

Percept D'Markr (India) Pvt. Ltd vs Zaheer Khan & Anr on 22 March, 2006

Equivalent citations: AIR 2006 SUPREME COURT 3426, 2006 AIR SCW 1751, 2006 ALL CJ 3 2375, 2006 (2) ARBI LR 34, 2006 (3) SCALE 324, 2006 (4) SCC 227, 2006 (5) COM LJ 224 SC, 2006 (1) CTLJ 100, (2006) 6 ALLMR 9 (SC), (2006) 5 COMLJ 224, 2006 (6) ALL MR 9 NOC, (2006) 4 MAD LJ 1695, (2006) 3 SCJ 338, (2006) 2 ARBILR 34, (2006) 2 MAD LW 870, (2006) 2 WLC(SC)CVL 375, (2006) 2 CURCC 102, (2006) 2 ALL WC 1869, MANU/SC/1412/2006, (2005) 3 KER LJ 614, (2006) 1 KER LT 37, (2006) 1 RECCIVR 482, (2006) 3 CIVLJ 498, (2006) 1 CIVILCOURTC 328, (2006) 73 CORLA 8, (2006) 3 SUPREME 186, (2006) 3 ICC 13, (2006) 3 SCALE 324, (2006) 4 CIVLJ 409, (2006) 5 BOM CR 322, 2006 (2) BOM LR 1017, 2006 BOM LR 2 1017

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Bench: H.K. Sema, Ar. Lakshmanan

CASE NO.:

Appeal (civil) 5573-5574 of 2004

PETITIONER:

Percept D'Markr (India) Pvt. Ltd.

RESPONDENT:

Zaheer Khan & Anr.

DATE OF JUDGMENT: 22/03/2006

BENCH:

H.K. Sema & Dr. AR. Lakshmanan

JUDGMENT:

J U D G M E N T Dr. AR. Lakshmanan, J.

The above appeals were filed from the common final judgment and order dated 19.12.2003 passed in Appeal No. 1109/2003 in Arbitration Petition No. 514/2003 and Appeal No. 1110/2003 in Arbitration Petition No. 514/2003 by the Division Bench of the High Court of Judicature at Bombay whereby the appeals filed by the appellant against the order of the learned Single Judge were allowed and the arbitration petition filed by the appellant herein before the Single Judge was dismissed.

The central issue of importance in this appeal is whether the right of first refusal under clause 31(b) of the permission agreement entered into between the appellant Percept D. Markr (India) Pvt. Ltd. and the respondent No.1 Zaheer Khan is void under Section 27 of the Indian Contract Act, 1872 has been in restraint of trade. It was submitted by learned senior counsel for the appellant - Mr. Ashok H. Desai that the provision such as the right of first refusal is merely regulatory and not in restraint of trade.

FACTS:

The appellant is a company incorporated under the Companies Act, 1956 and carries on business, inter alia, of event management, model and celebrity endorsement and management, charity events/social marketing, all entertainment related activities, sports management and marketing, internet marketing, broadband publicity and radio marketing.

Respondent No.1 - Zaheer Khan is an Indian citizen and a cricketer of international repute. He had entered into an agreement with the appellant. Respondent No.2 is a company incorporated under the Companies Act, 1956.

The appellant entered into the said agreement with respondent No.1 on 01.11.2000 for a period of 3 years commencing on 30.10.2000 and expiring on 29.10.2003. By a letter of intent dated 29.07.2003, the appellant forwarded to respondent No.1 the draft terms for extension of the said agreement for a further period of 5 years. Respondent No.1 informed the representative of the appellant from time to time that he does not intend to appoint any agent for managing his different media affairs. Respondent No.1 informed the appellant on 10.09.2003 that he was not desirous of renewing and/or extending the terms of the said agreement and the same would, therefore, terminate as of 20.10.2003. He further stated that the said letter provided for notice of non-renewal. By the said letter, he informed the appellant of having received the letter of intent and informed the appellant that he was not desirous of signing the same. By the said letter, he confirmed that the 3 agreements stated in the said letter were subsisting. Respondent No.1 was further informed that as per the terms of the said agreement, prior to the execution of the first negotiation period provided in Clause 31(a), he could not accept any offer for endorsements, promotions, advertising or other affiliation with regard to any product or services and that prior to accepting any offer, he was under an obligation to provide the appellant in writing all the terms and conditions of such third party and offer the appellant the right to match such third party offer. Respondent, by his letter dated 23.09.2003, did not deny his representation to the fact and the effect that he did not intend to appoint any agent for managing his media affairs, however, clarified that he intended to perform the subsisting agreement which had been entered into between the appellant and him and third parties which would continue beyond the terms of the said agreement. The appellant, by its letter, clarified its position as regards its contention in paragraphs 3 and 4 of letter dated 15.09.2003 and further reiterated that if

respondent No.1 was at any time during or after the term of the said agreement desirous of appointing any other person as his agent for rendering services similar to the services rendered by the appellants under the said agreement, respondent No.1 was first required to offer the appellant the right to match the third party offer only in the event the appellant does not exercise its right to accept respondent No.1's offer on the same terms and conditions as the third party offer. It was further stated that if the terms offered by the third party materially changed in favour of such third party after the same had been offered by respondent No.1 to the appellant, respondent No.1 would be required to re-offer the revised terms of the third party offer. The appellant, by its letter dated 27.10.2003, reiterated the same terms. On 29.10.2003, the agreement expired by efflux of time.

