
(2003) 12 BOM CK 0009
In the Bombay High Court
Case No : Appeal No. 1109 of 2003

Zaheer Khan

APPELLANT

Vs

Percept D" Mark (India) Private Limited and Another

RESPONDENT

Date of Decision : 19-12-2003

Acts Referred:

Contract Act, 1872 — Section 27
Specific Relief Act, 1963 — Section 42

Citation : AIR 2004 Bom 362 : (2004) 2 ALLMR 369 : (2004) 4 BC 181 : (2006) 3 ComplJ 253

Hon'ble Judges : R.M. Lodha, J;A.V. Mohta, J

Bench : Division Bench

Advocate : I.M. Chagla and C.U. Singh and Soma Singh, instructed by Thakore Jariwala and Associates, for the Appellant; G.E. Vahanwati and R.M. Kadam and V.C. Khatri, instructed by DESK Legal for Respondent No. 1, Janak Dwarkadas and Z. Andhyarujina, instructed by Atul Damle, for the Respondent

Judgement

R.M. Lodha, J.—These two appeals were heard finally at the stage of admission by the consent of the learned Advocate General and the learned senior counsel appearing for the parties and as both the appeals arise out of common judgment dated 10th December, 2003 passed by the learned single Judge, we are disposing of these appeals by this common order.

2. We may also notice at the outset that though by the impugned order the learned Judge has granted an ad-interim relief in the arbitration petition filed u/s 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act of 1996"), when the matter came up before us on 17th December 2003, the learned Advocate General and the learned senior counsel appearing for the parties agreed that by the impugned order the arbitration petition itself may be deemed to have been finally disposed of. In our order dated 17th December we also noted the statement of the learned senior counsel for the appellant in appeal No. 1109/2003 that the appellant did not intend to file any reply affidavit to the arbitration petition filed by the first respondent and that the appeal may be

heard finally on the basis of the pleadings set out in the arbitration petition.

3. Having heard the learned senior counsel and the learned Advocate General at quite some length, in our considered view the matter turns on a short question. The question is whether the covenant in Clause 31(b) of the agreement dated 1-11-2003, after the completion of the contract, is in the restraint of trade and, therefore, void u/s 27 of the Contract Act, 1872. Clause 31 of the agreement provides thus :

"31. NEGOTIATION AND RIGHTS OF FIRST REFUSAL:

(a) NEGOTIATION :-- During the third contract year, and in any event not later than August 1st, 2003 the parties shall meet to commence discussions with a view to the extension of their relationship beyond the Term. For sixty (60) days thereafter, Zaheer Khan, agrees to negotiate in good faith only with Percept, and not with any third party, concerning the right after the Term to the use of his endorsement or for the arrangement contemplated by this Agreement in association with any goods or services. Only after such hundred and eighty (180) day period from the date of the last assignment, Zaheer Khan shall have the right to negotiate with other persons, subject however to Sub-clause (b).

(b) FIRST REFUSAL :-- During the Term of the Agreement, prior to completion of the first negotiation period provided for in Sub-clause (a) above, Zaheer Khan agrees not to accept any offer for his endorsement, promotion, advertising, or other affiliation with regard to any products or services. Thereafter, Zaheer Khan agrees not to accept any offer for his endorsement, promotion, advertising, or other affiliation with regard to any goods or services or for arrangement similar to the transaction hereunder without first providing percept with written notice of such offer and all the material terms and conditions thereof and offering Percept the right to match the third party offer Percept shall thereafter have the right, exercisable by written notice to Zaheer Khan within ten (10) days of receipt, to accept Zaheer Khan's offer on the same terms and conditions offered by such third party. If Percept does not accept Zaheer Khan's offer, Zaheer Khan shall thereafter have the right to enter into an agreement with such third party."

4. The statutory provision pertaining to agreement in restraint of trade as contained in Section 27 of the Contract Act reads thus:

27. Agreement in restraint of trade void.--

Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception -- Saving of agreement not to carry on business of which goodwill is sold. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

5. As to what constitutes restraint of trade has come up for judicial consideration from time to time. We do not deem it necessary to deal with all the authorities cited before us in this regard as in our view the three judgments of the Apex Court adequately deal with this aspect and the reference to these three judgments of the Apex Court shall suffice without multiplying authorities.

