(2011) 09 CAL CK 0010

Calcutta High Court

Case No: C.A.N. 373 of 2011; F.M.A.T. No. 1589 of 2010

Kajal Kumar Bhowmick		APPELLANT
	Vs	
Indian Oil Corporation Ltd.		RESPONDENT

Date of Decision: Sept. 22, 2011

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 28, 36, 7, 9
- Criminal Procedure Code, 1973 (CrPC) - Section 389
- Penal Code, 1860 (IPC) - Section 102B, 302
- Specific Relief Act, 1963 - Section 10, 14, 14(1), 19, 41

Citation: (2011) 5 CHN 742

Hon'ble Judges: Syamal Kanti Chakrabarti, J; Kalyan Jyoti Sengupta, J

Bench: Division Bench

Advocate: P.K. Das, Rezaul Hossain, Parmer Hossain, for the Appellant; Vineeta Meheria, Amit Kr. Nag, Swati Choudhury, Barsa Saha, Piyush Meheria for Indian Oil Corporation Ltd., for the Respondent

Final Decision: Allowed

Judgement

K.J. Sengupta, J.

By this appeal the appellant has impugned the judgment and order dated 11th November, 2010 passed by the then 2nd Bench of the City Civil Court at Calcutta in Miscellaneous Case No. 1208 of 2010. By the judgment and order the prayer for injunction restraining the respondent from giving effect to the order of termination of dealership was refused. The fact leading to filing the aforesaid Miscellaneous Application in the learned Court below and then preferring appeal is set out briefly as hereunder. The appellant herein contends that his father obtained the Petroleum Pump Dealership of the respondent and as such the said business was set up under the name and style of M/s. Bhowmik Service Station at a place in the District of Nadia. However, after death of his father by subsequent agreement dated 10th May,

1978, the appellant retained the said dealership of the respondent No. 1 under the same business name. The agreement was signed by the appellant as a sole proprietor of the said business on one hand and the appropriate officials of the respondent on the other. Pursuant thereto until the time hereinafter mentioned there has been no problem on either side as the appellant without any disturbance whatsoever carried on business of dealership. On 14th July, 1997 by a letter the respondent suspended the dealership of the appellant by reason of being convicted by the learned Sessions Judge, Nadia in Sessions Case No. 7 of 1996 and Trial Case No. 10 of 1997 u/s 302/102B of IPC.

2. Thereafter, an appeal being preferred to the Hon''ble High Court and on being released on bail by the First Appellate Court the appellant made a representation to the respondent for revoking the said order of suspension of dealership. Allowing such representation the respondent withdrew this order of suspension and restored the supply to his retail outlet on and from 5th September, 1997. There had been uninterrupted supply of petroleum product to the said outlet of the appellant till a snow-cause notice was issued on 22nd March, 2010. In between 5th September. 1997 and 22nd March, 2010, the appeal against the conviction and sentence of the appellant was dismissed by this Hon''ble Court in its Criminal Appellate Jurisdiction by judgment and order dated 14th May, 2008. Thereafter, the appellant approached the Hon''ble Supreme Court against the said judgment and order of this Court by filing a Criminal Appeal being No. 122 of 2008. In the said appeal the appellant herein duly applied for granting bail, which was granted by the Hon''ble Supreme Court by order dated 4th August, 2008.

