

+ **A.A.P. 14/2009**

BAKSHI SPEEDWAYS Appellant

Versus

Through: Mr Kailash Vasdeu, Sr Advocate with
Mr Parijat Sinha, Mr Anil Kumar Mishra and Ms
Reshmi Rea Sinha, Advocates

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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

RAJIV SAHAI ENDLAW, J.

1. The appeal under Section 37(2)(b) of the Arbitration Act 1996 is preferred against the order dated 4th June, 2009 of the arbitral tribunal dismissing the application of the appellant and allowing the application of the respondent, both under Section 17 of the Act. The appellant is the dealer for retail sale of certain petroleum products of the respondent, from the premises in Sector-51 Gautam Budh Nagar, NOIDA, UP, on the terms and conditions contained in an agreement dated 23rd August, 1995 between the parties. It is inter alia provided in the agreement that the respondent is the owner/lessee of the land underneath the aforesaid premises at NOIDA and all the structures / apparatus/ equipments installed thereon and wherefrom the appellant was permitted to sell and retail petroleum products belong to the respondent. Under clause 2 of the said agreement the

respondent granted leave and licence and permission to the appellant, for the duration of the agreement, to enter on the said premises and to use the premises and the apparatus and equipments installed thereon for the sole and exclusive purpose of storing, selling and handling the products purchased by the appellant as dealer from the respondent; it is further provided therein that the appellant, save in such manner shall have no right, title or interest to the said premises or apparatus or equipments installed thereon and shall not be entitled to claim the right of lessee, sub-lessee, tenant or any other interest in the said premises or outfit; it is also specifically provided therein that the appellant shall not be deemed to be in exclusive possession of the said premises.

2. Disputes and differences having arisen between the parties with respect to the said agreement and the respondent having terminated the dealership of the appellant, the Chairman and Managing Director of the respondent on 13th June, 2008, in accordance with the arbitration clause, in the said agreement, appointed an officer of the respondent as the arbitrator. As aforesaid, the petitioner as well as the respondent preferred application under Section 17 of the Act before the arbitrator; while the appellant sought interim measures in the form of a direction against the respondent to resume sale and supplies of the petroleum products as was being done prior to the letter of termination, to the appellant, during the pendency of the arbitration proceedings, the respondent sought interim direction against the appellant restraining the appellant from interfering with the respondent resuming the business of sale and supply of petroleum products from the aforesaid premises/retail outlet.

3. The arbitrator has inter alia held that the respondent had purported to terminate the agreement with the appellant on the allegations of stock variation, short delivery and tampering with dispensing units; that though the petitioner had disputed the said grounds but it would not be in the interest of the public that a dealer whose dealership had been terminated for the said reasons should be permitted to operate the retail outlet during the pendency of the arbitration case and unless the issue about the correctness of the said allegation and consequently of the termination of the dealership is decided; that the petitioner in the event of termination being found bad can be compensated; that resultantly the respondent during the pendency of the arbitration case ought to be permitted to operate the retail outlet itself without creating any third party rights therein.

4. The principles applicable to an appeal under Section 37(2)(b) in my view ought to be the same as the principles in an appeal against an order under Order 39 Rules 1 and 2 CPC i.e., unless the discretion exercised by the court against whose order the appeal is preferred is found to have been exercised perversely and contrary to law, the appellate court ought not to interfere with the order merely because the appellate court in the exercise of its discretion would have exercised so otherwise. I had at the beginning of the hearing itself inquired from the senior counsel for the appellant as to what could be said to be perverse in the exercise of discretion by the arbitral tribunal in the exercise of powers under Section 17 of the Act and as to how the said interim measures granted by the arbitral tribunal could be said to be contrary to law; it was further pointed out that in the opinion of this court, on the perusal of the memorandum of appeal, the only ground which appeared to have some force was the ground taken in the memorandum of appeal of

the arbitrator as on the date of making of the order having become *functus officio*.

