GUJARAT HIGH COURT

Lalbhai Dalputbhai and Co.

Vs.

Chittaranjan Chandulal Pandya

Appeal No. 19 of 1964, 3rd Court at Ahmedabad in Civil Suit No. 137 of 1964.
(P.N. Bhagwati and M.U. Shah, JJ.)

14.04.1965

JUDGMENT

Bhagwati, J.

1. This appeal raises an important question as to how far a negative stipulation in a contract of personal service can be enforced by the Court by grant of injunction. The facts giving rise to the appeal are few and may be briefly slated as follows. The plaintiffs are a partnership firm having their registered office in Ahmedabad and they carry on business inter alia as Managing Agents of diverse textile mills situate in Ahmedabad. One of those textile mills is Ashok Mills Limit at Abmedabad. The defendant is a Bachelor of Engineering of the Gujarat University and it is common ground that he was at the date of his appointment by the plaintiffs a fresh graduate from the University. By a letter of appointment dated 16th May 1962 the plaintiffs appointed the defendant as an Assistant Engineer mi probation for a period of three months in Ashok Mills Limited, Ahmedabad. On the expiration of the period of three months specified in the letter of appointment the probation was extended for a further period of three months and on the expiration of the said period, the defendant's appointment as an Assistant Engineer was confirmed and a contract dated 25th June 1963 was executed by and between the plaintiffs and the defendant. The contract provided that the defendant will diligently, faithfully and to the best of his ability and capacity serve as an Assistant in the Engineering Department for a period of three years from 1st May 1963. During the period of the contract the defendant was to receive monthly basic salary of Rs. 230 per month for the first year Rs. 270 per month for the second year and Rs. 310 per month for the third year. After the expiration of the period of the contract each party was at liberty to terminate the service by giving one month's notice to the other Clauses 7 and 9 of the contract contained what may he termed negative stipulations and since the entire controversy between the parties has centred round these stipulations, it would be desirable to set them out in extenso. Clauses 7 and 9 of the contract ran as follows :

"7. That the said Assistant in Engineering Department shall devote his whole time and

attention to the services of the firm during the said term of three years and shall not during the said term, whether he be in the employment or not, get in the employ of or be engaged in any concern, company or with individual as an Assistant in Engineering Department or otherwise in any capacity whatever be connected with any firm or company in any part of India or elsewhere for the space of the said term or any portion of the unexpired period of the said term."

"9. That the said Assistant in Engineering Department shall not leave the services of the said firm and shall not serve or engage himself directly or indirectly for any other person firm or company in India or elsewhere in any capacity whatever and if the said Assistant in Engineering Department attempts to do so, in addition to and without prejudice to any right that the firm may have to claim damages from him in respect of breach or attempted breach of this article of agreement by him."

Pursuant to the contract the defendant served the plaintiffs as an Assistant in the Engineering Department of Ashok Mills Limited, Ahmadabad from 1st May 1963. Though the period of the contract had not vet expired. the defendant in his feller dated 15th January 1964 tendered his resignation from the post of Assistant in the Engineering Department and requested the plaintiffs to accept the resignation and to relieve him on or before 31st January 1964. The resignation was presumable given by the defendant as he wanted to take up service with another employer. The plaintiffs refused to accept the resignation and intimated to the defendant that they were not prepared to relieve the defendant from service. As the plaintiffs apprehended that the defendant would not with standing the refusal leave their service and join service with some other employer, they filed a suit against the defendant being Suit No. 137 of 1964 in the City Civil Court. Ahmadabad praying for a permanent injunction restraining the defendant from serving or engaging himself directly or indirectly for or under any other person, firm or company in India in any capacity during the period of the contract. The plaintiffs also sought an injunction restraining the defendant from divulging any of the secrets techniques, processes information of matters revealed to him or received by him in connection with his work as an Assistant in the Engineering Department of the Ashok Mills Limited Ahmadabad, until the expiration of the period of the contract, but since that injunction has been granted by the City Civil Court and no complaint in regard to that injunction has been made before us by way of appeal or cross objections on behalf of the defendant, we are not concerned with it immediately after filing the suit, the plaintiffs took out a Notice of Motion for interim injunction pending the hearing and final disposal of the suit and obtained ex parte injunction against the defendant. The defendant appeared to contest the Notice of Motion and filed an affidavit in reply showing cause why injunction should not he granted against him. The Notice of Motion was thereafter heard by Judge V.V. Mehta of the City Civil Court and the learned Judge after hearing the parties vacated the ex parte injunction and dismissed the Notice of Motion in so far as it sought to restrain the defendant from serving or engaging himself directly or indirectly for or under any other firm, person or Company in India or elsewhere in any capacity whatever until the expiration of the period of the contract. The main ground on which the learned Judge discharged the ex parte

injunction and dismissed the Notice of Motion was that there were two conflicting decisions of Single Judges of this Court, one taking a view in favour of the plaintiffs and the other taking a view in favor of the defendant, and the learned Judge felt that in view of this conflict of decisions it could not be said that the plaintiffs had made out a prima facie case warranting the issue of injunction against the defendant. The plaintiffs thereupon preferred the present appeal in this Court complaining against the dismissal of their Notice of Motion.

