IN THE HIGH COURT OF SINDH AT KARACHI

SUIT No. 2413 / 2018

Plaintiff:	**Geo Entertainment Television Network (Pvt.) Limited through M/s Behzad Haider, Abid Naseem and Gohar Mehmood Advocate.**
Defendant:	**Anjum Shahzad through M/s Haider Waheed, Uzma Farooq and Ahmed Masood Advocates.**

1) For hearing of CMA No. 41/2019.
2) For hearing of CMA No. 18452/2018.

Dates of hearing: **31.1.2019 & 01.02.2019**
Date of order: **05.03.2019**

O R D E R

Muhammad Junaid Ghaffar, J. This is a Suit for Specific Performance, Cancellation, Declaration and Injunction, whereas, application bearing CMA No. 1845/2018 has been filed for Injunction under Order 39 Rule 1 & 2 Civil Procedure Code ("CPC") and CMA No. 41/2019 is an application by the Defendant under Order 39 Rule 4 CPC for recalling of order dated 24.12.2018 whereby, an ad-interim injunction was granted in favour of the Plaintiff.

2. Precise facts as stated are that Plaintiff and Defendant entered into an Agreement dated 30.03.2018 for a period of 18 months and exclusive services of Defendant were hired as a Director for Drama serials / series, feature films, telefilms etc. etc. It is the case of the Plaintiff that this Agreement is valid from 01.04.2018 to 30.09.2019 and also contains a negative covenant in Clause 26, which as per their information is being violated and Defendant has acknowledged himself approaching direct competitors of the Plaintiffs; hence, instant Suit. On 24.12.2018 an ad-interim order was passed by restraining the Defendant from providing his professional services and disclosing any information or material relevant to the Plaintiff to any third party; however, subject to depositing Rs. 3,50,000/- per month regularly in Court on or before first of every calendar month which amount the Defendant may withdraw with the permission of the Court. It appears that such amount is being deposited; but Defendant has not withdrawn the same on any occasion.

3. Learned Counsel for the Plaintiff has contended that through listed application; two reliefs are being sought on behalf of the Plaintiff and they are in respect of Clause

19 and 26 of the Agreement with a further prayer of restraining the Defendant from disclosing any information or material relevant to the Plaintiff to any third party. He has further contended that Plaintiff is a well-known organization in the Media Industry and is acknowledged in production of various Dramas and Telefilms for which the Agreement in question was entered into, which provides that firstly this agreement will remain valid for a period of 18 months till 30.09.2019, and even if the Agreement is terminated for any reason, as per Clause 26, the Defendant cannot offer his services to any one till 30.09.2019. He has further argued that the Defendant is also bound not to disclose or discuss any information of the Plaintiff's business with any third party without Plaintiff's consent. Learned Counsel has read out Clause(s) 3, 4, 26, and 27 of the Agreement and submits that though the Defendant has violated other provisions as well as he has failed to direct three Dramas of 26 episodes each as agreed; however, for the present purposes, the Plaintiff's case is more precisely in relation to the enforcement of Clause 26. According to him, firstly, the Plaintiff has failed to serve a proper notice as provided in Clause 19, therefore, the Agreement is yet to be terminated as claimed by the Defendant, and even otherwise, if it stands terminated, the Defendant cannot work with any third party including the competitor of the Plaintiff for a period of 18 months from the date of Agreement which is ending on 30.09.2019. He has further argued that though the Agreement does not provide so; however, while obtaining the ad-interim orders, the Plaintiff as a good gesture, offered to deposit Rs 3,50,000/- per month till the expiry of the Agreement before this Court; hence, the Plaintiff has acted reasonably and is entitled for the injunction as prayed. He has further argued that in terms of Clause 19 even if any notice of termination could be given by the Defendant, it was subject to mutual discussion and agreement between the parties, whereas, Plaintiff never agreed to such termination prematurely. Secondly, according to him, Clause 19 further provides that alternatively Defendant ought to have compensated the Plaintiff as notice of termination along with Rs. 3.0 million as a penalty has not been paid and therefore, the Agreement still subsists. Per learned Counsel, Section 57 of the Specific Relief Act, 1877, fully applies in this case and to the extent of enforcement of the negative covenant, the Plaintiff is entitled for injunction. He further submits that it is known in the market and the Plaintiff is privy to this effect that Defendant intends to work for a competitor of the Plaintiff, and even the affidavit filed by the Defendant is through an attorney, who according to the Plaintiff is an employee of their competitor. As to the provision of claiming damages, he submits that Plaintiff has not claimed any damages in this matter; but is seeking enforcement of the negative covenant, and to prove its good faith and bonafides, has already deposited suitable amount for compensating the Defendant; hence is entitled for an injunctive relief. According to him, Section 27 of the Contract Act is not applicable as pleaded on behalf of the Defendant in the counter

affidavit as according to him, the restrain itself is reasonable and not unlimited, whereas, Section 57 of the Specific Relief Act applies in this case; therefore, it is not absolute that such an understanding duly signed by the Defendant can be termed as void in terms of Section 27 ibid. In support of his contention he has relied upon the cases reported as ***Al-Abid Silk Mills Limited V. Syed Muhammad Mudassar Rizvi (2003 M L D 1947), Syed Shabih Haider Zaidi V. Shaikh Muhammad Zahoor uddin (2001 C L C 69), Excide Pakistan Limited V. Malik Abdul Wadood (2008 C L D 1258),*** and ***Niranjan Shankar Golikari V. The Century Spinning and Mfg. Co. Ltd. (AIR 1967 SC 109).***

