2024:BHC-OS:16749

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL APPEAL (LODGING) NO.26031 OF 2023
ALONG WITH
INTERIM APPLICATION (LODGING) NO.26098 OF 2023
IN
COMMERCIAL APPEAL (LODGING) NO.26031 OF 2023

Indus Power Tech Inc.]
Through its President]
8331 Brandford Way, Suite#5,]
Raleigh, NC 27615] .. **Appellant /**
United States of America] *Original Respondent*

Versus

M/s. Echjay Industries Pvt. Ltd.]
83, Bajaj Bhavan, Nariman Point,] .. **Respondent /**
Mumbai – 400021] *Original Petitioner*

Mr. Ravi Kadam, Senior Advocate, with Mr. Anoshak Davar, Mr. Bhavesh Wadhwani, Ms. Kajal Gupta, Advocates, i/b M.V. Kini & Co., for the Appellant-Applicant-Original Respondent.

Mr. Sharan Jagtiani, Senior Advocate, with Mr. Jehangir Jejeebhoy, Mr. Rahul Dwarkadas, Mr. Areez Gazdar, Ms. Shireen Mistri and Mr. George Reji, Advocates, i/b Veritas Legal, for the Respondent-Original Petitioner.

CORAM : A.S. CHANDURKAR & RAJESH S. PATIL, JJ

The date on which the arguments were heard : 22ND AUGUST 2024

The date on which the Judgment is pronounced : 17TH OCTOBER 2024

JUDGMENT : (Per A. S. Chandurkar, J.)

1] Admit. The Commercial Appeal is taken up for final disposal.

2] This appeal filed under Section 37 of the Arbitration & Conciliation

Act, 1996 *(for short, "the Act of 1996")* raises challenge to the judgment dated 08/08/2023 passed by the learned Single Judge in exercise of jurisdiction under Section 9 of the Act of 1996. By the said judgment, the appellant has been restrained from sourcing forgings/parts or products from an Indian entity, RKFL by granting an injunction in terms of prayer clause (a) of the Interim Application. Being aggrieved by the aforesaid judgment, the respondent in the proceedings under Section 9 has filed this appeal.

3] Facts that are relevant for considering challenge are that on 31/03/2015 a Master Supply Agreement – MSA came to be executed between Indus Powertech Inc, the appellant, hereinafter referred to as "the Company" and Echjay Industries Private Limited, the respondent, hereinafter referred to as "the Supplier". Under this MSA, the Supplier undertook to supply to the Company various products since the Company was specializing in supplying engineering components to North American manufacturers. Various terms and conditions were entered into. Clauses 3 and 15 to 17 being relevant are being reproduced hereunder:-

> "3. **Non-compete/Non-solicitation** :
>
> The Supplier agrees that the Company shall have exclusive rights to deal with all customers or clients introduced to it by the Company (hereinafter referred to as "Customers") from within the geographical boundaries of United States of America, Canada and Mexico (hereinafter "Territory"). The

current list of such Customers is detailed in Annexure-I and all transactions with the Customers in the Territory shall be through and shall accrue to the benefit of the Company. During the term of this Agreement and for a period of twenty four (24) months after termination of this Agreement for any reason, the Supplier shall not sell or solicit business from, or conduct business with the Customers. Similarly, the Company will also not source forgings from any other forging Company from India unless pursuant to Supplier's refusal to quote or supply such items."

"15. **Termination for Cause :**

Either party may terminate this Agreement prior to the expiration of the initial or any renewal term of this Agreement only for "cause" upon one hundred eighty (180) days' prior written notice to the other Party setting forth the breach complained of. The term "cause" shall for purposes of the Agreement mean :

a) Existence of a force majeure or other circumstance beyond a Party's reasonable control which hinders that Party's performance of its obligations under this Agreement for more than one hundred eighty (180) days.
b) Breach of any material obligation under this Agreement;
c) Conviction on a serious criminal offense."

"16. **Termination without Cause :**

Either Party may terminate this Agreement without cause by

giving an advance notice, in writing, to the other Party at-least three hundred sixty-five (365) days prior to intended date of such termination."

"17. Commission upon Termination: Upon termination of this Agreement by the Supplier for any reason, the Supplier agrees to continue to supply the Products and to pay any commission due or earned to the Company on all orders which are received by the Supplier for a period of two (2) years from the date of such termination."

