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

% *Date of Decision: June 29, 2020*

\+ **O.M.P.(I)(COMM.) 121/2020**

AAKASH EDUCATIONAL SERVICES LTD.

.... Petitioner

Through: Mr. Naresh Thanai, Adv. with
Ms. Khushboo Singh, Adv.

versus

SAHIB SITAL SINGH BAJWA & ORS.

..... Respondents

Through: Ms. Shantha Devi Raman, Adv.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. The present petition has been filed with the following prayers:-

"It is, therefore, most respectfully prayed that the Hon'ble Court may be pleased to:

(a) restrain the respondents, their representatives, successors, lawful assigns, etc. from enrolling fresh students, collecting fee and/or or in any manner associating themselves in running centre for coaching students preparing for class XII Board, Medical, IIT -JEE and other competitive examination fee for a period of two years except for completion of courses of students admitted in Aakash Institute/ Aakash IIT -JEE;

(b) direct respondents to remove forthwith the sign boards, hoardings and all other material with the name of Aakash Institute/ Aakash IIT /JEE available at the centre i.e. first and second floor, Patel Chowk, Saili Road, Pathankot, Punjab;

(c) award costs in favour of petitioner; and (d)pass any other order in favour of petitioner which this Hon'ble Court may deem fit and proper in the facts and circumstances."

2. It is the case of the petitioner and so contended by Mr. Thanai that petitioner is engaged in running coaching centre under the name and style of "*Aakash Institute/ Aakash IIT -JEE*" and preparing students appearing and qualifying for Medical, IIT -JEE and other competitive examination. It has developed goodwill and reputation as premium coaching chain across the country. On account of expertise in developing technique and method of imparting coaching and also the notes and study material / programme prepared by the expert, "*Aakash Institute/ Aakash IIT-JEE*" has acquired distinctive status. The immense goodwill and reputation being enjoyed by the petitioner is evident from the manifold increase of students succeeding in XII Board, Medical, IIT-JEE and other competitive examination.

3. He stated, respondents were appointed as franchisee, vide agreement dated June 30, 2016 by which, the respondents were permitted to run the centre at First and Second Floor, Patel Chowk, Saili Road, Pathankot, Punjab under the name and style of "*Aakash Institute / Aakash IIT-JEE*". It is the case of the petitioner that, as per the terms and conditions of the Franchise Agreement ('Agreement', for short), respondents were under obligation to pay 33% of the gross fee collected from the students to the petitioner, by demand draft on expiry of each fortnight i.e. 4th day and 19th day of English calendar month. They were also required to send statement of fee collected in a preceding month. The Agreement also stipulated that the respondents shall pay the teachers and other staff regularly appointed by the centre.

4. Mr. Thanai stated that as per the terms and conditions of the Agreement, agreed between the parties, in particular clause 5.5, respondents

were under obligation to serve six months advance notice in writing to the petitioner in case it wishes to terminate / exit from the agreement. Respondents could exit from the agreement only on completion of courses for particular session. It was with the object of saving interest of students and that the study of any student is not affected in any manner that the agreement required respondents to give six months' notice before exiting the agreement. He submitted that during the subsistence of the Agreement, the petitioner provided study material to the respondents. According to him, the respondents violated the terms and conditions of the Agreement and did not pay commission to the petitioner despite receiving amounts / fee from the students. Since May, 2018 amounts payable to petitioner by respondents remained outstanding and after various reminders respondents have been paying paltry amounts.

5. That apart, he stated that vide e-mail dated May 08, 2020 respondents informed petitioner that centre at Pathankot where respondents were allowed to run the centre has been closed. According to him, this was in breach of the Agreement. Be that as it may, he also concedes to the fact that the petitioner vide letter / email dated May 11, 2020 informed respondents that abrupt closure of the centre is unauthorised and illegal and causes serious prejudice to the students. The petitioner terminated the agreement and further required respondents to complete the courses for ongoing session for which respondents had already collected fee from the students and also the study material from the petitioner. In fact, according to him, vide letter / email dated May 11, 2020 petitioner asked the respondents to pay a sum of Rs.2,21,35,360/-.

6. According to him, as per Clause 6.4 of the Agreement, which reads as under, the respondents could not have used the premises for activity of coaching for two years from the date of termination / Agreement expiry period.

