Royal Orchid Hotels Ltd. Vs Ferdous Hotels Pvt. Ltd.

Court: Madras High Court

Date of Decision: April 15, 2013

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 28, 9, 9(ii), 9(ii)(a), 9(ii)(e)
Contract Act, 1872 â€" Section 42
Specific Relief Act, 1963 â€" Section 14(1)(c), 14(i)(c), 41, 41(e), 42

Hon'ble Judges: Vinod K. Sharma, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

Vinod K. Sharma, J.
M/s. Royal Orchid Hotels Ltd. Has filed this application under Order XIV Rule 8 of the O.S. Rules read with Sec.

9(ii)(a) of the Arbitration and Conciliation Act, 1996, with the prayer for interim injunction restraining the respondent, its agents and employees

from selling, exchanging, leasing, licensing or creating any third-party rights or otherwise disposing of, or from entering into any agreement for

franchise or management with any third-party, of the property detailed in the schedule to the Judges summons in breach of the Hotel Operation

Agreement, dated 3.7.2011 pending determination of the rights and claims of the applicant against the respondent through arbitration. Schedule

attached to the Judges summons reads as under:

Land measuring 10 grounds with building constructed thereon situated at R.S. No. 1731/17 and 57, Block No. 37 of Mylapore Village situated at

New Door No. 20 (Old Door No. 9-C & 9-D), Dr. Radhakrishnan Salai, Mylapore, Chennai-4.

2. The applicant is a company registered under the Companies Act. It is carrying on the business of operating hotels and providing hospitality

services in India.

3. It is submitted that the mark ""Royal Orchid"" and the quality of services offered by the applicant are well reputed in the hospitality service sector.

The applicant either operates its own hotels or enters into hotel operation agreements with owners of hotel properties in India, where the hotels are

managed by the applicant in accordance with its established standards in operating procedures for provision of quality hospitality services. These

agreements for hotel operations provide for the complete management of the hotel by the applicant, under the supervision of the applicant,

including the deputation of its own employee as the General Manager of the hotel. The General Manager is a person incharge of the day to day

operations of the entire hotel.

4. The applicant also takes up pre-commissioning work for the hotel leading to the opening of the hotel to the public, and thereafter it is operated

by the applicant. The applicant also provides pre-opening services under which consultancy is provided to owner of the hotel on various aspects of

the planning and establishment of the hotel in a property. The applicant is paid a fee for the management of the hotel under its brand. In order that

the operations and profitability of the hotel is not affected, the applicant undertakes not to enter into similar agreements for management of hotel in

the vicinity of the hotel.

5. The respondent company was incorporated in the year 1993. It owns property at No. 20 (Old Door No. 9-C & 9-D), Radhakrishnan Salai,

Chennai 4. This property is built up and comprises 9 floors including two basements with 132 rooms and with the areas for setting up facilities such

as restaurants, swimming pool, gymnasiums, banquet and conference hall and related facilities for hotel to be established in these premises.

6. The respondent also obtained permission from the Chennai Metropolitan Development Authority for construction of multi-storied structure for

setting up of a hotel in the property. It also sought the collaboration of the applicant for setting up a star hotel at the property and after discussions,

the applicant and the respondent entered into a binding Term Sheet on 17.6.2011 and a Consultancy Agreement for technical services on

30.6.2011 at Chennai.

7. It is pleaded that the Term Sheet provided for the execution of a detailed Hotel Operation Agreement between the parties under which the

applicant would provide management services leading to the opening of the hotel in the property and its operation and management of the hotel in

the property for its opening. Under the Consultancy Agreement for Technical services, the applicant agreed to provide consultancy services for

architecture, mechanical installations, electrical, interior designing, lighting, kitchen, operating equipment, furniture and furnishings, procurement,

training, design and planning of the hotel in the property. The respondent agreed to pay a fee of Rs. 10,00,000/- (Rupees ten lakhs only).

