IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : ARBITRATION

Judgment delivered on:11.07.2006

OMP 463/2005

WIPRO LIMITED ... Petitioner

-versus -

BECKMAN COULTER INTERNATIONAL S.A. ....Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Raju Ramachandran, Sr Advocate with Mr M.S. Vinaik,
Ms Anjali Sharma, Mr Saurabh Suman and Ms Suman Sinha
For the Respondent : Arun Mohan, Sr Advocate with Mr Arvind Bhat

BADAR DURREZ AHMED, J

1. In this petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act'), the petitioner is seeking directions and / or orders restraining the respondent from employing any person who is, or has been employed with the petitioner, during the pendency of arbitral proceedings. This prayer emanates from the Canvassing Representative Agreement said to have been entered into by and between the petitioner and the respondent in January, 2002. The relationship between the petitioner and the respondent is that of a distributor and principal and has subsisted for almost 17 years which has been renewed from time to time. The last of the documents delineating the relationship between the parties is said to be the Canvassing Representative Agreement entered into in January, 2002. This agreement is said to have taken effect on 01.01.2002 and was to operate till 31.12.2002. It is alleged by the petitioner that subsequently, by virtue of a letter dated 24.05.2004 (Annexure-P-3), the terms and conditions of the said agreement of 2002 were extended by another two year period commencing from 01.01.2004 and ending with 31.12.2005. Therefore, according to the petitioner, the said Canvassing Representative Agreement of January, 2002 was to continue to operate till 31.12.2005 and this governed the relationship between the parties. The said agreement contained a document entitled 'Exhibit-D' and and forms part thereof. Clause 5 of the said agreement which is the bone of contention between the parties, reads as under:-

“5. Non-Solicitation of Employees:

Both parties agree that for a period of two (2) years from the date of termination of the agreement to which this appendix is attached, including termination by either party with or without cause, either directly or indirectly solicit, induce or encourage any

employee(s) to terminate their employment with or to accept employment with any competitor, supplier or customer of the other party, nor shall either party cooperate with any other in doing or attempting to do so. As used herein, the term "solicit, induce or encourage" includes, but is not limited to (a) initiating communications with an employee relating to possible employment, and/or (b) offering bonuses or additional compensation to encourage employees to terminate their employment with and accept employment with a competitor, supplier or customer of the soliciting party, or (c) referring employees to personnel or agents employed by competitors, suppliers or customers of the soliciting party. General advertising of positions and other general means of recruitment shall not be considered solicitation; and neither party shall be restricted from responding to unsolicited applicants who are employees of the other party."

2. It is the contention of the petitioners that the parties had agreed that for a period of two years after the termination of the agreement, this non-solicitation of employees clause would be operative. This clause provides that upon the termination of the agreement, neither party shall solicit, directly or indirectly or induce or encourage the employees of the other party to leave and join a competitor or join the other party. There was an exception and that was that general advertising of posts and other general means of recruitment were not to be considered as solicitation.

3. It is the case of the petitioner that it was only the petitioner who, for the past 17 years, was the exclusive distributor of the respondent's products in India. It is the petitioner's case that on 01.09.2005, the respondent informed the petitioner's representative over the telephone that a decision had been taken to prepare for direct operations in India without distributorship, such as the one with the petitioner. It was also indicated that by the end of October, 2005, the respondent would issue to the petitioner a formal notice for non-renewal of the contract and that shortly thereafter a communication was also received from the respondent to this effect. It is submitted by the petitioner that efforts were made with the respondent to work out a plan for ensuring a smooth transition mainly in the interest of thousands of customers and installations all over the country where the products of the respondent were installed and which were hitherto being exclusively maintained by the petitioner. Some proposed transition documents, which were not finalised by the parties, are annexed as Annexure-P-6. It is in this background that in the month of October, 2005 an advertisement was issued by the respondent in leading English newspapers of India with, inter alia, the following text:-
"For all Sales and Marketing and Service and Support positions experience of working with or having handled Beckman Coulter products and or similar products would be a distinct advantage."

4. A copy of one such advertisement is annexed as Annexure-P-7 and is at page 218 of the paper book. It is the petitioner's case that the aforesaid statement in the said advertisement amounted to solicitation and was in violation of the non-solicitation of employees clause referred to above. The counsel for the petitioner submitted that this amounted to solicitation because reference to experience of working with or having handled Beckman Coulter Products had reference solely to the employees of the petitioner, who had hitherto been the exclusive distributors insofar as the respondent's products in India were concerned. Clearly, therefore, according to

the learned counsel for the petitioner, the advertisement was directed towards the employees of the petitioner and since such personnel were to be given a distinct advantage, it was a clear case of solicitation as contemplated under clause 5 of Exhibit-D to the Canvassing Representative Agreement of January, 2002. It is in this context that the present petition under Section 9 of the said Act has been filed because the agreement by virtue of clause 22 thereof provides for arbitration and, according to the learned counsel for the petitioner, the petitioner has already issued a notice to the respondent raising disputes arising out of the aforesaid act of solicitation of its employees by the respondent in violation of the non-solicitation of employees clause contained in the said agreement. As indicated in the petition, the petitioner apparently raised claims in the arbitral proceedings for declaring that the respondent's action in issuing the said advertisement and in soliciting its employees thereby was in violation of the contract expressly prohibiting solicitation and the petitioner has claimed damages amounting to Rs.81,400,000/- in respect of employees who have actually submitted their resignations to the petitioner pursuant to the said solicitation by the respondent. This, in sum and substance, is the case of the petitioner.

5. It must be pointed out that when this petition was filed and taken up for the first time on 19.12.2005, after noticing the aforesaid contentions on behalf of the petitioner, this court had passed an ex parte interim order under Section 9 of the said Act. In the said order, it was, inter alia, noted that the necessity for asking for interim orders had arisen because although the agreement had been terminated and the termination is to take effect from 31.12.2005, the petitioner is still bound by agreements with various hospitals to provide service and maintenance in respect of the equipments of the respondent which have already been supplied by the petitioner to the said organisations. It was also noted that if the personnel of the petitioner are permitted to join the respondent in pursuance of the said advertisements, then the petitioner would be unable to meet its contractual obligations with those medical organisations. It was further noted that the petitioner was prima facie able to show that 21 persons employed with the petitioner had already left, being allured by the advertisement of the respondent. The learned counsel for the petitioner had also stated on instructions that the orders which they are seeking would not be to the disadvantage of those employees who had tendered their resignation and that the petitioner would be willing to accommodate them in its organisation without any penalty. Under these circumstances, this court had arrived at the prima facie view that the petitioner was entitled to the reliefs prayed for in this petition and, accordingly, till further orders, the court restrained the respondent from employing any person who is presently employed with the plaintiff or who was employed with the plaintiff upto 01.10.2005. Shortly thereafter, an application being IA No.623/2006 was moved on behalf of the respondent. On 19.01.2006, notice was issued and it was directed that this application be heard alongwith the present petition. The learned counsel appearing for the respondent had sought clarification of the order passed on 19.12.2005. The clarification which he sought was that the said order would not apply to those employees which the petitioner had overtly released from its employment. After hearing the counsel for the parties, this court was of the opinion that the respondent was entitled to the clarification that those employees who were overtly released from the employment of the petitioner would not be covered by the order dated 19.12.2005. It was also indicated that the order would operate till the matter is finally disposed of and that any action taken by the respondent would be

subject to the final orders which would be passed in this matter. The parties were directed to complete the pleadings in the meanwhile.

6. At the first instance, Mr Arun Mohan, the learned senior counsel, appearing on behalf of the respondent raised several objections. First of all, he raised the objection with regard to territorial jurisdiction. Secondly, he submitted that the advertisement was merely a general advertisement for recruitment and did not amount to solicitation. Thirdly, he submitted that, in any event, the non-solicitation clause was not in operation inasmuch as the Canvassing Representative Agreement of January, 2002 was not extended and that there was a different agreement in operation, but that agreement did not contain a non-solicitation clause. Fourthly, he mentioned that any restraint on employment would be violative of Section 27 of the Indian Contract Act, 1872 and that the ratio of the decision in the case of Pepsi Foods Ltd and Others v. Bharat Coca-Cola Holdings Pvt. Ltd & Others: 81 (1999) DLT 122 would be clearly applicable wherein this court had held that the freedom to seek employment cannot be curtailed and no injunction to such an effect can be granted. Fifthly, he submitted that the petitioner is not entitled to any relief inasmuch as the manner in which relevant material has been placed amounts to suppression and, therefore, the petitioner is disentitled from any relief whatsoever.

7. Before these contentions are set out in greater detail, Mr Arun Mohan invited my attention to the facts as he saw them. He submitted that the Canvassing Representative Agreement of January, 2002 was w.e.f. 01.01.2002 and was to expire on 31.12.2002. He submitted that this agreement, in fact, expired on 31.12.2002. It was substituted by a further agreement as indicated by the letter dated 21.01.2003 (at page 214 of the paper book) which was effective from 01.01.2003 to 31.12.2003. As per this letter, which has been issued by the respondent to the petitioner, the respondent confirmed that the petitioner was its exclusive agent for its products and related accessories in the whole of India as per the product list (Annexure-1 thereto). It was also indicated in the letter of 21.03.2003 that the effective period of the agreement was from 01.01.2003 to 31.12.2003 unless the termination notice is given by the respondent 60 days prior to the expiry of the said period from either side and that this appointment shall be extended for another one year. This letter of 21.01.2003 also contained the following clauses:-

"Competitor's Product

Wipro Ltd (Biomed Division) shall not import nor sell any related products of other manufacturers, which they are already dealing with.