The appellant, by its letter dated 10.11.2003 reiterated what was stated by it in its earlier letters with regard to the rights of the appellant and obligations of respondent No.1 in case respondent No.1 was desirous of appointing any other person as his agent for rendering services similar to the services rendered by the appellant under the said agreement.

Respondent No.1, by his letter dated 18.11.2003, alleged that he had no obligation under the said agreement after 29.10.2003, save and except honouring the subsisting agreement entered into by respondent No.1 with third parties as specified in his letter dated 10.09.2003 and the agreement entered into with Adidas Limited which was negotiated prior to the expiry of the said agreement. In the said letter for the first time, after the said agreement had expired by efflux of time, respondent No.1 alleged that the said agreement was allegedly one-sided and an unfair arrangement. It is pertinent to note that during the entire period of the said agreement, respondent No.1 had not alleged to the appellant that the terms of the said agreement was either one-sided or unfair. The appellant states that the same was clearly an after-thought.

The appellant, for the first time, became aware on 01.12.2003 from some sources and from the website of respondent No.2 that respondent No.1 has entered into an agreement with respondent No.2 for services similar to the services rendered by the appellant under the said agreement. Respondent No.1 has not denied the fact that he negotiated with third parties, including respondent No.2 prior to expiry of the agreement without discharging his obligation to intimate the appellant of such offer.

On 04.12.2003, the appellant filed an Arbitration Petition No. 514/2003 in the High Court under Section 9 of the Arbitration and Conciliation Act, 1996 praying, inter alia, for an interim order that pending the commencement of and during the arbitration proceedings and the making of the award therein and the implementation thereof, respondent No.1 be restrained by an interim order and injunction from entering into any agreement/arrangement or acting upon or continuing to act upon any agreement/contract with respondent No.2 or any third party without first performing and complying with respondent No.1's obligations under and in terms of Clause 31(b) of the agreement.

Learned Single Judge of the High Court granted ad-interim relief in terms of prayer Clause (a) of the petition. Respondent Nos.1 and 2 preferred separate appeals against the order of the learned Single

Judge praying, *inter alia*, for a stay therein.

The Division Bench allowed the appeals and dismissed the arbitration petition filed by the appellant on 19.12.2003. The High Court, by the said order, directed respondent No.1 (i) to place before the High Court in a sealed cover the copy of the agreement entered into by respondent No.1 with respondent No.2 and/or any other third party immediately and was further directed to place upto date accounts under the said contract/s (ii) to place before the High Court any other contract that he may enter into with any third party within a period of 4 weeks from 19.12.2003; and (iii) to place on record the account/s of four weeks under such contracts in a sealed cover.

Aggrieved by the above order, two special leave petitions were filed by the appellant in this Court. This Court stayed the impugned order until further orders. On 27.08.2004, leave was granted.

We heard Mr. Ashok H. Desai, learned senior counsel, appearing for the appellant and Mr. Chanderuday Singh, learned senior counsel, appearing for respondent No.1 and Mr. K.N. Bhat, learned senior counsel, appearing for respondent No.2.

Mr. Ashok H. Desai, learned senior counsel, appearing for the appellant submitted that the High Court has failed to appreciate the true legal meaning and effect of Section 27 of the Indian Contract Act, 1872. He submitted that an agreement of 'first option' or the 'right of first refusal' of the kind contained in the Promotion Agreement dated 01.11.2000 entered between the appellant and respondent No.1 can never be said to be an agreement in restraint of trade. Explaining further, he said that the contract of 'first refusal' on the ground of option in favour of the appellant is not an independent agreement to promote trade and not an agreement in restraint of trade. He would submit that the High Court was not justified in rejecting the contention of the appellant that the obligation of respondent No.1 in Clause 31 (b) of the agreement survives the term of the said agreement. It was also submitted that the High Court is not correct and justified in coming to the conclusion that the agreement is a contract of service. Likewise, the High Court was not justified in coming to the conclusion that the covenant contained in Clause 31(b) of the said agreement was applicable only during the period of contract and not thereafter. The High Court was also not justified in rejecting the appellant's contention that the derogation contained in Clause 31(b) of the agreement is not in restraint of trade but effectively in furtherance of trade and, therefore, not void under Section 27 of the Contract Act. According to Mr. Desai, the covenant in Clause 31(b) of the agreement was an obligation which was to operate after the close of business hours on 29.10.2003. There is also no contention on behalf of respondent No.1 that the agreement was unconscionable or excessively harsh or unreasonable or one sided. It was submitted that the covenant contained in Clause 31(b) did not restrict respondent No.1 from accepting any offer for his endorsements, promotions, advertisements or other services on his own and thus did not restrict respondent No.1's liberty to carry on his affairs in the manner he liked. The finding and the conclusion of the High Court that the covenant contained in Clause 31(b) of the agreement curtailed respondent No.1 to accept any offer for his endorsement, promotion etc. by dealing with any person on his own. Under the covenant contained in Clause 31(b), the appellant did not match the third party offer within ten days of receiving such offer from such third party, respondent No.1 had the liberty to enter into an agreement with such third party.

According to Mr. Desai, the facts in this case clearly disclose the nature of the Promotion Agreement entered into between the parties and the benefit obtained by respondent No.1 as well as the appellant. The Promotion Agreement dated 01.11.2000 is a class of contracts, common in the industry, that may be termed as 'celebrity contracts'. While arguing the case, Mr. Desai highlighted certain provisions of the agreement which are as follows:-

? Under the Agreement, the appellant was appointed as the sole and exclusive agent to manage and market the affairs of respondent.

