

(2005) 02 BOM CK 0085

In the Bombay High Court

Case No : Notice of Motion No. 143 of 2005 in Suit No. 143 of 2005

Villa Moda General Trading Co. W.L.L. and Another

APPELLANT

Vs

Chordia Fashions Pvt. Ltd.

RESPONDENT

Date of Decision : 03-02-2005

Acts Referred:

Contract Act, 1872 — Section 51, 52

Citation : (2005) 3 BomCR 41

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : Virendra Tulzapurkar and Alpana Ghone, instructed by DSK Legal, for the Appellant; I.M Chhagla and Ravi Kadam, instructed by H.W. Kane and M.S. Jamdar, for the Respondent

Judgement

D.G. Karnik, J.—This motion is taken out by the plaintiffs for reliefs of several injunctions mentioned below:

i) Regarding confidentiality - restraining the defendant from committing a breach of clause No. 12.1 of the Franchisee Agreement and disclosing to anyone the confidential information mentioned therein.

ii) Regarding injurious falsehood -restraining the defendant from committing a tort of injurious falsehood by alleging in any correspondence, e-mail or otherwise that it is not the defendant but it is the plaintiffs who have committed breach of the franchisee agreement dated 4th November 2003 (Exhibit-C to the plaint)

iii) Regarding copy right -restraining the defendant from infringing its copy right in the drawings and designs mentioned in prayer clause a(ii) of the motion.

2. The plaintiffs moved the application for ad-interim relief after serving a private notice to the defendant. The defendant appeared and opposed grant of an ad-interim relief. Mr. Chhagla, learned counsel appearing for the defendant handed in a compilation of the documents relied upon by the defendant but chose to proceed with the opposition of the ad-interim relief by way of demurrer without

filing an affidavit in reply. Meaning of Demurrer.

3. A controversy has erupted as to the meaning of the phrase "demurrer". It is contended by Mr. Chhagla that proceeding by way of demurrer means proceeding on the basis of denial and defendant has proceeded with the hearing on the basis that all averments made in the plaint were denied. He further went on to say that the concept of demurrer is unknown to Indian Law and therefore, the word "demurrer" must be deemed to mean that all averments in the plaint are denied. He relies upon an old judgment of a Division Bench of this Court in *Vithaldas G. Seth v. The Hyderabad Spinning and Weaving Co. Ltd.* reported in AIR 1923 Bom 24, wherein the Division Bench observed:

"In the first place, it is not desirable to use the word "demurrer" as demurrer in English practice has been abolished since the passing of the Judicature Act, while the term has never been recognised in India by any of the Codes of Civil Procedure. It can only be used in India by way of analogy to a bygone English form of procedure."

Mr. Tulzapurkar, learned counsel appearing on behalf of the plaintiff however submits that the word "demurrer" is well recognised in India and used in the Courts day-in and day-out even after the judgment of the Division Bench. An objection like lack of jurisdiction of the Court to entertain a suit and consequently an application for injunction is often raised by way of a demurrer in the Courts. Such objection to the jurisdiction was also raised in *Expnar SA and Another Vs. Eupharma Laboratories Ltd. and Another*, . In paragraph No. 9 of the said decision, the Supreme Court observed

"Besides, when an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law. In rejecting a plaint on the ground of jurisdiction, the Division Bench should have taken the allegations contained in the plaint to be correct."

(underlining supplied)

In view of the authoritative pronouncement of the Apex Court, it cannot be said that the word "demurrer" is alien to Indian Jurisprudence. When a party to a suit prays for a grant of ad-interim relief by way of an injunction and the opposite party appears it ordinarily has two options. It may either request the Court to defer the hearing of the application for grant of the relief for a short while till it files an affidavit in reply, in which case the Court may pass a workable order preventing injustice to either side till the hearing of prayer for ad-interim injunction or it is open to the defendant not to agree to any workable order and show to the Court that even if it is assumed that all averments made in the plaint or the application are true, the plaintiff would not be entitled to any relief. He can satisfy the Court that even on the basis of averments made in the plaint and/or application for interim relief, the plaintiff is not entitled to any interim relief in

law. This second method is called opposing relief by way of "demurrer". When the defendant proceeds to oppose ad-interim relief by way of demurrer, it is open for him to show that assuming that all the facts stated in the plaint and/or application were true, the plaintiff is not entitled to a relief in law. It may also be open for him to show, on the basis of the documents produced by the plaintiff and also on the basis of documents which he may tender and which are not disputed, that one or more of the facts pleaded are so intrinsically improbable that no reasonable person would believe them to be true. This would be an exception to the normal rule that in a demurrer, the defendant proceeds on the assumption that all facts pleaded by the plaintiff are true and correct. This exception of course, would be limited when the same facts are so patently wrong or incorrect that no reasonable person is likely to believe in their existence.

