

CALCUTTA HIGH COURT

Sheikh Kallu

Vs

Ramsaran Bhagat

(Mukerjee and Carnduff, JJ.)

29.01.1909

JUDGMENT

Mukerjee, J.

1. The petitioner be are this Court is a manufacturer of combs in the city of Patna. The opposite party is a merchant resident in the same city, who makes it a part of his business to supply traders in Calcutta with combs. On the 28th March 1908, the opposite party took an agreement from the petitioner as well as 28 other manufacturers of combs in the city of Patna, by which the latter agreed to supply him with combs and not to sell the same to any one else. The material portion of the agreement, which further provided that the petitioner would be liable to damages for contravention thereof, was as follows "where as we, the declarants. Nos. 1 to 29, do hereby agree that whatever combs will be made by us and by our comb-makers the same will be sold to Ramsaran Bhagat and to his heirs during our lifetime and we will not sell the same to any one else. If we do sell to the other men, and if the fact be found true, then the men who will be found guilty of such act, will be bound to pay Rs. 100 as damages to Ramsaran and if in the payment of such sum as damage, any objection be made, Ramsaran shall have power to recover Rs. 100 as damage money from the persons by the sale of any moveable and immoveable properties of such men who will be found out to have sold combs to other men. In this matter, we and our heirs have, nor shall have any objection. If on account of non-despatch of combs to places where they are sent for disposal, Ramsaran does not purchase combs from us, we shall not have the least objection, but if for other reasons, he does not buy our combs, he will be bound to pay Rs. 100 to each of us. Be it noted that if the despatch of combs to Calcutta be wholly stopped and combs be not sold in Patna, we will give up selling combs to Ramsaran, and the comb-makers will make no objection. We will make combs according to the selection of Ramsaran Bhagat."

2. On the 7th July 1908, Ramsaran, commenced the action out of which the present Rule arises, in the Small Cause Court of Patna, against the defendant who is one of the executants of the agreement for recovery of the stipulated damages upon the allegation that the defendant had refused to supply him with combs and had sold the combs to another man, by name Elahi Mea. The defendant resisted the claim on the merits, ho denied the allegations of the plaintiff and contended that the agreement was in restraint of trade and consequently was unenforceable. The learned Small Cause Court Judge held that the facts as alleged were established by the evidence, and, as, in his opinion the contract was perfectly valid he made a decree for damages for Its. 25.

The defendant now invites this Court to reverse this decision on the ground that the agreement on which the claim is founded is void, as being one in unlawful restraint of trade.

3. The learned Vakil, who appears in support of the rule, has placed reliance upon Section 27 of the Indian Contract Act, 1872, and upon the decisions of this Court in *Madhub Chunder v. Raj Coomar Doss*¹ and *Nur Ali Dubash v. Abdul Ali*² The learned Vakil, who appeared to show cause, has contended, on the other hand, that the agreement is valid and in support of this view, has referred to the dictum of Sir Richard Garth, C.J. in *Carlisles Nephews & Co. v. Ricknauth*³ as also to the decisions in *Mackenzi v. Striramiah*⁴ and *Donell v. Benett*⁵ After a careful examination of the arguments addressed to us on both sides and the authorities to which we shall presently refer, we are of opinion that the agreement upon which the claim of the plaintiff is founded is void.

