IN THE COURT OF SH. ARUN SUKHIJA,

ADDITIONAL DISTRICT JUDGE – 07, (CENTRAL DISTRICT)

TIS HAZARI COURTS, DELHI.

SUIT NO. :- 214/2016

UNIQUE CASE ID NO. :- 618236/2016

IN THE MATTER OF :-

M/s. Indiasign Pvt. Ltd.
Head Office at
30, DSIDC Complex,
Mata Sundari Road,
New Delhi-110002. ….Plaintiff

VERSUS

Mr. Nirmal Kumar Gupta
S/o Mr. Vishnu Kumar Gupta
M/W/2603, Near Modern Public School,
Naya Bagh, Agra Road,
Hathras – 204 101. ....Defendant

::- O R D E R -::

Vide this order, this Court shall decide issue no. 1, which was framed on 09.09.2019 and was treated as preliminary issue. The issues no. 2 and 3 were kept in abeyance till the decision of issue no.1 and issue no.4 is the Relief. The issue no.1 is as follows:-

1. *Whether the service contract dated 1/7/2009 executed between the parties is hit by Section 27 of the Indian Contract Act?*

The issue no. 1, being a legal issue based on the service Contract dated 01.07.2009, was treated as Preliminary Issue. The said service Contract dated 01.07.2009 is an admitted document between the parties as Ex.P-1 during the admission and denial of documents. The plaintiff has filed the present suit for permanent injunction and recovery of damages of Rs.5,02,381/-. Succinctly, the case of the plaintiff is as under:-

1. The plaintiff company is engaged in the business of providing wide range of satellite communication and broadcasting services including teleport services for TV Channels, up-linking of OB/DCNG Vans. The business of plaintiff requires highly skilled advanced technology for efficient operation of sophisticated, sensitive expensive equipment. A fresh Engineer gets exposure to very technical sophisticated field of communication and broadcasting. The plaintiff engages Engineers for its highly skilled and technical job requirements. The plaintiff has to train Engineers for specialized job and has to spend huge amount of money on the training of the Engineers, especially Engineers, who are fresher and have no experience. By the exposure given by the plaintiff company, the fresh Engineer gets enriched with experience, confidence and competence.

2 The defendant was recruited as Engineer (Operation & Customer Support) vide appointment letter dated 01.07.2009. Initially, the defendant was appointed on the post of Trainee vide letter dated 13.12.2007 issued by the plaintiff company. The last drawn salary of defendant was Rs. 20,422/- per month. The defendant had accepted the Terms and Conditions of appointment letter dated 01.07.2009.

3 The service of defendant was governed by the Terms and Conditions enumerated in the appointment letter dated 01.07.2009 and clause 7 and 8(i) of the same is as under:-

> *(i) Clause 7 Protection of Interest*
>
> *"In case of your leaving the services of the company or the same getting terminated by the company or by mutual consent, you will not directly or indirectly join services of the person or company working in direct competition with our company to any person or company."*
>
> *(ii) Clause 8 Service Conditions*
>
> *"(i) The employee appreciates that the company is engaged in a business, which requires high skill, technology, special business acumen, in a cutthroat competitive and a confidential market. The employee undertakes, that he shall not join as an employee or a consultant or disclosed in any manner any information to a competitor/customers of the company at least two years after leaving the services of the company. In the event, the employee violates this condition and joins any competitor of the company, in any part of the country, the employee shall become liable to compensate the company, by paying the damages of a sum equivalent to 24 months last drawn salary of the employee/candidate."*

4 As per the appointment letter, the defendant was under obligation to give one month's prior notice before leaving the job from the organization of plaintiff or to pay one month salary in lieu thereof. The defendant resigned from the services of the plaintiff on 19.09.2014.

