

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Civil Revision No.5150 of 2018 (O&M)
Date of Decision:29.08.2018**

**Mahalaxmi Filling Station through Prop. Suman Lala
.....Petitioner**

Vs

**Mahinder Singh
....Respondent**

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. Sanjiv Gupta, Advocate
for the petitioner.

Mr. Vinod S. Bhardwaj, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Petitioner has challenged the order dated 17.07.2018 passed by the Addl. District Judge, Karnal vide which application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred to as 'the Act') for interim preservation and protection of Mahalaxmi Filling Station was dismissed.

[2]. At the very outset, the objection raised by learned counsel for the caveator/respondent with regard to maintainability of the revision petition is sought to be met with

reference to *M/s Archcon and others vs. M/s Sewda Construction Co. and others, 2005 AIR (Gauhati), 58;*
Conros Steels Pvt. Ltd. vs. Lu Qin (Hong Kong) Co. Ltd. and others, 2012(24) R.C.R. (Civil) 79 Bombay DB; and
Somasundaram and another vs. Anguparameswari Textiles Pvt. Ltd., 2008(21) R.C.R. (Civil) 790 Madras.

[3]. In view of aforesaid, I deem it appropriate to decide this case on merits.

[4]. Brief facts of the case are that the petitioner was granted Letter of Intent for selling petroleum products by the Bharat Petroleum Corporation Ltd. (for short 'the BPCL') and was authorised to operate Rural HSD Retail Outlet Dealership. Petitioner was granted licence in the year 2005. It was agreed that the respondent would provide his land for installation of the filling station and a separate lease agreement was executed between the BPCL and the respondent for a period of 30 years. Conditions No.4 and 5 of the Letter of Intent were to the following effect:-

“4. You shall not induct any partner(s) in case of individual(s) nor make any changes in the constitution of the partners, as existing at the time of application and shall give an undertaking to this effect.

5. It will always be a basic condition for the award of

Rural retail outlet dealership that you shall operate the dealership personally full time and you will give us a written undertaking to this effect and shall not assign or part with the same to any other person(s)."

[5]. Lease agreement was executed on 17.04.2017 between the BPCL and respondent, but the same was made enforceable w.e.f. 01.04.2017. Rate of rent was fixed as Rs.9000/- per month with enhancement of 15% after every five years.

[6]. It was alleged that the respondent was running a firm in the name and style of Swaraj Fertilizers and was indebted to the petitioner for an amount of Rs.4,35,340/- and another amount of Rs.20,30,051/- which was spent by the petitioner at the instance of respondent on the assurance that the respondent will compensate later on to the petitioner, but the respondent did not indemnify the petitioner. After installation of filling station, commercial activities were started. It was further alleged by the petitioner that she herself was maintaining the affairs of the filling station and the respondent became familiar with the business. After being induced by the respondent for making investment in the business, petitioner agreed to receive an amount of Rs.10,25,000/- as unsecured loan. After paying the aforesaid amount, respondent started coercing the petitioner,

therefore, agreement dated 10.04.2017 executed between the parties was the result of said inducement and coercion. Respondent got registered the said agreement with the Sub-Registrar, Karnal. There was no intention on the part of the petitioner to allow the respondent to enter into the business of the firm and to entitle the respondent to share the business. There was no such partnership deed showing the respondent to be partner.

[7]. There was an arbitration clause in para no.22 of the agreement. For ready reference, the agreement dated 10.04.2017 was typed as partnership agreement, but word 'partnership' was scratched on the original. On the stamp paper purchased on 10.04.2017 words 'partnership deed' were duly mentioned. The recital of the aforesaid agreement would show that the respondent was shown as second party. The first party has got letter of intent from the BPCL. The second party was approached by the first party to join her in the partnership with a view to carry out and start HSD Retail Outlet Dealership. Relevant terms and conditions of the agreement in terms of paras no.2, 5, 6, 9, 10, 14 and 22 were to the following effect:-

“2. *The partnership shall be deemed to have commenced from the 04th Day of April, 2017 till the continuation of the HSD Outlet in the name of first party. If any of the party damaged the business*

(Licence) or back out from this deed in that eventuality the both party is entitled for a sum of Rs.50,00,000/- as penalty. If above said HSD outlet cancelled due to some technical/unavoidable reason in that eventuality no body bound to pay the penalty to each other.

5. *The Parties have contributed towards the initial capital of the firm a sum of Rs.10,00,000/- in equal shares. I required additional amount then the parties charged Interest at the rate of 18 per cent per annum on the said amount.*
6. *The net profits and losses of the firm will be shared by the partners hereto in equal shares. Net profit will mean the gross profits earned in such years less the expenses of the management of the business of the firm. The outgoings in respect of the salaries and wages of the staff. Commission paid to others & Electricity charges. Interest payable on the amounts advanced by the Party and by other creditors if any and all other expenses incurred in connection with the business and allowable as deduction under the Income Tax Act.*
9. *The party of the Second Party will act as the Manager Partner and shall utilize all his work knowledge for the said purpose he will be entitled to salary at the rate of Rupees 10,000/- per month, in addition to his share in the profits.*
10. *The Party of the Second Part will look after the financial side of the work as well as look after the*

administration of the Firm and its said business.

