Introduction

In most instances, a joint venture emerges out of one or more commercial incentives for parties to come together and collaborate rather than 'go at it alone'. It could be on account of securing access to local expertise, sharing of otherwise scarce resources / technologies / know-how in a controlled environment, etc. In each environment, the joint venture would need the parties to not compete with the joint venture lest the joint venture loses its competitive edge. In fact, courts in India have gone on to hold in the context of a joint venture that "*there is equitable duty of a partner or other person not to compete with the business of the [JV] Partnership/Company*" (see *Novartis Vaccines & Diagnostics Inc* v *Aventis Pharma* Limited, order dated 18 December 2009, Bombay High Court in Arbitration Petition No. 763 of 2009).

It is helpful to have this sort of jurisprudence at hand in light of the core issue underlying Section 27 of the Indian Contract Act, 1872 which on the face of it makes all agreements in restraint of trade void. Courts (including the Supreme Court) and the Law Commission (see *199th Report of the Law Commission of India dated August 2006*) have all noted that this is not an absolute bar. While Indian law does not have the same level of flexibility as does English law which allows agreements in restraint of trade to the extent that they are "reasonable and necessary", arguably, agreements requiring parties to not compete during the term of the agreement may not be seen as agreements in restraint of trade altogether (see *Gujarat Bottling Co. Ltd v Coca Cola, (1995) 5 SCC 545*).

Nonetheless, actually enforcing such covenants has almost always been a little challenging and uncertain. A similar example can be seen in the recent judgment of the Delhi High Court in *Las Ground Force Private Limited v Goldair Handling SA, MANU/DE/8713/2024*.

Facts of the case

Both parties incorporated a company as a joint venture for ground handling operations at Bagdogra airport under a tender from the Airports Authority of India (AAI). In this context, they signed a shareholders' agreement as well. One clause of the shareholders' agreement is reproduced here which specified that until a party holds any equity shares in the company, and for a period of 3 years thereafter:

> "*it shall not directly or indirectly, or through its Affiliates, whether by themselves, or through, or together with, or on behalf of/for, or through any Person, solely or jointly participate (whether as a partner, shareholder, lender, principal, agent or consultant) in any business similar to the Business of the Company anywhere in India*".

There were some exceptions to this obligation, e.g., where the parties were conducting business together,

airports in India managed by private players (and not the AAI), where a party is otherwise eligible to bid on account of tender conditions, or where one party wishes to bid for a tender/contract and the other party refuses to participate. It appears that there were other collaboration and exclusivity agreements as well. Connected cases were also filed between the same parties for similar agreements in relation to the Udaipur airport, and dealt with under the same order.

The exclusivity agreements required the parties to inform each other of new opportunities in the business, to discuss with each other, and while parties were to share information with each other, a party was required to:

> "*not submit any such bid, proposals, offers, documents, clarifications or other commitments in relation to the Scope to any persons including Government authorities before securing the written consent of the Party*".

The respondents resisted the agreements based on their language, and also entered a prayer that the shareholders' agreement non-compete clause conflicted with Section 27 of the Indian Contract Act, 1872.

The facts in the judgment also make reference to several other reciprocal proceedings and other projects in respect of which the parties seem to have disputes. Nonetheless, we are confining ourselves to the above facts for the purposes of this update. The agreements had arbitration provisions, and the judgment was passed in proceedings under the arbitration law seeking an interim injunction restraining Goldair from bidding for other airports such as Ranchi and Vijaywada airports.

Judgment of the Delhi High Court

The High Court rejected the request for an injunction, and held that if the respondent is denied the right to participate in a tender, and ultimately, the eventual decision on merits in the arbitration proceedings is contrary, then irreparable loss will be caused to the restrained party, as it "would have been precluded from participating in the tender". However, if the arbitration eventually decides that the restriction was valid, the aggrieved party may be compensated by damages and rendition of accounts. Therefore, the test of balance of convenience and irreparable loss lies in favour of the respondent having allegedly breaching the non-compete provision.

On the specific facts, and multiple agreements, the High Court has also held that there was no *prima facie* case in favour of the petitioner. Nonetheless, that being a highly fact specific aspect needs separate deliberation.

Comments

In any dispute, interim relief would help prevent further harm or damage. Furthermore, while statistics show that dispute resolution timelines are improving in India, final relief in arbitral proceedings or court proceedings still continues to be far from quick and expeditious (and not to mention, expensive!). Surely, these factors should be considered while determining the balance of convenience (or the lack thereof).

If the approach advocated by the court is adopted, every alleged defaulter in a similar situation would be relatively easily able to demonstrate how it would lose out on a business opportunity 'unfairly' if restrained and how the allegedly aggrieved party could be made whole on account of damages or mesne profits (no matter how unrealistic or uneconomical pursuing such eventual relief may be). This could potentially make enforcement of most negative covenants through interim injunctions quite otiose. This therefore begs the question of whether this issue requires a serious re-look, and hopefully, this judgment would be looked at once again in appeal.

- *Sameer Sah (Partner) & Ahaan Dar (Associate)*

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