2. The main question which arises in this appeal is whether the negative stipulation contained in Clauses 7 and 9 of the contract is valid and enforceable and the Court should issue an injunction restraining the defendant from committing a breach of the negative stipulation. On this question various contentions have been advanced before us on behalf of the parties and we shall presently refer to those contentions but before we do so, it would he desirable to clear the ground by observing that negative stipulations such as this in contracts of personal service cannot be regarded as stipulations in restraint of trade so as to be liable to be invalidated under Section 27 of the Contract Act. It is now well settled that restrictions |hat are to operate only while the employee is contractually bound to serve his, employer are never regarded as in restrain of trade either at common law. (See *Gaumont British Picture Corporation Ltd. v. Alexander*[1], and *Warner Bros v. Mrs. Nelson*[2], and *Marco Productions Ltd. v. Pagola*[3], or in *India Charlesworth v. MacDonald*[4] and *V.D. Deshpande v. Arvind Mills Ltd*[5]). In (1899) ILR 23 Bom 103 the negative stipulation was contained in a contract under which the defendant agreed to practise as an Assistant of the plaintiff a medical practitioner in Zanzibar, for a period of three years and the contract contained a negative stipulation which was construed by the Court to be that the defendant shall not practise on his own account in Zanzibar during the period of the contract. The question arose whether this negative stipulation was void under the Contract Act as being an agreement in restraint of trade Farran, C.J., answered the question in the negative observing in words which have since then been oft quoted in various subsequent decisions :

> ". . . . . is it an agreement which restrains the defendant from exercising his lawful profession ? Is it an agreement in restraint of trade ? I think not. I do not think that an agreement of this class falls within the section. If it did, all agreements for personal service for a fixed period would be void. An agreement to serve exclusively for a week, a day, or even for an hour, necessarily prevents the person so agreeing to serve from exercising his calling during that period for any one else than the person with whom he so agrees. It can hardly be contended that such an agreement is void in truth, a man who agrees to exercise his calling for a particular wage and for a certain period agrees to exercise his calling, and such an agreement does not restrain him from doing so. To hold otherwise would, I think, be a contradiction in terms. . . . . There is also the dictum of Candy, J., in *Callianji v. Narsi Tricum*[6], and illustration (d) to Section 57 of the Specific Relief Act is what I may call a legislative decision to the same effect."

This decision is binding upon us, but we may point out that even if it were not so, we should still

have been inclined to reach the same decision and we wish to express our respectful concurrence with these observations. The negative stipulation in the contract in the present case cannot, therefore, be said to be void as being in restraint of trade. There was no other ground suggested on behalf of the defendant which would invalidate the negative stipulation and we must, therefore, proceed to decide this case on the basis that the negative stipulation was a valid stipulation.

3. Mr. C.T. Dadu on behalf of the defendant agreed that the negative stipulation in the present contract being a valid stipulation if any injury resulted to the plaintiffs as a result

[1](1936) 2 All England Reporter 1686 [3](1945) 1 All England Reporter 155
[5](1946) 48 Bom LR 90 AIR 1946 Bom 423
[2](1937) 1 KB 209 [4](1899) ILR 23 Bom 103 [6](1894) ILR 23 Bom 103

of the breach of the negative stipulation, the plaintiffs would be entitled to recover damages for such injury from the defendant his only dispute was that the plaintiffs were not entitled to obtain an injunction against the, defendant to restrain the breach of the negative stipulation lie urged various arguments in support of this pica and we shall presently examine these arguments but before we do so we must refer to an objection raised by him which sought to give an answer in limine to the claim for an injunction. That objection was based on the provisions of the Specific Relief Act, 1963, which was admittedly the statute governing the determination of the present question and the argument was that the negative stipulation in the contract imposed a continuous duly on the defendant not to serve anyone other than the plaintiffs and the Court could not supervise the performance of this continuous duty and, therefore, having regard to the rule enacted in Section 14(1)(d) which was applicable to a case of an injunction by reason of Section 38(2), the Court was precluded from granting an injunction to the plaintiffs. Now Mr. C.T. Daru is certainly right in his contention that by reason of Section 38(2), the rule enacted in Section 14(1)(d) must apply even where an injunction is sought to prevent the beach of an obligation arising from a contract but obviously the rule can apply in any given case only when it is applicable on the facts of the case. The Rule says that a contract, the performance of which involves the performance of a continuous duty which the Court cannot supervise cannot be specifically enforced and it is clear from the language and the intendment of the rule that the duty which is referred to there is a positive duty to do something and not a negative duty to abstain from doing something. Where under the contract the defendant is under a continuous duty to do something the performance of which the Court cannot supervise, the rule says that such a contract shall not be specifically enforced since it would not be possible for the Court in such a case to ensure performance of the continuous duly. But where the duty under the contract is merely to abstain from doing something, there would be no question of the Court being called upon to supervise the performance of the duty. The enforcement of a negative stipulation such as the one we have in the present case can, therefore, never be within the inhibition of this rule and we cannot refuse to grant injunction in limine on such ground.

