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India

Post-Termination Non-Compete Clause in an Employment Contract Does Not Raise Competition Law Issue

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A non-compete clause in an employment contract between an employee and a company does not contravene Sections 3 and 4 of the Competition Act, 2002 ("Act"), as recently clarified by the Competition Commission of India ("CCI").¹

Section 3 of the Act prohibits an enterprise, person or association of enterprises or persons from entering into agreements which cause an adverse effect on competition within India, while Section 4 prohibits an enterprise from abusing its dominant position in the market.

The present case concerned the enforceability of a contractual non-compete clause which restricted the employee from seeking employment with a competitor of the employer for a period of one year after termination of employment.

As per the Act, 'dominant position' means a position of strength enjoyed by an enterprise, in the relevant market, which enables it to operate independently of other competitive forces in the market and affect its competitors or consumers or the relevant market in its favour. The CCI, in examining whether a post-termination non-compete clause would amount to abuse of dominance under the Act, observed that the relevant dominant position enjoyed by the company is with respect to its competitors, not its employees, and that an employment contract has nothing to do with the market of the company.

The CCI further observed that an employee who enters into an employment contract restraining him from providing services to a competitor of the employer, post termination of his employment, negotiates his salary/pay package accordingly and takes into calculation even the period for which he would not be able to provide his expertise to competitors. The CCI therefore held that a clause in a service contract restricting an employee from taking employment with its competitors does not raise any competition issue.

Indian courts have previously refused to enforce post-termination non-compete clauses in employment contracts, viewing them as a 'restraint of trade' prohibited under Section 27 of the *Indian Contract Act, 1872* ("Contract Act").² The case before the CCI only concerned competition law issues and does not, therefore, impact upon the position under the Contract Act.

¹*Mr. Larry Lee Mccallister v. M/s. Pangea3 Legal Database Systems Pvt. Ltd. & Ors.*, Case No. 66 of 2013.

²*Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd* AIR 1967 SC 1098.

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