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(2016) 04 MP CK 0026

In the Madhya Pradesh High Court

Case No : Arbitration Appeal No. 20/2016

Indian Oil Corporation Ltd. APPELLANT

Vs

Agrawal Agro Auto Service RESPONDENT

Date of Decision : 18-04-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, Section 28, Section 36, Section 37(1)(a), Section 9
Specific Relief Act, 1963 — Section 14, Section 14(1)(c), Section 16, Section 36, Section 38, Section 39, Section 40, Section 41, Section

Citation : (2016) 04 MP CK 0026

Hon'ble Judges : Sanjay Yadav, J.

Bench : Single Bench

Advocate : Aditya Adhikari, Learned Senior Counsel and Ritwik Parashar, Learned Counsel, for the Appellant; Naman Nagrath, Learned Senior Counsel and Jubin Prasad, Learned Counsel, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Yadav, J.—With consent of learned counsel for the parties, matter is finally heard.

1. Quashment of order-dated 24.9.2014 of suspending sale of all products, closing of totalizer reading and dip stock, in a proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 (for short ''the 1996 Act''), by order-dated 15.2.2016 by the trial Court, has led the appellant-Indian Oil Corporation Ltd. and its functionaries, prefer this Appeal under Section 37(1)(a) of 1996 Act.

2. In a surprise inspection conducted at respondent''s outlet on 24.9.2014, following irregularities/discrepancies were observed-

(i) Positive stock variation beyond permissible limits by 3403 litre in HSD (High Speed Diesel).

(ii) HSD DU (Delivery unit) L & T line Model 71324, Sr. No. 2927 in the picher cable an additional electronic fitting in form of electronic chip was found at the mother board end of the cable. Four small wires running from chip which were connected to an on-off switch at the bottom of the Z portion of DU.

3. These irregularities led to immediate suspension of sales of all products, closing of totalizer reading and closing of dip stock on 24.9.2014, followed by a show cause notice on 26.9.2014 and termination of dealership agreement dated 31.8.2009 for violation of Clauses 8(1), 42, 45 of dealership agreement read with MDG 2012 Clause 8.2(iv) read with 5.1.4.

4. So far as termination of dealership is concerned, it is informed on behalf of respondent that he has invoked the arbitration clause and an application under Section 11 of 1996 Act is pending consideration before the Gwalior Bench.

5. As against suspension of sale of all products, closing of totalizer reading and dip stock as was ordered on 24.9.2014, respondent instituted proceedings under Section 9 of 1996 Act on 29.10.2015. The trial Court in the said proceedings on the finding that the suspension order is illegal, has quashed the same by impugned order.

6. It is urged that the trial Court having lost sight of the scope of interference under Section 9 of 1996 Act and the nature of contract of distributorship being determinable leaving no scope for restoration of supply which cannot even be granted as final relief, committed gross error in law in quashing the suspension order and directing for restoration of dealership. It is further contended that the impugned order being mandatory in nature, is not countenanced in exercise of powers under Section 9 of 1996 Act. It is urged that there being an arbitration clause, the respondent at best could have been left to pursue the said remedy, moreso, in the fact situation, wherein the respondent-applicant was found of committing serious irregularities. To substantiate these submissions, appellant has placed reliance on the decisions by Supreme Court in Indian Oil Corporation Ltd. v. Amritsar Gas Service , (1991) 1 SCC 533, Percept D''Mark (India) (P) Ltd. v. Zaheer Khan , (2006) 4 SCC 227 and Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd. , (2007) 7 SCC 125.

7. Respondent refutes all these contentions and raises a preliminary objection as to maintainability of present appeal. It is contended that the appellant having restored the supply in compliance to the order under challenge, no cause now exist, therefore, the Appeal is not tenable. This contention deserves to be rejected at the outset. As merely because pending decision to challenge the order, supply is restored, it will not be a bar to challenge the order in Appeal.

8. Further contentions on behalf of the respondent borders on the merit of the matter, which being subjected to an arbitration proceeding, the propriety demands not to be analytical about the pros and cons of the action taken against the respondent, and more particularly, when the extant of jurisdiction of the Court in the context of Section 9 of 1996 Act is being questioned, i.e. whether it would be within the jurisdiction of the trial Court in a proceedings under Section

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9 of 1996 Act to grant injunction, which is mandatory in nature.

