* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CS(OS) No. 671/2017**

% **14th December, 2017**

EV MOTORS INDIA PRIVATE LIMITED ..... Plaintiff

Through: Mr. Ashim Sood and Ms. Payal Chandra, Advocates.

versus

ANURAG AGARWAL AND ANR. ..... Defendants

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

IA No. 14900/2017 (exemption)

Exemption allowed subject to just exceptions.

I.A. stands disposed of.

CS(OS) No. 671/2017 and IA No. 14899/2017 (Order XXXIX Rules 1 & 2)

1. This suit seeking reliefs of injunction, damages and rendition of accounts is filed by the plaintiff company against two defendants. Defendant no.1 in the suit is the Ex-Director of the plaintiff company. Defendant no.2 is the company of which defendant

no.1 is the Principal Promoter. As per the suit plaint the following reliefs are prayed:-

> "In view of the above facts and circumstances, the Plaintiff most humbly prays that this Hon'ble Court may be pleased to grant a decree in favour of the Plaintiff and against the defendant to the following effect:
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> (a) Restrain the Defendants, their officers, directors, employees, agents, representatives, successors in interest, assignees or anybody acting through them or on their behalf from, in any manner whatsoever, utilising the Plaintiff's confidential, strategic and proprietary information acquired by Defendant No. 1 by virtue of his association with the Plaintiff;
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> (b) Direct the Defendants to jointly and severally pay damages to the tune of INR 2,00,00,000 (Rupees Two Crores) with interest at the rate of 18% per annum;
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> (c) For rendition of accounts of Defendant No. 2 and any further damages found to be payable to the Plaintiff by the Defendants jointly and severally, upon accounts so rendered, for which the Plaintiff undertakes to pay any additional court fees if found to be required:
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> (d) Award costs of the proceedings in favour of the Plaintiff; and pass any such other or further orders/directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case."

2. The relief clauses in the plaint are predicated on the cause of action during the tenure of the defendant no.1 as director with the plaintiff company, the defendant no.1 has derived knowledge and information as regards business of manufacture and sale of electric buses, and that this knowledge and information therefore the defendant no.1 as also the defendant no. 2 company which is promoted by defendant no. 1, cannot use for carrying on business.

3. During the course of arguments learned counsel for the plaintiff has drawn the attention of this Court to the following paras of the plaint which as per the plaintiff creates a cause of action for the plaintiff company to file the suit and claim the reliefs as prayed:-

> "54. During the meeting of the Board of Directors held on February 9, 2017 in Dharuhera (which was attended by Defendant No. 1), a discussion was held on the Plaintiff's updated strategy and the Board of Directors was made aware of substantial confidential information including the details of selected battery chemistry, details relating to Microvast (the Chinese battery technology partner identified by the Plaintiff after months of efforts), the build of its pilot electric vehicle and details of other partners/vendors.
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> 58. The chassis is the foundation on which the body of the electric bus has to be built and has to match the exact specifications and size of the components of the electric bus, in particular, the battery and the climate control system. Without finding the chassis that matched the precise specifications that the Plaintiff had indentified, there was no possibility for the Plaintiff to build its electric buses so as to match its strategy. When the Plaintiff and its founders carried out research to identify the appropriate chassis maker, which included visits and discussions with the major chassis makers and automobile and bus manufacturers in India, the Plaintiff learnt that chassis makers build, manufacture chassis so as to meet their local mass production requirements. Through this process of trial, error and elimination, some time around January, 2017, the Plaintiff determined that the chassis could not be procured in India and had to be imported in all likelihood from China. The Plaintiff identified a bus/chassis manufacturer in China, namely Higer bus Company Limited ("Higer") which could suit the Plaintiff's requirements, and commenced further discussions with it. Throughout this process, Defendant No. 1 was a keen observer who came to benefit greatly merely by observing Mr. Bansal's efforts. Defendant No. 1 had access to all this information and analyses by virtue of his position as a Director in the Plaintiff.
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> 62. Thereafter, on March, 26, 2017, the Plaintiff circulated an email with the agenda for the proposed trip to China. This agenda, *inter alia,* included a tour of Higer's facility so as to understand the manufacturing process, and discussions on the battery technology with Microvast. These

visits, which were scheduled on April 27-28, 2017, were arranged purely as a result of the Plaintiff's efforts in identifying Higer and Microvast as potential suppliers for the Plaintiff's electric buses and initiating discussions with them. In his position as a Director of the Plaintiff , Defendant No. 1 became aware of the steps being taken by the Plaintiff towards identifying the appropriate technologies and suppliers/vendors. Defendant No. 1 in fact had the benefit of these field visits, meetings and discussions arranged by the Plaintiff and received all information that was provided during these visits. Any information that could be derived by Defendant No. 1 from these meetings and would be advantageous to the Plaintiff could be used by Defendant No. 1 only for the benefit of the Plaintiff and towards no other end. Defendant No. 1, being a Director of the Plaintiff, was bound by a duty of confidentiality and was enjoined from using any confidential information for his own advantage, or for the benefit of any other person or entity.

