

Burn and Co. Vs. Mcdonald

Burn and Co. Vs. Mcdonald

SooperKanoon Citation : sooperkanoon.com/855925

Court : Kolkata

Decided On : Dec-02-1908

Reported in : (1909)ILR36Cal354

Judge : W. Maclean, ;K.C.I.E., C.J. ;Harington and ;Brett, JJ.

Appellant : Burn and Co.

Respondent : Mcdonald

Judgement :

Maclean, C.J.

1. The plaintiffs in this case are a firm of Engineers in the neighbourhood, of Calcutta, and the defendant entered into a contract with them to act as a draughtsman and general assistant in their business at Howrah. That agreement was reduced into writing. It is dated the 27th of July 1904, and was made in England; the defendant was then in England, and he came out here, the plaintiffs paying the expenses of his passage out. 'By that agreement he covenanted that on his arrival at Calcutta he should' at once report himself at the said Engineering Works at Howrah aforesaid and enter upon his duties aforesaid and during the said period of this agreement he should diligently and to the best of his ability devote himself to the duties incumbent on him as aforesaid and should faithfully observe and comply with such instructions as he might from time to time receive from the said Messrs. Burn & Co., Ld., or their authorised representative for the

time being.' There are other provisions in the contract, namely, as to the conditions upon which the defendant might be dismissed by Messrs. Burn & Co., but they are not material. In the 12th paragraph both parties' bound and obliged themselves to perform their respective parts of the premises to each other under the penalty of one hundred pounds to be paid by the party failing to the party performing or willing to perform over and above performance.' In accordance with the terms of that agreement, the defendant came out from England and entered upon his duties as an assistant with Burn & Co. and he seems to have discharged those duties very satisfactorily, I find nothing to the contrary, for some three and a half years. But on the 18th of February 1908, he wrote to his employers a letter, the effect of which was that he proposed to resign and leave that employment on the 15th of March next. To that Messrs. Burn and Co. replied that 'they declined to accept the resignation and gave him notice that they would take legal steps to enforce the terms of his agreement with them.' We need not refer further to the correspondence in detail. It is sufficient to say that early in March, on the pretext that the plaintiffs had refused to pay him his February salary, the defendant left the firm's service and took employment with the firm of Raja Sreenath Roy and Brothers. The plaintiffs then instituted this suit, and asked for damages and 'for an injunction to restrain the defendant from serving, working or being employed by the said Raja Sreenath Roy and Brothers or any person or persons other than the plaintiff company.' I ought to have said that the agreement was to last for five years, which expired on the 13th of October 1909.

2. The matter was tried before Mr. Justice Fletcher, and he refused to grant an injunction; he gave the plaintiffs Rs. 30 by way of damages and no costs of the suit. In fact he ordered the plaintiffs to pay the costs of an application for an interlocutory injunction. The plaintiffs have appealed.

3. There is no dispute as to the facts; and I will deal as shortly as I can with the legal points which have been raised. It is suggested that in a case of this sort, the Court ought not to grant an injunction, that the question of granting or refusing an injunction is one which lies in the exercise of the judicial discretion of the Court, and that in a case such as the present it ought not to be granted. We have been referred to the law in England on the subject.. The law of England no doubt is that

a mandatory injunction will not be granted for the specific performance of a personal service-but ever since the day of Lumley v. Wagner (1852) 5 De. G. & Section 485, which is a decision now some 50 to 60 years old, it has been laid down that, although the Court cannot grant a mandatory injunction to that effect, yet where in the agreement there is a negative clause, that is to say, a clause to the effect that the contracting party will not serve anybody else, effect can be given to that and an injunction granted. In the present contract there is no such negative condition in terms. But, although I do not think that authorities in England are very useful to us, in dealing with questions codified by the law of India, I should like to call attention to the observations of Lord Selborne, then Lord Chancellor sitting as Master of the Rolls in the case of Wolverhampton and Walsall Railway Co. v. London and North-Western Railway Company (1873) L.R. 16 Eq. 433, 440. The passage I propose to read is at page 440. This is what this great Judge says: 'With regard to the case of Lumley v. Wagner (1852) 5 De. G. & Section 485, to which reference was made, really when it comes to be examined, it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance, the technical distinction being made, that if you find the word 'not in an agreement' I will not do a thing 'as well as the words' I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of the negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the form ought to be changed by the use of a negative rather than an affirmative.'

