

Embee Software Private Limited Vs. Samir Kumar Shaw and Others

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Court : Kolkata

Decided On : Mar-27-2012

Judge : I.P. Mukerji

Appeal No. : GA 526 of 2012

Appellant : Embee Software Private Limited

Respondent : Samir Kumar Shaw and Others

Advocate for Pet/Ap. : Mr. Abhrajit Mitra

Judgement :

1. The Court: Section 27 of the Indian Contract Act, 1872, is involved in this case. It enacts that every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. We are not concerned with the exception clause in that section, save and except for the purpose of interpreting the main section.

2. The scope of the law on the subject has to be ascertained first before entering into the facts of this case.

3. In England this branch of law is part of their common law. The employer may provide, in the contract of employment, that after cessation of the relationship between the employer and employee, the latter may be restrained from carrying on or being employed in a similar type of business within a reasonable

geographical limit or for a reasonable length of time, (see the case of T. Lucas and Co. Ltd. v. Mitchell reported in (1974) Ch 129, John Michael Design plc v. Cooke and another reported in (1987) 2 AER 332 and G.W. Plowman and Son, Ltd. v. Ash reported in (1964) 2 AER 10. The same principle was followed and applied by our Supreme Court in the case of Niranjana Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd. reported in AIR 1967 SC 1098.

4. But there is an old decision of a Division Bench of the Calcutta High Court which was decided on 21st July, 1874. It was the case of Madhub Chunder Poramanick v. Rajcoomar Doss and Ors. reported in (1875) (Vol. XIV) Bengal Law Reports page 76. That ancient Division Bench judgment for the first time drew a distinction between the English law and the codified Indian Law and opined that the meaning that was to be ascribed to the word "restraint" was any kind of restraint. Therefore, any kind of restraint by which a person was prevented from exercising a lawful profession, trade or business was void. It did not matter whether that restraint was partial or appeared to be reasonable. That dictum was substantially followed by the Supreme Court in the case of Percept D'Mark (India) (P) Ltd. v. Zaheer Khan and Anr. reported in (2006) 4 SCC 227 : (AIR 2006 SC 3426), popularly known as the Zaheer Khan case and also by our division bench in Electrosteel Castings Ltd. v. Saw Pipes Ltd. and Ors. reported in 2005 (1) CHN page 612.

4A. Now, I come to the facts of this case.

5. The first respondent Samir Kumar Shaw is a B.Com. (Hons.) and joined as a data entry operator in the accounts department of the plaintiff in the year 2002. The second respondent Pritam Lala is a pass B.Sc. graduate and joined the same organisation in the same year as a Sales Executive in Technology Solutions. The third respondent is a B.Sc. and joined the same organisation in 2010 as a Support Executive in Technology Service.

6. All these three employees left the plaintiff company on 16th December, 2011. Prior to that it is alleged that they had incorporated a private limited company being the fourth respondent. They had applied for registration of this company on or about 22nd November, 2011. The fourth respondent company was incorporated on 10th December, 2011. At the time of their leaving the company, the first

respondent was Senior Manager (Finance and Accounts) and Regional Manager (Procurement and Logistics), the second respondent was Senior Business Manager (Enterprise Sales, Technology Solutions) and the third respondent was the National Manager and Solution Architect.

7. The case of the plaintiff is like this.

8. The plaintiff has a very large business net work with diverse clientele. They render services to them in the field of information technology. While rendering such service files, programmes, know how, formula are prepared by the plaintiff and stored in appropriate softwares. These programmes and files are customer specific or as the learned Counsel for the plaintiff describes them, "customised" to suit the need of specific clients. The details of these programmes, the clientele of the plaintiff and so on are contained in detail in the annexures to the petition, namely annexures D, E, F, G, H, I and so on.

9. A very important submission which was made by Mr. Abhrajit Mitra, learned Advocate for the plaintiff was that a great many of these programmes contain a "source code." Now, this source code is supposed to be known exclusively by the plaintiff to operate the programmes and to update them. Now whilst doing this programming and file preparation work, the said first, second and third respondents are in the know of these source codes. With that knowledge they are in a position to approach the clients of the plaintiff with the proposal that instead of the plaintiff they would render them the necessary services and update their programmes, files and so on. This would deprive the plaintiff of their business.

