(2008) 02 MAD CK 0018

In the Madras High Court

Case No : O.A. No''s. 441 and 442 of 2008 and A. No''s. 571 and 572 of 2008

Glory Jeeva Rita — APPELLANT

Vs

Executive Director, Bharat Petroleum Corporation Ltd. and Others — RESPONDENT

Date of Decision : 11-02-2008

Acts Referred:

- Arbitration Act, 1940 — Section 18, 41
- Arbitration and Conciliation Act, 1996 — Section 17, 22, 36, 38, 39
- Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5
- Constitution of India, 1950 — Article 14
- Specific Relief Act, 1963 — Section 14(1)

Citation : (2008) 3 ARBLR 588

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : T.R. Rajagopalan, for T.R. Rajaraman, for the Appellant; Krishna Srinivas, for Ramasubramanian, for the Respondent

Judgement

S. Rajeswaran, J.—OA No. 441 of 2008 has been filed to suspend the order of termination passed by the third respondent vide Ref.

TCN.LPG.JOTHI dated 18.01.2008 pending proceedings of the arbitrator.

OA No. 442 of 2008 has been filed to direct the respondents herein to redeliver the goods taken by them such as all records including SV/TV

pads, entire stock of LPG filled/empty cylinders, DPRs/equipments taken from Jothi Gas Service, Tirunelveli and permitting the petitioner to

continue the distributorship of Bharat Gas at Tirunelveli as per the distributorship agreement dated 13.07.2004 pending the proceedings of the

arbitrator.

2. The brief facts as culled out from the affidavit filed in support of OA Nos. 441 and 442 of 2008 are as under:

The applicant applied for distributorship of LPG Bharat Gas by her application dated 03.10.2000. She was selected by the Corporation for LPG

distributorship. Before attending the interview on 07.02.2004, she entered into an agreement of sale with one S.M. Farooq for purchasing the

lands for the purpose of construction of godown if the distributorship for LPG gas is allotted to her. In the letter of intent dated 05.03.2004, the

respondents stated that she has to procure a suitable plot measuring to 36 m ï¿½ 29 m for storing LPG cylinders, either purchased by her or leased

to her initially for a period of 10 years with renewal option.

3. After receiving the Letter of Intent (LoI) she came to know that the land for which the agreement of sale was entered into with S.M. Farooq

was already sold to a third party and without disclosing the same, the said S.M. Farooq entered into an agreement of sale with her. Therefore, she

cancelled the agreement of sale and started searching for suitable lands and after selecting three such lands, she showed them to the field

investigation officer of the Corporation for inspection and thereafter she entered into an agreement of lease dated 20.04.2004 for 25 years with the

landlord whose land was selected by the field investigation officer for the purpose of construction of the godown and showroom. The lease

agreement dated 20.04.2004 was handed over to the Corporation and third respondent entered into an agreement for the LPG distributorship on

13.07.2004 and on and from 14.07.2004 she has been carrying on the business of distributorship of Bharat Gas in Tirunelveli Town, covering 15

km. radius and supplying gas to customers numbering 15,000.

4. While so, one C.M. Rajan who stood second in the interview for the selection of distributorship, filed WP No. 6347 of 2004 challenging her

selection for the distributorship. Though a status quo order was passed by this court on 27.04.2004, the same was vacated on 26.05.2004.

Finally, the writ petition itself was disposed of by this court with a direction to the Corporation to consider the complaint dated 03.10.2006 given

by the said C.M. Rajan within a reasonable time. In his complaint, C.M. Rajan stated that the applicant had committed four irregularities for getting

the LPG distributorship, which are as follows:

(1) She submitted false land documents;

(2) She submitted false certificate showing her work experience when she did

not work in any company;

(3) She submitted a fake bank balance statement; and

(4) She obtained forged plan from Reddiarpatty Panchayat for construction of LPC godown.

5. To these complaints, she submitted a detailed explanation, but the third respondent sent a show cause notice dated 12.12.2007 seeking her

explanation for the same old complaints and asking her as to why her distributorship agreement dated 13.07.2004 should not be terminated by

invoking Clause 28(1) of the distributorship agreement. To this show cause, she submitted a detailed explanation on 02.01.2008 and thereafter she

appeared in person before the third respondent and explained her stand. But, the third respondent by order dated 18.01.2008 terminated her

distributorship agreement and challenging the same, she filed a writ petition in WP No. 505 of 2008 before the Madurai Bench of this court, but by

order dated 24.01.2008, this court dismissed the petition by holding that her remedy is only by way of arbitration. Hence, before the

commencement of arbitration proceedings, by way of interim relief, the above applications have been filed u/s 9 of the Act of 1996.

6. On 30.01.2008, this court granted interim order as prayed for and posted the matter for respondents'' appearance on 28.02.2008.

7. The respondents appeared before this court through their counsel and filed Application No. 571 of 2008 praying to recall the order dated

30.01.2008 in OA No. 441 of 2008 and in OA No. 572 of 2008 praying to vacate the order dated 30.01.2008 in OA No. 442 of 2008.