4. Turning to the other contentions it may be pointed out at the outset that the question whether injunction should be granted in the present case or not is governed by the Specific Relief Act, 1963, and not by the Specific Relief Act, 1877, since the latter statute was repealed from 1st

March 1964 by Section 44 of the former statute But the provisions of the two statutes in so far as they are material to the determination of the present controversy are identical and the decisions given under the Specific Relief Act, 1877, would, therefore, still continue to have binding authority when we are interpreting the provisions of the Specific Relief Act, 1963. Now if there is one principle more than any other recognized and en forced by Courts of Equity in England, it is this that no specific performance should he granted in respect of a contract of personal service. This principle was evolved by Courts of Equity in England on grounds of public policy for the view taken was that it was against public interest to compel an employer to work for a particular employer against his will To compel an employee to work against his will for a particular employer whom he did not wish to serve would smack of slavery and ever since the year 1771 when Lord Mansfield set free a coloured slave James Somerset who was held in irons on a ship lying in Thames and bound for Jamaica, the English law always set its face against all forms of slavery Consistently with this attitude the Courts of Equity in England said that they would not specifically enforce any contract of personal service for they fell that if they did so, they might turn contracts of personal service into contract of slavery Fry L.J. said in *De Francesco v. Barnum*[7], at 438 :

> "For my own part I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of continuing personal relations with one another to continue those personal relations I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the Courts are bound to be jealous lest they should turn contracts of service into contracts of slavery: and, there fore, speaking for myself I should lean against the extension of the doctrine of specific performance and injunction in such a manner Lindlay, L.J . agreed with these observations of Fry, L.J., and emphasized the true ground on which the rule against specific enforcement of a contract of personal service was based in the following words in *Whit wood Chemical Co. v. Hardman*[8], at p 428 :
>
> "..... I agree, also, in what Lord Justice. Fry has said more than once, that cases of this kind are not to be extended. I confess I look upon *Lumley v. Wagner*[9]. rather as an anomaly to be followed in cases like it. but an anomaly which it would be very dangerous to extend I make that observation for this reason, that I think the Court looking at the matter broadly will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone : and whether it is attempted to enforce these con tracts directly by a decree of specific performance, or indirectly by an injunction, appears to me to be immaterial. It is on the ground that mischief will he done to one at all events of the parties that the Court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may have apart from the extraordinary remedy of an injunction "

It will, therefore, be seen that it is on grounds of public policy and in the interests of the public that Courts of Enquiry in England refuse to grant specific performance of a contract of personal

service. This rule of public policy precluding specific performance of a contract of personal exercise was embodied in Section 21 Clause (d) of (be Specific Relief Act, 1877, and is now to be found in Section 14. Sub-Section (I) Clause (d) of the Specific Relief Act, 1963.

5. Now what is the position when in employer does not seek specific performance of a contract of personal service bill asks for an injunction to restrain the breach of it negative stipulation contained in the contract of personal Service ? The reliet by way of injunction depends in India upon statute and is governed by the provisions of the Specific Relief Act, 1903 Section 30 of that Act places the grant of an injunction in the discretion of the Court a discretion to be exercised of course as the discretion of court always is. The discretion is not arbitrary but sound and reasonable governed by Judicial principles and capable of correction by a Court of appeal Section 38 still. Section (1) provides that subject in the other provisions contained in or referred to by Chapter VIII, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favor, whether expressly or by implication and Sub-Sec (2) of that section declares that when any such obligation arises from contract, the Court shall be guided by the rules

[7](1890) 45 Ch D 430 [9](1852-1 De GM and G 604)

[8](1891) : Ch 416

and provisions contained in Chapter II. Section 41, Clause (c) enacts that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced but Section 42 breaks in on that provision and provides that :

> "42. Notwithstanding anything contained in Clause (e) of Section 41, where a contract compromises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.
> Provided that the plaintiff has not failed to perform the contract so far as it is binding on him."

What is the true scope and effect of Section 42 was one of the questions raised before us. Section 48 deals with a case where a contract comprises an affirmative stipulation to do a certain act coupled with a negative stipulation, express or implied, not to do a certain act. Now if Section 42 had not been enacted, by reason of Section 41, Clause (e) it would not have been possible to grant an injunction to restrain the breach of the negative stipulation. The breach of the negative stipulation would have been a breach of the contract and an injunction though limited to preventing the breach of the negative stipulate or would have been an injunction to prevent file breach of the contract and the contract being one of which performance would not be specifically enforced, Section 41, Clause (e) would have precluded the Court from granting an injunction to prevent the breach of the negative stipulation Section 42 was, therefore, enacted and it provided that in such a case even though the contract cannot be specifically enforced, the Court would still be entitled to grant an injunction restraining the breach of the negative stipulation, if it otherwise

thinks it fit and proper so to do. The bar created against the granting of such an injunction by Section 41. Clause (e) is thus removed by Section 42. but that does not mean that the Court must grant such an injunction even if the effect of doing so would be to compel the defendant to specifically perform the contract. The Court has a discretion whether or not to enforce the negative stipulation by grant of an injunction. That discretion is declared in no uncertain terms by Section 36 and is further emphasized by Section 38, Sub-Sections (1) and (2). The language of Section 42 also shows that the discretion of the Court is not intended to be taken away by any thing staled in the section. The words used are "the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction" so that Section 41. Clause (e) shall not stand in the way of the Court in granting an injunction; but the Court would still have to consider whether in the exercise of its discretion it should grant the injunction or not. That the Court has a discretion in the matter is amply borne out by various authorities. It will be sufficient to refer only to three of them. One is ILR 28 Bom 108 (supra), the other is 48 Bom LR 90 : AIR 1946 Bombay 428 (supra) and the third is *Shri Ambernath Mills Corporation v. Custodian of Evacuee Property*[10], These authorities clearly lay down that even where an injunction is sought to prevent the breach of a negative covenant, it is always a matter for the Court whether to grant the injunction or not. The same is the position also in England though at one time for historical reasons a view did prevail in England that where there is a negative covenant, it must be enforced by an injunction. That view gradually underwent a change and with the realization of the

[10] AIR 1957 Bom 119

difficulties attendant upon such a rigid and inflexible view the Courts ultimately accepted that even in the case of a negative stipulation, injunction is a discretionary remedy and it may or may not be granted by the Court according to the circumstances of each particular case Some of the instances where injunction was either wholly refused or partly granted and partly refused or granted only in a modified form though the stipulation sought to be enforced was a negative stipulation will be found in *Ebraman v. Bartholomew*[11]. *Rely-a-Bell Burglar and fire Alarm Co. Ltd. v. Eisler*[12], *William Robinson and Co. Ltd. v. Heuer, (1898) 2 Ch 451, 1937-1 KB 209 (supra) and (1954) 1 All England Reporter 155* (supra). It would, therefore, he idle is contend that in a case falling tinder Section 42 the Court has no discretion whether to grant an injunction or not.