14. *At the tangible and intangible assets of the Firm including the goodwill, stock-in-trade, benefit of business and permits, benefits of contacts entered etc. will belong to the parties in equal shares but subject to the debts and liabilities of the Firm and the property of the Firm shall be used by the parties exclusively for the business of the firm.*
22. *If any dispute or difference shall arise between the parties hereto touching the business of the firm or interpretation of any provision hereof or otherwise, howsoever relating to the Firm and its business, the same shall be referred to arbitration of a common arbitrator. If agreed upon, failing which to two arbitrators one to be appointed by each party to the dispute and the arbitration shall be governed by the Arbitration & Conciliation Act, 1996.*

[8]. The prayer clause No.(i) in terms of application under Section 9 of the Act filed by the petitioner was to the following effect:-

- “(i) *Pass an Interim order under Section 9 of Arbitration and Conciliation Act 1996 for the Preservation of Mahalaxmi Filling Station at Village Sirsi on Karnal to Kaithal Road of District Karnal, Haryana by unlawful acts of Respondent till determination of arbitral proceeding which is subject-matter of the arbitration agreement.*”

[9]. In reply to the application filed by the respondent, reference of Rs.10 lakhs towards initial capital of the firm was highlighted as per clause 5 of the partnership agreement. The payment of the said amount is an admitted fact between the parties. As per para no.2 of the agreement, the partnership was to commence from 04.04.2017.

[10]. Learned counsel for the petitioner submitted that the agreement dated 10.04.2017 cannot be termed as partnership deed as the same was not registered with the Registrar of the Firms. The enforcement of said agreement would give rise to independent cause of action to the respondent as the same was the result of coercion and undue influence.

[11]. Learned counsel further submitted that as per condition No.4 of the Letter of Intent, the petitioner was not entitled to induct any partner(s) in the business, therefore, petitioner never intended to enter into any partnership agreement with the respondent. Learned counsel by referring to **Firm Ashok Traders and anr. etc., vs. Gurumukh Das Saluja and others etc., 2004(1) R.C.R. (Civil) 725** contended that in the application under Section 9 of the Act filed before the commencement of the arbitral proceedings there has to be manifest intention on the part of the applicant to take recourse to arbitral proceedings. The order passed by the Court shall fall

within the meaning of expression 'an interim measure of protection'.

[12]. Learned counsel also by relying upon **M/s Sundaram Finance Ltd. vs. M/s NEPC India Ltd., 1999(1) R.C.R. (Civil) 580** contended that the power and jurisdiction of the Court is to grant injunction to preserve and protect the subject property of the dispute even before start of the arbitral proceedings. Pendency of proceedings before the arbitral Tribunal is not the condition precedent.

[13]. On the other hand, learned counsel for the respondent/caveator opposed the arguments of learned counsel for the petitioner and contended that as per recital of the agreement dated 10.04.2017, sharing of business was narrated in terms of ways and means to operate the outlet. An amount of Rs.10,25,000/- was accepted towards initial capital of the firm in contribution towards the business prospects. Respondent was deputed as Manager and he took control of the business and is transacting the business on the spot.

[14]. Learned counsel also by relying upon **M/s Sundaram Finance Ltd.'s** case (supra) contended that for maintenance of application under Section 9 of the Act, existence of arbitration agreement and dispute thereof are necessary. It is implicit that

the party accepts a final and binding arbitration agreement between them. By referring to **Tata Finance Limited vs. Pragati Paribahan and others, 2000 AIR (Calcutta) 241,** learned counsel further contended that Section 9 of the Act cannot be invoked where manifest intention on the part of intending party to take recourse to the arbitration proceedings does not exist.

[15]. At the last, learned counsel by relying upon **S.S. Gupta and sons (HUF) vs. Ramesh Kumar Gupta and others, 2011(1) R.C.R. (Civil) 206** contended that in case of partnership firm, keeping the other partner away from the affairs of the business is most inequitable, particularly when agreement dated 10.04.2017 has been admitted by the petitioner though in different context.

[16]. I have considered the submissions made by learned counsel for the parties.

[17]. As per the stand taken by the petitioner existence of agreement dated 10.04.2017 was not in dispute, however the same was alleged to be the result of coercion. As per condition No.4 of the Letter of Intent, the petitioner was not supposed to induct any partner(s) in the business. It appears that the petitioner despite condition No.4 of Letter of Intent, entered into

some business understanding with the respondent and accepted an amount of Rs.10,25,000/-. Though the agreement dated 10.04.2017 was claimed to be the result of coercion, but in order to maintain application under Section 9 of the Act, existence of agreement has to be admitted with reference to arbitration clause. For filing an application under Section 9 of the Act, there has to be manifest intention on the part of the petitioner to take recourse to arbitral proceedings. For taking recourse to the arbitral proceedings, there has to be an admitted arbitration agreement having arbitration clause. The ratio of judgments cited by the learned counsel for the petitioner i.e. **Firm Ashok Traders and anr. etc.'s** case (supra) is to the same effect.

[18]. Perusal of the record would show that possibly the petitioner cannot invoke the arbitration clause under the threat of clause no.4 of the Letter of Intent. The manifest intention to take recourse to the arbitral proceedings at the instance of the petitioner cannot be inferred on the basis of aforesaid disability of the petitioner. If a party does not have manifest intention to take recourse to the arbitration proceedings, relief under Section 9 of the Act cannot be granted. The relief granted thereunder cannot be presumed to be an infinity when the subject matter of arbitration is not going to be invoked by the

intending party.

[19]. In my considered opinion, at this stage it can be observed that the petitioner has no such manifest intention to get the matter referred to the Arbitrator as per clause No.22 of the agreement. For invoking Section 9 of the Act, the petitioner has to admit the existence of arbitration agreement.

[20]. In view of facts and circumstances of the case, I do not wish to interfere in the impugned order as no error of jurisdiction is found in the same. This revision petition is accordingly dismissed.

August 29, 2018

Atik

Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No