4. Since the defendant had chosen to proceed by way of demurrer to oppose the ad-interim relief, I would proceed on the basis that the facts pleaded in the plaint are true and/or admitted by the defendant for the purpose of considering grant of ad-interim relief unless it is shown that one or more of the facts pleaded are so improbable that no reasonable person would believe them to be true.

5. Before I proceed to consider the ad-interim reliefs prayed, it is necessary to state a few undisputed facts. The plaintiff nos. 1 and 2 are companies incorporated in accordance with laws of Kuwait. The plaintiff No. 1 is a subsidiary of plaintiff No. 2. The plaintiffs inter alia carry on the business of establishing multi-branded high value stores (retail outlets) in different cities of the world. The plaintiffs obtain licence/permission for use of different brands of different manufacturers and then set up stores either by themselves or through their franchisees in different cities in the world.

6. The defendant is a private limited company incorporated in India in accordance with the Companies Act, 1956. The plaintiffs and the defendant came together for the purpose of opening of a high value store under a franchise arrangement. After a preliminary agreement and negotiations a definitive agreement, called as "franchise agreement", was entered into between the plaintiff No. 1 and the defendant on 4th November 2003. The said agreement contemplated grant of franchise by the plaintiffs to the defendant for dealing in 12 types of goods retailed under 23 different brands Basic Facts.

(for short "the said brands") mentioned in Exhibit III of the said franchise agreement. The said brands mentioned in Exhibit-III to the franchise agreement do not belong to the plaintiffs but the plaintiffs agreed that they would obtain the requisite legal rights and/or authorisation to use the said brands in the whole of the territory of India and would authorise the defendant to sell the products using the trademarks and trade names of the said brands. It was agreed between the parties that the defendant would set up retail stores initially in Mumbai and then in such other cities in India as may be agreed upon for retailing of the merchandise under the said brands in India. The retail stores to be set up by the defendant were generally to conform to the international standards with

certain agreed designs and specifications. The plaintiffs agreed to render assistance to the defendant for opening and setting up of the stores including their location, design, shop fittings and furnishings as well their inauguration and advertising (Clause 5 of the agreement). The plaintiffs represented that they had or would acquire the requisite legal rights and authorisation to use the trademarks and intellectual property rights in respect of the said brands from the brand owners for their use by the defendant. In consideration, the defendant agreed to pay fixed initial fees as also a certain percentage of sales as royalty to the plaintiffs. As initial payment as well as royalty was to be paid in US dollars, the defendant agreed to obtain the necessary permission of all the authorities for making payment in dollars and/or transmitting the currency out of India. It was also agreed between the parties that the information which the defendant would receive in pursuance of the said franchise agreement would be confidential and would not be disclosed by it to anybody except to the employees for the purpose of implementation of the agreement. The employees were to be further bound by similar covenant of non disclosure.

7. Clause 2.1.1 of the agreement provides that the agreement would come into force and be binding on the parties only upon the defendant obtaining the requisite permissions from the Ministry of Finance and/or Reserve Bank of India (RBI) Income Tax authorities and other regulatory authorities for implementing terms and conditions of the agreement, including the permission for making payment to the plaintiffs envisaged under the franchise agreement. Clause No. 2.1.2 provides that the plaintiffs would acquire the rights/authorisation from the brand owners owning the said brands on or before 21st January 2004. Clause 2.2 provides that on receipt of the necessary approvals in accordance with clause 2.1 the plaintiffs would provide the relevant documents authorising the defendant to sell the products of the said brands using their trademarks and trade names at its stores. Clause 2.4 provides that the parties would be entitled to terminate this agreement if conditions mentioned in clause 2.1 and 2.2 were not fulfilled. It further provides that in case of termination, no party would have rights or claims against the other, save and except those rights or claims which were to expressly survive the termination of the agreement. Disputes arose between the parties regarding the interpretation of the agreement and in particular various sub clauses of clause 2 of the agreement referred to above. According to the plaintiffs, the defendant was to first obtain necessary permission of the Government/RBI/other authorities mentioned in clause 2.1.1 of the agreement before the plaintiffs obtained the rights/authorisation for use of the said brands from the brand owners in accordance with the conditions mentioned in clause 2.1.2. According to the defendant, the plaintiffs were to first obtain the rights/authorisation for use of the said brands in India and the approvals of the Government/RBI/other authorities were to be obtained by the defendant subsequently. The defendant insisted on the plaintiffs first obtaining rights/authorisations from the brand owners while plaintiffs insisted upon the defendant obtaining necessary permission of the Government/RBI/other authorities before