9. Section 9 of 1996 Act envisages that-

"9. Interim measures etc. by Court.-A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure or protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

10. The provision thus, aims at the preservation, interim custody or sale of any goods which are subject-matter of the arbitration agreement; securing the amount in dispute in the arbitration; the detention, preservation or inspection of any property or thing which is subject-matter of the dispute in arbitration, authorizing any person to enter upon any land or building in the possession of any party or authorizing any sample to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; interim injunction or the appointment of a receiver; or such other interim measure of protection as may appear to the Court to be just and convenient. However, the provision does not empower the Court to order for restoration as the same tantamount to mandatory injunction at interim stage.

11. In Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd. , (2007) 7 SCC 125, while observing "whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of well settled principles in that behalf", their Lordships

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were pleased to hold-

"21. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject-matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject-matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to O.M.M. Private Limited for a period of 10 years and its attempted abrupt termination by O.M.M. Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of O.M.M. Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of the Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by O.M.M. Private Limited or the termination of the contract by O.M.M. Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case.

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23. The question here is whether in the circumstances, an order of injunction could be granted restraining O.M.M. Private Limited from interfering with Adhunik Steels working of the contract which O.M.M. Private Limited has sought to terminate. Whatever might be its reasons for termination, it is clear that a notice had been issued by the O.M.M. Private Limited terminating the arrangement entered into between itself and Adhunik Steels. In terms of Order XXXIX, Rule 2 of the Code of Civil Procedure, an interim injunction could be granted restraining the breach of a contract and to that extent Adhunik Steels may claim that it has a prima facie case for restraining O.M.M. Private Limited from breaching the contract and from preventing it from carrying on its work in terms of the contract. It is in that context that the High Court has held that this was not a case where the damages that may be suffered by Adhunik Steels by the alleged breach of contract by O.M.M. Private Limited could not be quantified at a future

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point of time in terms of money. There is only a mention of the minimum quantity of ore that Adhunik Steels is to lift and there is also uncertainty about the other minerals that may be available for being lifted on the mining operations being carried on. These are impoundables to some extent but at the same time it cannot be said that at the end of it, it will not be possible to assess the compensation that might be payable to Adhunik Steels in case the claim of Adhunik Steels is upheld by the arbitrator while passing the award.

12. In the case at hand, the agreement being determinable, even if the trial Court found a prima facie case in favour of respondent, it was impermissible as per express prohibition under Sections 14 and 16 of the Specific Relief Act, 1963 to have granted the relief for restoration of supply and sale of all products when, in fact, the dealership agreement was terminated on 31.8.2009.

13. In Adhunik Steels Ltd. (supra), it is held-

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

...

16. 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

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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 remedy for the non performance 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.

17. In Nepa Limited v. Manoj Kumar Agrawal [, AIR 1999 Madhya Pradesh 57], a learned judge of the Madhya Pradesh High Court has suggested that when moved under Section 9 of the Act for interim protection, the provisions of the Specific Relief Act cannot be made applicable since in taking interim measures under Section 9 of the Act, the court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration clause and the necessity of taking interim measures for issuing necessary directions or orders. When the grant of relief by way of injunction is, in general, governed by the Specific Relief Act, and Section 9 of the Act provides for an approach to the court for an interim injunction, we wonder how the relevant provisions of the Specific Relief Act can be kept out of consideration. For, the grant of that interim injunction has necessarily to be based on the principles governing its grant emanating out of the relevant provisions of the Specific Relief Act and the law bearing on the subject. Under Section 28 of the Act of 1996, even the arbitral tribunal is enjoined to decide the dispute submitted to it, in accordance with the substantive law for the time being in force in India, if it is not an international commercial arbitration. So, it cannot certainly be inferred that Section 9 keeps out the substantive law relating to interim reliefs.

14. In view of above analysis, it is inappropriate for the trial Court to (a) grant injunction which would lead to enforcement of dealership agreement which has

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been terminated; (b) it is barred by Section 14(1)(c) of the Specific Relief Act, 1963, which mandates that the contract which is in its nature determinable cannot be enforced and (c) amounted to grant of final relief, which otherwise could not be granted at the end of the trial, as the agreement being determinable, the respondent, at most, would be entitled for compensation rather than restoration (please see. Indian Oil Corporation Ltd. v. Amritsar Gas Service , (1991) 1 SCC 533).

15. In view whereof, the impugned order is set aside.

16. In the result, appeal is allowed to the extent above. No costs.

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