6. What then are the rules which should guide the Court in the exercise of this discretion ? Now in the matter of exercise of the discretion in such cases there is one rule which has always been recognized by Courts of Equity in England and which has also found favour with Courts in India. The rule is that the Court will not grant an injunction to restrain the in each of a negative stipulation in a contract of personal service where the effect of doing so would be to compel the defendant to specifically perform the contract. This rule is based upon the principle that the Court will not do indirectly that which it can not do directly. The Court cannot for reasons, which we have pointed out above grant a decree for specific performance of a contract of personal service. But the Court cannot escape that inhibition by granting instead an injunction to restrain the

breach of a negative stipulation contained in the contract if the effect of the injunction would be to compel specify performance of the contract by the defendant. As observed by Lindley. L.J. in Whitwood's case, 1891-2 Ch 416 (supra) "the Court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contrails directly by a decree of specific performance, or indirectly by an injunction, Appears to me to be immaterial." What the law denounces is compelling an employee to work against his will for B particular employer and whether it is sound to be achieved by a decree for specific performance or by an injunction does not make any difference; the mischief remains the same and the law insists that the mischief shall be avoided. Even in the case of (1852) 1 De G M. and G. 604 which the Courts in England have always regarded as an anomaly not to be extended. Lord St. Leonards while issuing an injunction to prevent the breach of a negative stipulation disclaimed doing indirectly what he could not do directly. The learned Law Lord recognized that he could not issue an injunction if by doing so he would in effect he granting specific performance of the contract of personal service but since in his view the injunction issued by him would not have that effect, be granted the injunction Of course in determining whether the effect of granting the injunction would be to compel the defendant to specifically perform the contract of personal service, regard would have to be paid to the practical realities of the situation and it would have to be seen whether in the circumstances of a particular case the practical effect would be that the defendant would he render : virtually idle and would have to starve as an alternative to going back to his employer. If that is the effect of granting the injunction. The Court will not exercise its discretion in favour of granting the injunction, for the Court will not allow its process to be utilised as an instrument for compelling the employee to specifically perform the contract of personal service. This

[11](1898) 1 Ch 671

[12](1926) Ch 609

was the rule on which the Court refused to grant injunction in 1898-1 Ch 671 (supra) and 1926 Ch 609 (supra) and gave an injunction in a limited form in 1937-1 KB -109 (supra). This rule is in our opinion equally applicable in India. This rule being merely a corollary of the main rule that the Court would not specifically enforce a contract of personal service must be held applicable in India when we find that the main rule has received statutory recognition in India in Section 21. Clause (b) of the Specific Relief Act, 1877 and Section 14(1)(b) of the Specific Relief Act, 1963. Section 38(2) read with Section 14(1)(b) of the Specific Relief Act, 1963, also supports the applicability of this rule As a matter of fact there are decided cases in India where this rule has been applied to guide the Court in the exercise of its discretion Candy, J.. affirmed this rule in (1899) ILR 23 Bom 103 (supra) and observed that the case before him did not come within the mischief of the rule since it was not a case in which the Court was "asked to indirectly decree specific performance of the contract of personal service". A Division Bench of the Bombay High Court in (1894) ILR 18 Bom 702 (supra) also recognized the validity of this rule and we find that in a recent decision given by Shelat, J., as he then was in ***Sunil*** *Chand v.*

Aryodaya Mills C0. Ltd[13]*.,* the correctness of this rule has been accepted in its application to India. It is, therefore, clear both on principle and authority that even where a negative stipulation in a contract of personal service is sought to be enforced, the Court has a discretion in the matter and one of the principles which must guide the discretion of the Court is that if the effect of granting the injunction would he to indirectly compel the defendant to specifically perform the contract of personal service, the Court would not grant such injunction.

7. If this rule is applied, it is clear that in injunction cannot he granted to restrain the defendant front committing it breach of the negative stipulation contained in Clauses 7 and 9 of the contract. The negative stipulation contained in these clauses is in the widest terms and prevents the defendant from serving anyone else other than the plaintiffs in any capacity whatever. If an injunction were granted in terms of this negative stipulation, the result would he that the defendant would he either reduced to idleness and starvation or be compelled to go back in the employment of the plaintiffs. This would in substance and effect amount to decreeing specific performance of the contract of personal service which the Court cannot do. We cannot, therefore, grant an injunction in the wide terms in which it is claimed by the plaintiffs.