? In consideration for this appointment, respondent no. 1 was guaranteed a minimum amount of Rs. 55 lakhs per year. In reality, he was able to obtain Rs. 1 crore per year.

? Such a celebrity contract involves considerable risk to the agent (in this case, the appellant) who has to guarantee a large amount and to invest considerable amounts of money at a substantial risk in creating and promoting a particular person as a brand. The reciprocal promise obtained from the opposite party (in this case, respondent no.1) is in the form of a right of first refusal. ? The Agreement provided for an initial term of three years (from 30.10.2000 to 29.10.2003) and extension thereof for such further period as may be mutually agreed.

? The extension was contemplated, inter alia, pursuant to the terms of Clause 31 of the Agreement pursuant to which Respondent no. 1 was to negotiate on an exclusive basis with the appellant for a prescribed period. ? Thereafter, Clause 31(b) contained a right of first refusal clause pursuant to which the appellant was to be given an opportunity to match any third party offer made to Respondent No. 1 before Respondent No. 1 was permitted to enter into the third party agreement. If the appellant failed to match the third party offer, Respondent no. 1 was free to enter into a contract with the third party. If the appellant matched the offer, Respondent no.1 suffered no detriment. In either case, it cannot be said that Respondent no.1 was restrained in any manner and more importantly, the right of first refusal clause has no detrimental impact on respondent No.1 - Zaheer Khan whatsoever. It is submitted that such right of first refusal provision is customary in agreements of this nature.

? The Agreement contains an arbitration clause to refer disputes to arbitration. ? It is the undisputed position that both parties performed their respective obligations under the Agreement and that Respondent no. 1 therefore benefited financially for the 3 years that the Agreement was in force. After gaining such benefit over a three year period, Respondent No. 1 now challenges the validity of clause 31(b) which is an integral part of the bargain and mutual rights and obligations of the parties to the Promotion Agreement in the following circumstances.

Mr. Desai also furnished a brief list of dates which, according to him, will restrict the contract of respondent No.1 in attempting not to honour his obligation under the agreement to provide the appellant with a right to match any third party offer.

01.11.2000 Appellant enters into Promotion Agreement with Respondent no. 1. Initial term is to expire on 29.10.2003.

29.07.2003 Appellant's letter to Respondent No. 1 forwarding the draft terms of an extension of the Promotion Agreement. Only if accepted, the letter speaks of a conclusion of the negotiations contemplated under clause 31 of the Promotion Agreement.

10.09.2003 Reply of Respondent no. 1 stating that he was not desirous of renewing and or extending the term of the Promotion Agreement. Respondent no.1 also informed the appellant that he did not intend to appoint any agent to manage his different media affairs, which was misleading.

15.09.2003 Appellant's letter referring to discussions with Respondent no. 1 wherein Respondent no. 1 had informed the appellant that he did not intend to appoint any agent for managing his different media affairs. The letter clearly stated the understanding of the parties that the right of first refusal did not apply if the appellant himself managed his media affairs and that otherwise, it applied during and after the terms of the Agreement.

23.09.2003 Reply of the Respondent no. 1 not contraverting the position stated in the appellant's letter dated 15.9.2003.

06.10.2003 Further letter by appellant during term of Promotion Agreement.

No reply from respondent no. 1 to appellant's letter dated 6.10.2003. 27.10.2003 Further letter by appellant during term of Promotion Agreement. 28.10.2003 Reply of respondent no.1 (one day before expiry of initial term of Promotion Agreement) making out a new case that clause 31(b) was void under the Contract Act.

20.11.2003 Respondent no. 1 enters into contract with Respondent no. 2 (Appellant became aware of the contract only during proceedings before the Division Bench in the Bombay HC).

04.12.2003 Appellant files Arbitration Petition No. 514/2003.

10.12.2003 Order of Single Judge granting ad interim relief in terms of appellant's prayer (a)
19.12.2003 Impugned judgment of Bombay High Court holding clause 31(b) to be void.

According to Mr. Desai, it is clear from the above details that contrary to his commitment and without giving the appellant a right of first refusal as required by Clause 31(b), respondent No.1 appeared to have entered into an agreement with respondent No.2 on 20.11.2003 for managing his media affairs. In such circumstances, on 01.12.2003, the appellant filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 praying that respondent No.1 be enjoined from entering into any such agreement or from acting in furtherance of it. Thus, the relief claimed in Section 9 proceedings was only against respondent No.1.

The learned Single Judge of the Bombay High Court granted the interim relief in terms of prayer (a). The appeal filed by the respondent was allowed and the learned Division Bench found Clause 31(b) to be void under Section 27 of the Indian Contract Act, 1872.

Mr. Desai then argued the scope and effect of Section 27 of the Indian Contract Act, 1872. According to him, Section 27 deals with restraint of trade and not with promotion or regulation of trade. The language of the section makes this abundantly clear and the development of the case law in India also supports this. In support of this contention, he relied on V.N. Deshpande vs. Arvind Mills, AIR 1964 Bombay 423. In the said case, the High Court of Bombay was considering a clause relating to confidentiality of information and stated as follows:-

"Clause 9 of the agreement prevents the appellant from divulging any secret information of the nature mentioned in that clause after the termination of his service. As pointed out in (1916) 1 AC 688 the defendant is not prevented from acquiring knowledge which makes him a better employee for the public for future employment. It only prevents him from divulging information which he has received as respondents' employee to another party. It is, therefore, clear that the clause as worded is proper and an injunction granted in terms thereof is not unreasonable or wider latitude than justified in law." (emphasis added) The decision in Deshpande's case (supra) was affirmed in Niranjana Shankar Golikari vs. Century Spinning and Manufacturing Co. Ltd. (1967) 2 SCR 378.

