

(1998) 08 BOM CK 0068

In the Bombay High Court

Case No : Appeal From Order No. 56 of 1998

M/s. Sociedade de Fomento Industrial Ltd. and others

APPELLANT

Vs

Ravindranath Subraya Kamat and others

RESPONDENT

Date of Decision : 05-08-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 6 Rule 2
Companies Act, 1956 — Section 48
Contract Act, 1872 — Section 10, 27
Evidence Act, 1872 — Section 58
Specific Relief Act, 1963 — Section 15, 20

Citation : AIR 1999 Bom 158 : (1999) 4 BomCR 809 : (1999) 3 CivCC 255 :
(2000) 1 MhLj 148

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : M.S. Usgaonkar, S.A. and Ku. A. Razak, for the Appellant; U.S. Kolwalkar, for the Respondent

Judgement

R.M.S. Khandeparkar, J.—This is an appeal against order dated 25th June, 1998, passed in Civil Miscellaneous Application No. 62/98/II in Special Civil Suit No. 37/98/II by IInd Additional Civil Judge. Sr. Division at Margao. By the impugned Order, the trial Court has dismissed the application filed by the appellants for temporary injunction against the respondents.

2. The appellants have filed a suit seeking the relief of permanent injunction to restrain the respondents from conducting the business activities similar to those of the appellants and in breach of Clause 4 of the appointment letter dated 13th July, 1995, and further for direction to pay an amount of Rs. 10,00,000/- with interest as well as an amount of Rs. 1,46,686/- with interest and for damages to the tune of Rs. 10,00,000/- with interest. The appellants also filed an application for temporary injunction along with the suit. The appellants filed the said suit on 20th February, 1998. After service of the summons on the respondents, an application for better particulars was filed by the respondents 18th March, 1998,

which was replied to by the appellants on 27th March, 1998. On 2nd May, 1998, the respondents filed an application contending that they are unable to file any reply unless proper better particulars are furnished to them in terms of their application dated 18th March, 1998. The appellants thereupon, on 11th May, 1998, filed an application praying either for ex parte temporary injunction or for early hearing of the application for temporary injunction which the appellants had filed along with the plaint in the suit. On 18th May, 1998, the respondents filed their reply to the said application dated 11th May, 1998. The trial Court rejected the said application of the appellants on 21st May, 1998, which was subject-matter of the Revision Application No. 94/98 before this Court and by Order dated 27th May, 1998, this Court has directed the trial Court to dispose of the application for temporary injunction as well as the application for better particulars on or before 25th June, 1998. The respondents filed their reply on 8th June, 1998, to the main application for temporary injunction and the appellants filed their rejoinder on the same day. The matter was finally disposed of by trial Court by its impugned order dated 26th June, 1998.

3. The case of the appellant/plaintiffs in brief, is that the plaintiffs constitute a group of companies and are engaged in various business activities which include production and export of mineral ores, transportation of mineral ore through water and road, real estate and civil constructions, Beach R

"If this is not sorted out, there could be problems with I.T. Department if I take up the issue which I may have to do to protect the interest of my wife and son as they are I.T. payers".

According to the plaintiffs, the two letters were an indication of the fact that the defendant No. 1 had already breached the clauses of the said letter of appointment, namely, Clauses 4 and 5 thereof and the plaintiffs therefore had apprehension that the defendant No. 1 would not hesitate to commit breach of other clauses thence further also. The said correspondence was followed by further correspondence between the parties. Consequent to the said correspondence, certain enquiries were made by the plaintiffs which revealed that the defendant No. 1 had started real estate, land development and civil construction business under the name and style of M/s. Eclectic Homes Ltd., the defendant No. 5, which business was similar to that which was being carried out by the plaintiff No. 1's Company namely Fomento Engineering as also by plaintiff No. 11 namely Fomento Resorts and Hotels Pvt. Ltd. The enquiries further revealed that the defendant No. 1 had also started the business of sub-distributorship of two-wheeler, Kinetic Honda Scooters and its spare parts having show room of Kinetic Honda at Margao under the name and style of M/s. Noble Ventures Private Ltd., which business was similar to that was carried out by the plaintiff No. 2 Fomento-Corp., Margao and that the defendant No. 1 had also started the business of marketing soft drinks and aerated water under the name and style of M/s. Western Beverages and M/s. Western Beverages Pvt. Ltd. respectively and thereby had been competing with the business of the plaintiffs