they obtained the rights/authorisations for use for the said brands. Correspondence was exchanged between the parties as to who was to perform its part first. Finally by a letter dated 27th November 2004 (Exhibit-M to the plaint) the plaintiffs purported to terminate the franchise agreement on the ground of breach by the defendant in not obtaining the permissions of the Government/RBI/other authorities as contemplated under clause 2.1.1. The plaintiffs thereafter wrote letters to the owners of the said brands that the agreement with the defendant was terminated on account of the breach committed by the defendant. In response, the defendant wrote to the owners of the said brands that the franchise agreement was wrongly terminated by the plaintiffs and in fact it were the plaintiffs who had committed breach of the franchise agreement. It appears that the defendant thereafter started negotiations with some of the brand owners owning the said brands for grant of direct franchise for sale of their merchandise and/or use of their brand names. It is at this stage that the present suit has been filed claiming various injunctions mentioned above. Injunction regarding breach of confidentiality agreement.

8. It would be appropriate to extract here the clause No. 12.1 of the agreement which provides for the confidentiality and it reads thus :

"12.1 FRANCHISEE acknowledges that it has or shall possess or acquire knowledge of confidential information and trade secrets related to the Products and/or the business operations of VM ("Confidential Information"), and FRANCHISEE hereby undertakes to keep the same secret as confidential and not disclose or use any of the Confidential Information without prior consent from VM. The FRANCHISEE may disclose the same to such employees for whom such information is necessary in the performance of their duties who shall be nevertheless be made subject to the same duties of confidentiality, by contract or otherwise. Without prejudice to the foregoing, FRANCHISEE shall exercise diligent care in keeping the Confidential Information safe and confidential as if it was its own trade secrets."

9. Shri Tulzapurkar, learned counsel for the plaintiff contends that there was a specific agreement between the parties that the defendant would keep the information disclosed to it by the plaintiffs in pursuance of the franchise agreement as secret and confidential and would not disclose the same to anybody except with the prior written consent of the plaintiffs. Apart from this special right conferred by clause 12.1 of the agreement, plaintiffs also have a common law right regarding the non-disclosure of the information given by them in confidence. He refers to and relies upon the decisions of the Division Bench of this Court rendered in *Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd and Ors.* reported in 2003(27) PTC 457 and an unreported judgment of a learned Single Judge in *Intec Polymers Ltd. v. Rajendra Eknathrao Tambe and Ors.* (Notice of Motion no. 1278/03 in Suit No. 1197/03 decided on 23rd December 2004, Coram F.I. Rebello, J).

10. In *Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd.*, the Division Bench

of this Court was considering the claim for injunction inter alia on the ground of breach of confidentiality by the defendants. The defendants contended that the plaintiff was seeking an injunction in respect of an idea, and an idea being intangible, there would be no copy right in respect of an abstract idea which was intangible and there could be no injunction against copying and/or using an abstract idea which was mooted by the plaintiff. The plaintiff on the other hand claimed injunction on the basis that the idea was conveyed to the defendant in confidence and the defendant was not entitled to disclose that idea as it would constitute a breach of confidentiality. In paragraph No. 9 of the judgment the Division Bench quoted with approval a passage from Copinger and Skone-James on copy right (13th Edition) which reads as follows:-

"There is a broad and developing equitable doctrine that he who has received information in confidence shall not take unfair advantage of it or profit from the wrongful use or publication of it. He must not make any use of it to the prejudice of him who gave it, without obtaining his consent or, at any rate, without paying him for it. It has for long been clear that the courts can restrain a breach of confidence arising out of a contract or any right to property... The ground of equitable intervention is that it is unconscionable for a person who has received information on the basis that it confidential subsequently to reveal that information. Acceptance of information on the basis that it will be kept secret affects the conscience of the recipient of the information. In general it is in the public interest that confidences should be respected, even where the consider can point to specific financial detriment to himself. If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff without his consent, express or implies, he will be guilty of an infringement of the plaintiff's rights."

