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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 6th October, 2021
Pronounced on: 12th October, 2021

\+ O.M.P.(I) (COMM.) 292/2021

ABP NETWORK PRIVATE LIMITED .... Petitioner
Through: Mr. Sandeep Sethi, Sr. Adv. with Mr.Arijit Mazumdar, Ms. Arunabha Deb, Mr. Shambo Nandy and Mr. Atif Shamim, Advs.

versus

MALIKA MALHOTRA ..... Respondent
Through: Mr. Hrishikesh Baruah, Mr. Pranav Jain & Ms. Radhika Gupta, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T

% 12.10.2021

1. The respondent was appointed as an Anchor with the petitioner, *vide* letter of appointment dated 28th April, 2021, at the salary of ₹ 7,26,000/– per annum. The following clauses of the letter of appointment, are relevant for adjudication of the issue in controversy:

> "3.3 You agree not to engage in any conduct detrimental to the interests of the Company or contrary to the information received by the management of the Company in any manner whatsoever.

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5. Term:

5.1 You agree that your services with the Company shall be for a fixed term of Thirty Six (36) months commencing from the Date of Commencement, which may be further renewed, on the basis of factors including but not limited to your performance and requirements of the company ("**Term**").

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7. Termination of Employment:

7.1 During the period of your employment, your services are liable to be terminated by either party at any time, with ninety days (90) prior written notice or payment of ninety days basic salary for the notice period short for, in lieu thereof.

7.2 It is agreed by you that serving notice period shall be essential and mandatory, unless otherwise agreed by the Company management, in view of the nature of your KRA with the Company. In view thereof, you agree that the right of finalizing your exit date, from the Company, shall solely based with your reporting manager/management of the Company, and the same shall be confirmed to you after confirmation of your resignation/termination.

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11. Engagement in other Business:

11.1 You acknowledge that the Company requires you to devote your whole time and attention to the service of the Company during the term of your employment with it. Accordingly, you agree to be employed with the Company on an exclusive basis.

11.2 For this reason, during the term of your employment, you must not (without the Company's prior written consent) directly or indirectly own, manage, control, participate in, consult with, render Services to or engage in the business of

any other business entity or other organisation (whether as an employee, officer, director, agent, partner, consultant or otherwise full time or part-time) including production of any creative interest with any production house, whether for ready commercial benefit or not.

12. Non-competition:

12.1 You acknowledge that during the term of your employment with the Company, you will become familiar with the Company's trade secrets and other confidential information concerning the Company and its associates and related companies and that your services will be of a special, unique and extraordinary value to the Company.

12.2 It is further agreed by you that being an identity and face of the Company, you shall not directly or indirectly own, manage, control, participate in, consult with, render services for, or engage in any business competing with the businesses of the Company or its associates or related companies, such as other news channel/web streaming platform/etc. whether by appearing on such channels/platforms for the same region (north/south/east/west) in India or in the same language and time slot, for a period of at least six (06) months from the date of your relieving from the Company."

Additionally, Clause 17.1 of the letter of appointment provided for arbitration as the mode for resolving disputes, with Delhi as the designated arbitral seat.

2. The respondent worked with the petitioner, uninterruptedly, till 3rd August, 2021, when she addressed the following email to the petitioner:

"Dear Sir,

As discussed with you, I wish to resign from the post of Anchor with ABP Network. Since I am still on probation, would be grateful if I could be relieved by August 16th.

Even though it has been a very short journey, my heartfelt thanks to you for allowing me this opportunity.

Thank you so much.

Regards
Malika"

3. This was succeeded by the following email dated 12th August, 2021:

"Dear Sir,

Dear Sir, as discussed, please relieve me on Monday, August 16th. I have cleared everything that had been pending on me. Please let me know of any exit procedures.

Thank you.

Best regards,
Malika"

4. W.e.f. 18th August, 2021, the respondent stopped attending the office of the petitioner. On 20th May, 2021, it came to the knowledge of the petitioner that the respondent is anchoring a show of a rival news channel (*Aajtak*).

5. The petitioner has, in the circumstances, sought to invoke the jurisdiction of this Court, under Section 9 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), seeking a pre-arbitral interlocutory order restraining the respondent from "directly or indirectly, participating, consulting, rendering any services for, or engaging in any business competing with the businesses of the

Petitioner or performing any task or undertaking any assignment, with or without remuneration, as being performed by the Respondent while being in the services of the Petitioner".

6. This, then, is the limited controversy before me.

7. Opposing the petition, Mr. Hrishikesh Baruah has, patiently and persuasively, urged the following preliminary contentions, without prejudice to the defences to the allegations of the petitioner on merits. The contentions of Mr. Baruah essentially question the entitlement, of the petitioner, to the nature of the relief sought in the petition, in view of the provisions of Specific Relief Act, 1963, read with judicial pronouncements on the issue. In case, the submissions of Mr. Baruah are found worthy of acceptance, no occasion would arise for this Court to pronounce on the merits of the controversy between the parties. The bulk of the argument before me, too, revolved, advisedly, around the preliminary objections of Mr. Baruah. It would be appropriate, therefore, to examine these objections at the outset.

8. The objections of Mr. Baruah, to grant of the relief claimed in the petition, are interconnected. They may be enumerated thus:

(i) Clauses 12.1 and 12.2 of the letter of appointment are void under Section 27 of the Indian Contract Act, 1872 ("the Contract Act").

(ii) Clauses (c) and (d) of Section 14, read with Section 41(e) of the Specific Relief Act, 1963 bars the grant of the injunction, as sought.

(iii) The right to such injunction is not saved by Section 42 of the Specific Relief Act, 1963 as no injunction, even to enforce a negative covenant in a contract which is, in its nature determinable, can be granted in a contract of personal service, if it would directly or indirectly compel the employee to idleness, or to serve the employer against her, or his, will.

(iv) Clauses 11.1 and 11.2 of the letter of appointment are not applicable, as they apply only during the currency of the employment of the respondent with the petitioner. Besides, enforcement of the said clauses would amount to enforcing a contract of personal service, which is impermissible, in view of Section 14(1)(c) of the Specific Relief Act, 1963.

(v) The considerations of balance of convenience and irreparable loss would also militate against the grant of relief as sought in the petition, as the petitioner could be equally efficaciously be compensated in monetary terms. Section 41(h) of the Specific Relief Act, 1963 has been pressed into service, to support this contention.

9. While contentions (ii) to (v) are interconnected, and would have to be examined accordingly, contention (i) is distinct therefrom.

10. The Specific Relief Act, 1963 before and after amendment:

10.1 Before examining the contentions of learned Counsel, it is necessary to survey the statutory position in the Specific Relief Act, 1963 before, and after, the amendments effected by the Specific Relief (Amendment) Act, 2018 ("the 2018 Amendment Act").

