

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

AA no. 10/2022

Reserved on: 30.11.2022

Pronounced on: 05.12.2022

M/S Doon Caterers Dehradun Uttrakhand

..... Applicant/Petitioner(s)

Through: Mr. Sunil Sethi, Sr. Advocate with
Mr. Navyug Sethi, Advocate

Vs

UOI and others

..... Respondent(s)

Through: Mr. Vishal Sharma, DSGI

Coram: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as "the Act"*] for grant of interim protections/directions, which are reproduced as under:-

(a) Directing the respondents to maintain status quo with respect to the Refreshment Room at SDVK Station, Katra held by the petitioner during the pendency of arbitral proceedings.

(b) Restraining the respondents from levying/imposing and recovering undue license fee from the petitioner during the pendency of the arbitral proceedings.

(c) Restraining the respondents from evicting the petitioner by arbitrarily terminating the license agreement of the petitioner in contrast to the similarly situated persons during the pendency of the arbitral proceedings.

(d) Restraining the respondents from creating any third party interest over the Refreshment room at SVDK Railway Station, Katra by any means.

ARUGMENTS ON BEHALF OF THE PETITIONER

2. It is submitted that the petitioner is one of the leading and renowned caterers of the country. The present petition is being filed by Mr. Naveen Tandon, who is the authorized signatory of the petitioner.

3. Mr. Sunil Sethi, learned Senior counsel appearing for the petitioner has argued that the petitioner competed in the process of tendering in reference to bid 23-AC/0/XV-2-VII dated 26.06.2014 for license for provision of catering services at major static unit refreshment room at Shri Mata Vaishno Devi Katra Station and on being found successful, the contract to operate, manage and supply catering services at Shri Mata Vaishno Devi Railway Station, Katra has been awarded to the petitioner for a period of five years from the date of commencement of operations i.e. 01.04.2017 and a Master License Agreement was executed with the petitioner by the respondents on 25th May 2017. It is pertinent to mention that the Master License Agreement also included a force majeure clause.

4. It is the further case of the petitioner that in furtherance of the award of contract and execution of Master License Agreement dated 25th of May, 2017 commenced working in the refreshment room with effect from 01.04.2017.

5. It is submitted by the learned Senior counsel for the petitioner that in the beginning of March, 2020, the petitioner deposited license fee to the tune of Rs. 54,55,555/- for the entire year of 2020 (April, 2020 to March, 2021). However, since March, 2020 the entire India engulfed with the deadly Corona

Virus and the same was declared as pandemic by the World Health Organization. Keeping in view the extreme highly infectious and fatal nature of the virus, the entire country was completely put under severe lockdown. Entire activities throughout the country including in the Railway sector came to be shut down completely. The Railway traffic throughout the country was also completely suspended during this period as a result of which the catering facilities at the railway stations were also completely closed. The impact of the COVID-19 pandemic also hit the pilgrimage to Shri Mata Vaishno Devi shrine as the pilgrimage was completely suspended/closed. The refreshment room being operated by the petitioner at Shri Mata Vaishno Devi Katra Railway Station also came to be completely shut down. Various restrictions were imposed on all the sectors including the Railway sector which was completely paralyzed. The condition of the country was so bad that many trains stranded at railway stations throughout the country were being used as relief camps and SVDK was one such railway station.

6. The case set up by the petitioner is that the static catering units were also closed and in addition to that strict restrictions were imposed upon movement of the passengers by the Government of India and the Government of U.T. of Jammu and Kashmir through Ministry of Health and Family Welfare. Keeping in view the COVID 19 pandemic, Ministry of Railways in consultation with Ministry of Health & Family Welfare and Ministry of Home Affairs, Government of India, issued guidelines dated 20.05.2020 w.e.f. 1st of June, 2020 whereunder *inter alia* restrictions were imposed, whereby, regular passenger services including passenger and sub-urban services were cancelled

and unreserved coaches in the train were also stopped. Only the passengers with confirmed tickets were allowed to commute and even enter into the Railway stations; no family or friends were allowed at the railway station.