The principle laid down by the Division Bench of this Court in Zee Telefilms Ltd. (Supra) was followed by a learned Single Judge of this Court in Intec Polymers Ltd v. Rajendra Eknathrao Tambe and Ors (Supra). Learned counsel for the plaintiff, therefore, contends that the plaintiff is entitled to an injunction restraining the defendant from disclosing to anyone confidential information contained at pages 184 to 263 of the plaint.

11. I would firstly proceed to consider the extent of the contractual obligation of the defendant to treat as confidential the information furnished by the plaintiff. A careful reading of clause 12.1 shows that the defendant had agreed that it would treat "the information and trade secrets related to the products and/or business operations of the plaintiffs" as secret and confidential and would not disclose or use the said confidential information without prior written consent of the plaintiffs. The exception which permitted the defendant to disclose the said information to the employees for whom such information was necessary for performance of their duties is immaterial for the purpose of this suit as it is not the case that the information is being disclosed by the defendant to its employees in breach of the franchise agreement. The only information that was

required to be kept as secret and confidential under the agreement was "relating to the products and/or business operations of the plaintiffs". None of the information which is contained in page nos. 184 to 263 of the plaint relates to the products and/or business operations of the plaintiffs. The plaintiff has also produced on record a sealed envelope containing the alleged confidential information in respect of which the plaintiff seeks an injunction of non disclosure. The envelope was opened in the Court and sealed again after perusal of its contents. The envelope contains three sheets. The first two sheets contain business plan of the defendant and projections of financial investments, sales, income and profit etc. This plan could have been prepared for several purposes including for enabling the parties to estimate the amount of royalty which would have been payable by the defendant to the plaintiffs as a percentage of sales and also for the purpose of defendant to make an estimate of the investment required to be made for the store and calculate its return on the investment. The said two sheets do not contain any information relating to the products and/or business operations of the plaintiffs. At best, they contain the projections of the investment, income and expenditure and the profits likely to be made by defendant from its operations. This certainly was not a confidential information which was protected under clause 12.1. The sheet No. 3 contains names of 10 out of the 23 brands mentioned in Exhibit III to the franchise agreement and the names of the contact persons and their designations. This information also does not relate to the products and/or business operations of the plaintiffs. The names of the brands lie in public domain. The names of the persons who may be contacted for sale of the products of those brands cannot, in my view, be regarded as secret or confidential information. If the products under those brands are for sale in the market then in today's world, when every manufacturer is looking for promoting his brands and sales nobody would keep the names of the persons to be contacted for sale of their products. On the contrary, the names would be disclosed to promote the sales. The names of persons who are involved in promoting the sales cannot be regarded as confidential information. In any event, it is not confidential information relating to the products or business operations of the plaintiff. Therefore, in my view the information contained in the three sheets cannot be regarded as a confidential information covered by the agreement. Even otherwise, the information cannot be regarded as confidential or given by the plaintiff in confidence so as to attract the principle laid down by the Division Bench of this Court in the case of Zee Telefilms Ltd. v. Sundial Communications Pvt. Ltd. Zee Telefilms Ltd. is an authority for the proposition that there exists a right in the plaintiff who parts with any confidential information to prevent the defendant from divulging to others the confidential information irrespective of whether there is a contract to treat the information as confidential. The idea mooted by a person may be in an intangible form and may not have a benefit of a copy right but still if that information is passed on by a person to another in confidence, it may be possible for the former to obtain an injunction against the latter from disclosing that particular idea to the others or to use it for any purpose other than the purpose

for which it was transmitted on the basis of confidentiality. This right of confidentiality can be extended or curtailed by a contract. In the present case, clause 12 contains a specific clause regarding the confidentiality. Clause 32 of the franchise agreement says that the agreement embodies the entire understanding between the parties relating to the subject matter and supersedes all previous oral or written arrangements or understanding in relation thereto. It also provides that any change in the agreement would be made only by a writing signed by both the parties. The parties having agreed in writing to treat only certain information as confidential and that agreement being the entire understanding between the parties, it is not open for the plaintiffs to claim confidentiality relating to any other information. In any event, the information contained in the three sheets produced in the sealed envelope cannot be regarded as confidential information. Because, the first part of the information relates to the defendant's own projections of its own business and the second part of the alleged confidential information relates to the brand names and contact persons which lie in the public domain. The plaintiff is therefore not entitled to an injunction restraining the defendant from committing the breach of confidentiality. Regarding tort of injurious falsehood.