Nos. 8, 9 and 10. It is the case of the plaintiffs that the aforesaid activities which are carried on in the name of various establishments, the said establishments are set up by the defendant No. 1, those activities are clearly in breach of the appointment letter, more particularly Clause 4 thereof. The defendant No. 1 is in fact together with defendants Nos. 2 and 3 carrying on the said activities in the name of those establishments and that the defendant Nos. 1, 2 and 3 are merely acting through the said Companies/establishments. It is further the case of the plaintiffs that there is a negative covenant in the said letter of appointment dated 13th July, 1995, to the effect that the defendant No. 1 shall not undertake directly or indirectly by himself or family members or any persons as defendants nominee/agent/assigns any activity competing with the business, trade, industries/interest of the plaintiffs Company and/or partnership or any other bodies of Fomento group including the Companies dealing with and/or connected with beverages (more particularly Coca Cola and Parle Companies) and that the same was inserted with a view not to permit the defendants Nos. 1, 2 and 3, either to have business competing with that of the plaintiffs. The contention of the plaintiff is that if the defendant No. 1 is permitted to directly or indirectly use the devices to have business similar to and competing with those of the plaintiffs, the whole purpose of the appointment and the Memorandum of Understanding would be defeated. The plaintiffs having complied with all their obligations in terms of the said appointment letter but the defendants have acted in contravention of Clause 4 of the said appointment letter dated 13th July, 1995. The plaintiffs are, therefore, entitled for injunctive relief against the defendants as prayed for.

4. On the other hand, it is the case of the respondents/defendants that the said appointment letter dated 13th July, 1995 was merely a camouflage and was not to be acted upon and this fact is clear from the conduct of the parties as well as from various correspondence between the parties, including the Memorandum of Understanding. It is their further case that although the defendant No. 1 was appointed as Advisor of the Group of Companies in terms of the said letter dated 13th July, 1995, it was only the plaintiff No. 9 who was regularly and continuously paying the monthly monetary compensation of Rs. 15,000/- to the defendant No. 1. It is their further case that the defendant No. 1 has not been paid all the benefits payable in terms of the said agreement and agreed upon in the Memoranda of Understanding dated 27th June, 1995, and has merely paid monthly compensation of Rs. 15,000/- only. It is their further contention that the defendant Nos. 4 to 7 are not set up by the defendant No. 1. They also deny that the defendant No. 1 is carrying along with the defendant Nos. 2 and 3 the activities of the establishments and Companies through the defendant Nos. 4 to 7. They further deny that the activities carried out by the defendant Nos. 4 to 7 are in breach of the said appointment letter dated 13th July, 1995. The defendant No. 2 has further contended that the sum of Rs. 10,00,000/- given by the plaintiffs to the defendants was towards the guarantee for regular payment of compensation and other benefits to the defendant No. 1 for every month.

However, there has been rank failure and neglect on the part of the plaintiffs to comply with the said agreement as regards the said benefits to the defendants. The defendants have also raised the plea of laches on the part of the plaintiffs in approaching the Court, which according to the defendants, is apparent on the face of the plaint itself and also the plea of acquiescence with regard to the business carried out by the defendants.

5. The trial Court by the impugned order dismissed the application for the temporary injunction filed by the plaintiff, firstly on the ground that the Memorandum of Understanding entered into between the parties was not executed in terms of section 48 of the Companies Act. Secondly, there has been no privity of contract between the plaintiffs and the defendants. Thirdly, the letter of appointment cannot be said to be a deed between the plaintiff No. 1 company and the defendant No. 1 and that, therefore, the negative covenant is not enforceable by the parties to the suit; fourthly that the negative covenant in Clause 4 of the letter of the appointment is in restraint of trade and therefore not enforceable; Fifthly, that there is no legal entity under the name and style called Fomento Group. Lastly, that the plaintiffs have failed to show that the defendant Nos. 4 to 7 are competing with the business of the plaintiffs.