Arguing further learned senior counsel submitted that all negative covenants are not in restraint of trade. This is true even though the negative covenant may have an impact at a stage after the term of the contract. Thus, for example, a requirement of maintaining confidential information after the period of employment is not void although it may be subject to the qualification that an employee has a right to improve himself.

The same principle was reiterated in Mahindra & Mahindra Limited vs. Union of India, (1979) 2 SCC 529 which cited with approval the decision of Brandeis, J in Board of Trade vs. United States (62 L Ed 231).

In Gujarat Bottling Co. Ltd. Vs. Coca Cola Co. (1995) 5 SCC 545, this Court cited with approval the decision of the House of Lords in Esso Petroleum Co. Ltd. Vs. Harper's Garage (Stourport) Ltd. (1967) 1 All ER 699 as follows:

"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.

* * * 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."

In the context of the franchise agreements before this Court in Gujarat Bottling, this Court concluded:

"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."

Mr. Desai further submitted that even assuming for the sake of argument that the proviso is regarded as in restraint of trade, it operates within the term of the contract. This is because it is clear that the intention of the parties was that there would be an initial term that would be extended on mutual agreement on the terms set forth in the Promotion Agreement. The words "initial term" means that the full term contemplated is beyond the initial term.

Alternatively, he submitted that in the event that the provision is construed as operating beyond the period of the contract, the test of reasonableness applies. This is the position arising from *Niranjan Golikari* (supra) as although that case may have dealt with a restraint during the period of the contract, it applied the test of reasonableness in holding that the restraint would be void only if it was unconscionable or excessively harsh or unreasonable or one-sided. (Emphasis added) The test of reasonableness is, therefore, a part of the analysis of whether there is a restraint of trade.

While referring to the reliance placed on observations in the judgment of Justice A.P. Sen in *Superintendence Company of India vs. Krishan Murgai*, 1981 (2) SCC 246 by respondent No.1, Mr.

Desai submitted that the observations of Justice A.P. Sen are not a part of ratio decidendi of the decision but are a minority view (although it was a concurring view). According to him, this is clear as the majority expressly stated that they were not expressing a view on that issue and decide the appeal on other grounds and the judgment of Justice Sen also records this.

It is further seen that the decision of A.P.Sen, J. was not affirmed in Gujarat Bottling Co. Ltd. (supra). In fact, the Court exactly stated to the contrary "24. We do not propose to go into the question whether reasonableness of restraint is outside the purview of Section 27 of the Contract Act and for the purpose of the present case we will proceed on the basis that an enquiry into reasonableness of the restraint is not envisaged by Section 27."

That in the facts and circumstances, Mr. Desai submitted that Clause 31(b) is reasonable as it is on the basis of the right of first refusal clause that the appellant can take the risk on a relatively less well-known player and compensate him so well. While in determining reasonableness, Courts take a stricter view of employer-employee relationship, but this, according to him, is admittedly not that. According to him, this is an agency and as argued, it is not clear which side has the stronger bargaining power.

Learned counsel for respondent No.2 submitted that no relief can be claimed against it in application under Section 9 of the Arbitration and Conciliation Act, 1996. Such a submission, according to Mr. Desai, fails to appreciate the prayer made by the appellant in Section 9 application wherein relief was claimed only against respondent No.1 as could be seen from the prayers in Section 9 application. In fact, at the time the Section 9 was applied, the appellant had only reason to believe but could definitively assert that respondent No.1 had entered into a contract with respondent No.2.

According to Mr. Desai, a relief can be granted even against a third party under Section 9 of the Arbitration and Conciliation Act, 1996 which provides as follows:-

"9. Interim measures, etc. by Court.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

Explaining further, Mr. Desai, submitted that the language of Section 9 states that the application has to be made by a party to the arbitration agreement but not that the relief would be confined only against a party. For instance, preservation or custody of goods or appointment of a receiver may involve a third party as well, along with the party to the arbitration agreement. In the present case, the application is made by a party to the arbitration agreement against another party to the arbitration agreement, and a third party may be affected by the application. This is the very principle underlying Section 9 otherwise, the purpose and intent of interim relief contemplated under Section 9 cannot be frustrated.

Learned counsel for respondent No.1 submitted that the failure of the appellant to commence arbitral proceedings since the date of the impugned order was fatal to its Section 9 application. According to Mr. Desai, the appellant in fact, in this case, has acted with utmost expedition. The appellant upon becoming aware of the fact that respondent No.1 had acted in breach of its obligation under the Promotion Agreement filed Section 9 application on 04.12.2003 and the Single Judge granted interim relief on 10.12.2003 which decision was reversed by the Division Bench on 19.12.2003 and the appellants promptly approached this Court.

The fact that the appellants have not yet commenced arbitral proceedings is solely on account of the fact that the Division Bench, in the impugned order, has held Clause 31(b) to be void under Section 27 of the Contract Act. Since the claim of the appellant is based on only Clause 31(b), it would be a futile exercise for the appellant to commence arbitration. Learned senior counsel for respondent No.1 submitted that the impugned judgment of the Division Bench that Clause 31(b) is void under the Indian Contract Act is only a prima facie finding at an interim stage. Such a submission, according to Mr. Desai, is only to be stated to be rejected. The judgment of the Division Bench is a determination on a point of law and is a final and binding decision, even if such determination is in proceedings arising out of Section 9 application.

