Supreme Court of India
M/S Gujarat Pottling Co.Ltd. & Ors vs The Coca Cola Co. & Ors on 4 August, 1995
Equivalent citations: 1995 AIR 2372, 1995 SCC (5) 545
Author: S Agrawal
Bench: Agrawal, S.C. (J)

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                 PETITIONER:
M/S GUJARAT POTTLING CO.LTD. & ORS.

        Vs.

RESPONDENT:
THE COCA COLA CO. & ORS.

DATE OF JUDGMENT04/08/1995

BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
AHMAD SAGHIR S. (J)

CITATION:
 1995 AIR 2372            1995 SCC  (5) 545
 JT 1995 (6)     3        1995 SCALE  (4)635


ACT:



HEADNOTE:



JUDGMENT:
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J U D G M E N T S.C. AGARWAL. J. :

Special leave granted.

In the past nations often went to war for the protection and advancement of their economic interests. Things have changed now. Under the international order envisaged by the Charter of the United Nations war is no longer an instrument of State policy. Now-a-days there are wars between corporations, more particularly corporations having multi-national operations, for the protection and advancement of their economic interests. These wars are fought on the economic plane but some of the battles spill over to courts of law. The present case is one such legal battle. The combatants are two American multi-national corporations dominating the soft drink market having operations in a number of countries. On the one side is Coca Cola Company (respondent No. 1), hereinafter referred to as "Coca Cola", and on the other side is PEPSICO INC. (for short "Pepsi"), and its subsidiaries and subsidiaries of the subsidiaries which are under, direct or indirect, control of Pepsi. There is a long history of trade rivalry between these two multi-national corporations.

Coca Cola had been operating in this country till 1977 when on account of change of policy of the new Government Coca Cola had to close its operations in India. After the departure of Coca Cola the products of the domestic manufactures filled the vacuum. A substantial share of the market came to be controlled by the parle group of companies owned and controlled by Mr. Ramesh Chauhan and Mr. Prakash Chauhan, respondents Nos. 3 and 4. The said group was manufacturing under trade marks bearing the names "Gold Spot", "Thums Up", "Limca", "Maaza", "Rim Zim" and "Citra" as well as "Bisleri" club soda. They had arrangements with bottlers in different parts of the country whereunder the bottlers prepared beverages from the essence/syrup supplied by the Parle group and after bottling the same the beverages were sold under the names for which trade marks were held by the Parle group. In late 1980s Pepsi started operations in India and introduced beverages under their trade marks. Coca Cola followed suit thereafter. Under the Deed of Assignment dated November 12,1993, the Parle group assigned their trade marks in the beverages bearing the names "Gold Spot", "Thums Up", "Limca", "Maaza", "Rim Zim" and "Citra" to Coca Cola. On January 6, 1994, Coca Cola applied to the Registrar of Trade Marks for being recorded as subsequent proprietor of the trade marks which had been assigned to it by the various Parle entities.

Gujarat Bottling Company Ltd., appellant No. 1, (hereinafter referred to as `GBC') is a company incorporated under the Companies Act, 1956. 21% of its shares are held by Ahmadebad Advertising and Marketing Consultants Ltd., respondent No. 7. The remaining 79% of shares were held by Mr. Pinakin K. Shah, respondent No. 2 and his family members and business associates and respondents Nos. 3 and 4 and their family members and associates in the ratio of 78% and 22% respectively. The shares of respondent No. 7 were also held by respondent No. 2 and his family members and associates and respondent No.3 and 4 and their family members and associates in the same ratio of 78% and 22% respectively. GBC has bottling plants at Ahmedabad and Rajkot in Gujarat. GBC was having an arrangement with respondents Nos. 3 and 4 whereunder licence had been given to GBC to prepare, bottle, sell and distribute beverages under the trade marks "Thums-Up", "Limca", "Gold Spot", "Maaza", "Citra", "Rim Zim", and "Bisleri" club soda. In anticipation of the assignment of the rights in trade marks by Parle group in its favour, Coca Cola, on September 20, 1993, entered into an agreement (hereinafter referred to as the "1993 Agreement") with GBC whereby Coca Cola permitted and authorised GBC, upon the terms contained in the said agreement, to bottle, sell and distribute the beverages known and sold under the trade marks "Gold Spot", "Thums Up", "Limca", "Maaza" and "Rim Zim". The trade mark "Citra" was excluded from this agreement for the reason that a suit for `passing off' was pending against the Parle entity concerned in the Delhi High Court and there was uncertainty of the outcome of this litigation. The 1993 Agreement was to come into effect on the date Coca Cola indicated in writing to GBC that all trade marks related to the said agreement have been assigned and transferred to Coca Cola. The 1993 Agreement is to operate till November 17, 1998 unless earlier terminated as provided in the said agreement. Under paragraphs 4(a), 6, 18, 19, 20 and 23 Coca Cola is empowered to terminate the said agreement without notice and in paragraph 21 provision is made for termination of the said agreement by either side on giving one year's written notice. The said period of notice could be reduced by mutual consent in writing between Coca Cola and GBC. Paragraph 14 of the

1993 Agreement contains a negative convenant by GBC not to 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 the agreement including the period of one years' notice as contemplated in paragraph 21. Under paragraph 19 Coca Cola has the right to dis-continue supplying to GBC with essence/ syrup and/ or other materials on the happening of any of the events mentioned in clauses (a) to (e) of the said paragraph. Clause (b) of paragraph 19 relates to transfer of stock, share or interest or other indicia of ownership of GBC resulting in effective transfer of control without the prior express written consent of Coca Cola. The 1993 Agreement came into force on November 12, 1993 when the trade marks related to the said agreement were assigned and transferred to Coca Cola. Two such agreements were executed

- one pertaining to Ahmadabad town and other pertaining to Rajkot town. In addition, Coca Cola also entered into two separate agreements under letters dated September 20, 1993 in respect of permission to use the trade mark "Citra" by GBC for Ahmedabad and Rajkot towns. Two other separate agreements were entered by Coca Cola under letters dated September 20, 1993 for Ahmedabad and Rajkot towns for the use of the trade mark "Bisleri" club soda by GBC. All these four letter agreements are operative for two years and can be renewed by mutual consent. These agreements can be terminated by giving three months notice by either side. These agreements were also to come into effect from the date indicated by Coca Cola in writing to GBC that all trade marks related to the said agreements have been assigned and transferred to Coca Cola.

On April 30, 1994 Coca Cola entered into another agreement (hereinafter referred to as the "1994 Agreement") with GBC whereby Coca Cola granted to GBC a non-exclusive licence to use the trade marks mentioned in the schedule to the agreement, namely, "Gold Spot", "Limca", "Thums Up", "Maaza", "Citra", etc. in relation to goods prepared by or for the licensee (GBC) from concentrates and/or syrup supplied by the licensor (Coca Cola) and packaged or dispensed in accordance with standards, specifications, formulae, processes and instruction furnished or approved by the licensor from time to time and only so long as such goods are manufactured within such territory of India and sold within such territory of India and in such bottles or other containers as shall be approved by the licensor from time to time. In the said agreement it is provided that both the parties shall make application to the Registrar of Trade Marks under the Trade & Merchandise Marks Act, 1958 (hereinafter referred to as `the Act') or any statutory modification or enactment thereto or thereof for the time being in force to procure the registration of the Licensee (GBC) as a registered user of the said trade marks as aforesaid as soon as the said trade marks are registered and shall sign and execute all such documents as are reasonably proper and necessary to secure such registration and for any change thereof in the future. The said agreement is not limited to any particular period and is to continue in force without limitation of period but can be terminated at any time by either party upon giving ninety days' notice in writing to the other or by mutual consent. But in the event of either party committing a breach of any of the provisions of the said agreement it shall be lawful for the other party, by giving thirty days' notice in writing, to terminate the agreement. In accordance with the 1994 Agreement an application was submitted by Coca Cola on July 12, 1994 under Section 48 and 49 of the Act to register the said agreement as a Registered User Agreement.