8. In the affidavit filed in support of the above applications, the Territory Manager of the Corporation stated that as per the distributorship

agreement dated 13.07.2004, the agreement is determinable by its very nature and, therefore, she is not entitled to specifically enforce the

agreement as per Section 41 of the Specific Relief Act. Even if the applicant succeeds before the arbitrator, she is only entitled to compensation

and not restoration of agency. It is further stated that after terminating the distributorship agreement on 18.01.2008, the Corporation took steps to

ensure servicing of her customers by another distributor of the Corporation and the said agreement has been in force since then. The order of

termination was passed after conducting an elaborate enquiry in which she was given complete opportunity to present her case and the termination

is strictly in accordance with the distributorship agreement.

9. It is stated in the affidavit that Clause 1(a) of the distributorship agreement stipulates that the distributor would be initially appointed for a period

of 10 years and renewable every 5 years at the sole discretion of the Corporation. Clause 28 deals with the termination of the agreement and Sub-

clause (1) stipulates that if any information given by the distributor in her application is found to be incorrect in any material particular, then the

Corporation shall be at liberty to terminate the agreement forthwith or at any time thereafter.

10. Pursuant to the direction of this court dated 01.12.2006, in WP No. 6437 of 2004 filed by the first empanelled candidate one C.M. Rajan, the

Territory Manager, Vijayawada was appointed by the Corporation to enquire into the matter. In his report dated 22.02.2007, the enquiry officer

concluded that the applicant misrepresented the fact and submitted a false agreement of sale and the bank statement submitted by her to the

Corporation is a forged statement. With reference to other two charges, the enquiry officer reported that her work experience in a company has no

relevance and it could not be proved that she forged a plan to obtain the explosive licence. Upon the receipt of the enquiry report, the Corporation

issued a show cause notice dated 12.12.2007 and after considering her detailed reply dated 02.01.2008, an order dated 18.01.2008 was passed

by the, Corporation terminating the distributorship. Thereafter, the Corporation went to the showroom and took possession , of the Corporation''s

properties after taking an inventory of the properties with acknowledgement from her. A public notice in English and Tamil Daily was published

bringing to the knowledge of the customers about the termination of distributorship and the arrangement made to book their refills from another

distributor. Therefore, according to the Corporation, they have followed the conditions in the agreement and conducted a detailed enquiry.

Therefore, the Corporation prays for vacating the orders granted by this court on 30.01.2008.

11. Heard Mr. T.R. Rajagopalan, learned senior counsel for the applicant/ distributor and Mr. Krishna Srinivas, learned Counsel for the

respondent/Corporation. I have also gone through the documents and judgments referred to by them in support of their submissions.

12. The learned senior counsel for the applicant/distributor submitted that the complaint itself was given by a person who also applied for

distributorship and could not succeed. Further, out of the four charges, two were found to be not proved and insofar as the bank statement is

concerned, it is not at all required by the Corporation for grant of distributorship. Therefore, the amount mentioned in the bank statement is

immaterial and irrelevant. Apart from that, according to the learned senior counsel, the applicant has properly explained about the same but the

same was not at all considered by the Corporation in the final order of termination dated 18.01.2008. The learned senior counsel further urged that

insofar as the document, i.e. the agreement of sale entered into with S.M. Farooq is concerned, the applicant has properly explained as to how she

was cheated by her estranged husband in this regard. Further, learned senior counsel pointed out that even as per the LOI dated 05.03.2004, she

has been given four months period to procure suitable plot for storing the cylinders and she did procure the same within the stipulated time that too

after inspection and approval of the Corporation''s field investigation officer and, therefore, the Corporation is estopped from accusing the

applicant that she misrepresented and submitted a false agreement of sale. Further, the applicant being a woman believed her husband, who

cheated her due to some family problem and, therefore, on that basis she should not be punished with the order of terminating the agency itself

especially when she has been running the agency for the last 4 years without any complaint from any public and law of equity requires that the

agency is to be continued till an award is passed by the arbitrator. In support of his submission, the learned senior counsel relied on the following

decisions:

(1) Harbanslal Sahnia and Anr. v. Indian Oil Corporation Ltd. and Anr. 2003 (1) CTC 189;

(2) An unreported judgment of this court dated 20.06.2006 in WA No. 731 of 2006-Indian Oil Corporation Ltd. v. Bommai Kadhirvelu and

three Ors.;

(3) Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., (This was relied by the learned Counsel for the Corporation also).

13. Per contra, the learned Counsel for the Corporation submitted that as per the order of the writ court, they conducted an enquiry after affording

a full opportunity and as per the conditions contained in the agreement and also as per the affidavit of undertaking given by the applicant, her

agency has been terminated and, therefore, the same cannot be restored by this court u/s 9 of the Arbitration and Conciliation Act, 1996. The

learned Counsel further submitted that by the nature of the agreement itself, the contract is terminable and, therefore, the applicant cannot ask for

its specific performance even before the arbitrator and in such circumstances, she cannot do it before this court u/s 9 of the Act. He further

submitted that properties of the Corporation were removed from her showroom and the entire customers of the applicant have been shifted to

another distributor. In such circumstances, there cannot be any application u/s 9 to preserve any property and to restore the same. Hence, he

prayed for vacating the interim orders granted by this court on 30.01.2008. He relied on the following decisions in support of his submissions:

(1) Modi Rubber Ltd. v. Guardian International Corporation 2007 (2) RAJ 556 (Del.) : 2007(2) Arb. LR 133 (Del.);

(2) Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, ;

(3) Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd. (supra);

(4) (2002) 112 Comp. Cases 630 (Mad.).