> *"6.4 Premises of Franchisee*
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> *After termination or non renewal of agreement due to any reason whatsoever, the franchisee cannot use the same premises for activity of coaching for Medical / IIT-JEE / Engineering of its own or any other brand in competition with Aakash for a period of 2 years from the termination/ agreement expiry date. He cannot use Telephone nos. which was operational when he was franchisee. These numbers have to be surrendered with the company from where they were got issued."*

7. That apart, he also relied upon Clause 7.6 of the Agreement under the heading Similar Business, which reads as under, to contend that the respondents cannot open a coaching centre at least till June 29, 2021.

> *"7.6 Similar Business*
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> *The Franchisee agrees and undertakes that during the term of this Agreement, neither the Franchisee nor any of its associates shall, directly or indirectly, engage, undertake, carry on, sponsor, support, assist or be associated with any other business, vocation, activities, operations of a nature similar to or competitive with or conflicting with the courses, training, services, business activities and operations of the franchisee centre for which this Agreement is being entered into and in or relating to which, any of the Course ware, knowhow, information and/or data and/or any part therefore supplied by and/or belonging to the Company may or could be utilised in any manner whatsoever and the decision of the Company in that behalf shall be final and binding on the Franchisee.*
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> *The Franchisee also agrees that during the validity of this Agreement, it will not rent out, licence/sub-licence, lease out or make available in any way, the property or premises or any part*

thereof used in any way for the franchisee centre and/or any matter related thereto, to any other persons/party for the purposes, of carrying on any courses, training, business, activities or operations which, in the Company's opinion (which opinion shall be binding on the Franchisee), are or shall be of a nature similar to or competitive with or will in any way adversely affect the business, activities or operations of the said franchisee centre.

For the aforesaid purpose, the franchisee shall, while entering into any lease licensing or other agreement, arrangement or understating expressly specify and stipulate that the premises are not to be used for education/training, or any other similar or competitive business, operations or activities, failing which, the lessee, tenant, licensee, and /or any other person shall be liable to be summarily and forthwith be evicted by the Franchisee, failing which the Company shall and shall be deemed to be irrevocably and unconditionally authorised by the Franchisee to do and perform all such acts, deeds, matters and things as may be necessary or desirable for this purpose for and on behalf of the Franchisee.

Notwithstanding anything herein contained and any of the rights of the Company under this Agreement, in the event of the Franchisee failing to discharge any of its obligations under this clause, the Company shall forthwith be entitled to terminate this Agreement, without incurring any obligation whatsoever to or in favor of the Franchisee."

8. He relied upon the following judgments in support of his submissions.

(i) Niranjan Shankar Golikari vs. The Century Spinning and Mfg. Co. Ltd. MANU/SC/0364/1967;

(ii) BLB Institute of Financial Markets Ltd. vs. Ramakar Jha MANU/DE/1359/2008;

(iii) Gujarat Bottling Co. Ltd. and Ors. vs. Coca Cola Company and Ors. MANU/SC/0472/1995.

9. On the other hand, Ms. Shantha Devi Raman, Advocate appearing for the respondents would submit that vide mail dated February 25, 2020, the petitioner informed the respondents that it has decided to withdraw all its support and services and advised the respondents to stop all admission / registration with immediate effect. According to her, vide mail dated May 08, 2020, the respondents informed the petitioner that due to the action, conduct and behavior of the petitioner, the Pathankot Centre stands closed. She stated that it is admitted by the petitioner in paragraph (xviii) of the petition that the petitioner has terminated the Agreement vide e- mail dated May 11, 2020. The Agreement, having been terminated, the negative covenant to restrict the Trade, business or profession of the respondents, by the petitioner is hit by Section 27 of Indian Contract Act, 1872. Such a covenant is void as held by plethora of judgments. In this regard, she relied upon the following judgments:-

(i) Superintendence Company Of India (P) Ltd. Vs Krishan Murgai (1981) 2 SCC 246;

(ii) Percept D'Mark (India) (P) Ltd. vs. Zaheer Khan & Another (2006) 4 SCC 227;

(iii) Arvinder Singh & Ors. Vs Dr. Lal Pathlabs Pvt. Ltd. 2015 SCC Online Del 8337;

(iv) Steller Information Technology Pvt. Ltd. vs. Rakesh Kumar 2016 SCC Online Del 4812;

(v) EV Motors India Private Ltd. Vs Anurag Agarwal 2017 SCC Online Del 12373.