After the execution of these agreements steps for upgradation of the plants of GBC at Ahmedabad and Rajkot were taken and when the upgradation of the said two plants was near completion Coca Cola advised GBC that it was necessary for GBC to provide for aditional investments in marketing arrangements, purchase of crates and other equipments and trucks etc. GBC was, however, reluctant to make further investment and respondent No. 2 requested Coca Cola to give its consent in advance for transfer of interest of respondent No. 2 in GBC. Coca Cola declined to give its consent to such transfer in advance without being aware as to who the prospective purchaser was and informed GBC and respondent No. 2 that the transfer can be permitted provided GBC does not lose controlling power or management in favour of an outsider. On January 20, 1995, the share holding of respondent No. 2 and his family members and associates as well as respondent Nos. 3 and 4 and their family members and associates in GBC and respondent No.7 were transferred to appellants Nos. 2 to 5 which are concerns closely associated and connected or affiliated to subsidiaries of Pepsi, respondent No. 6, and Pepsi Foods Limited, respondent No. 5, a subsidiary of Pepsi. As a result Pepsi acquired control over GBC. On January 25, 1995 GBC gave a notice to Coca Cola under clause 7 of the 1994 Agreement whereby the said agreement was terminated. In the said notice it is also stated that without prejudice to the contentions of GBC that the 1993 Agreement stands replaced by the 1994 Agreement and/or that the termination period under the 1993 Agreement in any event stands reduced to 90 days and that the said letter dated January 25, 1995 be treated, as a matter of abundant caution, as termination notice also under clause 21 of the 1993 Agreement. On January 25, 1995 GBC also addressed a letter to Coca Cola informing them that shares representing 70.6% approximately of the paid up equity capital of GBC had been acquired by and transferred in favour of appellants Nos. 2 to 5. On January 31, 1995 GBC addressed a letter to the Director (F&VP), Ministry of Food Processing Industries, Government of India, for approval of crown cap designs pertaining to beverages of which the trade marks are held by Pepsi.

On January 30, 1995 Coca Cola filed a suit (Suit No. 400 of 1995) in the Bombay High Court seeking various reliefs. In the said suit Coca Cola took out Notice of Motion No. 316 of 1995 seeking interim relief. During the course of hearing on the said Notice of Motion before the learned single Judge of the High Court (Dhanuka J.) the learned counsel for Coca Cola sought interim relief in terms of prayers (a)(i), (a) (ii), (a)(iii) and (a)(viii) of the Notice of Motion. By his order dated February 22, 1995 the learned single Judge declined the application for grant of interim relief in terms of prayers (a)(i), (a)(iii) and

(a)(viii) but issued an interim injunction restraining GBC from manufacturing, bottling or selling or dealing with the products, beverages of any brand or trade mark owned by respondents Nos. 5 and 6 or any one else other than Coca Cola. GBC was permitted to pursue its application dated January 31, 1995 pending before the Director (F&VP), Ministry of Food Processing Industries, in accordance with law but GBC was directed not to act upon the permission of the said authority or any other authority, if granted, without obtaining prior leave of the court. Two appeals (Appeals Nos. 183 and 191 of 1995) were filed against the said order of the learned single Judge before the Division Bench of the High Court - one was by GBC abd the other was by Coca Cola. During the course of hearing of the said appeals the parties, through their counsel, submitted that as decision in the appeals would have impact on the Motion pending before the learned single Judge, it was desirable that Notice of Motion No. 316 of 1995 should be taken up on board and disposed of finally by the Division Bench so as to avoid one more appeal. In view of the said submission and by consent of the parties the Motion was heard and disposed of finally by the Division Bench by the impugned judgment dated March 31, 1995. By the said judgment Notice of Motion No. 316 of 1995 was made absolute in terms of prayer Nos.

(a)(ii) and (a)(iii) as modified. Prayer (a)(ii) was for an injunction restraining respondent No. 1 (GBC) either directly or indirectly by itself or through its shareholders from concerning itself with the products, beverages of any other brand or trade mark of the plaintiffs (Coca Cola). Under prayer (a)(iii) as modified an injunction has been granted in the following terms:

> "That in the event of the sale of shares having taken place before the institution of the suit, the deponent No.1 and those to whom the shares have been sold and also subsequent transferees, their servants, agents, nominees, employees, subsidiary companies, controlled companies, affiliates or associate companies or any person acting for and on their behalf are restrained by an interim injunction from using the plants of respondent No. 1 at Ahmedabad and Rajkot for manufacturing, bottling or selling or dealing with or concerning themselves in any manner whatsoever with the beverages of any person till January 25, 1996."

Feeling aggrieved by the said judgment of the Division Bench of the High Court dated March 31, 1995, GBC (defendant No.1) and the four transferees of the shares of GBC (defendants Nos.7 to 10) have filed these appeals.

By the said interim order the High Court has given effect to the negative stipulation contained in paragraph 14 of the 1993 Agreement which is in the following terms:-

> "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 subsistenance of this Agreement including the period of one year's notice as contemplated in paragraph 21."

On behalf of the appellants submissions have been made assailing the validity of the said negative covenant. For that purpose it is necessary to determine whether the 1993 Agreement subsists or has been legally terminated. The case of GBC, in this regard, is that the 1993 Agreement is no longer in operation since it has been superseded by the 1994 Agreement and the 1994 Agreement has been terminated by notice dated january 25, 1995 and that, in the alternative, the requirement regarding giving of one year's written notice for terminating the 1993 Agreement as contained in paragraph 21 of the said agreement was reduced by mutual consent by the parties by the 1994 Agreement wherein under clause 7 the period of such notice for terminating the agreement is 90 days and that by notice dated January 25, 1995 the 1993 Agreement stands terminated on the expiry of 90 days from the date of the said notice. These submissions require an examination of the nature and contents of the 1993 and 1994 Agreements but before we proceed to do so we may briefly refer to the relevant law governing the use of trade marks in India.

