

REPORTED

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% DATE OF RESERVE: September 16, 2009

DATE OF DECISION: October 28, 2009

+ **FAO(OS) 226/2009 and CM No.8106/2009**

M/S. BHARAT CATERING CORPORATION Appellant
Through: Dr. A.M. Singhvi, Sr. Advocate with
Mr. Manish Bishnoi and Mr. L. Nidhiram
Sharma, Advocates

Versus

INDIAN RAILWAY CATERING AND TOURISM
CORPORATION LIMITED (IRCTC) & ANR Respondents
Through: Mr. Gaurav Banerjee, Addl. Solicitor
General with Mr. Saurav Agrawal,
Advocate

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **REVA KHETRAPAL, J.**

1. The present appeal is directed against the judgment of the learned Single Judge dated 26th May, 2009 in OMP No.281/2009 dismissing the petition filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996.

2. The brief facts leading to the filing of the aforesaid petition are as follows.

3. The appellant claims to be a partnership firm under the name and style of M/s. Bharat Catering Corporation and is engaged in the business of running catering services. The appellant firm, initially constituted by a Deed of Partnership dated 26th April, 2005 between five partners, was awarded a catering contract by the respondents for providing mobile and static catering services to the respondents. Admittedly, it was one of the conditions of the tender that in case any change was made in the constitution of the firm, an approval would be sought from the respondents.

4. During the subsistence of the contract, one of the partners of the appellant firm, namely, Shri Madhav Bhimsaria made a representation to the respondents by a letter dated 18.11.2008 that the partnership firm had been converted into a proprietorship concern with effect from 15.11.2008. Copy of the Dissolution Deed was also enclosed. It was also informed by the said Shri Bhimsari that he had become the sole proprietor of the firm and the only authorised person to deal with the respondents. Soon thereafter, i.e. on 28.11.2008, another partner, namely, Shri Balmiki Singh approached the respondents asserting that the representation made by Shri Bhimsari to the respondents by letter dated 18.11.2008 was wrong and in fact he had been

expelled and he was the sole proprietor. The partners continued to make allegations and counter-allegations against each other in their representations to the respondents asserting that one or other partner of the firm was no longer the partner while the license fees running into several lakhs of rupees in respect of the contract continued to mount, so much so that FIRs were also lodged by two of the partners against each other. Eventually, the internecine disputes of the partners resulting in the cancellation of the contract by the respondents vide letter dated 6th May, 2009.

5. The aforesaid cancellation led to the appellant filing OMP No.281/2009, inter alia, praying for an ex parte order of injunction staying the operation of the aforesaid letter and further restraining the respondents or their agents from giving any effect to the said letter. The learned Single Judge by his order dated May 26, 2009 dismissed the OMP holding that:-

“5.....the scope and ambit of Section 9 is not to restore the contract which has already been terminated. The contract between the respondent and the petitioner created a commercial relationship between the parties. The termination of contract is one of the facets of the contract and as per contract entered into between the parties, the contract could be terminated by respondent for various reasons given therein. If the petitioner is aggrieved by the act of the termination of the contract by respondent and considers that the termination was bad or illegal, the petitioner is at liberty to invoke the arbitration clause and claim damages, if any, suffered by the petitioner. The contract cannot be restored by the Court under Section 9 nor is it a case where the Court should interfere. In my

view prima facie there is no case made out in favour of petitioners. The petitioners' conduct, as reflected from the impugned letter of termination justifies termination of the contract.”

6. Aggrieved by the dismissal of its petition under Section 9 of the Act, the appellant has preferred the present appeal, on which counsel for the parties have been heard. Dr. A.M. Singhvi, the learned senior counsel for the appellant has assailed the order of the learned Single Judge on the ground that the respondents were duly intimated about the fact of reconstitution of the partnership firm vide letter dated 31st December, 2007 by one of the partners, namely, Shri Balmiki Singh. Along with the letter, the revised Partnership Deed was also submitted, which showed that the partnership firm had been reconstituted on 01.04.2007 with the remaining four partners, the fifth partner Shri Vijay Kumar Sinha having retired on the said date. The respondents thereafter never objected to this reconstitution nor wrote any letter to the appellant in response to the letter dated 31st December, 2007. This showed that the respondents had acquiesced in the reconstitution and had condoned the same. It was also contended by Dr. Singhvi that for one and a half year thereafter, i.e., till May, 2009, there was no protest or demur from the side of the respondents and as a matter of fact the respondents also executed agreements with the appellant firm and awarded work to it. The respondents were now debarred by the principles of estoppel from contending that the

reconstitution of the firm did not have the approval of the respondents.