6. While assailing the impugned order, Shri M.S. Usgaonkar, the learned Senior Counsel appearing for the plaintiffs, submitted that the reference to section 48 of the Companies Act as well as the judgment relied upon by the trial Court in *G. Subha Rao v. M/s. Rasmi Die-Casting Ltd*, AIR 1998 A.P. 95 is totally out of context and irrelevant for the decision in the matter. Section 48 provides that "a Company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney to execute deeds on its behalf in any place either in or outside India and a deed signed by such an attorney on behalf of the Company and under his seal where sealing is required, shall bind the Company and have the same effect as if it were under its common seal. Indeed, as rightly submitted by the learned Counsel for the appellants, I fail to understand as to how section 48 of the Companies Act can be imported in the matter in issue. Section 48 will come into play when somebody wants to enforce the obligations arising under the contract against Company and when Company denies or disputes the execution of agreement or contract under which the obligation arises in favour of the third person by the Company. That is not the case in the instant matter and here it is the Company itself, as rightly contended by the appellants, that is seeking to enforce the Clause 4 of the letter of appointment. Being so, reference to section 48, is totally out of question. So also, the reliance on the judgment in the matter of *G. Subha Rao v. M/s. Rashmi Die-Castings Ltd*, AIR 1998 A.P. 95 (supra) is also out of context and is not at all applicable to the facts of this case. Being so, the finding of the trial Court that the Memo of Understanding is not executed by the plaintiffs Companies nor by the defendants companies and therefore cannot be acted upon, cannot be sustained and is liable to be set aside.

7. As regards the absence of privity of contract and finding in respect thereof, it is to be seen that in the instant case the plaintiff is seeking the relief basically against the respondent No. 1 in terms of Clause 4 in appointment letter dated 13th July, 1995. What is sought to be restrained by the relief of injunction in the instant case by the plaintiffs are the activities of the defendant No. 1 in violation of the conditions imposed under Clause 4 of the letter of appointment dated 13th July, 1995. It is the case of the plaintiffs that the defendant No. 1 along with his family members were sought to be benefited under the Memorandum of Understanding dated 27th June, 1995 and 30th June, 1995 and pursuant thereto the letter of appointment dated 13th July, 1995, was issued and the benefits thereunder were to ensure on all defendants and since the activities of the defendants Nos. 4 to 7 are initiated and actually carried out by the defendant Nos. 1 to 3 and at the instance of defendant No. 1, the question of privity of contract between the plaintiff No. 1 and defendants does not arise as such for the purpose of decision in the matter, the relief sought being pertaining to the performance of the negative covenant in the letter dated 13th July, 1995, which is in the form of an agreement arrived at between the plaintiff and the defendant No. 1 assuring various benefits to the defendants Nos. 1 to 3 including the grant of loan of Rs. 10,00,000/- in the name of the defendant No. 4. Viewed from this angle, the learned Advocate for the appellant justified in contending that the trial Court erred in dismissing the application on the ground that there was no privity of contract between the parties.

8. The finding of the trial Court that the letter of appointment cannot be said to be a deed between the plaintiff company and the defendant No. 1 because it has been signed by Prashant Timblo and no document is produced to show that the signatory of the said letter had authority on behalf of the plaintiffs Company to sign the said letter and that therefore, the plaintiffs are not entitled to enforce a negative covenant against the defendant No. 1 cannot also be sustained in view of the fact that the defendant No. 1 himself by his letter dated 20th February, 1996, and subsequent correspondence has in terms admitted that the understanding arrived at by the defendant No. 1 on one hand and Shri Avdhut Timblo and Prashant Timblo on the other hand in the form of Memorandum of Understanding dated 27th June, 1995 and 30th June, 1995 was by way of overall final settlement of various dues to the defendant No. 1 and based on reciprocal gesture on his part to surrender major part of shares in M/s. Beverage Ventures (P) Ltd. and Beverage Ventures by his wife and son as well as the provision of Rs. 10,00,000/- by way of loan to the defendant No. 4. From the said correspondence it is apparent that the understanding arrived at between the defendant No. 1 on one hand and Avdhut Timblo and Prashant Timblo on the other hand, on 27th June as well as on 30th June, 1995, was in the form of overall final settlement between the plaintiffs companies and the defendants Nos. 1, 2 and 3 on the other hand. The correspondence also disclose that the letter of appointment dated 13th July, 1995, was in consequence and as a result of the said understanding and the settlement arrived at between the parties. Besides,

the defendants have been accepting the monthly compensation of Rs. 15,000/- apart from receipt of loan of Rs. 10,00,000/- from the defendant No. 4. Being so, it is too late in the day for the defendants to contend that the letter dated 13th July, 1995 was not issued under the authority of the plaintiff's Companies or that on that count to contend that the negative covenant in Clause 4 cannot be binding and not enforceable against the defendants Nos. 1 to 3 and for the same reason the said finding of the trial Court cannot be sustained.