10.2 Section 41 of the Specific Relief Act, 1963 enumerates instances in which grant of injunction is completely proscribed. Of these, clauses (e) and (h) are relevant. They read as under:

> "**41. Injunction when refused. –** An injunction cannot be granted –
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> *****
>
> (e) to prevent the breach of a contract the performance of which would not be specifically enforced;
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> *****
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> (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;"

10.3 Section 42 is in effect an exception (more precisely, a proviso) to Section 41(e), and reads thus:

> "**42. Injunction to perform negative agreement. –**
>
> Notwithstanding anything contained in clause (*e*) of section 41, 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 circumstances 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 plaintiff has not failed to perform the contract so far as it is binding on him."

10.4 Sections 41 and 42, to the extent they are relevant, were undisturbed by the 2018 Amendment Act.

10.5 Section 41(e) relates back to Section 14, which enumerates the categories of contracts which cannot be specifically enforced, and the relevant clauses thereof read thus:

"**14. Contracts not specifically enforceable. –** The following contracts cannot be specifically enforced, namely:–

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(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and

(d) a contract which is in its nature determinable."

10.6 Section 14 was entirely recast by Section 5 of the 2018 Amendment Act. Prior thereto, Section 14 contained three sub-sections. Sub-sections (2) and (3) of the pre-amended Section 14 are not relevant for our purpose. Sub-section (1) enumerated the categories of contracts which could not be specifically enforced, in its clauses (a) to (d). Clause (d) of the amended Section 14 existed, in the same form, in the pre-amended Section 14(1) as clause (c). Clause (c) of the amended Section 14 is, however, a modified version of the

pre-amended Section 14(1)(b). Section 14(1), before the amendment of Section 14, with its clauses (b) and (c), read as under:

> "**14. Contracts not specifically enforceable. –**
>
> (1) The following contracts cannot be specifically enforced, namely: –
>
> *****
>
> (b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications *or volition* of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;
>
> (c) a contract which is in its nature determinable;"

10.7 Section 10, which dealt with the duty of courts to specifically enforce contracts capable of specific performance, too, underwent a significant change with the 2018 Amendment Act, though the change does not seriously impact the controversy in the present case. The consequence of the change was that courts are now required mandatorily to order specific performance of contracts which are capable of specific performance. Prior to the amendment, Courts had the discretion to enforce, or not to enforce, specific performance. That discretion now stands eviscerated, with the amendment of Section 10. Section 10, before and after amendment, reads thus:

> Before amendment
>
> "**10. Cases in which specific performance of contract enforceable. –** Except as otherwise provided in this Chapter, the specific performance of any contract *may, in the discretion of the court,* be enforced **–**

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

After amendment

"**10.Specific performance in respect of contracts. –**

The specific performance of the contract *shall be enforced* by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16."

Section 11(2) bars specific performance of a contract made by a trustee in excess of his powers or in breach of the trust. Section 16 enumerates the cases in which personal bars operate to disentitle the claimant to specific performance. These provisions are of no relevance to the case before us.

10.8 While Section 14(1)(c), before amendment, continues as Section 14(d) after amendment, there is a significant difference between Section 14(1)(b) (before amendment) and Section 14(c) (after amendment). The words "or volition", which existed in the erstwhile Section 14(1)(b), do not find place in Section 14(c), as amended. This distinction acquires additional significance when one refers to the May 2016 Report of the Expert Committee constituted to examine proposed amendments to the Specific Relief Act, 1963 ("the Expert Committee Report"). Mr. Sandeep Sethi placed especial reliance on this Report. Paras 11, 11.1(a), 11.3 (with its sub-clauses), 11.5 (with

its sub-clauses), 11.7, 12.1, 12.1.1 and 12.1.2 of the Expert Committee Report read thus:

> "**11.** Changes in some provisions of the Specific Relief Act, 1963 will improve the ease of doing business, and will encourage parties to perform their contracts. Primarily, the recommendations enable any party to the contract to seek whichever remedy he chooses. Hence specific performance or injunction will be available by choice, and will no longer be exceptional or discretionary. Courts will be able to refuse these reliefs on specified grounds only. Secondly, a party to a contract must have the right to complete performance by himself or through a third party at the cost of the promisor, and to claim the amount he spends for this purpose. Hence a new relief is recommended. Thirdly, it is recommended that relief under section 6 of the Act should also be available to persons from whom those in immediate possession derive their rights. Other recommendations relate to assessment of compensation, enforcement by third parties. Amendments are therefore recommended to sections 6 (Possession), sections 10, 14, 15, 16, 19, 20, 21, 23, 24 and 25 (Specific Performance), 26 and 28 (Rescission), and sections 37 and 41 (Injunctions) of the Act.
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> **11.1 Concerns and Issues**
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> (i) Changing the approach from damages being the rule and specific performance being the exception, to specific performance being the rule, and damages being the alternate remedy.
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> *****
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> **11.3 Reliefs of specific performance and injunction**
>
> 11.3.1 Currently under Indian law, compensation is the usual, normal and natural remedy, and is provided under section 73 of the Indian Contract Act 1872. An order of compensation must put the promisee in a position as if his contract is performed. But such an order does not give to the promisee the benefit of the promise. An award of compensation is circumscribed by strict tests of foreseeability (contemplation) and mitigation. A promise may not be able to prove all losses

he has suffered by the breach, nor will such amounts claimed be awarded to him. Proving losses with certainty is difficult. A decree for compensation may not give to the promisee the equivalent of the promise that is broken. A decree of specific performance comes closest to protecting this interest: it gives the promisee what was promised.

11.3.2 A promisee who wants to enforce performance by the promisor through arbitration or civil courts seeks reliefs of specific performance or injunction, which are extraordinary remedies in Indian law, the Specific Relief Act, 1963. A plaintiff must satisfy a threshold test, i.e. he must show that compensation is either unascertainable or is inadequate. This is the inadequacy test. It makes these remedies exceptional and restricts the availability of specific relief. Also, these remedies are not available as a matter of right, but their grant is in the discretion of the Court. The inadequacy test is the first hurdle any plaintiff must meet. The Act prescribes this test in Section 10, which faithfully follows, with a small change, the provisions of Section 12 of the repealed Specific Relief Act, 1877.

11.3.3 The inadequacy test does not permit the remedy of specific performance (or injunction) for every contract. By operation of a presumption, it is in fact, and is considered to be, generally available for contracts to transfer immovable property. In the case of contracts to transfer movable property, the presumption operates to cast contracts into types or categories. Specific performance thus gets granted for certain types or classes of contracts. In other classes, viz., contracts other than for transfer of property, a plaintiff has to satisfy the inadequacy test. The origin of this test lies in the history of English law. Equity courts could give these reliefs only in those matters where compensation was not an adequate remedy.

11.3.4 The proposed amendments seek to remove this restriction and make specific performance and injunction as general remedies available to a promisee who wishes to claim them.