3. The factum of disposal of the appeal by the Division Bench of this High Court in Criminal Appellate Jurisdiction and also preferring appeal before the Supreme Court therefrom, and granting of bail was duly communicated to the respondent. On 22nd March, 2010 the respondent issued a show-cause notice for termination of the dealership on two grounds namely committing breach of the conditions under Clause 47(h) of the said agreement and also on the ground of conviction in the said criminal case under clause 58(d) of the said dealership agreement. It appears from the records that the said show-cause notice was challenged in the writ jurisdiction by the appellant however, the same was not pressed by obtaining order of withdrawal. On 6th June, 2010 the appellant sought for personal hearing which was granted by the respondent on 21st June, 2010. On 12th August, 2010, the petitioner herein moved an application u/s 9 of the Arbitration and Conciliation Act, 1996 before the learned 3rd Bench, City Civil Court being Misc. Case No. 1208 of 2010. On the same date the learned Judge passed an ad interim order of injunction restraining the respondent herein from terminating his dealership till 10th September, 2010. The respondent against the aforesaid ex parte order of injunction preferred appeal in this Hon''ble Court on 10th September, 2010 and on that date this Hon''ble High Court was pleased to vacate the interim order. This Hon''ble Court at the same time directed the learned Trial Judge to decide the pending

interlocutory application u/s 9 expeditiously.

4. On vacating the said interim order respondent terminated the dealership of the petitioner by passing an order on the ground of conviction namely under Clause 58(d) not on any other ground.

5. The aforesaid subsequent development was brought to the notice of the learned Trial Judge by filing an application for expeditious hearing. The learned Trial Judge finally refused to pass any order of injunction restraining the respondent from giving any effect to the said order of termination of the dealership. It will not be inappropriate to record one significant development as it is borne out by the record is that the appellant herein wanted to convert the said business of dealership into partnership one since it was originally set up as sole proprietorship by his father. On death of his father he inherited as one of the heirs and legal representatives of the said business. The said application was not considered hence he filed a writ petition being W.P. 1016 of 2009 and the learned Single Judge of this Court disposed of the same by order dated 22nd September, 2009 passing appropriate orders the relevant portion of which is setout hereunder:-

For the foregoing reasons, the petitioner No. 5 is given liberty to file an independent application before the Director, District Distribution, Procurement and Supply, Food & Supplies Department, Government of West Bengal, respondent No. 3. If such an application is filed, the same will be considered and dealt with on its own merits and in accordance with law and orders passed thereon within a period of six weeks from the date of receipt of such independent application. The appellant herein also by the same order was given liberty to apply afresh before the respondent No. 5 praying that his name be struck off/cancelled from the licenses.

5. The learned Trial Judge by the impugned judgment and order, after having considered the facts and circumstances constituting claim and contention of both the parties refused to grant any interlocutory relief on the ground that the application u/s 9 of the Act is not maintainable. It appears from the impugned judgment and order the learned Trial Judge while refusing to grant interim relief has decided the matter on merit also.

6. In the aforesaid background this appeal was admitted by this Court on 22nd of April, 2011 on the following points of law:-

(i) Whether the learned Trial Judge is justified in holding application u/s 9 of the Arbitration and Conciliation Act, 1996 on the facts and circumstances of this case being not maintainable though there is not dispute that there has been an arbitration agreement between the parties?

(ii) Whether the learned Trial Judge committed error in coming to fact finding which relates to the merit of the subject-matter of the Arbitration or not?

7. It is to be noted that during pendency of the aforesaid Misc. Case immediately after passing of the ad interim order the appellant herein prayed for appointment of an Arbitrator.

8. From the submission of the learned Counsels and from the pleadings we do not find that there is any dispute as to the factual existence of the arbitration agreement. We set out the said arbitration agreement Clause 69 hereunder:-

69. Any dispute or difference of any nature whatsoever or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this Agreement shall be referred to the sole arbitration of the Managing Director, Marketing of the Corporation, or of some Officer of the Corporation who may be nominated by the Managing Director, Marketing. The dealer will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an officer of the Corporation or that he has to deal with the matters to which the contract relates or that in the course of his duties as an officer of the Corporation he had expressed views on all or any of the matters in dispute or difference. In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason the Managing Director, Marketing, as aforesaid at the time of such transfer, vacation of office or Inability to act, shall designate another person to act as arbitrator in accordance with the terms of the Agreement. Such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of this contract that no person other than the Managing Director, Marketing or a person nominated by such Managing Director, Marketing of the Corporation as aforesaid shall net as arbitrator hereunder. The award of the arbitrator so appointed shall be final conclusive and binding on all parties to the Agreement, subject to the provision of the Arbitration Act, 19-10, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause. The award shall be made in writing and published by the Arbitrator within six months after entering upon the reference or within such extended time not exceeding further four months as the sole arbitrator shall by a writing under his own hands appoint.