9. The trial Court has also held that Clause 4 in letter dated 13th July, 1995, which is a negative covenant is in the form of restraint on trade and, therefore, is not enforceable by virtue of section 27 of the Indian Contract Act. There is no doubt that Clause 4 explicitly provides that the defendant No. 1 shall not undertake directly or indirectly by himself or his family members or any person as his nominee, agent, assign, any activity competing with the business, trade, industry, interests of the Companies and/or partnerships and/or any other corporate body or otherwise of Fomento Group of Companies including Companies dealing with and/or connected with Beverages (more particularly Coca Cola and Parle Companies). The clause thus clearly prohibits the defendant No. 1 from competing in the business activities with the plaintiffs company. However, it is submitted by the learned Counsel for the appellants that such a restraint would be restricted for a period up to 7th September, 1998, in view of the fact that the said restraint would be effective during the period of the appointment of the defendant No. 1 as the Advisor for the Fomento Group of Companies on the payment of Rs. 15,000/- per month and other benefits as per the said letter of appointment dated 13th July, 1995. In this connection, the learned Advocate for the appellants has referred to the judgment of the Apex Court in the matter of M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, and has submitted that in view of the law laid down by the Apex Court in this respect, the stipulation for restraint being restricted for the period of the agreement between the parties, the same would not be hit by section 27 of the Indian Contract Act. The said agreement is sought to be countered by the learned Advocate for the respondents submitting that irrespective of the fact whether it is for a particular period or not the very fact that the restraint is in the nature of total ban on the business activities of the respondent No. 1, it will certainly amount to a restraint which is hit by section 27 of the Contract Act. Besides, according to the learned Advocate, it is nowhere pleaded in the plaint or in the application that the said restraint would be valid for a period of the agreement and the contention that the restraint will only be for a period up to 7th September, 1998, has come for the first time in the course of arguments.

10. The Clause 4 of letter dated 13th July, 1995, as already stated above specifically provides for certain restraint upon activities of the defendant/respondent No. 1 which may amount to competing with the business of the plaintiffs Company. Indeed, the learned Advocate for the respondents is justified in making a grievance that the plaintiff who now wants to contend that such

restraint would be effective only during the period of subsistence of agreement has conveniently avoided to make any categorical statement in writing to that effect either in the plaint or in the application for temporary injunction filed in the Court. However, at the same time we cannot ignore the other contents of the letter dated 13th July, 1995, which clearly says that the period of appointment of the respondent No. 1 would be valid up to 7th September, 1998, and he would be paid retainership of Rs. 15,000/-per month and till the time of his appointment he would be entitled to certain facilities. The very first paragraph of the letter also discloses that the appointment of retainership is made on certain terms as enumerated in the said letter. The letter also refers to the Memorandum of Understanding dated 30th June, 1995. Bearing this in mind and the categorical statement made by the learned Advocate on behalf of the appellants as regards the fact that such a restraint would be effective only during the period of subsistence of agreement, we will have to proceed on the basis that the restraint under Clause 4 could be effective only during the period of subsistence of the agreement, i.e. up to 7th September, 1998. Being so, considering the decision of the Apex Court in the matter of M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, such a restraint during the period of subsistence of agreement cannot be void u/s 27 of the Contract Act. In this regard, the observations made by the Apex Court while quoting an extract from the case of Esso Petroleum Co. Ltd. v. Harper's Garage, (Stourport) 1968 A.C. 269 read thus :--

"The underlying principle governing contracts in restraint of trade is the same and as a matter of fact the Courts take a more restricted and less favourable view in respect of a covenant entered into between an employer and an employee as compared to a covenant between a vendor and a purchaser or partnership agreements. We may refer to the following observations of Lord Pearce in Esso Petroleum 1968 A.C. 269 (supra) :

"When a contract only ties the parties during the continuance of the contract, and the negative ties are incidental and normal to the positive commercial arrangements at which the contract aims, even though those ties exclude all dealings with others, there is no restraint of trade within the meaning of the doctrine and no question of reasonableness arises...."

Since the negative stipulation in paragraph 14 of the 1993 Agreement is confined in its application to the period of subsistence of the agreement and the restriction imposed therein is operative only during the period the 1993 Agreement is subsisting the said stipulation cannot be held to be in restraint of trade so as to attract the bar of section 27 of the Contract Act."

