

(2010) 06 AHC CK 0018

In the Allahabad High Court

Case No : First Appeal From Order No. 728 of 2010

Hindustan Petroleum Corporation Ltd.

APPELLANT

Vs

Atul Kumar Jain

RESPONDENT

Date of Decision : 24-06-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37, 9

Citation : (2010) 06 AHC CK 0018

Hon'ble Judges : Devendra Kumar Arora, J and Shri Narayan Shukla, J

Final Decision : Disposed Of

Judgement

1. Heard Mr.Anil Kumar Tiwari, Senior Advocate assisted by Mr.Vikas Budhwar & Mr.K.S.Pawar, learned counsels for the Appellants as well as Mr.Yashowardhan Swaroop, learned counsel for the opposite parties.

2. Briefly the facts of the case are that the parties entered into an agreement with the several terms and conditions. The main term and condition, which is relevant for the purpose of dealing with the order impugned passed by the District Judge on the application moved under Section 9 of the Arbitration and Conciliation Act, 1996 is reproduced hereunder:

"1.The Carrier will provide the Company with 5 no. of Tank Trucks for transporting petroleum products as per LOI/Work Order issued by the Oil Company, Carrier has certified that it is the owner and/or sufficiently entitled to operate these Tank Trucks throughout the Agreement period and these Tank Trucks are not under Agreement with any other party. Further these Tank Trucks shall remain under exclusive use with the Company throughout the contract period."

3. Out of these trucks, one truck which is numbered as UP 78 AT 5614 was found not belonging to the respondent, therefore being in violation of the conditions a show cause notice was issued to the respondent in exercise of power provided under clause 17 of the agreement and after considering the reply thereof the

appellants proceeded to terminate the contract in exercise of power provided under clause 17(b) and (e) of the agreement.

4. There is a clause of arbitration to settle the dispute, but even before initiation of the arbitration proceedings the respondent moved an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the District Judge, Lucknow to permit the respondent to carry on with the transportation and at least to stay the cancellation of transportation of bulk petroleum products under the agreement and issue a direction to the Motor Vehicle Department, Kanpur to certify the authenticity of the documents of Tank Truck No.UP 78 AT 5614.

5. The learned District Judge dealing with the case as well as on the basis of evidence adduced therein, *prima facie*, arrived at conclusion that the Truck in question has been transferred in favour of the respondent and accordingly he is owner of the same. Even then he excluded the operation of disputed truck and permitted the respondent to operate the remaining trucks under the tenders, being aggrieved with which, the present First Appeal From Order has been filed.

6. The learned counsel for the appellants submits that though the application was moved under Section 9 of the Arbitration and Conciliation Act, 1996 for the interim purpose the case has to be dealt with under the Specific Relief Act and the ingredients which have been considered as being essential ingredients for granting the interim injunction are necessarily to be considered and only being satisfied with the same that those are in favour of the applicant, the court may proceed to grant particularly mandatory injunction. In support of his contentions he cited the following decisions of Hon'ble Supreme Court:

(1) Arvind Constructions Co.(P) Ltd. Versus Kalinga Mining Corporation and others reported (2007) 6 SCC 798. The relevant paragraph 15 of the judgement is quoted hereunder:

"15.The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot *prima facie* be accepted. The reliance placed on Firm Ashok Traders v. Gurumukh Das Saluja (2004 3 SCC 155 in that behalf does not also help much, since this court in that case did not answer that question finally but *prima facie* felt that the objection based on Section 69(3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court under Section 9 of the Act. The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. *Prima facie*, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is

conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order 18 Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognised principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a Receiver.

(2) *Dorab Cawasji Warden versus Coomi Sorab Warden and others*, reported in (1990) 2 SCC 117 = 1990 All.CJ 450). The relevant paragraph 16 of the judgement is quoted hereunder: (All.CJ at p.455)

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last noncontested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief."