9. Mr. Das, learned Senior Advocate appearing for the appellant while assailing the impugned judgment and order contends that the learned Trial Judge had exceeded his jurisdiction while deciding the subject-matter of the arbitration and the same cannot be done as the judicial pronouncement of the Supreme Court in a case reported in Grid Corpn. of Orissa Ltd. Vs. M/s. Indian Charge Chrome Ltd., does not approve of the same. The learned Trial Judge has committed patent error while holding that section 9 application was not maintainable in the eye of law although entire application has been decided on merit. This order is contradictory by itself. There is no dispute that there has been an arbitration agreement and further the

petitioner raised various disputes, claims and contentions in relation to the termination of dealership and resumption of supply of petroleum products to the said outlet of the appellant. In recent past despite order of conviction in view of granting bail suspension of supply was restored and it continued for sometimes. Even the learned Trial Judge passed an order of injunction at the initial stage.

10. Indisputably the power to appoint Arbitrator lies in terms of above arbitration agreement with the respondent and despite demand in writing admittedly being made, no appointment has yet been made.

11. Scope of section 9 of the aforesaid Act is very clear as to maintainability of application for interim measure at different stages. Therefore, all the conditions for maintaining interlocutory arbitration are satisfied hence this observation of the learned Trial Judge at the concluded portion of the impugned judgment and order is absolutely unwarranted under law.

12. He thereafter contends that while dealing with the application for interlocutory relief the learned Trial Judge did not consider the question of balance of convenience. According to him when for last several years despite order of conviction the termination of dealership was not made rather suspension of dealership was revoked there has been no change in circumstances for which the termination of dealership was warranted. Order of conviction will be reaching its finality when the Supreme Court will decide the matter finally.

13. He submits though specifically in the order granting bail by the Supreme Court, suspension of conviction is not mentioned, however, it would appear from the language of section 389 sub-section (4) of the Cr.PC that once the bail is granted by the Appellate Court the effect is automatic suspension of the sentence.

14. According to him, while dealing with the application of the interim measure the approach of the Court u/s 9 would be to maintain the order of status quo considering the balance of convenience.

15. If this order is allowed to remain as it is as it appears from the impugned order nothing remains to be decided by the learned Arbitrator. If the restoration of supplies is made to the said outlet of the appellant the respondent does not stand to suffer if not on the other hand the family of the appellant will be totally thrown to an uncertain future along with the staffs and employees thereof.

16. If the Hon''ble Supreme Court reverses the judgment and order of conviction of both the learned Courts below and the petitioner is acquitted, there is no scope for restoration of the dealership as it has been terminated as a permanent measure.

17. Smt. Vineeta Meheria, learned Advocate appearing for the respondent contends that it is true that learned Trial Judge has discussed merit and demerit of both the sides as learned Trial Judge is completely empowered to do so while granting or refusing to grant interim relief. Though by expressed words it is not mentioned by

the learned Trial Judge, it should be treated as prima facie findings.

18. She contends with the support of the Supreme Court judgment in case of Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., , that while dealing with section 9 application the Court has to follow all the principles as provided under Order 39 of the CPC read with relevant provision of this Specific Relief Act. The section 9 of the said Act is said to be provision independent of the Code of Civil Procedure. In this case the Court prima facie found upon reading of the document that subject contract is terminable in nature and by virtue of section 14 read with section 42 of the Specific Relief Act no order of injunction can be granted: the learned Trial Judge therefore has followed correct and established principle of law. In this case admittedly the appellant has been convicted, and just because he has been enlarged on bail the conviction is not erased as the appeal is pending. In such a situation relying on the Supreme Court judgment in rase of B.R. Kapur vs. State of Tamil Nadu (in cane of Jayalalitha''s) reported in 2001(7) SCC 231 she urges that the order of conviction remains for the purpose of operation or for taking action otherwise than serving terms.