Applying the law laid down by the Apex Court to the facts of this case, the restraint being only for the period during the subsistence of the agreement between the parties, it cannot be said that it is void u/s 27 of the Contract Act and, therefore, the finding of the trial Court that Clause 4 of the letter dated 30th July, 1995, is a restraint on trade and, therefore, not enforceable cannot be

sustained and is liable to be set aside.

11. The trial Court has held that there is no legal entity under the Companies Act called Fomento Group. I fail to understand as to what was the occasion for the trial Court to arrive at such a finding at all. It was nobody's case that there is any Company called Fomento Group. The term "Fomento Group" was used by the appellants only to denote the plaintiffs Group of Companies. That by itself cannot be in any manner disadvantageous to the appellants in establishing the dealings between the plaintiffs company and the defendants.

12. The last finding of the trial Court for rejecting the relief of temporary injunction to the plaintiffs is that the plaintiffs have failed to establish that the defendants Nos. 4 to 7 are competing with the plaintiffs. There is no doubt that the plaintiffs had approached the Court with the sole grievance that by the various activities which are being carried out by the establishments, namely, defendants No. 4 to 7 stated to have been set up by the defendant No. 1 are in breach of Clause 4 of the appointment letter dated 13th July, 1995, inasmuch as the defendants No. 1 to 3 are carrying on the said activities in all those establishments similar to the activities carried out by the plaintiffs Companies and are competing with the plaintiffs. At this stage it would be worthwhile to reproduce the letter of appointment dated 13th July, 1995, which reads thus :--

"13th July, 1995.

Mr. R.S. Kamat Mahalsa Krupa Near Electricity Office Aquem Margao, Goa 403601

Dear Sir,

As per the Memorandum of Understanding 11 dated 30-6-1995, we hereby appoint you as Advisor of the Fomento Group of Companies including Goa Bottling Co. Pvt. Ltd., Nectar Beverages Pvt. Ltd., Beverage Ventures Pvt. Ltd., Sociedade de Fomento Industrial Ltd., Fomento Resorts and Hotels Ltd., on the following terms and conditions :

1. Your appointment is valid for a period up to 7-9-1998.
2. You shall be paid a retainership fee of Rs. 15,000/- per month.
3. Till the term of this appointment, you shall be entitled to the following :

(a) Mediclaim

(b) Accident Insurance Policy

(c) Company Telephone, subject to respective calls paid by the respective companies for whose work such calls are utilised.

(d) Company will provide one car along with driver (or Rs. 1,500/- per month as the salary of the driver), for use of Company's work and the petrol will be supplied by the Company and the maintenance also shall be taken care of by the Company. Maximum of 100 litres petrol per month for which bill will be produced

by you to the Company.

(e) Security at the residence at night.

4. This appointment is explicitly on the condition and agreement by you with us that you shall not undertake directly or indirectly by yourself, your family members and/or any person as your nominee/ agents/assigns, any activity competing with the business trade/ industries/interests of the companies and/or partnerships and/ or any other corporate body or otherwise of Fomento Group of Companies including the companies dealing with and/or connected with Beverages (more particularly Coca Cola and Parle Companies).

5. You shall maintain strict confidentiality of all the business, trade secrets, practices, actions, policies and other matters past, present and future connected with and/or related to the Companies, partnership and other corporate bodies or otherwise in the Fomento Group.

6. You shall be available whenever required to all the existing and future Companies partnerships and other corporate bodies or otherwise in the Fomento Group.

7. You shall operate from your present residence until such time, if any, the management decides to provide you with an office. In which case you will be required to attend this office.

In acceptance of the above, please sign and return the duplicate hereof.

Sincerely Yours Sd/- (PRASHANT TIMBLO) For and on behalf of Fomento Group of Companies"

13. On a plain reading of the said Clause 4, it is clear that by the said clause the defendant is sought to be restrained from doing any activity competing with the business carried out by the plaintiff's company. The terminology used in the said clause ex facie discloses that the restraint spoken of is in relation to competition with the plaintiffs Companies. "To compete" is to strive for superiority over another or for doing something or to enter into rivalry. "To strive" is to be in the state of variance or mutual hostility and it implies involvement of conflict with somebody. "Rivalry" implies an act of rebellion or competition. The dictionary meaning of the term "rivalry" is to enter into competition or outdo another in some respect. The term "similar" is different from the term "competition". "Similar" would mean having marked resemblance or likeness. It would not involve rivalry or an act of involvement leading to conflict with somebody. Being so, considering the terminology used in Clause 4, it is abundantly clear that Clause 4 of the letter of appointment dated 13th July 1995, prohibits the respondent No. 1 from undertaking any business activity competing with the business of the plaintiffs Companies. A plain reading of the pleadings in the plaint, which forms the basis of the claim for the temporary injunction, discloses that the main grievance of the plaintiffs Companies is that the defendants have started the business of the nature similar to the business carried out by the

