ordinary copy of this order duly authenticated by the Associate of this Court. Certified copy is expedited.