63. The visit to Higer's plant took place on April 27-28, 2017. During this visit, a meeting with Microvast was also held. Defendant No. 1 was present for these visits and meetings. These meetings were held, inter alia, to (a) understand and review the bus body structure and design that would accommodate the weight and size of the identified battery; (b) the process for assembly of the electric bus and quality control measures to be employed; (c) discuss warranty and spare parts; (d) discuss charging mechanism; (e) discuss deliver, assembly and testing of the pilot electric bus; and (f) discuss pricing and payment terms.

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72. In the same conversation on June 20, 2017, Defendant No. 1 also informed the Plaintiff that one of the reasons why he did not want to collaborate with the Plaintiff anymore was because he and this associates had found a vendor to supply the buses at a price 40% lesser than what the Plaintiff was prepared to pay its vendor. It is evident that Defendant No. 1 had acted and was continuing to act in clear breach of his legal and fiduciary duties to the Plaintiff: in the first place, Defendant No.1 and his confederates were able to negotiate better prices with vendors due to their knowledge of the prices at which the Plaintiff was procuring these components from its vendors. Furthermore, if Defendant No. 1 had, during his tenure as a Director of the Plaintiff, learnt of the opportunity to procure electric buses at cheaper prices, he had a duty to inform the Plaintiff of the better prices and not divert a business opportunity from the Plaintiff. Defendant No. 1 had, in clear breach of his statutory and fiduciary duties, acted in conflict with the Plaintiff's interest"

4. On the basis of the aforesaid paras of the plaint, the plaintiff company pleads that such information and knowledge which is received/gained by the defendant no. 1 during his directorship with the plaintiff company, that information the defendants should not use, although and admittedly defendant no. 1 has ceased to be a director of the plaintiff company. In sum and substance the cause of action as averred in the plaint is that in case the defendants will use the information and knowledge derived by the defendant no.1 during the course of his working as a director with the plaintiff company for carrying on their independent business, that will be a breach of fiduciary duty of the defendant no. 1 as a director of the plaintiff company, and it is argued that this cause of action is supported by Section 88 of The Indian Trusts Act, 1882 which reads as under:-

> "**88. Advantage gained by fiduciary**.—Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

5. In my opinion the suit plaint fails to set out a legal cause of action and is liable to be dismissed at this stage itself since no

summons can be issued in a suit where there is no legal basis of the pleaded cause of action for claiming of the reliefs in the suit. In order to appreciate the issues involved, it is necessary to refer to Section 27 of the Indian Contract Act, 1872 and Section 42 of the Specific Relief Act, 1963. These provisions read as under:-

> "Section 27 of the Indian Contract Act, 1872
> **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.
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> *Exception* 1.—**Saving of agreement not to carry on business of which goodwill is sold.**—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein,
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> Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.
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> Section 42 of The Specific Relief Act, 1963
> **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:
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> Provided that the plaintiff has not failed to perform the contract so far as it is binding on him."

6. The aforesaid provisions of Section 27 of the Indian Contract Act as also Section 42 of the Specific Relief Act have now been subject matter of decisions by the Supreme Court. In sum and substance the ratios of the judgments of the Supreme Court are that

during the period of subsistence of the contract or during the period of employment of an employee with an employer, the employee or the contracting party cannot carry on competing business or employment when that is so provided in the contract between the parties, but after the termination of the contract and/or after the cessation of employment, there can be no bar to the contracting party or the employee from carrying on competing business. Supreme Court has therefore held that carrying on of competing business after cessation of the contract or engaging in a competing employment of an employee post his service with one employer, cannot be restrained because this would amount to restraint of trade. The main judgments of the Supreme Court laying down the aforesaid ratios are the judgments in the cases of ***M/s. Gujarat Bottling Co. Ltd. & Others Vs. Coca Cola Co. & Others (1995) 5 SCC 545, Percept D'Mark (India) (P) Ltd. v. Zaheer Khan & Another (2006) 4 SCC 227*** and ***Superintendence Company of India (P) Ltd. vs. Krishan Murgai, (1981) 2 SCC 246.***