plaintiffs Companies. In this regard, the statements in paras 30, 31, 32, 33 and 34 disclose that the plaintiff has a grievance against the defendants basically for starting the business of similar nature to that of the plaintiffs. Paragraph 30 of the plaint disclose that the plaintiffs on enquiry found that the defendant No. 1 had started the business of real estate and construction activities through the defendant No. 5, which is similar to the business of the plaintiffs Nos. 5 and 11; that the defendant No. 1 had also started the business of sub-distributorship of two-wheeler Kinetic Honda Scooters through the defendant No. 6, which business is similar to the one carried by the plaintiff No. 12 and that the defendant No. 1 had started business of marketing soft drinks and aerated waters through the defendants Nos. 4 and 7, which is similar to the business of plaintiffs Nos. 8, 9 and 10. In para 31 it has been specified that the plaintiff No. 5 had been carrying on the business of real estate and construction. The plaintiff No. 11 had been carrying on the business of beach resorts and land development. The plaintiff No. 12 had been carrying on the business of distributorship of two-wheelers and the plaintiffs Nos. 8, 9 and 10 are engaged in the business of bottling, marketing and distribution of soft drinks and aerated waters. In para 32, the allegation is that though all these activities are carried out through defendants Nos. 4 to 7, in fact they are carried out by defendants Nos. 1 to 3. Para 33 speaks about the restraint provided under negative covenant in Clause 4 and other benefits available to the defendant No. 1 under letter of appointment dated 13th July, 1995, and the argumentative submission that if the defendant No. 1 is permitted to directly or indirectly compete with the plaintiffs then the whole purpose of appointment letter and memorandum of understanding could be defeated. Para 34 said that the business carried out by the defendants is in competition with the business of the plaintiffs Company. At this state, it is pertinent to note that apart from the pleadings in paras Nos. 30 to 34, there is no other material placed on record to show that there is any act of competition in the business with the plaintiffs Company by the defendant No. 1. The learned Advocate for the appellants drawing my attention to the pleadings contained in paras (sic) and 34 did try to submit that the allegations pertaining to the competition by the defendant No. 1 in business with the plaintiffs have been clearly stated in those paragraphs and the defendants have not joined issue on these allegations and, therefore the trial Court has erred in holding that the plaintiffs have failed to show that the defendants Nos. 4 and 5 are competing with the plaintiffs. It is the contention of the learned Advocate for the appellants that in the absence of specific denial on the part of the defendants/respondents regarding the categorical averment by the plaintiffs/appellants regarding the business of the defendants being in competition with the business of the plaintiffs, the plaintiffs are not required to produce any further proof regarding such competition in business by the defendants. It is the case of the appellants that in the absence of denial on the part of the defendants of the case put forth by them, the appellants are not required to prove the same by adducing any further proof and the statement itself on the part of the appellants should be deemed to have been admitted by the respondents and in view of the fact that there is no issue raised

as such before the Court as to whether the respondents have started the business in competition with the business of the plaintiffs, there was no need for the plaintiff to adduce any evidence regarding the competition in business by the defendants.

