

(2012) 01 DEL CK 0269
In the Delhi High Court
Case No : FAO (OS) 433-35 of 2011

Indian Railways Catering and Tourism Corp. Ltd.	APPELLANT
Vs	
Cox and Kings India Ltd. and Another	RESPONDENT

Date of Decision : 06-01-2012

Acts Referred:

Citation : (2012) 1 ARBLR 184 : (2012) 186 DLT 552

Hon'ble Judges : A.K. Sikri, Acting C.J.; Siddharth Mridul, J

Bench : Division Bench

Advocate : Goolam E. Vahanvati, AG, Mr. A.S. Chandhiok, ASG with Mr. Abhijeet Sinha, Mr. Saurav Agrawal, Mr. Bhagat Singh, Ms. Vidit Gupta, Mr. Yash Wardhan Tewari and Ms. Titash, in FAO OS 433-35 of 2011 and CONT. CAS C No. 770 of 2011, for the Appellant; Ashok Desai, Rajiv Nayyar with Mr. Rishi Agarwala, Peter Lobo, Akshay Ringe, Ms. Misha Rohtagi for Respondent No.1, Mr. Sandeep Sethi, with Mr. Abhimanyu Mahajan, for Respondent No.2, Mr. C.A. Sundaram, with Mr. Rishi Kapoor, Ms. Ekta Kapil for applicant in CM No.18815/2011 in FAO(OS) No. 433-35/2011, None in Cont. Cas (C) No. 770 of 2011, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, Acting Chief Justice

1. The Indian Railway Catering and Tourism Corporation Limited (hereinafter referred to as "IRCTC") is the appellant in this appeal which has impugned orders dated 6th September, 2011 passed by the learned Single Judge in OMP No.609/2011 that was filed by M/s Cox & Kings India Limited (hereinafter referred to as "C&K?"). Vide the aforesaid order, various directions are given by the learned Single Judge. To put it in nutshell, the bone of contention is running of train famously known as "Maharaja Express" which is in the ownership of IRCTC and was to be run as Joint Venture (JV) of IRCTC & C&K. This JV Agreement has been terminated by the IRCTC. The learned Single Judge has directed that train shall continue to run for the period commencing from 14th September, 2011 up till 31st December, 2011 as per the arrangement which was

agreed to between the parties for the earlier season on certain conditions stipulated therein. The appellant is not happy with these directions as according to the appellant, Joint Venture Agreement has been terminated by it and since the appellant owns the Maharaja Express, it has right to operate the said train in any manner it likes as after the termination of the Joint Venture Agreement, such an arrangement cannot be foisted upon the appellant forcing it to continue the same arrangement. M/s C&K, on the other hand, maintains that even in case of disputes which have arisen pursuant to the termination of the arrangement, it is within its right to seek such an arrangement for preservation of the property (i.e. train) in question on the facts and circumstances of the present case. Before we take note of the respective arguments of the parties in detail, we deem it apposite to narrate the factual background which led to the dispute.

2. Maharaja Express is a luxury tourist train owned by IRCTC. IRCTC was in need of a partner with adequate experience who could form joint venture with it for operating the said luxury train on an en-India route within India. Accordingly, in August, 2006, it floated an "Expression of Interest" for a joint venture partner to operate, manage and run the said train. In view of the Government of India / Ministry of Railway's policy of not permitting a private party to own a rake / train in India, IRCTC commissioned CRISIL to make a report on the private sector participation in Luxury Trains in India. Accordingly, CRISIL submitted its report whereby it structured a model under the Build, Lease, Operate and Transfer (BLOT) Scheme so as to ensure private sector participation in the sector of Luxury Trains. The BLOT model proposed by CRISIL envisaged that IRCTC and the Joint Venture private sector partner would form a Joint Venture Company which would have equal share holding between both partners. IRCTC would own the train as per the Government of India policy and would lease the train to the Joint Venture Company for a lease period of 15 years from the date of the first commercial run of the luxury train and this lease period was to be further renewed for a period of 10 years. The Joint Venture private sector partner would contribute an amount equivalent to 50% of the cost of the luxury train and this amount would be paid and fully funded by the Joint Venture private sector partner to the Joint Venture Company and this Joint Venture Company would, in turn, give this entire amount which was equivalent to 50% of the cost of the luxury train to the IRCTC in order to enable the IRCTC to defray 50% of the cost of building the luxury train and this amount so paid by the Joint Venture Company and funded by the Joint Venture private sector partner would be used as advance lease rental to be adjusted over a period of 15 years. The IRCTC adopted this BLOT model proposed by CRISIL report of April, 2007 so as to ensure the private sector partnership / participation in luxury trains.

3. After undergoing the tender / selection process pursuant to the aforesaid Expression of Interest (EOI), M/s C&K was selected to be the Joint Venture Partner. Accordingly, Joint Venture Company in the name and style of M/s Royale India Rail Tours Limited (hereinafter referred to as the JV Company) was incorporated with IRCTC and M/s C&K holding 50% shares each. It was preceded

by MOU dated 10th July, 2008 between the Joint Venture partners and subsequently on 27th November, 2008, Joint Venture Company was floated. Memorandum and Articles of Association were also signed on 27th November, 2008. Thereafter the MOU of 10th July, 2008 was reduced into a Joint Venture Agreement dated 10th December, 2008 in order to provide the structure for management of the luxury train and the Joint Venture Company. Some of the material clauses of the said agreement are as under:

(a) A luxury train shall be used an integral part, not only as the principal mode of transportation but also as special facet and attraction.

(b) The JV Company was to acquire, furnish, maintain and manage the luxury train, with a view to market and sell holiday packages with the luxury train as an integral part.

(c) IRCTC who has been given the permission by the Ministry of Railways to own and operate a luxury tourist train will lease the rake, consisting of approximately 23 coaches, for exclusive use by the company for the period of this agreement. The company will manage onboard / off board services, marketing, booking, pricing, etc.. The operation of the train, on Indian Railways, will be coordinated by IRCTC.

The features of the Joint Venture Agreement are *pari materia* with the MOU with certain minor modifications. Some of the relevant clauses are as follows:

(i) Article 2 describes the business objective of the JVC. Article 2.2 deals with the Memorandum & Articles of the Company and the main object of the company is the business of acquiring, furnishing, maintaining, managing and operating luxury train with a view to market and sell holiday packages with such luxury train being the principle mode of transportation.

(ii) Article 3 specifies the term of the agreement and states as follows:

This agreement shall take effect upon its execution and shall continue to bind the parties initially for a period of 15 (fifteen) years from the date of first commercial run of the train and thereafter renewable for a further period of 10 (ten) years, on mutually acceptable terms and conditions.

It has been clearly stated that agreement shall continue to bind the parties for a period of 15 years from the date of first commercial run of the train and thereafter renewable for a further period of 10 years.

(iii) Article 5 deals with the provision of luxury train. This clause specifies that IRCTC has agreed to lease the train for the exclusive use of the Joint Venture Company. The IRCTC would acquire the coaches / rake from the Indian Railways. The Joint Venture Company shall design the interior concept at its cost and provide it to IRCTC. The Joint Venture Company would coordinate to ensure whether the train is manufactured as per the specification and design.

(iv) Article 6 deals with the lease of the luxury train. IRCTC was to bear the cost

of the train and lease it to the Joint Venture Company for a period of 15 years from the date of its first commercial run, renewable for a further period of 10 years. The Joint Venture Company has paid IRCTC an advance payment of 50% of the (total cost of the train minus capital subsidy) towards lease charges (Advance Lease Charges) of the luxury train. M/s C&K shall provide unsecured loan to the tune of 50% of the (cost of the train capital subsidy) to the JV company and the proceeds shall be utilized by the Joint Venture Company towards payment of Advance Lease Charges to IRCTC for partially meeting the cost of the luxury train. The payment of advance lease charges is paid to IRCTC as per Article 6. The advance lease charges shall be adjusted against the annual lease charges payable to IRCTC in equal installments over a period of 15 years. This Article deals with the period of the lease, date of commencement of lease and the calculations of annual lease rentals and also provides that the amount of 50% of the cost of the train funded by the JV private sector partner, namely, Cox & Kings and paid to IRCTC would be treated by IRCTC as advance lease rentals to be adjusted over the lease period of 15 years.