7. The relevant paras of the judgment in the case of ***M/s. Gujarat Bottling Co. Ltd. (supra)*** read as under:-

"21. 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 zealously any interference with trade, even at the risk of interference with freedom of contract, as it is public policy to oppose all restraints upon liberty of individual action which are injurious to the interests of the State. A person may be restrained from carrying on his trade by reason of an agreement voluntarily entered into by him with that object and in such a case the 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 complete 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 subjected to the test of reasonableness. <u>Since the doctrine of restraint of trade is based on public policy its application has been influenced by changing views of what is desirable in the public interest.</u> 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 economic thought. <u>The general principle once applicable to agreements in restraint of trade has consequently been considerably modified by later decisions in England.</u> In the earliest times all contracts in restraint of trade, whether general or partial, were void. <u>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 restrain 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 contract must be shown to be reasonably necessary for the purpose of freedom of trade</u>. A covenant in restraint of trade must be reasonable with reference to the public policy and it must also be reasonably necessary for the protection of the interest of the covenantee and regard must be had to the interests of the covenantor. <u>Contracts in restraint of trade are prima facie void and the onus of proof is on the party supporting the contract to show that the restraint goes no further than is reasonably necessary to protect the interest of the covenantee and if this onus is discharged the onus of showing that the restraint is nevertheless injurious to the public is on the party attacking the contract</u>. The court has to decide, as a matter of law, (i) whether a contract is or is not in restraint of trade, and (ii) whether, if in restraint of trade, it is reasonable. <u>The court takes a far stricter and less favourable view of covenants entered into between employer and employee than it does not similar covenants between vendor and purchaser or in partnership</u>

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 Spinning Co. MANU/SC/0364/1967 : (1967)ILLJ740SC . 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. (AC at p.331)* Lord Wilberforce.

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

> "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.
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> 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:
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> Provided that such limits appear to the Court reasonable, regard being had to the nature of the business."

23. The said provision was lifted from Hon. David D. Field's Draft Code for New York which was based upon the old English doctrine of restraint of trade, as prevailing in ancient times. The said provision was, however, never applied in New York. The adoption of this provision has been severely criticised by Sir Frederick Pollock who has observed that "the law of India is tied down by the language of the section to the principle, now exploded in England, of a hard and fast rule qualified by strictly limited exceptions." While construing the provisions of Section 27 the High Courts in India have held that neither the test of reasonableness nor the principle that the restraint being partial or reasonable are applicable to a case governed by Section 27 of the Contract Act, unless it falls within the exception. The Law Commission in its Thirteenth Report has recommended that the provision should be suitably amended to allow such restrictions and all contracts in restraint of trade, general or partial, as were reasonable, in the interest of the parties as well as of the public. No action has, however, been taken by Parliament on the said recommendation. (See : *Superintendence Company of India (P) Ltd. v. Krishan Murgai*, per A.P. Sen J.)

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. 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

<u>contract is or is not in restraint of trade</u>. 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?

25. In *Attorney-General of the Commonwealth of Australia. v. Adelaide 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 enforced, involve a derogation from the common law right in virtue of which any member of the community may exercise any trade or business he pleases and in such manner as he thinks best in his own interests."

Referring to these observations Lord Reid in Esso Petroleum Co. Ltd., (supra) has said :

> "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 services to another: then during the period of the contract he is not entitled to engage in other business activities. No one has ever suggested that such contracts are in restraint of trade except in very unusual circumstances. [p. 294]

26. 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 applicable to the right to sell his goods." Doubting the correctness of this statement Lord Reid in Esso Petroleum 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 suggested that they were in restraint of trade."

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

> "A contract in restraint of trade is one in which a party (the covenantor) agrees with any other party (the covenantee) to restrict his

liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses."

In the same case, Lord Denning M.R. has said :

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

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

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

29. These observations indicate that a stipulation in a contract which is intended for advancement of trade shall not be regarded as being in restraint of trade. In *Esso Petroleum Co. Ltd.* (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 relations between the parties and are, therefore, free from doctrine.

* * *

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' service and not their sterilisation. Sole agencies are a normal and necessary incident of commerce and those who desire the benefits of a sole agency must deny themselves the opportunities of other agencies."