6. In *Niranjan Shankar Golikari Vs. The Century Spinning and Mfg. Co. Ltd.*, , the Apex Court considered large number of judgments inter alia *Brahmaputra Tea Co. Ltd. v. Searth* ILR (1885) Cal 545; *Madras Railway Co. v. Rust* ILR (1891) Mad 18; *William Robinson and Co. Ltd. v. Heuer* 1898 2 Ch. 451; *Ehrman v. Bartholomew* 1898 1 Ch. 671; *Underwood and Son Ltd. v. Barker* 1899 1 Ch 300; *Charles Worth v. Mac Donald* ILR (1899) Bom 103; *Subba Naidu v. Haji Badsha Sahib* ILR (1903) Mad 168; *Pragji v. Pranjiwan* (1903) 5 Bom LR 787; *Burn & Co. Ltd. v. Colin Mac Donald* ILR (1909) Cal 354; *A. G. of Commonwealth of Australia v. Adelaide Steamship Co. Ltd.* (1913) AC 781; *Mason v. Provident Clothing and Supply Co. Ltd.* (1913) AC 724; *Herbert Morris Ltd. v. Saxelby* (1916) 1 AC 688; *Attwood v. Lamont* (1920) 3 KB 571; *Fitch v. Dewes* (1921) 2 AC 158; *W. H. Milsted and Son Ltd., v. Hamp and Ross and Glendinning Ltd.* (1927) WN 233; *Gaumont British Picture Corporation Ltd. v. Alexander.* (1936) 2 All ER 1686; *Warner Brothers Pictures v. Nelson* (1937) 1 KB 209; *V.N. Deshpande Vs. Arvind Mills Co. Ltd.,* ; *Kores Manufacturing Co. Ltd. v. Kolok Manufacturing Co. Ltd.* (1959) Ch. 108; *Shree Gopal Paper Mills Ltd. Vs. Surendra K. Ganeshdas Malhotra,* ; *Commercial Plastics v. Vincent* (1964) 3 All ER 546 and *Lalbhai Dalpatbhai and Co. Vs. Chittaranjan Chandulal Pandya,* . The Apex Court also noticed the law on restraint of trade as summarised in Halsbury's Laws of England. In paragraph 10 of the report, the Apex Court noted thus :

"(10) As to what constitutes restraint of trade is summarised in Halsbury's Laws of England (3rd ed.) Vol. 38, at page 15 and onwards. It is a general principle of the common law that a person is entitled to exercise his lawful trade or calling as and when he wills and the law has always regarded jealousy and interference with trade, even at the risk of interference with freedom of contract as it is public policy to oppose all restraints upon liberty of individual action which are injuries to the interests of the State. This principle is not confined to restraint of trade in the ordinary meaning of the word "trade" and includes restraints on the right of being employed. The Court takes a far stricter view of covenants between master and servant than it does of similar covenants between vendor and purchaser or in partnership agreements. An employer, for instance, is not entitled to protect himself against competition on the part of an employee after the employment has ceased but a purchaser of a business is entitled to protect himself against competition per se on the part of the vendor. This principle is based on the footing that an employer has no legitimate interest in preventing an employee after he leaves his service from entering the service of a competitor merely on the ground that he is a competitor. *Kores Manufacturing Co. Ltd. v. Kolok Manufacturing Co. Ltd.* 1959 Ch 108 . The attitude of the Courts as regards public policy, however has not been inflexible. Decisions on public policy have

been subject to change and development with the change in trade and in economic thought and the general principle once applicable to agreements in restraints of trade have been considerably modified by later decisions. The rule now is that restraints whether general or partial may be good if they are reasonable. A restraint upon freedom of contract must be shown to be reasonably necessary for the purpose of freedom of trade. A restraint reasonably necessary for the protection of the covenantee must prevail unless some specific ground of public policy can be clearly established against it *E. Underwood and Son Ltd. v. Barker*, 1899-1 Ch. 300. A person may be restrained from carrying on his trade by reason of an agreement voluntarily entered into by him with that object, In such a case the general principle of freedom of trade must be applied with due regard to the principle that public policy requires for men of full age and understanding the utmost freedom of contract and that it is public policy to allow a trader to dispose of his business to a successor by whom it may be efficiently carried on and to afford to an employer an unrestricted choice of able assistants and the opportunity to instruct them in his trade and its secrets without fear of their becoming his competitors, *Fitch v. Cewes* 1921 2 AC 158 . Where an agreement is challenged on the ground of its being a restraint of trade the onus is upon the party supporting the contract to show that the restraint is reasonably necessary to protect his interests. Once, this onus is discharged, the onus of showing that the restraint is nevertheless injurious to the public is upon the party attacking the contract. (See Cheshire's Law of Contract, (6th ed.) p. 328, *Mason v. Provident Clothing and Supply Co. Ltd.* 1913 AC 724, and *A. G. of Commonwealth of Australia v. Adelaide Steamship Co. Ltd.* 1913 AC 781."

The Apex Court further observed that the distinction drawn by the Courts in England between the restraints applicable during the terms of the contract of employment and those that apply after its cessation has also been similarly drawn by the Courts in India. It was observed that the restraint by which a person binds himself during the term of the agreement directly or indirectly not to take service with any other employer and be engaged by third party is not void nor it is hit by Section 27 of the Contract Act.