4. On the other hand, Learned Counsel for the Defendant has contended that a proper termination notice was duly served upon the Plaintiff through email on 09.10.2018, which has been duly acknowledged by a return email, and therefore, the three months period stands completed; hence, Defendant was not liable to pay the amount of Rs. 3.0 million as provided in Clause 19. He has further contended that as to Clause 26; firstly, since the Agreement stands terminated; therefore, it would not apply any more as it could be done only during validity of the Agreement, and moreover, the said clause is not in conformity with Section 27 of the Contract Act, 1872; as it puts a restriction on the very livelihood of the Defendant. He has further argued that it is also in violation of the Constitutional rights of the Defendant. Per learned Counsel, it is settled law that under Section 56(f) of the Specific Relief Act, an injunction ought to be refused to prevent the breach of a contract the performance of which would not be specifically enforceable as in this matter the Plaintiff is seeking enforcement of a service contract which even otherwise cannot be specifically enforced. Learned Counsel has read out various provisions of the Agreement in question and has contended that since damages is an adequate remedy in breach of the Agreement which has been accordingly provided therein; therefore, no injunction can be granted to the Plaintiff. He has next argued that the Defendant is a Director and has learned nothing nor had gained access to the Plaintiff's confidential information as contended; hence, the question of disclosing its information to any third party does not arise, whereas, even otherwise, Defendant through its written reply in this case has already undertaken not to disclose any information to any third party which the Plaintiff may have imparted or given to the Defendant. Per learned Counsel, the Plaintiff has made false statement before the Court as even the salaries of the Defendant were withheld during subsistence of the Agreement; and therefore, no discretion could be exercised in favour of the Plaintiff. He has further argued that the Defendant not only finished his own assignment(s), but also completed unfinished dramas of other Directors; hence, he has not violated any terms of the Agreement between the parties. He submits that Section 27 of the Contract Act fully applies in this matter as Clause 26 thereof is void to the extent that the Defendant be

restrained from seeking any further employment. In support of his contention he has relied upon ***Syed Shabih Haider Zaidi V. Shaikh Muhammad Zahoor uddin (2001 C L C 69), Shree Gopal Paper Mills Ld. V. Surendra K. Ganeshdas Malhotra (AIR 1962 Calcutta 61), Bank Alfalah Ltd. V. Meu Multiplex and Entertainment Square Company (Pvt.) Ltd. (2015 Y L R 2141), Monfar Raja Choudhry V. Dwan Rowsan Kamar Khatun Choudhry and others (A>I>R (3) 1943 Calcutta 586), Superintendence Co. of India V. Krishan Murgai (A I R 1980 SC 1717), Messrs American Presidents Lines Ltd. and another (P L D 1973 Karachi 49), Messrs Malik and Haq and another V. Muhammad Shamsul Islam Chowdhury and two others (P L D 1961 SC 531), Ramkumar V. Sholapur Spg. & Wg. Co. (A I R 1934 Bombay 427), M/s Lalbhai Dalpatbhai & Co. V. Chittaranjan Chandulal Pandya (A I R 1966 Gujrat 189), Shakeel Ahmed Shaikh V. Aga Khan University and another (2017 P L C (C.S.) 1080).***

5. I have heard both the learned Counsel and perused the record. The application filed by the Plaintiff under Order 39 Rule 1 & 2 CPC seeks the following two reliefs:-

> "1) Restrain the Defendant from providing his professional services to any third party without first terminating the Agreement in accordance with clause 19 thereof and without complying with clause 26 thereof, and
>
> 2) Restrain the Defendant from disclosing any information or material relating to the Plaintiff to any third party."

6. The Plaintiff's case is that an Agreement was entered into by the Defendant on 30.03.2018 for a period of 18 months starting from 01.04.2018 to 30.09.2019 and during this Agreement the Defendant, who is a Director was required to direct three Drama serials with 26 episodes each of 40 months duration. It is their case that he has not completed this assignment and appears to have approached their business rival(s) and competitors, and therefore, Plaintiff is entitled for an injunctive relief pursuant to the terms of the Agreement in question. Insofar as the Agreement is concerned, it is an admitted document and for the present purposes this Court is only required to examine the agreed terms and decide the injunction application and the relief being claimed on the basis of relevant provisions in the agreement, which reads as under:-

> "3) That the SECOND PARTY has agreed to provide the EXCLUSIVE SERVICES as Director from April 01, 2018 till September 30, 2019 to be renewed on mutual consent with first right of refusal to the FIRST PARTY.
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> 6) That the FIRST PARTY will pay to the SECOND PARTY an amount of Rs.200,000/= per episode (Rupees Two Hundred Thousand Only) of (U/O 40 Rule 1 CPC)42 Minutes duration net of all taxes.
>
> 7) That incase the episodes increase more than 78-episodes during the agreement the FIRST PARTY will pay an additional amount of Rs.200,000/- (Rupees Two Hundred Thousand Only) per episode to the SECOND PARTY, similarly if number of episodes decrease the FIRST PARTY will pay only for the completed episodes.

8) That the FIRST PARTY will give on monthly basis an amount of Rs.1,000,000/= (Rupees One Million Only) to the SECOND PARTY which is an advance amount on account of Directorial fee for the 3 projects of 26 episodes committed during the term of this agreement. This amount will be reconciled and adjusted on a six monthly basis depending on the number of episodes executed.