8. The Hotel Operation Agreement was entered into between the parties on 3.7.2011 under which the applicant undertook exclusively the

operation and management of the hotel on completion of its construction and the work relating to design, equipment, furnishings, furniture and

setting up of all related facilities in the property. The agreement was for a period of 10 years from the date of opening of hotel.

9. It is submitted that at the time of completion of civil works, the respondent commenced activities for establishment of hotel in the property in

consultation with the applicant as provided in the Consultancy Agreement for Technical services and advance of Rs. 5,00,000/- (Rupees five lakhs

only) was paid by the respondent to the applicant under this agreement. The respondent had engaged the services of Grandstand Consultancy

Private Ltd., civil engineering services company based in Chennai for this purpose. The respondent and Grandstand Consultancy Private Ltd.

Consulted with the applicant which had employed two Engineers for the purpose of this project. The applicant also identifies and negotiated with

all the contractors for issuance of work orders for interior work in the property and its employees have been visiting the site on a regular basis to

review progress of work. The applicant in consultation with the respondent also recruited key qualified personnel like the General Manager,

Engineer and Purchase Manager for the hotel at the end of September 2011.

10. The case of the applicant is that though in good faith it took steps to perform its part of the obligations under the Hotel Operation Agreement,

including the appointment of personnel as its employees dedicated to this project. It encountered delay in setting up the hotel. The pace of work

undertaken by the respondent was such that target for operation could not be achieved and the communication sent by the applicant to the

respondent in this regard met with evasive and vague replies.

11. Till June 2012, no steps were taken towards commissioning the hotel. While the furniture and furnishings in the public areas and most of the

rooms were completed, the utilities for the property were still pending, but no steps were taken to establish. The General Manager employed by

the applicant, resigned from its services since he was not being engaged with the management of the property despite eight months of his

employment. The case of the applicant is that since then the respondent has not taken any substantial steps to complete the hotel though applicant

repeatedly requested the respondent to commission the hotel.

12. It is submitted that the property is situated in the busy commercial area of the city and thus has immense potential. The occupancy rate in the

city of Chennai is also growing up in the past few years.

13. That applicant invested in the venture for its franchise and management in the city, with the expectation that the venture would be profitable to

the applicant as well as to the respondent, therefore, the applicant has also not engaged in any other hotel project in the city. The delay on the part

of the respondent in commissioning hotel in the property have cost both parties substantially in terms of earnings over this period, but applicant

continued to be invest in commissioning of hotel and also requested the respondent to do so.

14. The applicant also announced the opening of the hotel in the City of Chennai on its website.

15. The applicant came to know that the respondent had entered into negotiation with a third party under which it is proposed that the third party

will take over the establishment and management of the hotel in the property, but this fact is denied by the respondent.

16. It is submitted that now Mr. Mubarak Ali, Project Co-ordinator of the respondent contacted the Vice-President and informed him that the

respondent would be terminating the Hotel Operation Agreement, which is not permissible according to the applicant, as the Agreement does not

allow termination without any cause.

17. It is case of the applicant that the respondent cannot terminate the Hotel Operation Agreement in the manner intended and for this purpose,

placed reliance on Clause 25 of the Hotel Operation Agreement which reads as under:

ARTICLE XXV

Termination of Agreement

1. Either party shall have the right to terminate this agreement, by giving ninety (90) days written notice, thereof, if the Operator is disabled or

prohibited by law, to discharge its obligations hereunder in the event of termination of this Agreement, pursuant to this clause, such termination shall

be without prejudice to the parties claim for all loss or damage if any suffered, by the parties on the date of termination.

2. If any one or more of the following events or default shall occur to wit:

(a) The Operator shall fail to observe or perform any of the terms and conditions herein contained and on the part of the Operator to be observed

and performed, within thirty (30) days, after receipt of a written notice thereof given by the Owner to the Operator, unless such failure cannot be

cured within that thirty (30) days period, and the Operator is using its best efforts to cure the default and the name can be and is cured within

reasonable time after such thirty (30) days period.