14. I have considered the rival submissions carefully with regard to facts and citations.

15. The following facts are not in dispute. The applicant applied for distributorship of LPG by her application dated 03.10.2000.

In the application under Part II, Para (1) it is stated as under:

If any statement made in the application or in the documents enclosed therewith or subsequently submitted in pursuance of the application by the

candidate at any stage is found to be incorrect or false his/her application is liable to be rejected without assigning any reason and in case he/she

has been appointed as a dealer/distributor, his/her dealership/distributorship is liable to be terminated. In such cases, the

candidate/dealer/distributor shall have no claim whatsoever against the oil company.

16. It is also mentioned in the application that for LPG distributorship a complete

LPG godown is a must. Further, the initial tenure of the

agreement will be for 10 years renewable for every 5 years thereafter by the oil company.

17. She has sworn to an affidavit of undertaking stating that if selected, she would be a full time distributor and if any information/declaration given

by her in her application or in any document submitted by her in support of her application shall be found to be untrue or incorrect or false, the

Corporation would be within its rights to withdraw the letter of intent or if already appointed, to terminate the distributorship and she would have

no claim whatsoever against the Corporation for such withdrawal/termination.

18. As the applicant became successful in the interview, a letter of intent dated 05.03.2004 was issued in her favour followed by a distributorship

agreement dated 13.07.2004.

19. A perusal of the distributorship agreement reveals that Clause 28 of the agreement deals with the termination of the agreement. Under sub-

Clause (e) of Clause 28, the Corporation is at liberty in its entire discretion to terminate the agreement if any information given by the distributor in

her application for appointment as a distributor shall be found to be untrue or incorrect in any material particular. This right of the Corporation to

terminate the agreement shall be without prejudice to the rights or remedies against the distributor. In the event of the Corporation terminating the

agreement, it shall not be liable to pay for any loss or compensation in respect of such termination. Further, Clause 29 enables both the parties,

namely, the Corporation or distributor to terminate the agreement on giving 30 days'' notice to the other party without assigning any reason for such

termination. Clause 38 deals with referring the dispute to arbitration to the sole arbitration of the Director (Marketing) of the Corporation or some

other officer of the Corporation who may be nominated by the Director (Marketing).

20. The first empanelled person Thiru C.M. Rajan filed a writ petition in WP No. 6347 of 2004 praying to issue a writ of mandamus directing the

Corporation to cancel the LPG distributorship of the applicant. This court by order dated 27.04.2007 ordered status quo to be maintained. On

26.05.2004, this court vacated the order of status quo but order is clear that if the writ petitioner succeeds in the writ petition, the distributorship licence granted in favour of the applicant shall stand cancelled. Finally, the writ petition was disposed of on 01.12.2006, wherein the following

order is passed by this court:

6. It appears that after the award of the distributorship in the year 2004, the fourth respondent is running the distributorship. Though the petitioner

challenged the award of distributorship to the fourth respondent, on various grounds, the petitioner has now come up with certain allegations

against the fourth respondent, which we need not go into for the purpose of disposal of the writ petition. On 03.10.2006, the petitioner claims to

have sent a complaint to the Chief Vigilance Officer and the fact that he has sent them is borne out by the postal acknowledgement cards. It is

always open to the first respondent to look into any complaint so received and the respondents actually do not require any directions from this

court. In view of the fact that the petitioner is satisfied with a direction to the first respondent to consider their complaint dated 03.10.2006, the

writ petition is disposed of leaving it open to the first respondent to look into the complaint dated 03.10.2006, within a reasonable time. In the

event of the first respondent deciding to enquire into the complaint, opportunities of hearing may be given to the petitioner as well as to the fourth

respondent. No costs. Consequently, connected miscellaneous petition is closed.

21. Subsequent to the order of this court dated 01.12.2006, an enquiry was conducted on the basis of the complaint dated 03.10.2006 and on the

basis of the enquiry report, a show cause notice dated 12.12.2007 was issued by the Corporation. It is stated in the show cause notice that out of

the four charges, alleged in the complaint dated 03.10.2006, the enquiry officer found that she misrepresented the facts by submitting false

agreement of sale of land during the interview held on 07.02.2004 and the bank statement submitted at the time of field investigation was a forged

document. To this show cause notice, an explanation was given by the applicant wherein she stated that the copy of the unregistered sale

agreement dated 04.02.2004 submitted by her at the time of interview was submitted by her under the bona fide impression that the said vendor

had a lawful title over the property and she never knew whether the vendor had lawful title over the property or not. After the interview was over

and after the selection awarding the distributorship of gas to her only, in

February 2004, she came to know about the prior sale of the very same

property to third party from her vendor who received Rs. 1 lakh by her through sale agreement by deception. Immediately, she cancelled the sale

agreement dated 04.02.2004 and got back the amount of Rs. 1 lakh paid by her to him. Thereafter, she entered into registered lease agreement on

20.04.2004 with the owner of the land for a period of 25 years and thereafter she submitted the copy of the lease deed to the Corporation. The

officials of the Corporation also made inspection of the lands covered under lease agreement and approved the land as more suitable for

construction of godown and thereafter she constructed the godown. Hence, according to the applicant, she did not submit a false land document.