(v) As per Article 15, the Joint Venture Company was to have nine Directors on its Board, three Directors from IRCTC, three Directors from M/s C&K and three independent Directors, one each to be appointed by IRCTC and M/s C&K and the third independent Director to be jointly by IRCTC and M/s C&K. Article 15.3 provided that the Chairman shall be the nominee of IRCTC.

(vi) Article 17 pertains to the management of the Joint Venture Company. As per Article 17.2, the management of the Joint Venture Company was to be supervised by the Director (Finance) nominated by IRCTC and the Director (Operations) nominated by M/s C&K. As per Article 17.6, certain agreements were required to be executed by and between the company and IRCTC or M/s C&K as the case may be. None of these agreements have been executed save and except the agreement at Article 17.6(B), i.e. the agreement for providing onboard services has been executed by the Joint Venture company with MAPPLE.

(vii) Article 24.2 provided that lock-in period for holding shares was 15 years from the date of commencement of lease.

(viii) Disputes resolution, mutual negotiation and arbitration was to be carried out as per Article 30.

4. There was Maharaja Express curtain raiser at ITB, Berlin (International tourism industry's prime trade exhibition) between 11th - 15th March, 2009. The train as envisaged was constructed, built and interiors done by February, 2010. The Maharaja Express came into existence in its present Avtar and its first commercial run started on 6th March, 2010. The Joint Venture Company entered into Agreement dated 5th March, 2010 with MAPPLE for providing onboard services on the said train. This is the date of the commencement of 15 years lease by IRCTC to Joint Venture Company as per Joint Venture Agreement of December, 2008.

5. Upto April, 2011, Maharaja Express completed 34 journeys. Thereafter, it seems that some differences and disputes had started cropping up between IRCTC and M/s C&K during this period over certain matters which need not be elaborated. Suffice it is to say that as per M/s C&K, IRCTC sought to change the agreement between the parties by seeking to enter into an MOU between itself and the Indian Railways without M/s C&K being a party to the same. The agreement to be entered into between IRCTC as per the Joint Venture Agreement was purely meant for the approval of itineraries, technical operations and maintenance as well as revenue sharing and haulage. This draft MOU proposed to change all the terms that were agreed upon by and between both the parties in the MOU dated 10th July, 2008 and Joint Venture Agreement dated 10th December, 2008. The said MOU suggested certain entitlements to the Indian Railways and their officers which were totally outside the understanding between the parties. IRCTC emphasized that this draft MOU which they proposed to enter into with the Indian Railways would override all agreements between both parties and this MOU shall be binding on both parties. This was not accepted by M/s C&K which, over a period of time, became the bone of contention. Some correspondence was exchanged between the parties and there were attempts to drown the flames of differences even through mediation. However, things instead of improving became bad to worse and ultimately, the IRCTC vide letter dated 12th August, 2011, terminated the Joint Venture Agreement on the basis of some purported fraud or misrepresentation by M/s C&K at the time of Expression of Interest.

6. Within few days, i.e. on 16th August, 2011, M/s C&K filed the petition u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") inter alia praying for interim reliefs / measures to safeguard the subject matter of arbitration (being the luxury train and the Joint Venture company) during the proposed arbitration proceedings which M/s C&K was contemplating to initiate. Status quo order was passed qua the said train by the learned Single Judge on 16th August, 2011. The case set up by M/s C&K in the said OMP was that IRCTC and M/s C&K came together to form the Joint Venture Company which was set up specifically for the purpose of acquiring, furnishing, maintaining, managing and operating luxury tourist train with a view to market and sell holiday packages. The terms were recorded in MOU of July, 2008 and Joint Venture Agreement of December, 2008. M/s C&K had invested a sum of over Rs.45 Crores in the said Joint Venture company. It was clear intention of the parties that luxury train was to be operated by the Joint Venture company for a period of 15 years though the train was to be leased to Joint Venture company in a sense that Joint Venture company was to own the same for a period of 15 years. It was also the case of M/s C&K that IRCTC thereafter wanted to vary the terms understood and agreed between the parties when it enclosed draft MOU along with letter sent sometime in January, 2011 to be entered into which was rightly objected to by M/s C&K. It was projected by M/s C&K that not only IRCTC was to be blamed for this fiasco, it could not terminate such a lease arrangement which

termination was on the face of it arbitrary, illegal, void and bad in law. It was also contended that the termination would put the huge investment made by M/s C&K into jeopardy and even goodwill and reputation of the train and, in turn, the country was at stake inasmuch as M/s C&K had been marketing the booking internationally and within India. Season of this train is between the months of September to April. The train is mainly booked for foreign tourists and bookings are made much in advance. It was stated that as many as 400 bookings (approximately) had been received for the current year upto December, 2011 which were made by various international travel companies. M/s C&K contended that it was entitled to specific performance of the Joint Venture Agreement which had no termination clause and even when there was no formal lease agreement, conduct of the parties as well as documents executed and correspondence exchanged between the parties earlier would show that there was an effective and subsisting lease between the parties, by implication.

7. The IRCTC contested the petition on various grounds which are taken note of by the learned Single Judge in the impugned order, in the following manner:

(a) The petition is not maintainable as the same was filed on the basis of two letters on 12.08.2011 (termination letter) issued by the respondent by which the respondent for the reasons stated in the said letters terminated the Joint Venture Agreement entered between the petitioner and the respondent on 10.12.2008.

(b) The Joint Venture Agreement is void as the consent of the respondent was obtained by fraud and misrepresentation and cannot be given effect to and is also unenforceable and therefore, the petition would not be maintainable.

(c) The petitioner in the matter in fact is seeking the stay the operation of one letter dated 12.08.2011 issued by the respondent to Joint Venture Company. The said Joint Venture Company is not a party to the proceedings and also not party to any arbitration agreement. Therefore, granting of any relief would be amounting to grant of a mandatory injunction and in any event, if losses are suffered by the petitioner it could be compensated in terms of money as the contract has been terminated between the parties on account of various breaches committed by the petitioner of the Joint Venture Agreement. In fact, the train was never operated in the manner as contemplated in the Joint Venture Agreement by the Joint Venture Company. Nor the petitioner had agreed to pass on the booking revenues to the Joint Venture Company and instead raised inflated debit notes.

(d) It is stated by the respondent that by seeking the relief on the basis of the Joint Venture Agreement, the petitioner is trying to get a lease in favour of the Joint Venture Company, a third party who is not even a party to the present case and the agreement.

(e) The lease was never executed in favour of the said company. The rights of the petitioner cannot be beyond than what has been laid down in the Articles of Association of the Joint Venture Company.

(f) The relation between the Joint Venture Company and the respondent has already come to an end and has been terminated. Therefore, now the petitioner is attempting to create a right for use of the train which was never in the possession of the petitioner and the petitioner is not entitled to use the same in future as the respondent is the owner of the train.

(g) The Joint Venture Company was allowed to run the train on an ad-hoc arrangement, otherwise no terms and conditions of any lease arrangement were finalized, therefore, now the respondent is not inclined to continue with the said arrangement for the reasons stated in the said letter.

(h) The petitioner has suppressed the material fact from this court when it is stated that the Joint Venture Company was incorporated after entering into the Joint Venture Agreement, though the said Joint Agreement Company was incorporated on 27.11.2008 prior to the date of Joint Venture Agreement dated 10.12.2008.

(i) The respondents also alleged various breaches and misconducts on the part of M/s C&K which included retention of all revenues and not giving anything to IRCTC; C&K trying to take over the complete control of the operations of the train; inflating bills towards "off board services"; charging the Joint Venture company commission @ 30% on the total booking revenues of Joint Venture company which was much higher; non-payment of haulage charges, etc.

(j) It was also argued that argument of public interest was only a bogie and on the contrary, the public interest lay in terminating the agreement as up to now the operations had suffered only losses.

8. The learned Single Judge after considering the arguments of both the sides, returned the following findings:

(i) While considering the application u/s 9 of the Act which deals with interim measures, the Court could not go into the validity of termination of Joint Venture agreement as it was for the arbitral tribunal to decide whether the termination was valid or not. At this stage of interim measure, its validity is only for the limited purpose as to whether any prima facie case is made out or not.

(ii) It was not within the scope of Section 9 to restore the Joint Venture agreement as doing this would mean nullifying the termination.