(b) In the event that acts of War, Civil disturbances, acts of Government or any other cause, beyond the control of the Operator, shall have a

substantial adverse effect upon the operation of the Hotel, as contemplated, by this Agreement or the Hotel or any essential portion thereof (as

hereinafter defined), shall be taken by acquisition requisition of dispossession by proper authority either party shall have the right, by notice in

writing to the other party, to terminate this Agreement. An essential portion of the Hotel shall be deemed to have been taken when the remaining

portions of the Hotel could not be efficiently operated for hotel purposes, during the term for which such essential portion has been taken. The

determination of whether such essential portion has been taken, shall be made by mutual agreement of the Owner and the Operator or if the

Owner and the Operator are unable to agree the question shall be submitted to arbitration to Article XXIX of this Agreement.

If a non-essential portion of the Hotel shall be taken by acquisition, requisition or dispossession the award of compensation received therefore,

shall, to the extent necessary, be applied by the Owner to the restoration, repair, replacement, rebuilding or alteration of and to the hotel, made

necessary by such taking and any excess thereof, shall be retained by the Owner for its own purpose.

c) The Operator shall be ordered to be wound up or goes into voluntary liquidation (except for amalgamation or re-organisation). Then and in case

of any such event or default, the Owner may, upon the occurrence of such default, as its opinion, terminate this agreement, by giving thirty (30)

days, written notice thereof, to the Operator without prejudice to all legal rights accruing to the Owner, as a consequence of such default or event.

d) The termination of this Agreement, pursuant to the provisions of this Article shall not effect the rights of the parties under this Agreement, upto

the date of termination.

3. Right of Termination by Owners in case of Gross Operating Loss Notwithstanding anything contained anywhere else in this Agreement, if the

Hotel incurs Gross Operating Loss for a continuous period of two years, after the first two fiscal years after the date of commencement of

operations of the Hotel, the Owner shall have the right to terminate the agreement giving 3 (three) months written notice to the Operator. In such a

case the Operator shall be entitled to its Basic Management Fee only.

Upon the termination of this Agreement, all accounts and dues between the parties including the amount mentioned as above shall be paid within

thirty (30) days from the date of termination of this Agreement as full and final settlement between the parties.

Upon termination the Operator shall remove its name and all its signages and displays that represent the brand of the Operator from the Hotel and

the Owner shall not be allowed to use any name similar to that of the Operator or any such representatives.

18. It is thus, submitted that the agreement can be terminated only as per the terms of Clause 25 of the agreement. As under the agreement, the

applicant was given the exclusive right to manage and operate the hotel, which the respondent has undertaken to establish on the property. The

respondent also specifically undertook not to assign any of its obligations under the Hotel Operation Agreement without prior consent of the

applicant. Therefore, in these circumstances, the respondent is obliged to undertake the hotel management operations in the property only through

the applicant.

19. The applicant has filed this application u/s 9 of the Arbitration and Conciliation Act, on the plea that as per the agreement entered into between

the parties, the disputes between the parties are required to be settled through arbitration. That disputes and claims have arisen with regard to the

failure of the respondent to commission hotel in the property as undertaken and in authorising the applicant to commence its management

operations in the property. The applicant has also undertaken to initiate the process to commence the arbitration process for determination of its

claim against the respondent.

20. It is also submitted that the applicant has all along been ready and willing to perform its obligations in accordance with the Hotel Operation

Agreement, but there is now a grave threat that the respondent may dispose of/encumber the property, including creation of third party rights

therein, even before the resolution of the disputes between the parties. The applicant is also trying amicable settlement of disputes.

21. On the pleadings referred to above, the applicant prays for injunction against the respondent.

22. The application is opposed by the respondent by filing counter, wherein the stand of the respondent is, that for the services provided by the

applicant under the ""Binding Term Sheet"", they were to be paid a sum of Rs. 10,00,000/- (Rupees ten lakhs only) and on completion of the

construction and development of the hotel, the respondent was to hand over the hotel in a fully completed state to the applicant under the Hotel

Operation agreement for 10 years.