19. She citing another judgment of Supreme Court decision in case of Rama Narang Vs. Ramesh Narang and Others, submits that order of conviction can be taken note of for taking measure against the employee or officer by the employer though appeal is pending. The order of injunction can be refused in a fact like this and almost on identical fact such order of refusal is approved by the Supreme Court and in support of this case she has cited Division Bench of the Delhi High Court reported in AIR 2000 Delhi 450.

20. After considering the submissions of the learned Counsels and carefully going through the facts as emerge from the records in order to give answer to the first question formulated by us earlier we hold that the conclusion of the learned Trial Judge that application u/s 9 of the said Act is not maintainable, is not sustainable under the law. While accepting the submission of Mr. Das we find from the scope of section 9 of the said Act that application for interim measure can be made at different stages. The language of section 9 of the said Act is very clear to support such conclusion. The said portion is set out hereunder:-

Section 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.....

21. In this case indisputably there exists a written arbitration agreement and the present application was taken out after having raised dispute before initiation of arbitration proceedings. Willingness of the appellant to go for arbitration is manifested by his demand for appointment of Arbitrator, which can only be done by the respondent.

22. In civil suit or any proceedings of Civil nature application for interim measure cannot be made unless the parent proceeding is initiated. In case of arbitration under the scheme of the present Act the application for interim measure can be taken even in contemplation of the arbitration proceedings, during pendency of the proceedings and even after conclusion and passing of the award and this action however cannot be availed of when such award is put into execution. Learned Trial Judge has totally overlooked aforesaid provisions of law.

23. While considering the second point as formulated we also notice that as rightly pointed out by Mr. Das the learned Trial Judge has gone into deeply in the merit of the case of course, the Court is to do sometimes in order to have a prima facie case of both the sides as has rightly been urged by Smt. Vineeta Meheria. The statute nowhere prescribes any particular approach to be adopted by the Court while dealing with this sort of application.

24. The decision of the Supreme Court in case of Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., is a guidance as to the approach to be adopted by the Court u/s 9 of the said Act. In paragraph 17 of the report the Supreme Court while taking note of a judgment of the learned Single Judge of Madhya Pradesh High Court in case, of Nepa Ltd. vs. Manoj Kumar Agrawal has observed that 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 a 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 emerging from relevant provisions of the Specific Relief Act and the law bearing on the subject. u/s 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 a international commercial arbitration. So, it cannot certainly be inferred that section 9 keeps out the substantive law relating to interim reliefs.

25. Thereafter, the Supreme Court having considered the various judgments of High Courts and Supreme Court of our country and English Courts has held in paragraph 20 as follows:-

20. No special condition is contained in section 9 of the Act. No special procedure is indicated. In American Jurisprudence, 2nd Edition it is stated:

In judicial proceedings under arbitration statutes ordinary rules of practice and procedure govern where none are specified; and even those prescribed by statute are frequently analogous to others in common use and are subject to similar interpretation by the Courts.

26. The above Supreme Court judgment however has not laid down to what extent the Court u/s 9 of the Act can go. According to us on careful reading of the ratio of the above judgment of the Supreme Court the proper approach of the Court in

dealing with section 9 of the Arbitration Act would normally be as follows:-

(i) To find first apparent existence of the arbitration agreement between the parties in any form as mentioned in section 7 of the Arbitration and Conciliation Act, 1996.

(ii) Whether the party seeking interim relief has been able to make out a prima facie case meaning thereby enforceable claim before the learned Arbitrator.

(iii) By way of a clarification we state that whether the party approaching the Court u/s 9 as made out such case which is likely to succeed in the arbitration proceedings and the measure sought for is in aid and assistance of the claim in arbitration proceedings or not.