Confidentiality

All information about sales activities, technical or scientific details, especially those resulting from product registrations, remain the property of Beckman Coulter and have to be treated as confidential, even after termination of this agreement.

Arbitration:

All disputes arising in connection with the present agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules. All proceedings thereunder shall take place in New Delhi, India."

8. Mr Arun Mohan submitted that this letter of 21.01.2003 did not contain any non-solicitation clause. According to Mr Arun Mohan, this letter of 21.01.2003 was deliberately not produced by the petitioner and it is for this reason alone that the ex parte injunction is liable to be vacated. Mr Arun Mohan contended that this agreement of 21.01.2003 was signed by the petitioner before the DGS&D as being the agreement governing the relationship between the petitioner and the respondent. Mr Arun Mohan submitted that all the elements of a contract are contained in the letter of 21.01.2003. He then referred to the rejoinder submitted by the petitioner with reference to this letter of 21.01.2003. In paragraph 73-75 of the rejoinder, the petitioner had contended that it was wrong on the part of the respondent to hold out that, inter alia, the letter dated 21.01.2003 amounted to a contract or to state that nothing which is essential for the formation of a contract is missing from these documents. According to the petitioner, the most essential element that was missing from the said letter was the signature of the petitioner and as such, it did not result in a binding contract. Mr Arun Mohan also submitted that an identical letter dated 10.12.2003 (at page 228) was issued by the respondent for the period 01.01.2004 to 31.12.2005. This letter also contained identical clauses to the letter of 21.01.2003. This letter was also not signed by the petitioner. It is in this context that the petitioner in the rejoinder stated that the letters of 21.01.2003 and 10.12.2003 did not amount to binding contracts. The petitioner also mentioned that these documents were actually letters issued by the respondent so that the same could be submitted at the office of the Director General of Supplies & Disposals, New Delhi for the purpose of rate contract registrations. It was submitted that by no stretch of imagination could such letters be construed as agreements which modified the original agreement of 2002. In response to these statements contained in the rejoinder, Mr Arun Mohan submitted that if the fact that there were no signatures on the two documents on behalf of the petitioner could be taken to mean that no concluded contract had been arrived at, then the same reasoning would apply to the agreement of 2002 which also does not contain the signatures of the petitioner. Therefore, according to Mr Arun Mohan, apart from signatures, which according to him are not essential, no other essential features of a contract are missing from the said two documents dated 21.01.2003 and 10.12.2003. He also submitted that it could surely not be the petitioners argument that these documents, namely, letters dated 21.01.2003 and 10.12.2003 were false documents prepared only to deceive DGS&D.

9. Mr Arun Mohan then submitted that after these documents dated 21.01.2003 and 10.12.2003, on 03.02.2004 the respondent sent a detailed draft agreement for the period 01.01.2004 to 31.12.2006. This draft agreement did not contain any non-solicitation clause. It was then contended by Mr Arun Mohan that while this draft was under consideration of the petitioner, on 06.04.2004, the respondent wrote to the petitioner informing that the distributor agreement was currently under process for renewal and till such time, the existing terms and conditions would be binding on both the parties. According to him, the reference to the existing terms and conditions were as contained in the letter dated 10.12.2003. He submitted that on 17.04.2004, the petitioner sent its response (objections) to the draft distributor agreement under contemplation. What is material is that in its objections, the petitioner did not seek the insertion of any non-solicitation clause. Mr Arun Mohan pointed to page 325 and 326 of the paper book which was a part of the tabulation of suggestions made by the petitioner on the draft agreement submitted by

the respondent. According to Mr Arun Mohan, there were differences particularly with regard to clause 16 which spoke of the term and duration. This difference of opinion was whether the agreement was to terminate on 31.12.2006 or 31.12.2008. Secondly, whether the contract was terminable by a termination simplicitor with six months notice or whether it was terminable only if the minimum quantities were not achieved. It was suggested that the exclusivity clause be made non-exclusive. The other aspect which is material, according to Mr Arun Mohan, is that the suggestions did not include the suggestions for inclusion of a non-solicitation clause. He, however, submitted that subsequently on 07.05.2004, an e-mail (at page 365 of the paper book) was sent by the petitioner to the respondent indicating that apart from the changes proposed by the petitioner, it is also necessary to incorporate the "non hire" clause. According to Mr Arun Mohan, "non hire" clause was entirely different from a non-solicitation clause. In any event, he submitted that in the wake of such differences between the parties existing in April, May, 2004, how could the letter of 24.05.2004 be read as extending the earlier agreement of 2002. He further submitted, with reference to the letter dated 24.05.2004, that after exchange of drafts as aforesaid, no sane person would by such an informal letter extend the 2002 contract on the same terms and conditions. According to him, stated differently, subsequent to an "offer" and "counter-offer" process, to imply extension of the agreement of 2002 in an informal letter is unheard of. He further submitted that if the letter of 24.05.2005 was by itself an extension of the 2002 contract, one would have in the normal course expected the petitioner to at least write a letter proposing that instead of the terminal date being 31.12.2005, the respondent may make it, if necessary, 2008, as the petitioner had sought, or at least 2006, as the respondent itself had proposed. According to him, the fact that no communication was sent by the petitioner asking for signing a formal contract on the same terms and conditions as the original contract of 2002 was a significant fact.

10. Mr Raju Ramachandran, the learned senior counsel who appeared on behalf of the petitioner, submitted that the letter dated 21.01.2003 issued by the respondent was in response to the e-mail sent by the petitioner to the respondent (at page 210 of the paper book) on 21.01.2003 itself. As per the letter dated 21.01.2003 sent by the petitioner, it was indicated that the petitioner's registration with DGS&D had expired on 31.12.2002 as approved suppliers to Government customers under CSIR / ICMR. All these customers like CDRI, NCL, CPCRI etc. insist on the D.G.S.& D. Registration certificate for placing orders through the petitioner for Beckman Coulter Products. It was further indicated that there was a change in the format of Letter of Authorisation / Agreement which was enclosed with the letter. Further, since all the clauses were standard as per the normal agreement, the respondent was requested to send the agreement letter as an e-mail attachment and original by courier. He submitted that the letter dated 21.01.2003 was at best a further document confirming the relationship between the petitioner and the respondent and was for the limited purpose of obtaining a DGS&D Registration certificate and did not cover the entire relationship between the parties exhaustively as was done by the agreement of 2002 which stood extended by the subsequent letter of 24.05.2004. Similar is the position with regard to the letter of 10.12.2003. He further submitted that, in any event, these letters are prior to the letter finally issued by the respondent on 24.05.2004. He further submitted that the draft agreement sent by the respondent on 03.02.2004 was not accepted by the petitioner and, in any event, was not signed by

it. Therefore, it did not culminate into a binding contract. He also submitted that, in any event, various changes were proposed to the draft agreement as already indicated by the learned counsel for the respondent. One of the changes was the requirement to add the "non hire" clause, which, according to the learned counsel for the petitioner, amounted to the same thing as a non-solicitation clause. Thus, it is the submission of the learned counsel for the petitioner that the agreement of January, 2002 which was to initially operate till 31.12.2002, was extended in its operation by the letter dated 24.05.2004 till 31.12.2005. There was no further renewal of the agreement between the parties and, therefore, the arrangement and relationship between the parties terminated on 31.12.2005. The non-solicitation clause, as per clause 5 of Exhibit-D to the Canvassing Representative Agreement of January, 2002, would continue to operate for a period of two years after termination, i.e., upto 31.12.2007. He submitted that the letters dated 21.01.2003 and 10.12.2003 as well as the proposed draft agreement and the proposed changes did not fructify into a binding contract and could not be regarded as superseding the agreement of January, 2002 read with the extension letter of 24.05.2004.

11. Considering the submissions made by the counsel for the parties on the aspect as to whether the agreement of January, 2002 by virtue of extension letter of 24.05.2004 was in operation till 31.12.2005, I am in agreement with the submissions made by the learned counsel for the petitioner that it was in operation. The reason being that the letters dated 21.01.2003 and 10.12.2003 were for the purposes of obtaining the DGS&D Registration certificate and cannot be regarded as exhaustive agreements dealing with the entire relationship between the parties. Secondly, the letter dated 24.05.2004 was subsequent in time to these letters and at this juncture, it would be instructive to set out the first paragraph of the said letter which is addressed by the respondent to the petitioner:-

"In line with my communication to you last week and our subsequent conversation, I am writing to you to confirm that Wipro Biomed will continue to be the authorised distributor of Beckman Coulter products in the Indian market through until the end of 2005. This represents an extension of the normal one-year agreement which Beckman Coulter has habitually contracted with both Wipro Biomed and the vast majority of its other distributors in the BCISA area. Effectively, this is a two-year extension to the original canvassing agreement between our companies and covers the period of 1st January 2004 to 31st December 2005."