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11.5 Exceptional nature of reliefs of Specific performance and injunction: An evaluation

11.5.1 The exceptional nature of specific relief arises from the inadequacy test. It is justified on many grounds. A strong justification is made on the basis of economic analysis, which recommends breach when it is efficient. When compensation is the primary remedy and specific performance is exceptional, the promisor is able to break the contract when it is more beneficial for him than performing it. The promisee is expected to get compensated for his loss, and get into the same position as if the promise is performed. In this view, specific performance is efficient only when the promisee cannot find a substitute. This view assumes that the promisee can calculate all his losses, and that a decree for compensation will not fully compensate his losses. However, there is also ample support in terms of economic analysis for routine availability of specific performance.

11.5.2 Giving primacy to specific relief is based upon the moral obligation to honour one's promises. It is a well-accepted view that a regime that allows specific relief encourages promisors to perform and deters breaches. This enables parties to plan their activities and transactions.

11.5.3 Inadequacy, or lack of it, must be proved. It falls naturally on the plaintiff seeking specific performance or injunction to prove that compensation will be inadequate, having first proved the contract, its terms, and its breach. If it is a contract for transfer of immovable property, the presumption assists him, shifting the burden on the defendant to show adequacy of compensation. If it is a contract for transfer of movable property, the plaintiff must show circumstances that will satisfy the presumption of inadequacy, i.e. that-the goods are unique, or have special value for him, or are not an ordinary article of commerce, or are not available in the market. In all other cases, he must show that compensation would be inadequate. There are difficulties in establishing this test. Inadequacy often gets decided as a matter of inference, and depends on the individual perception of the judge.

11.5.4 A study about applying the inadequacy test (or its relative - the irreparable loss test in interim matters) concludes that the- test is applied without appropriate analysis, and judgments deciding inadequacy without giving reasons, and based on inferences rather than facts. The study also concludes that the inadequacy test is granted in many situations and cases for protection of monetary interests. If specific performance and injunction are no longer exceptional, courts can deal with such cases with a consistent approach.

11.5.5 A decree for compensation does not compensate fully. This is because compensation is calculated with reference to date of breach. Interest on the amount of compensation is rarely awarded. The decree does not take into account events after breach until execution of the decree. Specific performance can give the promisee the fullest relief possible.

11.5.6 Even if specific performance is a routine remedy, parties would seek specific relief in the same type of cases in which it is available under the present law. This is actually also the strongest justification of relaxing the grant of specific relief. If the promisee has the choice of his remedy, he will choose compensation after obtaining substitutes. He will also ask for compensation where he expects the promisor to be reluctant or hostile, where the performance will require supervision not available from the court, or where he cannot suspend his affairs pending orders from the court. He will choose specific performance only if there is no substitute, either because the subject matter is not available, or is of special value to him, and where he is willing to wait for relief till execution of the decree. Hence there need not be any fear of increase in litigation and administrative costs.

11.5.7 If the inadequacy test is removed, the promisee can choose his own remedy. The promisee is the best judge of his own interest, and whether substitutes satisfy his needs. He has more information than the courts whether compensation is adequate, what it would cost him to get specific performance, and whether his promisor will obey the decree. He is unlikely to sue for specific performance if he finds a substitute or where compensation will be adequate.

11.5.8 Such a regime will change contract behaviour, encourage performance of contracts, and will deter breach. It will ease the burden of proof that presently lies on the promisee, who has already suffered by the breach. It will also encourage parties to think en-ante about remedies, and make appropriate provisions in their contracts choosing remedies.

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11.7 Amendments proposed

The amendments proposed are broadly as given below, and are dealt with in detail later:

> (i) Both remedies of specific performance and injunction when sought for breach of contract, will no longer be exceptional remedies. Section 10 to be amended accordingly.
>
> (ii) A court can refuse these remedies only on the stated grounds. Such grounds in the current Sections 14 and 20 are merged into one section, i.e. Section 14. It is expressly stated that these remedies shall not be refused on any other grounds. These remedies shall no longer be discretionary.
>
> (iii) A new relief of 'compensation pursuant to substituted performance' is created in new section 20A.
>
> (iv) Title of Chapter II to be changed to 'Enforcement of Contracts' to accommodate all these remedies, and other consequential amendments.

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12.1 The Committee is of the view that availability of the relief of specific performance should be routine. This means courts should grant specific performance to the party who asks for it, and can refuse the relief only in circumstances specified, and in no others. Many grounds on which courts could exercise discretion under section 20 of the Act are incorporated as grounds on which the relief can be refused.

> 12.1.1 Currently, Section 20 of the Act lays down that specific performance is a discretionary remedy, and specifies certain non-exhaustive situations in which specific performance is not to be granted. While Courts have opined that discretion is not to be exercised arbitrarily, and is to be exercised only on the basis of sound judicial principles, the scope of the discretion is considerably wide. The basic tenets on the basis of which discretion is to be exercised are "*justice, equity, and good conscience*". This leads to a lack of certainty for those asking for this remedy, and creates the need for limiting this discretion.
>
> 12.1.2 It is proposed that the grounds on which specific performance may be withheld should be clearly delineated in the statute, based on existing case law in India and comparative practice. In other words, once the plaintiff successfully meets the conditions for obtaining specific performance, the relief must be granted unless the defendant can prove that the case falls squarely within the negative grounds or exceptions. This will have two benefits- first, it will ensure that specific performance is not granted in cases wherein it is impractical; second, it will make specific performance a statutory, and not an equitable remedy, based on clearly delineated grounds."

There can be no gainsaying, in the face of these observations of the Expert Committee that the very intent of amending the Specific Relief Act, 1963 was to make specific performance of contracts, the norm and minimize exceptions thereto. Even so, Para 11.7 (ii) did recognize the inability, of courts, to enforce specific performance in cases which fell within the categories enumerated in Section 14.

10.9 Most significantly, in the amendments suggested by Para 18.13 of the Expert Committee Report to Section 14(1), clause (c) was to read thus:

> "(c) where the contract runs into such minute or numerous details, or its performance is so dependent on the personal qualifications *or volition* of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;"

Section 14(c), as it finally emerged in its amended form did not, however, contain the words "or volition". This indicates that the legislature chose, consciously and deliberately, to exclude contracts dependent on volition of parties from the categories of contracts which were incapable of specific performance. This was a clear departure from the position which existed under the erstwhile Section 14(1)(b). A contract of personal service, which is determinable on volition of either of the parties, is no longer, therefore, incapable of specific performance. The sequitur, by operation of Section 10, as amended, would be that Courts are obligated to enforce specific performance of such contracts, *unless they are incapable of specific performance for any other reason envisaged by the Specific Relief Act, 1963.*

10.10 A contract which is "in its nature determinable" was incapable of specific performance by virtue of the erstwhile Section 14(1)(c), and continues to remain incapable of specific performance by virtue of the present Section 14(d).