She also accused the above said C.M. Rajan for creating false and forged records against her to wreak vengeance upon her.

22. For the submission of bank statement, she stated that she was never called upon to produce any bank statement either along with the

application or at the time of interview. She further denied that she gave any letter dated 27.02.2004 during the field investigation and the same

ought to have been given by her estranged husband Jothi Sigamani by misusing the blank signed papers given by her to her husband for the bona

fide purpose of using the same in her absence under necessity for the agency. Hence, she prayed for dropping the false and motivated charges

levelled against her.

23. By order dated 18.01.2008, the Corporation terminated the distributorship by invoking Clause 28(1) of the distributorship agreement dated

13.07.2004 with effect from 18.01.2008. In the order dated 18.01.2008, the Corporation stated that from the facts and evidence collected during

the enquiry and from her reply dated 02.01.2008 to the show cause notice dated 12.12.2007, it was established that she misrepresented the facts

by submitting false agreement of sale of land during the interview held on 07.02.2004 and the bank statement submitted at the field investigation

stage was a forged document. Hence, they terminated the distributorship agreement and asked the applicant to hand over all records. It is also not

in dispute that the writ petition filed by the applicant, challenging the order of termination was dismissed by the Madurai Bench of this court on

24.01.2008, the matter has to be decided in arbitration proceedings and writ petition is not maintainable. Hence, the above applications filed by

the applicant/distributor.

24. The only point that arises for consideration is whether the applicant is entitled to an interim order of suspension of the termination order dated

18.01.2008 and also for a direction directing the Corporation to re-deliver the goods taken by them and to permit the Corporation to continue the

distributorship, pending the proceedings before the arbitrator ?

25. Before proceeding further to answer this point let me consider the decisions relied on by both the counsel to cull out the legal principles

enunciated therein.

26. In Harbanslal Sahnia and Anr. v. Indian Oil Corporation Ltd. and Anr. (supra) the Hon''ble Supreme Court held as follows:

7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and,

therefore, the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by

availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative

remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies-(i) where the writ petitioner seeks enforcement of any of

the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without

jurisdiction or the vires of an Act is challenged [See Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, . The present case

attracts applicability of first two contingencies. Moreover, as noted, the petitioners'' dealership, which is their bread and butter, came to be

terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High

Court itself instead of driving them to the need of initiating arbitration proceedings.

27. In the above judgment, the Hon''ble Supreme Court held that in an appropriate case in spite of availability of alternative remedy, High Court

can still exercise its writ jurisdiction in the three contingencies mentioned therein and as the case before the Supreme Court attracted the first two

contingencies, namely, writ petitioner seeking enforcement of fundamental rights and there is a failure of principles of natural justice, the Supreme

Court held that the appellants in that case should have been allowed the relief by the High Court itself instead of driving them to the need of

initiating arbitration proceedings.

28. In the unreported judgment dated 20.06.2006-Indian Oil Corporation Ltd. v. Bommai Kadhirvelu and three Ors. (supra), the First Bench of

this court held as under:

6. A Two Judge Bench of the Supreme Court in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and

Others, observed that in certain cases even a disputed question of fact can be gone into by the court entertaining a petition under Article 226 of the

Constitution and further held:

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court

should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by

any other provisions of the Constitution. The High Court having regard to the facts of the case has a discretion to entertain or not to entertain a writ

petition. The court has imposed upon itself certain restrictions in the exercise of their power [See Whirlpool Corporation Vs. Registrar of Trade

Marks, Mumbai and Others,]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the court to

the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the

constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.

7. In Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , Lahoti, J. (as His Lordship then was), relied upon Whirlpool

Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , observing that in an appropriate case, in spite of availability of the alternative

remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies- (i) where the writ petitioner seeks enforcement of any

of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without

jurisdiction or the vires of an Act is challenged.

8. A Three Judge Bench of the Supreme Court in State of Himachal Pradesh v. Gujarat Ambuja Cement Limited (2005) 6 SCC 499 referring to

Harbansal Salmia case held:

22. ...There are two well recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before

the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings

on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine

has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings

itself are in abuse of process of law the High Court in an appropriate case can entertain a writ petition.

23. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are

shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But, normally,

the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the

jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the

remedies provided by the statute.

9. In the light of the aforesaid settled legal position, we are not inclined to accept the contention that the writ petition is not maintainable. After

going through the facts and circumstances of the case, we are fully satisfied that the transaction between the first respondent and A.T. Mohanraj

was only a money lending transaction. In any event, the first respondent had fully settled the claim of the A.T. Mohanraj. Thus, the so-called

partnership had never come into existence. In the facts and circumstances of the case, we are not inclined to interfere with the order of the learned

Single Judge. Consequently, the writ appeal is dismissed and the appellant-Corporation is directed to comply with the order of the learned Single

Judge forthwith. Consequently, connected C.M.P. is also dismissed. No costs.

29. In the above decision also, the same principle of the Hon''ble Supreme Court was followed by the Division Bench to hold that in an

appropriate case, in spite of availability of alternative remedies, the High Court may still exercise its writ jurisdiction.