7. The question whether a negative covenant which restricts right of the employee, after the completion of the term of the service, or the termination of the employment for other reasons, to engage in any business, similar to or competitive with that of the employer, was in restraint of trade and void under Section 27 of the Contract Act came up for consideration in the *Superintendence Company of India (P) Ltd. Vs. Sh. Krishan Murgai*, before the three Judge Bench of the Supreme Court. In that case a permanent injunction was sought against an ex-employee to restrain him from carrying on a business substantially similar to that of the plaintiffs. One of the terms of the employment was that the employee after leaving the service will neither serve any rival firm nor carry on himself a similar business for a period of two years at the place where he last served. The employee's services were terminated and thereupon he started his own rival business. *V.D. Tulzapurkar, J. for himself and on behalf of N.L. Untwalia,*

J. did not think it necessary to decide the aforesaid question as in their opinion the appeal could be decided on the other point. However, A.P. Sen, J. who delivered separate judgment was of the view that the appeal turned on the aforesaid question and could not be decided without deciding the said question and hence A.P. Sen, J. dealt with the aforesaid question at length. His Lordship held in paragraph 35 of the report that a contract in restraint of trade was one by which a party restricted his further liberty to carry on trade, business or profession in such manner and with such persons as he opted. His Lordship A.P. Sen, J. went on to observe that if the agreement on the part of the respondent put a restraint even though partial, it was void and, therefore, the contract must be held to be one which was not enforceable. He concluded by saying that a service covenant beyond the service tenure was void. In paragraph 52 and 53 of the report it was held thus :--

"52. Neither the test of reasonableness nor the principle that the restraint being partial was reasonable is applicable to a case governed by Section 27 of the Contract Act, unless it falls within Exception 1. We, therefore, feel that no useful purpose will be served in discussing the several English Decisions cited at the Bar.

53. u/s 27 of the Contract Act, a service covenant extended beyond the termination of the service is void. Not a single Indian Decision has been brought to our notice where an injunction has been granted against an employee after the termination of his employment."

8. In *M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others*, , the Apex Court elaborately considered the agreements in restraint of trade. Clause 14 of the agreement which was under consideration before the Apex Court in *Gujarat Bottling Co. Ltd.* read, "As such the bottler covenants that the Bottler will not manufacture, bottle, sell, deal or otherwise be concerned with the products, beverages of any other brands or trade marks/trade names during the subsistence of this Agreement including the period of one year's notice as contemplated in paragraph 21." The Apex Court referred to the historical background of Section 27 of the Indian Contract Act as was noticed in *Superintendence Company of India (P) Ltd. Vs. Sh. Krishan Murgai*, and in paragraph 23 of the report noted thus:

"23. The said provision was lifted from Hon. David D. Field's draft Code for New York which was based upon the old English doctrine of restraint of trade, as prevailing in ancient times. The said provision was, however, never applied in New York. The adoption of this provision has been severely criticised by Sir Frederick Pollock who has observed that "the law of India is tied down by the language of the section to the principle, now exploded in England, of a hard and fast rule qualified by strictly limited exceptions". While construing the provisions of Section 27 the High Courts in India have held that neither the test of reasonableness nor the principle that the restraint being partial or reasonable are applicable to a case governed by Section 27 of the Contract Act, unless it falls within the exception. The law Commission in its Thirteenth Report has

recommended that the provision should be suitably amended to allow such restrictions and all contracts in restraint of trade, general or partial, as were reasonable, in the interest of the parties as well as of the public. No action has, however been taken by Parliament on the said recommendation. (See : Superintendence Company of India (P) Ltd. Vs. Sh. Krishan Murgai, per A. P. Sen, J.)"

9. The Apex Court then proceeded to examine as to what was meant by contract in restraint of trade and observed that inquiry into reasonableness of the restraint was not envisaged by Section 27. While examining the said question, the Apex Court considered Attorney General of Commonwealth of Australia v. Adelaide Steamship Co. Ltd. 1913 AC 781 (cited supra); Esso Petroleum Co. Ltd. (1967) 1 All ER 699; Mc Ellistrim v. Ballymacelligott Co-op. Agricultural and Dairy Society Ltd. 1919 AC 548; Herbert Morris Ltd. (1916) 1 AC 688 (supra); Niranjan Shankar Golikari Vs. The Century Spinning and Mfg. Co. Ltd., and Superintendence Company of India (P) Ltd. Vs. Sh. Krishan Murgai, . In paragraphs 25 to 34 of the report it was held thus :---

25. In Attorney General of Commonwealth of Australia v. Adelaide Steamship Co. Ltd., Lord Parker has said: (All ER p. 1123)

"Monopolies and contracts in restraint of trade have this in common that they both, if enforced, involve a derogation from the common law right in virtue of which any member of the community may exercise any trade or business he pleases and in such manner as he thinks best in his own interests."