11. Mr. Baruah has invoked clauses (c) and (d) of Section 14. He has relied on decisions which, according to him, render a contract, such as the present, incapable of specific performance, as being "in its nature determinable". As this clause remains unchanged, even after

the amendment of the Specific Relief Act, 1963 it would be appropriate to, in the first instance, examine this contention of Mr. Baruah, *vis-à-vis*, the response of Mr. Sandeep Sethi thereto.

12. Re. Section 14(d) of the Specific Relief Act, 1963

12.1 Mr. Baruah relies on **Rajasthan Breweries Ltd v. Stroh Brewery Co.**[1], **Parsoli Motor Works v. B.M.W. India Pvt Ltd**[2], **Independent News Service v. Anuraag Muskan**[3], **Ambiance India Pvt Ltd v. Naveen Jain**[4], **G.E. Capital Transportation Financial Services Ltd v. Tarun Bhargava**[5] and **L.M. Khosla v. Thai Airways International Public Co. Ltd**[6]. Mr. Sethi relies, *per contra*, on **Inter Ads Exhibition Pvt Ltd v. Busworld International Corporate Venootschap Met Beperkte Anasprakelijkheid**[7], **Tarun Sawhney v. Uma Lal**[8] and the judgment of the Division Bench in the appeal from the said decision, in **Upma Khanna v. Tarun Sawhney**[9].

12.2 The expression "in its nature determinable" is, to say the least, delightfully vague. The exact import of the words "in its nature" is not easy to discern. Nor is it easy to distinguish a contract which is "in its nature determinable", from a contract which is merely "determinable".

[1] **AIR 2000 Del 450**
[2] **247 (2018) DLT 52**
[3] **199 (2013) DLT 300**
[4] **122 (2005) DLT 421**
[5] **190 (2012) DLT 185**
[6] **2012 SCC OnLine Del 4019**
[7] **2020 SCC OnLine Del 351**
[8] **(2011) 125 DRJ 527**
[9] **2012 SCC OnLine Del 2716**

12.3 An early decision which considered the issue of whether a contract was "in its nature determinable" is to be found in **Premier Automobiles Ltd v. Kamlekar Shantaram Wadke**[10]. The case related to an agreement, dated 31st December, 1966, between Premier Automobiles Ltd. (PAL) and the Sabha Union of its workmen, for availing certain incentives. Subsequently, a settlement dated 9th January, 1971 was executed between PAL and another Union of its workmen, namely the Association Union. Certain members of the Sabha Union, who were aggrieved by the settlement, instituted a suit before the Bombay City Civil Court, for a declaration that the settlement dated 9th January, 1971, was not binding on them and all others who were not members of the Association Union. Additionally, permanent injunction, restraining PAL from enforcing or implementing the settlement dated 9th January, 1971, was also sought.

12.4 Among other issues, the Supreme Court considered, in para 29 of the report, the question of whether perpetual injunction could be granted in view of Section 14(1)(c) of the pre-amended Specific Relief Act. Section 19(2) of the Industrial Disputes Act, 1947 ("the ID Act") provided for termination of settlement between workmen and the management, and read thus:

> "**19. Period of operation of settlements and awards. –**
>
> (1) A settlement shall come into operation on such date as is agreed upon by the parties to the dispute, and

[10] **(1976) 1 SCC 496**

> if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute.
>
> (2) Such settlement shall be binding for such period as is agreed upon by the parties, and if no such period is agreed upon, for a period of six months from the date on which the memorandum of settlement is signed by the parties to the dispute, and shall continue to be binding on the parties after the expiry of the period aforesaid, until the expiry of two months from the date on which a notice in writing of an intention to terminate the settlement is given by one of the parties to the other party or parties to the settlement."

The Supreme Court, in para 29 of the report, held that, by virtue of Section 19(2) of the ID Act, the settlement, between the Association Union and PAL was "in its nature determinable". Per corollary, it was held, the settlement was not specifically enforceable by virtue of Section 14(1)(c); consequently, injunction, restraining breach of the settlement, could not be directed in view of the proscription contained in Section 41(e) of the Specific Relief Act, 1963.

12.5 A contract which was otherwise stipulated as being valid for a particular period of time, and was determinable prior thereto at the option of either of the parties to the contract was, therefore, held to be "in its nature determinable". No injunction, restraining breach of such a contract could, therefore, be granted.

12.6 Having said that, it is important to note that, in para 29 of the report in **Premier Automobiles**[10], the Supreme Court noted the fact

that Section 42, which provided an exception to Section 41(e), was not applicable.

12.7 The expression "in its nature determinable" came up for consideration, before the Supreme Court, again, in **Indian Oil Co. Ltd v. Amritsar Gas Service**[11]. The Court was, in that case, seized with a Distributorship Agreement between Indian Oil Co. Ltd (IOCL) and Amritsar Gas Service (AGS). Clauses 27 and 28 of the Distributorship Agreement envisaged termination thereof. Clause 27 contemplated termination of the Distribution Agreement contingent on the happening of specified events, whereas Clause 28 permitted either party "without prejudice to the foregoing provision or anything to the contrary" contained in the agreement to terminate the agreement by thirty days notice to the other party "without assigning any reason for such termination"[12]. IOCL terminated the Distributorship Agreement. The matter was carried, by AGS, to arbitration. The arbitrator held the termination of AGS's distributorship, by IOCL, not to have been validly effected. As a consequence, the arbitrator held AGS to be entitled to compensation owing to breach of the contract by IOCL, till the breach was remedied by restoration of the distributorship of AGS. The quantum of compensation was worked out as, the commission that AGS would have earned on supply of gas cylinders to its customers, had its distributorship not been terminated. The arbitrator found that, in the peculiar facts of the case, which were exceptional, IOCL was liable to remedy the breach by restoration of

[11] **(1991) 1 SCC 533**
[12] (Reproduced from para 2 of the report)

the distributorship. *Inter alia*, one of the "exceptional" facts, justifying restoration of the distributorship, was the fact that the termination of the distributorship was not in accordance with the termination clause contained in the Distributorship Agreement. The arbitrator, however, reserved, to IOCL, the right to terminate the distributorship of AGS in accordance with the terms of the Distributorship Agreement.

12.8 The Supreme Court held, in para 12 of the report, the decision of the arbitrator to be unsustainable, as the Distributorship Agreement was "in its nature determinable", thus:

> "**12.** … The award further says as under:
>
> > "This award will, however, not fetter the right of the defendant Corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion arises."
>
> *This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28.* Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. *Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is 'a contract which is in its nature determinable'.* In the present case, it is not necessary to refer

to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since *clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award* which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained."