5 As per the Contract, the defendant could not have joined any of the competitors of plaintiff company nor could engaged in giving consultation or disclosed, in any manner, any information to the competitor/customer of the plaintiff company. However, the plaintiff has come to know that the

defendant, in utter violation of the terms and conditions of appointment letter, had joined M/s. ADSAT Engineers Pvt. Ltd. CPI Authorized Center, 207, SSG East Plaza, Local Shopping Center, Mayur Vihar, Phase III, Delhi 110096, a competitor of the plaintiff company. After serving with M/s. ADSAT Engineers Pvt. Ltd., the defendant has now joined M/s. Aaj Tak (TV Today), the India Today Group Mediaplex, FE-8, Sector 16A, Film City, Noida 201301. The defendant is providing consultancy and sharing its knowledge and information derived from the plaintiff company with Aaj Tak, in the running of OB Vans, uplinking and related functions.

6 The defendant is bound by the terms and conditions of appointment letter. For two years, after leaving the job of the plaintiff company, the defendant could not have joined any of the competitors of the plaintiff company. The aforesaid malafide and unethical conduct of the defendant, in violating the Terms and Conditions of appointment letter, has caused grave damages to the reputation of the plaintiff company and this act of defendant has adversely affected the business operations of the plaintiff company, which was resulted into heavy revenue loss to the plaintiff.

FINDINGS AND CONCLUSIONS OF THE COURT

I have heard the Ld. Counsel for parties and perused the material on record. The perusal of Order dated 06.02.2019 reveals that ld. counsel for plaintiff vide statement dated 06.02.2019 has withdrawn the relief for permanent injunction, as prayed in the plaint. The ld. counsel for plaintiff has relied upon clauses no. 7 and 8(i) of the appointment letter dated 01.07.20099 (Ex.P1) for claiming the relief of damages and the same is also apparent from the bare reading of the plaint. The said

clauses are reproduced hereinabove and the same are not repeated herein for the sake of brevity. The said document is an admitted document on the part of the defendant during the course of admission/denial of the documents.

The ld. Counsel for defendant submits that clauses no. 7 and 8(i) of the appointment letter dated 01.07.2009 violates Section 27 of the Indian Contract Act, 1872. In nutshell, the ld. counsel for defendant submits that the said clauses are against the public policy and the same amount to restrain of trade against the defendant and therefore, the same are void in terms of Section 27 of the Indian Contract Act, 1872.

The ld. counsel for defendant has relied upon the judgment of ***Niranjan Shankar Golikari Vs. Century Spinning and Manufacturing Co. Ltd., (1967) 2 SCR 378= (1967) 1 LLJ 740***. The ld. counsel for defendant has also relied upon the judgment of ***Superintendence Company of India Vs. Krishan Murgain, 1981 (2) SCC 246***. The aforesaid Judgment of ***Niranjan Shankar Golikari (Supra)*** has also been discussed in this Judgment. The judgment of Superintendence Company of India was passed by Hon'ble Full bench of the Hon'ble Supreme Court of India. However, only Hon'ble Mr. Justice A.P. Sen J. has given his view on the principle of Section 27 of the Indian Contract Act. The paras no. 52, 53, 58 to 62 and 64 of the judgment given by the Hon'ble Justice A.P. Sen are produced as under:-

> ***"52. Neither the test of reasonableness nor the principle of that the restraint being partial was reasonable are applicable to a case governed by Section 27 of the Contract Act, unless it falls within Exception 1.***
>
> ***53. We, therefore, feel that no useful purpose will be served in discussing the several English Decisions cited at the Bar. Under Section 27 of the Contract Act, a service covenant extended beyond the termination of the service is void. Not a single Indian Decision***

has been brought to our notice where an injunction has been granted against an employee after the termination of his employment.

58. The drafting of a negative covenant in a contract of employment is often a matter of great difficulty. In the employment cases so far discussed, the issue has been as to the validity of the covenant operating after the end of the period of service. Restrictions on competition during that period are normally valid, and indeed may be implied by law by virtue of the servant's duty of fidelity. In such cases the restriction is generally reasonable, having regard to the interest of the employer, and does not cause any undue hardship to the employee, who will receive a wage or salary for the period in question. But if the covenant is to operate after the termination of services, or is too widely worded, the Court may refuse to enforce it.