Parties acted in accordance with the MSA until the Supplier on 27/01/2023 exercised its right under Clause 15 of the MSA and served a notice to terminate the MSA by furnishing various causes for termination with which we are presently not concerned. The Supplier thereafter filed Commercial Arbitration Petition (L) No.16800 of 2023 on 21/06/2023 seeking an order of injunction as per Clause 3 of the MSA so as to restrain the Company from sourcing forgings/engineering components, etc from an Indian entity, RKFL or its subsidiaries and from carrying out business either directly or indirectly with RKFL and/or its subsidiaries. The learned Judge on 30/06/2023 issued an interim direction requiring the Supplier to place on record relevant details of quantities of supplies as indicated in various purchase orders. The Company thereafter filed its affidavit in reply dated 11/07/2023 and opposed the grant of any interim relief to the Supplier as

prayed for. It also referred to various documents and correspondence exchanged between the paries. A further affidavit was also filed by the Supplier in rejoinder.

4] While considering the Arbitration Petition filed under Section 9 of the Act of 1996, the learned Judge found that the Company had taken steps to source the concerned products from RKFL. Though Clause 3 which was the non-compete/non-solicitation clause provided that for a period of 24 months after its termination such steps could not be taken, it was found that the Company had proceeded to place orders on RKFL on the ground that the Supplier had refused to make supplies. It was found that there was no basis to hold that there was a failure on the part of the Supplier to supply requisite parts to the Company which constrained the Company to turn to another forging Company in India. Since Clause 3 contained reciprocal obligations, it was found that sourcing of 542 parts of "Alloy Steel Forging Machined Gear Pinion Semi-Finish" and 440 parts of "Alloy Steel Forging Machined Gear Ring Semi-Finish" was in breach of Clause 3 of the MSA. On that basis, the learned Judge proceeded to restrain the Company from sourcing the said parts/products from RKFL. It was also directed that the Company would not use 942 products as components in the automotive process by supplying it to the end user.

5] Mr. Ravi Kadam, learned Senior Advocate for the Company at the outset submitted that Clause 3 of the MSA which was the non-compete and non-solicitation clause would operate only during the period when the MSA was in existence. The Supplier on 27/01/2023 having issued a termination notice under Clause 15 and the notice period having come to an end on 28/07/2023, the said non-compete clause would not operate post termination of the MSA. The impugned order passed under Section 9 of the Act of 1996 was much subsequent to the issuance of the termination notice as well as the expiry of the notice period of 180 days under Clause 15. It was submitted that post termination of the MSA, such restraint clause would fall foul of Section 27 of the Indian Contract Act, 1872 (for short "the Act of 1872) which resulted in the Company being restrained from undertaking lawful trade or business after termination of the MSA. Though the Company was a signatory to the MSA, Clause 3 which was the non-compete clause could be treated as valid only during currency of the MSA and not after its termination. He submitted that though the Company did not raise this plea before the learned Judge while defending the proceedings under Section 9 of the Act of 1996, the said issue being a pure question of law based on interpretation of the MSA itself, it was entitled to raise this ground in appeal. To support this submission, the learned Senior Advocate placed

reliance on the decision in *Rajendra Shankar Shukla & Ors etc. vs. State of Chattisgarh & Ors. Etc.* 2015 INSC 532. According to him, no factual adjudication would be required to consider this submission that was being urged while challenging the order passed under Section 9 of the Act of 1996.

6] Inviting attention to the judgment in the case of *Gujarat Bottling Co. Ltd and Others vs. Coca Cola Co. and Others,* 1995 INSC 441, it was submitted that such a negative stipulation in the MSA could operate only till the time the MSA was in force and not after its termination. He also referred to the judgments of learned Single Judges of this Court in *Taprogge Gesellschaft MBH vs. IAEC India Ltd.,* AIR 1988 Bom 157 and *VFS Global Services Pvt. Ltd. vs. Surrit Roy,* 2008(3) Mh.L.J. 266. He therefore submitted that it was impermissible to grant injunction against the Company post-termination of the MSA on the basis of Clause 3 and that the same resulted in restraining the Company from carrying out its trade and business despite the fact that the Supplier had terminated the MSA. He also referred to Clause 17 of the MSA. It was thus submitted that the order of injunction as granted was liable to be set aside.

7] Mr. Sharan Jagtiani, learned Senior Advocate for the Supplier opposed the aforesaid submissions. According to him, the Company having failed to

raise the plea of alleged voidness of Clause 3 of the MSA after its termination, it could not be now permitted to raise the same in appeal having failed to raise this ground before the learned Judge. There was no occasion for the learned Judge to have gone into the said aspect and the the Company could not be permitted to attack the impugned order on a ground that was never urged in the said proceedings. He referred to the grounds raised in the memorandum of appeal prior to its amendment to urge that the Company had proceeded on the premise that the MSA was still in subsistence. A plea opposite to the one taken in the proceedings under Section 9 of the Act of 1996 was now being taken. He therefore submitted that the Company ought not to be permitted to raise this plea in appeal.