9) An additional amount of Rs.150,000 (rupees one hundred and fifty thousand only) per month will be paid to SECOND PARTY as car allowance, fuel allowance and mobile allowance.

14) That if the SECOND PARTY fails to direct the projects on the specified time, it will be held liable for all damages involved in addition to the whole expenses incurred by the FIRST PARTY.

18) That incase of breach of this contract by the SECOND PARTY, the FIRST PARTY has a right to claim all damages incurred by the FIRST PARTY including but not limited to the entire value of the projects.

19) **That the SECOND PARTY will give a 3 months' notice period in case he wants to leave before the expiry of the agreement for reasons which are mutually discussed and agreed upon between both parties. In case the SECOND PARTY leaves without serving the 3 months' notice period he will be liable to pay immediately equivalent to his 3 months compensation i.e. Rs.3,000,000/= (Rupees Three Million only) to the FIRST PARTY as a penalty for leaving without the above mentioned notice period.**

20) **The FIRST PARTY shall have a right to terminate the contract with 30 days written notice to the SECOND PARTY in case of any term and condition of this contract shall be violated/breached by the SECOND PARTY.**

26) **That the SECOND PARTY is the under an Exclusive agreement with the FIRST PARTY and will not make its services available to any other third party for the period of 18 months from the date of the contract and hereby grants first right of refusal for the 19th Month onwards to the FIRST PARTY.**

27) **That all matters pertaining to the projects are confidential. That the SECOND PARTY will not disclose or discuss information with third parties without prior consent of the FIRST PARTY.**

28) That this Agreement contains the full and complete understanding between the parties and supersedes all prior arrangements and understandings whether written or oral appertaining to the subject matter of this Agreement and may not be varied except by an instrument in writing signed by all of the parties to this Agreement."

7. Perusal of the aforesaid provisions of the Agreement reflects that it is for a period of 18 months and is valid till 30.09.2019. Clause 6, 7 & 8 provides for the compensation and the salary as well as benefit to be paid to the Defendant. Clause 19 is the only clause which could be exercised by the Defendant, and provides that Defendant will give a three months' notice period in case "*he wants to leave before the expiry of the Agreement"* for reasons which are mutually discussed and agreed upon between both the parties. It further provides that in case the Defendant "*leaves"* without serving the three months' notice period, he will be liable to pay immediately equivalent to his three months compensation i.e. Rs.3.0 million to the Plaintiff as a penalty for "*leaving"* without completion of the above mentioned notice period. First and foremost it is to be noted that this is not a termination clause insofar as the Defendant is concerned. It only

provides for the Defendant (employee) the manner and mode in which he could "*leave"* the service of the Plaintiff. The conspicuous missing of words "*termination*" is not without reason, and appears to have been consciously agreed to by the Defendant. The word "*termination*" has been provided in clause 20 for the plaintiff; therefore, it cannot be said that it is typographical mistake or an omission. The above clause as this Court reads it has two parts for the Defendant to sever his employment. The first one is a three months' notice period and Defendant through its email dated 09.10.2018 asked / requested the Plaintiff for relieving him from the service as the email was responded and it cannot be said that this notice was not served; however, it is the case of the Plaintiff that even if such a notice is served, the reasons for which it is to be served are to be mutually discussed and agreed upon between both parties and therefore, since the Plaintiff never agreed for the reasons so stated; hence, no notice was ever served to satisfy this clause. Though this appears to be a very harsh and stringent condition to fulfill for the Defendant whilst leaving the employment; but nonetheless, it was agreed upon and such Agreement is not in dispute, therefore, it is not for this Court to make any comment as to the agreeing of such a clause. In that situation the Defendant cannot exercise this option for leaving the service; as it is conditional with the assent and approval of the Plaintiff, therefore, Defendant cannot take shelter under this clause as it has not been assented to by the Plaintiff. Coming to the second part, the Defendant can leave the employment by making payment of Rs.3.0 million for the notice period and not otherwise, notwithstanding that notice was duly served from 09.102.018 and three months period has already passed, but admittedly, the amount in question has not been paid; therefore, the Defendant cannot even invoke this part of clause 19, so as to get himself relieved from the employment. There is no other clause in the Agreement by virtue of which the Defendant can either terminate the Agreement or leave the employment. Resultantly, the Agreement remains intact for its period i.e. up to 30.9.2019, at least to the extent of the Defendant, insofar as it relates to clause 26 and 27 of the Agreement in question and its true intent and interpretation.