The aforesaid extract makes it unequivocally clear that the respondent confirmed that the petitioner would continue to be the authorised distributor of the respondent's products in the entire market till the end of 2005. It was also expressly stated that this represented an extension of the normal one-year agreement which the respondent had habitually contracted with the petitioner and the vast majority of its other distributors in the BCISA area. Most importantly, it was categorically stated that effectively, this was a two-year extension to the original Canvassing Representative Agreement between the companies and covered the period 01.01.2004 to 31.12.2004. Therefore, even if letters dated 21.01.2003 and 10.12.2003 are, for the sake of argument, regarded as contracts, they are clearly superseded by the letter dated 24.05.2004, which, in categorical terms extends the arrangement not under the letters dated 21.01.2003 and 10.12.2003, but the original Canvassing Agreement which was the agreement of January, 2002. The argument advanced by Mr Arun Mohan that there were no signatures even in the original Canvassing Agreement of 2002 is of no

consequence because the respondent has signed the same and the petitioner has produced it as a binding agreement. Therefore, the parties are bound by the said agreement. It would have been a different matter if the petitioner, relying upon the agreement had produced the same and the respondent had not signed it. Then, the respondent could have taken up the plea that there was no consensus ad idem between the parties and, therefore, there was no binding contract. The situation here is different. The respondent has admittedly signed the agreement of 2002. The petitioner, who has apparently not signed the agreement, has produced it as a binding agreement and has acted upon it. Therefore, the plea advanced by Mr Arun Mohan that this would in itself not constitute a binding agreement is of no consequence.

12. With this largely factual issue, out of the way, it will now be necessary to take up the objection with regard to territorial jurisdiction. Mr Arun Mohan raised the plea of territorial jurisdiction. He submitted that the respondent did not have any office or establishment in Delhi. Earlier, a liaison office of the respondent was operating from Mumbai. Thereafter, the entire component of the respondent was incorporated at Mumbai. Its registered office, bank accounts, premises and establishment are all at Mumbai. The all-India advertisement was also issued from Mumbai. Therefore, according to Mr Arun Mohan, this court did not have territorial jurisdiction to entertain the present petition. He further submitted that the purported letters dated 21.01.2003 and 10.12.2003 referred to above have reference to arbitration being carried on in Delhi, but because those purported letters do not contain any non-solicitation clause, no cause of action under those letters could have accrued in favour of the petitioner. He submitted that as the petitioner places reliance on the 2002 agreement, the arbitration clause of that agreement will have to be examined. According to him, clause 22 of the agreement of January 2002, which refers to arbitration, excludes the jurisdiction of this court. In other words, according to him, if it is the 2002 contract that is sought to be relied on, then this court has no territorial jurisdiction and if reliance is placed on the contracts of 21.01.2003 and 10.12.2003, then they have no clause for non-solicitation. Therefore, according to him, in any event, this court does not have the territorial jurisdiction to entertain this petition.

13. Mr Ramachandran, on the other hand, referred to paragraph 26 of the petition wherein it is stated that pursuant to the said advertisement, 21 employees had tendered their resignation. It is stated that in the Northern Region, which based in Delhi, there were 4 sales employees and 5 service employees. It is further stated that after the issuance of the said advertisement, the strength of the employees of the petitioner has come down to 5 from 9. According to the learned counsel for the petitioner, the cause of action for the petitioner had arisen in all regions since the effect of the wrongful action of the respondent has been experienced all over the country. However, a substantial part of the cause of action has also arisen within the territorial jurisdiction of this court inasmuch as employees of the petitioner company working in the Northern Region based at Delhi were attracted by the advertisement and sought to leave the services of the petitioner at Delhi. Therefore, a part of the cause of action had arisen within the territorial jurisdiction of this court and, therefore, this court would have territorial jurisdiction to entertain the present petition.

14. Considering these arguments, it is clear that the petitioner is founding its claim on the basis of the contract of January, 2002 and the subsequent extension letter

of 24.05.2004. The petitioner's claim is in no way connected with the letters of 21.01.2003 and 10.12.2003. Therefore, the question of territorial jurisdiction would have to be considered in the light of the terms and conditions contained in the Canvassing Representative Agreement of January, 2002. Clause 22 of the said agreement which deals with arbitration reads as under:-

"22. Arbitration

22.1. All disputes arising in connection with the present agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules. All proceedings thereunder shall take place in Geneva, Switzerland.

22.2 The parties hereto expressly consent to and accept the exclusive jurisdiction of the courts of Switzerland and of the Territory with respect to the enforcement of their rights under this arbitration clause, or with respect to the determination of any claim, dispute, or disagreement which may arise concerning the interpretation, performance, or breach of this Agreement."

Clause 22.2, reproduced hereinabove, clearly provides that the parties have expressly consented to and accepted the exclusive jurisdiction of the courts of Switzerland and of the Territory....." It is well-settled that the parties by agreement can limit jurisdiction to a court or courts which would otherwise have jurisdiction. However, the parties by consent cannot confer jurisdiction on a court or courts which otherwise do not have jurisdiction. The above clause makes it clear that the courts of Switzerland as well as the courts of the 'Territory' would have exclusive jurisdiction. Therefore, jurisdiction was not limited to the courts of Switzerland, but also extended to the courts of the 'Territory'. The expression 'Territory' has been used in clause 2.1 whereby the Canvassing Representative Agreement has been shown to extend, inter alia, throughout the Territory described in Exhibit-A [Territory]. In Exhibit-A to the Canvassing Representative Agreement, 'Territory' has been defined as under:-

"TERRITORY:---India, Maldive Islands, Bhutan, and Nepal (Clinical Chemistry and Life Science Research in Nepal only, Nepal is not included in the territory for Cellular Analysis Division products)--"

15. Therefore, the parties have expressly consented to and accepted the exclusive jurisdiction of not only the courts of Switzerland, but also of the courts of the 'Territory' which includes the courts of India. Therefore, there is nothing in the Canvassing Representative Agreement which excludes the jurisdiction of this court. The only thing that has to be seen is whether a part of the cause of action has arisen in Delhi or not. The advertisements were all-India advertisements and the petitioner's employees all over India have allegedly been allured by the purported solicitation contained in the advertisements. As indicated by the petitioner, the petitioner's employees in Delhi have also been affected. Therefore, a part of the cause of action has arisen within the territorial jurisdiction of this court. That being the position, this court would have territorial jurisdiction to entertain the present petition.

16. Mr Arun Mohan next contended that the petitioner has concealed and / or suppressed many facts from the main petition. He submitted that the letters dated 21.01.2003 and 10.12.2003 were not mentioned in the body of the petition. Though, the petitioner annexed copies thereof, the reference to these documents is very cloaked. Mr Arun Mohan also submitted that the exchange of drafts in 2004 and, in

particular, the proposed draft agreement and the counter proposals given by the petitioner prior to the letter of 24.05.2004 were not referred to in the petition. He further submitted that the termination letter of 14.10.2005 was not mentioned and if the same had been disclosed to the court, then the court would have been able to link this document with the letter dated 10.12.2003 which, though filed by the petitioner, was not referred to in the petition. He further submitted that the petitioner did not disclose the transition facility talks between the petitioner and the respondent in October-November, 2005, which talks were held for the purpose that the end users may not be affected by the non-renewal of the relationship between the respondent and the petitioner. He finally submitted that the overt act of resignation and the acceptance of resignation on the part of the employees and the petitioner respectively was not referred to. He, therefore, submitted that in view of these concealments, the petitioner disentitled itself to any relief in this petition.

17. On behalf of the petitioner, it was contended that there was no concealment or suppression of the material facts. The learned counsel for the petitioner submitted that the letters dated 21.01.2003 and 10.12.2003 were merely letters issued by the respondent at the request of the petitioner for DGS&D Registration purposes. They were not agreements, as alleged by the respondent. The learned counsel submitted that since the pleadings of the petitioner did not revolve around DGS&D Registration of the respondents products, it was not deemed necessary to specifically refer to the said letters in the pleadings. It was further submitted by the learned counsel for the petitioner that the exchange of drafts for the proposed contract in the early part of 2004 was not material inasmuch as it did not fructify into a contract and the letter dated 24.05.2004 extending the original Canvassing Representative Agreement of 2002 till 31.12.2005 was the material document which superseded all these efforts at arriving at a fresh contract. As regards the allegation that the termination letter of 14.10.2005 was not disclosed, the learned counsel for the petitioner pointed out that in paragraph 12 of the petition, it is mentioned that on 01.09.2005, the respondent informed the petitioner's representative over the telephone that a decision had been taken to prepare for direct operations in India without distributorship, such as the one with the petitioner. It was further pointed out in the said paragraph that by the end of October, 2005, the respondent had indicated that it would issue to the petitioner a formal notice for non-renewal of the contract. It was then stated in the said paragraph that "shortly after this communication was received from the respondent, ..." This clearly indicates that the notice for non-renewal of the contract had been referred to in the pleadings. So, there was no concealment on the part of the petitioner. Though, a copy of the letter dated 14.10.2005 had not been filed alongwith the petition. As regards the allegation that the transition facility talks between the petitioner and the respondent in October-November, 2005 were not disclosed, Mr Ramachandran, the learned senior counsel appearing for the petitioner, submitted that this is not correct. There is a clear reference in paragraph 12 to the meeting between the representatives of the parties and the attempt to work out a plan for ensuring that a smooth transition takes place mainly in the interest of thousands of customers and installations all over the country where the products of the respondent were installed and were being maintained by the petitioner. The petitioner had also annexed one set of the proposed transition documents, which were not, however, finalised between the parties. The same were annexed as Annexure-P-6. As regards the allegation that the factum of the petitioner's

employees having resigned and having been relieved by the petitioner having been concealed in the petition, Mr Ramachandran submitted that this is also not correct. He submitted that in paras 19, 25 and 26 of the petition, the same has been specifically pleaded and is also reflected from the statement of employees at page 218 of the paper book. He referred to paragraph 19 to show that the petitioner had pleaded that after publication of the said advertisement, 21 persons employed by it, and possessing considerable expertise, and who were very experienced in their respective areas of specialisation, had submitted their resignations to the petitioner. Annexure-P-8 is a statement setting out the relevant details of the employees who had submitted their resignations. The details included the date of joining, date of tendering resignation, level of experience, area of specialisation and location, etc. Annexure-P-8 pertains to 21 employees who had tendered resignation from the employment of the petitioner in November, December, 2005 and, according to the learned counsel for the petitioner, these resignations were all pursuant to the advertisement in question. Similar averments with regard to the resignation of the employees are also contained in paragraphs 25 and 26 of the petition. Therefore, the learned counsel for the petitioner submitted that the petitioner has not concealed and / or suppressed any material fact from this court.