7. The further case of the petitioner is that incoming passengers were not allowed to stay inside the railway stations and were directed to follow the path directly outside railway station premises without even touching anything to contain the spread of corona virus. The outgoing passengers were directed to report only 90 minutes in advance and not prior to that for the purpose of thermal screening before boarding and only asymptomatic passengers were allowed to enter/board the trains.

8. It is submitted that the passengers were not allowed to remove the masks. Even all the establishments including the refreshment rooms at railway stations were not allowed to run with full capacity. As per the guidelines issued, the District Magistrates were directed to ensure full compliance and any defaulters were directed to be dealt under the provisions of Indian Penal Code and Disaster Management Act. In addition to this, joint teams were directed to submit daily reports regarding the activities at the Railway stations. Hence even after partial resumption of railway services, there was no footfall at the refreshment rooms and on the contrary, the petitioner remained incurring huge expenses/expenditure in order to maintain the refreshment room and also to comply with the guidelines with respect to sanitization and ensuring COVID-19 appropriate behavior without there being any customers.

9. It has also been contended by the learned counsel for the petitioner that the respondents issued communication dated 21.05.2020 whereby it was

decided to invoke Force Majeure clause for the lockdown period due to COVID-19 in respect of static catering and vending units on all railway stations. In this letter dated 21.05.2020, it has been made clear that actual date of opening of stalls depending upon passenger traffic in the respective railway stations has to be considered while determining the period of non-operation on account of lockdown and treating the period as *Dies-non* and contract period was directed to be extended accordingly, irrespective of the fact whether the agreements incorporated force majeure clause or not.

10. It is submitted by the petitioner that the Indian Railway Catering and Tourism Corporation Limited issued clarification dated 28.10.2021 wherein, amongst others, it has been clarified that tenure of the contracts for all units will be extended by the same number of days as were closed due to force majeure and advised zones not to consider such units for floating tenders.

11. The contention raised by the petitioner is that the similarly situated persons, who were allotted tender on the same date as petitioner in RR/Saharanpur, have already received extension for a period of almost two years.

12. On the same analogy, the petitioner also approached the respondents for grant of extension of Master license Agreement and the said request of the petitioner was considered by the respondents and vide letter dated 21.03.2022, the contract period has been extended for mere period of 68 days i.e. from 01.04.2022 to 07.06.2022 and then further extension was granted vide letter dated 26.05.2022 upto 30.11.2022.

13. It is submitted that the petitioner was directed to deposit license fee to the tune of Rs.21,14,696/-. To the utter surprise of the petitioner, the respondent no. 4 arbitrarily and without any notice to the petitioner deducted license fee to the tune of 94% for the period between 01.07.2021 to 30.09.2021 and to the tune of 82% for the period between 01.10.2021 to 31.12.2021 in furtherance of letter dated 14.06.2022 and, thereafter, demanded full license fee from the petitioner for the period between 01.01.2022 to 30.11.2022.

14. It has been pointed out by learned senior counsel for the petitioner that the Food unit at Saharanpur Railway Station has been given extension uptill 16.01.2023 but the petitioner has been meted out with discrimination by the respondents as its license has not been extended for the similar period but has been restricted till 30.11.2022.

15. The main plank of argument put-forth by learned senior counsel for the petitioner is that the similarly situated persons have been given due consideration and their licenses have been extended suitably for sufficient period and charged 20% of the license fee, however, the petitioner has been arbitrarily singled out and meted out discrimination by the respondents.