23. Clause 11 of the Term Sheet provided that the parties shall enter into the following agreement;

a. Technical services cum Pre-opening Services Agreement; and

b. Hotel Management Agreement.

The parties were also allowed to negotiate additional terms not inconsistent with the provisions of the Term Sheet. Whereas Clause 13 of the Term

Sheet provided as under:

The conditions precedent for the entering into the Definitive Agreements are:

(i) The owner shall obtain necessary Occupancy Certificate for the Hotel;

(ii) the owner having all statutory approvals and Licenses for the operations of the Hotel.

24. The stand is that Definitive Agreements was to come into effect only upon the fulfilment of the conditions precedent set out above.

25. On 30.6.2011, ""Consultancy Agreement for Technical Services"" was executed and the Scope of work therein was agreed to as under:

Advisor does not represent itself as professional, license expert in planning, architecture, interior design, engineering, lighting, specialized equipment

design, graphic design or other reliant disciplines. Specialist consultant on these matters will be responsible for all design development, design

documentation and approvals. Advisor''s services are limited to general review of specialist consultants'' work and making recommendations to the

owner, as set out above. Advisor accepts no responsibility or liability for any deficiency in the work of the specialist consultants.

26. It is case of the respondent that consultants for the design and execution of the interiors, equipment, installations and architecture were all

directly appointed by the respondent. Their fees, salaries, charges and wages were paid by the respondent. Furthermore, they were already

functioning in the schedule property even prior to commencement of agreement with the applicant.

27. That even before commencement of operation of hotel, the applicant insisted on the signing of the Hotel Operation Agreement which was

signed on 3.7.2011. Whereas except for superstructure and little work on interiors, other works were at different stages of execution. Therefore,

none of the preceding events which were contemplated as a prerequisite for the commencement of the Hotel Operation Agreement, had taken

place, therefore, the agreement itself did not come into force.

28. Under the Consultancy agreement, the applicant appointed two personnel including General Manager who informed the respondent that the

new Hotel will carry the name ""RE: GEN: TA"" and not ""Royal Orchid"" and also showed the design and logo for the new name.

29. The General Manager, however was evasive and refused to disclose the reason. The respondent subsequently came to know that Bangalore

based Kamat Hotels group had filed a Trademark infringement suit against the applicant and there was an order of injunction against the applicant

from using the name ""Orchid"". The case of the respondent is that this fact was suppressed by the applicant, at the time of entering into binding

Term Sheet or signing of the other two agreements. When confronted about this and after discussion with Mr. Mubarak Ali, the applicant agreed

to terminate the agreements so far signed by them, and accordingly, the applicant withdrew its personnel from the post. The General Manager

opted for alternative job. The respondent has denied the receipt of letter dated 26.6.2012.

30. The case of the respondent is that Term sheet and Consultancy agreement for Technical services, came to an end in June 2012. Whereas the

Hotel Operation Agreement had not come into operation.

31. That there was some delay in issuing the formal termination letter, as the respondent was given to understand that the applicant had left the

project.

32. The stand of the respondent, therefore is that the parties mutually resolved to part ways and respondent reserve its right to terminate contract,

if permitted by this Court, as the matter is sub judice.

33. That it was on 6.3.2013, that all of a sudden, the respondent received a letter, dated 1.3.2013 from the applicant, calling upon the respondent

to inform the proposed opening date and demanding the alleged balance due under the various agreements which were no longer subsisting. The

letter was received at the time of filing of this application.

34. The stand of the respondent is, that inspite of injunction by the Hon"ble High Court of Bombay, the applicant still claims to be holding right

over reputed mark of ""Royal Orchid"".

35. It is also submitted that no substantial services were rendered by the applicant under the two documents executed between the parties.