14. While appreciating the above referred contentions of the appellants, one cannot forget that this is a matter pertaining to equitable relief being sought by the appellants. No amount of weakness on the part of defence case can enure to benefit of the plaintiffs to obtain the equitable reliefs. It is the duty of the plaintiffs seeking the assistance of the Court for equitable relief, to disclose all the facts which can entitle the plaintiffs to justify the grant of the relief asked for. Once it is not disputed that Clause 4 clearly provides that what is sought to be restrained is the competition by the defendant No. 1 with the business of the plaintiff's company and the grievance of the plaintiff is that there is a violation or breach of the defendant No. 1 of Clause 4 in that regard it is primarily for the appellant company to plead and prima facie establish that there is violation by the defendant No. 1 in respect of Clause 4 inasmuch as there has been a business by the defendant No. 1 in competition with the business of the plaintiffs. As already seen above, merely because the defendants have started similar business it cannot be said that the same amounts to competition with the business of the plaintiffs companies. It cannot be said that similar businesses will always amount to competing with each other. Whether one party is competing with another in similar business is a matter of fact and is to be established by producing sufficient material to establish such fact. In order to establish such fact, there must be pleadings on record. Competition will certainly involve doing something with the intention or purpose of gaining upper hand on someone else. Such an act can be done in different ways and methods. Each of such methods can constitute a bundle of facts giving rise to a cause of action to somebody who is aggrieved by the act of competition. But in order to succeed in such suit, it is necessary to plead and prove all such facts which constituted the act of competition. Mere allegation that similar business started by the defendants amounts to competition with the business of the plaintiff's company cannot amount to a statement of fact pertaining to the competition. It would be rather a submission on the part of the plaintiff. For example, in the case of claim of adverse possession it is not just sufficient to state that the plaintiff is in peaceful possession of the land for over 12 years. It is necessary to state when it became adverse, nature of possession, the fact of the possession being to the knowledge of the owner, etc. Similarly, it is not sufficient to merely allege that the defendants have entered into competition with the plaintiffs by starting similar business. It is necessary to disclose the facts which constitute the competition with the business of the plaintiffs by the defendants. This will include not only the nature of the business started by the defendants but also the different methods those may be adopted by the defendants for the purpose of competition with the plaintiffs in the similar business.

15. The contention of the learned advocate for the appellants that the averments

in that regard are already found in the plaint and that the same were never sought to be disputed by the defendants cannot be accepted. The defendants and, particularly the defendant No. 1, in his affidavit-in-reply has clearly stated that the activities carried out by the defendants Nos. 4 to 7 are not in breach of the said appointment letter dated 13th July, 1995. The defendants have further disclosed that the annual turnover of the defendant No. 5 for the last 2 years is around Rs. 60,00,000/- and that the defendant No. 6 is having monthly turnover of Rs. 6,00,000/-. That the defendant No. 7 has purchased land at Cuncolim, Salcete, Goa, and has started manufacturing soft drinks, aerated waters, mineral water under various brand names such as Crush, Sport, Cola, etc. and they are employing 60 staff members in their factory besides 15 distributors in the States of Goa, Maharashtra and Karnataka and are having annual turnover of about Rs. 3 crores. All the defendants have unequivocally made grievance about non-disclosure of annual turnover and the profit earned by the plaintiff's Companies during the relevant period or regarding any loss sustained by them on account of the business of the defendants. These clear averments on the part of the defendants in their reply disclose that the defendants have on their part sufficiently sought to dispute the allegations on the part of the plaintiffs regarding the competition in business by the defendants with the plaintiffs.

16. The contention of the appellants that the averments, particularly in paras 30, 33 and 34 are sufficiently disclosing the facts regarding competition is devoid of substance. In para 30, the averments relating to competition read thus :--

"The business is similar to that carried on by the plaintiff No. 8 M/s. Nectar Beverages Pvt. Ltd., plaintiff No. 9 M/s Goa Bottling Co. Pvt. Ltd. and plaintiff No. 10 M/s. Beverage Ventures Pvt. Ltd. and is competing with the business of the plaintiffs Nos. 8, 9 and 10."

In para 33. the averments relating to competition read thus :---

"If the defendant No. 1 was permitted to directly or indirectly use the devices to have business similar and competing with that of the plaintiff, the whole purpose of the appointment and the Memorandum of Understanding would have been defeated."

The averment in that regard in para 34 reads thus :---

"It is exceedingly clear from the facts narrated above that after the appointment letter within a few days M/s. Noble Ventures Pvt. Ltd. defendant No. 6 was formed and it started the business of two-wheelers and spare parts competing with the business of plaintiff No. 12.....The clear conclusion is that the defendants Nos. 1, 2 and 3, through the other defendants are just doing the business competing with that of the plaintiffs."

None of these averments can be said to be statements of facts regarding the competition in business by the defendants with the plaintiffs. All these averments are mere submissions or conclusions sought to be arrived at by the plaintiffs

from the fact that the defendants had started business of the nature similar to the business carried out by the plaintiffs. As already stated above, merely because the defendants have started the business of the nature similar to the one carried out by the plaintiffs that by itself cannot be considered as amounting to competition in business by the defendants with the plaintiffs. The competition, as already observed above, will involve doing something by the defendants with the intention of gaining advantage over the plaintiffs in the similar business carried out by the defendants. None of the facts which can disclose any such advantage availed of by the defendants or any disadvantage suffered by the plaintiffs have been disclosed by the plaintiffs. In the absence of such pleadings and prima facie proof, there cannot be said any prima facie case having been made out by the plaintiffs in support of their grievance regarding breach of Clause 4 by defendant No. 1.