10. Secondly, another important submission made by the learned counsel for the plaintiff was that the Copyright Act, 1957, recognises copy right in computer programmes. A Computer programme is defined in section 2ffc of the Copyright Act, 1957. Section 14(b) recognises copy right in a computer programme. He argues that a great many programmes which have been prepared by the plaintiff are works over which the plaintiff has copy right.

11. On the other hand, Mr. S.N. Mookerji, learned Senior Counsel appearing for the respondents, takes me through the self same provisions of the Copyright Act,

1957 and argues that no programme or file or data recorded by the plaintiff can qualify to be a work over which they can claim copy right. He argues that the business which is proposed to be carried on by the plaintiff is purchase of hardware, software of known manufacturers and reselling them. Software is "tweaked" to the needs of a customer with a specified code. Such a programme cannot be said to be a work over which the plaintiff has copy right.

12. Furthermore, the above decisions of Madhub Chunder Poramanick -vs- Rajcoomar Doss and Ors. reported in (1875) (Vol. XIV) Bengal Law Reports page 76 and Percept D'Mark (India) (P) Ltd. v. Zaheer Khan and Anr. reported in (2006) 4 SCC 227 : (AIR 2006 SC 3426) were cited by him to argue that no restraint at all could be imposed upon the said respondents.

13. He underlined the qualifications of the respondents and their id initial designations to submit that these persons could not have the technical competence to have knowledge of trade secrets.

14. I find substance in this part of the submission of Mr. S. N. Mookherjee, learned Senior Advocate. The files and programmes referred to in the annexures to the petition do not disclose any specific data, with sufficient details at least at this stage, over which the plaintiff can claim copyright.

15. But there is another important contention which is raised by Mr. Abhrajit Mitra, learned Counsel for the plaintiff. The important matter is that inducing a person to break a contract with another or preventing a person from entering into a contract with another is a tort. Such a tort is capable of being committed by an ex-employee despite the protection granted to him by Section 27 of the Contract Act. Mr. Mitra points out that acts of soliciting may amount to this tort.

16. If the act of soliciting by the first three respondents takes such an active form that it induces the customers of the plaintiff to break their contract with the plaintiff and enter into a contract with the said respondents or the fourth respondent or prevents other persons from entering into a contract with the plaintiff, such acts of soliciting cannot be permitted. It was held in Wipro Limited v. Beckman Coulter International S.A. reported in 2006 (3) ARBLR 118 (Delhi), "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". Although it is submitted on behalf of the respondents that only the third respondent had a non-solicitation clause, in his contract of employment with the plaintiff the principle of law is that in soliciting, which has the effect of breaking a contractual relationship, is a tort and cannot be practised by an ex-employee to damage the business of the ex-employer. Such a principle was also recognised in paragraph 15 of an unreported decision of the Delhi High Court made on 14th July 2009 in Desiccant Rotors International Private Limited vs. Bappaditya Sarkar and Another. VFS Global Services Private Limited v. Mr. Suprit Roy reported in 2008 (2) Bom CR 446 : (AIR 2008 (NOC) 1502) says that a clause which prohibits an employee from disclosing commercial and trade secrets is not restraint of trade.

17. After discussing the above law and the particular facts and circumstances of this case I come to the following conclusions.

18. The first three respondents and the company they have incorporated, the fourth respondent cannot be prevented from carrying on the business of purchase of software and hardware of known manufacturers and brands and reselling them after "tweaking" the software to suit the need of the clients. But they can only do so subject to the following conditions.

19. The programmes, files, data etc. of which the plaintiff has a source code can be considered to be the personal property and trade secret of the plaintiff. The said defendants cannot deal in such programmes, files, data using that source code or otherwise.

20. Furthermore the said respondents will not be allowed to solicit the clients or customers of the plaintiff so as to induce them to break their contract or their legal relationship with the plaintiff or prevent them from entering into a contractual relationship with the plaintiff.

21. The plaintiff has been unable to establish copyright over any particular programme or files. But nevertheless, they are at liberty to approach this Court by making a subsequent application alleging that the said respondents have infringed

their specific copyright.

22. The plaintiff will also be at liberty to approach the Court to point out any breach in the above directions so as to enable this Court to take remedial measures.

23. The interim order passed on 1st March 2012 is modified accordingly.

24. Affidavit-in-opposition be filed within 12th April 2012. List this application on 25th April 2012. Affidavit-in-reply may be filed in the meantime.

25. All parties are to act on a signed photocopy of this order on the usual undertakings.

Order accordingly.

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