59. It is well settled that employees covenants should be carefully scrutinised because there is inequality of bargaining power between the parties; indeed no bargaining power may occur because the employee is presented with a standard form of contract to accept or reject. At the time of the agreement, the employee may have given little thought to the restriction because of his eagerness for a job; such contracts "tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression."

60. There exists a difference in the nature of the interest sought to be protected in the case of an employee and of a purchaser and, therefore, as a positive rule of law, the extent of restraint permissible in the two types of case is different. The essential line of distinction is that the purchaser is entitled to protect himself against competition on the part of his vendor, while the employer is not entitled to protection against mere competition on the part of his servant. In addition thereto, a restrictive covenant ancillary to a contract of employment is likely to affect the employee's means or procuring a livelihood for himself and his family to a greater degree than that of a seller, who usually receive ample consideration for the sale of the goodwill of his business.

61. The distinction rests upon a substantial basis, since, in the former class of contracts we deal with the sale of commodities, and in the latter class with the performance of personal service-altogether different in substance; and the social and economic implications are vastly different.

62. The Courts, therefore, view with disfavour a restrictive covenant by an employee not to engage in a business similar to or competitive with that of the employer after the termination of his contract of employment.

64. The restraint may not be greater than necessary to protect the employer, nor unduly harsh and oppressive to the employee. I would, therefore, for my part, even if the word 'leave' contained in clause 10 of the agreement is susceptible of another construction as being operative on termination, however, accomplished of the service e.g. by dismissal without notice, would, having regard to the provisions of Section 27 of the Contract Act, 1872, try to preserve the covenant in clause 10 by giving to it a restrictive meaning, as implying volition i.e. where the employee resigns or voluntarily leaves the services. The restriction being too wide, and violative of section 27 of the Contract Act, must be subjected to a narrower construction."

The ld. counsel for defendant has also relied upon the judgment ***Deepayan Mohanty Vs. Cargill India Pvt. Ltd. & Ors. CS(OS) 1157 of 2014 decided on 03.08.2018 by the Hon'ble High Court of Delhi***. The ld. counsel for defendant has relied upon para no. 15 of the said judgment. The paras no. 15 to 18 of the said Judgment are reproduced as under:-

"15. The facts, thus far, are not in dispute. The sequence of events shows that at the time when the Plaintiff resigned from the Cargill Group, the Defendants did not have any complaint against him. Further, the incentive awards were also given after assessing the performance during his employment. The argument now made to refuse the disbursement of the remaining portion of the incentive awards is that

the Plaintiff violated his obligations with Cargill by engaging in competing business:

> *a) during the course of employment; and*
> *b) within the period of two years after the cessation of employment."*

16. The violation if any as per (a) above i.e. during the course of the employment is not the subject matter of this suit, in as much as no issue was raised at the time of accepting his resignation and the forfeiture clause does not recognize conduct during the course of employment as being one of the reasons for forfeiting the deferred incentive. The only reason that can be given by Cargill to justify forfeiture is that the Plaintiff has engaged in a competing business within the two year period after his employment ceased with Cargill. Further, the note in the internal memo as extracted in para 9 above, only means that the award of the incentive cannot be made after a person ceases to be an employee. As per the scheme, those employees who leave the company who have already been awarded, can receive 50% after they leave employment.

17. The first and foremost question is whether the forfeiture clause is valid and enforceable in law.

"18 The forfeiture clause is clear: If a person engages in a competing business/service within the two years period after leaving Cargill, the outstanding amount can be forfeited. It is the settled position, in India at least, that no employer has a right to restrain an employee from taking up competing employment after the term of employment. Such a clause is invalid and unenforceable as per Section 27 of the Indian Contract Act, 1872. But what Cargill is doing in the present case is not restraining him from pursuing his competing business but refusing to disburse the balance incentive award amount to him since he allegedly engaged in a competing business. Can such a clause be held to be valid and enforceable? The answer to this question depends upon the nature of the sum being withheld. The deferred incentive is an amount which was awarded to an employee as a reward for good performance `during the course of employment". The said amount is awarded in