17. The learned Advocate for the appellants did try to submit that the establishments in the form of the defendants No. 4 to 7 are in fact, the activities by the defendant No. 1 in breach of Clause 4 of the appointment letter dated 13th July, 1995 and to ascertain the same it is not sufficient merely to refer to the pleadings and the material placed on record but considering the fact that the activities are being carried out under the corporate veil it is necessary to lift the veil and to find out the relationship between the defendants Nos. 1 to 3 and other defendants and in that regard he sought to place reliance on Delhi Development Authority Vs. Skipper Construction Company (P) Ltd. and another, . Drawing my attention to para 22 onwards he submitted that when the conception of corporate entity is employed to defraud creditors, or to evade an existing obligation, the courts will draw aside the web of entity, and will regard the corporate company as an association of live, up-and-doing, men and women share-holders, and will do justice between real persons as is observed by Professor L. Maurice in "Piercing the veil of corporate entity" which is quoted by the Apex Court in its judgment. There can be no doubt that the law regarding the lifting of veil in case of an attempt to defraud the creditors or to evade the existing obligation by the corporate entity, the courts are not handicapped and are fully entitled to lift the veil to find out the truth and to ensure justice to the aggrieved persons. The fact remains that in the instant case basically the appellants have not been able to make out a prima facie case regarding the breach of Clause 4 of the letter of appointment dated 13th July, 1995.

18. The contention of the learned Advocate for the appellants that it has been nobody's case that commencement of similar business by the defendants does not amount to competition within the meaning of the said term in Clause 4 of letter of appointment dated 13th July, 1995, cannot be accepted. As already observed above, the plaintiffs themselves have not clearly disclosed the facts constituting competition by the defendants with the business of the plaintiffs. In the absence of the plaintiffs disclosing the material facts regarding the alleged competition which was even otherwise required under Order 6, Rule 2, C.P.C., the plaintiffs are not entitled to make grievance about any absence of defence on

the point that similarity of business would not amount to competition within the meaning of the said term under Clause 4. It was primarily for the plaintiff to plead facts relating to the competition and then only he could have made a grievance about the absence of issue being raised in that regard by the defendants. Nevertheless, the facts disclosed in the affidavits-in-reply by the respondents prima facie show that the defendants did raise the issue regarding the absence of competition by the defendants with the plaintiffs' business. As already stated above, the defendants in that affidavit-in-reply have made a categorical statement that the activities carried by the defendants are not in breach with the agreement contained in Clause 4 of the letter of appointment dated 13th July, 1995. Being so, though it is difficult to agree with the reasoning of the trial Court for arriving at the finding that the plaintiffs have failed to show that the defendants No. 4 to 7 are competing with the plaintiffs, no fault can be found with the ultimate finding arrived at by the trial Court in that regard. The materials on record certainly do not establish prima facie case by the plaintiffs as regards the competition by the defendants with the plaintiffs in their business so as to say that the defendants have violated Clause 4 of letter of appointment dated 13th July, 1995.

19. As regards the balance of convenience and the point relating to irreparable loss, considering the fact that the appellants have not been able to establish prima facie case, strictly it may not be necessary to address on those points. Nevertheless, the fact remains that the plaint itself discloses that the defendants have been carrying on similar business to the knowledge of the appellants since February, 1996. This is apparent from the averments in para 14 of the plaint. In para 45 of the plaint it is stated that the cause of action for filing the suit arose in September, 1996, and on subsequent dates upon discovery of new facts and the same is recurring. The suit is admittedly filed in February, 1998. The complaint is that the defendants are carrying on business activities similar to those of plaintiffs. The relief of injunction sought for is admittedly to expire on 7th September, 1998. Being so, one can hardly say there is anything on record which can disclose the balance of convenience in favour of the plaintiffs. As regards the irreparable loss, the appellants have absolutely not brought on record anything in that regard.

20. The respondents did try to raise issue regarding laches and acquiescence. As regards laches, it has been already dealt with herein above while dealing with the point of balance of convenience. Moreover, as regards acquiescence it is not required to be considered bearing in mind the fact that the appellants have not been able to establish anything regarding the relief prayed for by them.

21. In the result, therefore, the Appeal fails and is accordingly hereby dismissed with no order as to costs.

22. Appeal dismissed.