Learned senior counsel for respondent No.1 submitted that the agreement may not be specifically enforced under Section 14 of the Specific Relief Act, 1963 and accordingly, under Section 41(e), no injunction could be granted as prayed for by the appellant. According to Mr. Desai, this submission loses sight of Section 42 of the Act which provides that a Court may grant an injunction to perform a

negative covenant even where specific performance of the affirmative covenant may not be enforced. Section 42 provides as follows:-

"42. Injunction to perform negative agreement.- Notwithstanding anything contained in clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:

Provided that the plaintiff has not failed to perform the contract so far as it is binding on him."

Learned senior counsel for respondent No.1, Mr. Chanderuday Singh, per contra, submitted that since the present appeal challenges an interim order, and no interim relief having been granted in favour of the appellant during the past 2= years, during which the contract between respondent No.1 and respondent No.2 has been in operation and indeed is soon to be completed, there is no cause for interference at this late stage by this Court. In the light of the intervening events, sufficient protection for the appellant will be given if this Court were to clarify (i) that all observations and findings of the High Court were for the limited purpose of deciding an interlocutory application, and hence will not bind parties at trial; (ii) that all contentions raised by all parties are expressly kept open; and (iii) that the interim protection in paragraph 17 of the High Court's order will continue till the conclusion of the contract dated 20.11.2003.

He would further submit that the term of the contract was expressly limited to 3 years from 30.10.2000 to 29.10.2003, unless extended by mutual agreement and all obligations and services under the contract were to be performed during the term. It was further submitted that assuming without admitting that the negative covenant in Clause 31(b) is not void and is enforceable, it was nevertheless inappropriate, if not impermissible, for the Single Judge to grant an injunction to enforce it at the interim stage, for the following reasons:-

"(i) Firstly, grant of this injunction resulted in compelling specific performance of a contract of personal, confidential and fiduciary service, which is barred by Clauses (b) and (d) of Section 14(1) of the Specific Relief Act, 1963;

(ii) Secondly, it is not only barred by Clause (a) of Section 14(1) of the Specific Relief Act, but this Court has consistently held that there shall be no specific performance of contracts for personal services;

(iii) Thirdly, this amounted to granting the whole or entire relief which may be claimed at the conclusion of trial, which is impermissible;

(iv) Fourthly, the Single Judge's order completely overlooked the principles of balance of convenience and irreparable injury. Whereas Percept could be fully

compensated in monetary terms if they finally succeeded at trial, respondent No.1 could never be compensated for being forced to enter into a contract with a party he did not desire to deal with, if the trial results in rejection of Percept's claim.

It was further contended that the appellant's failure to even invoke arbitration between 04.12.2003 and 02.03.2006 is fatal to their claim for an injunction under Section 9 of the Arbitration and Conciliation Act, 1996. In any event, the entire petition under Section 9 was not maintainable, as the agreement dated 20.11.2003 was already entered into and in force from 01.12.2003 when the petition was filed, and this agreement constituted the cause of action for the appellant. This agreement being with a third party who is outside the scope of the arbitration agreement in Clause 31(g) of the present contract, Section 9 could not be invoked.

It was further contended that the learned Single Judge's entire judgment was based on a new case made out by the learned Judge which was contrary to the pleadings or neither pleaded nor urged by the appellant before him. Learned Division Bench has noted this by analysing the Single Judge's judgment in detail, and has naturally found such exercise to be impermissible, especially in the context of an interlocutory application under Section 9 of the Arbitration and Conciliation Act, 1996. The Division Bench has traced and analysed the settled law on post-contractual covenants, has examined in detail the scope and effect of Clause 31(b), and has found it to be a patent restraint of trade, and, therefore, void under Section 27. With respect, this detailed and well-reasoned judgment ought not to be interfered with by this Court, especially since the entire matter is at the interim stage, and there has been no stay of the new contract in the interregnum.

Mr. K.N. Bhat, learned senior counsel for respondent No.2, submitted that under Section 41(e) of the Specific Relief Act, 1963 an injunction cannot be granted to prevent a breach of a contract, the performance of which cannot be specifically enforced. According to him, the said Section would apply to both temporary injunction as well as permanent injunction. In any view of the matter, it is not possible, in the present case, to sustain the injunction granted by the learned Single Judge and the Division Bench was clearly right in allowing the respondents appeal. By petition No. 514/2003, the appellant sought an interim order restraining the first respondent from entering into an agreement/arrangement or acting upon or continuing to act upon any agreement/contract with the second respondent or any third party without first performing and complying with the first respondent's obligation under and in terms of Clause 31(b) of the contract. In the correspondence addressed by the appellant, in particular, the letters dated 15.09.2003, 06.10.2003, 27.10.2003 and 10.11.2003 were annexed as Exhibits respectively to the petition. The appellant repeatedly contended that the first respondent was bound at any time during or after the term of the said contract to provide the appellant, in writing, of the terms and conditions of any third party offer so that the appellant would have the right to match the third party offer received by the first respondent prior to the first respondent accepting any such offer. The appellant's interpretation/understanding of Clause 31(b) of the contract that the negative covenant contained in Clause 31(b) will operate after the expiry of the contract is further demonstrated by the submissions contained in paragraph 9 of the petition. In light of the above, the Courts were required to consider whether the negative covenant contained in Clause 31(b) which was admittedly to operate after the expiry of the contract, was in restraint of trade and, therefore, violative of Section 27 of the Indian

Contract Act. Learned Single Judge for the reasons recorded in his order granted an injunction. The Division Bench held that the doctrine of restraint of trade does not apply during the continuance of a contract of employment and it applies only when the contract comes to an end. Accordingly, a restrictive covenant will apply during the period of the contract but will be hit by Section 27 of the Indian Contract Act and be void, after the contract is ended. Concluding his argument, learned counsel submitted that the Division Bench correctly held that Clause 31(b) of the contract was not merely a clause of first refusal but was in restraint of trade. The Division Bench also correctly held that in view of the fact that the latter part of the covenant under Clause 31(b) was not enforceable, it was not necessary for it to deal with this respondent's further contention that the appellant's petition No. 514/2003 under Section 9 of the Act was not maintainable against second respondent who was not a party of the contract.