18. Considering the arguments advanced by the counsel for the parties, I am of the opinion that it would not be possible to hold that the petitioner has been guilty of concealment and / or suppression of material facts. Though there is some substance in what Mr Arun Mohan has submitted, the same at the best can only be construed as varying degrees of emphasis given to different sets of facts. While Mr Arun Mohan may have a legitimate grievance in saying that certain facts were not accorded the degree of emphasis that they required, that would be a subjective point of view. Call it the advocates ingenuity or whatever, the same cannot be held to amount to concealment or suppression. Therefore, the petition cannot be thrown out on this ground urged on behalf of the respondent.

19. I now come to the question as to whether the advertisement amounted to a solicitation on the part of the respondent. The arguments and counter-arguments on this aspect have already been noted above. The material portion of the advertisement in question has already been set out above, but for the purpose of facility, the same is being reproduced at in this point also:-

"For all Sales and Marketing and Service and Support positions experience of working with or having handled Beckman Coulter products and or similar products would be a distinct advantage."

From a reading of the above extract, it is abundantly clear that the respondent has made it known to the public at large that for all sales and marketing and service and supports positions the experience of working with or having handled Beckman Coulter products and or similar products would be a distinct advantage. It is an admitted position that the petitioner was the only concern which had handled Beckman Coulter products for the past 17 years in India. This is so because the petitioner was admittedly the exclusive Canvassing Representative of the respondent in India. Therefore, the respondent was making it known to the employees of the petitioner that in case they applied for the positions advertised in the Sales and Marketing and Service and Support Departments, they, having handled Beckman Coulter products, would be at a distinct advantage. The indication that such persons

would be at a distinct advantage is an indication that the respondent would, be interested in employing such individuals. Therefore, there is no manner of doubt in my mind that this advertisement was, inter alia, directed towards the employees of the petitioner and it was definitely a solicitation on behalf of the respondent.

20. Although it is not material for deciding whether this was a solicitation or not, it must also be noted that after the advertisement was issued, as indicated in the reply filed on behalf of the respondent in paragraphs 124 onwards, over 10,000 applications were received. These were shortlisted, candidates were interviewed and ultimately 48 candidates were accepted. Out of these 48 persons, 24 were those who had resigned from Wipro (the petitioner company). Four have returned to Wipro after the grant of ex parte injunction dated 19.12.2005 leaving 20 employees from Wipro. These facts also disclose that the employees of the petitioner responded to the advertisement and were granted employment. Of course, there were others persons who had nothing to do with the petitioner, who had also responded and some of them were also employed. The position is clear that on a plain interpretation of the advertisement in the background of the exclusivity of the agreement between the petitioner and the respondent, the advertisement was a clear solicitation of the employees of the petitioner.

21. I now come to the key question, as to whether clause 5 of Exhibit-D to the Canvassing Representative Agreement of January, 2002 which has been styled as "non-solicitation of employees" is enforceable in law or not. The question as to whether the advertisement amounted to solicitation has already been examined and I have already concluded that it does amount to solicitation. The only question that remains is whether the requirement under the said clause 5 of Exhibit-D that, for a period of two years from the date of termination of the agreement, neither party shall directly or indirectly induce or encourage any employees to terminate their employment with or to accept employment with any other competitor, supplier or customer of the other party, would be hit by Section 27 of the Indian Contract Act as being in restraint of the trade, business or lawful profession. Section 27 of the Indian Contract Act, 1872 reads as under:-

"27. Agreement in restraint of trade, void.-Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1.-Saving of agreement is not to carry on business of which goodwill is sold.-One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business."

22. Mr Ramachandran submitted on behalf of the petitioner that the negative covenant that is contained in the non-solicitation clause is a reasonable restriction that the parties imposed upon themselves for a period of two years after termination of the agreement because of the peculiar nature of their relationship spanning over 17 years. He submitted that the petitioner during this period had, as the exclusive Canvassing Representative of the respondent in India, submitted to a stipulation that it would

refrain from "promoting, selling, or offering for sale during the life of this agreement any products which are competitive with such products" by virtue of clause 3.8 of the original Canvassing Representative Agreement of January, 2002. In the words of Mr Ramachandran, this stipulation had effectively barred the petitioner from promoting its business over and above the respondent's products. It was further explained by him that it was in this context that the inclusion of non-solicitation clause had become a necessity. By virtue of the same, the parties intended, in effect, that the petitioner would be given a fair chance to develop its business interest for a period of two years after termination of the agreement with the aid of its specially trained, highly skilled, very valuable sales, marketing, service and support personnel. In these circumstances, it was further submitted that the reasonable restriction set out in the non-solicitation clause, which does not seek to impose a restriction on the petitioner's employees, has to be enforced. According to Mr Ramachandran, if the same is not done and the petitioner loses its most valuable resources, i.e., its sales and marketing and service and support personnel, its business in the bio-med segment would come to an end. Quite dramatically, he had submitted that the petitioner would be "wiped out" from the market and thereby suffer damage and irreparable harm. It was also submitted that the petitioner had relieved the employees who had resigned and has not tried to hold them back. Such employees are free to join any other company besides the respondent because the respondent is barred from employing them in terms of the non-solicitation clause. According to Mr Ramachandran, the non-solicitation clause is a reasonable restriction and is not hit by Section 27 of the Indian Contract Act, 1872 since the clause does not impose a restriction on the petitioner's employees from joining any of the competitors of the petitioner post termination of such employees' contracts.

23. Mr Arun Mohan on the other hand argued that there is a fundamental difference and distinction between "solicitation" and "employment". To restrain solicitation is very different from restraining employment. According to Mr Arun Mohan, the petitioner wants a restraint on employment in the garb of a restraint on solicitation. He further submitted that the only act which the petitioner has termed as amounting to solicitation was the newspaper advertisement referred to above. According to him, the cause of action for 'non hire' begins on the date of hire and is continuous, but that for 'solicitation' begins and ends on the date of advertisement. According to him, solicitation, unlike employment, is not a continuous cause of action. The alleged solicitation, was complete in September, 2005 when the advertisement was issued. According to Mr Arun Mohan, the petitioner, at best, could have asked for an injunction to restrain further solicitation of the employees, but it asked for a much wider injunction-"Do Not Employ" as if: (1) there was a non-employment (non hire) clause in the agreement; (2) the agreement was subsisting; and (3) Section 27 of the Contract Act, 1872 was repealed.

24. Mr Arun Mohan also placed reliance on the following decisions:-

i) Superintendence Company of India (P) Ltd v. Sh. Krishan Murgai: 1981 (2) SCC 246;

ii) Electrosteel Castings Ltd v. Saw Pipes Ltd & Others: 2005 (1) CHN 612;

iii) R. Babu and Another v. TTK LIG Ltd.: 2005 (124) Comp Cases 109 (Madras);

iv) Pepsi Foods Ltd and Others v. Bharat Coca-Cola Holdings Pvt Ltd & Others: 1999 (50) DRJ 656;

v) Kores Manufacturing Co. Ltd v. Kolok Manufacturing Co. Ltd : 1957 (3) All E.R. 158 in appeal 1958 (2) All. ER 65;

vi) Star India Private Ltd v. Laxmiraj Seetharam Nayak and Another: 2003 (3) Maha LJ 726;

vii) Jet Airways (I) Ltd. v. Mr Jan Peter Ravi Karnik: 2000 (4) Bom CR 487;

viii) Ambience India Pvt Ltd v. Naveen Jain: 122 (2005) DLT 421;

ix) Taprogge Gesellschaft MBH v. IAEC India Ltd: AIR 1988 Bombay 157;

x) Shri Raj Chopra & Another v. Shri Narendra Anand & Others: 1991 (21) DRJ 53.

25. Before considering the case law on the subject of Section 27 of the Indian Contract Act, 1872, it would be instructive to have another look at the said non-solicitation clause. A reading of the clause indicates that it has two components. The first component deals with the aspect of solicitation and the second component saves general advertising from the purview of solicitation. The latter component reads as under:-

"General advertising of positions and other general means of recruitment shall not be considered solicitation; and neither party shall be restricted from responding to unsolicited applicants who are employees of the other party."

