IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/FIRST APPEAL NO. 2638 of 2021
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2021
In R/FIRST APPEAL NO. 2638 of 2021
With
R/FIRST APPEAL NO. 2639 of 2021
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FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE N.V.ANJARIA
and
HONOURABLE MR. JUSTICE SAMIR J. DAVE

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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KANHAI FOODS LTD
Versus
A AND HP BAKES

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Appearance:
MR. NANDISH CHUDGAR WITH MS NIDHI N PRAJAPATI(10572) for the Appellant(s) No. 1
DARSHAN M VARANDANI(7357) for the Defendant(s) No. 1,2,3,4
MR. JAIMIN R DAVE(7022) for the Defendant(s) No. 1,2,3,4

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CORAM:**HONOURABLE MR. JUSTICE N.V.ANJARIA**
and
HONOURABLE MR. JUSTICE SAMIR J. DAVE

Date : 10/06/2022

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE N.V.ANJARIA)

Since both these appeals involve similar facts and identical issues, they were notified and were considered together to be treated by this common judgment.

1.1 Heard learned advocate Mr. Nandish Chudgar with learned advocate Ms. Nidhi Prajapati for the appellant and learned advocate Mr. Jaimin Dave for the respondents in both the appeals, at length.

1.2 The parties through their respective learned advocates supplied the paper book of the relevant documents, of the contents of which, they were *ad idem*. They were accordingly permitted to refer to the same.

1.3 Learned advocates for the parties stated that no further pleadings were required and that the pleadings were completed. They stated that they argued the appeals finally. Accordingly, the appeals were taken up for final hearing.

2. The appeals are directed against the orders passed by learned Judge, Commercial Court, City Civil Court, Ahmedabad, rejecting the application of the same appellant-applicant under section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act, 1996').

2.1 In First Appeal No. 2638 of 2021, it is an order dated 31.08.2021 passed by the Commercial Court rejecting Commercial Civil Misc. Application No. 434 of 2021, which was an application under section 9 of

the Arbitration Act, 1996, is brought under challenge. In the other First Appeal No. 2639 of 2021, the challenge is directed against the order dated 6th September, 2021 of the Commercial Court, by which the Commercial Civil Misc. Application No. 435 of 2021 was rejected.

3. The appellant Kanhai Foods Ltd. through its Director filed Commercial Civil Misc. Applications referable to two respective Appeals under section 9 of the Arbitration Act, 1996 seeking interim measures by making the following prayers, extracted from para 24 (A) to 24 (C) of the application,

> (i) to direct the Respondent No.1 through its partners and / or their agents and servants to handover the franchised premises / outlet (shop at : Near M. F. Furniture, Vallabhnagar Cross Road, Pij Road, Nadiad – 387 002) to the Applicant for a period of three months from the date of such handover, as per Clause 5(22) of the franchise agreement dated 01.11.2020.
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> (ii) to restrain the Respondents from carrying out any activity at the franchised premises / outlet (shop at : Near M. F. Furniture, Vallabhnagar Cross Road, Pij Road, Nadiad – 387 002) for a period of three months as per Clause 5(22) of the franchise agreement dated 01.11.2020.
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> (iii) to restrain the Respondents through its partners and / or its agents and servants, from conducting business similar to the business as envisaged in the franchise agreement dated 1.11.2020 either directly or through his sister companies or family members as per Clause 5(27) of the franchise agreement and also restrain the Respondents from hiring any of the employees including chefs and cooks of the Applicant Company.

3.1 The prayers in application under section 9 which became subject matter of the First Appeal No. 2639 of 2021 were identically worded, therefore not repeated, except that the description of the franchised premises in that second case was shop at G5, Mercury Complex, Opp. BAPS Swaminarayan Temple, Vaniyavad Circle, College Road, Nadiad –

387 001.

3.2 The case of the appellant-applicant was *inter alia* that it was a registered company engaged in the business of production, marketing and selling of bakery products in the name and brand 'KABHI B'. Under the said brand, it was stated, the appellant started selling the products in year 2007 through exclusive stores and shops in Ahmedabad. As the business expanded, the appellant started granting franchise to other persons in the State. Amongst about 50 franchisees granted, the respondent No.1-partnership firm was also granted franchisee in the year 2015 for KABHI B products at Pij road, Nadiad.

3.2.1 Franchisee agreement was executed on 1.11.2017 as "Agreement for Franchisee of Kabhi-B Backery & Patisserie". Similar another agreement of even date was executed also in respect of shop No.G5, Mercury Complex, Opp. BAPS Swaminarayan Temple, Vaniyavad Circle, College Road, Nadiad.