Referring to these observations Lord Reid in Esso Petroleum Co. Ltd. has said : (All ER p. 705)

"That cannot have been intended, however, to be a definition: all contracts in restraint of trade involve such a derogation but not all contracts involving such a derogation are contracts in restraint of trade. Whenever a man agrees to do something over a period he thereby puts it wholly or partly out of his power to exercise any trade or business he pleases during that period. He may enter into a contract of service or may agree to give his exclusive services to another : then during the period of the contract he is not entitled to engage in other business activities. No one has ever suggested, however, that such contracts are in restraint of trade except in very unusual circumstances....."

26. In Me Ellistrim v. Ballymacelligott Coop. Agricultural and Dairy Society Ltd. 1919 AC 548, Lord Finlay after referring to the principle enumerated in Herbert Morris Ltd. v. Saxelby, that public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the State of his labour, skill or talent by every contract that he enters into, had stated: This is equally applicable to the right to sell his goods." Doubting the correctness of this statement Lord Reid in Esso Petroleum Co. Ltd. (1967) 1 All ER 699 has said : (All ER p. 706)

"It would seem to mean that every contract by which a man (or a company) agrees to sell his whole output (or even half of it) for any future period to the other party to "the contract is a contract in restraint of trade, because it restricts his liberty to sell as he pleases, and is therefore unenforceable unless his agreement can be justified as being reasonable. There must have been many ordinary commercial contracts of that kind in the past, but no one has ever suggested that they were in restraint of trade."

27. In *Petrofina (Great Britain) Ltd. v. Martin* 1966 Ch 146 Diplock L. J. (as the learned Law Lord then was) in the Court of Appeal, has said ; (All ER p. 138)

"A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses....."

In the same case Lord Denning, M. R. has said: (All ER p. 131)

".....every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, so long as he does nothing unlawful; with the consequence that any contract which interferes with the free exercise of his trade or business, by restricting him in the work he may do for others, or the arrangements which he may make with others, is a contract in restraint of trade. It is invalid unless it is reasonable as between the parties and not injurious to the public interest."

28. After referring to these observations Lord Morris in *Esso Petroleum Co. Ltd.* (1967) 1 All ER 699 said : (All ER p. 713)

"These are helpful expositions, provided they are used rationally and not too literally. Thus, if A made a contract under which he willingly agreed to serve B on reasonable terms for a few years and to give his whole working time to B, it would be surprising indeed if it were sought to describe the contract as being in restraint of trade. In fact such a contract would very likely be for the advancement of trade."

29. These observations indicate that a stipulation in a contract which is intended for advancement of trade shall not be regarded as being in restraint of trade. In *Esso Petroleum Co. Ltd.* the question whether the agreement under consideration was a mere agreement for the promotion of trade and not an agreement in restraint of it, was answered thus by Lord Pearce : (All ER pp. 726-27)

"Somewhere there must be a line between those contracts which are in restraint of trade and whose reasonableness can, therefore, be considered by the Courts, and those contracts which merely regulate the normal commercial relations between the parties and are, therefore, free from doctrine.

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The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract, provided that any prevention of work outside the contract viewed as a whole is directed towards the absorption of the parties services and not their sterilisation. Sole agencies are a normal and necessary incident of commerce, and those who desire the benefits of a sole agency must deny themselves the opportunities of other agencies."

In the same case, Lord Wilberforce has observed : (All ER p. 729)

"It is not to be supposed, or encouraged, that a bare allegation that a contract limits a trader's freedom of action exposes a party suing on it to the burden of justification. There will always be certain general categories of contracts as to which it can be said, with some degree of certainty, that the doctrine does or does not apply to them. Positively, there are likely to be certain sensitive areas as to which the law will require in every case the test of reasonableness to be passed; such an area has long been and still is that of contracts between employer and employee as regards the period after the employment has ceased. Negatively, and it is this that concerns us here, there will be types of contract as to which the law should be prepared to say with some confidence that they do not enter into the field of restraint of trade at all.

How, then, can such contracts be defined or at least identified? No exhaustive test can be stated probably no precise, non-exhaustive test. The development of the law does seem to show, however, that judges have been able to dispense from the necessity of justification under a public policy test of reasonableness such contracts or provisions of contracts as under contemporary conditions, may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations....."

30. There is a growing trend to regulate distribution of goods and services through franchise agreements providing for grant of franchise by the franchiser on certain terms and conditions to the franchisee. Such agreements often incorporate a condition that the franchisee shall not deal with competing goods. Such a condition restricting , the right of the franchisee to deal with competing goods is for facilitating the distribution of the goods of the franchiser and it cannot be regarded as in restraint of trade.