30. In Modi Rubber Ltd. v. Guardian International Corporation (supra) the Delhi High Court held as under (at pages 201 to 206 of Arb. LR):

208. The next issue which deserves to be considered is the nature of relief to which a party may be entitled. Section 9 confers a discretionary

power on the court which has to be exercised sparingly and cautiously, the object of the statutory provision is to be found in the words of the

section itself which confers jurisdiction on a court to pass orders of interim measures of protection for the preservation, interim custody or sale of

goods which are the subject matter of the arbitration agreement; securing the amount in dispute in the arbitration proceedings; detention,

preservation or inspection of a property which is the subject matter of the dispute in arbitration; authorise any person to enter upon a land or

building; taking of samples or making of observation or experiment to be tried as may be necessary or expedient for the purposes of obtaining full

information or evidence. The court is empowered to even appoint a receiver in respect of the property which is the subject matter of the arbitration

and take such interim measures of protection as may be just and convenient. The powers granted to the court are far-reaching. The statute has

specifically mandated that the court would have the same power for making such orders as it has for the purposes and in relation to any

proceedings before it.

209. It is also necessary to examine the parameters within which the court shall exercise such power. The manner and limits of exercise of such

discretion have fallen for consideration in several judicial pronouncements and the principles laid down can be usefully called out thus:

(i) Even though Section 9 does not embody the ingredients of Order 38 Rule 5 of the Code of Civil Procedure, 1908 nor the conditions of the

Order 38 Rule 5 can be read into it, however, for the exercise of discretion thereunder, the court can take guidance from the provisions of Order

39 as well as Order 38 of the Code of Civil Procedure, 1908. Rite Approach Group Ltd. Vs. Rosoboronexport,]

(ii) The scope of Section 9 of the Arbitration and Conciliation Act, 1996 is in pari materia with the provisions of Order 39 of the Code of Civil

Procedure, 1908. The power vested in the court by virtue of Section 9 must be exercised in consonance with equity which tempers the grant of

discretionary relief as the relief of interim injunction is wholly equitable in nature. [Ref.: M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola

Company and others, ; 115 (2004) DLT 219 : 2004 (VIII) AD (Delhi) 361- Reliance Infocomm Ltd. v. Bharat Sanchar Nigam Ltd.]

(iii) The intention of the defendant is a sine qua non for invoking Section 9 where the claim is to secure the amount in dispute in arbitration. The

court can take guidance from Order 38 Rule 5 of the CPC and Sections 18 and 41 of the Arbitration Act, 1940 for considering whether such a

relief as has been prayed for in the petition u/s 9 deserves to be granted. [Ref.: Global Company Vs. National Fertilizers Ltd., ; Mala Kumar

Engineers Pvt. Ltd. (MKE) Vs. B. Seenaiah and Co. (Projects) Ltd. (BSCPL),]

(iv) Protection u/s 9 can be granted only when a prima facie case is made out and balance of convenience and possibility of irreparable loss and

injury to the petitioner is made out. Section 23 of the Specific Relief Act, 1963 provides that the provision of liquidated damages is not a bar to the

specific performance of the contract. The general rule of equity is also that if a thing is agreed to be done, though there is a penalty attached thereto

to secure its performance, yet the court in its discretion enforces specific performance thereof. The jurisdiction of the court is discretionary and

must be exercised on such judicial principles when balance of convenience and possibility of irreparable loss and injury is shown to the plaintiff.

[Ref. : Geep Batteries (India) Pvt. Ltd. Vs. Gillette India Ltd., Techno Construction and Another Vs. Kunj Vihar Co-operative Group Housing

Society Ltd.,]

(v) The discretionary power of the court u/s 9 has to be exercised by the court sparingly and cautiously, bearing in mind that the objective of the

court is to create an alternative dispute redressal mechanism and consequently, the interference by the court is not required at every stage. [Ref.:

128 (2006) DLT 694 Sanrachna (India) Inc. v. A.B. Hotels Ltd.]

Whenever the powers of the courts are invoked u/s 9 with the objective of supporting the arbitration, the court must act with alacrity. However,

this would not justify grant of interim orders and relief on the mere asking. [Ref.: 87 (2000) DLT 449 : 2000 (VI) AD (Delhi) 509 : 2000 (55) DRJ

750 : 2000(3) Arb. LR 331 -CREF Finance Ltd. v. Puri Construction Ltd.; Sea Transport Contractors Ltd. Vs. Indian Farmers Fertiliser

Cooperative Ltd.,]

(vi) The scope and object of Section 9 of the statute is to grant such relief by way of interlocutory injunction so as to mitigate the risk or injustice to

the petitioner during the period before that uncertainty can be resolved. Its object is to protect the plaintiff against injury by violation of his right for

which he could not be adequately compensated in damages which would be recoverable in the action if the uncertainty were resolved in his favour

at the trial. [Ref.: M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, ; 2006 (IV) AD (Delhi) 38-Country

Development and Management Services Pvt. Ltd. v. Brookeside Resorts Pvt. Ltd.] In Shaw Wallace Breweries Ltd. Vs. Him Neel Breweries

Ltd., , learned Single Judge of this court held that the interim orders are calculated to ensure that the assets of the party are not dissipated or

frittered away and that such orders do not fall within the moratorium of Section 22.