36. The Hotel Operation Agreement had not come into operation, nor specialised services, designs, equipment, plant and machinery, etc. were

brought in by the applicant. The applicant admittedly played only an advisory role. Furthermore, after resignation by the General Manager, the

applicant kept silent from June 2012 to March 2013. Otherwise also, the Hotel Operation Agreement was to commence only upon the opening of

the Hotel for commercial operations. It is submitted that though it was signed, but had not come into operation. The applicant cannot place reliance

on the termination clause, to challenge the proposed action to terminate the agreement formally.

37. It is also the stand of the respondent, that the applicant cannot prevent the respondent from negotiating with reliable brands in order to run the

hotel, as it has made huge investments in the property. The applicant can only claim compensation for breach of contract alleged to have been

committed by the respondent, but the applicant is completely silent about the nature or quantum of loss allegedly suffered by the applicant.

38. It is also pleaded case that applicant rushed to this Court, with unclean hands, by suppressing material fact that there was an order of injunction

against the use of brand name ""Royal Orchid"" by the applicant. It is also pleaded that balance of convenience is in favour of the respondent and

that it would suffer heavy loss if the injunction is granted, as it has invested huge amount in the project.

39. It is also disputed that the applicant can invoke arbitration clause, on the ground that the agreement itself has not come into operation.

40. It is denied that the applicant has foregone business opportunities in the vicinity of the property in view of its commitment to the project. That

by virtue of the order of injunction dated 6.3.2013, the respondent is prevented from carrying on any of its activities and entire work has been

paralysed.

41. The applicant therefore neither has a prima facie case nor balance of convenience is in favour of the applicant. Therefore, it is prayed that this

application deserves to be dismissed.

42. From the pleadings of the parties, it emerges that the parties entered into Hotel Operation Agreement under which it was agreed that the

applicant would operate the hotel for a period of ten years.

43. The question therefore to be decided is:-

Whether the applicant is entitled to injunction as prayed for ?

44. The learned counsel for the applicant very ably contended that it is open to the party to enforce the negative covenants of agreement by

injuncting the respondent. The learned counsel for the applicant also contended that the parties had entered into Hotel Operation Agreement on

3.7.2011 wherein it was agreed that the applicant shall be the exclusive Operator of the Hotel who shall supervise and direct the operation of the

Hotel and discharge and perform efficiently with due diligence and obligations of the Operator.

45. That the absolute right and complete discretion to sell, exchange, lease or create any mortgage, charge or any other encumbrances on the land,

hotel furniture and equipment operating supplies, and all other properties, belonging to the owner, was again subject to advance notice to the

applicant and further, subject to condition that the right of applicant to operate Hotel is not impaired in any way, as the agreement stipulates that

lease or other disposition of the hotel by the owner would bind subsequent purchaser also. Therefore, it is not open to the respondent to back out

from the agreement.

46. It was contended, that neither parties had any right to assign its rights or obligations or any of them under this agreement without the consent of

the other party, except that either party could assign such rights and obligations to an affiliate of the assigning party. The learned counsel referred to

Article XXV of the Agreement which gives right to either party to terminate the agreement by giving 90 days notice, if the applicant was disabled

or prohibited by law, to discharge its obligations. This termination was to be without prejudice to the parties to claim for all loss or damage, if any

suffered by the parties on the date of termination.

47. On the other hand, the right to terminate the contract by owner could be exercised if the Hotel incurred Gross Operating Loss for a continuous

period of two years, i.e., after the first two fiscal years, i.e., after the date of commencement of operation of the hotel. In that event, again owner

was required to give three months written notice subject to payment of Basic Management fee.

48. The contention of the learned counsel for the applicant was that it is open to the applicant to enforce the agreement in view of negative

covenants in the agreement.

49. Section 42 of Specific Relief Act, 1963 reads as under:

42. Injunction to perform negative agreement.- Notwithstanding anything contained in clause (e) of section 41, 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 circumstance 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:

Provided that the plaintiff has not failed to perform the contract so far as it is binding on him.