full in favour of the employee. Only the payment is postponed partially and for the postponement of the payment, interest is also paid by Cargill to the employee. Thus, the amount belonging to the employee is being withheld by Cargill. Ideally, the entire amount ought to be disbursed at the time when it was awarded but as a part of Cargill"s company policy it is being deferred. If the deferment is to enforce a clause which is otherwise unenforceable, the forfeiture based on the said clause, is itself illegal. The amount does not belong to Cargill. It belongs to the employee and Cargill is merely making the employee agree to take the amount with interest after the period of two years. That does not mean that under the garb of paying interest, Cargill can forfeit something on the basis of an invalid and unenforceable clause in the agreement. The terms used in the clause, namely, "forfeiture", and "awarded but not yet distributed" clearly show that the amount vests in the employee and only the disbursement is deferred. The fact that interest is being paid on the unpaid incentive amount also shows that the intention of Cargill seems to be merely enforce conditions on employees which cannot otherwise be enforced in law, at least in India. The condition in an employment contract that an employee cannot engage in competing business after employment for any period is, in restraint of trade, as is clear from a reading of Percept D'Mark India Pvt. Ltd. v Zaheer Khan, (2006) 4 SCC 227(hereinafter referred as „Percept D"Mark India"), and Niranjan Shankar Golikari (supra). The Supreme Court in Percept D'Mark India (supra), held as under:-

> ***"54. On the pleadings contained in the arbitration petition, there can be no escape from the conclusion that what the appellant sought to enforce was a negative covenant which, according to the appellant, survived the expiry of the agreement. This, the High Court has rightly held is impermissible as such a clause which is sought to be enforced after the term of the contract is prima facie void under Section 27 of the Contract Act. …***
>
> ***56. 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 express exception engrafted in Section 27. …

63. Under Section 27 of the Contract Act: (a) a restrictive covenant extending beyond the term of the contract is void and not enforceable, (b) the doctrine of restraint of trade does not apply during the continuance of the contract for employment and it applies only when the contract comes to an end, (c) as held by this Court in Gujarat Bottling v. Coca-Cola [(1995) 5 SCC 545] this doctrine is not confined only to contracts of employment, but is also applicable to all other contracts."

In Niranjan Shankar Golikari(supra), the Court held as under:
"17. 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 contract. 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 & Son Ltd ..."

Thus, the obligation not to join a competitor or run a competing business, after the term of employment being contrary to Indian law, the forfeiture clause to the said extent is unenforceable and is in restraint of trade."

(Portions bolded in order to highlight)

The ld. counsel for defendant has also relied upon the following judgments and the same are more or less based upon the aforesaid principles as enunciated in the aforesaid Judgments:-

1. Paras No.30 and 31 of ***Shree Gopal Paper Mills Ltd. Vs. Surendra K. Ganeshdas Malhotra AIR 1962 Cal 61***.

2. ***Tritron Healthcare Pvt. Ltd. Vs. Shivram Iyer and Ors. passed on 10.04.2017 by Hon'ble High Court of Madras in OA. No.1192 to 1196 in CS No.896 of 2015***.

The ld. counsel for plaintiff has relied upon paras no. 17 and 27 of ***Dr. S. Gobu Vs. The State of Tamilnadu and Ors. decided on 08.06.2010*** passed by Hon'ble Single Bench of Hon'ble High Court of Madras. The ld. counsel for defendant, in order to counter the said judgment, has relied upon principle of doctrine of precedents and in order to substantiate the said principle, he has relied upon para no. 9 of the judgment passed in ***Union of India & Ors. Vs. Dhanwanti Devi & Ors. MANU/SC/1272/1996***.