It was then submitted that the material on record indicated that even after expiry of 180 days as stipulated in Clause 15 of the MSA, various purchase orders had been placed by the Company and the Supplier had undertaken supplies accordingly. Reference was made to Clause 17 of the MSA to indicate that parties continued to have business with each other notwithstanding the notice of termination. Drawing attention to the submissions made on behalf of the Company before the learned Judge, it was submitted that its conduct was contrary to the stand now taken. After noticing that the Company had solicited forgings from RKFL, the order of injunction came to be passed. It had not been demonstrated by the

Company that the impugned order was contrary to law. Hence there was no reason to interfere with the impugned order since it had been passed on the basis of material available on record. In the absence of any legal perversity interference under Section 37 of the Act of 1996 was not warranted. Inviting attention to the judgment of the Delhi High Court in *Wipro Ltd vs. Beckman Coulter International S.A.,* (2006) 3 Arb LR 118, it was submitted that Clause 3 did not amount to any restraint of trade, business or profession so as to be hit by the provisions of Section 27 of the Act of 1872. He sought to distinguish the decisions relied upon by the learned Senior Advocate for the Company and submitted that in these facts no interference with the impugned order was called for.

8] We have heard the learned counsel for the parties at length and we have also perused the relevant documents on record. It is not in dispute that the plea based on voidness of Clause 3 of the MSA being in violation of Section 27 of the Act of 1872 had not been raised before the learned Judge in proceedings under Section 9 of the Act of 1996. The same is being raised in this appeal under Section 37 of the Act of 1996 on the premise that the same goes to the root of the matter and it is a pure question of law based on interpretation of the MSA that has been signed by the parties. It is urged that no factual adjudication is required to be undertaken. In this regard, we may refer to the observations in paragraph 21 of the judgment of the

Supreme Court in *Rajendra Shankar Shukla & Ors* (supra). The same read as under:-

> "21. We are not able to agree with the contention of the respondent that a ground raised before this Court for the first time is not maintainable because it has been raised before us for the first time and has not been raised before the courts below. Though the said legal plea is raised for the first time in these proceedings, the learned senior counsel on behalf of the appellants placed reliance upon the judgment of the Privy Council In *Connecticut Fire Insurance Co. v. Kavanagh,* (1892) A.C. 473, 480 (Privy Council) wherein, Lord Watson has observed as under :
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> > "when a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."
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> The aforesaid views of the Court of Appeal have been relied upon by this Court in *Gurcharan Singh v. Kamla Singh, (1976) 2 SCC 152*. The above mentioned aspect of Article 243ZD, although is being raised before this Court for the first time, we are of the view that the same is based on admitted facts. The legal submission made on behalf of the appellants under Article 243ZD of the Constitution has to be accepted by this Court in view of the similar view that a new ground raising a pure question of law can be raised at any stage before this Court as laid down by this Court in *V.L.S. Finance Limited v. Union of India & Ors.*, (2013) 6 SCC 278, which reads thus :-
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> "7. Mr. Shankaranarayanan has taken an extreme stand before this Court and contends that the Company Law

> Board has no jurisdiction to compound an offence punishable under Section 211(7) of the Act as the punishment provided is imprisonment also. Mr Bhushan, however, submits that imprisonment is not a mandatory punishment under Section 211(7) of the Act and, hence, the Company Law Board has the authority to compound the same. He also points out that this submission was not at all advanced before the Company Law Board and, therefore, the appellant cannot be permitted to raise this question for the first time before this Court. We are not in agreement with Mr Bhushan in regard to his plea that this question cannot be gone into by this Court at the first instance. In our opinion, in a case in which the facts pleaded give rise to a pure question of law going to the root of the matter, this Court possesses discretion to go into that. The position would have been different had the appellant for the first time prayed before this Court for adjudication on an issue of fact and then to apply the law and hold that the Company Law Board had no jurisdiction to compound the offence."

