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

Judgment pronounced on: 06.11.2023

+ **ARB. A. (COMM.) 29/2023 & IA Nos.12437/2023, 12439/2023**

HDA FLAVOURS PVT LTD Appellant

Through: Mr. Arun Bhardwaj, Sr. Adv. with
Mr. Karn Bhardwaj, Mr. Kanwar
Abhay Singh, Mr. Gagar, Mr. Kshitiz
Ahlawat and Mr. Aayush Gautam,
Adv.

Versus

DADDY'S HOSPITALITY PVT LTD Respondent

Through: Mr. S. K. Nanda and Mr. Arman
Bhardwaj, Adv.

**CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA**

JUDGMENT

ARB. A. (COMM.) 29/2023

1. The present appeal is directed against the order dated 08.05.2023, passed by the Ld. Sole Arbitrator, disposing of the application under Section 17 of the Arbitration and Conciliation Act, 1996 (the "A&C Act"), filed on behalf of the appellant (the claimant in the arbitration proceedings).
2. The Ld. Sole Arbitrator was appointed by this court vide order dated 10.02.2023, at the joint request of the parties while considering a petition under Section 9 of the A&C Act, filed on behalf of the appellant.
3. While appointing the Ld. Sole Arbitrator, this court directed that the said petition under Section 9 of the A&C Act would be placed before the Ld. Sole Arbitrator as an application under Section 17 of the A&C Act.

4. It is in the above background that the impugned order has been passed by the Ld. Sole Arbitrator disposing of the said application under Section 17 of the A&C Act.
5. The disputes between the parties have arisen in context of a Business Transfer Agreement (BTA) dated 29.01.2022, entered into between the parties.
6. Another agreement referred to as the “Consulting Agreement” dated 01.04.2022 was also executed between the parties; however, whether or not disputes under the said consulting agreement can be brought within the fold of arbitration is an aspect which has been left to be considered by the Ld. Sole Arbitrator and which remains to be finally adjudicated upon in the arbitral proceedings. This is also expressly noticed in the impugned order.
7. By virtue of the BTA dated 29.01.2022, the seller transferred to the buyer thereunder the “transferred undertaking” alongwith certain other attendant rights as specified therein. The said agreement defines “transferred undertaking” as under:-

“1.1.39. “Transferred Undertaking” means the business undertaking of the Seller on a going concern basis as on the Accounts Date comprising their assets, rights, approvals, Liabilities, obligations, and employees as more particularly described below:

1.1.39.1. Assets;

1.1. 39.2. all rights, benefits and obligations under Assigned Contracts forming part of the Transferred Undertaking;

1.1.39.3. all Authorization (s) to the extent used in , or forming part of the Transferred Undertaking and which are permitted to be transferred in accordance with Applicable Laws and including original documents, related data , and correspondence in possession of the Seller;

1.1.39.4. all claims, rights, credits, causes of actions, defences, rights of set-off (including the right to sue) to the extent arising from, or related to the Transferred Undertaking;

1.1.39.5. the Current Liabilities, Trade Credits related to the

Transferred Undertaking;

1.1 .39.6. the Records related to the Transferred Undertaking;

1.1.39.7.all direct and indirect tax related statutory benefits, credits, exemptions, related to the Transferred Undertaking, as applicable;

1.1.39.8. all claims or benefits, in, to or under any express or implied warranties from suppliers of goods or services related to the Transferred Undertaking;

1.1 .39.9. any other assets and liabilities as the Seller and the Purchaser mutually agree in writing.”

8. Further, the BTA contains the following relevant stipulation:-

“2. TRANSFER OF TRANSFERRED UNDERTAKING

2.1 Subject to the fulfilment or waiver of the conditions set out in this Agreement and the receipt of the Purchase Consideration as specified in Clause 5 below, the Seller hereby agrees to sell, transfer, convey, assign and deliver, as the case may be, on an as - is - where- is basis to the Buyer and the Buyer shall, relying on the representations and warranties provided by the Seller in this Agreement, purchase , acquire and accept, as the case may be, from the Seller, free from Encumbrances in each case with effect from the Accounts Date, the Transferred Undertaking and legal and beneficial title to the following:

2.1.1. the benefit of any amount to which the Seller is entitled from a Person (including, without limitation, an insurer) in respect of damage or injury to any of the Assets other than an amount spent before the Accounts Date in repairing the damage or injury; and

2.1.2. all the warranties and guarantees given to the Seller or the benefit of which is available with the Seller in any manner in relation to the Assets, to the extent they are available and transferable.