8. Now coming to the implication of Clause 26 and 27 which provides that the Defendant is under an exclusive Agreement with the Plaintiff and will not make its services available to any other third party for a period of 18 months from the date of the Contract, and even grants first right of refusal for the 19th Month onwards to the Plaintiff, whereas, during this period will keep all matters confidential and will not disclose or discuss information with third parties without prior consent of the Plaintiff. This again has two parts and it provides that Defendant will not make his services available to any third party for 18 months, and further agrees, to even grant first right of refusal from 19 months onwards. The Defendant's case is that since the Agreement stands terminated as above; therefore, this clause will no more be applicable and after

termination of the Contract, the Defendant is at liberty to work with anybody. In the alternative Defendant's case is that this clause even otherwise is void in terms of Section 27 of the Contract Act, 1872, and therefore, Defendant cannot be restrained. The Plaintiffs case is that notwithstanding invoking clause 19 as above, (which they have disputed) the Defendant cannot work with or for anyone else for 18 months from the date of Agreement and even in the 19th month the Plaintiff has the first right of refusal, whereas, in view of Section 57 of the Specific Relief Act, 1877, this negative covenant can be enforced and is now well established that such clause are not void *per-se* in terms of Section 27 of the Contract Act. It would be advantageous to refer to the provisions of Section 27 of the Contract Act as well as Section 57 of the Specific Relief Act which reads as under:-

> "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; Provided that such limits appear to the Court reasonable regard being had to the nature of the business.
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> 57. *Injunction to perform negative agreement.* Notwithstanding section 56, clause *(f)*, 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; provided that the applicant has not failed to perform the contract so far as it is binding on him.

9. Section 27 provides that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. Insofar as the exception provided therein is concerned, the same is not relevant for the present purposes. Section 57 of the Specific Relief Act provides that an injunction can be granted to perform a negative agreement and notwithstanding Section 56, clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, either 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 a negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him. Now the question arises that whether in view of Section 27 of the Contract Act, any relief could be granted in terms of Section 57 of the Specific Relief Act thereof or not. The case as set up by the Plaintiff and as opposed by the Defendant, falls

within the contemplation of Section 57 of the Specific Relief Act as it is the case of the Defendant that the contract in question cannot be specifically enforced in terms of Section 56(f) of the Specific Relief Act; however, in my view, this is subject to exception as provided in Section 57 ibid as above. The argument that since the contract has been terminated, and therefore, Clause 26 of the Agreement also stands terminated and is no more valid, does not appeal to me. And it is for the reason that the validity of the Contract is by itself provided in Clause 3 thereof and states that the Agreement is valid for 18 months from 01.04.2018 to 30.09.2019. If that had been the case, as pleaded on behalf of the Defendant, then there was no need to incorporate clause 26 separately and independently. It is but natural that during the validity of the Agreement an employee cannot work for another employer except without permission; therefore, if the argument of the Defendant is accepted that Clause 26 goes away after termination of the Contract, then there was no specific need for this clause altogether. Once the Agreement stands terminated in terms of clause 19, then Defendant would have been at liberty to get another employment with anyone else; however, then there wasn't any need or reason for having clause 26. This was a consciously worded clause in the Agreement and has been agreed upon by the Defendant except the interpretation now being pleaded on behalf of it. Clause 26 clearly provides that Defendant will not make its service available for 18 months to anyone else and even is bound to give first right of refusal in the 19th month onwards to the Plaintiff and this is an independent clause which will remain valid notwithstanding the termination of the Agreement.

10. The test that whether such a clause can be acted upon or is reasonable or not has been dealt with in the case of ***Excide Pakistan Limited*** (supra) and the principles have been enunciated in the following terms:-

> 20. From the above discussion the following principles of law are deducible:--
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> (a) a restraint of trade clause is void if unreasonable, however, if the same is reasonable, the said clause is valid;
>
> (b) a reasonable restraint of trade clause whereby an employee is prevented from entering into competition with his former employer or entering into an employment in same/similar business with a competitor of former employer, can be enforced by Court. The said enforcement can include a declaration or injunction or both, as the case may be;
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> (c) Reasonableness of the clause will vary from case to case and will inter alia, depend upon the following:--
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> (i) the extent of duration;
>
> (ii) the extent of the geographical territory.
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> (d) the employer will only be able to obtain an injunction for information, know-how and details of customers/ orders acquired by employee through some classified or secret information.

> However, no injunction would be obtained if the know-how is not acquired by employee through access of classified or secret information but rather during the normal course of employment;
>
> (e) the restraint of trade clause should only be aimed at protecting interest of the employer and not aimed at penalizing the employee or causing him inconvenience;
>
> (f) the restraint of trade clause should not be vague and generalized but should be rather specific. In case general a vague part of the restrictive covenant is separable from the substantive part, the Court while exercising doctrine of severance and by supplying construction will be empowered to uphold the substantive part of the restrictive covenant. However, where the restraint of trade is not separable in the manner stated above, the Court will reject the entire clause without applying the doctrine of severance;
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> (g) the restraint of trade clause shall only be the applicable to the particular type of business in which the employer is actually engaged in and not to any business activity in which the employer would possibly engage in the future.

11. The learned Judge in the aforesaid case arrived at these guiding principles after a thread bare examination of the entire case law on the subject issue and while considering the facts of this case, when applied and considered, it could be safely said that for the present purposes, the stance of the Defendant's Counsel to the effect that the clauses of the Agreement in question are void in view of the provisions of s.27 of the Contract Act, is not tenable and justified. In this case the restraint clause does not appear to be unreasonable, but reasonable, and therefore it is valid. As to the principle (b), the Plaintiffs case is that Defendant during subsistence of the restraint clause intends to work with its competitors; hence an injunctive order could be passed by the Court. As to principle (c) the extent of duration is also not very large and is reasonable and is within the territorial jurisdiction as well as geographical duration; hence, can be invoked. For principle at (d), though no deeper appreciation can be made at this injunctive stage of the case; however, it has come on record that during the employment period, Defendant was supposed to direct 3 Drama serials, whereas, he has done only 1; and a presumption arises, that some secret business module must have been shared. Nonetheless, it is the stance of the Defendant that he will not share any such secret or information with anyone which he has gained from the Plaintiff during his employment. Therefore, no further aspect is to be examined. The injunction being sought by the Plaintiff is to protect its interests; and is not penalizing the Defendant; rather appropriate compensation has already been offered; therefore, principle at clause (e) also stands fulfilled and satisfied. As to clause (f) the restraint clause is neither vague nor generalized but is rather specific. Insofar as clause (g) is concerned, the restraint clause is and is being applied to the particular type of business of the Plaintiff in which it is actually engaged in and is not to any business activity in which the employer would possibly engage in the future.