10. She also stated that Mr. Thanai's argument that Clause 7.6 of the Agreement is applicable to present situation as the agreement is subsisting till June 29, 2021, which is the full term is misplaced. According to her Clause 7.6 is not at all applicable because it falls under the head of *"General terms and Conditions"* and it deals with a situation *"during the term of agreement"* and the Agreement having been terminated vide mail dated May 11, 2020, the petitioner cannot now try to take refuge under clause 7.6 solely to circumvent the rigours of section 27 of Contract Act as the said clause is not applicable post termination. In other words, the said clause has the effect only during the term of agreement.

11. Having heard the learned counsel for the parties, insofar as the first submission of Mr. Thanai that, in view of Clause 6.4 of the Agreement, the respondents cannot open a coaching centre from the same premises for a period of two years is concerned, the same is not appealing in view of the settled position of law, as relied upon by Ms. Raman. In ***Superintendence Company of India (P) Ltd (Supra)***, the Supreme Curt was concerned with the facts that the appellant company hired the respondent as Branch Manager of its New Delhi Office with one of the conditions of the employment contract being *"That you shall not be permitted to join any firm of our competitors or run business on your own in similarity as directly and / or indirectly for a period of two years at the place of your last posting after you leave the company"*. The appellant company terminated the services of the respondent after which he started his own business, which was similar to that of the appellant in Delhi. The appellant approached the High Court wherein the Single Judge held that the negative covenant was a partial restriction of trade and reasonable and hence not hit by Section 27 of the contract Act. The Division Bench has reversed the order of the Single Judge. The Supreme

Court dismissed the Appeal by a majority view which held that the word "leave" was intended by the parties to refer only to a case where the employee has voluntarily left services of the appellant company on his own. Since here, the respondent's services were terminated by the appellant company, the restrictive covenant contained in the clause would be inapplicable and non-enforceable against the respondent. Similarly, in ***Percept D'Mark (India) (P) Ltd. (supra)*** the facts are, the appellant is a company which is engaged in the business of model celebrity endorsement and management. The appellant company entered into an agreement with respondent no.1 who is a cricketer as on October 30, 2000 for a period of three years. Later the respondent no.1 issued a letter to the appellant company stating that he was desirous of renewing and / or extending the terms of the agreement. Issue arose with respect to clause 31 of the terms of the agreement which was reiterated in communications by the appellant company wherein as per the clause respondent no.1 could not accept any offers for endorsements, promotions, advertising or other affiliation with respect to any product or services and that prior to accepting any offer he was under the obligation to provide the appellant company in writing all the terms and conditions of such other third party and offer the appellant the right to match such offer. The terms of the contract came to an end on October 29, 2003. The respondent no.1 entered into an agreement with the respondent no.2, a different entity whereby the respondent no.2 became the agent for managing all the affairs of the respondent no.1 w.e.f December 1, 2003. On learning that respondent no.2 and respondent no.1 entered into a similar contract, the appellant company filed a Section 9 petition under the Arbitration and Conciliation Act praying that until arbitral proceedings are complete, respondent no.1 be restrained by way of an injunction from

entering into any or acting upon an agreement with a third party without first performing with respondent no.1's obligation. The learned Single Judge granted an interim relief. In an appeal before the Division Bench which was allowed on the conditions that a copy of the agreement between the respondent no.1 and respondent no.2 or any third party along with accounts be placed before the Court within a period of four weeks. The Supreme Court held that since the rejection of the interlocutory application on December 19, 2003 there had been no injunction in operation and during the past two and half years the contract dated November 22, 2003 had been in operation and was soon to be completed, the interim injunction for the stay of the Division Bench order be declined. The Supreme Court also held that the interpretation of the Section 27 of the Contract Act which found prima face favour with the Division Bench have been uniformly and consistently followed between 1874 till 2006 and even if a reconsideration needs to be undertaken that cannot be in interlocutory stage. In Para 54, the Supreme Court held that the appellant company sought to enforce a negative covenant which according to the appellant survived the expiry of the agreement. The Supreme Court agreed with the High Court in holding the clause impermissible as the clause was sought to be enforced after term of contract, which is prima facie void under Section 27 of the Contract Act. Similarly, in ***Arvinder Singh (Supra)***, the facts being the appellants were Radiologists and Pathologists by profession and carried on a business of Path Lab under the name of M/s. Amolax X-Ray and Diagnostic Centre which was then taken over by a Company set up by the appellants and named the Company as M/s. Amolak Diagnostic Pvt. Ltd. wherein 100% equity was held by them. Thereafter, the respondent took over the business and assets of M/s. Amolak Diagnostic Pvt. Ltd. The appellants executed Retailorship agreement dated