3.2.2 The Agreement *inter alia* provided that it would be having the initial term of three years. Thereafter, a fresh agreement was executed on 1.11.2020 for further three years. Respondent No.1 was obliged thereunder to sell bakery products of the appellant Kanhai Foods Ltd. only with the brand KABHI B from the outlet.

3.2.3 Looking at the important terms of the agreement, the initial term from the date of the execution was 36 months, unless terminated earlier by virtue of operation of termination clause 6. While clause 5 provided for responsibilities of the franchisee, clause 6 was related to termination. It provided that franchisor may terminate the agreement in the event the franchisee violating any of the clauses (a) to (e) mentioned in the

agreement, which are that the franchisee fails to commence business within 3 months of execution of Agreement, commits breach of specific terms of the agreement, persistently defaults in payments of any amount doe to the franchisor, is found to have supplied materially false or misleading information and goes into liquidity/bankcruptcy or becomes insolvent. The consequences of termination were also provided. The responsibility of the parties post-termination were also mentioned.

3.2.4 Clause No. 5 (22) mentioned in the prayer seeking interim measures read as under,

> "In case of any dispute, if the company desires, then the franchisee has to handover the outlet to the Company for a minimum period of three months. The Company shall be liable to pay 1% of the investments made by the franchisee on furniture and fixtures. At the end of three months the Company shall review the matters and take a decision on either to handover the outlet to another Franchisee in lieu of the amount mutually agreed by the three parties involved or to cancel the Agreement. Under any circumstances, the franchisee will not be allowed to take up any other activity at the said premises during these three months."

3.2.5 There were other conditions which the franchisee was required to observe, namely to keep records, to maintain cleanliness and hygiene, to maintain good relationship between the licensor and licensee, there is no Principal-Agent or Partnership-Associate relationship. Right was given to the franchisor to transfer the business. Under clause 27, franchisee was restrained from conducting similar business during the term of this franchisee agreement either directly or through its sister companies or family members.

3.3 It was a case of the appellant applicant in application under section 9 of the Arbitration Act *inter alia* that after execution of fresh franchisee agreement on 1.11.2020, in the month of January and February, 2021, it came to the knowledge that respondent No.1 that franchisee had started

selling of other bakery products and particularly of bakery ‘G5’ in which the partners of respondent No.1 were connected with. It was stated that when the Director of the appellant company visited the franchised premises at Nadiad, the partner of respondent No.1 firm assured not to sell the products of any other brand. It was the further case that despite such assurance, the respondent started storing and the selling the products of other bakery brand from the franchised premises packing with similar trade mark by passing off other products as if they were the products of KABHI B brand.

3.4 The applicant issued notice dated 17.3.2021. It was further stated that in the first week of January, 2021, the respondent was found to have started supplying duplicate cakes and other bakery items under the name of KABHI B. It was stated thereafter by the applicant that in the holidays of July and August, 2021, the respondent No.1 lifted large number of products of the applicant company for promotional marketing schemes for the purpose of selling them at the franchised outlet. It was further stated that due to this act of the respondent, the outstanding debit balance rose to Rs. 4,49,098.89/-.

3.5 On 16.7.2021, a communication was addressed by respondent No.1 firm to the applicant seeking to terminate the franchisee agreement. It was stated that existing franchisee agreement was for 36 months and was to expire on 31.10.2023 and that all the terms and conditions of the agreement were binding to respondent No.1 firm. The termination of the franchisee agreement, therefore, was not valid or legal, it was claimed. According to the applicant, by selling the bakery products other than of ‘KABHI B’ brand by attempting to pass off such products and by using the packaging material of the trade mark similar that of applicant, the

respondent had committed breach of franchisee agreement. The appellant applicant invoked arbitration in view of the arbitration clause in the franchisee agreement and notice invoking the clause was issued on 16.7.2021.

3.6 An application under section 9 was contested by the respondent by filling reply at Exh. 15, in which the allegations put forth by the appellant were denied. A contention was raised that the court at Ahmedabd had no territorial jurisdiction to deal with the application, by submitting that the immovable property in respect of which the relief was claimed was located outside Ahmedabad. It was the case that the territorial jurisdiction of Nadiad court would attract. It was further contended that the termination of the agreement by the respondent was legal. It was stated that once the agreement was terminated, the only remedy for the franchisor is as per clause 6 of the agreement only. The respondent filed written submission at Exh. 21 and raised further contentions that respondents could not have been restrained from conducting their business as it would have amounted to violate the section 27 of the Indian Contract Act. It was contended that the respondents were engaged in the business of bakery products and for a period of time, they had obtained expertise in the business. Closure of the business would lead to unemployment, it was pleaded. It was submitted that by not granting prayers for interim measures, the applicant would neither suffer any prejudice nor would suffer irreparable loss.