We have carefully considered the lengthy submissions made by all the counsel appearing for the respective parties. We have also gone through the pleadings, annexures and the judgments rendered by the learned Single Judge and of the Division Bench and other relevant connected records.

The present appeal challenges the interlocutory order of the High Court in which the Division Bench has itself made it clear that it is recording only a prima facie finding that Clause 31(b) of the agreement is void under Section 27 of the Indian Contract Act, 1872.

It is pertinent to notice that ever since the rejection of the said interlocutory application on 19.12.2003, there has been no injunction in operation and this Court while granting leave to appeal also declined to grant any stay of the Division Bench's order or restoration of the Single Judge's order. Consequently, during the past 2= years, the contract dated 22.11.2003 between respondent No.1 and respondent No.2 has been in operation and, indeed, is soon to be completed. The appellant is now seeking a mandatory interim order 2= years down the line, praying in effect that this Court should set the clock back and grant an interim injunction which was rejected by the High Court on 19.12.2003 and which was declined at the stage of granting leave to appeal by this Court.

Most importantly, the appellants are seeking at the interlocutory stage to question the interpretation of restraint of trade during the post-contractual period, which interpretation has been uniform, consistent and unchanged for the past several years since the judgment of Sir Richard Couch, C.J. in *Madhup Chunder vs. Rajcoomar Doss*, (1874) 14 Beng. L.R. 76. The interpretation of Section 27 of the Contract Act which found prima facie favour with the Division Bench is one which has been uniformly and consistently followed from 1874 till 2006 by all High Courts in India, and which has expressly been approved by this Court in *Niranjan Shankar Golikari (supra)*, *Superintendence Company of India (supra)* and *Gujarat Bottling (supra)*. Even if there were a case for reconsideration of this 132-year old interpretation, though none is made out by the appellant, such an exercise ought not to be undertaken in the present interlocutory proceedings.

We have perused the judgment of the Division Bench which is a detailed and well-reasoned judgment which more than adequately deals with the issues for the limited purposes of interim reliefs under Section 9 of the Arbitration & Conciliation Act.

According to learned senior counsel for the respondents, the appellant has no intention of invoking or pursuing arbitration proceedings. In this context, the judgment relied on by learned counsel for the first respondent in *Firm Ashok Traders vs. Gurumukh Das Saluja*, (2004) 3 SCC 155 may be referred. The said judgment says that commencement of arbitration proceedings is not dependent on the grant or refusal of interim reliefs, and that if arbitral proceedings are not commenced post haste after making an application under Section 9, such interlocutory proceedings would cease to be maintainable.

Respondent No.1, who was then the best fast bowler in the Indian Cricket Team and a rising star in the international world of cricket, entered into a Promotion Agreement dated 1st November, 2000 ('the agreement') with the appellant whereunder the appellant was to act as the sole and exclusive agent to manage, market, render various consulting services, negotiate for, execute contracts on behalf of, render tax and other advice to, and generally manage diverse media affairs, endorsements, advertising and the like for respondent No.1, during the term of the agreement.

The term of the said agreement was for a period of three years commencing on October 30, 2000 and ending on October 29, 2003, unless extended by mutual consent of the appellant and respondent No.1. The term of the contract came to an end on October 29, 2003, as expressly stated by the appellant in the Arbitration Petition.

Respondent No.1, thereafter, entered into an agreement dated November 22, 2003 with respondent No.2, whereby respondent No.2 became the agent for managing all media affairs of respondent No.1 with effect from December 1, 2003.

The appellant filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 for enforcement of the agreement after its expiry, and contended that such enforcement of the expired agreement should be granted pending commencement and conclusion of arbitration proceedings by the appellant. The cause of action for filing the petition was the concluded agreement between respondent Nos. 1 and 2. An injunction was sought seeking to restrain respondent No.1 from entering into any agreement/arrangement or acting upon or continuing to act upon any agreement/contract with respondent No.2 or any third party without first performing and complying with clause 31(b) of the said agreement.

PLEADINGS IN THE ARBITRATION PETITION The express case pleaded in the petition under Section 9 was that (i) the agreement was for a term of 3 years from October 30, 2000 till October 29, 2003; (ii) the agreement came to an end by efflux of time on October 29, 2003; (iii) the petitioner (appellant herein) had learnt and confirmed that respondent No.1 and respondent No.2 had entered into an agreement ; Clause 31 of the agreement survives the expiry of the agreement; the agreement contained a negative covenant which was valid and binding after its expiry; and the subsequent agreement entered into between respondent No.1 and respondent No.2 was null and void.