January 26, 2011 with the respondent wherein the two agreed to work for the respondent for a minimum of two years and would not compete with the business of respondent for a period of five years. When the original suit was filed, the Single Judge keeping in view that the decree sought was to restrain the appellants, who were defendants in the Suit, from directly or indirectly carrying on business activity competing with the respondent and also noting the fact that 100% shareholding of M/s. Amolak Diagnostic Pvt. Ltd. its goodwill was also purchased applied the exception to Section 27 of the Contract Act. The Division Bench held that if anyone is restrained from exercising lawful profession trade or business of any kind, the clause to that extent is void. It held the words profession, trade, business used in Section 27 are specific words and the rule of *noscitur a sociis* would not apply neither would the rule of *ejusedem generis* which would imply departure from a natural meaning in order to give them a meaning on the supposed intention of the legislature. The Supreme Court held that the sweep of the span of injunction to prohibit the appellants to carry on their profession as Pathologists or Radiologists in any manner whatsoever would render them incapable of working as Pathologists or Radiologists in any capacity whatsoever and this would be contrary to Section 27 of the Contract Act, and dismissed the application of the respondent, the plaintiff in the suit, for injunction.

12. Coming to the next submission of Mr. Thanai that the original term of contract was till the year 2021, the respondents cannot open a centre till that date is also not appealing, for the reason that the reliance placed by Mr. Thanai on Clause 7.6 is relevant for the purpose, that during the term of contract, the respondents were not required to open another coaching centre apart from the one of which a franchisee has been given.

13. Even otherwise, the plea is a misreading of Clause 6.4, which clearly determines the effect of termination and Clause 6.4 nowhere stipulates that even after termination, the respondents cannot run a coaching centre till the date of expiry of the original Agreement, which stood terminated. The reliance placed by Mr. Thanai on the Judgments as referred above are concerned, the same are not of any help to him for the reason that in ***Gujarat Bottling Co. Ltd. (Supra)***, the Supreme court in Para 37 clearly held that since the negative stipulation in Para 14 of the 1993 Agreement is confined in its application for the period of subsistence of the Agreement and the restriction imposed therein is operative only during the period the 1993 Agreement is subsisting, the said stipulation cannot be held to be restraint of trade so as to attract the bar of 27 of the Contract Act. The case is distinguishable on facts. Similarly, the reliance placed on the Judgment of ***Niranjan Shankar Golikari (Supra)*** is concerned, the Supreme Court dismissed the appeal by stating that a negative covenant differs from case to case inasmuch as the same applies during the period after the termination of the contract and in some cases, it operates during the period of the contract. The Trial Court and the High Court held that negative covenant with respect to the period of employment and carrying out employment of a similar nature being done by the appellant when he was under employment of respondent was reasonable and necessary for protection of the company's interest. The said judgment is clearly distinguishable. In so far as the Judgment in the case of ***BLB Institute of Financial Markets Ltd. (supra)*** is concerned**,** the Court held that the respondent is in breach of the negative covenant contained in the service agreement during the subsistence of his service and the doctrine of restraint of trade cannot therefore apply inasmuch as the court also held that the respondent must be held bound by the terms of his service agreement till

such time the Arbitrator renders the award in the dispute. The Judgment is clearly distinguishable.

14. As no other submission has been made, I am of the view that the prayer as made by the petitioner cannot be granted. The petition is dismissed. No costs.

15. During the course of arguments, both the counsel for the parties have given their no objection for this court to appoint an Arbitrator to adjudicate the disputes between the parties with regard to payment of fee under the agreement by the respondents to the petitioner. If that be so, this Court appoints Mr. Sudhanshu Batra, Sr. Adv. as a Sole Arbitrator for adjudicating the disputes between the parties. The Sole Arbitrator's fee shall be regulated under the Fourth Schedule to the Arbitration and Conciliation Act, 1996. The Sole Arbitrator is at liberty to conduct proceedings through video-conferencing. Parties can appear before the Sole Arbitrator for preliminary hearing after talking to him on the mobile no. 9811035392. Learned Counsel for the parties are at liberty to convey this order to Mr. Batra the Sole Arbitrator.

V. KAMESWAR RAO, J

JUNE 29, 2020/*ak/jg*