The primary question, which arises for consideration, is whether clauses no. 7 and 8(i) of the Contract dated 01.07.2009 violates Section 27 of the Indian Contract Act, 1872. The Clause no.7 provides that defendant, after leaving the services of the company, will not directly or indirectly join services of the person or company working in direct competition with the Plaintiff Company. The bare perusal of clause 7 reveals that the employer has put absolute restrain for infinite period on the defendant to join **any service** directly and indirectly working in the direct competition with the plaintiff company. The said clause on the face of it is not only oppressive but the same is also harsh, excessive and unreasonable. In view of the aforesaid judgments, as relied upon by the defendant, the clause no. 7

as far as restraining the defendant to join any service after leaving or termination is clear cut in violation of Section 27 of the Indian Contract Act and the same is accordingly void.

The primary basis for claiming the damages is clause No.8(i) of the Service Contract dated 01.07.2009. In nutshell, Clause no.8 (i) provides that the defendant undertakes that he shall not join as an employee or a consultant or disclosed in any manner any information to competitor/customers of the company at least two years after leaving the services of the company.

Admittedly, the defendant has resigned the service of the Plaintiff Company after a period of seven years. The said resignation was duly accepted by the plaintiff w.e.f. 19.09.2014. The Plaintiff Company has not made any hue and cry at the time of resigning by the defendant. As per the plaintiff company itself, the defendant has the authority to resign from the company by giving one month's notice or salary in lieu thereof. The defendant was the person, who was qualified engineer and there is nothing on the record, either by way of pleading or documents, which suggests that defendant had ever misconducted with the plaintiff during the said period of seven years. After the training period, the defendant has served for about five years and it is not that the Plaintiff was not benefited from the service of defendant during those five years, otherwise also, the plaintiff company, being the private entrepreneur, was having the option to fire out the employee. Each and every person gains experience during their service period and wants to grow in his and her life. There are secret information and also the knowledge of technical know-how which the employee came to know during the service. The span of seven years in one company must have given the experience of technical know-how to the defendant but from the said experience of defendant, the plaintiff

must have also gained as he had not remained naive during the said period of five years after the training period and this is not the case of the plaintiff company.

In my considered view, the Clause no.8 (i) of the Service Contract dated 01.07.2009, which restrains the defendant from joining the competitor company also violates Section 27 of the Indian Contract, 1872 in view of Judgment of Hon'ble Supreme Court of India passed in ***Superitendence Company of India Vs. Krishan Murgain (Supra)*** and judgment of our own Hon'ble High Court passed in ***Deepayan Mohanty Vs. Cargill India Pvt. Ltd. & Ors. (Supra)***. The Clause no.8 (i) is also same and similar to the facts and circumstances of the said cases.

Our own Hon'ble High Court, after referring the judgment of Hon'ble Supreme Court, came to the conclusion that such type of Contract, after the period of employment, is not enforceable and valid in the eyes of law.

As far as the allegation of divulging knowledge and information derived from the plaintiff company to Aaj Tak in para no. 6 of the plaint is totally vague and bereft of particulars. The plaintiff company has failed to point-out what was the secret information which has been divulged by the defendant to Aaj Tak in running OB Vans up-linking and related functions, which was not in the knowledge of Aaj Tak or which was not in the public domain or which was specifically provided to the defendant during the course of employment and covered under the secrecy arrangement/agreement. The primary ground of the plaintiff is to claim the damages, as per clause 8(i) of the Service Contract dated 01/07/2009 is that the defendant has joined the competitor company within the period of 24 months. In my considered view, the restrain after the period of employment, as put by the plaintiff, is not only harsh, oppressive and excessive in terms of the aforesaid Judgments, as relied upon by the defendant, but also violates