5. The senior counsel for the appellant has read various documents, earlier orders filed alongwith the memorandum of appeal. The senior counsel for the appellant firstly has contended that the arbitrator erred in not finding a case in favour of the appellant inspite of several courts in proceedings prior thereto having granted interim orders in favour of the appellant. In this regard it may be stated that the appellant had first preferred WP(C)14426/2006 in this court with respect to the order of the respondent terminating the dealership of the appellant. In the said writ petition vide order dated 13th September, 2006, while issuing notice to show cause to the respondent, the operation of the termination order was stayed till the next date of hearing. It may, however, be noted that though the respondent was represented before the court on that date but that must be on advance notice and no pleas appear to have been considered. Ultimately, the said writ petition was dismissed vide order dated 5th April, 2008.

6. The appellant preferred LPA 248/2008 against the dismissal of the writ petition and which also came to be dismissed on 20th May, 2008.

7. The appellant thereafter preferred a petition under Section 9 of the Arbitration Act, 1996 before the court of the Additional District Judge, Delhi who, vide an ex parte order dated 22nd May, 2008 stayed the order of termination of dealership and also directed the respondent to restore the sale and supply of petroleum products to the retail outlet of the petitioner, till the final disposal of the petition under Section 9 or of the Arbitration proceedings between

the parties. Much emphasis was placed by the senior counsel for the appellant on the said order and it was contended that inspite of the same the arbitrator could not have decided otherwise.

8. The respondent preferred FAO 186/2008 against the ex parte order aforesaid of the Additional District Judge. Vide ex parte order dated 29th May, 2008 in the said FAO the operation of the order dated 22nd May, 2008 of the Additional District Judge insofar as it directed the respondent to resume supply of the petroleum products to the respondent was stayed. The said FAO was ultimately disposed of vide order dated 29th July, 2008 on the agreement of the counsel for the parties that the order dated 22nd May, 2008 of the Additional District Judge be set aside but on the condition that the petitioner herein shall move an application before the arbitrator under Section 17 of the Act seeking similar relief as sought before the Additional District Judge and the arbitrator shall deal with such application on its own merits. It is also recorded in the said order that “the arbitrator shall also decide the question of possession. Till then, the parties shall maintain status quo”. The senior counsel for the appellant agrees that pursuant to the order dated 29th May, 2008 (supra), the supply of petroleum products to the retail outlet of the appellant was stopped and thereafter there has been no supply of petroleum products by the respondent to the appellant.

9. As far as the reliance by the senior counsel for the appellant on the earlier interim orders is concerned, attention was invited to recent judgment of the Supreme Court in **State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha** (2009) 5 SCC 694 holding inter alia that a precedent is a judicial decision containing a principle, which forms an authoritative element termed as *ratio*

decidendi; an interim order which does not finally and conclusively decide an issue cannot be a precedent; any reasons assigned in support of such non-final interim order containing prima facie findings, are only tentative. Any interim directions issued on the basis of such prima facie findings are temporary arrangements to preserve the status quo till the matter is finally decided and cannot be *ratio decidendi* or precedent. Moreover, the orders on which reliance was placed by the senior counsel for the appellant are ex parte and in any case finally it was directed that the arbitrator will decide the application under Section 17 of the Act without being influenced therefrom. Thus, it cannot be urged that the arbitrator was bound by the aforesaid ex parte interim orders of the courts. Faced with the said position, no further submissions were made in this respect.

10. The senior counsel for the appellant next contended that the arbitrator could not have dealt with the application of the respondent under Section 17 of the Act and could not have permitted the respondent to operate the said retail outlet on company operated basis during the pendency of the arbitration proceedings. In this regard, attention is invited to the opening words of Section 17 which are “unless otherwise agreed by the parties”. It is urged that the last order dated 29th July, 2008 (supra) in the FAO was a consent order and permitted the appellant only to move an application under Section 17 of the Act and did not provide for /contemplate the respondent moving such an application and thus the respondent was barred from moving such an application.