31. If the negative stipulation contained in paragraph 14 of the 1993 Agreement is considered in the light of the observations in *Esso Petroleum Co. Ltd. (1967) 1 All ER 699*, it will be found that the 1993 Agreement is an agreement for grant of franchise by Coca Cola to GBC to manufacture, bottle, sell and distribute the various beverages for which the trade marks were acquired by Coca Cola. The 1993 Agreement is thus a commercial agreement whereunder both the parties have undertaken obligations for promoting the trade in beverages for their mutual benefit. The purpose underlying paragraph 14 of the said challenge seeks to achieve the said purpose by requiring GBC to wholeheartedly apply to

promoting the sale of the products of Coca Cola. In that context, it is also relevant to mention that the said negative stipulation operates only during the period the agreement is in operation because of the express use of the words "during the subsistence of this agreement including the period of one year as contemplated in paragraph 21" in paragraph 14. Except in cases where the contract is wholly one sided, normally the doctrine of restraint of trade is not attracted in cases where the restriction is to operate during the period the contract is subsisting and it applies in respect of a restriction which operates after the termination of the contract. It has been so held by this Court in *Niranjan Shankar Golikari Vs. The Century Spinning and Mfg. Co. Ltd.*, wherein it has been said : (SCR p. 389)

"The result of the above discussion is that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall u/s 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided as in the case of *W.H. Milsted and Son Ltd.*"

32. Similarly, in *Superintendence Company of India (P) Ltd. Vs. Sh. Krishan Murgai, A.P. Sen, J.*, in his concurring judgment, has said that "the doctrine of restraint of trade never applies during the continuance of a contract of employment; it applies only when the contract comes to an end". (SGR p. 1289 :AIR 1722 SCC 255 Paragraph 18).

33. *Shri Shanti Bhushan* has submitted that these observations must be confined only to contracts of employment and that this principle does not apply to other contracts. We are unable to agree. We find no rational basis for confining this principle to a contract for employment and excluding its application to other contracts. The underlying principle governing contracts in restraint of trade is the same and as a matter of fact the Courts like 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*; (All ER p. 727)

"When a contract ties the parties only during the continuance of the contract, and the negative ties are only those which 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. If, however,

the contract ties the trading activities of either party after its determination, it is a restraint of trade, and the question of reasonableness arises."

34. 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. We are, therefore, unable to uphold the contention of the Shri Shanti Bhushan that the negative stipulation contained in paragraph 14 of the 1993 Agreement, being in restraint of trade, is void u/s 27 of the Contract Act."

10. The legal position that appears to be fairly crystalised in India is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness nor the principle of restraint being partial is applicable unless it falls within the Exception appended to Section 27. The reasonableness of the restraint is not envisaged by Section 27. u/s 27 of the Contract Act restrictive covenant extending beyond the terms of the contract is void and not enforceable. That the doctrine of restraint of trade does not apply during the continuance of the contract of employment and it applies only when the contract comes to an end, is not confined to a contract for employment, but is also applicable to other contracts. In other words the doctrine of restraint of trade is the same for the contracts for employment as well as the other contracts and the restrictive covenant in the agreement to operate beyond the contract period is void and hit by Section 27 of the Contract Act. Restrictive covenant is to apply during the period of contract but shall fall u/s 27 of the Contract Act where it is to operate after the contract has ended. In the backdrop of this legal position, now we shall examine the agreement in hand. For the sake of convenience, we shall refer the parties in the appeals as "Zaheer Khan", "Percept" and "the third party". On 1-11-2000 Zaheer Khan and Percept entered into Promotion Agreement. By the said agreement Percept was employed as Zaheer Khan's sole and exclusive agent to manage, market and render various consulting services and other activities through different media and for the day to day affairs of Zaheer Khan more particularly set out in Annexure "A" to the agreement i.e. (i) Event Management, (ii) Celebrity Endorsement and Management, (iii) Charity Events/ Social Marketing, (iv) All entertainment related activities, (v) Sports Management and Marketing, (vi) Internet Marketing, (vii) Broadband Publicity and (viii) Radio Marketing. The term of the contract was for a period of three years commencing on October 30, 2002 and ending on the close of business hours on 29th October, 2003 on the terms recorded in the agreement. The contract was extendable for a further period if mutually agreed. Inter alia it provided the services to be provided by the Percept to Zaheer Khan and corresponding services to be provided by Zaheer Khan to Percept. Clause 7 of the agreement provides for a minimum guarantee. It is to the effect that Percept shall underwrite a gross sum of Rs. 55 lakhs per year to Zaheer Khan or Zaheer Khan shall receive an amount of total gross value less 20% commission to Percept which ever was higher in