(3) *Adhunik Steels Ltd. Versus Orissa Manganese and Minerals (P) Ltd.* Reported in (2007) 7 SCC 125. The relevant paragraph 16 of the judgement is quoted hereunder:

"16. The 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 *Davi 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 *Tagore Law Lectures on Specific Relief*, the remedy for the nonperformance of a duty are (1) compensatory, (2) specific. In the former, the court awards damages for breach of the obligation. In the latter, it directs the party in default to do or forbear from doing the very thing, which he is bound to do or forbear from doing. The law of specific relief is said to be, in its essence, a part of the law of procedure, for, specific relief is a form of judicial redress. Thus, the Specific Relief Act, 1963 purports to define and amend the law relating to certain kinds of specific reliefs obtainable in civil courts. It does not deal with the remedies connected with compensatory reliefs except as incidental and to a limited extent. The right to relief of injunctions is contained in Part III of the Specific Relief Act. Section 36 provides that preventive relief may be granted at the discretion of the court by injunction, temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and Section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded either in lieu of or in addition to injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly Clause (e) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant. Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963.

(4) *Sanjana M. Wig (Ms.) versus Hindustan Petroleum Corpn. Ltd.*, reported in (2005) 8 SCC 242. The relevant paragraph 18 of the judgement is quoted hereunder:

"18. It may be true that in a given case when an action of the party is dehors the terms and conditions contained in an agreement as also beyond the scope and ambit of the domestic forum created therefor, the writ petition may be held to be maintainable; but indisputably therefor such a case has to be made out. It may also be true, as has been held by this Court in *Amritsar Gas Service and E. Venkatakrishna* that the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but while entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. A writ petition, however, will be entertained when it involves a public law character or involves a question arising out of public law functions on the part of the respondent.

(5) *Indian Oil Corporation Ltd. Versus Amritsar Gas Service and others* reported

in (1991) 1 SCC 533. The relevant paragraph 12 of the judgement is quoted hereunder:

"12.....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. Subsection (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 subsection (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."

7. He also invited our attention towards the order impugned to point out that the same does not bear the ingredients which are necessary therefor. Accordingly he submits that once the contract is terminated after providing opportunity of hearing, the District Judge has no jurisdiction to restore the same by way of mandatory injunction order as under the Arbitration Clause, termination as well as grant of compensation are also under consideration and if the respondent is permitted to operate the Trucks the purpose of Arbitration shall be frustrated.

8. On the other hand Mr. Yashovardhan Swaroop, learned counsel for the respondent by inviting the attention towards the Arbitration Clause submits that the Arbitration clause itself permits to carry on the operation of contract during the course of proceedings of arbitration without disputing the proceeding pending before the Arbitrator, therefore, he submits that even the ingredients for issuing mandatory injunction has not been discussed, but in the light of Arbitration Clause he is entitled to carry on the contract during the course of arbitration.

9. Though that is disputed by Mr. Tewari, learned counsel for the appellants and he submits that the said clause may be applicable in other contingency, but in the case of termination it is not applicable. Once the contract is terminated, it is terminated for all the purposes and for all the time, subject to result of arbitration proceeding, either side cannot be permitted to get it restored by way of such order as passed by the learned District Judge.

10. It is not in dispute that the application for temporary injunction moved in suit has to be considered in the light of essential ingredients of the Specific Relief Act and upon perusal of the order impugned, we do not find any discussion of any of the ingredients by the District Judge, but upon perusal of Arbitration Clause, which permits to carry on the contract, even during the course of arbitration

coupled with the facts that the authority of respondent over other Tank Trucks is not disputed, at this stage we do not feel it appropriate to interfere in the order impugned. Therefore without interfering in the order impugned, we hereby direct to the Arbitrator to expedite the arbitration proceedings and conclude the same, with the cooperation of the parties, within two months. This order shall be operative for two months only.

11. With the aforesaid observations and directions the Appeal is disposed of finally.