In the same case, Lord Wilberforce has observed :

"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. But the development of the law does seem to show that judges have been able to dispense from the necessity of justification under a public policy test of reasonableness such contracts or provisions of contracts as, under contemporary conditions, may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations."

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

31. If the negative stipulation contained in paragraph 14 of the 1993 Agreement is considered in the light of the observations in *Esso Petroleum Co. Ltd*. (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 wholeheartedly apply to promoting the sale of the products of Coca Cola. In that context, it is also relevant to mention that the said negative stipulation operates only during the period the agreement is in operation because of the express use of the words "during the subsistence of this agreement including the period of one year as contemplated in paragraph 21", in paragraph 14. <u>Except in cases where the contract is wholly one sided, normally the doctrine of restraint of trade is not attracted in cases where the restriction is to operate during the period the contract is subsisting and</u> <u>**it applies in respect of a restriction which operates after the termination of the contract**</u>. 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 contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided as in the case of *W.H. Milsted and Son Ltd*."

32. Similarly, in *Superintendence Company* (supra) A.P. Sen J., in his concurring judgment, has said that "the doctrine of restraint of trade never applies during the continuance of a contract of employment; **it applies only when the contract comes to an end.**" [p. 1289]

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

> "When 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 restraint of trade within the meaning of the doctrine and no question of reasonableness arises. If, however, the contract ties the trading activities of either party after its determination, it is a restraint of trade, and the question of reasonableness arises." (emphasis added)

8. The relevant paras of the judgment in the case of ***Zaheer Khan (supra)*** read as under:-

"22. 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."

23. 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 of 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*."

24. 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.

25. 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.*

26. The test of reasonableness is, therefore, a part of the analysis of whether there is a restraint of trade.

27. 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.

28. 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."

29. 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.

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56. **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.**

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62. **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.

63. **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**."

(emphasis added)

9. Applying the ratios of the judgments of the Supreme Court in the cases of ***M/s. Gujarat Bottling Co. Ltd. (supra)*** and ***Zaheer Khan (supra)*** it is seen that after the period of directorship of the defendant no. 1 with the plaintiff company any relief which is granted which has the effect of preventing the defendant no. 1 from carrying on any business or trade, even if the said business or trade be one of competing to the business of the plaintiff company, the same would result in restraint of trade and hence such relief as claimed in

this suit is clearly hit by the provision of Section 27 of the Indian Contract Act. It is already noted above that defendant no. 1 no longer continues as a director of the plaintiff company and the reliefs as prayed for in the suit are post the period of directorship of defendant no. 1 in the plaintiff company.

10. In my opinion, the law with respect to lack of powers in the court to restrain an employee after his employment from being engaged in similar nature of employment which he was with the ex-employer, will equally apply to an ex-director of a company. An ex-director of a company in a way is in the nature of an ex-employee of a company and therefore the ratios of the judgments of the Supreme Court in the cases of ***M/s. Gujarat Bottling Co. Ltd. (supra)*** and ***Zaheer Khan (supra)*** will clearly apply to prevent the plaintiff company from seeking any reliefs as prayed for in the present suit.

11. In fact, in my opinion, the plaintiff company in this suit is on a much weaker footing than the facts and ratios in the cases of ***M/s. Gujarat Bottling Co. Ltd. (supra)*** and ***Zaheer Khan (supra)*** because admittedly the plaintiff is not seeking to enforce any negative covenant in favour of the plaintiff pursuant to any contract i.e there is

no contract at all between the plaintiff and defendant no.1 and hence no contractual right in favour of the plaintiff which is or is capable of being enforced. Plaintiff thus is not seeking to enforce any contractual right by which contract the plaintiff was entitled to prevent the defendant no. 1 from carrying on competing business through the defendant no. 2 company. The plaintiff's entitlement and cause of action in the suit is not on the basis of any contract of the plaintiff with the defendant no. 1 post the period of directorship of defendant no. 1 with the plaintiff company and the cause of action pleaded is pure and simple of an alleged violation of fiduciary duty of the defendant no. 1 on account of defendant no. 1 using the information and knowledge derived by the defendant no. 1 during the course of his directorship with the plaintiff company.