12. No doubt while dealing with injunction and principles governing negative covenant and its implication, the Court has to exercise certain discretion, which ordinarily ought not to be exercised. However, in a case where a case is made out to the effect that it lacks reasonableness and balance of convenience, and inconvenience heavily weighs in favor of the Defendant, then the Court can refuse injunction. But the facts of this case do not lead me to this conclusion. In order to obtain an injunction the Plaintiff has to make out a prima facie case, with balance of convenience in his favor and that if refused, irreparable loss would be caused. It is but common in these proceedings that the Court is called upon to refuse specific performance on the general grounds of unreasonableness or of unfairness.

13. It is always of importance in cases like the one in hand to examine that whether there has been an unreasonableness or unfairness involved on the part of the party seeking an injunction in respect of a negative covenant. And this is to be determined by reference to all the circumstances involved; and whether the material interest of the parties is being affected. In order to establish a defence on this ground that there is involvement of unreasonableness and unfairness for a defendant it is necessary to point out such aspect. In order to make out a case for refusal of an injunction it is necessary to show that at the material time the defendant was at such a substantial disadvantage and through that disadvantage, he entered into an agreement of such a nature that in all circumstances it would be unjust and unreasonable to grant the plaintiff any such relief of injunction. In this matter I am of the view that on the basis of the material placed before me it appears that there are no material circumstances which gives rise to a position of undue influence, hardship or any kind of coercive means adopted by the Plaintiff. In the absence of circumstances of this nature, it would really be unfair to refuse an injunction on the ground of unreasonableness and unfairness. On the contrary in the instant case the plaintiff has been able to make out a case that the agreement in question was fair and it does not imposes any undue responsibility. Whereas the circumstances also do not appear to be unjust and unfair so as to refuse the injunction. Moreover it is not a case where the defendant has entered into such agreement in ignorance. Though damages is a relevant factor for refusing an injunction; but in the instant case damages is not at all an appropriate relief and unless the injunctive relief is granted the plaintiffs right under the agreement in question would be seriously prejudiced and irreparable loss may be caused to the plaintiff. In the instant matter the plaintiff has been able to demonstrate that there are substantial grounds for granting an order of injunction for protecting it from an irreparable injury. I am of the view that it is a fit case where the court should

grant the relief of injunction as prayed for on behalf of the plaintiff and against the defendant.

14. It must also be noted that in the peculiar facts of this case if the injunctive relief as prayed for is not granted; then perhaps the entire Suit of the plaintiff would be deemed to have been dismissed as it would be of no consequence at the trial stage. It is the duty of the Court to see and implement the solemn agreement between the parties. It is not that after entering into an agreement, when time comes for its enforcement, a party could be permitted to resile from the very terms of the Agreement which otherwise is not denied. It will not be in accordance with equity and justice to allow the defendant to flout the very Agreement with the blessings of the Court during pendency of the Suit on the ground that damages would be an adequate remedy at the final hearing of the case. In this connection it would be advantageous if I may refer to the observation of Lord Cairns L.C. and in the case of ***Richard Wheeler Doherty v. James Clagston Allman and W.C. Dowden***, reported as **(1878) 3 AC 709**, which reads as under:

> "My Lords, if there had been a negative covenant, I apprehend, according to well settled practice, a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury -- it is specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."

15. It is by now a settled proposition of law that a restraint by which a person binds himself during the period of contract from not taking service with any other employer is not in restraint of trade and is not hit by the provisions of section 27 of the Contract Act. The Courts, however, have a discretion in enforcing such a negative covenant contained in the contract of employment. At the same time the negative covenant should not be unreasonable in the sense that it should not compel anybody either to serve the employer only; or to remain wholly idle or starve. The Courts have, therefore, held that even if such a covenant is in wide terms the Courts have a discretion to grant an injunction in limited terms; so as to ensure first, that there is adequate protection to the employee; and secondly, an injunction is not so wide so as to bar an alternative venue of employment or earning a livelihood for an employee.