(vii) The application seeking interim measures of protection u/s 9 of the Arbitration and Conciliation Act, 1996 pertaining to the preservation,

interim custody or sale of equipment which is the subject matter of the agreement would be covered u/s 9(ii)(a) as also u/s 9(ii)(c), (d) and (e) of

the Act. [Ref. : National Highways Authority of India (NHAI) Vs. China Coal Construction Group Corpn.,]

(viii) The court has the power to pass an order u/s 9 during the pendency of the arbitration or even after the arbitral award but before the award is

enforced in accordance with Section 36. Such order can be passed for preservation, interim custody or sale of any goods which are the subject

matter of the arbitration agreement or securing the amount in the dispute and the like. [Ref.: 128 (2006) DLT 694 -Sanrachna (India) Inc. v. A.B.

Hotels Ltd. (supra); and 87 (2000) DLT 449 : 2000(3) Arb. LR 331 (Del.)-CREF Finance Ltd. v. Puri Construction Ltd. (supra)]

(ix) The power u/s 9 to grant interim relief is available to the court while u/s 17, such powers to make interim measures are made available to the

arbitral tribunal. Even though there may be some degree of overlap between the two provisions, however, the powers u/s 9 are much wider inasmuch as they extend to the pre and post award period as well as with regard to the subject matter and the nature of the orders which the court

is empowered to pass. Therefore, pendency of an application u/s 17 before the arbitral tribunal does not denude the court of its power to make an

order for interim measures u/s 9 of the statute. [Ref.: National Highways Authority of India (NHAI) Vs. China Coal Construction Group Corpn.,]

(x) It has been held that though Section 9 enables a party, before or during arbitral proceedings or at any time after the making of the arbitral

award but before it is enforced u/s 36 of the Act, to apply to the court for an interim order u/s 9, however, without a substantive move for

reference or declaration on the petitioner''s stand on the substantive relief by an appropriate forum, Section 9 cannot be invoked for grant of

interim relief. [Ref. : Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., ; M/s. Sundaram Finance Ltd. Vs. M/s.

NEPC India Ltd., ; National Building Construction Corpn. Ltd. (NBCC) Vs. IRCON International Ltd.,]

(xi) So far as the questions which can be considered in a petition u/s 9 of the Arbitration and Conciliation Act, 1996 are concerned, certainly issues

which are to be decided in the substantive arbitration proceedings cannot be gone into in a petition u/s 9 of the statute. Thus, a question as to

whether the agreement between the parties was validly entered into or whether it was validly terminated has to be determined only in the arbitration

proceedings and cannot be determined in a petition u/s 9 of the statute. [Ref. : 2002 (VIII) AD (Delhi) 617 : 2003 (66) DRJ 239 : 2003(Suppl.)

A. LR 501 (Del.)-S. Raminder Singh v. NCT of Delhi].

A similar question had arisen before this court in D.R. Sondhi and Others Vs. Hella KG Hueck and Co. and Others . In para 14 of the judgment, it

was held by this court that the question as to whether the material breach has been committed or not or if there is any breach at all was agitated but

it was not gone into for the reason that it is not the question for determination at present.

210. This court while considering the petition u/s 9 of the Arbitration and Conciliation Act, 1996, does not have the jurisdiction to return a finding

on the merits of a claim made or a dispute raised by the parties before the arbitrator. However, there can be no dispute that this court is required to examine the existence of a prima facie case on the assertions of the petitioner with regard to the termination of the agreement in the facts and law

applicable and as to strength in the petitioner''s case as to the bindingness and subsistence of the SHA.

Irreparable Injury and the Balance of Convenience Consideration

211. In a judgment reported at M/s. Sociedade de Fomento Industrial Ltd. and others Vs. Ravindranath Subraya Kamat and others, the

expression used in Clause 4 of the contract which was being considered prohibited the respondent no. 1 from undertaking any business activity

competing with the business of the plaintiff company.

The court noticed the case of the plaintiff that the activities of the defendant''s business were of a similar nature to that of the plaintiff and that it was

in competition with the business of the plaintiff. However, no other material was placed on record to show that there was any act of competition in

the business with the plaintiff company by the defendant.

The plaintiff had urged that the business of the defendant company was in competition with the plaintiff, and that they were not required to produce

any further proof of such competition. This contention was rejected by the court holding thus:

14. While appreciating the above referred contentions of the appellants, one cannot forget that this is a matter pertaining to equitable relief being

sought by the appellants. No amount of weakness on the part of defence case can enure to benefit of the plaintiff to obtain the equitable reliefs. It is

the duty of the plaintiff seeking the assistance of the court for equitable relief, to disclose all the facts which can entitle the plaintiff to justify the grant

of the relief asked for. Once it is not disputed that Clause 4 clearly provides that what is sought to be restrained is the competition by the defendant

no. 1 with the business of the plaintiff''s company and the grievance of the plaintiff is that there is a violation or breach by the defendant no. 1 of

Clause 4, in that regard it is primarily for the appellant company to plead and prima facie establish that there is violation by the defendant no. 1 in

respect of Clause 4 inasmuch as there has been a business by the defendant no. 1 in competition with the business of the plaintiff''s company. It

cannot be said that similar business will always amount to competing with each other. Whether one party is competing with another in similar business is a matter of fact and is to be established by producing sufficient material to establish such fact. In order to establish such fact, there must

be pleadings on record. Competition will certainly involve doing something with the intention or purpose of gaining upper hand on someone else.