11. I however do not find any merits in the said submission also and which was also raised before the arbitrator and has been rejected by the arbitrator also. The order aforesaid cannot be read as foreclosing the rights of the respondent to make an application under Section 17. Admittedly besides in the said order, there is no other agreement whereby the respondent had precluded itself from applying under Section 17 of the Act. A right under Section 17 conferred by the statute on a party to the arbitration proceedings is an important right and cannot be deemed to have been waived/abandoned in such a fashion. Merely because the petitioner who had applied under Section 9 of the Act to the court was by the said order permitted to reapply before the arbitrator under Section 17 cannot be read as meaning that the respondent if entitled to could not so apply.

12. The senior counsel for the appellant has also contended that though this court in the said order had directed the arbitrator to decide the question of possession but the order is quiet on the same and in fact disturbs the order of status quo qua possession. In this regard it may be noticed that there is a factual dispute also between the parties. The senior counsel for the respondent has contended that it is the respondent who has already been operating the said retail outlet. The senior counsel for the appellant contends otherwise. I, however, need not detain myself on this aspect. The order aforesaid of this court directed the arbitrator to decide the question of possession. The arbitrator in directing that the respondent shall be entitled to operate the retail outlet has decided the said question. I do not find anything wrong in the said direction of the arbitrator. As per the agreement (supra) between the parties, the land as well as structure, apparatus, equipments thereon belongs

to the respondent and the appellant was merely a licensee to operate the same. I have inquired from the senior counsel for the appellant whether there is anything in the agreement which bars such an arrangement. Though it is the admitted position that the term of the dealership agreement had not expired but the senior counsel for the appellant admits that the agreement otherwise was terminable even prior to the expiry of its term on stipulated defaults by the appellant. That being the position, the order impugned is found to be in consonance with law. The order protects the rights of the appellant by directing that the respondent shall not appoint any dealer or create any third party rights with respect to the said outlet till the disposal of the arbitration proceedings and adjudication of the disputes qua the termination order.

13. I had repeatedly inquired from the senior counsel for the appellant as to how the agreement of such a nature could be specifically enforceable as was sought by the appellant as a interim measure. Nothing was forthcoming in this regard. The senior counsel for the respondent has, on the contrary, invited the attention to clause 64 of the agreement providing that in the event of termination of the agreement the dealer shall not be entitled to any compensation or claim any loss or damage from the respondent in respect of the goodwill or otherwise. In spite of specific query, the senior counsel for the appellant has not pointed out any clause in the agreement whereunder during the pendency of the disputes as to the validity of termination also the appellant is entitled to continue operating under the agreement. Else it may be noticed that the agreements of such nature are not specifically enforceable and the remedy, if any, is for compensation only. Reference in this regard

can also be made to **Indian Oil Corporation Ltd Vs Amritsar Gas Service** (1991) 1 SCC 533.

14. The arbitrator has already held that in the event of the award in favour of the petitioner, the petitioner shall be entitled to compensation for the time deprived of operating the said retail outlet.

15. The senior counsel for the appellant has also challenged the finding of the arbitrator qua the public interest and contended that in fact the equities are in favour of the appellant who is a widow of a defence official and had been allotted the petrol pump on compassionate ground. In my view reference by the arbitrator to public interest is justified. The arbitrator has noticed that one of the grounds for termination was tampering by the appellant of the instrument measuring the quantity of petroleum products supplied by the appellant to the customers. The arbitrator was thus of the opinion that if the said allegations were to be true, it is not fair to allow the appellant to continue operating the retail outlet to the detriment of the customers and who can never be compensated for the short supply by the appellant.

16. In my view the only ground worth consideration in this appeal is of the arbitrator being *functus officio* on the date of the making of the order. In this regard it may be stated that the agreement between the parties in clause 66 inter alia provides for arbitral award to be made within six months after entering upon reference or within such extended time not exceeding further four months as the arbitrator shall by a writing under his own hands appoint. It is not in dispute that the arbitrator was appointed on 13th June, 2008. The senior counsel for the appellant has contended that arbitrator

entered into reference on 4th July, 2008; the period of six months expired on 4th November, 2008 and the further period of four months would expire on 4th March, 2009. The order aforesaid is dated 4th June, 2009. It is thus the contention of the senior counsel for the appellant that the arbitrator neither extended any time by four months neither by any order nor by the impugned order and was thus *functus officio* on the date of the making of the award. However, save for this bare averment nothing further has been contended on this important aspect.