7. Reference was made by Dr. Singhvi, the learned senior counsel for the appellant to Clause 16 of the Deed of Partnership dated 1st April, 2007 to buttress his contention that the reconstitution of the firm could not have been a ground for termination of the contract. The said clause reads as under:

“16. That death retirement of any party shall not dissolve the partnership in the event of death of any party, the partnership business shall be carried on by the surviving parties along with the legal representative of the deceased party or in such manner as may be decided by the surviving party.”

8. Dr. Singhvi further contended that the internecine disputes between the partners, which was the immediate provocation for issuance of the show cause notice dated 19th December, 2008, were also sorted out within a short span of time and afforded no justification for the cancellation of the contract, more so, as the partners informed the respondents in the meeting dated 27th February, 2009 that the disputes had been settled. Similarly, there was no justification for the respondents not to allow the matter to subside and to demand affidavits and unconditional undertakings for payment of the disputed dues. It is settled law that the Government has to act in a fair manner even in contractual matters and the Court can afford appropriate relief if the State has committed manifest illegality. The party cannot in such situation be relegated to the remedy of claiming damages only.

9. It was also contended on behalf of the appellant by the learned senior counsel for the appellant that in the present case there were no complaints about any deficiency in services by the reconstituted firm and, therefore, there was no breach of Clause 7.13 of the agreement which was relied upon by the respondents for terminating the contract as is evident from the perusal of the letter of termination dated 6th May, 2009. It was for this reason that Clause 7.13, which speaks about performance of such newly reconstituted firm and the right of the licensor not to allow the licensee to continue if the performance is not satisfactory, was not referred to in the show cause notice dated 19th December, 2008 and cannot now be pressed into service by the respondents. With regard to the failure of the partners of the appellant firm to appear before the respondents on 13th February, 2009 in response to the notice dated 29th January, 2009, it was submitted by Dr. Singhvi that it was on account of the fact that the respondents had asked to hand over the bedroll services in respect of train Nos.2521-22, BJU-ERS in Express Train and train Nos.2565-66, Bihar Sampark Kranti Express train that the partners could not appear on the said date before the respondents. However, on 27th February, i.e. on the adjourned date, two of the partners had appeared, namely, Shri Madhav Bhimsaria and Shri Kanahiya Singh, since out of the other two partners, Mr. Balmiki Singh was indisposed while Mr. ManikYadav had a certain urgent assignment. The

said two partners who attended the meeting in representative capacity categorically informed the Committee that all the disputes between the partners stood resolved. The Committee thereupon asked each of the partners to submit an affidavit to this effect to which they willingly agreed. However, strangely the Committee asked the partners to give an unconditional undertaking to clear all the dues which the partners were not in a position to submit. On the next date, i.e. 18.03.2009, all the members went to the office of the respondent No.1 but the meeting could not take place due to non-availability of a member. Again in response to the letter dated 18.03.2009, all the partners went to the office of the respondents on 06.04.2009, however the meeting again could not materialise due to the non-availability of one of the members. On the next date, i.e. on 27.04.2009, none of the partners could appear on account of the extremely short notice given to them by letter dated 21.04.2009. Further, parliamentary elections had been announced and one of the partners who is a worker of the Congress Party was in extreme difficulty while another partner was suddenly taken ill because of which it was impossible for all the partners to attend the meeting. All the partners, however, physically appeared before the learned Single Judge to contend that there were no dispute *inter se* them.

10. Reliance was placed by Dr. Singhvi on a judgment of this Court in the case of ***Old World Hospitality Pvt. Ltd. vs. India Habitat Centre (1997)*** 73

DLT 374 and a judgment of the Supreme Court in the case of **Gujarat State Financial Corporation vs. Lotus Hotels Pvt. Ltd. (1983) 3 SCC 379**, to which we shall presently advert.