16. It is further submitted that the petitioner has finally served the respondents with a letter/notice dated 30.10.2022 invoking Arbitration clause as provided in Clause 19 of the Master License Agreement seeking settlement of the dispute so arisen between the petitioner and the respondents. The petitioner, with a view to base his claim, has referred to Article 19 (Dispute Resolution Clause) of Master License Agreement dated 25.05.2017 and has projected that the petitioner has already shown his intention of resolution of

dispute by legal recourse of arbitration as defined in Article 19 of the Master License Agreement dated 25.05.2017 and the *inter-se* dispute raised by the respondents is likely to be decided by thorough arbitration process, but in the meantime, the petitioner projected that he has reasonable apprehension that the respondents may illegally evict the petitioner from the aforesaid Refreshment Room at SVDK Railway Station or issue fresh tender notice for the same Refreshment Room thereby creating third party interest.

17. In the aforesaid peculiar facts and circumstances, the petitioner has approached this Court invoking Section 9 of the Arbitration and Conciliation Act, 1996 for an interim measure of protection and hence, the instant petition.

ARGUMENTS ON BEHALF OF THE RESPONDENTS

18. *Per contra*, the reply has been filed by the respondents in which a specific preliminary objection has been raised with regard to maintainability of the instant petition as no dispute, controversy or claim of any kind or nature arising under or in connection with the agreement as covered by the arbitration clause exists or pointed out by the petitioner which is *sine qua non* for exercise of jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996.

19. Mr. Vishal Sharma, learned DSGI appearing on behalf of official respondents, has submitted that the case projected by the petitioner in the present petition has no bearing as to breach of any term or condition of the contract agreement contained in the arbitration clause, as such, the petition is liable to be dismissed summarily.

20. The respondents have further pointed out that the relief in the license has been granted and the license fee had been charged @ 0.62% for the period from 01.06.2020 to 31.12.2020, which was communicated to the petitioner.

21. The further stand of the respondents is that since all the catering units were closed from 25.03.2020 to 31.05.2020 due to non-operation of trains on account of lock down due to Covid-19 pandemic, therefore, the said period of 68 days is treated as “*dies-non*” and contract was extended, accordingly.

22. It has also been pleaded by the respondents that the contract was extended for the aforesaid period from 01.04.2022 to 07.06.2022, which was communicated to the petitioner. It was specifically mentioned in the aforesaid communication that the petitioner was directed to deposit the license fee + GST amount for the extended period well in time as per the contract agreement.

23. It is further submitted by the respondents that pursuant to the joint report called from SS/SVDK & CMI/JAT regarding closure of SVDK Station for 249 days from 25.03.2020 to 28.11.2020, the train operation was suspended from 25.03.2020 to 23.11.2020 (244 days).

24. The further stand of the respondents is that pursuant to the report of SS/SVDK, the contract was again extended for a period of 176 days with effect from 08.06.2022 in addition to 68 days i.e. total of 244 days, which was to expire on 30.11.2022 in which the petitioner was again requested to deposit the license fee for the extended period well in time.

25. It is the specific stand of the respondents that as per clause 3 of the Master License Agreement, the tenure of the agreement was for five years from the date of its commencement.

26. The respondents have taken a specific stand that the relief has already been provided to the petitioner taking into consideration volume of the passenger traffic in respect of individual stations/platforms. Accordingly, the relief has already been granted to the petitioner who was asked to deposit the license fee.

27. The counsel for the respondents submitted that the license fee was charged at the rate of 94% and 82% on the actual footfall of the SDVK Station. The petitioner has been apprised that the normal license fee has per the contract agreement will be charged/levied with effect from 01.04.2022. Accordingly, as per the stand of the respondents, an amount of Rs. 21,41,696/- was long outstanding against the petitioner and consequently petitioner was directed to deposit the outstanding fee amounting to Rs. 21,14,696/- excluding all taxes and late fee for the period upto 30.11.2022.

28. The specific stand of the respondents is that the petitioner has not deposited the said outstanding as on date in spite of the fact that the petitioner was issued many reminders in this regard and latest communication has also been issued on 12.11.2022.