(Emphasis supplied)

12.9 Another case in point is **Her Highness Maharani Shantidevi P. Gaikwad v. Savjibhai Haribhai Patel**[13]. An agreement was executed, in that case, between Fatehsinhrao P. Gaekwad ("FPG", in short) as the owner, and the respondent before the Supreme Court ("the respondent", in short) as the licensee, in respect of immovable property, on which FPG desire to construct dwelling units. The respondent cancelled the agreement by a notice dated 23rd February, 1980. FPG filed the suit against the respondent, seeking a declaration that the cancellation of the agreement, by the respondent, was illegal and for a decree of specific performance of the agreement, along with injunction. The learned Trial Court decreed the suit as sought by FPG. The agreement was declared as continuing to subsist, and a decree of specific performance was also granted in favour of FPG. The respondent was directed to specifically perform the agreement and was restrained from committing breach thereof. The High Court upheld the decision, and affirmed the enforceability of the agreement

[13] **(2001) 5 SCC 101**

by specific performance, subject to the condition of final declaration, under Section 21 of the Urban Land (Ceiling and Regulation) Act, 1976 being issued with regard to the land in question in accordance with law.

12.10 Among the many issues which arose before the Supreme Court was the question of whether the agreement was capable of being enforced by a decree of specific performance. The appellant before the Supreme Court argued that, as the agreement was in its nature determinable, a decree for specific performance of the agreement could not be issued, in view of Section 14(1)(c) of the Specific Relief Act, 1963. The respondent argued to the contrary. The clauses of the agreement, around which the controversy revolved, were the following:

> "(4) On the competent authority making a declaration that the land of the said property is not in excess of the ceiling area and on his granting permission to the owner to continue to hold the land of the said property for the purpose of the Scheme above referred to be prepared by the licensee of the second part, the owner of the first part shall deliver the possession of the said property to the licensee of the second part for the execution of the said Scheme and construction of the buildings under the said Scheme.
>
> *****
>
> (17) This agreement shall not be unilaterally rescinded by either party after the licensee of the second part has been put in possession of the said property."

12.11 The Supreme Court held that Clause 17 of the agreement unambiguously envisaged termination of the agreement before the

delivery of possession of the license. The decisions of the courts below, granting specific performance of the agreement was, therefore, reversed.

12.12 The expression "in its nature determinable", used in the context of the erstwhile Section 14(1)(c) of the Specific Relief Act, 1963 has been considered by this Court on a number of occasions, of which three decisions of Division Benches, may be cited. Chronologically, the first decision – which was cited by both learned Counsel before me – is **Rajasthan Breweries**[1].

12.13 Rajasthan Breweries[1] was an appeal against the rejection, by a learned Single Judge, of an application, under Section 9 of the 1996 Act, seeking *ad interim* temporary injunction restraining the operation of two notices of termination issued by Stroh Brewery Co ("SBC", hereinafter) to the appellant Rajasthan Breweries Ltd ("RBL", hereinafter). The learned Single Judge had rejected the applications for interlocutory injunction on the ground that the contracts were determinable, invoking Section 41 read with the erstwhile Section 14(1)(c) of the Specific Relief Act, 1963. RBL contended that a determinable contract was one in which either party can terminate the agreement by notice and that, as there was no such clause in the agreements between RBL and SBC, they could not be regarded as determinable. Rather, contended RBL, the contracts granted license to RBL for 7 years, renewable successively for 3 years each.

12.14 The learned Single Judge had held that the two agreements contained clauses which permitted their termination at the occurrence of any of the events envisaged thereby. It was further noted, by the learned Single Judge, that there was no negative covenant in either of the agreements. Resultantly, the occurrence of any of the envisaged events entitled SBC to terminate the agreement. Accordingly, the learned Single Judge held that the agreements were determinable at the behest of SBC and were, therefore, in their nature determinable, thereby attracting the bar contained in Section 14(1)(c) of the Specific Relief Act, 1963.

12.15 RBL sought to contend, before the Division Bench, that an agreement which was determinable at the instance of either of the parties was not "in its nature determinable". The Division Bench rejected the submission, relying on **Indian Oil**[11]. The findings of the Division Bench in this regard read thus:

> "The facts of the present case are identical to those in aforementioned decision of the Supreme Court in as much as the agreements in the instant case are also terminable by the respondent on happening of certain events. In **Indian Oil Corporation's case (***supra***)** also agreement was terminable on happening of certain events. Question that whether termination is wrongful or not; the events have happened or not; the respondent is or is not justified in terminating the agreement are yet to be decided. There is no manner of doubt that the contracts by their nature determinable."

It was further held, by the Division Bench, that "even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private

commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice". The remedy available with RBL, in the event of an illegal termination, it was found, would only be compensation for wrongful termination. RBL could not maintain a claim for specific performance of the agreements. Any injunction against specific performance of the agreements was, therefore, statutorily prohibited, as they were determinable in nature. The decision of the learned Single Judge was, therefore, upheld and the appeal was dismissed.

12.16 Mic Electronics Ltd v. M.C.D.[14] was another decision, of a Division Bench of this Court, which considered the applicability of the erstwhile Section 14(1)(c) of the Specific Relief Act, 1963. This decision, too, was by way of an appeal against an order, of a learned Single Judge, rendered under Section 9 of the 1996 Act. The appellant Mic Electronics Ltd ("MEL", hereinafter) had applied for an injunction against the operation of a letter, issued by the Municipal Corporation of Delhi (MCD), cancelling the contract awarded to MEL for displaying advertisements at nine sites in the city of Delhi. Though other issues were raised, with which we need not concern ourselves, one of the submissions of MCD was that the contract was in its nature determinable and could not, therefore, be specifically enforced, as MEL desired. MCD contended that as MEL defaulted in payment of the licence fees, a show cause notice was issued to MEL, whereafter MCD cancelled the licence in accordance with the terms of the agreement. In paras 12 to 14 of the report, the Division Bench

[14] **(2011) 1 Arb LR 418 (DB)**

upheld this submission of MCD and, consequently, dismissed MEL's appeal, thus:

> "12. The next question that needs to be considered is the contention of the Respondent that the contract between the parties was in its very nature determinable and consequently could not be specifically enforced by way of the present proceedings. In this behalf, it is observed that the Appellant did not pay the agreed licence fee in terms of the licence agreement. Consequently, after issuance of the show cause notice and calling for a reply from the Appellant the Respondent cancelled the licence under the terms of the agreement between the parties. Therefore, the licence stood terminated, as correctly observed by the learned Single Judge, in the impugned order, and the legality or illegality of termination would be a matter to be determined in arbitration. Further, the justification given by the Appellant for not paying the licence fee will be examined in the arbitral proceedings. The case of the Appellant that, owing to the failure of the Respondent to perform obligations under the agreement, and the latter's refusal to decrease the number of LED screens in terms of clause 6 of the agreement, would also be considered by the Arbitral Tribunal. In this behalf, we, therefore, find considerable merit in the submission made on behalf of the Respondent that if the cancellation of the contract by the Respondent constitutes a breach of contract on their part, the Appellant would be entitled to damages. In other words, the questions whether the termination is wrongful or not or whether the Respondent was not justified in terminating the agreement, are yet to be decided. However, from the facts of the case there is no manner of doubt that the contract was by its very nature terminable, in terms of the contract between the parties themselves.
>
> 13. In **Rajasthan Breweries Ltd.** (*supra*), a Division Bench of this Court observed that, at the most, in case ultimately it is found that termination is bad in law or contrary to the terms of agreement or of any understanding between the parties or for any other reason, the remedy of the Appellant was to seek compensation for wrongful termination and not a claim for specific performance of the agreement. Further, in this view of the matter, there was every reason to

> come to the conclusion that the relief sought by the Appellant in terms of an injunction seeking to specifically enforce the agreement, by permitting the Appellant to continue to operate the 9 LED screens installed them, was statutorily prohibited with respect to a contract which is determinable in nature.
>
> 14. Thus, the learned Single Judge correctly declined to grant interim relief as sought for by the Appellant in view of Section 14(1)(c) read in conjunction with Section 41(e) of the Specific Relief Act, 1963."