(iii) On the maintainability of petition u/s 9 of the Act, the learned Single Judge held that as Articles of Association is an agreement between the shareholders and the Joint Venture company which contained an arbitration clause and Joint Venture Agreement has a separate arbitration agreement, prima facie it could not be said that there was no arbitration agreement between the Joint Venture company and the parties, more so when only shareholders and parties in the management of Joint Venture company were M/s C&K and IRCTC.

(iv) Examining the scope of Section 9 of the Act, the learned Single Judge held

that the Court had jurisdiction to preserve the subject matter of disputes in many forms depending upon the facts of each case and as per the order sought for. It was observed that proceedings in a Court, as distinct from those before an arbitrator, are also between the parties to an agreement / transaction only, still the practice of issuing interim orders / directions qua third parties exist. Further, Joint Venture company was not completely a third party as it was the upshot of IRCTC and M/s C&K, who were the co-sharers of the Joint Venture company. The Joint Venture company was thus added as respondent No.2 allowing the application of the Joint Venture company.

(v) The learned Single Judge thereafter came to the conclusion that any interim measure even for enforcing the earlier arrangement to continue could be passed u/s 9 of the Act and by doing so, the Court was not attempting to re-write the agreement or to confer any leasehold rights in favour of M/s C&K and Joint Venture company, but rather in larger public interest which would otherwise be affected by virtue of sudden stopping of train, bookings of which are already undertaken by the petitioner. Another reason for continuing this arrangement given by the learned Single Judge is that bookings for this season commenced from 8th May, 2011 and, therefore, IRCTC cannot deny that they were not aware about the said bookings and the agreement was terminated only in November, 2010. Referring to the Supreme Court judgment in Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, , the learned Single Judge took the view that having regard to the conduct of the parties and the present situation, if some interim arrangement is not made, there may be some serious repercussions as it was not merely a question of goodwill and reputation of M/s C&K which was at stake, but that of IRCTC as well.

(vi) According to the learned Single Judge, though mandatory injunction is not to be given normally but the Court had the power to grant such injunction if the case of greater risk of injustice is made out for temporary period in order to preserve the status quo ante.

(vii) In the opinion of the learned Single Judge, it was a fit case to appoint a receiver as a matter of interim measure, else irreparable loss would ensue to M/s C&K and to the public at large by discontinuation of the running of the train, bookings of which had already been made. A senior advocate of this Court was appointed as the receiver.

(viii) Following directions have been given for running of the train in the interregnum:

a) For the period commencing from 14th September 2011 upto 31st December 2011 which is the major period for which the bookings are effected by the petitioner and their agents in overseas countries, the train namely "Maharaja Express" Train shall continue to run for the said period under the supervision of the learned receiver as per the arrangement which was continuing at the earlier season.

- b) The petitioner shall deposit 50% of the total receipt of the sum against the bookings made upto 31.12.2011 without any deduction within four days in separate account to be opened in the Nationalized Bank in the name of the respondent. The petitioner shall not withdraw any amount from the said account without the prior permission of the court or the arbitral tribunal. The said account will be maintained by the Receiver who will sign the cheques and make the payment to the respondent as per the direction (f) issued by this Court.
- c) The petitioner shall also deposit 50 % of the amount in the separate account maintained for the future bookings to be conducted by it uptill the December 2011 in the said account as stated in (b).
- d) The petitioner and the Joint Venture Company shall maintain the proper and true accounts pertaining to booking amounts, expenses incurred or to be incurred in future by them. The statement of accounts shall be filed before the Receiver every fortnightly for the purposes of the records.
- e) Subject to agreeing to the aforementioned directions, the respondent shall, after repair if any or maintenance, allow to run the train as per previous manner. The JV Company is also allowed to make the furnishing and other arrangements consequent upon the receiving the permission of the said train from respondent from 9th September 2011 onwards.
- f) The respondent/ Indian railways would be entitled to recover the haulage charges, on board expenses (only for the current period), operational and maintenance/ repairing expenses against the train which is going to run for the said interim period and the same can be paid by the Receiver after due consideration of the same from the deposit made in the separate account. If any shortfall is occurred, the respondent shall maintain the accounts and give the detail to the Receiver. The said amount shall be subject to the discussion and adjustment of the final award to be passed by the Arbitral Tribunal.
- g) As regards the remaining 50% booking amount retained by the petitioner, the same shall be subject to the maintenance of the accounts of the petitioner and JV Company which shall be filed before learned Receiver. The said booking amount shall also be adjusted towards the expenses incurred or to be incurred in running the said train. Any shortfall of revenue beyond the said 50% amount shall form the subject matter of the claim before the Arbitral tribunal.
- h) Parties are granted liberty to approach the Court or the Arbitrator (if appointed) for modification of order in case the circumstances do arise.
- i) Authorized representatives of all concerned parties are allowed to co-operate with the Receiver in order to smooth running of train in question and can have joint meeting, if necessary. If the presence of Receiver is required at the site, he may exercise his discretion in this regard.
- j) The petitioner or any of his agents shall make not any further bookings for the next season which is, September, 2012 to April, 2013.

k) The above said arrangement shall be treated as tentative in nature.

9. We may point out at the outset that the line of arguments of counsel for both the sides was largely the same though with much force as counsel for the parties not only referred to the material on record but supported their arguments with plethora of case law. These arguments have led to various issues which need to be answered by us. We would, therefore, like to formulate these issues first and while dealing with these issues, respective submissions of the parties would be noted.

Issue No.1: Whether petition u/s 9 of the Arbitration and Conciliation Act, 1996, filed by C&K is maintainable? The different aspects of this maintainability would be as under:

- a. Is there any arbitration clause between IRTCT and C&K?
- b. Could C&K, instead of Joint Venture company, seek reliefs in respect of the train?
- c. Could the train owned by IRCTC be the subject matter of proceedings u/s 9?

Issue No.2: Whether relief of specific performance could be granted u/s 9 of the Act, in the given circumstances?

Issue No.3: Whether there was any valid and binding lease between the parties, and if so, whether the lease between the Joint Venture and IRTCT was subsisting?

Issue No.4: Could there be a mandatory injunction of the nature passed by the learned Single Judge?

Issue No.5: After holding that the Court could not restore the terminated agreement, whether the Court could still pass an order which had the effect of continuing the agreement/arrangement? Connected with this issue will be the cross-objections of the C&K questioning this finding of the learned Single Judge.

Issue No.6: Whether "public interest" could be a justifiable reason for continuing the arrangement? If so, whether there was any such public interest in the present case?

Issue No.1: Maintainability of petition u/s 9 of the Act at the instance of M/s C&K

10. In order to answer this issue, it would be necessary to take into account certain provisions of Joint Venture Agreement, the MOU between IRCTC and M/s C&K, the averments made in the OMP filed by M/s C&K and the governing law. The facts narrated above bring forth the factual position, namely, IRCTC and M/s C&K entered into MOU which was later on substituted by Joint Venture Agreement. Vide these instruments, the two parties agreed to form a Joint Venture Company for the running of the Maharaja Express. Article 30 of the Joint Venture Agreement contains arbitration clause, relevant portion whereof is extracted below:

Article 30 - Dispute Resolution

30.1 Reference to an Arbitrator

IRCTC and C&K will endeavour to resolve by mutual negotiation any dispute, differences, controversy or claims arising out of or in relation to, this Agreement, including the scope, validity, existence and the interpretation thereof, the activities performed hereunder, or for the breach thereof, arising between them in connection with this Agreement.

In the event that the dispute between the parties remains unresolved even after the reference to the Shareholders Committee, the same shall be referred to arbitration.

30.2 Any and all disputes differences, controversy or claims arising out of or in relation to, this Agreement, including the scope, validity, existence and the interpretation thereof, the activities performed hereunder, or for the breach thereof, which cannot be satisfactorily resolved by mutual negotiation within Ninety (90) days of issue of a notice by a party, shall be finally settled by arbitration, in accordance with the rules of Arbitration of Indian Council of Arbitration (ICA) under the Arbitration and Conciliation Act, 1996, including any statutory modifications, amendments, re-enactments thereof from time to time, by reference to a single arbitrator where claim, if any, does not exceed Rs.1.00 crore. In other cases, if the parties so agree, the dispute shall be referred to single arbitrator or in absence of such agreement to three arbitrators, one to be appointed by each party within such period as prescribed under ICA Rules after the expiry of said ninety (90) days, and the presiding arbitrator shall be appointed in accordance with the provisions of ICA Rules.