one transaction year or that being of 12 months and that Percept shall be entitled to charge a 20% commission of the total gross value for all endorsements during the term. Zaheer Khan was to make himself available for 75 days in one calendar year for the purposes of honouring all commitments of the Percept. The agreement also provides that the affairs of Zaheer Khan shall be solely and exclusively managed by Percept and in the event of Zaheer Khan receiving any direct deal from any third party, Zaheer Khan shall refer under all circumstances such third party deals to Percept for the purposes of managing his affairs and in that case Percept shall be entitled to a commission as provided in clause of minimum guarantee. It also provides that Zaheer Khan shall not authorise or permit others to authorise the use of his name or endorsement during the term of the agreement in connection with the promotion, advertisement, marketing of any goods or services. It also provides that Zaheer Khan shall not publicly utilise or endorse any product or services which have not been arranged by Percept. Zaheer Khan shall also not appear in the entertainment portion of any program or production other than those arranged by Percept or in any other programme, news channel or otherwise which may directly or indirectly compete with the goods and services to be endorsed of the clients identified by Percept pursuant to this agreement. Clause 14 of the agreement provides that Zaheer Khan shall not publicly announce and/or advertise and invite and solicit any direct arrangement for the ventures under the agreement. Clause 17 deals with the agency and it provides that Percept shall be sole and exclusive agent of Zaheer Khan to render the services and allied or related activities. Percept shall have the right to market Zaheer Khan to as many brands as Percept deems fit and the selection of the Brands shall remain the sole prerogative of the agency. Either party is entitled to terminate agreement by giving notice in writing to the other party if the other party commits breach of the term of the agreement and a breach if capable of remedy and not remedied within fifteen days of written request. Clauses 27, 28 and 29 of the agreement provide for termination of contract, consequences of termination and effect of termination. Clause 31 deals with the negotiation and right to first refusal. We have already reproduced Clause 31 of the agreement at the beginning of our judgment.

11. What is provided in Clause 31 (a) is that during the third year of the contract and in any event not later than August 1, 2003, Zaheer Khan and Percept shall commence discussion for extension of the agreement. For a period of 60 days from the date of discussion commenced for extension of the agreement, Zaheer Khan agreed to negotiate in good faith only with Percept and not with any third party with regard to the arrangements similar to the agreement. Only after 60 days (we are told by the learned senior counsel for the Parties that period of 180 days is wrongly mentioned in the agreement) Zaheer Khan has the right to negotiate with other person. It is provided in the agreement that such negotiation shall be subject, however, to Clause (b). As a matter of fact, before us, there is no controversy concerning the negotiation part as provided in Clause

31(a). The controversy centres round Clause 31(b) and that too later part of it. Clause 31(b) provides that during the currency of the agreement and prior to completion of the first negotiation period as provided in Clause (a), Zaheer Khan shall not accept any offering, endorsement, advertising, or other affiliation with regard to any products or services. To this extent also there is no controversy before us which is operative during the term of the agreement. The controversy before us is with regard to the covenant which provides. "Thereafter Zaheer Khan agrees to not to accept any offer for endorsement, promotion, advertising or other affiliation with regard to any goods or services or for arrangements similar to the transaction hereunder without first providing Percept with written notice of such offer and all the material terms and conditions thereof and offering, Percept shall have the right to match the third party offer. Percept shall thereafter have a right to exercisable by written notice to Zaheer Khan within 10 days of receipt to accept Zaheer Khan's offer on the same terms and conditions offered by such third party. If Percept does not accept Zaheer Khan's offer, Zaheer Khan shall thereafter have the right to enter into an agreement with such third party". On the one hand it is contended that this covenant extending beyond the term of the contract is void, while on the other hand the learned Advocate General for Percept strenuously contends that each and every derogation or interference in some form of restriction by providing the clause for First Refusal is not a covenant in restraint of trade. What is provided under this covenant is that after the conclusion of the contract Zaheer Khan shall not, accept any offer for his endorsement, promotion, advertising or other affiliation with regard to (a) any goods, (b) services, (c) for arrangement similar to the transaction he had under the agreement with Percept without first providing Percept in writing the offer so received and material terms and conditions thereof to enable Percept to match the third party offer. Percept has been given right to accept Zaheer Khan's offer on the same terms and conditions offered by such third party within 10 days of the written notice received from Zaheer Khan. If Percept accepts Zaheer Khan's offer, Zaheer Khan shall not have the right to enter into any agreement with such third party. Having reflected over the later part of Clause 31(b) as noticed above thoughtfully, we have no hesitation in holding that the said covenant is restrictive covenant in restraint of trade as it clearly restricts Zaheer Khan from his future liberty to deal with the persons he chooses for his endorsements, promotion, advertising or other affiliation. Such type of restriction extending beyond the tenure of the contract is clearly hit by Section 27 of the Contract Act and is prima facie void. How can Percept bind Zaheer Khan after completion of the contract to not to accept any offer for his endorsements, promotion, advertising or other affiliation either on his own or through any third party. The subject covenant restricts the right of Zaheer Khan to appoint an agent of his choice even though the contract has completed its course. This clearly restricts Zaheer Khan's liberty to carry on his affairs in the manner he likes with the persons he chooses. Though it was sought to be urged by the learned Advocate General that by this covenant Zaheer Khan is not restrained from accepting any offer for his endorsements, promotion, advertising