11. Mr. Gaurav Banerjee, the learned Additional Solicitor General appearing on behalf of the respondents, rebutting the contentions of Dr. Singhvi submitted that the respondents had in the instant case had no option but to cancel the licenses of the appellant firm. Reference was made to the General Terms and Conditions of the Tender Documents which stipulated as follows:-

<i>“7.13 Consequence to the death/severance of any partner/s (in case partnership firm)</i>	<i>If the Licensee is a partnership firm and in case there is permissible clause in the constitution of the firm that the firm shall not be dissolved by reason of the death of one partner or the severance of any partner from the business of the firm and in case the performance of the Licensee is entirely satisfactory according to the assessment of the licensor then in such an event the licensor at its discretion may allow the Licensee to continue under the agreement.”</i>
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12. The learned counsel for the respondents contended that the reconstituted Partnership Deed does not have the approval of the respondents and hence is a

breach of the tender conditions as mentioned in Clause 7.13. To make matters worse, Shri Madhav Bhimsaria, one of the partners of the appellant firm, had informed vide his letter dated 18.11.2008 that the partnership firm had been converted into a proprietorship concern with effect from 15.11.2008 and that he (Shri Madhav Bhimsaria) is the sole proprietor of the proprietorship concern and the only authorised person to deal with the respondents. Copy of the Dissolution Deed was also enclosed with this letter. Soon thereafter, another letter dated 26.11.2008 was received from one Shri Shailesh S. Yadav claiming to be a person authorised by Shri Madhav Bhimsaria as the proprietor of the appellant Corporation. Copy of the authorisation on a stamp paper was also enclosed with the said letter. Two days hence, another letter dated 28.11.2008 was received which was sent by Shri Balmiki Singh, one of the partners of the appellant firm informing that the change of address as advised Shri Madhav Bhimsaria should not be considered. A letter dated 25.11.2008 sent by Shri Madhav Bhimsaria indicating that he had withdrawn the Deed of Dissolution/Retirement and his letter dated 18.11.2008 was enclosed by Shri Balmiki Singh with his letter dated 28.11.2008. The matter did not rest here. Shri Balmiki Singh by a letter dated 24.12.2008 informed that a case had been filed under Section 156(3) Cr.P.C. for registration of FIR against Shri Madhav Bhimsaria. Shri Madhav Bhimsaria by a letter dated 03.01.2009 informed that

he had also filed a FIR bearing No.627/08 dated 18.01.2008 against Shri Balmiki Singh. Considering the various conflicting statements made by the partners in their aforesaid communications to the respondents, all the partners were asked to appear before the Committee in the first instance on 13.02.2008, on which date not even a single partner appeared before the respondents. Subsequent opportunities granted to the partners of the appellant firm to take a stand met with the same result. Reference was made by the learned counsel for the respondents in this regard to the termination letter dated 6th May, 2009, the relevant portion of which reads as follows:-

“Considering the various conflicting statements made by different partners in their communications as detailed above to IRCTC, all the partners were given two opportunities to appear before a Committee, once on 13.02.08 which was not attended by any one of the partner and second on 27.02.09 which was attended by Sh.Madhav Bhimsaria and Sh.Kanahiya Singh. Sh.Balmiki Singh one of the partners informed through his letter dated 25.02.09 alongwith medical certificate that he was unable to attend the hearing on 27.02.09 due to being unwell. During the hearing before the Committee, Sh.Madhav Bhimsaria and Sh.Kanahiya Singh stated that the partners have reached an understanding and that their differences have been resolved. Further they stated that all the partners will submit affidavits to this effect and will make payments of all dues to IRCTC unconditionally and for which a date may be fixed by the Committee. Accordingly, the Committee agreed to fix any one date suitable to all the partner between 16th March, 09 to 18th March, 09 by giving a 12 hour advance notice to IRCTC. The Committee also stipulated that this opportunity would lapse if no communication is received from all the partners by 18.00 hrs of 18.03.09.

However, due to non appearance of any of the partner between 16th March, 09 to 18th March, 09 the party was advised vide letter dated 21st April, 09 that as it may, keeping in mind the importance of the issue and that a serious situation has emerged involving the interest of the travelling public, a last and final opportunity was given to all the partners of the firm to personally appear before the Committee on 27th April, 09 at 11.00 hrs and submit their affidavits as undertaken by Madhav Bhimsaria and Sh.Kanhiya Singh. Further, it was also advised that this communication should be treated as a final notice in the matter and no change in time would be entertained. It was also stated categorically that if the partners or any of them do not turn up it would be presumed that they have nothing to say and the Committee would submit its report accordingly.