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It thus refers to disputes, differences, controversy or claims arising out of or in relation to the said Joint Venture agreement.

11. Thereafter, the Joint Venture company was got incorporated with 50% stakes of both the parties. As per the Joint Venture Agreement, the Maharaja Express was to be leased out to the said Joint Venture company by IRCTC. The Joint Venture Agreement also contemplated execution of separate agreement (lease agreement) between IRCTC and Joint Venture company for this purpose. However, no such document could see the light of the day.

12. Insofar as Joint Venture company is concerned, it has its Articles of Association. Article 200 of this Articles of Association of the Joint Venture company contains an arbitration clause which reads as under:

200. Reference to an Arbitrator

IRCTC and C&K will endeavour to resolve by mutual negotiation any dispute, differences, controversy or claims arising out of or in relation to, this Agreement, including the scope, validity, existence and the interpretation thereof, the

activities performed hereunder, or for the breach thereof, arising between them in connection with this Agreement. (a) Any and all disputes differences, controversy or claims arising out of or in relation to, this Agreement, including the scope, validity, existence and the interpretation thereof, the activities performed hereunder, or for the breach thereof, which cannot be satisfactorily resolved by mutual negotiation within ninety (90) days of issue of a notice by a party, shall be finally settled by arbitration, in accordance with the rules of Arbitration of Indian council of Arbitration (ICA) under....

13. As per M/s C&K, this arbitration agreement which is an agreement between the shareholders and the Joint Venture company is to be treated as agreement between M/s C&K and IRCTC. It is their submission that the definition of "Party" includes M/s C&K and IRCTC and "Parties" in relation to this Joint Venture company would include M/s C&K and IRCTC. Thus, there is an arbitration clause in the Joint Venture Agreement, namely, Article 30 and this agreement is between M/s C&K and IRCTC. Likewise, there is an arbitration clause in the Articles of Association of the Joint Venture company, which is an agreement between the shareholders and Joint Venture company. The question is as to whether with the aid of these arbitration clauses, M/s C&K can maintain petition u/s 9 of the Act and bring within its ambit the scope of reliefs claims by it in the said OMP. We may point out at this stage that in the OMP filed by M/s C&K, it has relied upon Article 30 of the Joint Venture Agreement only to sustain the said petition and not on Article 200 of the Articles of Association. However, since this Article of Association is discussed and inter alia made the basis of maintainability of the petition in the impugned order, we have referred thereto as well. Otherwise, insofar as averment in the OMP is concerned, it reads as follows:

59. It is stated that on account of the deliberate act of the Respondent of executing an MOU with the Indian Railways, which is contrary to the provisions of the Joint Venture Agreement dated 10.12.2008 and understanding between the parties and further failure of Respondent to execute a lease agreement in respect of the train with which the Joint Venture company and further wrongful termination of Joint Venture Agreement by letter dated 12.8.2011, disputes and differences have arisen between. The parties which are referable to the arbitration in terms of clause 30 of the Joint Venture Agreement.

The prayers which are made in the OMP may also be noted at this stage which are as under:

A. that pending the hearing and final disposal of the arbitration proceedings:

(a) stay the operation of the Respondents letters dated August 12, 2011 annexed as Annexure A & B hereto and restrain the Respondents from in any manner acting in furtherance to the aforesaid letters and the Respondent be restrained from using the train for any purpose other than the Joint Venture company (RIRTL).

(b) The Respondent, its servants and agents be restrained by an order of

injunction of this Hon''ble Court from:

(i) from interfering or preventing the petitioner and the JV Company from operation of the Luxury Tourist Train (Maharaja Express)

(ii) from obstructing the petitioner in operation of the JV Company and as a consequence from operating the bank accounts dealing with vendors, suppliers, and any third parties for smooth functioning of the luxury Tourist Train.

B. That *exparte* interim and *ad interim* reliefs in prayer clause (A) above be granted to the Petitioner.

C. Cost of the Petition be provided for.

D. other as this Hon''ble Court may deem fit and proper looking to the circumstances of case.

14. No doubt, Joint Venture Agreement is between IRCTC and M/s C&K. It also contains arbitration clause, namely, Article 30 which would constitute arbitration agreement between the parties. Therefore, on the strength of this agreement, M/s C&K can file petition u/s 9 of the Act. However, next relevant aspect would be the scope of disputes which can be raised invoking this arbitration agreement. As is clear from Article 30, the dispute which can be raised are "any and all disputes, differences, controversy or claims arising out of or in relation to, this Agreement, including the scope, validity, existence and the interpretation thereof, the activities performed hereunder, or for the breach thereof...". It is the submission of the appellants that on the basis of this arbitration agreement, M/s C&K could file the petition raising disputes, differences, etc. "arising out of or in relation to this agreement", i.e. Joint Venture Agreement only. It was contended that Joint Venture Agreement dealt with rights and obligations of the two shareholders of the Joint Venture company. It was strenuously argued by Mr. Vahanvati, learned Attorney General who initially appeared for the appellant as well as Mr.Chandhiok, learned Additional Solicitor General who made elaborate submissions in this behalf, that the disputes in question raised were outside the scope of Article 30. As per the appellant, the disputes are in relation to the train. This train is owned by IRCTC which was to be leased to the Joint Venture company and it was even recognized in the Joint Venture agreement that separate agreement was to be entered into between IRCTC and Joint Venture company (refer Articles 5, 6 and 17.6). It was further argued that when no such agreement was entered into between IRCTC and the Joint Venture company, the train was never leased to Joint Venture company which was only permitted to use the train for limited period of time under an *ad hoc* arrangement which was brought to an end by letter dated 12th August, 2011. This letter was issued by IRCTC to Joint Venture company and till date, Joint Venture company had not filed any proceedings questioning the validity, propriety and justification of this termination. It was argued, thus, that on termination of this *ad hoc* arrangement, it is only Joint Venture company which could raise the dispute and had it been raised by the Joint Venture company, even the Joint Venture company could not

file any arbitration proceedings as there was no arbitration agreement between IRCTC and Joint Venture company. In no case, M/s C&K could claim such a relief, that too of specific performance in respect of the so called arrangement of purported leasing out of the train by IRCTC to Joint Venture company in the garb of performance of Joint Venture Agreement.

15. Mr. Ashok Desai, learned senior counsel appearing for M/s C&K, countered the aforesaid submissions with all vehemence. His argument proceeded on the premise that there were four players in the fray, namely, Ministry of Railways which was holding 100% shares in IRCTC; IRCTC; M/s C&K which is specialized in super luxury travel; and the Joint Venture company. He stressed the fact that IRCTC entered into an MOU / Joint Venture Agreement with M/s C&K after the approval and blessings from the Ministry of Railways. The main purpose and objective of entering into MOU and Joint Venture Agreement between IRCTC and M/s C&K was to run the luxury train in question. Clause 15 of MOU dated 10th July, 2008 deals with leasing of the train. Likewise, Joint Venture Agreement dated 10th December, 2008 echoes the same arrangement to be entered into. It was with this understanding and for this very reason, namely, running of the train by the two partners, i.e. IRCTC and M/s C&K that Joint Venture company was formed. He was emphatic in maintaining that agreement, by conduct, was entered into in favour of the Joint Venture company for leasing of the train even if no written agreement could be executed for want of certain differences which erupted later. In such a scenario, when the Joint Venture Agreement has been terminated by IRCTC, contended the learned senior counsel, M/s C&K could challenge this agreement by raising arbitration dispute in view of the arbitration clause contained in Article 30 of the Joint Venture Agreement. According to him, during the pendency of these arbitration proceedings, it was permissible for M/s C&K to protect the property in dispute by seeking interim measure and for this, M/s C&K was very well within its power to file Section 9 petition. Justifying the nature of relief sought, his submission was that the property in question which needed to be protected was Maharaja Express itself and, therefore, prayer of the kind made could very well be made in proceedings u/s 9 of the Act, which is a preservative proceeding rather than based strictly upon rights of the parties under the contract. He argued that Section 9 proceedings were not akin to Order XXXIX Rule 1 and 2 which is a provision empowering Court to pass interim injunction / orders pending main Suit before the Court inasmuch as in those proceedings, ultimately it is the Court which finally decides the lis between the parties. On the other hand, u/s 9, the Court only passes interim measures and main disputes are left for arbitral tribunal to decide. On the scope of Section 9, Mr.Desai referred to the following dicta in the Apex Court judgment in the case of Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., :

A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract.