4. Assailing the impugned order, it was submitted by learned advocate for the appellant that under the terms of the franchisee agreement, the parties had decided their own mechanism. Clause 5(22) quoted above, was highlighted to submit that it was the duty of the

franchisee to handover the outlet to the appellant company. The contract was for a fixed term of three years, it was submitted. It was submitted that the contract was such it could be terminated by either of the parties except in accordance with the terms stipulated in the agreement. It was the next submission that only franchisor was given right to terminate the agreement provided five requisite conditions mentioned were satisfied and that they could not have been prematurely terminated. Learned advocate for the appellant further submitted that the agreement was valid upto 31.10.2022. Clause 5(22) and clause 5 (27) of the Agreement would be attracted.

4.1 Learned advocate for the appellant relied on the provisions of the Specific Relief Act, particularly the Specific Relief (Amendment) Act, 2018 to highlight the amendment in section 10 of the principal Act, which provides that the Specific Performance of Contract shall be enforced by the court subject to the provisions contained in subsection (2) of section 11, section 14 and section 16. Provisions of section 14 of the Specific Relief Act were referred to and on the basis of the such statutory provisions placing them in the context of the nature of the conditions incorporated in the franchised agreement, it was submitted that the contract between the parties was in the nature not determinable. It was submitted that it was only franchisor who could terminate the contract.

4.2 In support of the submissions, the decision in **B. Santoshamma and Another vs. D. Sarala and Another (2020 SCC Online SC 756)** was relied on. Also was placed reliance on another decision of the Kerala High Court in **T.O. Abraham v. Jose Thomas (2017 SCC Online Ker 19872)**. Yet another decision of the Delhi High Court in **DLF Homes Developers Limited vs. Shipra Real Estate Limited Ors. (2021 SCC**

Online Del 4902) was pressed into service.

4.3 On the other hand, learned advocate for the respondent relied on the decision of the Delhi High court in **ABP Network Private Limited vs. Malika Malhotra vs. Malika Malhotra being O.M.P. (I) (COMM) 292 of 2021 decided on 12.10.2021**. On the basis of the aforesaid decisions, the parties canvassed the point as to what nature of contract could be said to be determinable in law. It was the submission on behalf of the applicant that the franchisee agreement in question was not determinable having regarding to the nature of conditions incorporated therein whereas other view of the respondent was that it was a determinable contract and accordingly, the respondent had acted to terminate the same.

5. While dealing with the contentions about of the territorial jurisdiction, the Commercial Court rightly observed that after going through the jurisdiction clause in the agreement, it suggested that the parties had agreed to conduct the arbitration proceedings at Ahmedabad. The decision of the Supreme Court in **Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services [(2012) 9 SCC 552]**, was relied on and on that basis, the court negatived the case of the respondent that the court at Ahmedabad did not have jurisdiction.

5.1 It was reasoned thus in para 24 to conclude that the court at Ahmedabad had territorial jurisdiction and the present application was properly entertained,

> "After going through the pronouncement made by the Hon'ble Supreme Court and the contents of the Agreement entered into between the parties, it is undisputed that the Agreement has been executed between the parties and the Agreement contains the Arbitration Clause and it is also agreed between the parties that the place of Arbitration shall be at Ahmedabad. Nowhere in

> the Agreement, the intention of the parties shows that they intend to carry out the arbitration proceedings at any other place except the Ahmedabad….."

5.2 As far as the aspect of territorial jurisdiction is concerned, the view taken by the Commercial Court rejecting the contentions of the respondent, could be said to be eminently legal. This court endorses too the findings of the Commercial Court on that score.

5.2.1 In **Adhunik Steels Limited vs. Orissa Manganese and Minerals Private Limited [(2007) 7 SCC 125],** the Apex Court observed the propositions of law with regard to exercise of powers under section 9 of the Arbitration Act,

> "It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of 'just and convenient' while speaking of passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."
>
> (Para 11)

5.3 It is now well settled that powers under section 9 of the Arbitration

Act are required to be exercised on the lines of recognised principles applicable to exercise general powers to grant interim injunction under Order XXXIX of the Code of Civil Procedure. This was observed by the Supreme Court in **Arvind Constructions Co. (P) Limited vs. Kalinga Mining Corporation [(2007) 6 SCC 798]**.