Further, this Court in *Greater Mohali Area Development Authority & Ors. v. Manju Jain & Ors., (2010) 9 SCC 157* held as under :-

> "26. Respondent 1 raised the plea of non-receipt of the letter of allotment first time before the High Court. Even if it is assumed that it is correct, the question does arise as to whether such a new plea on facts could be agitated before the writ court. It is settled legal proposition that pure question of law can be raised at any time of the proceedings but a question of fact which requires investigation and inquiry, and for which no factual foundation has been laid by a party before the court or tribunal below, cannot be allowed to be agitated in the writ petition. If the writ court for some compelling

circumstances desires to entertain a new factual plea the court must give due opportunity to the opposite party to controvert the same and adduce the evidence to substantiate its pleadings. Thus, it is not permissible for the High Court to consider a new case on facts or mixed question of fact and law which was not the case of the parties before the court or tribunal below. [Vide *State of U.P. v. Dr. Anupam Gupta, Ram Kumar Agarwal* v. Thawar Das, *Vasantha Viswanathan* v. *V.K. Elayalwar*, *Anup Kumar Kundu* v. *Sudip Charan Chakraborty*, *Tirupati Jute Industries (P) Ltd.* v. *State of W.B.* and *Sanghvi Reconditioners (P) Ltd.* v. *Union of India*.]

27. In the instant case, as the new plea on fact has been raised first time before the High Court it could not have been entertained, particularly in the manner the High Court has dealt with as no opportunity of controverting the same had been given to the appellants. More so, the High Court, instead of examining the case in the correct perspective, proceeded in haste, which itself amounts to arbitrariness. (Vide *Fuljit Kaur* v. *State of Punjab*.)"

In *National Textile Corporation Ltd.* v. *Naresh Kumar Badrikumar Jagad*, *(2011) 12 SCC 695*, it was held as under:-

"19. There is no quarrel to the settled legal proposition that a new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings. [See *Sanghvi Reconditioners (P) Ltd.* v. *Union of India* and *Greater Mohali Area Development Authority* v. *Manju Jain*.]""

The aforesaid would indicate that if a question of law is sought to be

raised based on the construction of a document or on the basis of admitted facts, it would be open for the appellate Court to consider the same notwithstanding the fact that said aspect was not raised in the Court of first instance. If however a question of fact that requires investigation and inquiry for which no factual foundation has been laid in the pleadings, it would not be permissible for the Court to consider the same when it was not raised before the Court whose order is under challenge.

9] The execution of the MSA dated 31/03/2015 and existence of Clause 3 therein is not in dispute. The Supplier has proceeded to terminate the MSA on 27/01/2023. The only exercise to be undertaken, if the plea sought to be raised as regards its voidness is to be examined, is consideration of a purely a legal issue not requiring any factual adjudication to be undertaken. The legal issue to be considered is, whether after termination of the MSA the operation of the non-compete/non-solicitation clause would result in breach of the provisions of Section 27 of the Act of 1872. In our view, since the Court is required to consider the legal effect of Clause 3 of the MSA after its termination, the same can be examined in appeal notwithstanding the fact that such a plea was not raised for consideration in proceedings under Section 9 of the Act of 1996. No pleadings are required to be gone into and it is only the legal effect of what has been provided in Clause 3 of the MSA that is required to be examined.

In that view of the matter, on admitted facts, we are inclined to examine the effect of the non-compete clause operating post termination of the MSA being a pure question of law.

10] On a plain reading of Clause 3 of the MSA, it can be seen that the Supplier had agreed that the Company would have exclusive right to deal with all customers or clients introduced to the Suppliers by the Company within the territories of the United States of America, Canada and Mexico. The said clause is to operate during the term of the MSA and for a period of 24 months after termination of the MSA whereby the parties have agreed that the Supplier would not sell or solicit business from or conduct business with the customers and the Company would not source forgings from any other Forging Company from India unless the Supplier refuses to quote or supply such items. The MSA has been terminated by the Supplier by its notice dated 27/01/2023 after invoking Clause 15 being the termination clause of the MSA for cause. That clause requires prior written notice of one hundred eighty days setting forth the breach complained. The period of one hundred eighty days in terms of Clause 15 has come to an end on 28/07/2023. Since the MSA has been terminated by the Supplier on 27/01/2023, the only issue to be considered is whether post termination of the MSA, the non-compete/non-solicitation clause would operate. In this

regard, it may be noted that the consequence of such non-compete clause during the period when the agreement is in force and its operation post-termination has different connotations. While operation of such non-compete clause has been held to be valid and reasonable during currency of the agreement, same has been treated as a restraint prohibited by Section 27 of the Act of 1872 after the termination of the agreement itself. We may in this regard refer to the decision in *Percept D'Mark (India) Pvt. Ltd. vs. Zaheer Khan & Anr* in 2006 INSC 161 which considers the distinction between a negative covenant operating during the period of agreement and its effect after termination of such agreement. Therein the Supreme Court has observed as under:

> "The legal position with regard to post-contractual covenants or restrictions has been consistent, unchanging and completely settled in our country. The legal position clearly crystallised in our country is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness nor the principle of restraint being partial is applicable, unless it falls within the express exception engrafted in Section 27. Section 27 of the Indian Contract Act, 1872 provides as follows:-
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> > "27. Agreement in restraint of trade, void.- Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void.
> >
> > Exception 1.- Saving of agreement is not to carry on

> business of which goodwill is sold.- One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business."