4. If it had been necessary I should have applied that principle to the present case, but here we have to deal with the law in India. The law in India on this subject is codified and, it has been laid down in the House of Lords, by the Judicial Committee and in several cases in this Court, to some of which I myself was a party, that where the law has been codified it is of little avail to enquire what is the law apart from such codification, but we must look to the Code itself as our guide in the matter. The law here is codified by Section 57 of the Specific Relief Act. That seems to me to make the case reasonably clear. That section runs as follows: 'Notwithstanding Section 56, Clause (f) '-Clause (f) says that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced-'Where a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement, shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him.' The language of that section is reasonably clear, and it appears to give legislative sanction in India to the view expressed by Lord Selborne in the passage I have read. If there had been any doubt as to the meaning of the language of the section, illustration (d) is conclusive upon the subject. It runs: 'B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk.' The view I entertain coincides with that of the late Chief Justice Farran in the case of Charlesworth v. MacDonald (1898) I.L.R. 23 Bom. 103, 113. In that case the Court thought that there was a negative covenant, although the terms of the agreement were not very-clear. After dealing with the case of Lumley v. Wagner (1852) 5 De. G. & Section 485 Farran C.J. says: 'In my opinion it would be most unfair to gentlemen in the position of the plaintiff not to protect them in such cases. It would virtually debar them from engaging an assistant at all. An action for damages would afford them no protection, certainly no adequate protection;' and, in a previous part of his judgment he refers to Section 57 of the Specific Relief Act and speaks of it 'as a legislative decision to the same effect.' Now, can we in the present case properly

say that a negative covenant is implied.

5. I feel no doubt about it. Here the covenant is that the defendant will diligently and to the best of his ability devote himself to the duties as a draftsman and general assistant. Surely when a man says that he will devote himself during a period of years to the business of a particular firm, it does imply that he will not give his services during that period to any other firm. It would be dangerous to hold the contrary. Here to my mind, an injunction is not only the most effective but the only remedy according to the principles of equity, justice and good conscience. To give damages in a case of this sort-damages, which perhaps will never be recovered--will be a very small consolation to the plaintiffs. It is said that if we grant an injunction the defendant will starve. We have nothing to do with that; he ought to have thought-of that, before he deliberately broke his contract;-as a matter of fact there is no vista in that direction as the defendant is willing to go back and the appellants are willing to take him back into their service. It is important in this country that assistants should know when they enter into contracts of this nature, when they are brought out to India at considerable expense by their employers, that they cannot treat their employers in this high-handed fashion. They must honestly and faithfully perform their contracts. If the defendant's argument was well-founded he might have left Burn & Co., at the end of a week instead of at the end of three years. Here we have a case in which the contract is deliberately entered into and most deliberately broken. In my opinion, the plaintiffs are entitled to that special remedy, which the principles of equity, justice and good conscience demand, of an injunction to prevent the defendant from breaking his contract., There is no suggestion in the pleadings-there is not one word in the evidence, that Burn & Co. have not treated him properly. In fact they are willing to take him back.

6. It is not necessary, as we are asked for and are granting an injunction, to go into the question of damages; but I do not desire to be understood as agreeing with the principle upon which the Court of first instance has given Us. 30 as damages. I can scarcely think that the learned Judge would have done this, had his attention been attracted to Section 74 of the Indian Contract Act.

7. The result, therefore, is that the decision of Fletcher J. is reversed and that a decree must be made for an injunction in terms of the prayer and that the defendant must pay the costs of the suit and the appeal, including those of the interlocutory injunction.

Harington, J.

8. I agree: but, inasmuch as we are differing from the learned Judge in the Court of first instance, I propose to add a few words.