(Underlining added)

26. The underlined portion indicated above gives us a key to understanding the ambit of the clause. Firstly, solicitation of an employee by the other party is not permitted for a period of two years from the date of termination of the agreement. Secondly, there is no restriction on either party employing erstwhile employees of the other party provided such employees have approached the other party either in response to a general advertisement or on their own without any solicitation, inducement or encouragement. Therefore, the clause read in its proper perspective has two components; one, that neither party shall solicit and, two, that neither party shall employ any one who has responded to such solicitation. Thus, there is a prohibition for a period of two years after the termination of the agreement upon either party from not only soliciting the other party's employees, but also not hiring them or not employing them in response to such solicitation. There is, however, no restriction on the employees of either party leaving on their own and joining the other party. This is the scope and ambit of the said non-solicitation clause and it is in the context of this meaning that it has to be considered as to whether the clause is hit by Section 27 of the Indian Contract Act, 1872 and to what extent.

27. In Superintendence Company (supra), the Supreme Court took up for consideration the following term (clause 10) in the contract of employment between

the appellant and the respondent:-
"That you will not be permitted to join any firm of our competitors or run a business of 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 therein had terminated the services of the respondent, who subsequently started his own business at Delhi on identical lines to that of the appellant. The appellant brought an action claiming damages on account of the breach of the aforesaid negative covenant contained in the said clause 10. Two concurring opinions were rendered; one by Untwalia and Tulzapurkar, JJ and the other by A.P. Sen, J. Principally two substantial questions were raised before the Supreme Court:-
"(a) whether a post-service restrictive covenant in restraint of trade as contained in clause (10) of the service agreement between the parties is void under Section 27 of the Indian Contract Act? and

(b) whether the said restrictive covenant, assuming it to be valid, is on its terms enforceable at the instance of the appellant-company against the respondent ?"

28. In the opinion of Tulzapurkar, J (for himself and Untwalia, J), the appeal was capable of being disposed of on the second question alone and, therefore, they did not think it necessary to decide or express any opinion on the first question. By virtue of the said opinion which considered only the second question, the court had come to the view that the clause would not operate because the termination on the part of the appellant of the services of the respondent would not fall within the expression "after you leave the company". However, A.P. Sen, J, in his opinion also took up the first question for consideration. He observed that:-
"Agreements of service, containing a negative covenant preventing the employee from working elsewhere during the term covered by the agreement, are not void under Section 27 of the Contract Act, on the ground that they are in restraint of trade. Such agreements are enforceable. The reason is obvious. The doctrine of restraint of trade never applies during the continuance of a contract of employment; it applies only when the contract comes to an end. While during the period of employment, the courts undoubtedly would not grant any specific performance of a contract of personal service..."
It was also noted that in Niranjan Shankar Golikari v. Century Spinning and Mfg. Co. Ltd: 1967 (2) SCR 378=AIR 1967 SC 1098, the Supreme Court drew a distinction between a restriction in a contract of employment which is operative during the period of employment and one which is to operate after the termination of employment. After referring to certain English cases where such distinction had been drawn, the court observed:
"A similar distinction has also been drawn by courts in India and a restraint by which a person binds himself during the term of his agreement directly or indirectly not to take service with any other employer or be engaged by a third party has been held not to be void and not against Section 27 of the Contract Act."

The court was of the view that "negative covenants operating during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act and that a negative covenant that the employee

would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one-sided". In the opinion of A.P. Sen, J, in Superintendence Co. Ltd (supra), the question whether an agreement is void under Section 27 must be decided upon the wording of that section. A contract, which has for its object a restraint of trade, is prima facie, void. Section 27 of the Contract Act is general in terms and unless a particular contract can be distinctly brought within Exception I there is no escape from the prohibition. As observed by A.P. Sen, J-"We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act and put upon the meaning which they appear plainly to bear. The observations of Sir Richard Couch, C.J., in Madhub Chunder v. Raj Coomar Doss: 14 BLR 76 (1874) were noted as having become the locus classicus on this subject. Those observations were:-
"The words 'restraint from exercising a lawful profession, trade or business' do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some particular place, otherwise the first exception would have been unnecessary." Moreover, "in the following Section (Section 28) the legislative authority when it intends to speak of an absolute restraint and not a partial one, has introduced the word 'absolutely' .... The use of this word in Section 28 supports the view that in Section 27 it was intended to prevent not merely a total restraint from carrying on trade or business, but a partial one. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act, and put upon them the meaning which they appear plainly to bear."

29. In Superintendence Co. Ltd (supra), it was held that the aforesaid test laid down in Madhub Chunder (supra), had stood the test of time and had invariably been followed by all the High Courts in India. Therefore, the conclusion arrived at was that the agreement in question was not a 'good will of business' type of contract and, therefore, did not fall within the exception. If the agreement on the part of the respondent puts a restraint even though partial, it was void, and, therefore, the contract must be treated as one which cannot be enforced. A.P. Sen, J also observed, with reference to a number of English cases which were cited in the context of partial restraint and the test of reasonableness applied thereto, as under:-
"52. Neither the test of reasonableness not the principle that the restraint being partial or reasonable are applicable to a case governed by Section 27 of the Contract Act, unless it falls within Exception I. We, therefore, feel that no useful purpose will be served in discussing the several English decisions cited at the Bar.

53. Under Section 27 of the Contract Act, a service covenant extended beyond the termination of the service is void. Not a single Indian decision has been brought to our notice where an injunction has been granted against an employee after the termination of his employment."

30. In Electrosteel Castings Litd (supra), a Division Bench of the Calcutta High Court observed as under:-
"58. From the said passage it appears that if an employee has a right to terminate his employment with a month's notice and somebody induces the employee to serve that month's notice, it is no inducement to commit breach of contract. The

answer as to why this should be so is very simple. A person inducing an employee in this manner is not inducing him to break the contract but only inducing him to end it. Such an inducement is not a known tort."

31. In R. Babu (supra), a Division Bench of the Madras High Court, following the view expressed by A.P. Sen, J in Superintendence Co. Ltd (supra), observed that- "no injunction can be granted against an employee after the termination of his employment restraining him from carrying on a competitive trade".

32. In Pepsi Foods Ltd (supra), a learned single Judge of this court had denied injunctions to the plaintiffs on, inter alia, the ground that if the injunction was granted, the same would have the direct impact of curtailing the freedom of employees for improving their future prospects and service conditions by changing their employment. It was also observed that: the rights of an employee to seek and search for better employment cannot be restricted by an injunction. It was also observed that: an injunction cannot be granted to create a situation such as "Once a Pepsi employee, always a Pepsi employee". It was observed that: "such a situation would amount to 'economic terrorism' or a situation creating conditions of 'bonded labour'". It was also observed that: "freedom of changing employment for improving service conditions is a vital and important right of an employee, which cannot be restricted or curtailed by a court injunction". However, it must be noted that this decision was not one based on contract and was a fight between two soft drink giants, Pepsi Foods on the one hand and Coca Cola on the other who were allegedly involved in a battle over their employees. There was no agreement between the two parties and the entire scope of the decision fell within the parameters of law of torts, not under the law of contract and definitely not relating to restrictive covenants of the nature contemplated under Section 27 of the Indian Contract Act, 1872. Therefore, this decision, as rightly pointed out by Mr Ramachandran, would have no impact on the present case. The decision in Kores Manufacturing Co. (supra) has been cited by Mr Arun Mohan for explaining as to what is an agreement in restraint of trade. The said decision is of the Court of Appeal and is an English case and deals with the question of reasonableness with regard to the restriction on employees' freedom of choice of employment as also the question of public policy. However, I need not spend any further time on this decision inasmuch as the Supreme Court Per A.P. Sen, J in Superintendence Co. Ltd (supra), has held that neither the test of reasonableness nor the principle that the restraint being partial or reasonable are applicable to a case governed by Section 27 of the Contract Act, unless it falls within exception I. The court specifically observed that no useful purpose would be served in discussing the several English cases cited at the bar. Moreover, it was also observed that are not concerned with the policy of such a law and all that we have to do is to take the words of the Contract Act and put upon the meaning which they appear plainly to bear. Therefore, reference to the decision in Kores Manufacturing Co. (supra) would not be apposite.

33. The case of Star India Pvt Ltd (supra), which was one decided by a learned single Judge of the Bombay High Court, dealt with the question of trade secrets. The court was of the view that anyone in employment for some period would know certain facts and would come to know certain information without any special efforts and the same cannot be said to amount to trade secrets or confidential information. As regards acquisition of excellence, the court observed that "that is a

very long process in the careers of every person, no one else can have proprietary rights or interest in such acquisition of excellence". The court observed that "if the plaintiff had right to terminate the contract on the ground of misconduct it cannot be said that the defendant had absolutely no right to resign from the employment on account of better prospects or other personal reasons. If he finds a better employment with better remuneration and other service conditions he cannot be tied down under the terms of the service contract. This decision of the Bombay High Court pertains to the right of an employee to resign from employment and to seek employment elsewhere, it is obvious that every employee has a right to resign and to seek better avenues of employment. Any agreement restraining an employee post termination from seeking employment elsewhere, as held in Superintendence Co. Ltd (supra) would be in restraint of trade and would be hit by Section 27 of the Indian Contract Act, 1872.