2.2 The Seller represents and warrants to the Buyer that it has, and will at the Accounts Date have, the right to transfer the Transferred Undertaking and the legal and beneficial title to the respective Assets and, agrees to transfer the Transferred Undertaking and sell the legal and beneficial title to the respective Assets free from all Encumbrances.

2.3 Subject to Clause 2.4.4, after the Accounts Date the Buyer shall perform all the Seller” obligations to be performed after the Accounts Date under each Assigned Contract (other than the excluded Liabilities and settlement of the claims referred to in Clause 3) in accordance with the terms of the Assigned Contract.

2.4 If an Assigned Contract cannot be transferred except by an

assignment made with a specified person's consent or by a novation agreement.

2.4.1. this agreement does not constitute an assignment or attempted assignment of the Assigned Contract if the assignment or attempted assignment would constitute a breach of the Assigned Contract;

2.4.2. both before and after the Accounts Date, the Parties shall make all reasonable effort to obtain the Person's consent to the assignment, or achieve the novation, of the Assigned Contract;

2.4.3 until the assignment or novation is achieved, the Seller shall do each act and thing reasonably requested it by the Buyer to enable the performance of the Assigned Contract and to provide for the Buyer the benefits of the Assigned Contract (including without limitation, enforcement of a right of the Seller against another party to the Assigned Contract arising out of its termination by the other party or otherwise; and

2.4.4. if the arrangements in Clause 2.4.2 and 2.4.3 cannot be made in respect of the Assigned Contract:

(i) each Party shall make all reasonable efforts to ensure that the Assigned Contract is terminated without liability to either Party; and

(ii) neither the Buyer nor the Seller has any further obligations to the other relating to such Assigned Contract except that the Seller shall immediately repay to the Buyer any amount paid by the Buyer to the Seller in respect of the Assigned Contract."

9. Clause 1.1.6 defines assets as under:-

"1.1.6 "Assets" means the assets pertaining to the Transferred Undertaking including the Trade Debts, along with the goodwill relating to the Transferred Undertaking, to be transferred to the Buyer under this Agreement, and as laid down under Schedule E of this Agreement."

10. The BTA provides for payment of purchase consideration as under:-

"5. PURCHASE CONSIDERATION

5.1. The lump sum consideration payable by the Buyer for the sale and transfer of the Transferred Undertaking by the Seller to the Buyer shall be a sum of INR 1,50,00,918.84 (Indian Rupees One Crore Fifty Lakhs Nine Hundred Eighteen and Eighty- Four Paise), of which INR 68,00,000 (Indian Rupees Sixty Eight Lakhs) shall be paid on the

Execution Date and remainder shall be paid by the Buyer to the Seller on the Closing Date (“Purchase Consideration”), by way of an electronic wire transfer into the designated account of the Seller (details of which account are set out at Schedule A hereto).

5.2. The Buyer may, without prejudicing the business transfer sale, determine or attribute individual values to any of the Assets, Liabilities and/or rights transferred herein , for payment of stamp duty, registration fees or other similar taxes or fees under applicable Law, on any other deeds and /or instruments as may be required to be executed for effectuating and completing the vesting of the Transferred Undertaking contemplated herein. Such attribution of specific values is not intended, nor shall it be construed, to be an assignment of specific values to individual Assets, Liabilities and/or rights thereto.”

11. The petition under Section 9 of the A&C Act was filed by the appellant on the averment that although an amount in excess of the sale consideration contemplated under the BTA stood paid by the appellant to the respondent, the respondent allegedly acted in violation thereof inasmuch as in derogation thereof, the respondent continued to operate a competing brand. In this regard it was specifically averred in the petition under Section 9 of the A&C Act, filed on behalf of the appellant as under:-

“(10) That in the meantime on 20/06/2022, while compiling the data of the Respondent company, the Petitioner company learned that the Respondent had also owned and operated a brand named „Roll Mad by 34 Chowringhee Lane”. But the Respondent who since inception were having malafide intentions to cheat the Petitioner, did not disclose the same. The Respondent was further required to assign the Domain Name and the associated trademark of “34 Chowringhee Lane” to the Petitioner as per the terms of the business transfer agreement. Despite numerous requests of the Petitioner, the Respondent refused to comply with their obligations as per the terms of the business transfer agreement. The acts of the Respondent convincingly establish that they intended to execute the business transfer agreement with the intention to deceive and cause harm to the interest of petitioner. The fraudulent intent could further be established by the fact that Respondent took down the website of “34 Chowringhee Lane” on 01/02/2023.