or other affiliation on his own with regard to any goods or services and what is required of Zaheer Khan is to disclose such offer to Percept to enable them to match that offer, we are afraid such covenant after completion of contract is simply a restrictive covenant, It curtails the liberty of Zaheer Khan, even though the contract has been competed not to accept any offer for his endorsement, promotion, advertising or other affiliation even by dealing with any person on his own. We find it difficult to fathom the view that a party to the contract can be restrained from doing a particular thing or not to do a particular thing which was subject matter of a contract, after the contract tenure has been exhausted and completed. The covenant in the contract that restricts a party to the contract his future liberty to carry on his affairs in the manner he likes and with the person he chooses. in our considered view, is clearly hit by Section 27 of the Contract Act. As would be seen by the covenant contained in Clause 31 (b) that after the completion of the contract with regard to subject matter of contract. Zaheer Khan is required to first provide percept the offer received from the third party with material terms to enable Percept to match the third party offer. Then Percept has right either to accept or reject such offer. If Percept accepts Zaheer Khan's offer, Zaheer Khan shall have no right to enter into agreement with such third party. This is, thus, not a simple case of first refusal. It is a case where if the Percept, upon having been provided with the offer and material terms and conditions thereof which Zaheer Khan has with third party, matches that offer, then Zaheer Khan is restrained from entering into an agreement with such third party. The consequence of covenant contained in later part of Clause 31 (b) is that Zaheer Khan must become offerer, offering Percept the offer and the material terms and conditions he had received from third party and Percept as offeree, if accepts that offer, by matching offer received from the third party, Zaheer Khan either shall have to deal with Percept or shall not be entitled to enter into any agreement with third party. For sake of clarity, we may paraphrase later part of Clause 31(b) thus; "Zaheer Khan agrees not to accept any offer for his endorsement, promotion, advertising or other affiliation with regard to any goods or services or for arrangement similar to the transaction hereunder without first offering Percept the right to match the third party offer. Percept shall thereafter have the right to accept Zaheer Khan's offer on the same terms and conditions of offer by such third party. If Percept does accept Zaheer Khan's offer, Zaheer Khan shall not thereafter have the right to enter into agreement with such third party. "If this is not a restriction on Zaheer Khan of his future Liberty to carry on affairs in the manner and with the persons he chooses, even after his contract with percept has ended then what else will be the restriction. We, thus, have no hesitation in holding that covenant contained in later part of Clause 31(b) as indicated above cannot be enforced after the period of contract has ended.

12. The claim of Percept is founded on the rights which are asserted to have given to it by the Promotion Agreement under Clause 31(b). This is reflected from the averments made in the arbitration petition However, we find that the

learned Judge in the impugned order has recorded few findings that travel beyond the pleadings set out in the petition. Some of the findings are plainly erroneous. Such findings recorded by the learned single Judge are : (i) that it was a sole selling agency agreement for sale of a marketable commodity -- Celebrity endorsement; (ii) that it negative covenant (the covenant Clause 31 (b) as noted above) is not in restraint of trade, but in furtherance of trade; (iii) that the later Clause of 31(b) of the agreement contains a separate and independent contract commonly known as a right of first refusal ; (iv) that Sub-clause (b) of Clause 31 is not in the nature of a negative covenant after the expiry of the initial contract, but it is an independent contract contingent upon the happening of a future uncertain event viz. the failure of negotiations under Sub-clause (a) of Clause 31 (v) that Clause 31(b) in the present case is in the nature of contract of first refusal and the restriction put under later part of Clause (b) on the respondent to first offer his product -- Brand endorsement -- to the petitioner on the terms offered to him by a third party is not agreed with a view to put a restraint on the respondent No. 1 in his freedom of contract but with a view to promote trade, at worst to regulate trade and (vi) that the present contract firstly is not a contract of employment and secondly a negative covenant contained therein is not to operate after the period of a contract and the right of first refusal conferred under later part of Sub-clause (b) of Clause 31 is an independent contract.

13. We are amazed to find that the learned Judge has imported the independent contract under Clause 31(b) which was not even the case set up by Percept in the arbitration petition. As a matter of fact, the learned Advocate General, confronted with this difficulty, sought to explain by saying that the learned Judge while using the term independent contract wanted to convey that the obligation provided in Clause 31 (b) as noticed above i.e. the obligation upon Zaheer Khan to offer third party offer to Percept to match the offer was required to be discharged. We are afraid, the submission of the learned Advocate General cannot be accepted for the reasons we have already indicated above as we find that the so called obligation in Clause 31(b) is nothing but a restriction on the future right of Zaheer Khan to deal with the affairs concerning his endorsement, promotion, advertising or other affiliation in the manner he likes and the person he chooses. After the completion of the contract, one party to the contract, cannot bind or tie the other party to do a particular thing or not to do a particular thing even concerning the transaction under the agreement. Once the contract comes to an end either by efflux of time or otherwise on lawful termination, the restrictive covenant in the nature of restraint of trade cannot operate; and the party seeking its enforcement shall not be entitled to injunction u/s 42 of the Specific Relief Act, 1963. The learned Judge stretched too much to create an independent contract under Clause 31(b) contingent upon the happening of uncertain event which was not even the case of the Percept in the petition. Incidentally, we may notice that if later part of Clause 31(b) of agreement is treated as a separate and independent contract as has been made out by the