29. It is further averred by the respondents in the reply affidavit that the M/S Katra Mata Vaishno Devi Hotels & Restaurants Pvt. Ltd. is operating “Jan Ahaar” at Jammu Tawi as well as “IRCTC Guest House” at Shri Mata Vaishno

Devi Katra Railway Station. Both the catering units are major static units and under the control of Indian Railway Catering & Tourism Corporation (IRCTC), which has a separate policy for governing these units and, hence, railway rules do not apply to these catering units.

30. The further stand of the respondents is that the licensee/petitioner herein has been asked to execute the tri-partite between the Divisional Office, IRCTC and the petitioner for handing over the said contract to IRCTC vide letter dated 27.07.2022 followed by 01.09.2022 and 28.09.2022.

31. A specific stand has been taken by the respondents that the said contract was not transferred to the IRCTC due to non-payment of the outstanding dues amounting to Rs. 21,14,696/-.

32. Learned counsel appearing on behalf of the respondents further submits that the relief in the license fee has already been provided to the petitioner on footfall basis in accordance with the policy which is not open to judicial review.

33. A specific stand has been taken by the respondents in the reply affidavit that the contract of refreshment room at SVDK Railway Station was extended up to 30.11.2022 only and the petitioner was under an obligation to pay the license fee for the extended period.

34. The further stand of the respondents is that the extension of the contract was allowed only on the payment of the license fee. The petitioner has accepted the extension but failed to pay the agreed license fee which clearly

implies the bad intention of the petitioner as such, the petitioner is not entitled to any relief.

LEGAL ANALYSIS

35. The petitioner through the medium of the present petition filed under Section 9 of the Arbitration and Conciliation Act, 1996, is seeking final relief with regard to the **extension of the contract** in spite of the fact that the petitioner **has failed to pay the license** fee which was agreed by the petitioner while seeking the extension of the license agreement which was extended initially for a period of 176 days with effect from 08.06.2022 in addition to 68 days i.e. total of 244 days, which expired on 30.11.2022.

36. From the perusal of the record, it is apparent that while extending the period of the contract, the petitioner was time and again reminded to deposit the license fee + GST amount for the extended period well in time as per the executed contract agreement but the petitioner failed to deposit the license fee and instead has approached this Court through the medium of the present petition filed under Section 9 of the **Act seeking waiver of the license fee** and **also extension in the agreement**, which has **expired on 31.11.2022**.

37. It is settled preposition of law that the proceedings of Section 9 of the Act is by way of an interim measure and are not meant for enforcement of the conditions of the contract as it would be done only when the rights of the parties are finally adjudged or crystallized by the arbitrator. Section 9 proceedings which are for interim measures cannot be converted into the proceedings where a party may seek indirectly a final relief but nature of the

conditions incorporated in the terms and conditions of the agreement, its scope and merit in-law and its applicability, are all questions to be examined by the arbitrator in accordance with law. The question of determinability or otherwise of the agreement in respect of which the parties will advert to the detailed submissions is also a merit aspect and **will be an arbitrable issue**. While dealing with the application under Section 9 of the Act, whereby the petitioner has prayed for interim measure, such issues which are essentially to be decided by the arbitrator, are not to be adjudicated while considering the application under Section 9 of the Arbitration Act, 2916. These are the main questions/issues which can be considered by the arbitrator, when the parties go before the arbitrator for decision over the said dispute, if any, and the said situation has not yet arrived in the present case. For facility of the reference, Section 9 of the Act is reproduced as under:-

“Section 9.....(1) 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 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.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

38. The petitioner by no stretch of imagination **can seek the main relief of extension of the agreement by seeking waiver of the license fee by way of interim measure by resorting to the petition under Section 9 of the Act,** which falls within the ambit of the final relief and can be adjudicated finally by the arbitrator or by the Court in appropriate proceedings.