(iv) The Court will merely examine such claim and will go to the extent that there has been considerable dispute and debate having regard to the case and rival case made out by both parties. Except in extraordinary circumstances Court cannot come to findings which will have the bearing in the arbitration proceedings even on prima facie.

Obviously the Court while dealing with interim measure particularly order of injunction will be guided by the settled principle of law, viz. prima facie case, balance of convenience and inconvenience and irretrievable injury. It is also settled position that while dealing with the balance of convenience and inconvenience Court will as far as possible try to maintain status quo so much so that neither of the parties is seriously affected by the measure taken by the Court.

27. Now we examine this case at our hands in the light of our above views. The scope of the arbitration agreement is extremely widest in nature and it covers all the possible disputes.

28. We think that the dispute raised by the appellant is absolutely covered by the arbitration agreement, We are unable to say at this stage that dispute raised by the claimant is apparently bogus. All that we can say that the appellant has been able to make out a considerable debate for decision of the learned Arbitrator.

29. We have considered the contention of Smt. Meheria learned Counsel on behalf of the respondent whether injunction can be granted overlooking the provision of Specific Relief Act, 1963 namely section 14(1)(c) read with section 41(e) of the Specific Relief Act or not. In principle it is not possible for the Court to overlook the same but the fact of the case must be examined in order to attract the aforesaid provisions. In this case it is urged by Smt. Meheria the said dealership agreement is determinable in nature as it will appear from Clause (3) at page 24 of the said agreement. But on reading of the entire agreement it appears that method of termination as provided in Clause 58 is something different. Clause (3) of the said agreement is of a general character and it is applicable to both the parties while Clause 58 apparently appears to be the power given to the Corporation to terminate the agreement unilaterally.

30. At this stage the learned Trial Court could and this Court at the most can observe whether the termination as it is sought to be done is protected by section 14(1)(c) read with section 41(e) of the Specific Relief Act or not, is seriously debatable issue.

31. Had it been a termination under Clause (3) then case of the respondent would have been such a stronger position that would have needed hardly any further consideration by the learned Arbitrator and it could have been decided even in interlocutory stage as an exceptional case, leaving the final decision of the Arbitrator for academic purpose. It is not so as the termination was made on the ground of conviction of the appellant. Learned Senior Counsel Mr. Das has raised a pertinent question on behalf of the appellant that enforceable conviction has to be understood as when it reaches its finality meaning thereby when the appellant has lost before all the Law Courts. This argument and point cannot be brushed aside lightly without due consideration. Smt. Vineeta Meheria, learned Counsel for the respondent Corporation ha.; also brought, a couple of decisions of Supreme Court reported in 2001(7) SCC 231 and Rama Narang Vs. Ramesh Narang and Others, to elucidate the effect of conviction of any Court though not reached finality as appeal being pending and bail having been granted. In those cases it appears that the Court did not consider nor decided whether order of conviction and sentence pending appeal would be determinative factor at the interlocutory stage. Whether conviction which is subject to scrutiny before Supreme Court, can be a decisive factor or not are to be decided by the learned Arbitrator, nor by the Court at this stage.

32. We accepting argument of Mr. Das hold that learned Judge while dealing with the prima facie case have exceeded his jurisdiction, as the learned Judge could not travel to the extent done in the guise of prima facie findings.

33. It is true as rightly pointed out by Smt. Vineeta Meheria the order of conviction passed by the Court eliminates element of innocence as it is available during the trial to the accused rather the presumption is shifted guilt in place of innocence. We are unable to accept the contention of Smt. Meheria that unless sentence is suspended by specific words order of bail granted by the Supreme Court is of no effect, as it has been rightly pointed out by Mr. Das that effect of granting bail is clearly provided in section 389 of Code of Criminal Procedure 1973. We therefore appropriately reproduce the same--

S.389. Suspension of sentence pending the appeal; release of appellant on bail.-- (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and also, if he is in confinement, that he released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a Court

subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,--

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one and he is on bail,

order that the convicted person be released on bail unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

34. The aforesaid section is having two components for taking different interim measure in different appeals. According to us sub-sections (1) and (2) of said section provide for granting bail and also suspending sentence by the Appellate Court itself, while the Court grants bail in cases as mentioned in Clauses (i) and (ii) of sub-section (3). The portion of sub-section (3) of said section being relied on by Mr. Das is having limited application and it does not have any application to the other appeals other than those appeals mentioned in Clauses (i) and (ii).