12. After the plaintiffs terminated the franchise agreement dated 4th November 2003, they wrote letters to the various brand owners owning the said brands that the agreement has been terminated on account of the breach committed by the defendant. On becoming aware of such letters, the defendant responded by writing two letters dated 29th November 2004 (Exhibit-P1 and P2) to two of the brand owners taking exception to the plaintiffs' claim. In the said letters, the defendant inter alia said that in spite of several requests made by the defendant the plaintiffs were not able to complete their part and therefore, the agreement never came into force and that the defendant had not committed any breach of the franchise agreement. The tenor of the letters indicates that the defendant laid the blame for not opening of the stores for retailing of the products of the said brands on the plaintiffs. The plaintiffs have alleged that the defendant is further writing letters to the owners of the said brands for entering into a direct contract with it by making false representations to them that it were the plaintiffs who had committed the breach or in any event it were the plaintiffs who were at fault for non-implementation of the franchise agreement dated 4th November 2003. The plaintiffs have alleged that this claim made by the defendant and likely to be repeated to the other brand owners owning the said brands is not only false but is likely to injuriously affect the plaintiffs in their business. Because of this false representation made and/or likely to be made by the defendant to the various brand owners owning the said brands the business relationship of the plaintiffs with those brand owners is likely to be soured thereby causing injuriously affecting their business. The plaintiffs therefore claim injunction restraining the defendant from making false representations about the breach/termination of the franchise agreement dated 4th November 2003 to the various brand owners owning the said brands or to anybody else. A tort of injurious

falsehood can be distinguished from the tort of defamation or slander. While in both cases the tort feaster makes a statement which is false or untrue in the case of defamation or slander the false statement is likely to lower the person, against whom false imputations are made, in the estimation of others. It affects reputation of the person. In case of the tort of injurious falsehood, the false statement made may not lower the injured person in the estimation of others but it may affect him in his business. In both torts, a misrepresentation is made by the tort of feaster but in the former it is the character or reputation of the injured person that is affected; in the latter the business of the injured person is affected. Salmond and Heuston on "The Law of Torts" (Nineteenth Edition) sucking points out the difference in the two torts in para No. 147 at page 446, which reads as follows:-

"This wrong of injurious falsehood is to be distinguished not only from the wrong of deceit, but also from that of defamation, to which it is analogous, but from which it is distinct. Both in defamation and in injurious falsehood the defendant is liable because he has made a false and hurtful statement respecting the plaintiff; but in one case the statement is an attack upon his reputation, and in the other it is not. The distinction is clearly made in the following quotation. "Thus the malicious publication in a newspaper to the effect that Y, the famous popular singer, had commenced his novitiate with a closed order of monks would not lower him in the esteem of right-thinking people -quite the reverse possibly - but would lose him engagements and therefore money, and therefore be actionable at this suit." It should be noted that no action lies for such a statement is made maliciously: here, as in some other branches of law of torts, carelessness alone, however gross, does not suffice to establish liability".

13. No action lies for an untrue statement which constitutes a tort of injurious affection unless it has been made maliciously. Here, as in some other branches of law of torts, carelessness alone would not be sufficient to establish the liability. The remedy for a tort of injurious affection would be both in damages as well as in injunction preventing further dissemination of the statements. However, the essential things which the plaintiff would be required to prove in a tort of injurious affection are (i) falsity, (ii) malice and (iii) damage. The plaintiff first would be required to prove that the statement is untrue. He would further be required to prove that the statement was made not merely out of the carelessness but was made maliciously ; there must exist a malice in law, if not in fact. The onus of proof of existence of malice is on the plaintiff. The plaintiff would further be required to allege and prove special damage to claim damages, though a mere possibility of a special damage would be enough for an injunctive relief.

