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Agreements in Restraint of Trade

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Freedom of trade and commerce is a fundamental right protected by the Constitution of India. Just as the Legislature cannot take away the individual freedom of trade, so also the individual cannot barter it away by agreement. Section 27, therefore, declares in plain terms that "every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent, void."

Madhub Chander v. Raj Coomar[1] is the first case in which the scope of the section came up for determination before the Calcutta High Court.

> The plaintiff and the defendant were rival shopkeepers in a locality in Calcutta. The defendant agreed to pay a sum of money to the plaintiff if he would close his business in that locality. The plaintiff accordingly did so, but the defendant refused to pay.

The plaintiff sued him for the money contending that the restraint in question was only partial as he was restrained from exercising his profession only in one locality and that such restraints had been upheld in English Law. Couch J., however, held the agreement void and laid down:

> "The words "restrained 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."[2]

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1. (1874) XIV Bengal Law Reports 76.
2. Ibid at p. 85.

His Lordship drew support from the use of the word "absolutely" in S.28 which deals with restraint of legal proceedings. As this word is absent from S.27, his Lordship concluded, that it was intended to prevent not merely a total restraint but also a partial one.[3]

This interpretation of the section has been generally accepted."The section has abolished the distinction between partial and total restraints of trade. Whether the restraint is general or partial, unqualified or qualified, if the agreement is in the nature of a restraint of trade, it is void."[4] Thus an agreement to close a mill for three months only in a year,[5] and an agreement that one partly would sell beef for fourteen days in a month and the other for the rest of the month,[6] have been held void.

In England the law relating to restraint of trade was elaborately laid down by the House of Lords in Nordenfelt v. Maxim Nordenfelt Gun Co.[7]

> The case invdved a sale of goodwill by an inventor and a manufacturer of guns and ammunition who agreed with the buyer company (i) not to practice the same trade for twenty five years, and (ii) not to engage in any business competing or liable to complete in any way with business for the time being carried on by the company. He afterwards entered into agreement with another manufacturer of guns and ammunition and the company brought an action to restrain him.

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3. See his Lordship's judgment at p.86, ibid.
4. Per Mookerjee and Candruff J.J. in Shaik Kalu v. Ram Saran Bhagat, (1909) 8 C.W.N. 388 at p. 391; 1 I.C. 94. Similar opinions have been expressed in Carew & Co. v. North Bengal Sugar Mills, (1951) 2 I.L.R. Cal. 386, 388-9.
5. Khemchand Manekchand v. Dayaldas Bassarmal, AIR 1942 Sind 114.
6. Mohammad v. Ona Md. Eorahim, A.I.R. 1922 Upper Burma 9. See also Harikrishna Pillai v. Authilachmy Ammal, A.I.R. 1916 Lower Burma 51.
7. (1894) A.C. 535.

It was held that the first part of the agreement was valid, being reasonably necessary for the protection of the purchaser's interest. But the rest of the convenant by which he was prohibited from competing with the company in any business that the company might carry on was held as unreasonable and, therefore, void. Lord Macnaghten stated:

> "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 trade ... may be justified by the special circumstances of a particular case. The only justification is thatthe restriction should be reasonable - reasonable in reference to the interests of the parties and reasonable in reference to the public interest. The restriction should be so framed and 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.[8]

Thus both in England and in India the general principle is the same, namely, that all restraints of trade, whether partial or total, are prima facie void.[9] the only difference is that in England

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8. Ibid. at p. 565.

9. See, for example, Chitty on Contracts (General Principles) 21st. edn. pp. 481-82, where the learned writer says that "all contracts in restraint of trade are prima facie void unless they are reasonable. For Indian authority see Pigot and Mcpherson J.J. In Nur Ali Dubash v. Abdul Ali, (1892) 19 I.L.R. Cal. 765,773, where the learned judges observe: "Section 27 of the Indian Contract Act does away with the distinction between partial and total restraints of trade."