(11) That on making further investigation it was also revealed that even

after selling the said company, the Mr. Rishi Kapoor in contravention of the business transfer agreement continued to operate the brand, as a competing brand while utilizing the goodwill associated with 34 Chowringhee Lane even after 31st of December 2021.”

12. Disputes having arisen between the parties, legal notices came to be exchanged between the parties and the respondent also purported to terminate the BTA itself.

13. Significantly, in the reply filed on behalf of the respondent to the aforesaid petition, it was not disputed by the respondent that by virtue of the BTA, the appellant acquired the brand “34 Chowringhee Lane”. It was also not denied that pursuant to the BTA, the appellant was dealing with the brand “34 Chowringhee Lane” and also opened new franchisees. In this regard, reference may be made to para-10 of the said reply, which reads as under:-

“10. That the Claimant Company on the strength of the non-complied agreements with the Respondent started dealing with the Brand “34 Chowringhee Lane” giving the assurance to the Respondent that all the considerations of the takeover i.e. Part-I, Part- II and Part-III payment would be made to the Respondent which never happened till date. The Claimant Company dealt with the Franchisees in a manner that sixteen (16) well established Franchises, got closed thereby eroding the Goodwill and value of the brand name “34 Chowringhee Lane”. Even the new franchises opened by the Claimant Company are closed or are at the verge of closing. It is pertinent to mention that even the franchisees have ongoing litigation (s) with the Claimant Company for their unprofessional and oppressive business model. The list of franchisees with their present status is enclosed herewith as DOCUMENT-R11.”

14. In the aforesaid backdrop, Ld. Arbitrator passed the impugned order in the context of the following prayers made in the petition under Section 9 of the A&C Act (directed to be treated as an application under Section 17 of

the A&C Act):-

“(a) Pass an ex-parte or ad-interim injunction order in favour of the petitioner and against the respondent thereby restraining the respondent, their legal heirs, successors, nominees, assignees, attorney, representatives or any other person acting on their behalf in any capacity from approaching, meeting and contacting either of the franchisee based in pan Indian running under the banner of 34 Chowringhee Lane; and

(b) Pass an ex-parte or ad-interim injunction order in favour of the petitioner and against the respondent thereby restraining the respondent, their legal heirs, successors, nominees, assignees, attorney, representatives or any other person acting on their behalf in any capacity from representing, presenting and claiming themselves as owner of 34 Chowringhee Lane; and

(c) Pass an ex-parte or ad-interim injunction order in favour of the petitioner and against the respondent thereby restraining the respondent, their legal heirs, successors, nominees, assignees, attorney, representatives or any other person acting on their behalf in any capacity from making any deal or interfering in day to day affairs of the 34 Chowringhee Lane in any manner and of whatsoever nature; and

(d) Pass an ex-parte and ad-interim injunction order in favour of the petitioner and against the respondent thereby restraining the respondent, their legal heirs, successors, nominees, assignees, attorney, representatives or any other person acting on their behalf in any capacity from posting any post or comment or making any communication of whatsoever nature on social media or any other public and social platform from hampering and damaging the reputation of 34 Chowringhee Lane as well as the petitioner; and

(e) Pass an ex-parte or ad-interim injunction order in favour of the petitioner and against the respondent thereby directing the respondent for transferring the ownership right in respect of the intellectual property as per Schedule D forming part of the Business Transfer Agreement dated 29/01/2022 in view of the agreed terms and conditions; and

(f) Pass an ex-parte or ad-interim injunction order in favour of the petitioner and against the respondent company thereby restraining the respondent company, its directors, employees, representatives, agents and attorney etc from selling, transferring or alienating and creating third party interest of whatsoever nature in respect of the moveable and immovable assets of the business till final disposal of the Arbitration

proceedings; and

(g) Pass an order directing the respondent company for reserving the amount of Rs.4,00,00,000/- (Four Crores Only) separately which the petitioner is claiming towards damages, loss of business and reputation subject to the outcome of the arbitration proceedings; and

(h) Award throughout cost of the petitioner alongwith counsel"s fees in terms of the memo of fees in favour the petitioner and against respondent; and

(i) Pass any other or further order which this Hon"ble Court deems fit, proper & expedite in view of the detailed submissions made herein above, in favour of petitioner and against the respondent, in the interest of justice."