16. It is also settled law that if the Court is unable to compel specific performance of the affirmative agreement to do a certain act, it shall not preclude it from granting an injunction to perform the negative agreement, not to do a certain act, provided that the plaintiff has not failed to perform the contract so far as it is binding on him. This view of the Courts has been very eloquently dealt with by a Division Bench of the then High Court of Bombay (now Mumbai) in the case reported as ***Bhavesh J. Bhatt v Cyrus N. Baxter and Ors.*** **[1990(92) BOMLR 474]** speaking through S.V. Manohar. J. The learned Judge has dilated upon the effects of a negative and an affirmative covenant in an Agreement and its implication as well as enforceability and has also considered Judgments from various Court including the Indian Supreme Court. At para 5 of the judgment the observations are relevant and reads as under;

> 5. The Courts, however, have a discretion in enforcing such a negative covenant contained in the contract of employment. The negative covenant should not be unreasonable in the sense that it should not compel an employee either to serve the employer only or to remain wholly idle or starve. A contract of personal service cannot be specifically enforced. And it is also well settled that Courts cannot compel a person to perform indirectly what he cannot be compelled to perform directly. Therefore, a negative covenant which compels a person either to specifically perform his contract of personal service or to remain idle or starve will not be specifically enforced. The courts have also spelt out at times the public interest is utilising the skills and knowledge of an employer. The Courts have, therefore, held that even if such a covenant is in wide terms the Courts have a discretion to grant an injunction in limited terms so as to ensure firsts, that there is adequate protection to the employer and secondly, an injunction is not so wide as to bar an alternative venue of employment or earning a livelihood for an employee. In the case of Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. Ltd. , MANU/SC/0364/1967 : (1967)ILLJ740SC the Supreme Court was required to consider such a negative stipulation in a contract of employment. The Supreme Court said (in para 12): "a restrain by which a person binds himself during the term of his agreement directly or indirectly not to take service with any other employer or be engaged by a third party has been held not to be void and not against section 27 of the Contract Act." It cited with approval the decision of the Gujarat High Court in M/s. Lalbhai Dalpatbhai & Co. v. Chittaranjan Chandulal pandya, MANU/GJ/0051/1966: AIR1966Guj189 and a decision of the Bombay high Court in the case of V.N. Deshpande v. Arvind Mills Co. Ltd., reported in 48 Bom.L.R. 90. In the latter case the agreement of service contained both a positive covenant, namely that the employees shall devote his whole time and attention to the service of the employer and also a negative covenant preventing him from working elsewhere during the term of the agreement. The Court observed that illustrations (c) and (d) to section 57 of the Specific Relief Act in terms recognise such contracts and the existence of a negative covenant therein; and therefore the contention that the existence of a negative covenant in a service agreement makes the agreement void on the ground it was in restraint of trade and contrary to section 27 of the contract Act has no validity. The Supreme Court went on to say that the Courts have a wide discretion to enforce by an indention a negative covenant of such a nature and there is nothing to prevent the Courts from granting a limited injunction to the extent that is necessary to protect the employers interest

> where the negative stipulation is not void. It may be if the employee is not permitted to get himself employed in another similar employment, he might perhaps get a lesser remuneration. But that should not be a consideration against enforcing the covenant.

17. Similarly proposition came for discussion before the Indian Supreme Court in the famous case of ***Gujrat Bottling Co. Ltd. And others v Coca Cola Company and others*** (**AIR 1995 SC 2372**), and after considering the case law as well as the precedents of English Courts, the Court came to the conclusion that if a case for grant of an injunction is made out, then there is no bar in granting the same and the provisions of s.41(e) of the Specific Relief Act, 1963, of India (corresponding to S.56(f) of our Specific Relief Act, 1877), will not come in way in granting such an injunctive relief. The relevant observation is contained in Par 45 of the report and reads as under;

> 45. In the matter of grant of injunction, the practice in England is that where a contract is negative in nature, or contains an express negative stipulation, breach of it may be restrained by injunction and injunction is normally granted as a matter of course, even though the remedy is equitable and thus in principle a discretionary one and a defendant cannot resist an injunction 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. I, 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 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 circumstance 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. This is subject to the proviso that the plaintiff has not failed to perform the contract so far as it is binding on him. The Court is, however, not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer.

18. At least to my understanding the position as it emerges from the above discussion is that the Agreement in question could not be terminated by the Defendant and he can only leave the employment on fulfilment of certain conditions as discussed hereinabove at Para 7. He had no termination option or authority. This is pertinent to understand in the context of implication of clause 26 ibid, and as to its fall out after the Defendant leaves the employment on his own. On the other hand the Plaintiff had a right to terminate the said Agreement in terms of clause 20 which has not been invoked. So for all legal purposes the Defendant is bound by the terms of the Agreement till such time it remains valid i.e. till 30.9.2019. In my view there is no exception to this. If not, then the whole

purpose of incorporating the said clause i.e. negative covenant would become meaningless. This naturally wasn't the intention of the parties, at least the Plaintiff. The question that whether such a negative covenant is valid and can it be enforced as it is, and even beyond the period of contract or employment also came for consideration before the Indian Supreme Court in the case of ***Niranjan Golikari*** (Supra) so heavily relied upon on behalf of the Plaintiff, and equally opposed and distinguished on behalf of the Defendant. This case arose out of a contract of employment for five years. Niranjan Golikari left the services four years before the expiry of his contract, whereupon, Century Spinning & Mfg. Co. Ltd. filed a suit for enforcing the negative covenant. Clause 6 of the contract obliged the defendant, Niranjan Golikari, to devote whole of his time and energy to the business of the plaintiff "during the period of his employment", whereas, Clause 17 restrained him from engaging in or carrying on competing business or serving in any capacity with an employer engaged in competing business. At para 15 of the Judgment it has been observed as follows which is of relevance for this case in the context of restraint of trade or profession, if any, after the period of contract. It reads as under;

> (i) The considerations against the restrictive covenants are different in cases where the restraint is applied after termination of the contract.
>
> (ii) The restraints during the period of the contract "are generally not regarded as restraints on trade" and, therefore, are outside S. 27.
>
> (iii) The restrictions operating during the term of the contract may be void if they are excessively harsh or unconscionable;
>
> (iv) The negative covenant "in the present case restricted as it is to the period of employment"..... was unreasonable.