5.4 Therefore, the celebrated principles for grant of interim injunction, namely that *prima facie* case, balance of convenience and irreparable injury are relevant considerations also in respect of passing orders for interim measures under section 9 of the Arbitration Act, 1996. Interim injunction is an equitable remedy, so would be the consideration in granting interim measures under section 9 of the Arbitration Act. It is trite principle that interim injunction of the nature amounting to granting of principal relief, could not granted. All these would be the cardinal principles for judging the case of a party who apply for grant of interim measures pending or during the pendency of the arbitral proceedings.

5.5 In light of the above principles governing of exercising powers under section 9 of the Arbitration Act, if the prayers made by the appellant applicant in its section 9 application are recollected, what is prayed is to direct the respondents to hand over the franchised premises. It is also prayed to restrain the respondents from carrying out any activity at the franchised premises and further to restrain the respondents from conducting the business similar to the business mentioned in the franchisee agreement. Now, the submission of the appellant with reference to clause 5(22) of the franchisee agreement would not survive to operate inasmuch as the period of three months has expired and the question of handing over the outlet to the appellant company would not apply. The submission of the respondent that the prayer regarding

handing over of possession has become infructuous in view of passage of time, could not be brushed aside lightly.

5.6 section 9 of the Arbitration Act provides interim measures for preservation, interim custody of goods which are subject matter of arbitration agreement, for securing the amount in dispute in arbitration, for retention, supervision or inspection of property which is subject matter of arbitration, regarding passing interim injunction or appointment of receiver and lastly such other interim measures or protection as may appear to the court to be just and convenient.

5.7 Essentially, the measures which may be ordered under section 9 by the court are interim in nature. They are intended to protect and preserve the subject matter of arbitration and to balance equitable rights of the parties as may be necessary pending resolution on their disputes in the arbitration. It was also a submission on behalf of the respondent that the prayers made by the appellant in its application under section 9 do not fall within the purview of any of the clauses (a) to (e) of section 9.

6. The Commercial Court correctly observed in para 30 about the nature of powers to be exercised while passing the interim measures,

"The power to pass orders with regard to interim measures should always be exercised by the court for the purpose of safeguarding the interest of the parties to the arbitration proceedings so that the award is not frustrated. The Court's discretion ought to be exercised in those exceptional cases when there is adequate material on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous, by frittering away the properties or funds either before or during the pendency of arbitration proceedings or even during the interregnum period from the date of ward and its execution."

6.1 The Commercial Court was justified in observing that the relief

which are prayed for by the applicant-appellant are of such nature in respect of which the applicant could be compensated in terms of money. The situation of irreparable loss would not arise for the applicant, if the applicant finally succeeds. In other words, there is no sufferance of irreparable loss and if the applicant succeeds in the arbitration, he can always be compensated monetarily. These considerations have rightly dissuaded the Commercial Court in not granting the prayers and rejecting the section 9 application.

6.2 Weighing reasons to deny the relief for interim measures as prayed for by the applicant appellant are that the kind and nature of interim measures prayed for are in form of final relief. Granting relief by handing over the franchised premises/outlet to the applicant and to restrain the respondents from carrying out any activity at the franchsed premises, are the reliefs of final nature. The effect of granting such relief would be to bring the business of the respondent to a complete halt. Such relief cannot be a subject matter of passing interim measures.

6.3 The contentions raised by the appellant with regard to the enforcement of conditions of the franchisee agreement and the applications of the parties arising therefrom, are the issues to be decided and resolved in the arbitration proceedings. These issues are in the nature of arbitrable disputes, to be tried and decided by the Arbitral Tribunal. Proceedings of section 9 are not meant for enforcement of conditions of the contract as it could be done only when the rights of the parties are finally adjudged or crystlised by the Arbitrator. Section 9 proceedings which are for interim measures, cannot be converted into the proceedings where a party may seek indirectly the final relief.

6.4 The nature of conditions incorporated in the franchisee agreement, its scope and import in law and its applicability, are all questions to be examined by the arbitrator. The question of determinability or otherwise of the franchisee agreement in respect of which the parties have adverted to the detailed submissions, is also a merit aspect and an arbitrable issue. While dealing with the application under section 9 of the Arbitration Act, 2016, whereby the appellant has prayed for interim measures, such issues which are essentially to be decided by the Arbitrator, are not to be weighed for their merits by this court. They are the main questions which may be considered by the Arbitrator when the parties go before the Arbitral Tribunal for decision on their disputes.

7. For all the aforesaid reasons and discussions, the impugned order dismissing the application of the appellant under section 9 of the Arbitration Act, 1996, does not book any error in both the appeals. The appeals are meritless and are dismissed accordingly.

No orders are required to be passed in the civil applications in view of the disposal of the main Appeals.

(N.V.ANJARIA, J)

(SAMIR J. DAVE,J)

C.M. JOSHI