The first enactment whereby the machinery for registration and statutory protection of trade marks was introduced in this country was the Trade Marks Act, 1940. Prior to the said enactment the law relating to trade marks in India was based on common law which was substantially the same as was applied in England before the passing of the Trade Marks Registration Act, 1875. At common law the right to property in a trade mark was in the nature of monopoly enabling the holder of the said right to restrain other person from using the mark. For being capable of being the subject matter of property a trade mark had to be distinctive. This right was an adjunct of the goodwill of a business and was incapable of separate existence dissociated from that goodwill. [See: General Electric Co. V. General Electric Co. Ltd., 1972 (2) All E R 507]. The Trade Marks Act, 1940, which was based on the Trade Marks Act, 1938 of U.K., has now been replaced by the Act. The Act has codified the law relating to Trade and Merchandise Marks and is a comprehensive piece of legislation dealing with the registration and protection of trade marks and criminal offences relating to trade marks and other markings in merchandise. Under the Act registration of trade marks is not compulsory and as regards unregistered trade marks, some aspects are governed by the Act while others are still based on common law. In respect of a trade mark registered under the provisions of the Act certain statutory rights have been conferred on the registered proprietor which enable him to sue for the infringement of the trade mark irrespective of whether or not that mark is used. The Act also makes provisions whereunder registered proprietor of a trade mark can permit any person to use the mark as a registered user and for that purpose provision are made in Sections 48 to 54 of the Act. In clause (m) of Section 2 the expression "permitted use" in relation to a registered trade mark by a registered user of the trade mark in relation to goods- (a) with which he is connected in the course of trade; and (b) in respect of which the trade mark remains registered for the time bing; and (c) for which he is registered as registered user; and (ii) which complies with any conditions or restrictions to which the registeration of the trade mark is subject". In sub-section (i) of Section 48 it is provided that a person other than a registered proprietor of a trade mark may be registered as the registered user thereof in respect of any or all of the goods in respect of which the trade mark is registered otherwise than as a defensive trade mark and in the said Section the Central Government has been empowered to make rules providing that no application for registration as such shall be entertained unless the agreement between the parties complies with the conditions laid down in the rules for preventing trafficking in trade marks. Under sub-section (2) the permitted use of a trade mark shall be deemed to be use by the propriter thereof and shall be deemed not to by used by a person other than the proprietor, for the purpose of Section 46 or for any other purpose for which such use is material under the Act or any other law. Section 49 makes provision for submission of application for registration of trade mark as a registred user and one of the requirements is that the said application shall be accompanied by the agreement in writing or a duly authenticated copy thereof entered into between the registered proprietor and the proposed registered user with respect to permitted use of the trade mark and it is further required that the registered proprietor or some person authorised to the satisfaction of the Registrar to act on his behalf give an affidavit in respect of the matters set out in sub-clauses (a) to (d) of clause (ii) of sub-section (1) of Section 49. Section 51 empowers a registered user of a trade mark to call upon the proprietor to take proceeding to prevent infringement of the trade mark and if the proprietor refuses or neglects to do so within three months after being so called upon, the registered user may institute proceedings for infringement in his own name as if he were the proprietor, making the proprietor a defendent. Section 52 deals with power of Registrar to very or cancel registration as registered user. Under Section 53 a registered user does not have the right of assignment or transmission of the right to use the trade mark. Further provisions relating to registered user are contained in Chapter V (Rules 82 to 93) of the Trade and Merchandise Marks Rules, 1959 (hereinafter refered to as "the Rules"). Rules 83 provides the particulars which are required to be stated in the agreement between the registered proprietor and the proposed registered user with respect to the permitted use of the trade mark. The said particulars include "the particulars specified in sub-clauses (a) to (d) of clause (ii) of sub-section (1) of Section 49" and a provision about 'means for bringing the permitted use to an end when the relationship between the parties or the control by the registered propretor over the permitted user ceases."

The abovementioned provisions contained in the Act and the Rules indicate that the use of registered trade mark by a registered user is subject to fulfilment of certain conditions and for the purpose of registration of a registered user it is necessary for the registerd proprietor of the trade mark and the proposed registered user to execute an agreement which must contain the prescribed particulars and must be submitted alongwith the application for registration as a registered user. The registration as registered user enables the use of the trade mark by the registered user as being treated as use by the proprieter of the trade mark and enables a registered user to take proceedings in his own name to prevent infringement of the trade mark.

Apart from the said provisions relating to registered users, it is permissible for the registerd proprited of a trade mark to permit a person to use his registerd trade mark. Such licensing of trade mark is governed by common law and is permissible provided (i) the licensing does not result in causing confusion or deception among the public;

(ii)it does not destroy the distinctiveness of the trade mark, that is to say, the trade mark, before the public eye,continues to distinguish the goods connected with others; and (iii) a connection in the course of trade cosistent with the definition of trade mark continues to exist between the goods and the propriter of the mark. [see : P. Narayanan = Law of Trade Marks and passisng-Off, 4th Ed., para 20.16,p.335]. It would thus appear that use of a registered trade mark can be permitted to a registered user in accordance with provisions of the Act and for that purpose the registered proprietor has to enter into an agreement with the proposed registered user. The use of the trade mark can also be permitted dehors the provisions of the Act by grant of licence by the registered proprietor to the proposed user. Such a licence is governed by common law.

We may now examine the two agreements, viz., the 1993 Agreement and 1994 Agreement. In the 1993 Agreement, in paragraph 2, Coca Cola has agreed to permit and authorise GBC, upon the terms contained in the said agreement, to bottle, sell and distribute the beverages known as and sold under the trade marks set forth in Annexure ii to the agreement. Under paragraph 3 it is required that beverages shall be manufactured in a plant approved by Coca Cola in accordance with the formula and procedure provided by Coca Cola. In clause (a) of paragraph 4 GBC expressly covenants to consistently maintain the quality of the sid beverages in all respects and to strictly adhere and conform to the technical specification and standards as provided, using only such ingredients and of such quality as provided by Coca Cola. GBC also undertakes to exercise great care and caution to see that sub-standard, inferior or unwholesome beverages will not be manufactured/marketed by GBC or its agents directly or indirectly and if Coca Cola observes that the quality of the beverages is not maintained consistently, and/or there are persistent complaints from the market, dealers, outlets, consumers, etc., concerning the low standard or inferior quality of the beverages manufactured/marketed by GBC, Coca Cola retains the right to forthwith terminate the agreement. In clause (b) of paragraph 4, in order to assure compliance by GBC with the above requirments, it is permissible for the representatives and/or agents of Coca Cola to inspect at any time the premisesof GBC, the finished beverages, the methods of preparation there of and the bottling process, and full cooperation in this regard is to be extended by GBC. GBC has also agreed to submit samples of the finished beverages to Coca Cola every month for analysis and approval by Coca Cola who is the sole judge to determine and certify the quality of the said beverages as fit for marketing . Paragraph 5 relates to keeping by GBC of complete records of all chemical tests carried out as specified by Coca Cola and of production, sale and distribution of the beverages and furnishing of monthly reports about the same to Coca Cola. Under clause (a) of paragraph 6 GBC undertakes to buy only from Coca Cola or a manufacturer approved by Coca Cola essences and beverages bases (ingredients for making the said beverages). Under clause (b) of paragraph 6 GBC undertakes to buy bottles,crowns lables and other ingredients of the quality, standard and specifications laid down by Coca Cola preferably from the suppliers approved by Coca Cola and in case GBC chooses to buy the above items from a supplier/suppliers other than the one approved by Coca Cola, GBC is required to submit the itens so procured to Coca Cola to determine the quality, standard and specifications before they are put to use to manufacture, bottle or sale of the said beverages. Under clause (c) of paragraph 6 GBC has agreed to use only bottles, lables and crowns for the said beverages of a type, style, size and design approved by Coca Cola. The breach of clauses (a), (b) and (c) of paragraph 6 would constitute an infringement of the agreement for which Coca Cola reserves its right to terminate the agreement. Under pragraph 7 GBC has agreed to vigorously and deligently promote and solicit the sale of the said beverages and assure full and complete distribution of the said beverages to meet the market demand for the said beverages. Under clause (a) of paragraph 8 GBC covenants and agrees not to manufacture, bottle, sell,deal in or otherwise be concerned with any product under any get up or container used by Coca Cola or which is likely to be confused or used in unfair competition therewith or passed- off therefor. Under clause (b) of pragraph 8 GBC covenants and agrees not to manufacture, bottle , sell, deal in or otherwise be concerned with any product under any trade mark or other cdesignation which is an imitation or infringement of these trade marks or is likely to cause passings-off of any product which is calculated to lead the public to believe that it originates from Coca Cola because of GBC's association with the business of bottling, distributing and selling the beverages. In the said clause,it is provided that the use of the said trade marks in any form or fashion or any words graphically or phonetically similar thereto or in imitation thereof on any product other than that of Coca Cola. would constitiute an infringement of the trade marks or be likely to cause passing-off. Under clause (c) of paragraph 8 GBC covenants and agrees that during the continuance of the agreement it will not manufacturer, bottle, sell deal in or otherwise be concerned with any beverages put out under any trade mark or name or style being same or deceptively similar to the trade marks owned by Coca Cola or having similar or near similar phonetic rendering and any beverages put out under the said trade marks or otherwise which is an imitation of the essence, syrup or beverages or is likely to be a substitute thereof. In paragraph 9 it has been provided that the decision of Coca Cola on all matters concerning the said trade mark shall be final and conclusive and not subject to question by GBC and Coco Cola in the defenc above trade marks at its sole cost and expenses and GBC will co-operate fully with Coca Cola in the defence and protection of the said trade marks in use in the territory infringing Coca Cola's trade marks. In paragraph 10 GBC has assured Coca Cola that it will safeguard that no spurious beverages are manufactured, marketed, sold or otherwise dealt with in the bottles registered with Coca Cola's trade name or trade marks and GBC has further undertaken to take all necessary steps to prevent any spurious or imitation beverages being filled in the bottles registerd under Coca Cola's trade name or trade marks. In pragraph 11 GBC has recognised Coca Cola's ownership of the trade marks and has agred to only use the said trade marks in the manner lawfully permitted and not to take any action which would cause breach or harm the trade marks or Coca Cola's ownership thereof in manner. In paragraph 12 it is provided that nothing contained in the Agreement shall be construed as conferring upon GBC any right, title or interest in the above trade marks, or in their registration or in any designs, copy rights, patents, trade names, signs, emblems, insignia, symbols, slogans, or other marks or devices used in connection with the said beverages. In paragraph 13 GBC has agreed to sell and distribute the said beverages under Coca Cola's trade marks strictly on its own merits, and make only such representation concerning the said beverages as shall have been previously authorized in writing by Coca Cola and that GBC will not use coca Cola's trade marks or any other such name/names which are deceptively similar or have phonetic resemblance or can be confused with Coca Cola's trade mark, as part of its name, nor will GBC use in connecetion with any drink any trade marks or design which is deceptively similar to Coca Cola's trade marks or any other trade marks which Coca Cola may acquire.In paragraph 14 GBC recognises that Coca Cola has awarded the territory on the assurance of GBC, that it will work vigorously and deligently to promote and solicit the sale of the products/beverages produced under the trade marks of Coca Cola and has further assured full and complete distribution of Coca Cola's products/beverages to meet the demand from the consumers because of the goodwill enjoyed by Coca Cola and its products/beverages and GBC also recognises that Coca Cola has incurred heavy expenditure by way of advertisements, periodic training of the sales, marketing and technical staff of GBC as well as the protection of its goodwill and GBC recognises that it is imperative that it must maintain with full vigour the continuity of the supply of Coca Cola's products/beverages for safeguarding the interest of the consuming public and thus maintaining the goodwill of Coca Cola. At the end of paragraph 14 there is the negative stipulation which has already been set out earlier. In paragraph 15 GBC has agreed that it will not sell the said beverages to the retailers in the territory on prices higher than the price agreed to or recommended by Coca Cola in writing. In paragraph 16 Coca Cola reserves its rights to grant at any time one or more additional licence near the area where GBC plant is located, if in the judgement of Coca Cola situation warrants commissioning of further/additional licence. In paragraph 17 it is provided that nothing in the agreement shall create or be deemed to create any relationship of agency, partnership or joint venture between Coca Cola and GBC and further that GBC will assume full responsibility or liability for and will hold Coca Cola harmless from any loss, injury, claims or damages resulting from or claimed to result from acts of commisions or omissions on the part of the GBC. In paragraph 18 GBC has agreed not to sell, assign, transfer, pledge, mortgage, lease, licence or in any other way or manner encumber or dispose of, in whole or in part, the agreement or any interest herein, either directly or indirectly, nor to pass by operation of law or in any other manner without Coca Cola's prior written consent. Under paragraph 19 Coca Cola has to right to cancel and terminate the agreement forthwith by written notice to GBC upon the happening of any one or more of the events mentioned in clauses (a) to (e) of the said paragraph.