34. In Jet Airways (supra), a learned single Judge of the Bombay High Court observed with reference to Section 27 of the Indian Contract Act, 1872 as under:-
"Whether or not the contract is in restraint of trade would depend upon whether the contract was unreasonable, unfair or unconscionable. A contract imposing a general restraint would, in all probability, be void. Partial restraint would prima facie be valid and, therefore, enforceable. In order for the negative covenant to be valid, even the partial restraint would have to be reasonable in the interest of the parties and of the public. In the case of covenants of restraint between master and servant two question necessarily arise. First what are the interests of the employer that are to be protected. Second what is the remedy available to the employer to protect the interest. ..."

35. In Ambience India Pvt Ltd (supra), a learned single Judge of this court observed:-
"6. The law is well-settled that all contracts in restraint of trade are void and hit by Section 27 of the Contract Act. A Judgment of this Court in Krishan Muragai v. Superintendence Co. of India, reported in AIR 1979 Delhi P-232 succinctly deals with the law on this point. An employee, particularly, after the cessation of his relationship with his employer is free to pursue his own business or seek employment with someone else. However, during the subsistence of his employment, the employee may be compelled not to get engaged in any other work or not to divulge the business ' trade secrets of his employer to others and, especially, the competitors. In such a case, a restraint order may be passed against an employee because Section 27 of the Indian Contract Act does not get attracted to such situation. It is also to be added that a trade secret is some protected and confidential information which the employee has acquired in the course of his employment and which should not reach others in the interest of the employer. However, routine day-to-day affairs of employer which are in the knowledge of many and are commonly known to others cannot be called trade secrets. A trade secret can be a formulae, technical know-how or a peculiar mode or method of business adopted by an employer which is unknown to others.

8. After considering the pleadings of the parties and particularly Clauses (6), (7) and (8) of the Agreement dated 30th August, 2003, this Court is of prima facie view that the Agreement between the parties prohibiting the defendant for two years from taking employment with any present, past or prospective customer of the

plaintiff is void and hit by Section 27 of the Indian Contract Act. This stipulation was prima facie against public policy of India and an arm-twisting tactic adopted by an employer against a young man who was looking for a job. The contract between the plaintiff and M/s. Indigo Orient Limited has already come to an end and as such no prima facie case remains in favour of the plaintiff to restrain the defendant from remaining in the employment of the said Company. The employment contract between the plaintiff and defendant was determinable in nature and as such the defendant was entitled to determine the same and seek another employment. Everybody has a right to strive for progress in career. The restrictions imposed upon the defendant in the Agreement, therefore, were void and unconscionable."

36. In Taprogge Gesellschaft (supra), a decision of a learned single Judge of the Bombay High Court, the facts were that the plaintiff company engaged in the business of manufacturing cooling water filters and allied products. It was a German Company and appointed the defendant, an Indian company, as its agent to sell its goods in India. Under the contract, there was a restriction to sell the defendants own products. Disputes arose and the contract was rescinded. The plaintiff claimed an injunction restraining the defendants from recommending, offering or selling any of the covered products for a period of five years after the contract was rescinded. The defendant took the plea that the negative covenant embodied in the clause was in restraint of trade and therefore void under Section 27 of the Contract Act. The court held that the negative covenant embodied in the clause of the contract between the parties to the suit could not be enforced in India. Therefore, it refused to grant injunction in favour of the plaintiff. The court observed as under:-

"The distinction between the restraints imposed by a Contract, operative during the subsistence of the contract and those operative after the lifetime of the contract is of a fundamental character. The purpose, incidents and consequences of the two types of restraints need to be borne in mind before proceeding to determine the validity of the restraint sought to be enforced in this notice of motion. While guarding jealously the freedom of contract to engage in any trade, business or profession as one wills, the law abhors monopoly which prohibit a person from pursing a lawful trade, business or profession. This being the policy of law, any restraint on the freedom of trade, business or profession, is considered void. The law enacted by S.27 of the Act is founded on the public policy which disapproves and negates the restraints on trade, business or profession. Though this is the general rule of law, all corners are not alike, and the restraints imposed by them are varied in their nature and effect. The contracts between the vendor and purchaser of business are generally marked by equality of strength and bargaining power. In the contracts between Master and servant, this may not be so.

Again, the purpose which a restraint is expected to serve determines the character of the restraint. For instance the restraints which operate during the term of the contract have to fulfil one kind of purpose viz. furthering the contract. On the other hand, the restraints operative after the termination of the contract strive to secure freedom from competition from a person who no longer works within the contract. There is, thus, a natural difference which marks the restraints which tend to further the contract as in Gaumont British Picture Corpn. Ltd. v. Alexander, (1963) 2 All ER 1686 or Brahamaputra Tea Co. v. Scarth, (1885) ILR 11 Cal 545. An implied covenant in such exclusive agreements preventing an employee from serving

anywhere else during the term of the contract is intended to ensure the fulfilment of the contract and, therefore is not in restraint of trade, business or profession Gaumont British Picture Corp. v. Alexander, (1936) 2 All ER 1686, unless the contract is unconscionable, excessively harsh or onesided."

The court also observed that:-

"15.... Generally speaking, the negative covenants operative during the term of the contract are not hit by S. 27 of the Contract Act because they are designed to fulfil the contract and not to restrict them. On the other hand, when a restriction applies after the contract is terminated, the restriction on freedom of trade, business or profession takes the form of restraint on trade, business or profession. This distinction which is of a fundamental nature has to be borne in mind; otherwise the perspective will be lost."

With reference to the issue as to whether there was a conflict between the Supreme Court decisions rendered in the case of Niranjan Shankar Golikari (supra) and Krishan Murgai (supra), the learned single Judge observed as under:-

"... The judgment of Supreme Court in Niranjan Golikari was in respect of of the period covered by the contract of employment. The Judgment in Krishan Murgai arose, on the other hand, out of the facts which show that it applied to the period after the termination of the contract. The two decisions apply in different spheres and to different situations. There is no conflict at all between the two decisions. In Niranjan Golikari's case the Supreme Court did not hold that the post-employment restrictive covenant was valid. All that it was concerned was whether the implied negative covenant which applied during the term of employment could be enforced. Since there is no conflict at all, the question of choosing one of the two judgments by the subordinate courts does not arise...."

37. In Raj Chopra (supra), a learned single Judge of this could held as under:-

"16. Under Section 27 of the Contract Act every agreement by which any person is restrained from exercising a lawful profession, trade or business of any kind is to that extent void. The 8 kms. restraint clause would appear to be per se void under Section 27 of the Contract Act as it puts restriction on the party preventing him from exercising his lawful right of trade or business of the kind. The exception to the section is inapplicable. There is no question of sale by one partner to the other of any goodwill. In fact the argument had been that since the first defendant was given more assets a restriction was put on him. But the restriction acts on both the partners, and there is nothing in the agreement (modification deed) to suggest that first defendant got larger assets. Two lots were prepared of the assets to which this deed applied. (One partner opted for one lot and the other partner for the second. It was said that the restraint clause went with the property taken over by the first defendant and as such it survived even after the dealership of Maruti vehicles was granted separately to both the erstwhile partners, and since defendant No.1 was bound by the restrictive covenant, defendant No.1B was also similarly bound. I have been unable to appreciate this argument. Under Section 27 question of reasonableness of the restriction does not arise. A.P. Sen, J, in Superintendence Company of India (P) Ltd v. Krishan Murgai, AIR 1980 S.C. 1717, observed that when a covenant or an agreement was impeached on the ground that it was in restraint of trade, it was the duty of the court first to interpret the covenant or agreement itself and to ascertain according to the ordinary rules of construction what was the fair meaning of the

parties. There is no ambiguity in the present case. The restraint is very much there. Then the learned Judge observed that while the Contract Act did not profess to be a complete code dealing with the law relating to contracts, to the extent the Act dealt with a particular subject, it was exhaustive on the same and it was not permissible to import the principles of the English Law dehors the statutory provision unless the statute was such that it could not be understood without the aid of the English Law. This restraint clause has, therefore, to be held to be void under Section 27 of the Contract Act."

38. Apart from the above judgments which were referred to by Mr Arun Mohan, the learned counsel appearing on behalf of the respondent, there is need to refer to certain other decisions both of the Supreme Court as well as of this court. First of all, I take up the discussion with regard to two decisions of the Supreme Court in the case of Niranjan Shankar Golikari (supra) and Gujarat Bottling Company Ltd and Others v. Coca Cola Co. and Others: 1995 (5) SCC 545. In Niranjan Shankar Golikari (supra), the Supreme Court, referring to Halsbury's Laws of England (3rd ed.) Vol.38, at page 15 observed, in the context of what constitutes restraint of trade, that "it is a general principle of the common law that a person is entitled to exercise his lawful trade or calling as and when he wills and the law has always guarded jealously any interference with trade, even at the risk of interference with freedom of contract as it is public policy to oppose all restraints upon liberty of individual action which are injurious to the interests of the State". It was further observed that "this principle is not confined to restraint of trade in the ordinary meaning of the word 'trade' and includes restraints on the right of being employed". The court further observed that "courts take a far stricter view of the covenants between master and servants than it does of similar covenants between vendor and purchaser or in partnership agreements. An employer, for instance, is not entitled to protect himself against competition on the part of an employee after the employment has ceased but a purchaser of a business is entitled to protect himself against competition per se on the part of the vendor". The Supreme Court observed that "this principle is based on the footing that an employer has no legitimate interest in preventing an employee after he leaves his service from entering the service of a competitor merely on the ground that he is a competitor" [See: Kores Manufacturing Co. (supra)]. With a further reference to the principles summarised in Halsbury's Laws of England (supra), it was noted in the decision of Niranjan Shankar Golikari (supra) that "the rule now is that restraints whether general or partial may be good if they are reasonable. A restraint upon freedom of contract must be shown to be reasonably necessary for the purpose of freedom of trade. A restraint reasonably necessary for the protection of the covenantee must prevail unless some specific ground of public policy can be clearly established against it". This aspect of reasonableness and / or partial restraint has, however, been dealt with by A.P. Sen, J in Superintendence Co. Ltd (supra) wherein he has observed that these principles which apply to English Law cannot be imported into the Indian context. In India, the statutory provision of Section 27 of the Indian Contract, 1872 alone has to be examined. If a covenant falls within the scope of that Section as amounting to a restraint of trade, business or profession, then whether it is partial or general or whether it is reasonable or unreasonable would not be a material question.