35. However, reading the language of the Supreme Court order granting bail by the Supreme Court to the appellant it appears to us that when the appellant is released on bail question of serving the terms does not and cannot arise and by necessary implication sentence has been suspended for a convict cannot serve the sentence whilst on bail.

36. As we have already indicated while granting order of injunction balance of convenience will have to be looked into meaning thereby Court will try to preserve the status quo as it was on the date of moving of the application. The Court initially granted interim relief at the stage when there has been no order of termination but order of conviction was on the head of the appellant. Subsequently there has been no change of status of the appellant on the date of passing impugned judgment and order, hence there was no reason to change mind.

37. The respondent for some reason or other despite existence of the order of conviction recorded by the learned Sessions Judge revoked the suspension of supply of petroleum products to the appellant on representation being made and at that stage order of conviction did not stand in the way to enable the appellant to carry

on business. Even after dismissal of the appeal followed by affirmation by the High Court the supply to the petitioner was neither disrupted nor the dealership was terminated. It was done only when this High Court in a Civil Appellate Jurisdiction vacated the interim order initially granted by the learned Trial Judge. According to us vacating of the interim order by the Division Bench did not change the situation vis-a-vis the status of appellant. The appellant was granted bail by the Supreme Court as it was granted by the High Court when the supply was not terminated nor the agreement.

38. We fail to understand what prompted to pass a decision after a long time on the ground of conviction when it could have been done earlier. Smt. Vineeta Meheria has tried to answer this question contending that earlier wrong cannot be allowed to be continued and a wrong thing cannot be perpetrated so according to her client the action which is a right one and ought to have been taken earlier, has now been taken.

39. We think this issues and questions are highly debatable and at this interlocutory stage it would not be proper to accept such plea in favour of the respondent.

40. When we consider the balance of convenience and inconvenience it appears to us that if such supply is restored to the outlet of the appellant the respondent does not stand to suffer nor loose anything else, on the other hand if the conviction order is set aside by the Hon''ble Supreme Court and the appellant is exonerated from all the charges then the sole ground of termination being conviction, will automatically stand extinguished and the loss during this period the appellant is likely to suffer cannot be retrieved in terms of money as by the passage of time the installation of the machines, equipment and installation and the business connectivity will be totally destroyed and cannot be restored at all. Moreover, the appellant''s main source of living and so also the employees and staff of this outlet will be atrociously jeopardised, by the time the Supreme Court would decide the matter finally if in favour of the appellant. On the other hand if the Supreme Court dismisses the appeal obviously order of termination will come into effect automatically and the respondent will not be prejudiced at all.

41. Under these circumstances, we think that supply of Petroleum product as it was done earlier before termination of the dealership shall be restored to the petroleum outlet of the appellant.

42. Accordingly, we stay the operation of the order of termination till learned Arbitrator takes decision in this regard or the decision of the Supreme Court whichever is earlier. In view of the order staying of operation termination of dealership the supply of Petroleum product to the outlet of the appellant has to be restored. We direct the respondent to restore the supply and use of Petroleum product however this should be done not in the name of the appellant but in the name of its business concerned. This appointment is in terms of the order of this

Court and not otherwise. This order will continue till the time as mentioned hereinabove. This appeal is allowed to the extent as above. Stay as prayed for, is granted for a period of one week after puja vacation.

S.K. Chakrabarti, J.:

I agree.