The said power is in addition to all other rights and remedies which Coca Cola may have. In the concluding part of paragraph 19 it is provided that upon the happening of any one or more of the foregoing events, Coca Cola shall also have the right to discontinue supplying GBC with essence/syrup and/or other materials for such length of time as Coca Cola may in its sole judgment deem necessary without thereby cancelling or prejudicing Coca Cola's right to cancel or terminate the agreement for the said cause or for any one or more other cause or causes. In paragraph 20 it is prescribed that the said agreement shall expire, without notice, on November 17, 1998 unless it has been earlier terminated as provided in the agreement. Paragraph 21 makes provision for termination of the agreement by either side on giving one year's written notice which period may be reduced by mutual consent in writing between Coca Cola and GBC. Paragraph 23 deals with partial invalidity resulting from any of the provisions of the agreement being held invalid for whatever reason by any of court, governmental agency, body or tribunal. In paragraph 25 provision is made for supersession of all prior contracts, agreements or commitments, either written or oral, which are rendered mull and void and of no effect. Paragraph 29 provides that the agreement shall come into effect at the date on which Coca Cola indicates in writing to GBC that all trade marks related to the said agreement have been assigned and transferred to Coca Cola, provided that if such notice is not issued by the first anniversary of the agreement, then the agreement shall be void ab initio and of no effect. In paragraph 30 GBC represents and warrants to Coca Cola that GBC acknowledges that the trade marks listed on Annexure II will be, as of the effective date of this agreement, the property of Coca Cola, that GBC has no right, title or interest to such trade marks, except pursuant to the licence granted by the agreement and the GBC has no existing claims or basis for claims against parle (Exports) Limited or any of its affiliates which would affect the rights of Coca Cola under the agreement.

A perusal of the various provisions contained in the 1993 Agreement shows that by this agreement Coca Cola has agreed to grant a licence to GBC for the use of the trade marks in respect of beverages mentioned in Annexure II to the agreement which were to be acquired shortly by Coca Cola. A number of provisions in the agreement relate to the use of the said trade marks by GBC so as to ensure that such user of the trade marks by GBC is strictly in accordance with the common law governing user of trade marks. The 1993 Agreement was, therefore,an agreement for grant of licence under common law for user by GBC of the trade marks which were to be acquired by Coca Cola. The 1993 Agreement also contains various provisions governing preparation, bottling and sale of the beverages covered by the said trade marks. In that sense the 1993 Agreement can be regarded as an agreement for grant of a franchisee, whereunder GBC has been permitted to manufacture, bottle and sell the beverages covered by the trade marks referred to and mentioned in the agrement in the area covered by the agreement subject to the conditions laid down in the agreement.

We would now come to the 1994 Agreement. In this agreement Coca Cola has been described as the Licensor and GBC as the Licensee. In clause (a) of the preamble to the agreement it is stated that the licensor has acquired the trade marks specified in the schedule to the agreement by virture of Deeds of Assignment dated November 12, 1993 in respect of the goods specified in the said schedule. In clause (b) of the preamble reference is made to the 1993 Agreement and it is stated that the parties have arranged for the prepration, packaging and sale of the goods by the Licensee and for the use of the said trade marks in relation thereto, and may enter into further arrangements in the future, within the scope of the 1994 Agreement. In clause