Such an act can be done in different ways and methods. Each of such methods can constitute a bundle of facts giving rise to a cause of action to

somebody who is aggrieved by the act of competition. But in order to succeed in such suit, it is necessary to plead and prove all such facts which

constituted the act of competition. Mere allegation that similar business started by the defendants amounts to competition with the business of the

plaintiff''s company cannot amount to a statement of fact pertaining to the competition. It would be rather a submission on the part of the plaintiff.

For example, in the case of claim of adverse possession it is not just sufficient to state that the plaintiff is in peaceful possession of the land for over

12 years. It is necessary to state when it became adverse, nature of possession, the fact of the possession being to the knowledge of the owner,

etc. Similarly, it is not sufficient to merely allege that the defendants have entered into competition with the plaintiff by starting similar business. It is

necessary to disclose the facts which constitute the competition with the business of the plaintiff by the defendants. This will include not only the

nature of the business started by the defendants but also the different methods those may be adopted by the defendants for the purpose of

competition with the plaintiff in the similar business''.

31. In the above judgment, the Delhi High Court while dealing with the scope of Section 9 of Act of 1996, held that-(1) even though Section 9

does not embody the ingredients of Order 38 Rule 5, CPC, the court can take guidance from the provisions of Order 39 as well as Order 38; (2)

protection u/s 9 can be granted only when a prima facie case is made out and balance of convenience and possibility of irreparable loss and injury

is made out; (3) court has the power to pass an order u/s 9 during the pendency of arbitration or even after the arbitral award but before the award

is enforced u/s 36; (4) an order u/s 9 can be passed for preservation, interim custody or sale of any goods which are the subject matter of the

agreement or securing the amount in dispute; (5) the powers u/s 9 are much wider than the powers u/s 17 of the Act; (6) pendency of Section 17 application before the arbitral tribunal does not denude the court of its powers to make an order for interim measures u/s 9 of the Act.

32. In Indian Oil Corporation Ltd. v. Amritsar Gas Service and Ors. (supra) the Hon''ble Supreme Court held as under:

12. The arbitrator recorded finding on Issue No. 1 that termination of distributorship by the appellant-Corporation was not validly made under

Clause 27. Thereafter, he proceeded to record the finding on Issue No. 2 relating to grant of relief and held that the plaintiff-respondent no. 1 was

entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of

distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons

given. The reasons given state that the distributorship agreement was for an indefinite period till terminated in accordance with the terms of the

agreement and, therefore, the plaintiff-respondent no. 1 was entitled to continuance of the distributorship till it was terminated in accordance with

the agreed terms. The award further says as under:

This award will, however, not fetter the right of the defendant-Corporation to terminate the distributorship of the plaintiff in accordance with the

terms of the agreement dated 01.04.1976, if and when an occasion arises.

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms

of the agreement dated 01.04.1976, which contains the aforesaid Clauses 27 and 28. Having said so in the award itself, it is obvious that the

arbitrator held the distributorship to be revokable in accordance with Clauses 27 and 28 of the agreement. It is in this sense that the award

describes the distributorship agreement as one * for an indefinite period, that is, till terminated in accordance with Clauses 27 and 28. The finding

in the award being that the distributorship agreement was revokable and the same being admittedly for rendering personal service, the relevant

provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts

which cannot be specifically enforced, one of which is a contract which is in its nature determinable. In the present case, it is not necessary to refer

to the other clauses of Sub-section (1) of Section 14, which also may be attracted in the present case since Clause (c) clearly applies on the finding

read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the

distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the

Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to the law governing such

cases. The grant of this relief in the award cannot, therefore, be sustained.

xxx xxx xxx

14. The question now is of the relief which could be granted by the arbitrator on its finding that termination of the distributorship was not validly

made under Clause 27 of the agreement. No doubt, the notice of termination of distributorship dated 11.03.1983 specified the several acts of the

distributor on which the termination was based and there were complaints to that effect made against the distributor which had the effect of

prejudicing the reputation of the appellant-Corporation; and such acts would permit exercise of the right of termination of distributorship under

Clause 27. However, the arbitrator having held that Clause 27 was not available to the appellant-Corporation, the question of grant of relief on that

finding has to proceed on that basis. In such a situation, the agreement being revokable by either party in accordance with Clause 28 by giving 30

days'' notice, the only relief which could be granted was the award of compensation for the period of notice, that is 30 days. The plaintiff-

respondent no. 1 is, therefore, entitled to compensation being the loss of earnings for the notice period of 30 days instead of restoration of the

distributorship. The award has, therefore, to be modified accordingly. The compensation for 30 days'' notice period from 11.03.1983 is to be

calculated on the basis of earnings during that period disclosed from the records of the Indian Oil Corporation Ltd.

33. In the above judgment, the Hon''ble Supreme Court held that when the distributorship agreement is revokable and the same being admittedly

for rendering personal service, the provisions of Specific Relief Act are automatically attracted and Sub-section (1) of Section 14 of Specific Relief

Act specifies the contracts which cannot be specifically enforced and one of which is a contract which is in its nature determinable.