According to the respondent, there is no pleading whatsoever to support the argument that respondent No.1 was a fledgeling or was yet to develop into a celebrity at the time the agreement was entered into, or that the appellant took any risk whatsoever in entering into the agreement and

agreeing to procure endorsements/advertising to ensure the minimum guaranteed amount. There is no pleading whatsoever that the actual endorsements/advertising fees secured were worth more than the minimum guaranteed amounts, or that they totalled Rs.1 crore per year as is sought to be argued. There is no pleading whatsoever to suggest that the appellant was responsible for building up the reputation or saleability of respondent No.1, or that the success of respondent No.1 as a cricketer was in any manner contributed to or enhanced by the appellant. There is no pleading relating to "celebrity contracts", nor anything to suggest that the right of first refusal is a normal or common form of contract in agency contracts relating to personal services or promotional services, nor indeed even a whisper to the effect that such a clause is necessary for the regulation or promotion of trade. There is no pleading whatsoever to the effect that Clause 31(b) was a reciprocal promise obtained by the appellant to offset the alleged (but unpleaded) investments and risks undertaken by the appellant. There is no allegation of mala fide conduct. The appellant, on the other hand, proceeds entirely on submissions relating to the alleged enforceability of a negative covenant after the expiry of the agreement.

We have already perused the judgment of the learned Single Judge and of the learned Division Bench of the High Court.

On the pleadings contained in the Arbitration Petition, there can be no escape from the conclusion that what the appellant sought to enforce was a negative covenant which, according to the appellant, survived the expiry of the agreement. This, the High Court has rightly held is impermissible as such a clause which is sought to be enforced after the term of the contract is prima facie void under Section 27 of the Contract Act.

It was contended by learned senior counsel for the appellant that Clause 31(b) is not prima facie void as (i) it allegedly does not travel beyond the term because it is an independent contract; (ii) the term of agreement was itself extendable and never came to an end; (iii) the words "initial term" denote that Clause 31(b) itself resulted in an automatic extension of the term; and (iv) the "full term" contemplated was beyond the "initial term" of 3 years.

The legal position with regard to post-contractual covenants or restrictions has been consistent, unchanging and completely settled in our country. The legal position clearly crystallised in our country 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 express exception engrafted in Section 27.

Section 27 of the Indian Contract Act, 1872 provides as follows:-

"27. Agreement in restraint of trade, void.- Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is to that extent void.

Exception 1.- Saving of agreement is 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."

We have perused the relevant portions of *Niranjan Shankar Golikari (supra)*, *Superintendence Company of India (supra)* and *Gujarat Bottling (supra)* which have been extracted by the learned Judges of the Division Bench and quoted in extenso. In the circumstances, there can be no manner of doubt that the Division Bench was right in coming to the prima facie conclusion drawn by it, and in setting aside the Single Judge's order. No case was made out by the appellant for compelling respondent No.1 to appoint the appellant as his agent in perpetuity. In view of the personal nature of the service and relationship between the contracting parties, a contract of agency/management such as the one entered into between the appellant and respondent No.1 is incapable of specific performance and to enforce the performance thereof would be inequitable. Likewise, grant of injunction restraining first respondent would have the effect of compelling the first respondent to be managed by the appellant, in substance and effect a decree of specific performance of an agreement of fiduciary or personal character or service, which is dependent on mutual trust, faith and confidence.

The appellant can be adequately compensated in terms of money if injunction is refused. In our view, grant of injunction, in the present case, would result in irreparable injury and great injustice to first respondent which is incapable of being remedied in monetary terms, as he would be compelled to enter into a relationship involving mutual, faith, confidence and continued trust against his will.

We have perused the contract in detail. The terms of the contract was expressly limited to 3 years from 30.10.2000 to 29.10.2003, unless extended by mutual agreement, and all obligations and services under the contract were to be performed during the term.

Clause 31 (b) was also to operate only during the term, i.e. from the conclusion of the first negotiation period under clause 31(a) on 29.7.2003 till 29.10.2003. This respondent No.1 has scrupulously complied with. So long as Clause 31(b) is read as being operative during the term of the agreement, i.e. during the period from 29.7.2003 till 29.10.2003, it may be valid and enforceable. However, the moment it is sought to be enforced beyond the term and expiry of the agreement, it becomes prima facie void, as rightly held by the Division Bench.

If the negative covenant or obligation under Clause 31(b) is sought to be enforced beyond the term, i.e. if it is enforced as against a contract entered into on 20.11.2003 which came into effect on 1.12.2003, then it constitutes an unlawful restriction on respondent No.1's freedom to enter into fiduciary relationships with persons of his choice, and a compulsion on him to forcibly enter into a fresh contract with the appellant even though he has fully performed the previous contract, and is, therefore, a restraint of trade which is void under Section 27 of the Indian Contract Act.

Under Section 27 of the Contract Act (a) a restrictive covenant extending beyond the term of the contract is void and not enforceable. (b) The doctrine of restraint of trade does not apply during the

continuance of the contract for employment and it applied only when the contract comes to an end. (c) As held by this Court in *Gujarat Bottling vs. Coca Cola* (supra), this doctrine is not confined only to contracts of employment, but is also applicable to all other contracts.

Assuming without admitting that the negative covenant in Clause 31(b) is not void and is enforceable, it was nevertheless inappropriate, if not impermissible, for the single Judge to grant an injunction to enforce it at the interim stage, for the following reasons:

(i) Firstly, grant of this injunction resulted in compelling specific performance of a contract of personal, confidential and fiduciary service, which is barred by Clauses (b) and (d) of Section 14(1) of the Specific Relief Act, 1963;

(ii) Secondly, it is not only barred by Clause (a) of Section 14(1) of the Specific Relief Act, but this Court has consistently held that there shall be no specific performance of contracts for personal services;

(iii) Thirdly, this amounted to granting the whole or entire relief which may be claimed at the conclusion of trial, which is impermissible. (*Bank of Maharashtra v. Race Shipping*, (1995) 3 SCC 257 (Paras 10-12).

