

Items 2. 14-01-2025

sg Ct. 37

**In The High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side
Commercial Division**

**FMA 1492 of 2024
CAN 1 of 2024
CAN 2 of 2025**

**Bharat Petroleum Corporation Ltd.
Versus
Anubhav Ghosh & Anr.**

Mr. Sanjib Kumar Mal
Mr. Bimalendu Das
Ms. Shomrita Das
...for the appellant
Mr. Abhrajit Mitra, Sr. Adv.
Mr. Ritzu Ghosal, Sr. Adv.
Mr. Sayantan Chatterjee
Mr. Anirban Ghosh
...for the respondents

1. The appeal is arising out of an order dated 22nd July, 2024 passed by the learned Judge, Commercial Court at Alipore in an application under Section 9 of the Arbitration and Conciliation Act, 1996.

2. In the said proceeding, the present appellant was restrained from giving effect to its notice dated 22nd December, 2023. The leaned Commercial Court has also refused to vacate the ad interim order passed earlier.

3. Briefly stated, the BPCL granted a licence to a partnership firm Ambika service Station which on reconstitution has the following persons as partners:

- i. Samir Kumar Ghosh;
- ii. Debasis Kumar Ghosh;
- iii. Sandipan Kumar Ghosh, and;

iv. Munmun Ghosh.

4. The present respondents alleged that in or about 8th November, 2015 a fresh deed of partnership was executed by which the aforesaid partners inducted the opposite parties as partners and after substantial investments has been made by the opposite parties, the aforesaid partners had refused to execute a formal deed of partnership, following which, a suit for specific performance was filed by the opposite parties in the year 2023 being Title Suit No. 8 of 2023. The opposite parties claimed that they have acquired 96% share in the said partnership and are in control and management of the said partnership firm.

5. The disputes arose between BPCL and the opposite parties herein. BPCL has referred to the original licence agreement dated 29th December, 2017 to show that the original partners had no right to assign the licence or part with the benefit thereof or grant any sub licence to any person, firm or company and not to change the constitution of the licensees firm nor to dissolve the partnership nor admit new member as partner nor allow any partner to withdraw from the partnership without obtaining the previous consent in writing of the company. BPCL has contended that BPCL was not aware of any reconstitution as alleged by the opposite parties and after BPCL became aware of such reconstitution consequent upon filing of the suit BPCL is contemplating to terminate the said agreement.

6. The opposite parties herein filed a writ petition being WPA 471 of 2023 being aggrieved by an order of BPCL dated 12th December, 2022 where reconstitution of the opposite

parties dated 20th June, 2022 was considered, in terms of an order of a Single Judge dated 25th August, 2022 in WPA 13328 of 2022. The opposite parties in the said writ petition claimed to be family members of the existing partners of the Ambika Service Station in whose favour the licence was granted. The said writ petition was disposed of, inter alia, with the following observation:

“Since it is evident that the disputes are between the petitioners and the private respondents, the BPCL cannot be put to task for bringing on record its lack of knowledge on the internal agreement, if any, between the petitioners and the private respondents. The impugned order cannot be faulted in any manner.”

7. In effect, the order of BPCL dated 12th December, 2022 was upheld.

8. In an Intra Court appeal, the Hon’ble Division Bench presided over by the Hon’ble the Chief Justice, disposed of the appeal with the following observations:

“The appellants case is that the partnership was reconstituted and in terms of the reconstituted partnership 96% share of the partnership firm was allotted in favour of the appellants and 4% share was allotted in favour of the private respondents and this position continued from 2015 to 2022. It is at that juncture a cheque issued by the appellants was not accepted by BPCL on the ground that they refused to recognize the appellants as licensee. It cannot be disputed that reconstitution of the firm/licensee was without prior approval of BPCL. In such factual position it is in clear violation of the guidelines notified by BPCL. Therefore, it would be well within the jurisdiction of BPCL to cancel the license itself granted to the private respondent. However, we do not wish to travel that part, as we are clear in our mind that the dispute is essentially

private in nature between the appellants and the private respondent. Therefore, in the best interest of the parties, it is upto them to resolve the dispute and then approach BPCL for the purpose of reconstitution of the partnership and if consensus is arrived at by the parties that would be beneficial to both the parties as it would be a step to save the license which has been granted in favour of the private respondent by BPCL. On the other hand, if the parties are not ad idem and they continue to fight, BPCL would cancel the license granted in favour of the private respondent. Therefore, we are of the view that earnest attempt can be made by the appellants and the private respondent to resolve their private dispute and then approach BPCL with the request for reconstitution of the partnership and till then considering the public interest involved BPCL should continue the outlet operation and for the purpose of operation we direct BPCL to open the outlet and operate the outlet by deploying their own staff till the dispute is resolved by respondents. the appellants and the private respondents.

With the aforesaid observation, the appeal and connected application stand disposed of. However, we leave it open to the parties to mediate and settle the dispute amongst themselves and in our opinion if the parties V agree to appoint one or two mediators to resolve the issue, we are confident that the matter can be resolved.

It is suggested by the learned advocates for the parties that Mr. Sakya Sen, learned Senior Advocate and Mr. Firoze Edulji, learned Advocate may be nominated as mediators. The parties are directed to approach the learned mediator to initiate mediation.”

9. BPCL claimed that they have not received any communication from the original partners or the respondents/opposite parties who claimed to be the partners with regard to any settlement between them and in deference to

the order passed by the Hon'ble Division Bench wanted to operate the retail outlet and requested Shri Anubhav Ghosh/opposite party no.1 to facilitate taking over the assets and materials belonging to BPCL and the retail outlet site for the smooth operation of the said outlet.