(c) of the preamble it is stated that the Licensor holds no equity interest in the Licensee and wishes to enter into an agreement for the use of the said trade marks on a purely contractual basis. Thereafter, the agreement provides in paragraph 1 for grant of a non-exclusive license by the Licensor to the Licensee to use the said trade marks in relation to goods prepared by or for the Licensee from concentrate and/or syrup supplied by the Licensor or its nominee and prepared and packaged or dispensed in accordance with standards, specifications, formulae, processes and instruction, furnished or approved by the Licensor from time to time and so long as such goods are manufactured within such territory of India and in such bottles or other containers as shall be approved by the Licensor from time to time. In paragraph 2 of the agreement it is provided that the Licensor and the Licensee shall make application to the Registrar of Trade Marks under the Act or any statutory modification on enactment thereto or thereof for the time being in force to procure the registration of the Licensee as a registered user of the said trade marks as aforesaid as soon as the said trade marks are registered and shall sign and execute all such documents as are reasonably proper and necessary to secure such registration and for any change thereof in the future. In paragraph 3 the License has undertaken to prepare and package or dispense the said goods strictly in accordance with standars, specifications, formulae, processes and instructions furnished or approved by the Licensor from time to time to use the said trade marks in relation only to such goods so prepared and packaged or dispensed and also agreed to permit the Licensor or its authorised representative at all reasonable times to inspect at the Licensee's premises and elsewhere as the Licensor may consider appropriate to implement these convenants to ensure quality control of the said goods and the methods of preparing, packaging or dispensing the said goods and the Licensee will, if called upon by the Licensor to do so, submit samples of the said goods, including packages and the markings thereon, for the inspection, analysis and approval of the licensor. Paragraph 4 records the undertaking that the licensee shall not be the sole licensee/permitted user of the said trade marks. In paragraph 5 the Licensee has agreed that whenever the said trade marks are used by the Licensee in relation to the said goods, the marks shall be so described as to clearly indicate that the trade marks are being used only by way of permitted use. In paragraph 6 the Licensee recognises the Licensor's title to the said trade marks and the Licensee agrees that it shall not at any time do or suffer to be done any act or thing which will in any way impair the rights of the Licensor in and to the said trade marks and the Licensee shall not acquire and shall not claim any right, title or interest in and to the said trade marks adverse to the Licensor by virture of the licence granted under the agreement to the Licensee or through the Licensee's use of the trade marks. In paragraph 7 it is provided that the agreement shall continue in force without limit of period but may be terminated at any time by either party upon giving 90 days notice in writing to the other or by mutual consent and further that in the event of either party committing a breach of any of the provisions of the agreement it shall be lawful for the other party by giving 30 days' notice in writing to terminate the agreement. In paragraph 8 the Licensee convenants that upon any amendments that the Licensor may request the Licensee to execute for the purpose of applying for variation or cancellation of the entry of the Licensee as a registered user of the said trade marks and that in the event of cancellation, the Licensee will not make any further use of the said trade marks.

A perusal of the provisions contained in the 1994 Agreement, more particularly paragraph 2 and 8, indicates that the said agreement has been executed with a view to comply with the requirements of the Act and the Rules for registration of GBC as the registered user of the trade marks specified in the Schedule to the agreement which had been acquired by Coca Cola. This agreement has been executed as per the requirements of Rule 83 of the Rules read with sub-clauses (a) to (d) of clauses (ii) of sub-section (1) of section 49. This is evident from paragraphs 1, 3, 4, 5, and 6 which contain partculars referable to sub-clauses (a), (b) and (c) and paragraph 7 which contains partculars referable to sub-clause (d) of clause (ii) of sub-section (1) of section 49. The 1994 Agreement must, therefore, be treated as an agreement for registration of GBC as a registered user as contemplated by Section 49 of the Act. In other word's 1994 Agreement is a statutory agreement which is required to be executed under Section 49 of the Act read with Rule 83 of the Rules for registration of GBC as a registered user of the trade marks held by Coca Cola. It is true that provisions similiar to these contained in 1994 Agreement are also contained in the 1993 Agreement. But that is so because a licence to use a trade mark in common law can only be granted subject to certain limitations which are akin to the requirements for an agreement for registered user under the Act. But, at the same time, the 1993 Agreement is much wider in its amplitude than the 1994 Agreement in the sense that the 1993 Agreement includes various terms regulating the exercise of the right of franchise that has been granted by Coca Cola to GBC in the matter of the manufacturing, bottling and selling of the beverages which provisions are not found in the 1994 Agreement. The 1994 Agreement canot be construed as wiping out the said terms and conditions regarding exercise of franchise granted by Coca Cola to GBC as contained in the 1993 Agreement. In this context, reference may also be made to paragraph 25 of the 1993 Agreement which contains an express provisions for superseding all prior contracts/agreements or commitments either written or oral. No similar provision regarding the supersession of the 1993 Agreement is contained in the 1994 Agreement. We are, therefore, of the opinion that the 1994 Agreement cannot be construed as supersending the 1993 Agreement and the learned single Judge and the Division Bench of the High Court have rightly rejected the contention urged on behalf of GBC that 1993 Agreement was superseded by the 1994 Agreement.

Shri Shanti Bhushan, the learned senior counsel appering for the appellants, however, laid emphasis on the alternative submission that the period of notice for terminating the agreement as contained in paragraph 21 of the 1993 Agreement was reduced by mutual consent from one year to 90 days'by paragraph 7 of the 1994 Agreement. We find it difficult to accept this contention. It is no doubt true that pragraph 21 of the 1993 Agreement enables the termination period to be reduced by mutual consent in writing between.Coca Cola and GBC. There is, howecer, no such agreemdnt which expressly reduces the daid termination period under paragraph 21 of the 1993 Agreement. What is suggested is that paragraph 7 of the 1994 Agreement. What is suggested is that poaragraph 7 of the 1994 Agreement is such an agreement which, by implication, reduces the termination period prescribed in paragraph 21 of the 1993 Agreement. Since we are of the view that the nature and scope of the two agreements , i.e., 1993 Agreement and 1994 Agreement, are not the same and that while the 1993 Agreement is an Agreement for grant of licence in common law and the 1994 Agreement is executed as per the reguirements of the Act and the Rules for the purpose of registration of user, GBC as registered user of the trade marks under the Act, clause7 of the 1994 Agreement has to be confined tin its application to that agreement only and it cannot be construed as having modified the termination period contained in paragraph 21 of the 1993 Agreement.

Moreover, papragraph 21 of the 1993 Agreement requires that reduction of the termination period has to be by mutual consent of both the parties, viz., Coca Cola and GBC. Mutual consent postulates consensus ad idem between the parties. There is no material on record to show that there was such a consensus ad idem between Coca Cola and GBC regarding reducing the termination period for the notice under paragraph 21 of the 1993 Agreement. The notice dated January 25, 1995 that was given by GBC to Coca Cola does not lend support to the case of the appellants. In the said notice it is stated:

> "without prejudice to our contentions that the so called Licence Agreement dated September 20, 1993 (herein `the Livense Agreement') stands replaced by the Trade Mark License Agreement and/or that the temination period under the License Agreement in any event stands reduced to 90 days ' please treat termination notice also under clause 21 of the License Agreement."

In the said notice, it is not stated that the parties had mutually agreed to reduce the termination period from one year to 90 days by the 1994 Agreement. What is stated in the notice is the contention of GBC that the 1993 Agreement is replaced by the 1994 Agreement and that in any event the limitation period had been reduced to 90 days. If it was mutualy agreed by Coca Cola and GBC that the termination period for notice under paragraph 21 of the 1993 Agreement is being reduced from one year tp 90 days by the 1994 Agreement, there was no reason why GBC would not have mentioned about the said mutual understanding in the notice dated January 25, 1995. The fact that there is no mention about such mutual understanding in the notice dated January 25, 1995. and what is stated in the said notice about reduction of the termination period of thenotice is by way of contention of GBC negatives the case put forward by the appellants that the termination period for the notice under paragraph 21 of the 1993 Agreement had been reduced from one year to 90 days. it must, therefore, be held that the 1993 Agreement can be terminated only by giving a notice of one year as required by paragraph 21 of the said agreement. The Question whether the notice dated january 25, 1995 can be treated as a notice terminating the 1993 Agreement on the expiry of period of one year from the date the said notice has not been examined by the High Court. we do not proposes to go into the same and leave it to the High Court to deal with it, if raised. For the present, we will proceed on the basis that the 1993 Agreement subsists and it does not stand terminated on the expiry of 90 days from the date of notice dated January 25, 1995.

We may now examine the submission of Shri Shanti Bhushan that the negative stipulation contained in paragraoh 14 of the 1993 Agreement, being in restraint of trade, is void in view of the provisions of Section 27 of the Indian Contract Act, 1872. For that purpose, it is necessary to consider whether and, if so, to what extent the law in India differs from trhe common law in England.