34. In Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd. (supra) the Hon''ble Supreme Court held as under (at pages 70 to 73 of

Arb. LR):

9. Learned Counsel for O.M.M. Private Limited submitted that Section 9 leaves it to a party to approach the court for certain interim measures

and it enables the court to pass orders by way of interim measures of protection in respect of the matters enumerated therein. Neither this section

nor the Act elsewhere has provided the conditions for grant of such interim protection leaving it to the court to exercise the jurisdiction vested in it

as a court to adjudge whether any protective measure is called for. In that context, neither the provisions of the CPC nor the provisions of the

Specific Relief Act can be kept out while the court considers the question whether on the facts of a case, any order by way of interim measure of

protection should be granted. So, the court had necessarily to consider the balance of convenience, the question whether at least a triable issue

arises if not the establishment of a prima facie case by the applicant before it and the other well-known restrictions on the grant of interim orders,

like the principle that a contract of personal service would not be specifically enforced or that no injunction would be granted in certain

circumstances as envisaged by Section 14 and Section 41 of the Specific Relief Act. Thus, it was contended that grant of an injunction by way of

interim measure to permit Adhunik Steels to carry on the mining operations pending the arbitration proceedings notwithstanding the termination of

the contract by O.M.M. Private Limited was not permissible in law.

10. 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 is 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 Ac 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 are 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

u/s 9 of the Act.

11. The power and jurisdiction of courts in arbitral matters has been the subject of much discussion. The relationship between courts and arbitral

tribunals have been said to swing between forced cohabitation and true partnership. The process of arbitration is dependant on the underlying

support of the courts who alone have the power to rescue the system when one party seeks to sabotage it. The position was stated by Lord

Mustill in Coppee Levalin N.V. v. Ken-Ren Fertilisers and Chemicals 1994 (2) LR 109 :

There is plainly a tension here. On the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans

against the involvement of the mechanisms of State through the medium of a municipal court. On the other side there is a plain fact, palatable or

not, that it is only a court possessing coercive powers which could rescue the arbitration if it is in danger of floundering.

In Conservatory and Provisional Measures in International Arbitration, 9th Joint Colloquium, Lord Mustill in ""Comments and Conclusions

described the relationship further:

Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton

is in the grasp of the court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being

ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award.

It is in the above background that one has to consider the power of the court approached under the Arbitration Act for interim relief or interim

protection.

xxx xxx xxx

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 remedies for the non-performance of a duty are (1)

compensatory and (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.

35. In the above decision, the Hon''ble Supreme Court held that it is not possible to keep out the concept of balance convenience, prima facie

case, irreparable injury and the concept of just and convenient while passing interim measures u/s 9 of the Act. The Supreme Court further held

that the power to grant injunction by way of specific relief is covered by the Specific Relief Act, 1963.

36. In (2002) 112 Comp. Cases 630 this court held that where an agreement gives a clear right to either party to terminate the agreement, by

giving not less than one month''s notice in writing to the other party and one of the parties has given such notice, having regard to Sections 14(1)(a)

& (c) and 41(e) of the Specific Relief Act, an interim order restraining the termination of agreement pending arbitration cannot be granted.

37. In the light of the above legal principles, now let me consider the facts of the present case.

38. As already narrated the clauses contained in the distributorship agreement especially Clauses 28 and 29 permit the Corporation as well as to

any party to the agreement to terminate the agreement. If such being so, the provisions of Specific Relief Act will hold the field and this court u/s 9

of the Act of 1996 cannot enforce the specific performance of the contract by directing the Corporation to continue the agency till the arbitration

proceedings are completed.

39. Further, I do not find a prima facie case in favour of the applicant as she herself admitted that the agreement of sale entered into with her by

S.M. Farooq is for a property which was already sold and she came to know about that only later on and at the time of submitting the copy of the

agreement of sale, she did not know whether the vendor has got legal title or not.

40. Apart from that she alleged the illegal activities of the first empanelled person and her estranged husband in creating document to take

vengeance on her.

These allegations ought to be proved before the arbitrator by letting in evidence and this court cannot go into the allegations at the stage of Section

9 application.

41. The judgments relied on by the learned senior counsel are for the proposition that the writ petition is still maintainable even though there is an

arbitration clause available in the agreement in the appropriate cases. There is no quarrel about it. But the applicant did not appeal against the order

of the learned Single Judge, dismissing her writ petition being not maintainable and directing her to go before the tribunal. Having decided to initiate

arbitration proceedings, it is not open to the applicant to rely on these judgments to contend that the writ petition is maintainable.

42. Further, I find balance of conveniences almost in her favour. Admittedly, the properties were returned to the Corporation after the termination

of the agreement and the existing customers were directed to take their refills from another agency and this arrangement has been going on since

the order of termination.

43. In view of the above facts and settled legal principles, I am not inclined to grant the reliefs prayed for by the applicant in her Section 9

applications. Hence, they deserve to be dismissed, accordingly dismissed. Consequently, the applications filed by the Corporation are allowed.

44. In the result, OA Nos. 441 and 442 of 2008 are dismissed. A. Nos. 571 and 572 of 2008 are allowed. No costs. Before, parting with the

case, it is made clear that the observations made in the order are only for the purpose of disposing Section 9 application and they do not come in

the way of the proposed arbitration proceedings and the arbitrator has to pass orders on merits uninfluenced by the observations made in this

order.