8. It was then contended on behalf of the plaintiffs that in any event an injunction in a limited form should be granted and the form in which the injunction was sought was that the defendant should be restrained from serving am concern, company, authority or individual as an Assistant Engineer or Engineer or in any other similar capacity in the (Engineering Department or any other department involving work of engineering Now there can he may doubt that even where a negative stipulation is couched in the widest terms the Court can issue an injunction in a limited form if other wise it thinks that it is fit and proper so in do. That is a matter of exercise of discretion by the Court. The question is what should he the principles which should guide the Court in the exercise of this discretion low fortunately we do not have to go far in search of the principles and the search is considerably assisted by several English decisions. These decisions though

[13](1963) 4 Guj LR 795 (AIR 1964 Guj115)

hearing on a different question, namely, how far agreements in restraint of trade should be upheld, yield principles which are equally applicable to guide the discretion of the Court in the matter of grant of injunction to restrain the breach of a negative stipulation in a contract of personal service. Before we refer to these decisions, we might first examine the question on principle. The main ground on which the claim of the plaintiffs to an injunction was sought to be sustained was that the defendant having entered into the contract with open eyes and full awareness of its terms should be held board by the contract and the contract should be enforced against him, for otherwise the sanctity of the contract would be violated. An appeal was made to what may be termed freedom of contract. Now freedom of contract involves two different aspects, namely, (1) freedom in the matter of entering into the contract : and (2) freedom from interference with the contract when once it is made. The common law at a time when it was overshadowed by the laissez-faire school of economics accepted the Benthamite utilitarian theory

and considered freedom of contract almost as an end by itself. Thus evolved the doctrine accepted by the Courts that if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of justice. But very soon it was found that to put no restrictions on the freedom of contract would logically lead in cases of contracts of employment to contracts of slavery. It was realised that although liberty and equality before they are essential to democracy. They have not in themselves any necessary connection with economic justice, and may, where there is great economic disparity between individuals, operate as instruments of oppression. Applied to the field of contract this led to the recognition that freedom is only reasonable as a social ideal when equality of bargaining power is assumed. Where there is inequality arising as a result of disparity if economic power. The parties would not be on equal bargaining terms and in sin b a case the inferior party would very often be in danger of parting, by the very contract which he is allowed to make, with all real freedom is observed by Hughes, C.J. in *Morehead v. New York. ex. rel. Tipaldo*[14] at p. 627. "While it is highly important to preserve (the liberty of contract) from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom which it is designed to safeguard". In cases of contract of employment the contracts would usually in-drafted by the employer thus presenting him with an excellent device for extending the scope of his own protection at the expense of tin hapless employee. Naturally the interest of the employer might lead to the inclusion in such contracts of protection extending beyond the realm of the legitimate : interest. In a country like India where there is over population and the spectre of unemployment looms large, an employee would have to submit to the contracts so drafted by the employer for as observed by Lord Northinglon in *Vermon v. Bethell*[15]. "necessitous men are not truly speaking free men but to answer a present exigency, will submit to any terms that the powerful may impose". The employee may, therefore, be compelled to agree to a negative stipulation that he would not carry on any trade or occupation or be employed with tiny other employer during in period of the contract. Now under the law of the land as we have discussed above, such a stipulation would of course be a valid stipulation for the law does not give any absolving power to the Court even though the stipulation may not be the result of contract between parties on equal bargaining terms.

[14](1936) 298 US 587

[15](1762) 2 Eden 110 : 28 ER 838

But when the question arises as to whether the Court should enforce such a negative stipulation by means of the extraordinary remedy of injunction. The Court must ask itself : Must interpose at the instance of the employer ? If the injunction is granted the effect would be that the employee would not be able to exercise his skill, knowledge and training and earn his livelihood by such exercise. Now if public interest demands that contracts voluntarily entered into should be carried out and that sanctity of contracts should be respected and enforced, public interest equally requires that the employee should be free to exercise his skill, knowledge and experience to the

lies : advantage for the benefit of himself and of all those who desire to employ him. The negative stipulation would, to use the words of Lord Shaw if Dunfermline in *Herbert Morris Ltd v. Saxelby*[16], put "an embargo upon the energy and activities and labour of a citizen; and the public interest coincides with his own in preventing him, on the one hand, from being deprived of the opportunity of earning his living, and in preventing the public, on the other, from being deprived of the work and service of a useful member of society". Again to quote Lord Shaw of Dunfermline "a man's aptitudes his skill, his dexterity. In manual or mental ability they may and they ought not to be relinquished by a servant" they arc not his master's property; they are his own property; they are himself There if no public interest which compels the rendering of those things dormant or sterile or unavailing, on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large. . . . "It will, therefore, be seen that in cases such as this, two principles or views of public policy come into conflict, namely freedom of occupation and freedom of contract. There is an apparent conflict between these two freedoms; the extreme of the one would destroy the other. But the law must reconcile the two and remove all antagonist by adjusting the bounds of each. The law must achieve a reconciliation and adjustment of these two elementary freedoms in a manner so as to subserve public interest. This we car do by importing the principle evolved by the English Courts while dealing with cases of agreements in restraint of trade. In England the question arose towards the end of the nineteenth century as to how far agreements in restraint of trade could be regarded as valid. In what is commonly called the Nordenfelt Case. 1894 AC 535. Lord Macnaghten laid down the following principle reconciling the two apparently conflicting liberties, namely, liberty of contract and liberty of occupation and there is no reason why the same principle should not be adopted to resolve the conflict between the two competing liberties when the Court is called upon to exercise its discretion whether or not to enforce a restraint imposed by a negative covenant in a contract of personal service by means of an injunction. This is what the learned Law Lord said :

> "The true view at the present time, I think, is this : The public have an interest in every person's carrying on his trade freely: so had 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, restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - reasonable, that is, in

[16](1916) AC 688 (714)

> reference to the interest of the parties concerned and reasonable in reference to the interest of the nubile, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

If this principle is to be applied, it is clear that two conditions must he fulfilled before a restraint

imposed by a negative covenant can be held enforceable by an injunction. In the first place it must he reasonable in reference to the interest of the contracting parties and secondly it must be reasonable in reference to the interest of the public. In the case of each condition the test of reasonableness must be satisfied. To be reasonable in reference in the interest of the contracting parties. Unrestraint must afford no more than adequate protection to the party in whose favour it is imposed. To be reasonable in reference to the interest of the public, it must be in no way injurious to the public.

