

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.845 of 2023

Date	Order with signature of Judge(s)
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1. For hearing of CMA No.8752/2023.
2. For examination of parties/settlement of issues.

24.01.2024

Mr. Aitzaz Manzoor Memon, advocate for the plaintiff.
Mr. Danish Nayyer, advocate alongwith Ms. Kubra Ali, advocate for the defendants No.1 & 2.
Mr. Ahmed Masood, advocate for the defendant No.3.

1. Briefly stated, the plaintiff claims to be an affiliate of a company incorporated in Delaware, USA and it is that foreign entity, and not the plaintiff, that asserts grievance against the present defendants. A service agreement, available at page 189 of the file, demonstrates the said nexus. The affiliate of a purportedly aggrieved party has filed this suit *inter alia* seeking to impose restraint of trade upon the defendants.

Per learned counsel of the plaintiff, since the software developed by the foreign affiliate is employed by the present plaintiff, therefore, the suit has been maintained in the name of plaintiff and not in the name of foreign entity. Learned counsel further submits that since the defendants were privy to the software and its working, hence, they ought to be restrained from acting in any manner considered competitive by the said foreign affiliate.

Learned counsel for the defendant No.3 submits that *prima facie* there is no privity between the plaintiff and the said defendant. In addition thereto, it is submitted that the said defendant was demonstrably only a non-exclusive contractor, as apparent from page 193, and under such circumstances without even defining the trade, upon which restraint is sought, a perpetual embargo cannot be placed upon the defendant, hence, precluding him from earning a livelihood. Learned counsel submits that interim relief sought, and granted vide *ad interim* order, offends Article 18¹ of the Constitution as well as Section 27² of the Contract Act 1872.

Learned counsel for the defendants No.1 and 2 draws attention to page 159 of the court file and shows that the restraint, reasonable or otherwise, imposed by the pertinent contract was for the tenure thereof and a period of 12 months thereafter. It is submitted since the engagement ended on 02.10.2018 no cause is made out for the present suit having been filed in 2023 and in any event the defendants could not be restrained from their livelihood as interim measure.³

Heard and perused.

¹ Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business...

² Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

³ Reliance was placed by the respective counsel upon judgments reported as 2023 SCMR 939; 2019 SCMR 1753; 1997 SCMR 1508; 2018 PLC (N) 42; PLD 2008 Karachi 583.

The agreement on page 189 demonstrates the patent absence of privity between the plaintiff and the defendant; the same has also not been denied by the plaintiff's counsel before this Court. In so far as the expiration of tenancy of the restraint is concerned, in respect of the other defendant, apparent from page 195, the same has also not been denied. The plaintiff's counsel articulated no cavil to the observation that the plaintiff had either no privity with the defendants or the tenancy of any contractual restraint stood long expired.

The Constitution guarantees the right to every citizen to enter upon any lawful profession or occupation and to conduct any lawful trade or business. The imposition of any fetter in such regard has to be weighed seriously as it amounts denial of fundamental rights.

Section 27 of the Contract Act 1872 can be employed to challenge the very contract placing such a restraint, however, it is apparent from the arguments that either the contract is non-existent *inter se* or long since expired.

The case law relied upon demonstrates *inter alia* that a restrictive covenant beyond cessation of employment may be considered void; any restrictions has to be subjected to the anvil of whether it is reasonable, arbitrary and / or oppressive; onus lies on the claimant to prove that a restrictive covenant is necessary, albeit for a specific period; and that a Court is also duty bound to factor whether enforcement of such a restraint would denude a person of his livelihood. Last but not least that grant of any interim relief in the nature of final relief is repugnant to the settled principles of law.

Admittedly, there is no privity of contract between the plaintiff and a defendant; the restraint in respect of other, notwithstanding the tenability thereof, is *demonstrably* past its expiration. The restraint sought in this application does not satisfy the anvil of the law, as enumerated supra, and the necessary ingredients of *prima facie* case, balance of convenience and the apprehension of irreparable loss have not been set forth by the plaintiff, hence, this application is dismissed.

2. Per joint request, the matter is adjourned for filing purposed issues.

Judge