4. Section 27 of the Indian Contract Act provides that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. To the general rule, thus laid down in broad and comprehensive terms three exceptions are specified, viz., the case of an agreement not to carry on business, the good will of which is sold, the case of an agreement between partners prior to dissolution and the case of an agreement between partners during continuance of partnership. It is common ground that the case before us is not covered by any of the exceptions. The question, therefore, arises whether it is within the mischief of the general rule, and, if so, how its validity is affected thereby. Now the scope and effect of the general rule was examined by Sir Richard Couch in 1874, shortly after the Indian Contract Act came into force, in *Madhub Chunder Pramanik v. Raj Coomar Doss*⁶. That learned Chief Justice, with the concurrence of Mr. Justice Pontifix, held that the case then before the Court was governed by the Indian Contract Act and ruled that, whether the restraint was general or partial, unqualified or qualified, if it was in the nature of a restraint of trade, it was void. He observed that the words "restrained from exercising a lawful profession, trade or business", did not mean an absolute restriction and were intended to apply to a partial restriction, a restriction limited to some particular place; otherwise the first exception would have been unnecessary. He also contrasted the language of Section 27, with that of Section 28, where the Legislature introduced the word "absolute" when they intended to speak of an absolute restraint and not a partial one. It cannot be disputed that the interpretation thus put upon the section is plainly justified by the language used and has been subsequently approved in the cases of *Brahmaputra Tea Co. v. E. Scarth*⁷ and *Nur Ali v. Abdul Ali* (2) where it was observed that Section 27 had abolished the distinction between partial and total restraints of trade. On the other hand, in the case of *Carlisles Nephews & Co. v. Ricknauth* (3) Sir Richard Garth, with the concurrence of Mr. Justice White, appears to have placed a much narrower construction upon Section 27 and this view was adopted by Mr. Justice Handley in *Mackenzi v. Striramiah* (4). As we have observed the wider construction put by Sir Richard. Couch is undoubtedly justified by the comprehensive language of the section, and that the section was intentionally framed in the widest possible terms becomes obvious from an examination of the history of the legislation on the subject. As is well known, Section 27 of the Indian Contract Act was reproduced from Section 833 of the draft Civil Code of the state of New York, which was in the following terms:

5. Section 833. "Every contract by which any one is restrained from exercising a lawful profession, trade or business of any kind otherwise than provided by the next two sections is to that extent void."

6. The framers of the New York Code added the following explanatory note:

Contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent. In *Dunlop v. Gregory* 10 N.Y. 241, a contract not to run a certain steam boat before Saugerties on the Hudson was enforced, although there was no sale of a good will, nor any circumstance to justify the contract, except that it was made upon a sale of the vessel by an association of persons who had previously used it to run before Saugerties and wished to avoid competition. In *Whittaker v. Houce* 3 Beav. 383 a contract not to practise law anywhere in England was specifically enforced. Such a contract mainly tends to enforce idleness and deprives the state of the services of its citizens.

7. "The two following sections" referred to in Section 833 lay down the exceptions in favour of sales of good will and of partnership arrangements and exceptions 1 and 2 to Section 27 of the Indian Contract Act are taken with slight variations from them. It is obvious, therefore, that the framers of the Indian Contract Act deliberately reproduced the provisions of Section 833 of the New York Civil Code with the full knowledge that the effect would be to lay down a rule much narrower than what was recognised at the time by the common law. The rules of the common law, on the other hand, have since then been considerably widened and developed. The result is that the rule as embodied in Section 27 of the Indian Contract Act presents an almost startling dissimilarity to the most modern phase of the English rule on the subject. As observed, however, by Sir Richard Couch in the case to which we have referred, we have nothing to do with the policy of the law, especially as the Legislature has deliberately left the provision in Section 27 in its original form, though other provisions of the Contract Act have from time to time been amended. The inference would be almost irresistible under these circumstances, that the Courts have lightly ascertained the intentions of the Legislature (*Phelan v. Johnson*) 7 Irish Rep. 535; the silence of the Legislature in a case of this description is almost as emphatic as an express recognition of the construction which has been judicially put upon the statute during many years past. In this view of the matter if we adopt the construction of Section 27 of the Indian Contract Act as first suggested by Sir Richard Couch and subsequently affirmed in the cases to which we have referred, a construction which is consistent with the plain language of the section; the agreement in this case must be pronounced to be void.

8. The learned Vakil, for the opposite party, laid stress on the fact that the view indicated by Sir Richard Garth in *Carlisles Nephews of Co. v. Ricknauth* (3), is exposed to that taken by Sir Richard Couch in *Madhub Chunder v. Raj Coomar* (1), and he pressed for the acceptance of the position that Section 27 does not lay down any rule materially different from the rule of the English law on the subject, according to which he argued the agreement upon which the claim of the plaintiff is founded is enforceable as valid and binding between the parties. In answer to this argument, it must be observed in the first place that Sir Richard Garth did not expressly dissent from the view taken by Sir Richard Couch in the earlier case, and Mr. Justice Handley in *Mackenzi v. Striramiah* (4), conceded that Section 27 of the Indian Contract Act had done away with the distinction observed in English cases between partial and total restraints of trade and made all contracts falling within the terms of the section, void, unless they fell within the exception. In the second place, even if the rules of the English law were applied to the case before us, they would be of no assistance to the plaintiff.