9. The agreement between the plaintiffs and the defendant was that the plaintiffs should employ the defendant for a period of five years and that the defendant should serve the plaintiffs during that period, and there was a stipulation that, if either the plaintiffs failed to perform their part of the agreement or the defendant failed to perform his part, a sum of 100 should be payable by the party in default to the one who was ready to carry out the agreement. Now, while the defendant was employed under that contract of service he appears to have seen an advertisement, which attracted him, he desired therefore to quit the services of the plaintiffs. It appears that he first spoke to the plaintiffs' manager about his desire to leave and the result of that conversation was a letter declining to forego, on behalf of the firm, any part of the agreement and pointing out to the defendant that, if he desired to quit the services of the firm, he could do so, at a month's notice, on paying the amount stipulated in the agreement. In reply to that the defendant wrote declining to pay the sum of money stipulated under the agreement, because, he said, he was not in a position to do so, and asking the firm to accept his resignation. That the firm declined to do and subsequently, against the wishes of the plaintiffs, the defendant quitted their services and thereby broke the agreement, which he had entered into with -them. Now, the plaintiffs ask for an injunction to prevent the defendant from entering into the service of a rival firm and giving them the advantages of his skill.

10. It is said that no injunction ought to be granted on two substantial grounds. One is that the agreement contained no negative stipulation under which the defendant undertook not to serve any rival firm of Engineers; and, secondly, on the

ground that the granting of an injunction is an indirect means of enforcing a covenant, of which the specific performance would not be granted, that is to say, a covenant to perform a personal service.

11. Now, no doubt, these two grounds influenced the learned Lord Justices in England, who decided the case of *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416: and they were further influenced by the danger, which they considered there was, in a country like England, of extending the case of *Lumley v. Wagner* (1852) 5 De G. & Section 485. The case of *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416 was afterwards followed by Mr. Justice Romer in the later case of *Ehrman v. Bartholomew* [1898] 1 Ch. 671, in which, in refusing an injunction, the learned Judge adopted and assented to the observations of the Lord Justices in *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416 as to the danger of extending the case of *Lumley v. Wagner* (1852) 5 De G. & Section 485. So if those cases represented what was the law here, there might be, at any rate, a good deal to be said on behalf of the respondent. But the answer is that the law here is expressed in Section 57 of the Specific Relief Act, which provides that an injunction may be granted for a negative agreement, either express or implied, notwithstanding the fact that the specific performance of the positive agreement cannot be enforced under the law. So, that disposes at once of one of the grounds on which the respondent must rely.

12. Then, with regard to the other ground, that it is an indirect way of enforcing a covenant for personal service, that is met by Illustration (d) to Section 57: that gives an instance of a case in which the plaintiffs would be entitled to an injunction—a case which is on all fours with the present case. The result is that Section 57 as illustrated by Illustration (d) shows that the two grounds, which have been relied upon by the respondent, do not represent what is the law in this country, and I therefore think that there are no grounds for refusing an injunction in the present case.

13. Then, as regards another point, the learned Judge in his judgment expressed the opinion that, if it had been necessary to decide, he should have held that this agreement was void as being an agreement in restraint of trade See p. 358. With

very great deference to the learned Judge, speaking for myself, I should have thought that an agreement to serve Messrs. Burn & Co. in the course of their trade was not an agreement in restraint of trade, because by it the defendant stipulated that he would ply his trade, and that distinguishes the case from that familiar class of cases in which an employee covenants that after the expiration of his service he will not ply his trade within some specified distance of his late employer's place of business. In the one case, he agrees to ply his trade, in the other case he specifically agrees not to ply his trade. But, whether that distinction be sound or not, it is really not necessary in the present case, because, in my opinion, illustration (d) affords the answer to the argument that this contract is void as in restraint of trade. Illustration (d), as I pointed out, deals with a case which is on all fours with the present and says that the plaintiffs are entitled in such a case to an injunction. Under those circumstances, it cannot be said that a similar stipulation in this case is void, being in restraint of trade. If so, illustration (d) would provide that an injunction could not be granted, because the agreement was void. In my opinion, illustration (d) to Section 57 meets the point as to the contract being void as being in restraint of trade and that disposes of that point in favour of the plaintiffs. For these reasons I agree that this appeal should be allowed.

Brett, J.

14. I agree with the learned Chief Justice and have nothing to add.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com