15. The Ld. Sole Arbitrator found that several of the aforesaid prayers could not be acceded to at the Section 17 stage inasmuch as the same could be adjudicated only upon a complete enquiry/trial. In this regard, it was expressly noted in the impugned order as under:-

"17. In the present case, several of the prayers as reproduced herein above, in para no.8 (prayers b, d to h) cannot be acceded to at this stage without complete enquiry/trial)."

16. Further, the impugned order goes on to hold as under:-

"18. However, the submission of Ld. Counsel for the Claimant being limited, the relief seeking protection against interference in the business conducted by the Claimant, can be considered. Such consideration would not tantamount to the final disposal of the matter.

19. There is no dispute that the parties had entered into the Business Transfer Agreement on 29.01.2022 as also the Consulting Agreement on 01.04.2022. There is again no dispute of a payment of Rs. 1.7 crores by the Claimant to the Respondent and the receipt of the said amount by the Respondent. The issue at this stage would be whether the Respondent has any right to interfere with the conduct of the business by the Claimant in the manner as reflected in the various communications of the Respondent sent to some of the franchisees of the Claimant.

20. The contention of the Claimant is that since there was a breach of the terms of the Consulting Agreement the same was terminated by the Claimant. In turn, the Respondent claims that such a termination being

invalid, justified the termination of the Business Transfer Agreement as the complete consideration had not passed.

21. This submission of the Respondent would call for enquiry in as much as the Business Transfer Agreement mentioned a consideration of only Rs. 1.5 crores and it is inexplicable why an excess of Rs.0.2 crores has been paid by the Claimant to the Respondent, unless it also included some payment in terms of the Consulting Agreement as alleged by the Respondent.

22. At the same time, as is evident from the record, that after the receipt of Rs.1.7 crores the conduct of the business was recognized to be the right of the Claimant, with the Respondent's Directors, at best, assisting in the conduct of the business for remuneration.

23. Prima facie it is clear that the Respondent cannot claim a right to interfere with the conduct of that business. Thus, whatever be the grievance of the Respondent, the remedy does not lie in their addressing letters to the franchisees of the Claimant to dissuade them from conducting business as such franchisees of the Claimant or interfering in the day to day affairs of the Claimant and its franchisees under the name/ brand of 34 Chowringhee Lane. A countervailing factor is that some rights to equity seemed to have formed part of the consideration, indicating an interest of the Respondent in the business. The very prayer number (e) of the present application also suggests the absence of a complete transfer of ownership rights in the brand name. Some rights remain with the Respondent. What is the nature of such residuary rights will be a matter of adjudication.

24. Balancing the interests of both sides, the following order is passed:

(i) The Respondent or any person acting on their behalf in any capacity, are restrained from approaching meeting, contacting any franchisees of the Claimant or interfering in the day to day affairs of the Claimant and its franchisees in its business under the name/brand 34 Chowringhee Lane in any manner whatsoever, till the making of the Award;

(ii) Neither party will create any new franchise or enter into such business agreements with third parties for the use of the name/brand 34 Chowringhee Lane during the pendency of these proceedings;

(iii) The Claimant shall henceforth maintain separate accounts of the turnover and profits earned etc. in respect of the business transactions, including of, and through its franchisees, under the name/brand 34 Chowringhee Lane till the conclusion of these proceedings, so that any accounting detail that may be required

for the determination of the present dispute are readily available to the Tribunal.

25. Nothing contained in this order shall be considered as an opinion on the merits of the dispute which needless to state, will be based on the evidence led by both the parties.”

17. In the above conspectus, the appellant is aggrieved with the directions contained in para-24(ii) of the impugned order inasmuch as the appellant has been restrained from creating any new franchise or entering into business agreements with third parties for the use of the name/brand “34 Chowringhee Lane”. The said direction has been assailed on the following grounds:-

“3.a. The impugned direction (ii), in effect, prevents the Appellant /Claimant from conducting its business and is causing severe irreparable loss and injury to the Appellant, which cannot be compensated in terms of money. Such a direction can prove fatal to the business interests and survival of the Appellant company.