11] The learned Single Judge in *VFS Global Services Pvt. Ltd.* (supra) has after considering the decision of the Supreme Court in *Percept D'Mark (India) Pvt. Ltd.* (supra) held in clear terms that operation of such restraint beyond terms of the agreement resulted in an unlawful restraint of trade. In the said case, the Garden Leave clause prohibited the employee from taking up any employment during the period of three months of the cessation of his employment. The learned Single Judge refused to grant relief to the employer on that basis by holding that the said clause resulted in restraint of trade and was hit by Section 27 of the Act of 1872.

12] *In Gujarat Bottling Co. and Others* (supra) the effect of a negative covenant operating during the subsistence of an agreement and after its termination has been considered. It has been observed as under :

> "In that context, it is also relevant to mention that the said negative stipulation operates only during the period the agreement is in operation because of the express use of the words "during the subsistence of this agreement including

the period of one year as contemplated in paragraph 21" in paragraph 14. Except in cases where the contract is wholly one sided, normally the doctrine of restraint of trade is not attracted in cases where the restriction is to operate during the period the contract is subsisting and it applies in respect of a restriction which operates after the termination of the contract. It has been so held by this Court in N.S. Golikari [(1967) 2 SCR 378] wherein it has been said:

> "The result of the above discussion is that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contracts. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided as in the case of W.H. Milsted and Son Ltd. [1927 WN 233]"
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> Similarly, in Superintendence Co. [(1981) 2 SCC 246] A.P. Sen J., in his concurring judgment, has said that "the doctrine of restraint of trade never applied during the continuance of a contract of employment; it applies only when the contract comes to an end". (SCR p. 1289: SCC p.255, paragraph 18)"

The contention that such a negative covenant must be confined only to a contract of employment and not to other contracts was not accepted by observing that there was no rational basis for restricting the application of that principle only to a contract for employment.

13] Assuming that the parties to the MSA had engaged in some transactions post termination, that by itself would not be sufficient to compel the Company to continue such arrangement in the face of Section 27 of the Act of 1872. It is well settled that a plea of estoppel cannot be raised to defeat the provisions of a statute as held in 1961 INSC 338, *M/S. Mathra Prashad and Sons Vs. State of Punjab.*

14] It thus becomes clear from the aforesaid that though a non-compete clause that can operate validly during the term of the agreement, it would not be valid post-termination of the agreement as it would result in restraint of trade prohibited by Section 27 of the Act of 1872. In the present case, since the MSA was terminated on 27/01/2023 by the Supplier and the notice period of one hundred eighty days had already expired prior to the passing of the impugned order of injunction, we are of the view that the Company cannot be restrained from undertaking its business after

termination of the agreement.

15] It is true that this aspect was not urged before the learned Judge in proceedings under Section 9 of the Act of 1996 and hence the learned Judge had no occasion to consider the same. However, considering the settled legal position referred to hereinabove, it is obvious that such non-compete clause cannot be the basis for grant of relief of injunction post-termination of the agreement. It is for this reason that interference under Section 37 of the Act of 1996 is warranted.

Hence for the aforesaid reasons, it is held that Clause 3 of the MSA to the extent it operates beyond the termination of the MSA cannot be the basis for grant of an order of prohibitory injunction against the Company. The impugned judgment dated 08/08/2023 in Commercial Arbitration Petition (L) No.16800 of 2023 is set aside and the Arbitration Petition stands dismissed. It is however clarified that observations made in this judgment are only for considering the prayers made under Section 9 of the Act of 1996 and parties are free to seek adjudication of all their rights in the arbitration proceedings. All contentions of parties are kept expressly open. The Commercial Appeal is allowed in aforesaid terms leaving the parties to bear their own costs. In view thereof, pending Interim Application (Lodging) No.26098 of 2023 is disposed of.

16] At this stage, the learned Senior Advocate for the respondent seeks continuation of the interim relief/order that was operating during pendency of the proceedings. This request is opposed by the learned counsel for the appellant. In the facts of the case, the judgment would operate after a period of four weeks from today.

[RAJESH S. PATIL, J.] [A.S. CHANDURKAR, J.]