39. In Niranjan Shankar Golikari (supra), with reference to Fitch v. Dewes:

1921-2 AC 158 at pp. 162-167, it was observed that "a person may be restrained from carrying on his trade by reason of an agreement voluntarily entered into by him with that object. In such cases, the general principle of freedom of trade must be applied with due regard to the principle that public policy requires for men of full age and understanding the utmost freedom of contract and that it is a public policy to allow a trader to dispose of his business to a successor by whom it may be efficiently carried on and to afford to an employer an unrestricted choice of able assistants and the opportunity to instruct them in his trade and its secrets without fear of their becoming his competitors". As noted above, a distinction has been drawn by the courts in England as well as in India between cases which deal with restrictive covenants during the term of the agreement and those cases which pertain to the period post termination. The Supreme Court in Niranjan Shankar Golikari (supra) observed as under:-

"A similar distinction has also been drawn by courts in India and a restraint by which a person binds himself during the term of his agreement directly or indirectly not to take service with any other employer or be engaged by a third party has been held not to be void and not against Section 27 of the Contract Act."

40. The Supreme Court then referred to the decision in Brahmaputra Tea Co. Ltd. v. Scarth: 1885 ILR 11 Cal 545 and observed that "the conditions under which the covenantee was partially restrained from competing after the term of his engagement was over with his former employer was held to be bad but the condition by which he bound himself during the term, of his agreement, not, directly or indirectly, to complete with his employer was held good".

41. After an elaborate discussion of the case law, both English and Indian, the Supreme Court came to the following conclusion in Niranjan Shankar Golikari (supra):-

"17. The result of the above discussion is that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employment exclusively are generally not regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one-sided....."

42. It may be mentioned that the Supreme Court in Niranjan Shankar Golikari (supra) had already observed: "...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". The court also observed in the context of the factual matrix of the case before it that there was 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 further observed that it may be that if the appellant 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 Supreme Court further observed that the appellant 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. In that case, the injunction issued against the appellant was found by the Supreme Court to be restricted as to time, the nature of the employment and as to the area and, therefore, could not be said to be too wide or unreasonable or unnecessary for the protection of the interests of the respondent company.

43. Coming now to the decision of the Supreme Court, i.e. of the Gujarat Bottling (supra), one finds that the Supreme Court embarked upon an extensive survey to consider whether and, if so, to what extent the law in India differs from the common law in England. With regard to the position in England, the court observed as under:-

"21. Under the common law in England a man is entitled to exercise any lawful trade or calling as and where he wills. The law has always regarded zealously any interference with trade, even at the risk of interference with freedom of contract, as it is public policy to oppose all restraints upon liberty of individual action which are injurious to the interests of the State. A person may be restrained from carrying on his trade by reason of an agreement voluntarily entered into by him with that object and in such a case the general principle of freedom of trade must be applied with due regard to the principles that public policy requires for persons of full age and understanding the utmost freedom to contract. Traditionally the doctrine of restraint of trade applied to covenants whereby an employee undertakes not to compete with his employer after leaving the employer's service and covenants by which a trader who has sold his business agrees not thereafter to compete with the purchaser of the business. The doctrine is, however, not confined in its application to these two categories but covenants falling in these two categories are always subjected to the test of reasonableness. Since the doctrine of restraint of trade is based on public policy its application has been influenced by changing views of what is desirable in the public interest. The decisions on public policy are subject to change and development with the change and development of trade and the means of communication and the evolution of economic thought. The general principle once applicable to agreements in restraint of trade has consequently been considerably modified by later decisions in England. In the earliest times all contracts in restraint of trade, whether general or partial, were void. The severity of this principle was gradually relaxed, and it became the rule that a partial restraint might be good if reasonable, although a general restraint was of necessity void. The distinction between general and partial restraint was subsequently repudiated and the rule now is that restraints, whether general or partial, may be good if they are reasonable and any restraint on the freedom of contract must be shown to be reasonably necessary for the purpose of freedom of trade. A covenant in restraint of trade must be reasonable with reference to the public policy and it must also be reasonably necessary for the protection of the interest of the covenantee and regard must be had to the interests of the convenator. Contracts in restraint of trade are prima facie void and the onus of proof is on the party supporting the contract to show that the restraint goes no further than is reasonably necessary to protect the interest of the covenantee and if this onus is discharged the onus of showing that the restraint is nevertheless injurious to the public is on the party attacking the contract. The court has to decide, as a matter of law, (i)

whether a contract is or is not in restraint of trade, and (ii) whether, if in restraint of trade, it is reasonable. The court takes a far stricter and less favourable view of covenants entered into between employer and employee than it does of similar covenants between vendor and purchaser or in partnership agreements, and accordingly a restraint may be reasonable as between employer and employee which would be reasonable as between the vendor and purchaser of a business. [See: Halsbury's Laws of England, 4th Edn., Vol. 47, paragraphs 9 to 26; Niranjan Shankar Golikari v. Century Spg. and Mfg. Co. Ltd.: 1967 (2) SCR 378=AIR 1967 SC 1098 (SCR at pp.384-85)]. Instead of segregating two questions, (i) whether the contract is in restraint of trade, (ii) whether, if so, it is "reasonable", the courts have often fused the two by asking whether the contract is in "undue restraint of trade" or by a compound finding that it is not satisfied that this contract is really in restraint of trade at all but, if if is, it is reasonable. [See: Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.: 1968 AC 269=(1967) 1 All ER 699= (1967) 2 WLR 871 (AC at p. 331) per Lord Wilberforce.]"

With regard to the position in India, the Supreme Court observed that agreements in restraint of trade are governed by Section 27 of the Indian Contract Act. It was noted that the said provision (i.e., Section 27 of the Indian Contract Act) was lifted from Hon. David D. Field's Draft Code for New York which was based upon the old English doctrine of restraint of trade, as prevailing in ancient times. The Supreme Court further observed that "the adoption of this provision had been severely criticised by Sir Frederick Pollock who has observed that "the law of India is tied down by the language of the section to the principle, now exploded in England, of a hard and fast rule qualified by strictly limited exceptions". The Supreme Court further observed that "while construing the provisions of Section 27 the High Courts in India have held that neither the test of reasonableness nor the principle that the restraint being partial or reasonable are applicable to a case governed by Section 27 of the Contract Act, unless it falls within the exception". The court also observed that "The Law Commission in its Thirteenth Report has recommended that the provision should be suitably amended to allow such restrictions and all contracts in restraint of trade, general or partial, as were reasonable, in the interest of the parties as well as of the public. No action has, however, been taken by Parliament on the said recommendation. [See: Superintendence Co. of India (P Ltd. v. Krishan Murgai: 1981 (2) SCC 246=1980 (3) SCR 1278 (SCR at pp. 1291, 1296-98: SCC pp. 257, 261-63) per A.P. Sen, J." Therefore, the position is clear that insofar as the courts in India are concerned as also indicated by the Supreme Court in Superintendence Co. Ltd (supra), the test of reasonableness as well as the principle that the restraint is only partial would not be material considerations for determining whether an agreement is in restraint of trade, business or profession and is hit by Section 27 of the Indian Contract Act, 1872. In fact, the Supreme Court in Gujarat Bottling (supra), did not go into the question whether reasonableness of restraint is outside the purview of Section 27 of the Contract Act inasmuch as in para 24 of the said decision it was observed as under:-

"24. We do not propose to go into the question whether reasonableness of restraint is outside the purview of Section 27 of the Contract Act and for the purpose of the present case we will proceed on the basis that an enquiry into reasonableness of the restraint is not envisaged by Section 27. On that view instead of being required to consider two questions as in England, the courts in India have only to consider the

question whether the contract is or is not in restraint of trade. It is, therefore, necessary to examine whether the negative stipulation contained in paragraph 14 of the 1993 Agreement can be regarded as in restraint of trade. This involves the question, what is meant by a contract in restraint of trade ?"