19. It was held that the negative covenant which restrained Niranjan Golikari "before the expiry of the said period of five years" was valid. What was considered was the validity of service restriction applicable while the contract was alive. The contract to serve an employer exclusively during the specific period necessarily means that during such period the employee shall not serve elsewhere and, therefore, such a negative covenant is not in restraint of trade but in in furtherance of the trade or profession. Generally speaking, the negative covenants operative during the term of the contract are not hit by Section 27 of the Contract Act because they are designed to fulfil the contract and not to restrict them. This distinction which is of a fundamental nature has to be borne in mind; otherwise the perspective will be lost. It also needs to be considered by this Court that whether a party to an Agreement, firstly agreeing on a negative covenant out of its

own volition can be allowed by the Court to take shelter by terming such a clause as restraint of trade and profession. To me 'No'. A party to an Agreement must not come to the Court with an act of avoidance or default already committed; and then try to hide under the umbrella of the Court. A learned Single Judge of the then High Court of Bombay (now Mumbai) in the case of ***Y.T. Entertainment Limited v One More Thought Entertainment Pvt. Ltd., and Ors*** reported as **[2009 (6) Bom.CR 148]** has been pleased to observe as under;

> 11. The submission with regard to the "Doctrine of Negative Covenant", based upon above Section, in the facts and circumstances of the case, in no way sufficient to overlook the case of the petitioner. The Doctrine of Negative Covenant cannot be extended blindly in each and every case, where the parties knowing fully the principle behind the Doctrine, incorporate those provisions/clauses and when it comes to payment, the defaulted party invokes the Doctrine to use as a shelter/umbrella to avoid the obligations. The commercial transaction like this where the parties entered into the contract of production of the film & having once obtained the benefits arising out of the finances so received, just cannot be allowed to turn around to say that in view of the said Doctrine, no order should be passed against them. The amount of Rs. 7.25 crores was reduced to Rs. 5,01,00,000/, therefore, though settled and agreed but not made the payment, in my view, such party is not entitled to claim the benefit of the said Doctrine. Apart from this, the earlier agreements provide for this Doctrine, but not the last Deed, and now cannot be permitted to invoke the same when it comes to their responsibilities/obligations to perform their part of the contract.
>
> 12 In my view, this Section cannot be interpreted or extended to assist a defaulted person/party and specially in the present facts and circumstances of the case. There is nothing in this clause or section to direct the parties to comply with agreed clauses and to pay the agreed amount or at least to secure the same. Section 27 of the Contract Act just cannot be extended blindly in each and every case merely because such clause is mentioned in the Agreement. Any direction and/or order to make the payment of agreed amount against any person, in my view, cannot be said to be granting any order of restrainment of trade or a lawful profession, trade or business. They can do or continue with their business or trade but subject to agreed payment.

20. The argument that notwithstanding the clause in the Agreement or its termination being valid or otherwise; but in any case the said clause of which the enforcement is being sought is void in terms of s.27 of the Contract Act, is not justified and tenable. The reason being, besides all others as discussed hereinabove, it is for the present purposes within the period of the Agreement. It is not beyond that. It is enforceable, whereas, this doctrine never applies during the continuance of the Agreement; it applies only when it comes to an end. There may be an argument that as soon as the Defendant left the employment or terminated the Agreement; it no more remains valid or enforceable, however, to my understanding this is not so. It will remain valid till 30.9.2019 as long as the Defendant intends to invoke clause 19; however, if clause 20 is invoked by the Plaintiff for termination of the Agreement, then it cannot be enforced as in that case it will be the Plaintiff who will be asking for a termination, and then cannot

take any advantage of its own doing. As to the argument that in view of the bar contained in s. 56(f) of the Specific Relief Act, no specific performance of a contract of employment can be granted, it would suffice to observe that presently the Plaintiff is not seeking any specific performance. Moreover, in terms of s.57 ibid, if a case is made out, then for grant of an injunction to restrain the breach of such a covenant is permissible as it is not in restraint of, but in furtherance of trade (of the Plaintiff). The India Supreme Court in the case of ***Niranjan Shankar Golikari*** (Supra) has finally held as under;

> 20. 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. [p. 389]
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> 21. The next question is whether the injunction in the terms in which it is framed should have been granted. There is no doubt that the Courts have a wide discretion to enforce by injunction a negative covenant. Both the Courts below have concurrently found that the apprehension of the respondent company that information regarding the special processes and the special machinery imparted to and acquired by the appellant during the period of training and thereafter might be divulged was justified; that the information and knowledge disclosed to him during this period was different from the general knowledge and experience that he might have gained while in the service of the respondent company and that it was against his disclosing the former to the rival company which required protection. It was argued however that the terms of clause were too wide and that the court cannot sever the good from the bad and issue an injunction to the extent that was good. But the rule against severance applies to cases where the covenant is bad in law and it is in such cases that the court is precluded from severing the good from the bad. But there is nothing to prevent the court from granting a limited injunction to the extent that is necessary to protect the employer's interests where the negative stipulation is not void. There is also nothing to show that if the negative covenant is enforced the appellant would be driven to idleness or would be compelled to go back to the respondent company. It may be that if he is not permitted to get himself employed in another similar employment he might perhaps get a lesser remuneration than the one agreed to by Rajasthan Rayon. But that is no consideration against enforcing the covenant. The evidence is clear that the appellant has torn the agreement to pieces only because he was offered a higher remuneration. Obviously he cannot be heard to say that no injunction should be granted against him to enforce the negative covenant which is not opposed to public policy. The injunction issued against him is restricted as to time, the nature of employment and as to area and cannot therefore be said to be too wide or unreasonable or unnecessary for the protection of the interests of the respondent company.