39. I am fortified by the view laid down by the **“Gujarat High Court in case tilted as “Kanhai Foods Ltd v. A and HP Bakes” AIR 2022 Gujarat 120,** which is reproduced as under:-

“6.3 The contentions raised by the appellant with regard to the enforcement of conditions of the franchisee agreement and the applications of the parties arising therefrom, are the issues to be decided and resolved in the arbitration proceedings. These issues are in the nature of arbitrable disputes, to be tried and decided by the Arbitral Tribunal. Proceedings of section 9 are not meant for enforcement of conditions of the contract as it could be done only when the rights of the parties are finally adjudged or crystallised by the Arbitrator. Section 9 proceedings which are for interim measures, cannot be converted into the proceedings where a party may seek indirectly the final relief.

6.4 The nature of conditions incorporated in the franchisee agreement, its scope and import in law and its applicability, are all questions to be examined by the arbitrator. The question of determinability or otherwise of the franchisee agreement in

respect of which the parties have adverted to the detailed submissions, is also a merit aspect and an arbitrable issue. While dealing with the application under section 9 of the Arbitration Act, 2016, whereby the appellant has prayed for interim measures, such issues which are essentially to be decided by the Arbitrator, are not to be weighed for their merits by this court. They are the main questions which may be considered by the Arbitrator when the parties go before the Arbitral Tribunal for decision on their disputes.”

40. It is now well settled that powers under Section 9 of the Act are required to be exercised on the lines of recognized principles to exercise general powers to grant interim injunction under order XXXIX of the Code of Civil Procedure as observed by the Hon'ble Supreme Court in **“M/s Arvind Constructions Co. Pvt Ltd v. M/s Kalinga Mining Corporation & ors”** (2007) 6 SCC 798. Therefore, the celebrated principles for grant of interim injunctions, namely, that **prima facie case**, **balance of convenience** and **irreparable injury** are relevant considerations in respect of passing of orders for interim measure under Section 9 of the Act.

41. Interim falls within the realm of equitable remedy, so would be the consideration in granting interim measures under Section 9 of the Act. It is **trite principle that interim injunction of the nature amounting to granting of main relief could not be granted.**

42. The petitioner by way of camouflage has come to this Court by invoking the powers under Section 9 of the Act for seeking final relief to the extent of restricting the respondents from levying/imposing and recovering license fee from the petitioner and also seeking extension of the license agreement, which has expired on 30.11.2022 with a further direction against the respondents to create any third party interest over the refreshment room at

SVDK Railway Station, Katra, which falls within the **realm of final relief and cannot be granted under Section 9 of the Act.** Admittedly, the term of the license stood terminated, the petitioner by no stretch of imagination can continue in the premises after the termination of the license. The question whether the termination of license in default of payment of the license fee was right or wrong, is a subject matter which can be determined either by way of the arbitral proceedings which are yet to commence in the present case or by constitutional Court in appropriate proceedings. The only remedy which is available to the petitioner on account of termination of license would be by way of damages or otherwise.

43. The petitioner in the present petition has claimed parity with similarly situated persons and has sought waiver of the license fee or the issues which are subject matter of the arbitral proceedings and this Court, at this stage, cannot enter into this question. The consequences of such determination or relevant factors would ultimately judge/govern, if the relief claimed by the petitioner can be granted to him or not. The granting of the relief in the present petition to the petitioner under Section 9 of the Act would mean allowing him to run the Refreshment Room at SVDK Railway Station in the license premises without a license.

44. This Court while exercising the powers under Section 9 of the Act cannot pass an interim order by directing **specific performance of the contract, the breach of which is alleged by the respondents,** as the petitioner has failed to pay the license fee in spite of various reminders from time to time. The interim relief under Section 9 of the Act can in no way be

granted for specific purpose of the Contract. Thus, it is amply clear that even by way of grant of interim injunction, the Court cannot **restore an agreement which already stands terminated due to failure on the part of the petitioner to pay the license fee as agreed mutually while seeking extension.**

45. While discussing the principles to be followed by the Courts, while dealing with the matter of Section 9 of the Act, the Court has observed in the case of **“R.P.S Educational Society (Regd.) v. DDA” OMP no. 538/2008, decided on 02.09.2009.**