44. Although the Supreme Court in Gujarat Bottling (supra) had refrained from entering into the question whether reasonable restraint is outside the purview of Section 27 of the Contract Act, in my view, this issue has already been settled in Superintendence Co. Ltd (supra) wherein A.P. Sen, J categorically observed that "neither the test of reasonableness nor the principle that the restraint being partial or reasonable are applicable to a case governed by Section 27 of the Contract Act, unless it falls within exception I. We, therefore feel that no useful purpose will be served in discussing the several English decisions cited at the bar". It would be fruitful to reiterate that in that decision [Superintendence Co. Ltd (supra)], A.P. Sen, J also observed that "under Section 27 of the Contract, a service covenant extending beyond the termination of the service is void". It was also observed that not a single decision had been brought to the notice of their Lordships where an injunction had been granted against an employee after the termination of his employment. However, what is of significance in the decision of Gujarat Bottling (supra) is the consideration that a stipulation in a contract which is intended for advancement of trade ought not to be regarded as being in restraint of trade. The Supreme Court referred to the decision in Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd: 1968 AC 269= 1967 (1) All ER 699 wherein the question whether the agreement under consideration was a mere agreement for promotion of trade and not an agreement in restraint of it, was answered in the following manner by Lord Pearce:-

"Somewhere there must be a line between those contracts which are in restraint of trade and whose reasonableness can, therefore, be considered by the courts, and those contracts which merely regulate the normal commercial relations between the parties and are, therefore, free from doctrine.

* * *

The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract viewed as a whole is directed towards the absorption of the parties' services and not their sterilisation. Sole agencies are a normal and necessary incident of commerce, and those who desire the benefits of a sole agency must deny themselves the opportunities of other agencies."

The Supreme Court then reiterated the conclusion in Niranjan Shankar Golikari (supra) and Superintendence Co. Ltd (supra) to that effect that "except in cases where the contract is wholly one sided, normally the doctrine of restraint of trade is not attracted in cases where the restriction is to operate during the period the contract is subsisting and it applies in respect of a restriction which operates after the termination of the contract". It was contended before the Supreme Court that these observations must be confined only to contracts of employment and this principle would not apply to other contracts. The Supreme Court repelled this contention by holding:-

"We are unable to agree. We find no rational basis for confining this principle to a contract for employment and excluding its application to other contracts. The

underlying principle governing contracts in restraint of trade is the same and as a matter of fact the courts take a more restricted and less favourable view in respect of a covenant entered into between an employer and an employee as compared to a covenant between a vendor and a purchaser or partnership agreements."

45. As regards the courts' power to grant an injunction in the case of a negative covenant, the Supreme Court observed as under:-
"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 agreement to do a certain act, coupled with a negative 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: 1898 (1) Ch 671: 1895-99 All ER Rep Ext 1680; N.S. Golikari: 1967 (2) SCR 378: AIR 1967 SC 1098]."

This concludes the discussion of the Supreme Court decisions.

46. I now take up the decisions of this court. In M/s Interlink Services Pvt. Ltd v. Shri S.P. Bangera Sole Prop.: 65 (1997) DLT 228, this court reiterated the principle mentioned above that the doctrine of restraint as contained in Section 27 of the Indian Contract Act, 1872, would not apply during the period the contract is subsisting, but would apply when the contract comes to an end. In IEC School of Art & Fashion v. Mr Gursharan Goyal & Others: 72 (1998) DLT 833, the court observed that there are different kinds of restraint clauses which form part of contracts in the present day. These different kinds are clauses which relate to:-
"(a) Goodwill;

(b) Competitive business during the term of contract, franchise / collaboration agreement in a specified area during the period of contract;

(c) The partnership agreements providing for restraint of trade after dissolution of the partnership;

(d) restrictions put on employees during the course of employment in another business;

(e) Restraint of using information acquired during employment, after employment, etc."

It was also observed that "the liberalisation and globalisation is likely to bring in numerous shades of such restrictions". However, in the context of the case before it, the Court observed that the contract had indisputably come to an end and, therefore, the question of unreasonableness cannot be seen in view of the observations of the Supreme Court in Gujarat Bottling (supra). The Court observed that "when a contract

only ties the parties during the continuance of the contract, and the negative ties are only those which are incidental and normal to the positive commercial arrangements at which the contract aims, even though those ties exclude all dealings with others, there is no restraint of trade within the meaning meaning of the doctrine and no question of reasonableness arises. If, however, the contract ties the trading activities of either party after its determination, it is a restraint of trade". The court observed that "in other words, the doctrine of restraint in trade never applies during continuance of the contract of employment (or collaboration or franchise agreement); it applies only when the contract comes to an end. The Courts, therefore, view with disfavour a restrictive covenant by an employee not to engage in a business similar to or competitive with that of the employer after termination of contract of his employment. [See Superintendence Company of India (P) Ltd. v. Krishan Murgai (supra) Pr. 62]

47. After a review of all the decisions of the Supreme Court and the High Courts, including this court, the following points become clear:-

1) Negative covenants tied up with positive covenants during the subsistence of a contact be it of employment, partnership, commerce, agency or the like, would not normally be regarded as being in restraint of trade, business of profession unless the same are unconscionable or wholly one-sided;

2) Negative covenants between employer and employee contracts pertaining to the period post termination and restricting an employee's right to seek employment and / or to do business in the same field as the employer would be in restraint of trade and, therefore, a stipulation to this effect in the contract would be void. In other words, no employee can be confronted with the situation where he has to either work for the present employer or be forced to idleness;

3) While construing a restrictive or negative covenant and for determining whether such covenant is in restraint of trade, business or profession or not, the courts take a stricter view in employer-employee contracts than in other contracts, such as partnership contracts, collaboration contracts, franchise contracts, agency / distributorship contracts, commercial contracts. The reason being that in the latter kind of contracts, the parties are expected to have dealt with each other on more or less an equal footing, whereas in employer-employee contracts, the norm is that the employer has an advantage over the employee and it is quite often the case that employees have to sign standard form contracts or not be employed at all;

4) The question of reasonableness as also the question of whether the restraint is partial or complete is not required to be considered at all whenever an issue arises as to whether a particular term of a contract is or is not in restraint of trade, business or profession.

48. In the light of these principles which have been culled out from the decisions with regard to the scope and ambit of the provisions of Section 27 of the Indian Contract Act, it remains to be considered as to whether the non-solicitation clause in question amounts to a restraint of trade, business or profession. Two things are material. First of all, the contract in which the non-solicitation clause appears is a contract between the petitioner and the respondent whereby the petitioner was appointed as the sole and exclusive Canvassing Representative / Distributor of the respondent for its products in India. Secondly, it is not a contract between an employer and an employee. If one considers the non-solicitation clause, it becomes apparent that the parties are restrained for a period of two years from the date of

termination of the agreement, from soliciting, inducing or encouraging any employees of the other party to terminate his employment with or to accept employment with any competitor, supplier or customer of the other party. It is a covenant which essentially prohibits either party from enticing and / or alluring each other's employees away from their respective employments. It is a restriction cast upon the contracting parties and not on the employees. The later part of the non-solicitation which deals with the exception with regard to general advertising of positions makes it clear that there is no bar on the employees of the petitioner leaving its employment and joining the respondent and vice versa. The bar or restriction is on the petitioner and the respondent from offering inducements to the other's employees to give up employment and join them. Therefore, the clause by itself does not put any restriction on the employees. The restriction is put on the petitioner and the respondent and, therefore, has to be viewed more liberally than a restriction in an employer-employee contract. In my view, therefore, the non-solicitation clause does not amount to a restraint of trade, business or profession and would not be hit by Section 27 of the Indian Contract Act, 1872 as being void.

49. However, the question that arises is what happens when the respondent has solicited and / or induced or encouraged employees of the petitioner to leave and / or resign from such employment and join the respondent. Can an injunction be granted restraining the respondent from giving employment to such employees ? There are only two possible situations. The first is that an injunction is granted and, the second is that an injunction is not granted. If an injunction is granted, it would imply that the respondent cannot employ such employees who have responded to the advertisement which I have already held to be a solicitation. But it would also mean that employees who did not have any such restrictive covenant in their employment contracts, would be barred from taking up employment with the respondent. In other words, we would be reading into their employment contracts a negative covenant that they would not seek employment after termination of their present employment, with the respondent. If such a term were to be introduced in their employment contracts, then, it, in view of the settled legal principles indicated above, would be void being in restraint of trade. Consequently, when such employees cannot be restrained from directly seeking the employment of the respondent, they cannot be restrained indirectly by preventing the respondent from employing them. Therefore, an injunction cannot be granted restraining the respondent from employing even those employees of the petitioner company who were allured by the solicitation held out by the respondent in the said advertisement. But, the respondent can be injuncted and restrained from making any such or other solicitation in future during the period of two years w.e.f. 31.12.2005 to any other employees of the petitioner. As regards the solicitation already made by the respondent in the advertisement, the petitioner, if it is able to substantiate this in the arbitration proceedings, would be entitled to be compensated by the grant of damages. So, it is not as if a breach of the non-solicitation clause would leave the petitioner without a remedy. The remedy lies in the claim for damages and an injunction against solicitation in future. It does not lie in the grant of an injunction preventing its employees from resigning and taking up employment with the respondent. Accordingly, this application under Section 9 of the Arbitration and Conciliation Act, 1996 is disposed of with the following directions:-

1) the respondent is restrained during the pendency of the arbitration proceedings from taking out any other or further advertisements or to do anything to

solicit, induce or encourage the employees of the petitioner to leave the petitioner's employment and take up employment of the respondent and / or its agents and / or representatives and / or competitors;

2) the employees of the petitioner would, however, be free to take up employment with the respondent, even in response to the said advertisement which has prima facie been held to be solicitation, but, the respondent would be liable to compensate the petitioner for such breach of the non-solicitation clause, if so established in the pending arbitration proceedings.

Sd/-
BADAR DURREZ AHMED

(JUDGE)