None of the partners had met/approached Sh.Anil Gupta, nominated officer, on 27th April, 09.

Sufficient opportunity for personal hearing i.e. **four times** has been given to the partners of M/s. Bharat Catering Corporation for clarifying their position with regard to the status of their firm. The partners have failed to appear and clarify the position. In the background, the existence and legal status of the licensee/firm continues to be in doubt and it not clear as to who is actually running the catering services.

In such a scenario the services inn mobile/static units, which have been awarded to M/s. Bharat Catering Corporation are bound to suffer causing inconvenience to the travelling public. There will also be a problem regarding fixing of responsibility in case of any breach of non-service of improper service. Issues may also arise as to the recovery of license fee.

In view of the above, and in interest of travelling passengers, it has been decided to terminate all licences of mobile and static units held by M/s. Bharat Catering Corporation. Further, all the partners of M/s. Bharat Catering Corporation, who were partners when the licenses were awarded to the firm, should be debarred to participate in future business of IRCTC either jointly or severally or in

any other capacity since it is clear that they are not serious about providing catering services to the passengers, they have misled the Corporation by making contradictory and incorrect statements, have failed to even turn up at the office on the dates fixed.”

13. Having heard the learned counsel for the parties and gone through the documentary evidence on record, we find no merit in the present appeal which, in our view, is liable to be dismissed for the following reasons.

14. Clause 7.13 of the General Terms and Conditions of the Tender Document stipulated that if the licensee is a partnership firm and in case there is a permissible clause in the constitution of the firm that the firm shall not be dissolved by reason of the death of one partner or the severance of any partner from the business of the firm, then in such an event the licensor **at its discretion may** allow the licensee to continue under the agreement provided the performance of the licensee is entirely satisfactory. Admittedly, the reconstituted Partnership Deed was never specifically approved by the respondents and the entire case of the appellant firm is that the respondents had in a manner of speaking *acquiesced* to the reconstitution of the partnership and hence the appellant was not in breach of the tender conditions mentioned in Clause 7.13. We are unable to agree as, in our view, *prima facie* the respondents were entitled to take action for revoking the agreement entered into with the appellant in view of the fact that the tender conditions stipulated

that the respondents at their discretion could revoke the said agreement if the appellant firm changed its structure and the appellant firm had admittedly changed its structure.

15. Further, the change of the structure of the appellant firm vide Deed of Partnership dated 01.04.2007 resulted in the internecine disputes between the partners as delineated above resulting in one of the partners claiming sole proprietorship of the firm with other partners disputing the same and the arrears of license fees mounting up to a point where the respondents were compelled to issue show cause notice to the appellant firm to clarify the position. By a letter dated 29.01.2009, the GGM (DCS) of the respondents asked all the partners to appear before the Committee comprising of three officers on 13.02.2009 to clarify the position. The said letter, which is titled “Change in constitution of Partnership firm and non-payment of license fee”, also directed the appellant firm to clear the outstanding amount of more than Rs.90 lakhs or suitable action would be taken. In response to this communication, it is not in dispute that not a single partner of the appellant firm cared to appear. The ostensible ground given for non-appearance and pressed into service by Dr. Singhvi, the learned senior counsel for the appellant, is that the bedroll services of the appellant in respect of certain trains having been terminated on 20.01.2009, the partners could not attend the

meeting on 13.02.2009 due to the sudden problems created as a result thereof.

A glance at the letter dated 20th January, 2009 vide which the bedroll services were terminated, however, shows that the dates of handing over of bedroll services in respect of train Nos.2521-22, BJU-ERS in Express Train and train Nos.2565-66, Bihar Sampark Kranti Express train were 26.01.2009 and 28.01.2009 respectively, and, in any case, the same did not justify the fact that all four partners did not care to appear on 13.02.2009 before the Committee constituted by the respondents.