12. At this stage, I must immediately notice that there is no cause of action which is pleaded in the plaint that there is any confidential proprietary information available of the plaintiff company with the defendant no. 1 in the sense that the information is a proprietary information which courts would protect. I have already reproduced the paras of the cause of action which have been relied

upon by the counsel for the plaintiff to argue the existence of a legal cause of action, however, it is seen that the information and knowledge of which exclusivity is claimed by the plaintiff is not on the basis of proprietary confidential information or copyright information. Averments in the paras of the plaint which is relied upon by the plaintiff and reproduced above in the present judgment are only knowledge and information derived during the course of the directorship of defendant no. 1 with the plaintiff company but information and knowledge which is otherwise in public domain. Such information of who can supply batteries for running of the electric buses, which are the best batteries available in the market for running the electric buses, where the batteries can be sourced from i.e from which supplier, what happened in the meetings during the directorship of defendant no.1 with the plaintiff company with the proposed supplier to the plaintiff company, in my opinion, is neither proprietary confidential information nor a legal copyright work to which plaintiff can claim exclusive ownership, and surely whatever has been stated by the plaintiff in the aforesaid paras in the plaint is otherwise available in public domain. What is available in public domain cannot be a subject matter of a legal cause of action in favour of the plaintiff unless there was created a copyright information, and which is not the case of the plaintiff that the plaintiff sues the defendants for infringing of any copyright work of the plaintiff company. Reliance placed by the learned counsel for the plaintiff upon Section 88 of The Indian Trusts Act in fact goes against the plaintiff because the language of Section 88 of The Indian Trusts Act which has been reproduced above shows that a director cannot breach his fiduciary duty by making money during the tenure of directorship only. Putting it in other words Section 88 of The Indian Trusts Act does not deal with the subject matter of a fiduciary duty continuing as against a director post the period of employment as a director of that person with the company, and this is all the more so in the facts of the present case inasmuch as there is no confidential proprietary information of the plaintiff company which is the subject matter of the present suit averred as the cause of action in the plaint and which proprietary information, the defendants are seeking to use. Aforesaid logic and discussion also applies with respect to the lack of the cause of action in favour of plaintiff in the suit for any copyright work as the plaintiff has not pleaded a copyright work of which it is the owner and hence disentitlement of defendant no.1 to use such information.

13. Clever drafting of the plaint and creating an illusion of a cause of action does not mean that a legal cause of action arises. Legal cause of action arises when taking the averments in the plaint as proved to be correct a legal right arises in favour of the plaintiff against the defendant and a legal obligation arises of the defendant towards the plaintiff. There is no cause of action which is pleaded as per Section 88 of the Indian Trusts Act in the suit plaint and reliefs accordingly claimed of any entitlement of the plaintiff for any benefits which the defendant no.1 has allegedly derived during the period of his directorship with the plaintiff company and therefore such benefits personally received by defendant no.1 during his tenure as a director being in breach of fiduciary duty should be refunded to the plaintiff company. At the cost of repetition, the cause of action in the plaint and the reliefs claimed are with respect to disentitlement of the defendant no.1 to carry on competing business post the period of directorship of defendant no.1 with the plaintiff company, and that too with respect to such aspects of the plaintiff not being owner of any

confidential proprietary information which is not in the public domain and that a work exists in which plaintiff has a copyright.

14. Learned counsel for the plaintiff argued that plaintiff has taken great pains to receive information with respect to suppliers of various products for manufacture of an electric bus and this information the defendant no.1 derived during his tenure of directorship with the plaintiff company and therefore defendant no.1 should be restrained from using such information, however, in my opinion this argument is completely misconceived because any information which is received or comes to the knowledge of a person which is otherwise available in public domain, cannot be the subject matter of exclusive knowledge of the plaintiff company for not being used by any other person unless and until the compilation would have become a work which is subject matter of copyright under the Copyright Act and as already stated above there is no cause of action pleaded in the plaint with respect to the plaintiff having copyright in a work which the defendants are illegally using.

15. In view of the above discussion, it is seen that in sum and substance the cause of action and reliefs prayed for in the plaint if

granted would amount to violation of the doctrine of restraint of trade contained in Section 27 of the Indian Contract Act. In fact the cause of action in the suit as also the relief prayed will amount to enforcing a negative covenant in a contract although there exists no contract and even assuming that there is a contract between the defendant no.1 and plaintiff claiming a relief for not carrying out competing business after the period of directorship of defendant no.1 with the plaintiff company. The suit plaint is not for seeking relief of the plaintiff being refunded benefits illegally derived by the defendant no.1 during his directorship with the plaintiff company. Therefore, there are no legal causes of action existing in favor of the plaintiff company on the basis of which reliefs as prayed for in the suit can be granted.

16. In view of the above the suit is dismissed. All pending applications are also accordingly dismissed.

DECEMBER 14, 2017 **VALMIKI J. MEHTA, J**

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