21. Now finally coming to the argument that no injunction can be granted in this matter firstly due to a bar contained in s.56 of the Specific Relief Act, as well as provision of claim for damages in the Agreement itself; hence, the relief of injunction as prayed cannot be granted, is again misconceived. The Plaintiff has not claimed any damages in this Suit. Secondly, the relief of injunction is not to be refused as a matter of right in each case. If it is so, then the entire reason and concept of having the law on this subject i.e. Specific Relief Act will be meaningless. It purports to define and amend the law relating to certain kinds of specific reliefs obtainable in the Civil Courts. In various parts and sections it provides for grant of injunctive reliefs by way of perpetual and or mandatory injunctions. It also provides for situations when injunctions cannot be granted. However, it is not that as and when damages could be claimed, it always prohibits grant of an injunction. In the instant matter, the relief being claimed is specifically provided in s.57; hence, it is not correct to suggest that for grant of such a relief there is any bar in law. The Indian Supreme Court in the case of ***Adhunik Steels Ltd. V Orissa Manganese and Minerals Pvt. Ltd*** **(AIR 2007 SC 2563)** has eloquently dilated on this aspect of the matter and the observation at Para 13 is relevant which reads as under;

> 13. Injunction is a form of specific relief. It is an order of a court requiring a party either to do a specific act or acts or to refrain from doing a specific act or acts either for a limited period or without limit of time. In relation to a breach of contract, the proper remedy against a defendant who acts in breach of his obligations under a contract, is either damages or specific relief. The two principal varieties of specific relief are, decree of specific performance and the injunction (See David Bean on Injunctions). The Specific Relief Act, 1963 was intended to be "An Act to define and amend the law relating to certain kinds of specific reliefs." Specific Relief is relief in specie. It is a remedy which aims at the exact fulfilment of an obligation. According to Dr. Banerjee in his Tagor Law Lectures on Specific Relief, the remedy for the non-performance of a duty are (1) compensatory, (2) specific. In the former, the court awards damages for breach of the obligation. In the latter, it directs the party in default to do or forbear from doing the very thing, which he is bound to do or forbear from doing. The law of specific relief is said to be, in its essence, a part of the law of procedure, for, specific relief is a form of judicial redress. Thus, the Specific Relief Act, 1963 purports to define and amend the law relating to certain kinds of specific reliefs obtainable in civil courts. It does not deal with the remedies connected with compensatory reliefs except as incidental and to a limited extent. The right to relief of injunctions is contained in part-III of the Specific Relief Act. Section 36 provides that preventive relief may be granted at the discretion of the court by injunction temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and Section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded either in lieu of or in addition to injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly Clause (e) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant. Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963.

22. Though I am of the view that since there is a specific clause in the Agreement wherein the Defendant has undertaken not to work with anyone else till 30.9.2019; hence, the other ground for granting of an injunction regarding non-disclosure of ideas and information as well as learning of other confidential information, need not be dilated upon; however, it may be of relevance to note that it is, but natural, that as a Director, who had been engaged to direct at least 3 Dramas of 26 episodes of 40 minutes each, has only directed 1 out of the three, therefore, there is every likelihood that he must be privy to various concepts, thoughts, ideas as well as stories of the next 2 Dramas to be directed, which appears to an enough information, which need not to be divulged to anyone else, including the competitors of the Plaintiff; hence, on this ground also, an injunction ought to be granted. Going further, Defendant will also be known of and privy to the current trend of creating ideas and Dramas to make them commercially viable as well as profitable; which will definitely be an issue or reason for a competitor to engage the Defendant, and therefore, again on this fact also the Defendant ought to be restrained in terms of the Agreement. The Defendant was employed on these terms and he has to abide by it failing which it will cause irreparable loss to the Plaintiff, which at the trial of the Suit could not be compensated; hence, the relief of injunction is the one which needs to be granted in the given facts of this case. And finally, the Plaintiff has by itself come forward to pay an appropriate and reasonable amount as a gesture towards the idleness of the Defendant, if any, for the period in question, which has only a period of 6 more months to go. In that it is not only reasonable in the given facts but so also needs to be appreciated as it is beyond the terms of the Agreement and the negative covenant. Resultantly, to decide the injunction application in any other way, would not be justifiable and appropriate.

23. Accordingly, CMA 41/2019 is dismissed, whereas, CMA 18452/18 is allowed in the terms that Defendant is restrained from making its services available as a Director to any other or third party till 30.9.2019 and shall also keep matters pertaining to the projects of the Plaintiff as confidential and is further restrained from disclosing or discussing information of the Plaintiff with third parties without prior consent of the Plaintiff. This is however, subject to deposit of Rs.3,50,000/- per month regularly by the Plaintiff with the Nazir of this Court on or before 1st of every calendar month till September, 2019, which amount, the Defendant may withdraw from the Nazir with permission of this Court.

Dated: 5.3.2019

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