12.17 A third Division Bench decision of this Court, on which Mr. Sandeep Sethi, learned Senior Counsel for the petitioner, relied, is **Upma Khanna**[9], a characteristically brief order authored by Pradeep Nandrajog, J. (as he then was). The respondent Tarun Sawhney ("Tarun", hereinafter) sought specific performance of two agreements to sell, whereunder he claimed to have paid amounts to the defendants (before the learned Single Judge). Clause 17 and Clause 20 in the two agreements, which were identical, read thus:

> "If this agreement is not implemented within the twelve calendar months from the date hereof this agreement shall stand terminated and extinguished automatically without any further act of parties and vendors shall be at liberty to sell the said property to any other person after refund of earnest money, as also other lawful charges hereinafter mentioned if paid by the vendee on behalf of the vendor; the intention of the parties is that they all be resorted to the same position as at the date hereof and as if this agreement had not been executed."

The appellant before the Division Bench contended that, by operation of this clause, the agreements between the appellant and the respondent were rendered "in their nature determinable" and could not, therefore, be specifically enforced, in view of the interdiction

contained in Section 14(1)(c) of the Specific Relief Act, 1963. The respondent contended, *per contra*, that an agreement could be regarded as "in its nature determinable", only when it could be terminated at the option of either of the parties, and not where it contained a covenant envisaging its determination by efflux of time. As pithily observed by the Division Bench, "in plain language, the plaintiff drew a distinction between agreements being determinable at the option of the parties and not agreements being determinable by way of default". (The word "not" appears to be a typo.) Thereafter, on the issue of the ambit of the expression "in its nature determinable", the Division Bench observed as under, in paras 16 to 20 of the report:

> "16. What is the meaning of the expression: *a contract which is in its nature determinable.*
>
> 17. The New Shorter Oxford English Dictionary defines 'determinable' to mean, if used as an adjective, fixed, definite. As a general meaning, to mean: 'liable to come to an end'. The dictionary by Jowitt's, Second Edition explains determinable: '*an interest is said to determine when it comes to an end, whether by limitation, efflux of time, merger, surrender or otherwise*'. Thus, it is possible to argue that for whatever reasons it may be the cause for, if an interest comes to an end by efflux of time, a contract would be determinable in nature. This would be an argument in support of the appellants, and as urged.
>
> 18. But, the argument overlooks the concept of a fault liability and a fault effect and a no fault liability and a no fault effect. It overlooks the point that one should not rush to conclusions. Clause (c) uses the expression 'in its nature determinable' and does not throw any light whether the determination contemplated embraces a fault effect determination.

> 19. If a defence by a contracting party that the sufferance of the default and hence the determination of the contract is to be accepted, it would amount to allowing the party committing the wrong to take advance of its own neglect and this would ex-facie not be acceptable to a court of equity.
>
> 20. We need not deal with the two decisions cited at the bar before us, which have been considered by the learned Single Judge, and the ratio extracted. We concur with the same. We concur with the view taken by the learned Single Judge."

12.18 From these passages, in my opinion, it is not possible to take home a clearly discernible ratio, which would justify applying this decision to the facts before us. In para 17, the Division Bench recognized the apparent merit in the contention, of the appellant before it, that, as generally understood, the agreement between the appellant and the respondent could be treated as "determinable" in nature. Para 18, however, sought to draw a distinction in view of the facts before the Division Bench on the principle of the existence of "a fault liability and the fault effect and that no fault liability and that no fault effect". The Division Bench went on to observe – and, I confess, I am constrained to entirely agree with the observation – that the expression "in its nature determinable" does not throw any light on its actual scope and effect and as to whether it would embrace fault-effect determination. This finding is obviously returned in view of the peculiar manner in which the termination clause in the agreements (extracted *supra*) was worded. The clause, according to the Division Bench, embraced a "fault liability" following the termination, resulting in restoration of the parties to the *status quo ante*.

12.19 No similar clause exists in the letter of appointment issued by the petitioner to the respondent. **Upma Khanna**[9] does not, therefore, appears to be of particular relevance to the facts before us.

12.20 A contract which is determinable, whether by efflux of time or at the option of either of, or both, the parties, and whether preceded by the requirement of issuance of notice or any other pre-termination formality, or not, ise, therefore, to be regarded as "in its nature determinable", within the meaning of Section 14(d) of the Specific Relief Act.

12.21 As this position is clear, from the judgments already discussed, I do not deem it necessary to refer to other decisions of learned Single Judges of this Court, cited by the parties, on the issue of the ambit of the expression "in its nature determinable"

13. Re. Sections 41(e) and 42 of the Specific Relief Act, 1963

13.1 The consequence of the letter of appointment of the respondent, by the petitioner, being a contract which is in its nature determinable, within the meaning of Section 14 (d) of the Specific Relief Act, 1963 would, ordinarily, be that no injunction, against breach of the letter of appointment, could be granted, in view of Section 41(e).

13.2 Mr. Sandeep Sethi does not dispute this position. He, however, sought to invoke Section 42, as an exception to Section 41(e).

13.3 Section 42 starts with a *non obstante* clause. If the injunction sought, comes within the four corners of Section 42, therefore, its grant cannot be inhibited by Section 41(e).

13.4 Section 42 applies "where a contract comprises of an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act". In such a case, Section 42 empowers the Court to, by injunction, compel the performance of the negative agreement, even if the affirmative agreement is incapable of specific performance.