Under the common law in England a man is entitled to exercise any lawful trade or calling as and where he wills. The law has always regarded jealoulay any interference with trade, even at the risk of interference with freedom of contract, as it is public policy to oppsse all restraints uopn liberty of individual action which are injurious to the interests oif the State. A person may be restrained from carrying in his trade by reason of an agreement voluntarilu entered into by him with that object and in such a case tha general principle of freedom of trade must be applied with due regard to the principles that public policy requires for persons of full age and understanding the utmost freedom to contract. Traditionally the doctrine of restraint of trade applied to covenants whereby an employee undertakes not to compete with his employer after leaving the employer's service and covenants by which a trader who has sold his business agrees not thereafter to compete with the purchaser of the business. The doctrine is, however, not confined in its application to these two categories but covenants falling in these two categories are always aubjected to the test or reasonableness. Since the doctrine of restrint of trade is based on public policy its application has been influenced by changing views of what is desirable in the public interest. The decisions on public policy are subject to change and development with the change and development of trade and the means of communications and the evolution of enconimic thought. The general principle once applicable to agreements in restraint of trade has consequently been considerbly modified by later decisions in England. In the earliest times all contracts in restraint of trade, whether general or partial, were void. The severity of this principle was gradually relaxed, and it became the rule that a partial restraint might be good if reasonable, although a general restraint was of necessity void. The distinction between general and partial restraint was subsequently repudiated and the rule now is that the restraints, whether general or partial, may be good if they are reasonable and any restraint on the freedom of contact must be shown to be reasonably necessary for the purpose of freedom of trade. A covenant in restraint of trade must be reasonable with reference to the public policy and it must also be reasonably necerssary for the protection of the interest of the covenantee and regard must be had to the interests of the covenantee and regard must be had to the interests of the covenantor. Contracts in restraint of trade are prima facie void and the onus of proof is on the party supporting the contract to shoe that the restraint goes no further than is reasonably necesary top rpotect the interest of the covenantee and if this onus is discharged the onus of showing that the restraint is nevertheless injurieous to the public is on the party attacking the contract. The court has to decide, as a matter of law, (i) whether a contract is or is not in restraint of trader, and (ii) whether, if in restraint of trade, it is reasonable. The court takes a far stricter and less favourable view of covenants entered into between employer and employee than it does of similar covenants between vendor and purchaser or in partnership agreements, and accordingly a restraint may be unreasonable as between employer and employee which would be reasonable as between the vendor and purchaser of a business. [See : Halsbury's Laws of England, 4th ?Edn., Vol. 47, paragraphs 9 to 26; N.S. Golikari V. Century Spuinning Co., 1967 (2) SCR 378 at PP. 384_85]. Instead of segregating two questions,

(i) whether the contract is in restraint of trade,(ii) whether, if so, it is "reasonable," the courts have often fused the two by asking whether the contract is in "undue restraint of trade" or by a compound finding that it is not satisfied that this contract is really in restraint of trade at all but, if it is, it is reasonable. [See: Esso Petroleum Co. Ltd. V. Harper's Garage (Stourport)Ltd., 1968 Ac 269 at p. 331 Lord Wilberforcel].

In India agreements in restraint of trade are govrned by Section 27 of the Indian Contract Act which provides as follows:

> "Section 27. 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.- 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."

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 wa, however, never applied times. The said provision was, however, never applied in New York. The adoption of this provision has been severly 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 not the principle that the restraint beoing partial or reasobale 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 or trade, generaql or partial, as were reasonablke, 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. V. Krishan Murgai, 1980 (3) SCR 1278, at pp.1291, 1296- 98, per A.P.Sen J.J.

We do not propose to go into the question whether reasonableness of restraqint 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. On that view instead of being required to consider two questions as in England, the courts in India have only to consider the question whether the contract is or is not in restraint of trade. It is, therefore, necessary to examine whether the negative stipulation contained in paragraph 14 of the 1993 Agreement can be regarded as in restraint of trade. This involves the question, what is meant by a contract in restraint of trade?

In Attorney-General of the Commonwealth of Australia v. Adelaids Steamship Co.Ltd., 1913 Ac 781, Lord Parker has said:

> "Monopolies and contracts in restraint of trade have this in common, that they both, if enforcved, 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." [p.794] Referring to these observations Lord Reid in Esso Petroleum Co. Ltd. (supra) has said:
>
> "But that cannot have been intended 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 service to another: then during the period of the contract he is not entitled to engage in other business activities. But no one has ever suggested that such contracts are in restraint of trade except in very unusual circumstances."[p.294] In McEllistrim v. Ballymacelligott co-operative Agricultural and Dairy Society Ltd., 1919 Ac 548, Lord Finlay after referring to the principle enumerated in Herbert Morris Ltd v. Saxelby, 1916 (1) Ac 688, 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 aplicabl;e to the right to sell his goods." Douibting the correctness of this statement Lord Reid in Esso POetroleum Co. Ltd. (supra) has said:

"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 suggersted that they were in restraint of trade." [p.296] In Petrfina (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:

"A contract in restraint of trade is one in which a party (the convenantor) agrees with any other party (the convenantee) to restrict his lberty in the future to carry on trade with other persons not parties to the contract in such manner as he cjhooses."[p.180] In the same case, Lord denning M.R. has said:

"Every member of the community is entitled to carry on any trade or business be 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 or tyrade. It is invalid unless it is reasonable as between the parties and not injurious to the public interest."

After referring to these observations, Lord Morris in Esso Petroleum Co. Ltd. (supra) has said:

These are helpful expositions provided they are used reationally 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 inmdeed if it were sought to describsbe the contract as being in restaint of trade. In fact such a contract would likely be for the advancement of the trade." [p.307] 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. (supra) 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 thus answered by Lord Pearce:

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 realations between the parties and are, therefore, free from doctrine." [p.327] "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' servives 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."[p.328] In the same case, lord wilberforce has observed:

"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 certaintly, 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 or 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." [p.332] "How, then, can such contracts be defined or at least identified? No exhaustive test can be stated-probably np precise non-exhaustive test. But the development of the law does seem to show that judge have been able to dispense from the necessity of justification under a public p[olicy 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."[pp.332-33] There is a growing trend to regulate distribution of goods and services through franchise agreements providing for grant of franchies by the franchiser on certain terms and conditions to the franchiseee. Such agreements often incorp;orate a conditionm that the francxhisee 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.

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. (supra), 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 agreement is to promote the trade and the negative stipulation under challenge seeks to achieve the said purpose by requiring GBC to wholeheartedlky apply to promoting the sale of the products of Coca /Cola. In that contextr, 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 subsistenance of this agreement including the period of one year as contemplated in paragraph 21," in paragraph 14. Except in cases where the contact is wholly one sided, normally the doctrine of restrain of trade is not attracted in cases where therestriction is to operate during the period the contract is substriction 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 N.S. Golikari (supra) wherein it has been said:

> "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 contracts. 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 under Section 27 of the Contract Act. A negative covenant that the employee would not engage 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 opr excessively harsh or unreasonable or one sided as in the case of W.H. Milsted and Son Ltd." [p.389] Similarly, in Superintendence Company (supra) A.P. Sen J., in his concurring judgement, has said that "the doctrine of restraint of trade never applied during the continuance of a contract of employment; it applies only when the contract comes to an end."(p.1289) 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 undelying principle governing contracxts in restraint of trade is the same and as a matter of fact the courts take a more restricted and less favourable view in respect of a covenant entered into between an employer and an employee as compared to a covenant between a vendor and a purchaser or partnership agreements. We may refer to the following observations of Lord Pearce in Esso Petroleum (supra);

> "We a contract only ties the parties 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 restrine and no question of reasonablness arises. If , however, the contract ties the trading activities od either party after its question of reasonablness arises."
>
> [p.328] Since the negatice 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 Shri Shanti Bhushan that the negative stipulation contained in paragraph 14 of the 1993 Agreement, being in restraint of trade, is void under Section 27 of the Contract Act.