9. It was pointed out by Sir Frederick Pollock in his *Treatise on the Principles of Contract*, 7th

edition, page 354, that according to the early common law of England, an agreement which placed any restriction upon a man's right to exercise his trade or calling was void as against public policy. In the course of time the strict doctrine of the early common law was relaxed in the English Courts and agreements in restraint of trade were classified under three heads viz.

(1) Where the restraint was unlimited as to both time and space;
(2) Where it was limited as to time but unlimited as to space; and (3) Where it was limited as to space but unlimited as to time. In the first and second cases, the agreement was void while in the third it was valid. In recent times, however, the law has been developed on entirely new lines and it has been ruled that the sole test of the validity of a contract in restraint of trade is its reasonableness in the interests of the covenantee to which the proviso must be added that the covenant must not otherwise offend against public policy (*Nordenfelt v. Maxim Nordenfelt Guns Co.*) (1894) A.C. 535. In the words of Lord Macnaghten "the public have an interest in every person's carrying on his trade freely; so has the individual; all interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule, but there are exceptions. Restraint of (sic) and interference with individual (sic) of action may be justified by the s(sic) circumstances of a particular case. It is a sufficient justification and indeed it is the (sic) justification if the restriction is reasonable; reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed while at the same time it is in no way injurious to the public." The substance of the matter, therefore, is that contracts which impose an unreasonable restraint upon the exercise of a business, trade or profession are void but contracts in reasonable restraint thereof are valid. Whether the limits prescribed in the contract are reasonable or not, depends upon the kind of business to protect which the contract is made and the reasonableness of the restraint imposed must be ascertained in every case by reference to the nature of the business in question and to the situation of the parties. This question of the reasonableness of the restriction is one of law for the Court [*Eddy on combinations* Section 786, *Haynes v. Doman*⁸ *Mallan v. May*⁹ and *Wiley v. Baumgardner*¹⁰]. It is impossible to formulate any abstract rules to enable the Court to determine the reasonableness of the restraint in any particular case but the following tests are deducible from an analysis of the judgments in *Nordenfelt v. Maxim Nordenfelt Guns Company* (10).

(a) The generality of the covenant whether as to time or space may render it unreasonable i.e. a covenant is not necessarily valid because restricted as to time but may be void because it is not so restricted.

(b) different degrees of protection are reasonable in different cases.

(c) the reasonableness of the restriction must be judged by the character and nature of the business or of its customers. In fact, no better test has been laid down of what is reasonable restraint than the one indicated in the judgment of Tindal, C.J., in *Hooner v. Graves* 7 Bingham 735: "We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given and not so large as to interfere with the interests of the public whatever restraint is larger than the necessary protection of the party can be no benefit to either; it can only be oppressive and if oppressive it is in the eye of the law unreasonable." This test of reasonableness has been applied both in the English and in the American Courts to the particular class of contracts to which the agreement now under consideration belongs viz.