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The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A & C Act. The relief sought for in an application u/s 9 of A & C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the arbitral tribunal; the Court u/s 9 is only formulating interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application u/s 9 of A & C Act.

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The High Court in spite of having formed an opinion in favour of directing the appointment of receiver has rightly observed that retail liquor trade is an intricate and tricky trade and hence cannot be entrusted to a third party. If that be so, we fail to appreciate the justification behind turning out the persons in actual management of business and passing on the reins in the hands of those who were not holding the same for nine months out of the twelve. We do not say that such a course has any prohibition in law on being followed. But we do not think a case of oppression of minority by majority - the sense in which the term is understood in law - having been made out on the material available in the present case. A better course would have been to allow the conduct of the business continuing in the hands of persons who were doing so till now but at the same time issuing such directions and/or devising such arrangement as would protect and take care of the interest of those who are not actually running the business and that is what we propose to do.

Other decisions of the Supreme Court on which reliance was placed in support of this submission are as under:

In the judgment of Transmission Corporation of A.P. Ltd. and Others Vs. Lanco Kondapalli Power Pvt. Ltd., , it has been held as follows:

We have referred to Firm Ashok Traders (supra) not because we agree with the principle laid down therein but only to suggest that Section 9 of the 1996 Act should be applied so that status quo may be directed to be maintained having regard to the fact that the parties understood the workability of the agreement in a particular manner.

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Conduct of the parties is also a relevant factor. If the parties had been acting in a particular manner for a long time upon interpreting the terms and conditions of the contract, if pending determination of the lis, an order is passed that the parties would continue to do so, the same would not render the decision as an arbitrary one, as was contended by Mr. Rao. Even the Appellant had prayed for adjudication at the hands of the Commission in the same manner. Thus, it itself thought that the final relief would be granted only by the Arbitrator.

In *Prabhjot Singh Mand and Others Vs. Bhagwant Singh and Others*, , the Apex Court held thus:

...But it is beyond any cavil of doubt that before passing an interim order, the courts should not only consider prima facie case, balance of convenience, and irreparable injury but also its effect on public interest..

16. Mr. Desai also submitted that the learned Single Judge was justified in referring to Article 200 of the Articles of Association inasmuch as the Joint Venture company was a necessary party and was rightly impleaded in the OMP. In this behalf, he submitted that admittedly, there is an arbitration clause in the Articles of Association of JV company being Article 200. This Article refers to "Parties". The Parties are defined in the Articles of Association to include the "Company". The signatories to the Memorandum of Association and the Articles are the IRCTC and M/s C&K. Thus, there is an arbitration clause amongst the three parties. He referred to the judgment in the case of *V.B. Rangaraj Vs. V.B. Gopalakrishnan and others*, , wherein it has been held that Article of Association is an agreement amongst the members of a Company and the Company itself. He also argued that in the case of *Hickman v. Kent of Romney Marsh Sheepbreeders Association*, (1915) 1 Ch. 881, it has been held that an arbitration agreement in the Articles of Association of a Company is a binding contract amongst the members and the Company itself. His submission was that on the application of this judgment, it cannot be asserted that there is no arbitration agreement with the JV company. The particular part of the judgment on which he laid stress is as follows:

....To reconcile those decision with the other expressions of judicial opinion above mentioned, some such view should, I think, be adopted and general articles dealing with the rights of members "as such" treated as a statutory agreement between them and the company as well as between themselves inter se, and, in my judgment, article 49 in the present case does constitute a submission to arbitration within the true meaning and intent of the Arbitration Act.

17. Mr. Desai also argued that in respect of joinder of causes in respect of an arbitration, the Supreme Court in the judgment of *PR Shah Shares and Stock*

Brokers P. Ltd. v. BHH Securities P. Ltd., CA No. 9238 of 2003 on 14.10.2011 has held as follows:

14. If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement. But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B & C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration. In this case though the arbitration in respect of a non-member is under Bye-law 248 and arbitration in respect of the member is under By Law 282, as the Exchange has permitted a single arbitration against both, there could be no impediment for a single arbitration. It is this principle that has been applied by the learned Single Judge, and affirmed by the division bench. As first respondent had a single claim against second respondent and appellant and as there was provision for arbitration in regard to both of them, and as the Exchange had permitted a common arbitration, it is not possible to accept the contention of the appellant that there could not be a common arbitration against appellant and second respondent.

18. According to Mr. Desai, if a common arbitration can be allowed to be conducted then a common Section 9 application under the Act can also be filed. This notwithstanding, u/s 9, orders can also be passed against third parties as held in *Heritage Lifestyles and Developers Pvt. Ltd. Vs. Amarvilla Co-operative Housing Society Ltd., Mrs. Sandhya R. Rao and Mr. Navnitlal P. Shroff, and Value Advisory Services v. ZTE Corporation*, (2009) 3 Arb.LR 331.

19. We have already pointed out above that M/s C&K could maintain Section 9 petition predicated on Article 30 of the Joint Venture Agreement. The entire dispute is about the nature of relief sought. Two kinds of reliefs are sought. First relates to stay of the operation of termination of Joint Venture Agreement vide letter dated 12th August, 2011. This Joint Venture Agreement was between IRCTC and M/s C&K and, therefore, would clearly fall within the ambit of Article 30. Petition qua this relief would be maintainable though it is a different case that on merits this relief is denied by the learned Single Judge and rightly so, as discussed by us at a subsequent stage. Second relief pertains to the Maharaja Train. M/s C&K sought restraint order against the IRCTC from using the train for

any other purpose other than Joint Venture company and further allowing M/s C&K and Joint Venture Company to operate the said luxury train. According to IRCTC, this dispute would not come within the scope of Article 30 as it does not arise out of or in relation to the Joint Venture Agreement including its scope, validity, existence, interpretation, etc. Prima facie, we feel that this may not be correct. The facts noted above would demonstrate that the Joint Venture Agreement was entered into between IRCTC and M/s C&K solely for the purpose of running the luxury tourist train, namely, Maharaja Express and for that purpose, the two had agreed to form a Joint Venture Company. In the Joint Venture Company also, both these parties have equal shareholding and there is no other shareholder. Thus, when the matter is looked into from this angle, we feel that the said luxury train becomes the subject matter of Joint Venture Agreement and, therefore, when the disputes have arisen in respect thereto, prima facie they would be covered by Article 30 and petition u/s 9 would be maintainable though it would be a different question as to whether M/s C&K is entitled to such a relief on merits or not. We may clarify at this stage that it is only a prima facie view taken by us for the purpose of entertaining the petition u/s 9 of the Act. Ultimately, in the arbitration proceedings, it would be open to the IRCTC to raise such an issue and it would be for the arbitral tribunal to take final view touching the scope and jurisdiction of the arbitration clause with reference to the nature of disputes raised.

Issue No.2 to 6:

20. Issues No.2 to 6 are the various facets of the centre of controversy, namely, whether direction in the nature given, which are in the nature of mandatory injunction, amounted to specific performance or directing continuation of the arrangement even when the agreement had been terminated could be given or not. Further, whether there is a public interest in continuing the arrangement and this public interest could be a reason to justify the running of the Maharaja train. We shall take up cumulative discussion on these aspects.

21. For answering this issue, we proceed on the premise that from the very beginning, the parties envisaged an arrangement for running the train in question for a period of 15 years. We also proceed on the premise that Joint Venture company was set up by the two Joint Venture partners specifically and exclusively for this purpose alone, namely, to run the said super luxury train, viz. Maharaja Express. We also proceed on the premise that for this purpose, IRCTC was supposed to give the train on lease to the Joint Venture company for a period of 15 years. It is also a fact that even before such an agreement could be entered into, the Joint Venture company was allowed to run the train which had completed one season, namely, September, 2010 to April, 2011. Whether it was on the basis of adhoc arrangement as contended by the IRCTC or it was in furtherance of the 15 years lease arrangement contemplated between the parties, according to us, would not make any material difference. The fact is that whatever was the nature of this arrangement, the same has been terminated by

IRCTC. We have also to bear in mind at this stage that it is the IRCTC which is the owner of the train having borne the entire cost of the train, less capital subsidy.