50. The learned counsel for the applicant placed reliance on the judgment of the Hon''ble Supreme Court in M/s. Gujarat Bottling Co. Ltd. and

others Vs. Coca Cola Company and others, wherein the Hon''ble Supreme Court was pleased to lay down as under:

42. In the matter of grant of injuction, the practice in England is that where a contract is negative in nature, or contains an express negative

stipulation, breach of it may be restrained by injuction and injuction is normally granted as a matter of course, even though the ready is equitable

and thus in principle a discretionary one and a defendant cannot resist an injuction simply on the ground that observance of the contract is

burdensome to him and its breach would cause little or no prejudice to the plaintiff and that breach of an express negative stipulation can be

restrained even though the plaintiff cannot show that the breach will cause him any loss. [See: Chitty on Contracts, 27th Edn., Vol. 1, General

Principles, para 27-040 at p. 1310; Halsbury''s laws of England, 4th Edn. Vol. 24, para 992]. In India section 42 of the specific Relief Act, 1963

prescribes that notwithstanding anything contained in clause (e) of Section 41, where a contract comprises an affirmative 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 injuction to perform the negative agreement. This is subject to the proviso that the plaintiff has not failed to perform the

contract so far as it is binding on him. The Court is, however, not bound to grant an injuction in every case and an injunction to enforce a negative

covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer. [See: Ethrman v. Bartholomew.

(1927) W.N. 233; N.S. Golikari (supra) at p. 389].

51. Reliance was also placed by the learned counsel for the applicant on the judgment of the Hon''ble Bombay High Court in Dirk India Pvt. Ltd.

Vs. Mahagenco, laying down that implied negative covenant in the agreement can be enforced by injuncting the respondent.

52. The learned counsel for the applicant also contended, that in this case the applicant had appointed its General Manager under the agreement

therefore, the agreement was in full force, therefore, it is was not open to the respondent to terminate the agreement. The applicant therefore is

entitled to injunction, as agreement contains negative covenants restraining the respondent from entering into Operation Agreement with any third

party.

53. On the other hand, the learned counsel for the respondent vehemently contended that the applicant had agreed to terminate the contract and in

pursuance thereto, withdrew its employees from the hotel. The General Manager had already resigned. The applicant therefore, has no right to

maintain the present application.

54. The learned counsel for the respondent placed reliance on the judgment of the Hon''ble Division Bench of Calcutta High Court in Brand Value

Communications Ltd. Vs. Eskay Video Private Ltd., wherein it was laid down as under:

16. Therefore, the power entrusted to a Court in any suit or proceedings for passing orders as mentioned in the Supplemental Proceedings

indicated in Part VI of the body of the CPC has been substantially repeated in Section 9(ii) of the Act by making it clear that in dealing with such

an application, the Courts shall have the same power as it has for the purpose of or in relation to any proceedings before it.

17. Thus, it is clear that while dealing with an application u/s 9(ii) of the Act, the Court should be guided by the same principles, which are required

to be followed while disposing of the applications under Orders 38- 40 of the Code.

55. It was contended that once power u/s 9 of the Arbitration and Conciliation Act, 1996 are regulated by the provisions of Code of Civil

Procedure, no injunction can be granted, as contract which terminable and the breach of which can be compensated by damages is not specifically

enforceable in view of section 14(1) (c) read with Sec. 42 of Specific Relief Act. This leaves no manner of doubt that the application filed by the

applicant is barred under Sec. 41(e) of the Specific Relief Act.

56. Reliance was also placed on the judgment of the Hon''ble Supreme Court in Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt.

Ltd., wherein the Hon''ble Supreme Court was pleased to lay down as under:

10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation,

interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may

appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by

well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de

hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the

Section itself brings in, the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of

the Section, ""and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it"" also

suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a

party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the

ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out

the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures

u/s 9 of the Act.