Shri Shanti Bhushan has urged that even if the negative stipulation contained in paragraph 14 of the 1993 Agreement is found to be valid it is confined in is application to the preceding part of paragraph 14 which reads as under:

> "The Bottlker recognises that is is imperative that the Bottler must maintain with full mvigion the products/beverages for safeguarding the interest of the consuming public and thus maintaining the goodwill of the company."

Laying emphasis on the wpord"As such" in the negative stipulation, Shri Shanti Bhushan has contended that the negative stipulation must be read as relatable to this part of paragraph 14 which means that the said stipulation can be invoked only if GBC is not able to maintain the continued supply of the products and beverages to Coca Cola. According to Shri Shanti Bhushan such an eventuality has not arisen in view of the fact Coca Cola has refused tosupply to GBC essence/syrups and/or other materials which are required for preparing the products and beverages. The submission of Shri Shanti Bhushan is that in these circumstances the negative stipulation contained in paragraph 14 cannot be invoked by coca Cola.

Shri T.R. Andhyarujina, the learned senior counsel appearing for Coca Cola, has, on the other hand, pointed out that in paragraph 14 the part commencing with the words "As such" is independent of the preceding sub-paragraph and is not a part of the preceding sub-paragraph referred to above and that the negative stipulation must be read with all the earlier sub-paragraphs contained in paragraph 14 and its application cannot be confined to the sub-paragraph immediately preceding the wqord "As such" as contended by Shri shanti Bhushan. We are in agreement with the said submission of Shri andhyarujina. In our opinion, the negative stipulation contained at the end of paragraph 14 must be read as applicable to all the sub-oparagraphs of paragrpah 14 preceding the said stipulation and, if it is thus read. it is apparent that the purpose of the negative stipulation in paragraph 14 is that GBC will work vigorously and deligently to promoite and solicit the sale of the products/beverages produced under the trade marks of Coca Cola as mentioned in the first sub-paragraph of paragraph

14. This would not be possible if GBC were to manufacture, bottle, sell, deal or otherwqise be concerned with the products, beverages or any other brands or trade marks/trade names.

We are, therefore, unable to agree with Shri Shanti Bhushan that the negative stipulation contained in paragraph 14 of the 1`993 Agreement must be confined in its application to the immediately preceding sub-paragraph of paragraph 14 of the 1993 Agreement.

Shri Shanti Bhushan has next contended that clause (b) of paragraph 19 of the 1993 Agreement wqhich imposes a restraint in the matter of transfer of the shares of GBC is void inasmuch as transfer of shares of a company registere under the Companie\s Act is governed by Section 82 of the said right to transfer the shares of a company. Shri Shanti Bhushan has placed reliance on the decision of this Court in V.B. Rangaraj v. V.B. Gopalakrishnan & Ors., 1992 (1) SCC 160, and has submitted that if clause (b) of paragraph 19 is held to be void then Coca Cola cannot invoke the concluding part of paragraph 19 and dis-continue the supply of essences/syrup and/or other materials to GBC while the 1993 Agreement susbsiste. The relevant part of paragraph 19 is as under:

> "Paragraph 19. Upon the happening of any one or more of the folloowing events in additon to all have the right to cancel and terminate this Agreement forthwith by written notice to the Bottler.
>
> (a) x x x x
>
> (b) Should Bottler be other than a natural person, no charge shall be m,ade in its structure nor shall any transfer be made of any of its stock, share or interest or other indicia of ownership which would result in an effective transfer of control without the prior express written consent of the Company. The Company reserves the right to terminate this Agreement at eill for failure to notify it of suchj change or transfer.
>
> (c) x x x
>
> (d) x x x
>
> (e) x x x Upon the happening of any one or more of the foregoing events, the Company shall also have the right to discontinue suplying the Bottler with essence/syrup and/or other materials for such length of time as the Company may in its sole judgm,ent deem necessaary without thereby cancelling or prejudicing the Company's right to cancel or terminate the AGReement for the said cause or for any one or more other cause or causes." Clause (b) does not appear to be very happily worded.

Since the parties to the 1993 Agreement were Coca Cola and GBC only and the shareholders of GBC were not parties to the agreement, it cannot have any binding force on the shareholders of GBC.

Clause (b) of paragraph 19 cannot, therefore, be constructed as placing any restraint on the right of the shareholders to transfer their shares. It can only be construed to mean that in the event of the shareholders of GBC. Clause (b) of paragraph 19 cannot, therefore, be construed as placing any restraint on the right of the shareholders to transfer their shares. It can only be construed to mean that in the even of the shareholders of GBC transferring their shares and such transfer resulting in an effective transfer of control of GBC, Coca Cola has a right to terminate the agreement and even without terminating the agreement Coca Cola has the additional right to dis-continue supplying GBC with essence/syrup and/or other materials for such length of time as Coca Cola may in its sole judgment deem necessary without thereby cancelling or pejudicing Coca Cola's right to cancel or terminate the Agreement for the said cause or for any one or more other cause or causes. In other words, in the event of effective transfer of control of GBC as a result of transfer of shares by the shareholders, apart from its right to cancel the agreement Coca Cola has also been goiven the right to cancel the agreement Coca Cola has also been given the right to dis-continue the supply of essences/syrup and/or other materials to GBC. This clause governs the relationship between Coca Cola and GBC inter se and it cannot be constued as placing a restraint on the right of the shareholders to transfer their shares. V.B. Rangaraj (Supra) on which reliance has been placed by Shri Shanti Bhushan has, therefore, nop application.

Shri Shanti Bhushan has next urged that in the facts and circumstances of the case the High Court was not justified, in law, in issuing an interim injuction enforcing the negative stipulation contained in paragraph 14 of the 1993 Agreement. The submission of Shri Shanti Bhushan is that as a result of the said injuction and dis-continuance by Coca Cola of the supply of essence/syrup and/or other materials by exercising oits right under paragraph 19 of the 1993 Agreement, the plants of GBC at Ahmedabad and Rajkot would remain idle and a large number of workers who are employed in those plants would be rendered unemployed and GBC would be saddled with heavy liabilities leading to its closure and therby resulting in irreparable loss which cannot be compenbsated in the event of suit filed by Coca Cola being dismissed. Shri Shanti Bhushan has also submitted the on the other hand Coca Cola would not suffer any loss because it has already made alternative arrangements for supply of its products in areas covered by both the Agreements between GBC and Coca Cola by arranging supply of their products from other licensees in the neighbouring areas. Shri Shanti Bhushan has placed reliance on the decisions of Gujarat high Court in M/s Lalbhai Dalpatbhai & Co. v. Chittaranjan Chandulal Pandya, AIR 1966 Guj. 189,and that of Delhi High Court in Modern food Industries India Ltd. v. M/s Shri Krishna Bottlers(p) Ltd, AIR 1984 Delhi 119, as well as on the observations of Lord Diplock in Amrican cynamid Co. v. Ethicon Ltd., 1975 Ac 396.

In the matter of grant of injuction, the p[ractice in Enland is that where a contract is negative in nature, or contains an express nagative stipulation, breach of it may be restrained by injuction and injuction is normally granted as a matter of course, even though the redy is equitable and thus in principle a discretionary one and a defendant cannot resist an injuction simply on the ground that observance of the contract is burdensome to him and its breach would cause little or no prejudice to the plaintiff and that breach of an express negative stipulation can be restrained even though the plaintiff cannot show that the breach will cause him any loss. [See : Chitty on Contracts, 27th Edn., Vol.1, General Principles, para 27-040 at p.1310; Halsbury's laws of England, 4th Edn. Vol. 24, para 992]. In India section 42 of the specific Relief Act, 1963 prescribes that notwithstanding anything contained in cluse (e) of Section 41, where a contract copmptises an affirmative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreeement shall not preclude it from granting an injuction to perform the negative agreement. This is subject to the proviso that the plantiff has not failed to perform the contract so far as it is binding on him. The Court is, however, not bound to grant an injuction in every case and an injuction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer. [See: Ethrman v. Bartholomew. (1927) W.N. 233; N.S.Golikari (supra) at p. 389].