13.5 Mr. Sethi places considerable reliance, in this context, on the judgment of the Supreme Court in **Niranjan Shankar Golikari v. Century Spinning & Manufacturing Co. Ltd**[15]. In order to appreciate the contention, it is necessary to appreciate, in the first instance, the exact controversy which arose before the Supreme Court in case. The appellant, Niranjan Shankar Golikari ("Niranjan", hereafter) was appointed as a shift supervisor with the respondent-Company ("the Company"). Clause 17 of the contract between Niranjan and the Company read thus:

> "In the event of the employee leaving, abandoning or resigning the service of the company in breach of the terms of the agreement before the expiry of the said period of five years he shall not directly or indirectly engage in or carry on of his own accord or in partnership with others the business at present being carried on by the company and he shall not serve in any capacity, whatsoever or be associated with any person, firm or company carrying on such business for the remainder of the said period and in addition pay to the

[15] **AIR 1967 SC 1098**

> company as liquidated damages an amount equal to the salaries the employee would have received during the period of six months thereafter and shall further reimburse to the company any amount that the company may have spent on the employee's training."

By a communication dated 7th November, 1964, Niranjan informed the Company that he had resigned w.e.f. 31st October, 1964. The Company, by its response dated 23rd October, 1964, directed Niranjan to resume work, stating that his resignation had not been accepted. Niranjan responded, informing that he had obtained another employment. The Company, thereupon, filed a suit before the Kalyan District Court, seeking an injunction restraining Niranjan from serving in any capacity whatsoever or being associated with any person, firm or company including Rajasthan Rayon, in which he claimed to have obtained employment after resigning from the services of the Company, till 15th March, 1968, being the *terminus ad quem* of the tenure of Niranjan with the Company. Niranjan also pleaded that Clause 17 was invalid, being violative of Section 27 of the Contract Act.

13.6 The Courts below found Clause 17 to be in the nature of a reasonable restriction to protect the interests of the Company and not, therefore, illegal or unconscionable in any manner. It also found that "*there was no indication at all that if the appellant was prevented from being employed in a similar capacity elsewhere he would be forced to idleness or that such a restraint would compel the appellant to go back to the Company which would indirectly result in specific performance of the contract of personal service"*.

13.7 On the sustainability of the decision, of the Courts below, to grant an injunction, the Supreme Court held, in para 18 of the report, thus:

> "**18.** The next question is whether the injunction in the terms in which it is framed should have been granted. *There is no doubt that the courts have a wide discretion to enforce by injunction a negative covenant. Both the courts below have concurrently found that the apprehension of the respondent Company that information regarding the special processes and the special machinery imparted to and acquired by the appellant during the period of training and thereafter might be divulged was justified; that the information and knowledge disclosed to him during this period was different from the general knowledge and experience that he might have gained while in the service of the respondent Company and that it was against his disclosing the former to the rival company which required protection*. It was argued however that the terms of clause 17 were too wide and that the court cannot sever the good from the bad and issue an injunction to the extent that was good. But the rule against severance applies to cases where the covenant is bad in law and it is in such cases that the court is precluded from severing the good from the bad. But there is nothing to prevent the court from granting a limited injunction to the extent that is necessary to protect the employer's interests where the negative stipulation is not void. *There is also nothing to show that if the negative covenant is enforced the appellant would be driven to idleness or would be compelled to go back to the respondent Company*. It may be that if he is not permitted to get himself employed in another similar employment he might perhaps get a lesser remuneration than the one agreed to by Rajasthan Rayon. But that is no consideration against enforcing the covenant. The evidence is clear that the appellant has torn the agreement to pieces only because he was offered a higher remuneration. Obviously he cannot be heard to say that no injunction should be granted against him to enforce the negative covenant which is not opposed to public policy. The injunction issued against him is restricted as to time, the nature of employment and as to area and cannot therefore be

> said to be too wide or unreasonable or unnecessary for the protection of the interests of the respondent Company."

Mr. Baruah would submit that the decision in **Niranjan Shankar Golikari**[15] actually supports the case of his client, rather than that of Mr. Sandeep Sethi's. He points out that the Supreme Court proceeded on the premise that enforcement of the negative covenant against NSG would not consign him to idleness or force him to work for the Company. As against this, Mr. Baruah contends that, if the negative covenant is, in the present case, enforced against the respondent, who has already joined as an anchor with another news channel, she would either be forced to idleness or would be compelled to rejoin the petitioner. This, he submits, is entirely unconscionable in law. He points out, in this regard, that, in fact, consequent to the *ad interim* order passed by this Court, the respondent is, in fact, idle, as she is unable to work for the *Aajtak* news channel, which she has joined. That an Anchor, placed in such a situation is, in fact, consigned to idleness, points out Mr. Baruah, stands acknowledged by the judgment of a coordinate bench of this Court in **Independent News Service P Ltd v. Sucherita Kukreti**[16].

13.8 One may also refer, in this context, to the following enunciation of the law, in para 42 of the report in **Gujarat Bottling Co. Ltd v. Coca Cola Co.**[17], on which Mr. Baruah places reliance:

> "In India Section 42 of the Specific Relief Act, 1963 prescribes that notwithstanding anything contained in clause (e) of Section 41, where a contract comprises an affirmative

[16] **257 (2019) DLT 426**
[17] **(1995) 5 SCC 545**

> 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. This is subject to the proviso that the plaintiff has not failed to perform the contract so far as it is binding on him. *The Court is, however, not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer*. [See: **Ehrman v. Bartholomew**[18]; **N.S. Golikari**[15] at p. 389.]"

13.9 **Niranjan Shankar Golikari**[15] and **Gujarat Bottling**[17] are *ad idem*, therefore, in holding that the availability of the benefit of Section 42 of the Specific Relief Act, 1963 in a contract of employment of personal service, would be subject to the consequence of grant of such benefit not resulting in the employee being consigned to idleness or being forced to work for the employer.

13.10 I am inclined, *prima facie*, to agree with the submission, of Mr. Baruah, that grant of injunction, as sought by the petitioner, would inevitably result in the respondent being either consigned to idleness, or being compelled to work for the petitioner. This submission was, in fact, not seriously traversed, to any convincing extent, by the petitioner. Mr. Sethi, in fact, predicated his submission on the premise that the respondent was welcome to join the petitioner, and would continue to draw the emoluments to which her employment with the petitioner entailed. This submission would support the contention of Mr. Baruah, as it indicates that the only options

[18] **(1898) 1 Ch 671 : (1895-99) All ER Rep Ext 1680**

available to the respondent, were injunction as sought by the petitioner be granted, would be either to join the petitioner or remain at home. The position, in law, is settled, that Section 42 of the Specific Relief Act, 1963 cannot be so pressed into service as would compel the employee to join the employer whose services she has voluntarily left.

13.11 Specifically in the context of the duties of an Anchor, a coordinate bench of this Court has examined the applicability of Section 42, in facts which mirror those in the present case in **Independent News Service**[16]. The respondent Sucherita Kukreti ("Sucherita", hereafter), in that case, was also working as an anchor with the plaintiff Independent News Service P Ltd ("INS", hereafter), a television news channel. The agreement between Sucherita and INS contained a negative covenant, proscribing association of Sucherita, with any other competing channel during the term of her agreement with INS. Sucherita expressed her intention of leaving the services of INS and joining a competing news channel, and in fact resigned on 13th December, 2018. She joined the competing news channel on 14th January, 2019. INS, in the circumstances, filed a suit before this Court and prayed for an interlocutory injunction restraining Sucherita from joining any other news channel, till the expiry of the tenure of her contract with INS.