9. If the negative stipulation which imposes a restraint is reasonably necessary for tin adequate protection of the interests of the employer, it must be enforced by issue of an injunction. But if the negative stipulation goes beyond what is reasonably necessary to protect the legitimate interests of the employer there is no reason why a Court should interpose to en force the negative stipulation. The employer in the latter case would not need an injunction for protection of his interests nor would his interests be protected by issue of such injunction. The only object which he could possibly hope to achieve by obtaining an injunction would he to spite or punish the employee for having broken the contract or perhaps to induce the employee to come back to his employment. Now it is clear from what we have said above while discussing the true basis of the rule against specific enforcement of a contract of personal service that the law does not favour compulsion of an employee to work against his will for any employer. The object to gel back the employee in service is. therefore, not an object which the law countenances and it cannot be a legitimate object for enforcement of a negative stipulation that the employee would, even if not compelled, be at least induced or to use the words of Branson, J., in 1937-1 KB 209 (supra) tempted to come back. The law cannot regard such a consideration as a relevant consideration for it such a consideration were relevant, the Court would in effect be doing indirectly what it cannot do directly, because the Court would be issuing an injunction in order to induce the employee to go hack to his employer, a thing which the Court should not think of doing. An injunction if otherwise properly granted may have the effect of inducing or tempting the employee to go back to the service of his employer but that is not the object for which injunction can be granted by the Court. It must, therefore, he seen whether the enforcement of the negative stipulation is reasonably necessary for the protection of the legitimate interests of the employer. If it is not going to benefit the employer in any legitimate manner, the Court would not injunct the employee from exercising his skill, training and knowledge merely because the employee has agreed to it. Of course when we say this we do not for a moment wish to suggest that in such cases sanctity of contract may not he respected or may be violated with impunity. The question is only one of remedy. The employee having agreed to the negative stipulation, the negative stipulation must be held binding on him mid if there is breach of the negative stipulation, the employer would have his remedy in damages, if any but the Court would not grant the extraordinary remedy by way of an injunction because by doing so, beyond a mere enforcement of a contractual obligation, or legitimate object or purpose would he advanced. The Court would not interfere with the freedom of occupation of the employee unless it is necessary to do so for the protection of the interests of the employer. To that extent, freedom of contract must yield to

freedom of occupation in public interest. We are, therefore, of the view that the principle laid down Lord Macnaghten in Nornenfelt case, 1894 AC 535 must be imported in order to guide the discretion of the Court in regard to the question as to when an injunction should be issued for breach of a negative stipulation in a contract of personal service, for that principle effects a happy reconciliation and adjustment of freedom of contract and freedom of occupation and subserves public interest.

10. If we adopt this principle, it would be possible for the Courts to permit themselves a freedom of action which would enable them to bring the law completely in line with social and economic conditions of the country and to administer the law in a manner which would satisfy the needs of the community in these conditions. It was simply pressed upon us that by accepting this principle we would be importing an extraneous consideration not permitted by the language of the statute but we must remember that the law must adapt itself to the changing needs of society and wherever it is possible we must not hesitate to adopt new principles for otherwise law will become "antiquated straight jacket and then dead letter" and "the judicial hand would stiffen in mortmain if it had not part in the work of creation". We have, therefore, no hesitation in accepting this principle and applying it to guide the exercise of discretion of the Court in issuing injunction to restrain breach of a negative covenant in a contract of personal service.

11. We may point out that in importing this principle in the realm of injunction to restrain breach of a negative stipulation in n contract of personal service, we are not making out a new path for ourselves The seed of this principle, we find, was sown in 48 Bom LR 98 : AIR 1946 Bombay 423 (supra). In that case a Division Bench of the Bombay High Court consisting of Kania, Ag. C.J. and Gajendragadkar, J., as he then was considered the English decisions to which we have referred including 1916 AC 688 and in the light of the principle there enunciated, considered the question as to how far the negative stipulation was reasonable and to what extent it should be enforced. If we closely look at the judgment in that case we find that the Court applied its mind to the question whether the negative stipulation was necessary for the protection of the interests of the employer and Kania, Ag. C.J. delivering the judgment of the Court analyzed the evidence on record and concluded by saying :

> "In fact on the evidence there is ample material to hold that it was reasonable for the respondents' protection."

We have no doubt that in that case the Court would not have granted an injunction if the Court had come to the conclusion that no part of the negative stipulation was necessary to be enforced for the protection of the interests of the employer.