The grant of an interlocutory injuction during the perdency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the descretion the court. While exercising the discretion the court applies the following tests - (i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the pliantiff would suffer an irreparable injury if his prayer for interlocutory injuction is disallowed. The decision whether or not to grant an onterlocutory injuction has to be taken at a time when the existence of the leagal right assailed by the plaintiff and its alleged violation are both contested and uncertain and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injuction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injuction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weghed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercisising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies. [see:Wander Ltd.& Anr. v,. Antox India P. Ltd., 1990 (suoo) Scc 727 at pp. 731-32]. In order to protect the defendent whiloe granting an interlocutory injuction in his favour the Court can require the plaintiff to furnish an undertaking so that the defendent can be adequately compensated if the uncertainty were resolved in his favour at the trial.

Shri Shanti Bhushan has contended that Coca Cola can be adequately compensated for the loss caused to it by award of damages in the event of it succeeding in the suit and that if the impugned injuction granted by the High Court is not reversed the loss suffered by GBC would be irreparable and incalculable inasmuch as the plants at Ahmedabad and Rajkot would remain idle and large number of workmen employed in those plants would be rendered unemployed and it may lead to closere of the undertaking of GBC. Shri Nariman and Shri Andhyarujina, on the other hand, have submitted that Pepsi in taking over GBC, took a calculated commercial risk knowing fully well the effect of negative convenant contained in the 1993 Agreement and that if GBC is not restrained from manufacturing and selling Pepsi products for the stipulated period of one year, the goodwill and the market share which Coca Cola has for its own products would be effectively destroyed by a rival which has captured GBC and that damages would not be an adequate compensation for the injury which would be irreparable and that in respect of the loss that may be sustained by it, GBC would be protected by the undertaking that is required to be given by Coca Cola under Rule 148 of the Bombay High Court (Original Side) Rules, 1980.

We are inclined to agree with the submission of Shrki nariman and Shri Andhyarujina. Having regard to the negative covenant contained in paragraph 14 of the 1993 Agrreement which is subsisting, Coca Cola has made out a prima facie case for grant of an injuction. As regards the other two requirements for grant of interlocutory injuction, viz., balance of convenience and orreparable injury, we find that as a result of the transfer of shares of GBC and respondent No.7 in favour of the appellants Nos, 2 5, the plants of GBC at Ahmedabad and Rajkot are now under the control of Pepsi. The 1993 Agreements were entered into by Coca Cola to ensure that the plants of GBC at Ahmedabad and Rajkot are available for manufacture of the beverages bearing the trade marks that were acquired by Coca Cola. The negative stipulation in p[aragraph 14 was inserted in order to preclude the said plants being used for manufacture of products of opther manufacturers during the period the 1993 Agreements were subsisting. Pepsi by taking control over GBC sought to achievce a dual purpose, viz., reduce the production capacity of beverage bearing the trade marks held by Coca Cola by denying use of the plants of GBC at Ahmedabad and Rajkot for manufacture of those products and to increase the production capacity of Pepsi products by making available these plants for manufacture of Pepsi products. As a result of the interim injuction granted by the High Court the two plants of GBC cannot be used for manufacture of Pepsi products till January 25, 1996 and the effort of Pepsi to gain an advantage over Coca Cola by reducing the availability of products of Coca Cola and increasing the availability of Pepsi products in the areas covered by the 1993 Agreement has been frustrated to a certain extent inasmuch as the increase in the availability of Pepsi products has been prevented. In the absence of such an order Pepsi would have been free to use the plants of GBC at Ahmedabad and Rajkot for the manufacture of their products. This wqouild have resulted in reduction of the share of Coca Cola in the Beverages m,aket and the resultant loss in goodwill and profits could not be adequately compensated by damages. In so far as loss that may be caused to GBC as a result of grant of interim injuction, we are of the view that the loss that may be sustained by GBC can be assessed and GBC can be compensated by award of damages which can be recovered from coca Cola in view of the undertaking that Coca Cola is required to give under Rule 148 of the Bombay High Court (Original Side) Rules, 1980. It has not been suggested that Coca Cola do not have the financial capacity to pay the amount that is found payable.

The interim injuction granted by the High Court has been assailed by the appellants on the ground that as a result of refusal by Coca Cola to continue with the supply of essence/syrup and/or materials the bottling plants of GBC at Ahmedabad and Rajkot would remain idle and a large number of workmen who were employed in the said plants would be rendered unemployed. We cannot lose sight of the fact that this complaint is being made by Pepsi through the mouth of the appellants. it is difficult to appreciate how Pepsi can ask coca Cola to Part with oits trade secrets to its business rival by supplying the essence.syrup etc. for which Coca Cola holds the trade marks to GBC which is under effective control of Pepsi. Pepsi took a deliberate decision yto take over GBCX with the full knowledge of the terms of the 1993 Agreement. It did so with a view to paralyse the operations of Coca Cola in that region and promote its products . In view of the negative stipulation contained in paragraph 14 of the 1993 Agreement which has been enforced by the High Court, Pepsi has not succeeded in this effort and it cannot assail the interim injuction granted by the High Court by invoking the plight of the workmen who are employed in the bottling plants of GBC.

In this context, it would be relevant to mention that in the instant case GBCX had approached the High Court for the injuction order, granted earlier, to be vacanted. UNder order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injuction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relkief is sholly equitable in nature, the party invoking the jurisdictionb of the court has tro show that he himselff was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the partyh against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injuction under order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vocating the ad-interim or temporary injuction order already granted in the pending suit or proceedings.

Analysing the conduct of the GBC in the light of the above principles, it will be seen that GBC, who was a party to the 1993 Agreement, has not acted in conformity with the terns set out in the said agreement. It was itself, Prima facie, resposible for the breach of the agreement, as would be evidenmt from the facts set out earlier. neither the consent of Coca Cola was obtained for transfer of shares of GBC not Coca Cola informed of the names of persons to whom the shares were proposed to be transferred. coca Cola, therefore, had the right to terminate the agreement but it did not do so. On the contrary, GBC itself issued the notice for terminating the agreements by giving three months notice It is contended by Shri nariman And, in our opinion, rightly, that the GBC, having itself acted in violation of the terms of agreement and ahaving breached the contract, cannot legally claim that the order or injuction be vocated particularly as th GBC itself is primarily reponsible for having brought about the state of things complained of by it. Since GBC has acted in an unfair and inequitable m,anner in its dealings with Coca Cola, there was hardly and any occasion to vacant the injuction order and the order passed by the Bombay High Court cannot be interferred with not even on the ground of closure of factory, as the party responsible, prima facie, for breach of contract cannot be permitted to raise this grievance.

Shri Shanti bhushan has lastly urged that the interim injuction granted by the High Court is in very wide terms because not only GBC but also those to whom the shares have been sold and also subsewquent trnasferees, their servants, agents nominees, employees, subsidiary companies. controlled companies. affiliates or associte companies or any person acting for and on their behalfd are restrained by the interim injuction from using the plants of GBC. It is no doubt true that the interim injuction is widely worded to cover the persons aforementioned but in its operation the order only restrains them from using the plants of GBC at Ahmedabad anbd RAjkot for manufacturing, bottling or selling or dealing with or concerning in any manner whatsoever with the beverages of any person till January 25, 1996, the expiry of the period of one year from the date of notice dated January 25, 1995. The interim injuction is thus confined to the use of the plants at Ahmedabad and Rajkot by any of these persons and it is in consonance with the negative stipulation contained in paragraph 14 of the agreement dated September 20, 1993.

For the reasons aforementioned we do not find any infirmity in the impugned order of the high Court dated March 31, 1995 granting an interim injuction in terms of prayers (a) (ii) and (a) (iii) of the Notice of motion as amended. The appeals, therefore, fail and are accordingly dismissed. No costs.