22. We may mention that a faint attempt was made for the first time before us by the learned senior counsel for M/s C&K to make out a case that train had become a partnership property, i.e. property of Joint Venture but it is not possible to accept such a plea which was not taken up to now in any of these proceedings. Not only it seems to be belated and an afterthought, it is contrary to record as well. As pointed out above, admittedly total cost of the train was Rs.49.5 Crores which was borne by IRCTC. This is so recorded in Article 6 of the agreement. Not only the shell train, even the cost of interior, fittings and furnishing was borne by IRCTC. If it was to be a Joint Venture property, there was no question of providing for leasing of this train by IRCTC to Joint Venture company. These clauses are anathema and alien to the plea of partnership property. Therefore, IRCTC was and remains the exclusive owner of the train. We would like to mention that Mr. Desai, learned senior counsel, had cited certain judgments on the supposition that Maharaja Express had become the partnership property and since it was a 50:50 partnership venture, there could not have been premature termination thereof without there being a termination clause. Since we do not find this train to be a partnership property, those judgments would be of no avail to M/s C&K.

23. The position that prevails today is that the Joint Venture Agreement stands terminated insofar as M/s C&K and IRCTC are concerned. Likewise, the arrangement between IRCTC and Joint Venture company, whether adhoc or otherwise, stands terminated. Whether termination of Joint Venture Agreement is bad in law or it was justified can be resolved by means of arbitration to be decided by the arbitral tribunal. Whether arrangement for running the train which was between IRCTC and Joint Venture company is terminated validly or not is again an issue which can be decided by the arbitral tribunal in the arbitration proceedings whether between IRCTC and Joint Venture company or in tripartite arbitration, if such tripartite arbitration is permissible in law. (We may clarify that we are not suggesting as to which proceedings would be appropriate). At this stage, we only commend that learned Single Judge is right in observing that the Court, while dealing with application u/s 9 of the Act, would not go into the contentions of the parties and decide as to whether termination of agreement is valid or not. That is the issue which has to be settled in the main arbitral proceedings. The learned Single Judge is also right in observing that in these proceedings, Court cannot restore the Joint Venture Agreement which has been terminated/rescinded. No doubt, Mr. Desai, learned senior counsel for M/s C&K has filed the counter objections to the impugned judgment assailing the aforesaid part of the judgment. The appellants had objected to the maintainability of such objections. However, it is not necessary to go into the same inasmuch as on merits, we feel that the learned Single Judge has rightly held that it is not within the scope of Section 9 to deal with these contentions

which would be the subject matter of main arbitration proceedings and the jurisdiction lies entirely with the arbitral tribunal to decide these substantial issues touching the merits of the dispute. Para 17 of the Division Bench judgment of this Court in the case of Bharat Catering Corporation Vs. Indian Railway Catering and Tourism Corporation Limited (IRCTC) and Another, is a complete answer wherein it was held:

17. Apart from merits, even otherwise, in our view, the scope and ambit of Section 9 do not envisage the restoration of a contract which has been terminated. The learned Single Judge, in our view, rightly held that if the petitioner is aggrieved by the letter of termination of the contract and is advised to challenge the validity thereof, the petitioner can always invoke the arbitration clause to claim damages, if any, suffered by the petitioner. It is not open to this Court to restore the contract u/s 9, which is meant only for the sole purpose of preserving and maintaining the property in dispute and cannot be used to enforce specific performance of a contract as such. A bare glance at the said Section will suffice to show that pending arbitration proceedings, the Court and the Arbitral Tribunal have been vested with the power to ensure that the subject matter of the arbitration is not alienated or frittered away. The provisions of Section 9, for the sake of convenience, are FAO(OS) 226/2009 Page No. 15 of 20 extracted below:-

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 a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of 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.

24. It is for this reason that that we refrain from dealing with various other arguments raised by both the parties accusing each other. Insofar as the appellant IRCTC is concerned, its allegation is that financial projections made by M/s C&K at the time of Expression of Interest were false and misguided which created confusion in the mind of IRCTC and which led to the impugned termination. It was also argued that M/s C&K had wrongly deducted higher rate of commission of 30% on the bookings made. It was also contended that Joint Venture company was not paying haulage charges as per the terms of arrangement. Likewise, M/s C&K has levelled accusation against the appellant which include that no amount is payable by M/s C&K or Joint Venture to the IRCTC, train operations are likely to result in profits in the near future, it was the fault of IRCTC to terminate the Joint Venture Agreement which was "a bolt from the blue", M/s C&K were right in charging the commission and it had made substantial investments in the Joint Venture and, therefore, there was no valid or justifiable reason on the part of IRCTC to terminate the agreement. We are eschewing the discussion on these aspects for the aforesaid reasons.

25. Based on the facts projected above, we come back to the main issue, namely, whether direction in the nature given, which are in the nature of mandatory injunction amounting to specific performance or directing continuation of the arrangement even when the agreement had been terminated could be given or not. Once the Joint Venture Agreement is terminated, prima facie we feel that even in the main arbitration proceedings, it would be difficult for M/s C&K to seek the final relief of specific performance and for restoration of the agreement. There is a huge possibility that in such a situation, normally M/s C&K would be entitled to damages even if it is held that Joint Venture Agreement was illegally terminated. After all, Joint Venture Agreement was a contract between the parties. It was only in the realm of contractual arrangement with no statutory flavour and no element of public law. While dealing with the contractual obligations under the realm of contract in a private field without any insignia of public element, it may be somewhat difficult for M/s C&K to maintain the relief of specific performance. The agreement was in commercial field to be governed by contract law, as between two private parties. In *Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company*, , the Court enunciated the principle on this aspect in the following words:

Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a

claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature. The application being under the provisions of Section 9(ii) (e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same.

26. We are unable to accept the contention of learned counsel for the appellant that since IRCTC is a corporation which is wholly owned by the Ministry of Railways and is, thus, subjected to Article 12 of the Constitution of India, the appellant can maintain the prayer for mandatory injunction. This plea of the appellant flows from the argument that the action of the State or instrumentality of the State has to be fair, just and non-arbitrary even in contractual matters and for this purpose, the appellant has referred to the judgment of this Court in Pioneer Publicity Corporation Vs. Delhi Transport Corporation and Another, and that of Supreme Court in Mahabir Auto Sales (supra). While there is no denial of the legal principle, per se, laid down in the aforesaid cases, we are unable to accept the applicability of these judgments insofar as the present case is concerned and that too, when we are dealing with the question of interim arrangement and not concerned with the final stage of the proceedings. Specific performance would require day to day supervision. In any event, M/s C&K can be compensated in terms of money if they prove losses due to alleged wrongful treatment. There is a serious dead lock between IRCTC and M/s C&K in relation to the affairs of Joint Venture company cannot be given a go-by.

27. Though our aforesaid observations are only prima facie in nature and we are clear that in arbitration proceedings, the Arbitral Tribunal would decide the same on its own merits without being influenced by our tentative observations, this exercise is undertaken for the purpose of present proceedings u/s 9 of the Act. Once this is the prima facie view we hold, it is difficult to make interim arrangement and pass an order in the nature of mandatory injunction directing continuation of the earlier arrangement which has been terminated by IRCTC. After all, it is to be borne in mind that IRCTC is the absolute owner of the train in question and the said train belongs exclusively to IRCTC. Can, in such circumstances, IRCTC be forced to do what it is not willing to in a matter relating to commercial contract, which has been terminated? Somewhat similar situation had arisen in the case of Country Development and Management Services Pvt. Ltd. v. Brookside Resorts Pvt. Ltd., 2006 (Supp.) Arb.LR 248 (Del). In this Single Bench judgment rendered by one of us (A.K. Sikri, J.), the injunction was refused. Para 14 of the said judgment takes note of the facts which prevailed in that case and in the said para, legal position is stated. In that case also, the Court was dealing with application u/s 9 of the Act. We reproduce herein para 14

and other relevant paragraphs for our purpose:

14. I may state at the outset that the fundamental aspect which is to be borne in mind is that we are dealing with petition u/s 9 of the Arbitration and Conciliation Act, 1996 and, therefore, entire matter has to be looked into from the angle as to what should be the interim arrangement between the parties. The parties entered into agreement dated 2nd June, 2001, namely, TLA and now the disputes have arisen between the parties arising out of the said TLA. The matter will have to be gone into, in depth, in those arbitration proceedings. The admitted position which emerges is that the land in question on which the hotel is built, belongs to the respondent. It is also not disputed that the entire financial arrangement for construction of the said hotel is borne by the respondent either from its own resources or by taking loan from financial institution. Though the petitioner's case is that financial institution has sanctioned the loan because of the petitioner's association with the respondent, fact remains that loan is sanctioned in the name of the respondent and it is the sole responsibility of the respondent to repay the said loan. The construction cost of the project is, according to the respondent, Rs.11 crores. Therefore, entire hotel property, namely, land as well as construction thereon exclusively belongs to the respondent. As per the petitioner's averments, it has provided the technical knowhow in the form of drawings, designs/consultancy etc. on the basis of which hotel is built and the hotel which stands now, gives an appearance of of a CIS hotel. This is disputed by the respondent. It, however, cannot be denied that some technical support is obviously provided by the petitioner pursuant to the TLA. However, only because of this reason can it be said that the respondent should not be allowed to run the hotel if the parties have otherwise fallen apart. Case of the petitioner is that the respondent has made structural, architectural and design changes and, therefore, even according to the petitioner the hotel is not made strictly in conformity with the standard on which CIS hotels are constructed. The respondent wants to run the hotel itself. Even if there was no dispute and the hotel was strictly built according to CIS standards and hotel had run under the petitioner's banner, the respondent could always terminate the agreement at any time under the TLA and start operating the hotel of its own. This is because the agreement is determinable in nature. If that could be the position even after the start of hotel as Carlson hotel, I am of the view that if the respondent wants to start the hotel, from the beginning itself, without the association of the petitioner, it can do so. The petitioner, for the alleged services rendered and for the alleged breach of contract on the part of the respondent, can always sue for damages.

15. In view of Sections 14 and 34 of the Specific Relief Act, injunction cannot be granted. These provisions have come up for consideration before the courts number of times. Some of these judgments are taken note of hereinafter:

(i) Rajasthan Breweries Ltd. The Stroh Brewery Co. (supra):

13: As the application by the appellant was filed u/s 9 of the Act prior to

commencement of the arbitration proceedings, it is not disputed that the Court is empowered to deal with the same and exercise such power for making orders as it has for the purposes of and in relation to any proceedings before it. The closing words of Section 9 of the Act empowering the Court to deal with such applications for interim measures have on the face of it to be dealt with in accordance with the law applicable to any proceedings taken out before such a court. On the ratio of the decision of the Supreme Court in *Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. and Others*, the application will be governed by the law of India and not by the governing law. However, the principles of equity governing specific performance are almost same in Indian law and English law. The discretion of the Courts of England while enforcing the specific performance of a contract is subject to the same constraints as are applicable in the Courts in India. Under the English law of specific performance of contractual obligation is available only in equity and is subject to various restrictions, which have been explained by G.H.Treitel in his work "The Law of Contracts" 6th Edition pages 764 to 775 as follows:

- (i) Specific performance will not be ordered where damages are adequate remedy.
- (ii) If the party applying for relief is guilty of a breach of the contract or is guilty of wrongful conduct.
- (iii) If the Contract involves personal service.
- (iv) If the contract requires constant supervision.
- (v) If the party against whom specific performance is sought is entitled to terminate the contract.

At page 775, it is stated in the aforementioned work:-

If the party against whom specific performance is sought is entitled to terminate the contract, the order will be refused as the defendant could render it nugatory by exercising his powers to terminate. This principle applies whether the contract is terminable under its express terms or on account of the conduct of the party seeking specific performance.

14. The effect of breach of a contract by a party seeking to specifically enforce the contract under the Indian law is enshrined in Section (c) read with Section 41 (e) of the Specific Relief Act, 1963. Clause (e) of Section 41 of the Specific Relief Act provides that injunction cannot be granted to prevent the breach of contract, the performance of which would not be specifically enforced. Clause (c) of Section 41 enumerates the nature of contracts, which could not be specifically enforced. Clause (c) to sub-section (1) of Section 14 says that a contract which is in its nature determinable cannot be specifically enforced. Learned Single Judge thus was justified in saying that if it is found that a contract which by its very nature is determinable, the same not only cannot be enforced but in respect of such a contract no injunction could also be granted and this is mandate of law.

This, however, is subject to an exception, as provided in Section 42 that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

18. In *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, , the Supreme Court had an occasion to consider the terms of agreement of distributorship. The agreement could be terminated in accordance with the terms of the agreement as per clauses 27 and 28 thereof. The Arbitrator had also held the distributorship to be revocable in accordance with clauses 27 and 28 of the agreement. The distributorship agreement was held for indefinite period, namely, till the time it was terminated in accordance with the terms contained therein. It was the case of the respondent therein that since the contract had not been terminated in accordance with clause 27 thereof, under which termination had been made, the firm was entitled to continuance of distributorship in the special circumstances of the case, which contention was upheld by the Arbitrator. Supreme Court set aside the award of the arbitrator on the ground that there is error of law apparent on the face of the record and grant of relief in the award cannot be sustained. It was held:-

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 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 April 1, 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 April 1, 1976, which contains the aforesaid clauses 27 and 28. Having aid 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 no 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. The facts of the present case are identical to those in aforementioned decision of the Supreme Court in as much as the agreements in the instant case are also terminable by the respondent on happening of certain events. In Indian Oil Corporation's case (supra) also agreement was terminable on happening of certain events. Question that whether termination is wrongful or not; the events have happened or not; the respondent is or is not justified in terminating the agreements are yet to be decided. There is no manner of doubt that the contracts by their nature determinable. In Classic Motors Ltd. Vs. Maruti Udyog Ltd., relying upon number of decisions, learned Single Judge of this court rightly observed:-

In view of long catena of decisions and consistent view of the Supreme Court, I hold that in private commercial transaction the parties could terminate a contract even without assigning any reasons with a reasonable period of notice in terms of such a Clause in the agreement. The submission that there could be no termination of an agreement even in the realm of private law without there being a cause or the said cause has to be valid strong cause going to the root of the matter, therefore, is apparently fallacious and is accordingly, rejected.

(ii) Crompton Greaves Limited Vs. Hyundai Electronics Industries Co. Limited,

(iii) National Auto Impex Vs. M/s Autocop (India) Pvt.Ltd. & Ors., 2001 VI AD (DELHI) 490

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

(v) Alfa Laval (India) Ltd. Vs. J.K. Corp. Ltd. and Another, .

16. The effect of the stay order would be that the hotel is not allowed to start its operation. If ultimately the respondent succeeds then the respondent would be put to unnecessary loss and the time gone by would be wasted without putting the clock back. On the other hand, it is ultimately held that the petitioner had right to run the management of hotel for specified period such an award can be passed in favour of the petitioner or the petitioner can be compensated for depriving it from doing so.

17. Learned senior counsel for the respondent, in these circumstances, is right in his submission that the petitioner cannot invoke the provisions of Section 42 of the Specific Relief Act. There is a dispute as to whether the contract is still in existence or it has come to an end by efflux of time. The respondents submission that once the opening date is not extended by the petitioner under clause 1.5 of the agreement there is no obligation on the part of the petitioner to comply with the agreement. The circumstance of the case, therefore, do not warrant exercise of any discretionary jurisdiction in favour of the petitioner. The principle laid down by the Supreme Court in *Gujrat Bottling Company Ltd. (supra)* is that relief by way of interlocutory injunction, is granted to mitigate the risk or injustice to the petitioner during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need to the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated.

28. In the present case, when the adhoc arrangement or even the so-called lease has been terminated, we agree with the learned Additional Solicitor General that passing of mandatory injunction would amount to:

- (i) First, create an agreement between Joint Venture company and IRCTC in relation to the train;
- (ii) Second, enforce such agreement even though JV company was not a petitioner; and
- (iii) Third, allow M/s C&K to take advantage of such agreement when, admittedly, even the "Lease Agreement" as per the terms of the Joint Venture Agreement was to be between JV company and IRCTC.