14. I would now proceed to examine whether the statements made by the defendant in the letters Exhibit P1 and P2 and likely to be repeated in same or substantially same form to the other owners of the said brands satisfy the aforesaid three tests to constitute a tort of injurious falsehood. The parties

entered into a franchise agreement on 4th November 2003. The agreement was terminated by the plaintiffs by a letter dated 27th November 2004 (Exhibit-M) purportedly in exercise of its rights under clause 2.4 of the franchise agreement which provides that if the condition fulfilled in clause 2.1 and 2.2 were not fulfilled by any of the parties on or before 31st January 2004, the other party would be entitled to terminate the agreement. The plaintiffs claim that the defendant had not fulfilled its obligation of obtaining the necessary permission of the Ministry of Finance and/or RBI for implementing the terms and conditions of the agreement and in particular for making payments envisaged under the agreement and therefore, it was the defendant who committed the breach of the agreement. Per contra, the defendant contends that such permissions were to be obtained only after the plaintiffs obtained rights/authorisation from the owners of the said brands for use of the said brands and retailing their products in India. The defendant's obligation under clause 2.1.1. did not arise until the plaintiffs obtained the necessary rights and authorisation under clause 2.1.2. It would be useful to quote here the clauses 2.1.1, 2.1.2 and 2.2 of the franchise agreement which read thus:

"2.1.1 The Parties agree that this Agreement shall come into force and be binding on the Parties only upon the FRANCHISEE obtaining all approvals from governmental and/or regulatory authorities, including the permissions from Ministry of Finance and/or the Reserve Bank of India ("RBI") as the case may be, Income tax authorities or other Central and State regulatory authorities etc. for implementing the terms and conditions of this Agreement, including in particular, for making the payments envisaged hereunder.

The FRANCHISEE agrees that the FRANCHISEE shall be liable to obtain all requisite approvals required to implement this Agreement, at its costs. Further, the FRANCHISEE shall immediately provide VM copies of all approvals obtained by the FRANCHISEE.

2.1.2 VM shall acquire the rights/authorisations from The Other Brands as envisaged in Clause 2.2 hereof on or before January 21, 2004.

2.2 On receipt of approvals in accordance with Clause 2.1 above (or upon receipt by the FRANCHISEE) of a request from any regulatory authorities in India for granting the approvals referred to in Clause 2.1 hereof, VM agrees to provide relevant documents to authorise a FRANCHISEE to sell products of the other Brands using their trade marks and trade names at the Store established in the Territory. Further, the Parties shall execute any agreements/documents as required to consummate the purpose of this Agreement and VM shall provide copies of agreements/authority letters from The other Brands evidencing that VM has valid and legal arrangements with the other Brands."

15. Perusal of the franchise agreement and clauses 2.1 and 2.2 in particular shows that the agreement contains mutual/reciprocal promises. It contains a promise by the defendant to obtain the permission of Ministry of Finance and/or

RBI, Tax authorities and all other central and state regulatory authorities for implementing the terms and conditions of the agreement including in particular for making payments envisaged under the agreement. It also contains a promise by the defendant to pay the initial amount and the royalty. The agreement also contains a promise or obligation on the part of the plaintiffs to acquire rights/authorisation from the brand owners owning the said brands for use of the brand names and/or retailing of the products of the said brands in the territory of India. The agreement does not specifically provide which obligation was to be first performed by which party. In the absence of any agreement between the parties of the order in which the reciprocal promises were to be performed, the rights would be governed by section 51 and section 52 of the Indian Contract Act, 1872 (for short "the Contract Act") which read as follows:-

51. Promisor not bound to perform, Promisor not bound to perform, Promisor not bound to perform, unless reciprocal promisee ready and willing to perform-. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

52. Order of performance of reciprocal promises-. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Section 52 of the Contract Act provides that where the order of performance is not expressly fixed by the contract, they (mutual promises) shall be performed in that order which the nature of the transaction requires. Illustration (A) below section 52 provides that where "A" and "B" contract that "A" shall build a house at a fixed price "A" is not required to pay for the house until the house is built. By the same analogy, the defendant herein was not be required to pay or even to obtain the permissions required for the payment until the plaintiffs obtained the authorisation from the brand owners owning the said brands the right/authorisation for use of the said brands and retailing their products in India.