Section 27 of the Indian Contract Act, 1872 and therefore, void. The judgment, as relied upon by the plaintiff, is not applicable to the facts and circumstances of the present case for more than reason. The said judgment is of the single bench of Hon'ble Madras High Court and our own Hon'ble High Court in the judgment of ***Deepayan Mohanty Vs. Cargill India Pvt. Ltd. & Ors*** has held that the such kind of clauses violate Section 27 of the Indian Contract Act, 1872 and not valid & enforceable. Furthermore, in para no.27 of Hon'ble Madras High Court, the reliance of Hon'ble Supreme Court of India passed in ***Nandganj Sihori Sugar Co. Ltd. Vs. Badri Nath Dixit 1991 (3) SCC 54***, to the facts and circumstances of the present case, is also misplaced. The aforesaid referred Judgment of the Hon'ble Supreme Court, nowhere, provides that the suit for damages lies against the employee even after cessation of the employment. The personal contract cannot be enforced in view of Section 14 of the Specific Relief Act, 1963, however, the employer may claim damages where employee has bound himself to work for a particular period and during that period the employee has left the service of employer. The aforesaid judgment of the Hon'ble Supreme Court of India, which is referred by the Hon'ble Madras High Court, nowhere, concludes that after the employment period ceased, the remedy of suit for damages is available to the employer even if the clause is contrary to Section 27 of the Indian Contract Act, 1872.

Furthermore, our own Hon'ble High Court has relied upon the judgment of Hon'ble Supreme Court titled as ***Percept D'Mark India Pvt. Ltd. v Zaheer Khan, (2006) 4 SCC 227*** and thereafter, relying upon the said judgment also came to the conclusion that the clauses, which are post-employment and which are against the Section 27 of the Indian Contract Act 1872, are not enforceable and valid in the

eyes of law. Moreover, the defendant has relied upon the judgment of Full bench of the Hon'ble Supreme Court of India in ***Superitendence Company of India Vs. Krishan Murgain(Supra)***, whereby, Hon'ble Mr. Justice A.P. Sen has, in detail, discussed such kind of clauses i.e. post-employment and came to the conclusion that they are not covered under Exception of Section 27 of the Indian Contract Act, 1872 and hence, void. The relevant portion of the said judgment has already been quoted above and the same is not repeated for the sake of brevity.

Considering from any view point, since clauses 7 and 8(i) of the Contract dated 01.07.2009, which restrain the defendant from joining the service of any competitor post-employment violate Section 27 of the Indian Contract Act, 1872.

In view of the detailed discussions, as adumbrated hereinabove, the preliminary issue no. 1 is decided in favour of the defendant and against the plaintiff. Accordingly, the suit of the plaintiff is not maintainable and hit by Section 27 of the Indian Contract Act, 1872 and the same is dismissed on this ground alone. Since, the suit is not maintainable and the same is dismissed on this ground alone, therefore, there is no requirement to decide issues no. 2 and 3, which were otherwise kept in abeyance till the decision of issue no.1.

The parties shall bear their own costs. Decree sheet be prepared accordingly.

File be consigned to record room after due compliance.

Announced through Video Conferencing on this 30th day of June, 2020.

ARUN SUKHIJA
Digitally signed by ARUN SUKHIJA
Date: 2020.06.30 12:25:20 +05'30'

(ARUN SUKHIJA)
ADJ-07 (Central)
Tis Hazari Courts, Delhi

Suit No.214/16 (ID No.618236/16)
India Sign Pvt. Ltd.
Vs.
Nirmal Kumar Gupta

30.06.2020

The order is pronounced through cisco webex video conferencing.

Present: None for the plaintiff.
Shri S.P. Dass Ld. Counsel for the defendant alongwith Defendant

The Ahlmad has sent the meeting ID to Ld. Counsel for parties, however, even after waiting for about 10 minutes none has joined on behalf of the Plaintiff.

Vide separate order announced through video conferencing, the preliminary issue no. 1 is decided in favour of the defendant and against the plaintiff. The suit of the plaintiff is not maintainable and hit by Section 27 of the Indian Contract Act,1872 and the same is dismissed on this ground alone. Since, the suit is not maintainable and the same is dismissed on this ground alone, therefore, there is no requirement to decide issues no. 2 and 3 which were, otherwise, kept in abeyance till the decision of issue No.1.The parties shall bear their own costs. Decree sheet be prepared accordingly.

File be consigned to record room after due compliance.

ARUN SUKHIJA
Digitally signed by ARUN SUKHIJA
Date: 2020.06.30 12:29:23 +05'30'

(Arun Sukhija)
ADJ-07/Central/Tis Hazari Courts,
Delhi/30.06.2020