12. Even if we look at the other decisions of the Bombay High Court where injunction was issued to enforce a negative stipulation in a contract of personal service, it would be observed that in all those cases the true basis of the decision was that the negative stipulation was

necessary for the protection of the interests of the employer. It is no doubt true that the Courts did not make articulate the true ground of the decisions but there are glimpses of the true ground to be seen in the observations made in those cases. Take for example (1899) ILR 23 Bom 103 (supra). In that case Farran, C.J.. referred at page 113 to the circumstances which led the defendant to throw up his assistantship and to start as the plaintiff's competitor for the medical business of Zanzibar. The same was the position also in 48 Bom LR 90 : AIR 1946 Bombay 423 to which we have already referred. Even in (1852) 1 De GM and G 604 it was a rival theatre in London where Mrs. Wagner wanted to sing and it was evident that if she was permitted to sing, the plaintiff would have been hurt and that is why an injunction was necessary in order to protect the interests of the plaintiff. As a matter of fact Hallet, J.. in 1945-1 All England Reporter 1BB, actually referred to the fact that Lord St. Leonards had damage to the plaintiff in mind in (1952) 1 De GM and G 604 (supra), In 1987-1 KB 209 also, Branson, J., enforced the negative stipulation only to the extent to which it was necessary for the protection of the Interests of the employer. The learned Judge observed in regard to the period for which the injunction should be granted at page 221 that "the Court should make the period such as to give reasonable protection and no more to the plaintiffs against the ill effects to them of the defendants breach of contract". It would there fore, be clear that in all these cases the Court did not enforce the negative stipulation by means of an injunction merely because the employee had agreed to it but because the Court found that it was necessary to do so in order to protect the interests of the employer.

13. Before we apply this principle to the facts of the present case we must refer to one other contention of Mr. C.T. Daru on behalf of the defendant. He urged that Section 42 in so far as and to the extent to which it empowers the Court to restrain a person from practising any trade or profession or occupation of his choice is violative of the freedom guaranteed under Article 19(1)(g) of the Constitution and the Court cannot issue an injunction imposing such a restraint resting on the authority purported to be conferred by that section. Now it is a little difficult to appreciate the force of this contention. Section 42 is no doubt wide in its terms but it leaves a discretion to the Court whether or not to enforce a negative stipulation in a contract of personal service by issue of an injunction. It does not provide that the Court shall issue an injunction in every case where there is a negative stipulation in a contract of personal service. If such had been the case, it might have plausibly been argued that the section imposes an unreasonable restriction on the fundamental right of n person to follow the occupation of his choice and is, therefore, in conflict with Article 19(1)(g). It is now established by the majority view of N.H. Bhagwati and Subba Rao, JJ.. (S.K Das.).. contra and S.R. Das, C.J. and Kapur J.. not expressing any opinion on the point) in *Basheshar Nath v. Commr of I. T*[17]*.,* that the fundamental right under Article 19(1)(g) cannot be waived and it is constitutionally impermissible to any one to contract out of it. Notwithstanding the negative stipulation to the contrary, the fundamental right of the employee to follow the occupation of his choice would, therefore remain and if the law provided that every negative stipulation, whatever be its scope to content, must be enforced by an injunction and the employee must be restrained from following the occupation of his choice in breach of the negative stipulation regardless of the con sideration whether the imposition of such restrain! was

reasonable or not in the interest of the general public, the law might be liable to be regarded as being in conflict with the fundamental right of the employee to follow the occupation of his choice. But where the, law merely confers authority on a Civil Court which is a Judicial Tribunal to decide in the exercise of its discretion whether to grant injunction or not, it is difficult to see how the law can be regarded as constituting an

[17] AIR 1959 SC 149

unreasonable restriction on the freedom to follow the occupation of his choice which belongs to the employee. The matter being left to a judicial Tribunal to be determined would be decided after giving both parties full opportunity of presenting their case and after considering whether in the circumstances of a particular case, the restriction which would be impose by the injunction is a reasonable restriction or not. The Judicial Tribunal in exercising its discretion would go into the reasonableness of the matter and grant an injunction only if it comes to the conclusion that the restriction imposed by the Injunction would be a reasonable restriction : if it comes to the conclusion that the injunction would result in the imposition of unreasonable restriction. It would not grant the injunction. Therefore, the decision whether in a particular case the grant of injunction would be a reason able restriction or an unreasonable one is left by Section 42 in the hands of a judicial tribunal and to the circumstances it cannot he said that Section 42 involves any contravention of the fundamental right of the employee to following occupation of his choice This view which we are taking is completely in accord with the decision of the Supreme Court in *Godavari's Sugar Mills v. K.T.S. Kamgar Sabha*[18], There the question arose in regard to the Bombay Industrial Relations Act and the contention was that inasmuch as on a reading of Section 3(18) which defined an "industrial matter" and Section 3(17) which defined an "industrial dispute", power was conferred in the Industrial Court to adjudicate on the mode of employment and this interfered with the right of the employer to carry on his trade us he liked subject to reasonable restrictions Section 3(18) in so far as it defined an "industrial matter" to include the mode of employment contravened the fundamental right guaranteed under Article 19(1)(g). This contention was repelled by the Supreme Court in the following words which apply wholly and completely to the situation before us :

> "Now assuming that the mode of employment used in Section 3(18) includes such questions as abolition of contract labour, the question would still be whether a provision which enables an Industrial Court to adjudicate in the question whether contract labour should or should not be abolished is an unreasonable restriction on the employer's right to carry on his trade. We cannot see how the fact that power is given to the Industrial Court, which is a quasi-judicial tribunal to decide whether contract labour should be abolished or not would make the definition of "industrial matter" in so far as it refers to the mode of employment, an unreasonable restriction on the fundamental right of the employer to carry on trade. The matter being entrusted to a quasi judicial tribunal would be decided after giving both parties full opportunity of presenting their case and after considering whether in the circumstances of a particular case the restriction on the mode of employment is a reasonable restriction or not. The tribunal would always go into the

reasonableness of the matter and if it comes to the conclusion that the mode of employment desired by labour is not reasonable it will not allow it; it is only when it comes to the conclusion that the mode of employment desired by labour in a particular case is a reasonable restriction that it will insist on that particular mode of employment being used. Take, for example, the case of contract labour itself The tribunal will have to go into the facts of each case. If it comes to the conclusion that on the facts the employment of contract labour is reasonable and thus doing away with it would be an unreasonable restriction on the right of the employer to carry on trade, it will permit contract labour to be carried on. On the