29. At this stage, we would like to deal with the argument of "public interest". Main reason with which the learned Single Judge has been swayed is that it would not be in public interest to discontinue the running of the train, bookings of which have already been made. It is also observed that if the arrangement, as existed earlier, is not preserved and status quo not restored, M/s C&K shall also suffer irreparable loss. On this aspect, the learned Single Judge inter alia observed:

This submission of the respondent is devoid of merit as by doing the interim measures this Court is not attempting to rewrite the agreement or to confer any leasehold rights in favour of the petitioner or JV company but rather in the larger public interest which is going to be effected by virtue of sudden stopping of the train, booking of which are already undertaken by the petitioner, there is no harm in continuing the said arrangement for some more period of time and more so when the parties have already earlier operated the said arrangement without

the execution of the said lease deed. Accordingly, the said continuation of the arrangement which was previously operated upon does not confer any further rights in favour of any of parties as this court is aware that it is claim to be adjudicated upon by the arbitral tribunal.

30. Mr. Desai, learned senior advocate supported the aforesaid reason by submitting that it was the expertise of M/s C&K in running such luxury train that yielded the results and because of the efforts of M/s C&K, it could build up brand name of the train in question, namely, "Maharaja Express". The result was that within one and a half years time, with sole efforts of M/s C&K, it became one of the most prestigious luxury train in the world. The tourism industry at global level knew that M/s C&K was associated with this train. Therefore, sudden halt of this train would put a severe jolt to the reputation of not only M/s C&K but the country at large. Further, because of bookings, interest of third parties were involved and in case these bookings are cancelled, it may entail series of claims against the Joint Venture company. It was also submitted that high level of expertise was required to run this train which IRCTC did not have. He further submitted that for the current season, i.e. up to April, 2012, bookings have been done which needed to be protected and the IRCTC was adopting destructive approach which was neither in the interest of any of the parties nor in the interest of the tourists who had made bookings nor in national interest. On this basis, the claim of "public interest" was sought to be taken to a high pedestal. It was also submitted that u/s 9 of the Act, protection sought was of "subject matter" which was permissible and it was not limited to the train but business itself as the sole business of the Joint Venture was to run this train. It was argued that Arbitral Tribunal had the power to enforce the contract and bind the parties to their contract on which the business relation establishes in the beginning, namely, conducting of business of running the train jointly for a period of 15 years. He also argued that IRCTC could not raise the bogie of deadlock as it was to meet this situation; that the learned Single Judge had appointed a receiver. His last submission was that once the learned Single Judge has exercised his discretion, the appellate court should not intermeddle with the same as per the well established principle of law laid down by the Supreme Court in series of judgments.

31. We are afraid that M/s C&K cannot sail itself through on the basis of this argument predicated on "public interest". At the cost of repetition we say that the train in question belongs to IRCTC which has invested entire amount therein. The arrangement between the parties, which was purely of commercial nature, has been terminated. In the light of these facts, the plea of larger public interest is to be examined. At the outset, prima facie it would be difficult to accept the plea of public interest in a pure commercial matter. That apart, it is also to be kept in mind that the running of this train had so far incurred losses only and profits are not in sight in near future. Can the appellant be bound to continue with this arrangement and to continue to suffer losses? Would such a situation be against public interest when the appellant is a public sector enterprise? When

there is a reasonable apprehension in the mind of the appellant that the joint venture is not viable, could there be an interim arrangement forced upon the appellant? Can the purported prestige of M/s C&K, allegedly at stake, be the foundation of "public interest"? Answer to all these questions has to be in the negative. It has to be borne in mind that running of this train was not a welfare measure of the State. In an era of globalized economy, such ventures are influenced by economic considerations. Precisely for this reason as well, the venture was conceived as public-private partnership whereby the Government decided to take in the Joint Venture a party from private sector. If such an arrangement, for whatever reasons, has not worked out, economics of this arrangement have to be kept in mind and analyzed. When we examine the matter keeping in view the economic logic and its effects including the normative aspects of economic analysis, we would reach the conclusion that M/s C&K are not able to establish that "public interest would be sub-served only when C&K allowed to run the train". M/s C&K had agreed to become the partner in Joint Venture with primary objective of earning profits. If it is ultimately found that the Joint Venture Agreement is illegally terminated, M/s C&K can always be compensated in terms of money.

32. What remains is the prestige of the country as Maharaja Express has earned worldwide name and is one of the premier luxury trains in the world tourism. No doubt, that is true. However, that would not mean that M/s C&K has acquired indefeasible right to run this train. Purpose can be served if the train runs as usual but by the IRCTC on its own or with the aid and addition of some other party as the IRCTC does not want M/s C&K to be its counterpart in the running of this train. We have to keep in mind that there have been serious differences and disputes between the parties in respect of payment of haulage charges, the amount of commission payable on bookings, the manner in which the train was operated in the previous season, etc. We cannot comment as to who is at fault. Blame game goes on and it is for the arbitral tribunal to decide. What we emphasise is that no public interest can be sub-served in continuing this arrangement which has not only run in rough weather but does not appear to be conducive for the health of joint venture. We find some substance in the arguments of learned Additional Solicitor General that it was not a "blow out of blue". Rather the differences were growing for quite some time and there is a correspondence on record which indicates that the IRCTC had asked the respondents to stop making bookings and, therefore, it does not appear to be a case of sudden stoppage of arrangement though there is a possibility that M/s C&K may have nurtured an impression that things would be sorted out and train will continue to run smoothly.

33. M/s C&K also cannot ride on its reputation and expertise in the field. That may be so. However, in case the IRCTC has decided to terminate the arrangement and, as discussed above, M/s C&K may prima facie only claim damages, even in the event of its success in the arbitration proceedings. The Court cannot restore the terminated arrangement and direct that the train would

be managed and run by M/s C&K under the supervision of a receiver. The public interest in the form of so-called national interest can be sub-served when the Maharaja Express continue to operate even by IRCTC. We find that before the learned Single Judge, IRCTC had made the following suggestions in order to honour the bookings as stated by M/s C&K without prejudice to the rights and contentions of the parties:

- a) The train has to be run by the owner/ respondent. All the facility material including crockery, furnishings etc which are in custody of the petitioner should be handover to respondent for executing this facility arrangement.
- b) All revenues arising therefrom without any deductions earned either by the petitioner or respondent may be deposited in the separate account from which expenditure will be funded.
- c) All the bookings may be allowed to be transferred to the respondents for honouring.
- d) All the on board or off board expenses and railway payments may be allowed to be charged to this account. In this way, the amount will be sufficient to cover the expenses and there will be no need for further loans.
- e) The existing service providers may be retained.

The IRCTC shall remain bound by the aforesaid suggestions and would run the train. Whatever bookings have been made up to now can also be transferred by M/s C&K to IRCTC.

34. In any case, it is not necessary to discuss this aspect in further detail. By the order of the learned Single Judge as well, the arrangement was to continue till December, 2011. By virtue of the interim orders, that arrangement continued till December, 2011. M/s C&K have, thus, already got the benefit of the order of the learned Single Judge. Though M/s C&K continued to do the bookings even beyond December, 2011, statement was made at the Bar by learned Additional Solicitor General that IRCTC will take over those bookings from M/s C&K and will ensure that the train would complete the season, albeit under the supervision of IRCTC. Therefore, third party interest is also not going to suffer. For all these reasons, we are of the opinion that the interim arrangement as directed by the learned Single Judge is not justified and legally sustainable. In that view of the matter, it is not necessary to go into the issue as to whether the appointment of receiver by the learned Single Judge was valid in law or not. It is also not necessary to go into the question of maintainability of the cross objections as even on merits they are found to be unsustainable.

35. At this stage, we would like to put on record that MAPPLE had intervened. They have filed application seeking certain directions. Since the arrangement as directed by the learned Single Judge is not to continue, it is not necessary to deal with the same. Suffice it to state that whatever rights have accrued in favour of MAPPLE either under the arrangement with IRCTC / Joint Venture or as a result

of the directions given in these proceedings, MAPPLE would be at liberty to enforce the same in appropriate proceedings in accordance with law.

36. Subject to the observations made in this order, we allow the present appeal and set aside the impugned order passed by the learned Single Judge. The appellant shall also be entitled to costs.