a restriction will be valid if it is reasonable; in India it will be valid if it falls within any of the statutory or judicially created exceptions. To the extent to which these exceptions are nothing but an embodiment of the situations in which restraints have been found reasonable in England, the two laws are parallet and not "widerly dissimilar."[10] The English law may be a little more flexible as the word "reasonable" enables the courts to adapt it to changing conditions. But the Indian courts have not been rendered entirely sterile in the matter. Thus, for example, where it was necessary to do so. the High Court of Kutch regarded an agreement to monopolise the privilege of performing religious services in a village as being opposed to public policy and void under S.27,[11] though it may be doubted whether the words "profession, trade or business" as used in the section were intended to cover the religious services of a priest. On the other hand, the Allahabad High Court in Pothi Ram v. Islam Fatima[12] upheld as valid a restrictive convenant on the ground that the activity restrained was not in the nature of "profession, trade or business."

> Two landlords in the same neighbourhood, in order to avoid competition, agreed that "a market for sale of cattle shall not be held on the same day on the lands of both of them."

The High Court said: "It seems to us that a landlord who in return for market tolls or fees, allows a cattle market to be conducted on his land is not thereby exercising trade or business of selling cattle. He is only a landholder and an agreement on his part not to use the land on a certain day fr a certain purpose does not amount to restraint of "profession, trade or business."

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10. As was, for example, observed by Mookerjee and Carnduff J.J. in Shaikh Kalu v. Ram Saran Bhagat, (1909) 8 C.W.N. 388, 392. The learned judges said: "As a result of the decision of the House of Lords in the Nordenfelt case the rule as embodied in S.27 of the Indian Contract Act presents an almost a startling dissimilarity to the most modern phase of the English rule on the subject."
11. Rewashanker Shamji v. Velji, A.I.R. 1951 Kutch 56.
12. A.I.R.(1915) All 94.

The strange contract in these two cases is that while letting out land for commercial purposes is not a "profession, trade or business," the performance of religious services is.

The Madras High Court took the lead provided by the Allahabad High Court and came to the conclusion in a case before it that submitting tenders for the purpose of obtaining a cotract is not "a trade or calling."[13]

> A postal authority invited tenders for licence for carrying mails. The plaintiff, a bus owner, abstained from tendering on the promise of the defendant, another bus owner, to pay him a sum of money. The latter was thus given the exclusive opportunity to tender, but subsequently he refused to pay the money.

The Court said that tendering to obtain a contract is not in the nature of a trade or calling. The Court compared the case with an agreement between intending bidders and said that such an agreement was considered as being not opposed to public policy in a few previous cases.[14] Special stress was laid upon a decision of the Judicial Committee where it was held that a court sale by public auction does not become void if a person had deterred others from bidding.[15] But, it is submitted with respect, that the decision cannot be an authority for the proposition that the collusion agreement between the bidders is itself valid and enforceable. In the

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13. Md. Isack v. Daddapaneni, A.I.R. 1946 Mad.289.

14. The court relied upon the opinions expressed by the Bombay High Court in Hari Balkrishna v. Naro Mareshwar, (1893) I.L.R. 18 Bom. 342and by the Privy Council in Md. Mira v. Savvasi Vijya Raghunanda, I.L.R. 23 Mad. 227.

15. Ibid.

United States such agreement have been held illegal.[16] Tendering may not be a business by itself. But it is the opening to a business, a method of securing business. It is too much to say that if a business activity is restrained the agreement is void, but if the agreement restrains an activity by which business is secured, it is valid. Moreover, agreements of this kind, if allowed, would defeat the very purpose of inviting tenders and would leave many a public authority at the mercy of tenderers.

16. See Restatement of the Law of Contract Ch.18 p.1002, where the rule is thus stated; "A bargain not to bid at an auction, or any public competition for a sale of contract, having as its primary object to stifle competition, is illegal. Illustration (1) given in the Restatement is as follows: "A and B attending an auction of curios, make mutual promises by which each agrees to refrain from bidding for specified articles in order that the other may acquire them more cheaply. The agreement is illegal." Illustration (4) comes very near the facts of the Madras case: "A advertises for bids for the construction of a building. B, a contractor, promises $1,000 each to C and D if they will refrain from bidding. They do so. The bargains are illegal."