“5. It is apparent that in terms of license deed, the respondent had authority to cancel the license. Under Section 9 of the Arbitration and Conciliation Act, the Court can pass an interim order to preserve such subject matter of dispute which it considered was necessary to be preserved for adjudication of the dispute. However, an order under Section 9 of the Arbitration and Conciliation act cannot be passed by the Court directing specific performance of the contract, the breach of which is alleged by the petitioner. This Court in Excel Generators Pvt. Ltd. Vs. IJM Corporation Berhad OMP No. 241/09 (decided on 13th May, 2009) had observed that where a contract is terminable contract and it can be foreclosed, the interim relief under Section 9 of the Arbitration and Conciliation Act cannot be granted for specific performance of the contract. In all those cases where monetary damages can compensate the breach of contract, the Court cannot insist upon the parties that the contract should be specifically performed.”

46. **It goes without saying that a person who seeks equity must do equity.** He must also come to the Court with clean hands. **The petitioner in present case is a defaulter** and has failed to pay license fee in terms of the agreement and has no right to seek injunction against the respondents being a defaulter.

47. The doctrine of “**approve and reprobate**”, which is borrowed **from the Scott’s Law is applicable in the present case** which means that **no party can be allowed to accept and reject the same thing and, thus, one cannot blow hot and cold.**

48. The petitioner has admittedly accepted in the present case the extension of the agreement which was subject to the payment of license fee and after having accepted the agreement subject to the payment of license fee, the petitioner by no stretch of imagination, can accept one part of the agreement which is favourable to him while rejecting the other. **A person cannot be allowed to have a benefit of an agreement while questioning the same.** Insofar as the extension of the agreement is concerned, the petitioner has accepted the same gladly without raising any grouse, but when the question of payment of the license fee is concerned, petitioner failed to deposit the same in spite of various reminders and started claiming parity with others on false and flimsy grounds.

49. Therefore, the petitioner, who knew that if he objects to an agreement he will not get the benefit he wants, **cannot be allowed to do so while enjoying the fruits of the same.** Such a party either has to affirm or disaffirm the transaction. Thus, **the doctrine of “approve and reprobate” is applicable in the present case.** This principle has to be applied with **more vigor as a common law principle** and as the petitioner has actually enjoyed one part of the agreement of having extension and on near completion of the said agreement, thereafter, questions the other part. **An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the**

conduct of the parties. Having accepted the terms and conditions of the agreement unconditionally, the petitioner is estopped under law to question to same now at this belated stage, when **the petitioner by his own volition has failed to pay the license fee.**

50. Thus, the doctrine of “approbate and reprobate” is only a species of estoppel and it applies only to the conduct of parties. It is settled proposition of law that once an agreement has been accepted by the other party who has derived the benefit out of the same, subsequently, cannot challenge it on any ground whatsoever. **Law does not permit a person to both approbate and reprobate.**

51. Petitioner, with his eyes open, knowingly accepted the benefits of the contract agreement, is estopped now at this belated state to deny validity or binding effect of such agreement.

52. I am fortified by the observations of the Hon’ble Supreme Court in case titled as **“Union of India and others v. N Murugesan Etc.”, (2022) 2 SCC 25** decided on October 07, 2021. The relevant portion of the aforesaid judgment is as under:-

“P-27.2.....State of Punjab v. Dhanjit Singh Sandhu, (2014) 15 SCC 144:

22. *The doctrine of “approbate and reprobate” is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (Vide CIT v. V. MR. P. Firm Muar [CIT v. V. MR. P. Firm Muar, AIR 1965 SC 1216]).*

23. *It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra SRTC v. Balwant Regular Motor Service [Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969*

SC 329].) In *R.N. Gosain v. Yashpal Dhir* [*R.N. 13 Gosain v. Yashpal Dhir*, (1992) 4 SCC 683] this Court has observed as under: (SCC pp. 687-88, para 10)

“10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that ‘a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage’.”