10. Mr. Anubhav Ghosh and Rama Ghosh in the capacity as partners of the said partnership firm being aggrieved by the said notice filed an application under Section 9 of the Arbitration and Conciliation Act in which the impugned order is passed.

11. Mr. Sanib Kumar Mal, the learned Counsel appearing for the appellant, has submitted that the order impugned is contrary to the direction passed by the Hon'ble Division Bench, presided over by the Hon'ble the Chief Justice. Although the said order was brought to the notice of the learned Judge however, by a queer reasoning the said notice was stayed by reason whereof the appellant was unable to operate the said outlet. The reasoning of the learned Commercial Court appears from paragraph 10 is reproduced herein below:

“In respect of second objection of the respondent, the petitioners have submitted that in the Order dated 24th April, 2023 the Hon'ble Court did not permit the respondent to take over the possession of the said petrol pump and neither it directed the petitioners to hand over the same to the respondent. The letter dated 26 December, 2023 was issued in violation of the specific direction of the Hon'ble High Court at Calcutta as by the said letter, the respondent called upon the petitioners to hand over all the materials at the said petrol pump. A perusal at the order dated 27 April, 2023 would show that the only direction that was passed, as and by way of a stopgap arrangement

was that the respondent should continue the outlet operation and to open the outlet and operate the same by deploying their own staff. The said order did not direct removal of the petitioners from the said petrol pump which the respondent is trying to do by way of the letter dated 26 December, 2023. The fact that the respondent also interpreted the order in such light would be corroborated from the position that from 27 April, 2023 for about a period 8 months, the respondent had not taken any step to oust the petitioners.

12. The learned Judge, however, has not gone into the locus of the present opposite parties to file the said application under the Partnership Act. Only partners of the partnership firm can refer the dispute to arbitration. As on date a suit for specific performance of an agreement for inducting the present opposite parties as partners is pending. The question arose whether the persons, who claimed that they could have been inducted as partners, could maintain an action under Section 9 of the Arbitration and Conciliation Act. In other words a prospective partner whose right is yet to be crystallized in a pending proceeding could refer the dispute of the partnership to arbitration.

13. The licence agreement only refers to the partnership firm duly constituted by the four partners mentioned above. The agreement dated 29th December, 2017 does not refer to the respondent no.1 and 2 as partners and the signatories to the said agreement is restricted to four partners who were the partners recognized by the BPCL all throughout. The suit appears to have been filed in the year 2023 based on an alleged agreement on 9th November, 2015.

14. Mr. Abhrajit Mitra, learned Senior Counsel appearing on behalf of the respondents has made an attempt to convince this Court that non-signatory to the agreement would be considered to be a party within the meaning of Section 7 of the Arbitration and Conciliation Act and may be bound by the Arbitration Agreement and in this regard, the learned Senior Counsel has referred to the decision of the Hon'ble Supreme Court in *Ajay Madhusudan Patel and Others vs. Jyotrindra S. Patel & Others* reported in *2024 SCC Online SC 2597*. Mr. Mitra has taken note of paragraphs 69, 70, 71, 78 and 80 of the said decision to argue that the application by a non-signatory to the RO outlet agreement is entitled to enforce its right under Section 9 of the Arbitration and Conciliation Act irrespective of the outcome of the suit having regard to the conduct of the parties.

15. We are, however, unable to accept the said submission. The judgment cited was with regard to a family dispute unlike the present dispute where the inter se dispute between the partners of Abmika Service Station and the opposite party nos. 1 and 2 may not have any relevance with regard to the dispute between the partnership and BPCL. The partners of Abmika have not referred any dispute to arbitration and seek any interim relief. Mr. Mitra would like to emphasize that the conduct of the parties would show that BPCL has accepted the opposite party nos. 1 and 2 as partners of Ambika. Mr. Mitra has argued that this conduct between the parties would be of relevant factor in the background of the respondent nos. 1 and 2 being alleged to be a non-signatory to the said

Distribution Agreement and the matter is to be decided with the Arbitral Tribunal by taking into consideration such conduct of the parties.

16. We have been informed that an application for appointment of an Arbitrator is pending before the learned Single Judge and the hearing of the said application was adjourned in view of the pendency of this appeal.

17. In view of the pendency of the said application, it would not be proper for us at this stage to make any observation save and except that under the Partnership Act in Section 19(2) (a) makes it clear that implied authority of the partner does not empower him to submit a dispute relating to the business of the firm to arbitration.

18. It is a *sine quo non* that for exercising any jurisdiction, the Court has to prima facie form an opinion that there is agreement binding between the parties.

19. Moreover, we find that the other persons have not been made parties in the application although on record they are the partners of Ambika Service Station. There is nothing on record to show that the persons have settled their dispute so as to enable the BPCL to take a decision in this regard. The order of the Hon'ble Division Bench has made it clear that till the opposite parties and the other persons dissolved the dispute and approach BPCL with a request for the reconstitution of the partnership firm, BPCL should continue the outlet operation and for the purpose of such operation, BPCL shall open the outlet and operate the outlet by deploying their own staff till the dispute is dissolved between the opposite parties and the

partners of said partnership firm.

20. We make it clear that since an application under Section 11 is pending, BPCL for the time being shall not operate the said outlet by any third party and shall be entitled to open outlet and operate the outlet by deploying their own staff as directed by the Hon'ble Division Bench.

21. We make it clear that the learned Single Judge deciding the application for appointment of an Arbitrator shall not be influenced by the observations made in this order as in this appeal we are only deciding whether any interim order of injunction could have been passed in favour of the respondent nos. 1 and 2.

22. Since no affidavit-in-opposition is filed, the allegations are deemed to have been denied.

23. With the aforesaid observations, the appeal and the applications are disposed of. However, there shall be no order as to costs.

24. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties, upon compliance of all requisite formalities.

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)