16. There is an indication in the agreement itself that the plaintiffs were to first acquire the rights/authorisation from the brand owners of the said brands. Under clause 2.1.2, the plaintiffs were required to obtain the authorisation on or before 21st January 2004. No date was fixed under clause 2.1.1 for the defendant to obtain the necessary permissions from the Ministry of Finance and/or RBI and the central and state regulatory authorities. So far as the plaintiffs' obligation was concerned, a time limit was agreed but so far as the defendant's obligation was concerned, time limit was not agreed indicating thereby that the defendant could obtain the permissions even after 21st January 2004 by which time the plaintiffs were to perform their part of the contract. Clause 2.4 gave right of termination to either of the parties if the obligations were not fulfilled by the parties on or before 31st January 2004. If the defendant were to obtain the

sanctions of the Ministry of Finance/RBI and Central and state regulatory authorities after 21st January 2004 but before 31st January 2004 they would have committed no breach of the agreement and the plaintiffs would not have been entitled to terminate the agreement. Thus, while the plaintiffs were required to perform their part on or before 21st January 2004, the defendants could have performed their obligation after 21st January 2004 but before 31st January 2004. Looked at any way, it were the plaintiffs who were to perform their obligations first and the defendant could perform its obligation thereafter.

17. It is not disputed that by 21st January 2004 or even till the purported termination by the plaintiffs by their letter dated 27th November 2004, they had not obtained necessary rights/authorisation from all the brand owners of the said brands. Till the termination the plaintiffs had obtained letters from only 4 out of the 23 brand owners. Perusal of the letters show that the said four brand owners had also given the permission for retailing the products under the said brand names only in the city of Mumbai and not throughout the territory of India which was a condition of the franchise agreement. I am therefore, satisfied that the plaintiffs have not prima facie proved that the defendant committed the breach of the franchise agreement. I am further satisfied that there is a bonafide dispute between the parties as to who has committed a breach of the franchise agreement. It cannot be held without trial that the defendant had committed the breach of the franchise agreement dated 4th November 2004.

18. It were the plaintiffs who first addressed communications to the said brand owners that the defendant had committed a breach of the agreement. The defendant's letters Exhibit-P1 and P2 were only a response to that allegation. Learned counsel for the defendant at one stage even suggested that it were the plaintiffs who had committed a tort of injurious falsehood by writing false letters to the said brand owners. The defendant's writing of the letters Ex.P1 and P2 was only a response of the defendant bonafide for protecting its own trade interest. In any event, there was no malice involved in sending of the communications Exhibit-P1 and P2.

19. Learned counsel for the parties drew my attention to the pleadings. In paragraph nos. 40 and 41 of the plaint, the plaintiffs have averred that the defendant had committed a tort of injurious falsehood. However, there is no allegation in the whole of the plaint that the defendant sent communications (Exhibit-P1 and P2) maliciously. There is no allegation of either malice in fact or malice in law. In my view, existence of a malice (in fact or law) is a necessary ingredient of a tort of injurious falsehood. In the absence of even an allegation of malice, far from its proof, it cannot be said that the defendant is guilty of committing a tort of injurious falsehood. The plaintiff is therefore not entitled to an injunction restraining the defendant from repeating and/or sending communications similar to (Exhibit-P1 and P2).

Regarding Infringement of Copy right

20. Learned counsel for the plaintiffs states that at this ad-interim stage injunction in respect of the copy right is claimed only for preventing distribution by the defendant the pamphlets or other materials contained in page nos.3, 4, 6, 7, 8, 9, 10, 12, 13, 15, 17, 19, 26, 27, 28 and 29 of the Exhibit V to the plaint or any colourable imitation thereof. No injunction is claimed in respect of the work which has already been carried out by the defendant in erecting the stores in accordance with the said drawings/designs. Mr. Chhagla, learned counsel for the defendant, on instructions of Mr. Ashish Chordia, Director of the defendant, who is present in the Court states that without admitting the plaintiffs' claim of copy right and reserving its rights to context the said claim at the stage of hearing, the defendant would not distribute the said pages in any form or in any presentation to anybody pending the hearing of the motion. The statement is accepted and recorded as an undertaking. In view of this undertaking, it is unnecessary for me to consider the claim of the plaintiffs to the copy right and further allegations of the infringement thereof.

21. For these reasons, I decline to grant any ad interim relief of injunction.

21. Motion made returnable in due course.