25. The Supreme Court in Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd. [Rajasthan State Industrial Development and Investment Corpn. v. Diamond and Gem Development Corpn. Ltd., (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153], made an observation that a party cannot be permitted to “blow hot and cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.

27.3 Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., (2013) 5 SCC 470:

“I. Approbate and reprobate

15. A party cannot be permitted to “blow hot-blow cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience. [Vide Nagubai Ammal v. B. Shama Rao [AIR 1956 SC 593], CIT v. V. MR. P. Firm Muar [AIR 1965 SC 1216], Ramesh Chandra Sankla v. Vikram Cement [(2008) 14 SCC 58 : (2009) 1 SCC (L&S) 706 : AIR 2009 SC 713], Pradeep Oil 14 Corpn. v. MCD [(2011) 5 SCC 270 : (2011) 2 SCC (Civ) 712 : AIR 2011 SC 1869], Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd. [(2011) 10 SCC 420 : (2012) 3 SCC (Civ) 685] and V. Chandrasekaran v. Administrative Officer [(2012) 12 SCC 133 : (2013) 2 SCC (Civ) 136 : JT (2012) 9 SC 260].]

53. Since the petitioner has served notice to the respondents invoking arbitration clause as provided in clause 19 of the Master License Agreement

seeking settlement of the dispute so arisen between the petitioner and the respondents, this Court while exercising the power under Section 9 of the Arbitration and Conciliation Act, 1996, will not adjudicate the relief which has been sought in the present petition which is the final relief and can be adjudicated by the arbitrator. **Clause 19 of the Master License Agreement** is reproduced herein below for facility of ready reference:-

"19.1 In the event of any dispute, controversy or claim of any kind or nature arising under or in connection with this Agreement between the parties (hereinafter called "Disputes"), the parties shall firstly attempt to amicably resolve such Disputes through negotiations and discussions.

19.2 In the event that Disputes between the parties subsist beyond 30 days of negotiations between the Parties, then the Dispute shall be settled as per the provisions of Arbitration and Conciliation Act 1996. The dispute shall be referred to:

(a) A Sole arbitration of a Gazetted Railway Officer appointed to be the Sole arbitrator, by the General Manager of the Zonal Railway awarding the License. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference.

(b) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitrator at all.

(d) The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award.

(e) Upon every and any such reference the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.

(f) Subject as aforesaid, the Arbitration and Conciliation Act, 1996 and the rules there under and any statutory modifications

thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.

(g) The venue of the arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.

54. It is admitted case of the petitioner that since no settlement has been arrived between the parties and the respondents have neither given any extension nor have come forward to relax the license by giving equal treatment to the petitioner on the analogy of similarly situated persons, the petitioner has resorted to initiation of arbitration proceedings. By virtue of the present petition filed under Section 9 of the Act petitioner, in a way, is seeking extension of the agreement, which has since lapsed its validity on 30.11.2022, besides seeking relaxation of the terms and conditions of the license by claiming parity with similarly situated persons and all these issues fall within the realm of final relief, which ultimately, can be adjudicated by the arbitrator and not by way of the present petition filed under Section 9. **Section 9 of the Act is not the remedy to seek extension of the contract which is the final relief and is arbitrable.**

55. Petitioner by his own conduct has failed to pay the license fee in terms of the agreement while he accepted the extension and now, he cannot seek extension as a matter of right being a defaulter.