14. In Nepa Limited Vs. Manoj Kumar Agrawal, , a learned judge of the Madhya Pradesh High Court has suggested that when moved u/s 9 of

the Act for interim protection, the provisions of the Specific Relief Act cannot be made applicable since in taking interim measures u/s 9 of the Act,

the court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration clause and

the necessity of taking interim measures for issuing necessary directions or orders. When the grant of relief by way of injunction is, in general,

governed by the Specific Relief Act, and Section 9 of the Act provides for an approach to the court for an interim injunction, we wonder how the

relevant provisions of the Specific Relief Act can be kept out of consideration. For, the grant of that interim injunction has necessarily to be based

on the principles governing its grant emanating out of the relevant provisions of the Specific Relief Act and the law bearing on the subject. 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 an international commercial arbitration. So, it cannot certainly be inferred that Section 9 keeps out the substantive law

relating to interim reliefs.

Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½Ã¯Â¿Â½..

18. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject matter of an arbitration

agreement. According to learned counsel for Adhunik Steels, the subject matter of the arbitration agreement in the case on hand, is the mining and

lifting of ore by it from the mines leased to O.M.M. Private Limited for a period of 10 years and its attempted abrupt termination by O.M.M.

Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of O.M.M. Private Limited to terminate it

prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that

the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force

in this submission made on behalf of the Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on

the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by O.M.M. Private Limited or the

termination of the contract by O.M.M. Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules

for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the

contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be

restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well settled

principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power u/s 9 of the Act is totally

independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed,

we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case.

57. On consideration, I find that this application deserves to fail. Reading of the agreement shows that either party has been given right to terminate

the agreement by giving 90 days written notice. The agreement further stipulates that such termination shall be without prejudice to the parties to

claim for all loss or damages if any, suffered by the parties on the date of termination. This clause clearly shows that parties had agreed that

damages are adequate compensation for termination of the contract.

58. Not only this, the owner has been further given right to terminate the agreement though subject to Hotel incurring Gross operating loss for

continuous period of two years. The contract therefore is not specifically enforceable.

59. It is well settled law that when relief of injunction is statutorily prohibited qua contract which is determinable. Therefore, injunction as prayed

cannot be granted.

60. This view finds support from the judgment of the Hon''ble Division Bench of the Delhi High Court in Rajasthan Breweries Ltd. Vs. The Stroh

Brewery Company, laying down as under:

19. 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.

61. This Court in Glory Jeeva Rita Vs. Executive Director, Bharat Petroleum Corporation Ltd. and Others,) was pleased to lay down that when

the clauses in distributorship agreement permit Corporation as well as any party to the agreement to terminate the agreement, only the provisions of

Specific Relief Act will hold and High Court under Sec. 9 of the Arbitration and Conciliation Act cannot enforce Specific performance of the

contract by directing the Corporation to continue the agency till the arbitration proceedings are over.

62. The Hon''ble High Court of Delhi in D.R. Sondhi and Others Vs. Hella KG Hueck and Co. and Others was pleased to lay down as under:

20. One finds in respectful agreement with the said view point. It can only be added that it is not only voidable contracts but where the contracts

provides that it is terminable on a particular event then it must be taken that in terms of Section 14(1)(c) of the Specific Relief Act it would come

into play and injunction as such will not be granted. Here the contract provided the conditions and that it was terminable. Exactly same is the

position herein and therefore the application of the petitioner must be taken to be misconceived.

63. The negative covenants on which reliance is placed by the applicant also deals with the restriction during pendency of the arbitration agreement

and not after termination.

64. The reliance in section 42 of the Contract Act is also misplaced. Section 42 of Contract Act does not stipulates the specific enforcement of a

contract, but only negative covenant under the contract. This is clear from wording

the circumstance that the Court is unable to compel specific performance of affirmative agreement shall not preclude it from granting an injunction

to perform the negative agreement.

65. The applicant in the garb of negative covenant cannot specifically enforce an agreement which is determinable in nature. It is not disputed that

the agreement contains clause for termination and therefore, terms of the agreement are not enforceable, as the remedy available with the applicant

is to claim damages for breach of contract if any. The contract being not specifically enforceable, therefore, no injunction can be granted being

statutorily barred.

No merit. Dismissed.

No costs.