13.12 Para 14 of the report enumerates the considerations which compelled this Court to refuse the prayer for injunction, as advanced by INS. The following considerations would apply, *mutatis mutandis*, to the present case:

"(A) Granting any interim injunction would amount to restraining the defendant from doing what she has been doing for the last 14 years and what she is best known to do and has skill to do. *Ad-interim* injunction if granted for the period till 30th November, 2019, would amount to killing the goodwill acquired by the defendant in the last 14 years and which loss cannot be monetarily compensated to the defendant in the event of it being ultimately found in the suit that the plaintiff was not entitled to such injunction. The Courts (see ***S. Tamilselvan v. The Government of Tamil Nadu***[19]**,**) have leaned in favour of resurrecting rather than killing what a person is best at. On the contrary, the plaintiff, in the event of ultimately succeeding, can always be compensated monetarily for the loss, if any suffered.

(B) Thus, neither the element of irreparable injury nor the element of balance of convenience, on the anvil of which grant of interim relief is to be tested, is in favour of the plaintiff.

(C) Though Section 42 of the Specific Relief Act, 1963 empowers the Court to grant an injunction to perform a negative agreement and the defendant in the present case did agree with the plaintiff to, till the expiry of the term of her agreement with the plaintiff, not be associated with any other news channel, but this by no means entitles the plaintiff as a matter of right to an injunction. Grant of injunction remains discretionary and which discretion is to be exercised on the well established anvils of *prima facie* case, irreparable injury, balance of convenience and public interest.

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(G) Granting any such *ad interim* injunction would lead the defendant to idleness and exception in which regard has been consistently made by the Courts including in all the cited judgments. The defendant cannot be asked to engage herself in other, behind the scene activities as is suggested, even if besides being in front of the camera for the last 14 years has also been incidentally involved in behind the scene activities. The averments in the plaint itself are guided by the acumen,

[19] **2016 SCC OnLine Mad 5960 (DB)**

training and skill of the defendant in front of rather than behind the camera.

(H) Benching a professional for as long as 10 to 11 months can be devastating, capable of inflicting permanent damage affecting mental and physical health and future prospects of a professional. This is more so in the case of Newscasters/News Presenter to whom the adage "out of sight out of mind" would also apply. The patrons of the defendant in the said 10 months are likely to turn over to other Newscasters/News Presenter to whom they would get habituated and not only is it doubtful that the defendant, after 10-11 months, will retain the same advantage owing whereto the plaintiff wants to restrain the defendant but it is also highly unlikely that the defendant will be able to win back the patrons so lost by her.

(I) The entire claim of the plaintiff is on the premise of the agreement of the plaintiff with the defendant being in force. It is not as if the defendant, while continuing with the employment with the plaintiff is intending to render her services to another as well. The defendant has terminated her employment/agreement with the plaintiff and it is yet to be determined, whether the defendant could have done so or could not have done so. The senior counsel for the plaintiff has fairly also agreed that the defendant cannot be compelled to continue to render services to the plaintiff. The case at best is thus of breach of agreement and which can ordinarily be compensated with money."

13.13 I see no reason to take a view different from that taken by the coordinate bench in **Independent News Service**[16]. Though the order is interlocutory in nature, and cannot, therefore, strictly speaking, constitute a binding precedent, it is well settled that, even at an interlocutory stage, consistency is expected to be maintained by the Court, and conflicting orders in cases involving similar circumstances is to be avoided. Else, public faith in the administration of justice would be severely eroded. Besides, the view adopted by the

coordinate bench in **Independent News Service**[16] is not discordant with any decision of any superior judicial forum.

13.14 The matter may be viewed from another angle as well. The contention, of Mr. Sethi, predicated on Section 42 of the Specific Relief Act, 1963 that the inability to enforce specific performance of a positive covenant in a determinable contract cannot inhibit specific performance of a negative covenant, with which the positive covenant may be coupled, can apply only if the extent of "coupling", between the positive and negative covenant, is not such that enforcement of the negative covenant would indirectly result in enforcement of the positive covenant. This principle stands underscored by the following words, in para 58 of the judgment of the Supreme Court in **Percept D'Mark (India) Ltd v. Zaheer Khan**[20] :

> "Likewise, grant of injunction restraining the first respondent would have the effect of compelling the first respondent to be managed by the appellant, in substance in effect a decree of specific performance of an agreement of my judiciary or personal character of service, which is dependent on mutual trust, faith and confidence."

The negative covenant, which the petitioner seeks to enforce in the present case is contained in Clause 11.2 of the letter of appointment. Clause 11.2 applies only during the currency of employment of the respondent by the petitioner. Enforcement of the negative covenant in Clause 11.2 would, therefore, require the respondent to be treated as continuing to be in the petitioner's employment, which would amount to indirectly enforcing the positive covenant. Though Section 42 of

[20] **(2006) 4 SCC 227**

the Specific Relief Act, 1963 commences with a *non obstante* clause and appears, therefore, to be in the nature of an exception to Section 41(e), the exception is limited in nature, conditioned by the specific terms of Section 42. What Section 42 ordains is that *the power to enforce the negative covenant would not be affected* by the lack of power to enforce the positive covenant. The *non obstante* nature of Section 42, therefore, *does not extend to rendering the positive covenant enforceable*, contrary to Section 41(e). To that extent, therefore, it would probably be etymologically more appropriate to treat Section 42 as a *proviso* to Section 41(e), rather than an *exception* thereto. It is obvious that Section 42 does not, in any manner, reduce the effect of Section 41(e). It merely clarifies that the inhibition, against injuncting the breach of a contract, which cannot be specifically enforced under Section 14, would not inhibit the Court from enforcing the negative covenant in the contract. *The positive covenant remains, nonetheless, unenforceable.* It is not possible, therefore, to implement Section 42 in such a way as to indirectly result in enforcement of the positive covenant.

13.15 That, however, would be the precise effect, if Mr. Sethi's submission is accepted. Enforcement of the negative covenant contained in Clause 11.2 of the letter of appointment would necessarily entail, as a pre-requisite, treating the respondent to be continuing to be in the employment of the petitioner, which would amount to enforcing the positive covenant in the letter of appointment. That cannot be done.

The Outcome

14. The prayer in the petition cannot, therefore, be granted, by a joint operation of Section 14(d) and Section 41(e) of the Specific Relief Act, 1963. In the facts of the case, the petitioner cannot be entitled to the benefit of Section 42.

15. It is not necessary, therefore, for me to enter into the other aspects argued before me.

Conclusion

16. Resultantly, the petition is dismissed with no orders as to costs.

C. HARI SHANKAR, J.

OCTOBER 12, 2021