contracts which restricts the liberty of doing business. An agreement that one will trade or do business only with another person or in a certain way for a definite or indefinite period, is one of frequent occurrence. In determining whether agreements of this character should be sustained as legal and binding obligations, the Courts have considered whether they were reasonable. Thus an agreement not to write plays for any other than a particular theatre (*Morris v. Coleman*¹¹) a contract to write for one year for a periodical and for no other publication sold at less than a certain price (*Stiff v. Cassell*¹²) an agreement by a seller of goods with a purchaser not to sell a certain kind of goods to any one else in the same town [*Keith v. Herschberg*¹³ *Roller v. Otts*¹⁴ *Anheuser v. Houck*¹⁵] a contract to sell a brand of cigars to no one in the city but the defendant so as to give him the exclusive agency for such sale (*Newell v. Meyendorff*¹⁶) an agreement between two traders that the first will sell the other all his commodities and that the second will buy from the first alone (*New York v. Levy*)¹⁷ an agreement that the defendant shall for a certain number of years consign exclusively to the plaintiff all the blankets of his manufacture (*Madden v. Dimick*¹⁸) an agreement by a dentist to purchase artificial teeth of a manufacturer on condition that the latter will not sell such teeth to any person in the town where the dentist resides (*Clark v. Crosby*¹⁹) an agreement by a manufacturer to prepare for his purchaser a certain number of barrels of lime within a given time at a certain price and not to sell to any other persons any lime during the continuance of the agreement *Schwalen v. Holmes*²⁰ and an agreement not to sell a certain medicinal preparation to any one but the plaintiffs within a defined territory (*Fowle v. Park*)²¹ have all been sustained by the Courts. An examination of these cases shows that in each instance the contract was not unrestricted as to time and place and in the circumstances of each case the Court came to the conclusion that the agreement was reasonable and should be enforced. On the other hand, as an illustration of a case on the other side of the line we may refer to *Clark v. Needham*²² where the Court refused to sustain an agreement by which one manufacturer had contracted with another engaged in the same business to cease manufacturing certain articles for one year, the latter having the privilege of renewing the contract for four years more. The Court ruled that, in the particular circumstances the agreement tended to create a monopoly and was against public policy as its effect would be to deprive the public of the advantages which flow from free competition. Now in the case before us, what is the scope and nature of the agreement? It is of the widest possible description. It is to hold good between the parties and their representatives apparently from generation to generation. It is unrestricted as to both time and place as the manufacturers of the combs are never to sell the products of their labour to any person in any part of the country. Even the case of *Donnell v. Bennett* (5) upon which the learned Vakil for the opposite party placed reliance referred to an agreement for the sale of chattels to the plaintiff with an express negative stipulation not to sell to any other manufacturer for a period of two years. It cannot be reasonably suggested therefore that an agreement of the nature now before us was needed for the protection of the plaintiff. The restraint is obviously larger than was necessary for his protection, and it was undoubtedly oppressive upon the defendant and if it was oppressive, it was in the eye of law unreasonable. There are, however, other points of view, as well, from which this agreement must be pronounced to be void. In the first place, the consideration for the contract was wholly illusory as there "was no mutuality. The agreement was signed by the manufacturers of the combs only and as the plaintiff did not execute it, he would have been at liberty at any time before it was acted upon to repudiate it. But, even, apart from this circumstance, the manufacture were bound to work for the plaintiff but he was not bound to accept the goods manufacturer were found that there was no market for (SIC) Patna, Calcutta or elsewhere. The bargain was in substance an unilateral one. Upon the principle, therefore, of the decision in *Young v. Timmins*²³ the agreement was void. It is settled of course that a legal

consideration of any value would be; sufficient to support the contract, if not otherwise bad and the Court will not enquire as to its adequacy; to this extent, as pointed out by Sir George Jessel in *Gravelly v. Barnard*²⁴ the case of *Young v. Timmins* (27), if it really decided that the validity of the contract depended upon the adequacy of consideration, must be treated as overruled by *Hitchcock v. Cocker*²⁵. In the case before us, however, there was no reciprocal promise and consequently no consideration whatever to support the agreement. In the second place, upon the facts, we have no doubt whatever that the agreement was intended to create a monopoly. It appears from the evidence that there are about 30 comb-makers in the City of Patna, from 29 of whom the plaintiff took this agreement for exclusive supply of combs to himself. His conduct, therefore, falls within the well-settled principle that although a contract with an independent manufacturer for the entire product of his plant may not in itself be an illegal contract in restraint of trade yet if there is an attempt to suppress competition by means of contracts with independent manufacturers for their entire products so as to monopolize the market, the agreement must be taken to be void. (*Carter Crum Coy, v. Penrrung*²⁶, Eddy on combinations, Sections 230, 281 and 623; Greenhood on Public Policy Rules 561 and 565). From all possible points of view, therefore, this agreement is open to objection and must be pronounced invalid.

10. The result, consequently, is that this rule must be made absolute, the decision of the Small Cause Court Judge set aside and the suit dismissed with costs both here and in the Court below. We assess the hearing fee in this Court at two gold mohur's.

Cases Referred.

114 B.L.R. 76; 22 W.R. 370
219 C. 765
38 C. 809
413 M. 472
522 Ch. Div. 835
614 B.L.R. 76; 22 W.R. 370
711 C. 545
82 Ch. 13 at p. 24
911 M.W. 653
1097 Ind. 66; 49 Am. Rep. 427
1118 Ves. 437; 11 R.R. 230
122 Jurist. N.S. 348
1348 Ark 138; 2 S.W. 777
1414 Kansas 609
1527 S.W. 692
169 Mont., 254; 8 L.R.A. 440
1754. N.Y.S.C. 32
1831 Howard N.Y. 196
1937 Vermont 188
2049 Calf. 665
21131 U.S. 88
22125 Michigan 86; 83, N.W. 1027
231 Cr. and J. 331
24L.R. 18 Eq. 518
256 A. and E. 438; 45 R.R. 522