16. It is also not in dispute that on 27.02.2009 only two of the four partners appeared before the Committee to state that all the disputes between the partners stood resolved while the other two partners again did not choose to appear. During the hearing of the Committee, a direction was issued to all the partners to submit an affidavit that the partners had reached an understanding and that their differences had been resolved and to make payments of all dues to the respondents unconditionally and for the aforesaid purpose all the partners were asked to appear on 18.03.2009 and to submit the said affidavits personally before the Committee on or before the said date, failing which, it was specifically stated that, action under the terms and conditions of the contract, inter alia, including termination of all existing contracts for mobile and static units, forfeiture of security money for various contracts and banning

all future business dealings with the respondents by the partnership firm, was liable to be taken. Despite this, till date admittedly affidavits have not been furnished by any of the partners nor the outstanding dues have been cleared. Subsequent opportunities granted to the partners of the appellant firm to appear and submit affidavits, as set out in the termination letter dated 6th May, 2009 proved to be of no avail. In the aforesaid circumstances, in our view, the respondents were wholly justified in terminating the contract.

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 under Section 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

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.”

18. On the aspect as to whether the respondents were entitled to take action for revoking the agreement entered into with the appellant firm, the judgment

of the Supreme Court in ***Hindustan Petroleum Corpn. Ltd. vs. Sriman Narayan and Anr. (2002) 5 SCC 760*** is apposite and a reference thereto is, therefore, necessitated.

19. In the aforesaid case, the question had arisen as to whether the respondent No.1 had violated the conditions stipulated in the agreement between the parties by changing the structure of the firm without taking prior permission from the appellant and whether in such circumstances still the latter was bound to give to the former an opportunity for rectifying the defect; and whether passing the order revoking the agreement without affording such opportunity would render the revocation order invalid. The Supreme Court holding that these were not matters to be considered in detail for considering the prayer for interlocutory injunction emphasized that it was incumbent upon the Court hearing the injunction application to consider the question whether if prayer for interim injunction is refused the plaintiff–petitioner will suffer irreparable loss which cannot be adequately compensated by damages. It was further held

“ordinarily relief to be granted to a plaintiff in such a matter is awarding of damages and interim injunction of a mandatory nature is not to be granted.”

20. In the said case, the Supreme Court also laid down the law as follows. In a case where *prima facie* one of the parties is entitled to take action for

revoking the agreement entered into with the other party, the validity or otherwise of the order of revocation can be considered at the stage of interim injunction **only for the limited purpose** of ascertaining whether there is a prima facie case in favour of the plaintiff–petitioner and not for the determination of the question finally.

21. The reliance placed by the learned counsel for the appellant, Dr. Singhvi on the judgment of the Supreme Court in ***Gujarat State Financial Corporation (supra)*** is also, in our view, misplaced. In the said case, the respondent acting upon the solemn promise made by the appellant incurred huge expenditure for undertaking and executing the project of setting up a 4-Star hotel. In this backdrop, it was held by the Supreme Court that the principle of promissory estoppel would certainly estop the appellant Corporation from backing out of its obligation arising from a solemn promise made by it to the respondent. In such a situation, it was held that the Court was not powerless from holding the appellant to its promise and to enforce the same through a writ of mandamus in a petition under Article 226 of the Constitution. The said decision, in our view, has no application whatsoever to the facts of the present case.

22. The reliance placed by the learned senior counsel for the appellant on the decision of this Court in ***Old World Hospitality Pvt. Ltd. (supra)*** is also of

no avail. The facts in the said case, which was a suit for specific performance of a contract, were that the contract entered into between the parties was for twenty years and the plaintiff had given up all other projects to undertake the project of the defendant. In such circumstances, the grant of an interim injunction was held to be justified. Significantly also, this Court while granting the interim injunction in the said case observed that any transaction like the one in the said case is not one of many transactions which often come up before the Courts.

23. Before parting with the case, we wish to highlight certain glaring facts in the instant case. The change of partners in the present case was not a logical or natural change occasioned by the death/retirement of a partner, but was due to a simmering dispute between the partners. The acrimony between the partners is evident from their correspondence with the respondents, before whom rival claims were being pressed into service from time to time. The filing of FIRs against each other had aggravated the situation. The respondents sought clarification from the partners and gave several opportunities to enable them to furnish the same on affidavits. None was forthcoming. The partners of the appellant firm paid no heed. The arrears of license fee were mounting. The cumulative effect of the above factors was a relevant consideration which weighed with the respondents in cancelling the contract. We think rightly so.

In the light of the above, we find no merit in the present appeal.

FAO(OS) 226/2009 and CM No.8106/2009 are accordingly dismissed.

REVA KHETRAPAL, J

MUKUL MUDGAL, J

OCTOBER 28, 2009

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