(iv) Fourthly, the single Judge's order completely overlooked the principles of balance of convenience and irreparable injury. Whereas Percept (appellant) could be fully compensated in monetary terms if they finally succeeded at trial, respondent No.1 could never be compensated for being forced to enter into a contract with a party he did not desire to deal with, if the trial results in rejection of Percept's claim. (*Hindustan Petroleum v. Sriman Narayan*, (2002) 5 SCC 760.

(v) The principles which govern injunctive reliefs in such cases of contracts of a personal or fiduciary nature, such as management and agency contracts for sportsmen or performing artistes, are excellently summarised in a Judgment of the Chancery Division reported in *Page One Records vs. Britton*, (1968) 1 W.L.R. 157. In this case it was held that, although the appellant had established a prima facie case of breach of contract entitling them to damages, it did not follow that entire of them was entitled to the injunction sought; that the totality of the obligations between the parties gave rise to the fiduciary relationship and the injunction would not be granted, first, because the performance of the duties imposed on the appellant could not be enforced at the instance of the defendants and, second, because enforcements of the negative covenants would be tantamount to ordering specific performance of this contract of personal services by the appellant on pain of the group remaining idle and it would be wrong to put pressure on the defendants to continue to employ in the fiduciary capacity of a manager and agent someone in whom he had lost confidence.

Clause 31 (a) and (b) is reproduced below:-

"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 one 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 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.

In our view, Clause 31(b) of the agreement merely provides for an obligation of respondent No.1 to give an opportunity to the appellant to match the offer, if any, received by respondent No.1 from the third party. This clause does not per se restrict or prohibit respondent No.1 to enter into any contract with a third party but at best it provides the appellant with an opportunity to gain from the advertisements the appellant has made in the process of marketing and creation of the image of respondent No.1 which was gradually built up by the appellant. This clause does not restrict the right of respondent No.1 to accept any offer for endorsement, promotion, advertising or other affiliation either on his own or through any party in the event of failure of the appellant to match the offer of the third party from whom respondent No.1 would receive any offer, respondent No.1 would be free to contract with such third party. Further, the said clause does not restrict the right of respondent No.1 to appoint an agent of his choice or restrict his liberty to carry on his affairs in the manner he likes, with the persons he chooses, in the manner he thinks best. The restriction, if any, is on account of voluntary obligations undertaken by respondent No.1 and assurances made by him to the appellant wherefor, respondent No.1 cannot be permitted to renege his promises under the garb of an alleged restriction violative of Section 27 of the Contract Act. Clause 31(b) of the agreement is an independent clause which survives the expiry of the agreement and any dispute between the parties regarding the enforceability of the said clause would come under the provision of Clause

32(g) of the agreement which provides for resolution of any claim or controversy pertaining to the agreement through the process of arbitration.

Clause 32(g) of is reproduced below:

"G) ARBITRATION: Any claims or controversies relating to this Agreement shall be resolved by arbitration held under the auspices and rules of the Indian Arbitration and Conciliation Act, 1996 by one arbitrator appointed in accordance with the arbitration rules. The place of arbitration shall be Mumbai. Any award of such arbitration shall be final, conclusive and legally binding, without any right of appeal and may be entered into judgment in any court of competent jurisdiction. This Agreement and all matters related hereto shall be governed by the laws of India."

In our view, no case is made out by the appellant for compelling respondent No.1 to appoint the appellant as his agent in perpetuity when the first respondent has no faith or trust in the appellant. The grant of injunction restraining respondent No.1 from acting upon the agreement entered into with the second respondent would have the effect of compelling the first respondent to be managed by the appellant, in substance and effect a decree of specific performance of an agreement of personal service, which is dependant on mutual trust, faith and confidence which, in the present case, are eroded and non-existent. In our view, the appellant can be adequately compensated in terms of money if injunction is refused. Clause 31(b) contains a restrictive covenant in restraint of trade as it clearly restricts respondent No.1 from his future liberty to deal with the persons he choses for his endorsements, promotions, advertising or other affiliation and such a type of restriction extending beyond the tenure of the contract is clearly hit by Section 27 of the Contract Act and is void. The said covenant, as noticed earlier, curtails the liberty of respondent No.1 Zaheer Khan even though the contract has been completed to accept any offer for his endorsement, promotion etc even by dealing with any person of his own.

As already noticed, no interim relief having been granted in favour of the appellant during the past 2= years during which the contract between respondent Nos.1 and 2 has been in operation and indeed is soon to be completed, there is no cause for interference at this late stage by this Court. In the light of the intervening events, it would be sufficient protection for the appellant if this Court directs:-

- (i) that all observations and findings of the High Court were for the limited purpose of deciding an interlocutory application, and hence will not bind parties at trial;
- (ii) that all contentions raised by all parties are expressly kept open;
- (iii) that the interim protection in paragraph 17 of the High Court's order will continue till the conclusion of the contract dated 20.11.2003.
- (iv) that this Court is not expressing any opinion on merits of the rival claims and that the observation made in this judgment is only for the purpose of finding out the

prima facie case.

(vi) that the appellant is at liberty to proceed against the respondent for breach of the contractual terms before the appropriate forum in accordance with law; and

(vii) that liberty is reserved to the appellant to invoke Clause 32(g) of the agreement.

In the result, the appeal stands dismissed on the above terms. No costs. 27578