b. The impugned direction (ii) fails to appreciate that the stopping of the business of the Appellant will cause irreparable loss to the business and brand of “34 Chowringhee Lane”, which will result in destruction of the subject matter of the dispute i.e. the brand and business undertaking in respect of 34CL.

c. The impugned order fails to appreciate that the Claimant has already paid the full sale consideration amounting to Rs. 1.7 Crores, and is out of pocket of huge amount as bona fide purchaser, and ought not be prevented from conducting its business. The Respondent has taken the benefit of the said payment and continues to do so. The Ld . Sole Arbitrator has also recorded that the payment of Rs. 1.7 Crores is an admitted fact.

d. That the Respondent never sought such a direction for stopping the Appellant/Claimant from creating further franchises/third party agreements. Such a direction amounts to stopping the business activity in respect of the Appellant and the business of the brand of „34 Chowringhee Lane” and is detrimental and severely prejudicial to the Appellant.

e. The direction (ii) is contrary to the own findings of the Ld. Sole Arbitrator contained in paragraphs 22 and 23 of the impugned order.

f. The material on the record shows prima facie acquiescence by the

Respondent, and balance of convenience lies in favor of the Appellant/Claimant.

g. The Ld. Arbitrator in para 9 has wrongly recorded that the Appellant/Claimant is a “joint venture”, which is without any basis and is contrary to record.”

18. On the contrary, learned counsel for the respondent has reiterated the contentions raised by it before the Ld. Sole Arbitrator and also the contents of the reply filed on behalf of the respondent before the Ld. Sole Arbitrator and emphasized that there has been flagrant breach by the appellant of the terms of the BTA and the Consulting Agreement.

19. Having considered the respective contentions of the learned counsel for the parties, I find merit in the contentions raised on behalf of the appellant.

20. Significantly, in para-22 of the impugned order, Ld. Arbitrator recorded that after receipt of the consideration amount of Rs.1.7 Crores “*the conduct of the business was recognized to be right of the claimant, with the respondent’s Directors, at best, assisting in the conduct of the business for remuneration*”.

21. In para-23 of the impugned order goes on to render a *prima facie* finding that the respondent “*cannot claim a right to interfere with the conduct of that business*”.

22. In view of the aforesaid findings in the impugned order, it was unwarranted to put fetters on the right of the appellant to create any new franchisee or enter into such business agreements with third parties. The said direction is in the teeth of the findings contained in paras-22 and 23 of the impugned order which recognize the right of the appellant to conduct the day to day affairs of the claimant/appellant and its franchisees under the

name/brand “34 Chowringhee Lane”

23. There is also merit in the contention of the appellant that the aforesaid directions are unwarranted given that there was no independent prayer/Section 17 application filed on behalf of the respondent seeking any injunctive orders against the appellant.

24. Moreover, para-24 (iii) of the impugned order sufficiently safeguards the rights of the respondent inasmuch as the appellant/claimant has been directed to “*maintain separate accounts of the turnover and profits earned etc. in respect of the business transactions, including of, and through its franchisees, under the name/ brand 34 Chowringhee Lane till the conclusion of these proceedings, so that any accounting detail that may be required for the determination of the present dispute are readily available to the Tribunal*”.

25. A blanket embargo on the appellant from creating any new franchisee or entering into such business agreements as may be appropriate for the advancement of business, may result in denuding the value of the business on account of stagnation/depletion in market share. Moreover, there is no occasion to pass such a direction while dealing with the appellant’s own application under Section 17 of the A&C Act, in the absence of any application by the respondent seeking any restraint/s against the appellant.

26. In the circumstances, this court deems it appropriate to set aside para-24 (ii) of the impugned order to the extent it interdicts the appellant from “*creating any new franchise or enter into such business agreements with third parties for the use of the name/brand 34 Chowringhee Lane during the pendency of these proceedings*”. It is directed accordingly.

27. However, although the appellant is not interdicted from creating any

new franchisee or entering into any new business agreement with third parties, it is directed that the same shall be done only with prior approval of the learned sole arbitrator and upon the terms (and rationale) for creation of any new franchisee or entering into any fresh business agreement being placed before the Ld. Sole Arbitrator. The same shall also be subject to further orders that may be passed by the Ld. Sole Arbitrator to safeguard the rights of the respondent owing to creation of any new franchisee or entering into any new business agreement.

28. With the aforesaid directions, the present appeal stands disposed of.

29. Pending applications also stand disposed of.

NOVEMBER 06, 2023/cl

SACHIN DATTA, J.