learned Judge, we find that for such independent and separate contract there is no arbitration clause and, therefore, the learned single Judge manifestly erred in granting interim injunction in respect of the so called separate and independent contract in the arbitration petition filed u/s 9 for which there is no arbitration agreement. The arbitration agreement in Clause 32(g) is only in respect of the agreement dated 1-11-2000 which expired on 29-10-2003. Even otherwise for the so-called separate and independent contract there is no consideration spelt out either in the petition or in the contract itself. We also find it difficult to uphold the finding of the learned Judge that the later part of Clause 31(b) is not in restraint of trade but is in furtherance of trade. No such case is set up by Percept that Clause 31(b) is in furtherance of the trade. The illustrations and examples given by the learned, Judge in the impugned judgment in respect of right of first refusal relate to shareholders agreements, memorandum and Articles of Associations of private limited company, conveyances and partitions of movable/ immovable property which can hardly be made applicable to contracts for personal services and agency agreements of the nature we are concerned and that too after the contract has come to an end. Moreover in none of the illustrations given by the learned single Judge it is pointed out that after the contract has been completed and come to an end, the right of first refusal has been held to be enforceable. We also find that the learned Single Judge tried to make out a new case by holding that the agreement was sole selling agency agreement for the sale of marketable commodity i.e. celebrity endorsement. The agreement dated 1-11-2000 between Zaheer Khan and Percept is a promotion Agreement where by Percept has been appointed as sole selling agent of Zaheer Khan to manage market and render various consulting services and other activities through different media and for the day to day affairs as set out in Annexure "A" to the agreement and, therefore, it is too much to say that the agreement dated 1-11-2000 between Zaheer Khan and Percept is an agreement for sale of marketable commodity. We also find that the learned Judge at one place observed that the covenant under Clause 31(b) as a negative covenant was not in restraint of trade, but subsequently observed that Sub-clause (b) of Clause 31 was not a negative covenant applicable after the expiry of the initial contract. Thus we find that approach of the learned single Judge in dealing with the controversy was plainly erroneous and that has rendered the impugned order unsustainable. In our thoughtful consideration later part of Clause 31(b) of the contract is in the nature of restrictive covenant which could not be made applicable after the expiry of the contract period i.e. 29-10-2003. In that view of the matter, the said restrictive covenant is clearly hit by Section 27 of the Contract Act and therefore, not enforceable.

14. Though the learned senior counsel appearing for Zaheer Khan raised other arguments as well in assailing the order of learned single Judge, but in our view it is not necessary to go into the said contentions as materially and substantially the fate of these appeals is dependent on the answer to the question noted by us above as to whether the covenant in Clause 31(b) of the agreement dated

1-11-2000 after the completion of the contract is in the nature of restraint of trade and, therefore, void u/s 27 of the Contract Act, 1872 and we have already held that the said covenant is a restrictive covenant in the restraint of trade and, therefore, void under Section 27 of the Contract Act.

15. In what we have held above, we also do not deem it necessary to deal with the submission of Mr. Janak Dwarkadas, the learned senior counsel appearing for the third party that arbitration petition u/s 9 of the Act of 1996 was not maintainable as third party was not party to the agreement dated 1-11-2000. We have already held that the later part of covenant under Clause 31(b) is not enforceable.

16. We accordingly, allow both the appeals and set aside the judgment dated 10th December 2003, Resultantly, the arbitration petition No. 514/2003 stands dismissed. No order as to costs.

17. At this stage, the learned Advocate General prays for stay of this order. Having considered the prayer of the learned Advocate General and after hearing him and the learned senior counsel appearing for the appellants, we are satisfied that for a period of four weeks, the following arrangement shall remain operative;

(i) Zaheer Khan is directed to place before this Court in the sealed cover the copy of the contract dated 20th November, 2003 entered into between him and the third party viz. Globo Media Solutions (I) Pvt. Ltd. and/ or any other third party immediately. Zaheer Khan is further directed to place up to date accounts under the said contract/s before this Court. in the sealed cover.

(ii) Zaheer Khan shall place before this Court in a sealed cover copy of any other contract that he may enter into with any third party within a period of four weeks from now.

(iii) Zaheer Khan shall also place on record the account/s of four weeks under such contracts in sealed cover.

The parties may be provided ordinary copy of this order duly authenticated by Court Associate on payment of usual copying charges.