17. The senior counsel for the respondent on enquiry in this respect contended that the 1996 Act unlike the 1940 Act does not provide for any time for making of the award. It is further argued that in the present case the parties have by their conduct extended the time for the arbitrator to make the award.

18. I had inquired from the senior counsel for the appellant whether the appellant had taken the said plea before the arbitrator. The answer is in the negative.

19. Even though the 1996 Act does not provide for any time for making of the award but under Section 28(3) the arbitral tribunal is governed by the contract between the parties. Further under Section 32 (2)(b) the proceedings before the arbitrator terminate where the parties agree on the termination of the proceedings. Also under Section 15(1)(b) the mandate of the arbitrator terminates by or pursuant to agreement of the parties.

20. In the face of the aforesaid statutory provisions, it cannot possibly be contended by the counsel for the respondent that inspite of the agreement aforesaid, the mandate of the arbitrator did not

terminate. Even though clause 66 of the Agreement between the parties relied upon by the appellant in this regard does not expressly provide that the mandate of the arbitrator shall terminate or the arbitration proceedings shall stand terminated on the expiry of six months or further time of four months but that is the only logical meaning of the said provision.

21. However, that is not end of the matter. The arbitration agreement as defined in Section 7(4)(c) includes an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. In the present case the petitioner, on the basis of the existence and continuation of the arbitration proceedings, proceeded with its application under Section 17 of the Act before the arbitrator and now cannot be permitted to contend that the arbitrator was *functus officio*. The petitioner cannot sail in two boats or indulge in wager, i.e., in the event of a favourable order on its application under Section 17, enjoy the protection thereof and upon losing in the said application contend that the arbitrator had become *functus officio*.

22. Further if a party contends that a mandate of the arbitrator has come to an end, it is required to raise the said controversy and if the said controversy remains, to approach the court in this regard under Section 14 of the Act. The petitioner has not done anything of this nature. The present petition is also not under section 14 but an appeal under Section 37 of the Act. An appeal under Section 37 lies only against an order granting or refusing the interim measures under Section 17; such an order assumes the subsistence of the arbitration proceedings at the time of making of the order; if the contention sought to be pressed by the petitioner is that there are no arbitration proceedings, no question of appeal against the said order

arises. Thus I find that parties by agreement express and/or implied had extended the arbitration agreement beyond the term provided in clause 66 of the earlier agreement between the parties.

23. I have had occasion to deal with such a clause also in **Surender Pal Singh Vs. Hindustan Petroleum Corp. Ltd.** MANU/DE/0929/2009. I find that even when the mandate of the arbitrator and/or the arbitration proceedings terminates in accordance with such an agreement between the parties, under Section 15(2) of the Act a substitute arbitrator is to be appointed, according to the rules that were applicable to the appointment of the arbitrator being replaced. That being the position, the expiry of the time aforesaid loses its significance inasmuch as the only impact thereof is of the appointing authority of the respondent again appointing the arbitrator. Considering that the arbitration proceedings were/are underway before the arbitrator already appointed, in all likelihood the same arbitrator would have been appointed again. Thus, no merits are found in the said ground also.

24. The senior counsel for the appellant has in conclusion also made some other arguments with respect to the arbitrator not giving dates and having decided the application without taking any evidence of the parties. It has further been contended that Section 17 is a benovelent provision and the respondent is the state and ought to act fairly and the arbitrator being an officer of the respondent is deliberately delaying the proceedings. However, the said contentions are beyond the appeal under Section 37 of the Act. The appeal is consequently dismissed. As noticed above, the appellant insisted upon reading the earlier orders inspite of being informed that the same are of no consequence and which had

resulted in the appellant being informed that it will be burdened with heavy costs for taking up the time of the court; though at that time I was inclined to award heavy costs, the appeal is dismissed with minimal costs of Rs 35,000/- payable by the appellant to the Delhi Legal Services Authority. The respondent to ensure compliance as to payment of costs by the appellant, during the course of arbitration proceedings.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**19th August, 2009
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