[18] AIR 1961 SC 1016

other hand if it comes to the conclusion that employment of contract labour is unreasonable in the circumstances of the case before it. It will hold that it should be abolished, the reason being that its abolition would be a reasonable restriction in the circumstances. Therefore the decision whether the mode of employment in a particular case is a reasonable restriction in unreasonable one is in the hands of a quasi judicial tribunal. In the circumstances it cannot be said that by providing in Section 3(18) this an 'industrial matter' includes also the mode of employment, there is any contravention of the fundamental right of the employer to carry on trade. If the argument on behalf of the appellant were to be accepted it would mean that judicial and quasi-judicial decisions could be unreasonable restrictions on fundamental rights and this the Constitution does not envisage fit all.

These last observations also answer the second contention of Mr. C.T. Daru that even if Section 42 cannot be struck down as offending Article 19(1)(g), the Court in issuing an injunction restraining an employee from following the occupation of his choice would be violating the protection of Article 19(1)(g) and the injunction issued by the Court would be ineffective to prevent the exercise of the fundamental right by the employee. This contention is clearly unsustainable for it is well-settled that a decision of a judicial tribunal cannot be an unreasonable restriction on fundamental rights. To quote the words of Shah. J in *Ratilal v. Stale of Bombay*[19] at p 253 : "A decision of regularly constituted Court can-not however be challenged as an interference with fundamental rights in the abstract. The Court in the very nature of things adjudicates upon conflicting claims and declares rights and does not by the operation of its own order seek to infringe any fundamental rights". The Court when it issues the injunction does so because it reaches the conclusion that the negative stipulation to the extent it is enforced by injunction would not impose an unreasonable restriction on the fundamental right of the employee to follow the occupation of his choice, if the decision is wrong the aggrieved party may prefer an appeal to a superior tribunal and the superior tribunal will apply the same test of reasonableness and see whether the conclusion reached by the inferior tribunal is correct or must be reversed. But the decision cannot be challenged as violative of the fundamental right of the employee to follow the occupation of his choice, for implicit in the decision is an adjudication of the reasonableness of the injunction and so long as the decision stands unreversed, it binds the

parties. We cannot, therefore, assent to the argument that a decision of a Court of law can be violative of the fundamental rights guaranteed under Part II of the Constitution and that if an injunction is issued by the Court, its validity can be challenged on the ground that it conflicts with any of the fundamental rights. It must accordingly be held that the following observations of Raju, J., in *Maganlal v. Ambica Mills Ltd*[20]. do not represent the correct law.

> "Acts of Courts and acts of Judicial would come within the purview of the expression 'Act of the State'. If a Court or a judicial officer imposes restrictions on the right given by Article 19 of the Constitution, that would offend the provisions of Article 19 of the Constitution."

But we must point out that Raju, J. is right to this extent that though the discretion conferred on the Court in Section 12 is an unfettered discretion, the Court in exercising

[19] AIR 1953 Bom 242

[20] AIR 1964 Guj 215

that discretion must go into the reasonableness of the matter and examine whether the grant of the injunction would impose a reasonable restriction or an unreasonable restriction on the right of the employer to follow the occupation of his choice. That this inquiry is not only a relevant but also an obligatory inquiry is clearly laid down in the decision of the Supreme Court in AIR 1961 Supreme Court 1016 (supra) and if this requirement is borne in mind it is clear that the principle to which we have referred earlier. Namely, that a negative stipulation in a contract of personal service should be enforced by an injunction only if it is necessary to do so for the protection of the legitimate interests of the employer and is otherwise also in public-interest must necessarily be imported. That principle does no more than give effect to the requirement that in granting the injunction the Court should not impose an unreasonable restriction and that the restriction imposed must be reasonable restriction in the interest of the general public. If that principle is adopted by the Court as a guide to exercise its discretion in the mailer of grant of an injunction, the constitutional requirement would be satisfied and that is all the greater reason why that principle should be imported in the consideration of the question as to whether and how far in injunction should he granted.

14. Now applying this principle to the facts of the present case, it is evident that there is no material on record which would show how far the enforcement of the negative stipulation contained in the contract is necessary for the protection of the legitimate interests of the plaintiffs. The plaintiffs are carrying on business as Managing Agents of various textile mills while the defendant is a fresh graduate from the University. It is no doubt true that the defendant has had experience in the Engineering Department of one of the mills under the management of the plaintiffs for a short period but nothing has been shown on the affidavits as to how the plaintiffs would be prejudiced if the defendant is not restrained from serving any other employer. This application is only for an interim injunction and it may be that at the bearing of the suit the plain lift's may be able to lead evidence to show that it is necessary for the protection of the interests of the plaintiffs that the defendant should be restrained from serving in any other textile mill in the same capacity or even with any other employer but to-day there is no material before us which

would warrant the grant of an injunction even in at limited form. The test which we have formulated above is not satisfied and we cannot. Therefore, issue an injunction in any form against the defendant.

15. The result, therefore, is that the appeal fails and is dismissed with costs.
Appeal dismissed.