56. As per the stand of the respondents, due diligence has been exercised and all the relevant factors have been taken into consideration keeping in view the volume of the passenger traffic in respect of individual station/platforms while fixing the license fee and accordingly, the relief has been granted to the petitioner wherein the license had been charged at the rate of 0.62 % from

01.06.2020 from 31.12.2020, besides all the catering units were closed from 25.03.2020 from 31.05.2020 due to non-operation of trains on account of lockdown due to Covid-19 pandemic and said period of 68 days has already been treated as *Dies-Non* and accordingly, a conscious decision was taken by the respondents **by way of a policy decision to extend contract, accordingly.**

In the light of the aforesaid policy decision, the contract was extended for 68 days from 01.04.2022 to 07.06.2022. Pursuant thereto, the contract was again extended for a period of 176 days with effect from 08.06.2022 in addition to above mentioned 68 days period (a total of 244 days) and, hence, the validity of the contract was extended from 08.06.2022 to 30.11.2022 which was gladly and voluntarily accepted by the petitioner.

57. Accordingly, the relief was granted to the petitioner and the petitioner was asked to deposit the license fee which he failed to deposit in spite of various communications/reminders. The license fee charged by the respondents at the rate of 94% and 82% was based on actual footfall of SVDK Railway Station. The petitioner was conveyed in unequivocal terms by way of various communications that the normal license fee as per the contract agreement will be charged with effect from 01.04.2022, which was gladly and voluntarily accepted by the petitioner while seeking extension of the agreement. Having accepted the terms and conditions of the agreement, the **petitioner is estopped under law to question the deposit of the outstanding license fee amounting to Rs. 21,14,696/- up to the period of 30.11.2022 which is the outstanding amount against the petitioner as on date.** The extension was allowed on the payment of the license fee for the extended

period but the petitioner accepted the extension but failed to pay the agreed license fee which clearly implies the intention of the petitioner and in turn the petitioner has resorted to invoking the provisions of Section 9 of the Arbitration and Conciliation Act. **Thus, the policy decision, which the respondents have taken while granting extension to the petitioner, can in no way be interfered or questioned while adjudicating the petition under Section 9 of the Arbitration and Conciliation Act, 1996.**

58. The petitioner through the medium of the present petition is seeking equitable relief arising out of the contractual matters, which is not permissible under law as held by the Apex Court in case titled as **“Laresn & Toubro Ltd v. Mohan Lal Harbans Lal Bhayana” (2015) 2 SCC 461** wherein the Apex Court has held **that equity cannot alter contract between the parties.**

59. Further in **(2015) 7 SCC 728 “Joshi Technologies International Inc. v. Union of India and others”**, the Apex Court has held that the doctrine of fairness and reasonableness applies only in the exercise of statutory or administrative actions of State (and it may be added State’s instrumentalities) and not in the exercise of contractual obligations. It was further held that **issues arising out of contractual matters are to be decided on the basis of law of contract and not on the basis of administrative law.**

60. I am fortified by the view laid down in **“Rajasthan Breweries Ltd. v. The Stroh Brewery Ltd”., 2001 (1) RAJ 309 (DEL).** The relevant portion of the aforesaid judgment is reproduced 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. In **“M/s Exclusive Motors Pvt Ltd. v. ITDC”, OMP no. 183 of 2008, decided on 04.04.2008**, the Supreme Court has dealt with the issue of refusal by the respondent to renew the licence agreement and the petitioner praying for an injunction restraining respondent from taking forcible possession of the premises. The Court rejected the contention of the petitioner and refused to grant any injunction. The Court has held that in an application under Order 39 Rule 1 and 2 CPC, the Court is not expected to conduct a detailed examination on merit. It has to form a prima facie view as to whether the plaintiff's request for interim relief has some merit and held that prima facie the plaintiff at no point of time has exclusive interest in the property.

CONCLUSION

60. Thus, in the light of what has been stated here-in-above coupled with the settled legal proposition of law, the present petition filed by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 is not maintainable and liable to be dismissed for the reasons that the petitioner through the medium of the aforesaid petition is seeking final relief by way of an interim measure, which is not permissible under law. The present petition is, accordingly, *dismissed* along with all connected applications.

61. Interim direction, if any, shall also stand vacated.

Jammu
05.12.2022
Sahil Toga



(Wasim Sadiq Nargal)
Judge

Whether the order is speaking? Yes
Whether the order is reportable? Yes