CASE NO.:
Appeal (civil) 5156 of 2003

PETITIONER:
Hindustan Petroleum Corpn. Ltd.

RESPONDENT:
Vs.
M/s. Pinkcity Midway Petroleums

DATE OF JUDGMENT: 23/07/2003

BENCH:
N Santosh Hegde & B P Singh.

JUDGMENT:

J U D G M E N T

(Arising out of SLP Â© No.21154 of 2002)

SANTOSH HEGDE, J.

Heard learned counsel for the parties.

Leave granted.

This appeal is filed against the judgment of the High Court of Punjab & Haryana at Chandigarh delivered in Civil Revision No.1688 of 2002 on 1.7.2002 whereby the High Court dismissed the revision petition filed by the appellant herein against an order made by the Civil Judge, (Senior Division), Rewari, Haryana, dated 19.2.2002 dismissing the application filed by the appellant herein under Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') in a suit pending before it seeking reference of the suit pending before it to an arbitrator as contemplated under Clause 40 of the Dealership Agreement between the parties.

The facts necessary for disposal of this appeal, briefly stated, are as follows :

The appellant herein is a company carrying on the business of manufacture, sale and distribution of petroleum products which it does through dealers and distributors appointed by it. The respondent herein is one of such dealers appointed by the appellant to sell its petroleum products through a retail outlet at Jaisingpur Khera, National Highway No.8, District Rewari, Haryana. The said appointment as a dealer of the respondent is governed by a Dealership Agreement dated 26.3.1997 executed by the parties. According to the appellant, Clause 30 of the said agreement empowers it to stop the supply of its products to a dealer for a period as the appellant thinks fit, for breach of any of the conditions contained in the agreement. The appellant also states that this stoppage of supply of its product is in addition to and without prejudice to any other right or remedy available to it or others under the said agreement. The appellant also contends that under Clause 40 of the said agreement, any dispute of whatsoever nature between the parties, arising out of or in relation to the said agreement, will have to be referred to the sole arbitration of the Chairman and the Managing Director of

the Corporation who may, as per the said clause, either himself act as an arbitrator or nominate some other officer of the appellant to act as an arbitrator. It is also the case of the appellant that under Clause 20 of the said agreement, the respondent is not only obligated to comply with the terms and conditions of the said agreement but is also responsible to comply with all directions, orders, guidelines etc. issued by the appellant-Corporation on safe practices and marketing discipline. The appellant further contends that in this regard as per the marketing discipline, guidelines issued for the purpose of prevention of mal-practices, irregularities at retail outlets, the officers of the appellant are entitled to conduct inspections, make necessary report and take action thereon. This right of the Corporation, according to the appellant, is in addition to the powers of the Government of India and other statutory authorities as notified in the Notification dated 28.12.1998 issued in exercise of powers conferred under Section 3 of the Essential Commodities Act, 1955 and Order of 1998 issued thereon for purposes of checking mal-practices.

The appellant contends that while in exercise of such power of inspection on 18.11.2001 by the officers of the Corporation, it was found that there was short delivery of Motor Spirit (MS) and High Speed Diesel (HSD) in the dispensing units of the respondent. The said officers also found weights and measurement seals in the HSD dispensing units tampered with. Based on the said inspection reports, the appellant states that on 29.11.2001 a show-cause notice was issued by the appellant to the respondent in regard to short-delivery and tampering, as stated above.

In response to the above show-cause notice of the appellant, it is stated that the respondent submitted its reply and on consideration of the same, the appellant not being satisfied, suspended the sales and supply of petroleum products to the respondent's retail outlet for a period of 30 days and also levied a penalty of Rs.15,000/- for the said irregularities committed by the respondent as per the appellant's letter dated 16.1.2002.

Being aggrieved by the said stoppage of supply of appellant's product, the respondent filed Civil Suit No.18 of 2000 in the Court of the Civil Judge, (Senior Division), Rewari, praying, inter alia, for a declaration that the order dated 16.1.2002 is illegal and arbitrary. The respondent along with the plaint in the said suit also filed an application under Order 39 Rules (1) and (2) of the CPC. Learned Civil Judge was pleased to stay the suspension of supplies by the appellant to the respondent while in regard to the penalty, no stay was granted.

In reply to the plaint filed in the Civil Judge's Court, the appellant filed an application under section 8 read with Section 5 of the Act in the said suit praying for referring the dispute pending before the Civil Court to the arbitrator as per Clause 40 of the Dealership Agreement dated 26.3.1997. Along with that application, as required under Section 8 of the Act, the appellant also enclosed a copy of the agreement. In the said application, the appellant had stated that the action taken by it was in consonance with the terms and conditions of the Dealership Agreement, hence, any dispute arising out of the said action of the appellant could only be referred to the arbitrator as per Clause 40 of the said agreement.

The learned Civil Judge by his order dated 19.2.2002 dismissed the said application holding that the dispute between

the parties was not covered by the arbitration agreement. A revision filed by the appellant in the High Court, as stated above, against the order of the learned Civil Judge came to be dismissed by the High Court. It is in the above backdrop that the appellant is before us in this appeal.

Mr. Mukul Rohtagi, learned A.S.G. appearing for the appellant-Corporation, contended that the courts below have seriously erred in coming to the conclusion that the arbitration clause found in the Dealership Agreement does not apply to a dispute of the nature which was pending in the suit before the learned Civil Judge. Learned counsel contended that the courts below having come to the conclusion that there was an arbitration clause which is widely worded in the Dealership Agreement which would ordinarily cover all differences, disputes, claims etc., could not have further proceeded to examine whether such a clause would cover the dispute raised in the suit because such an exercise could only be undertaken by the arbitrator in view of Section 16 of the Act. In support of this contention of his, learned counsel placed strong reliance on a Constitution Bench judgment of this Court in Konkan Railway Corporation Ltd. & Anr. v. Rani Construction Pvt. Ltd. [2002 (2) SCC 388]. He further contended that even the finding rendered by the two courts below that there can be no arbitration clause in regard to a dispute concerning short-delivery of Motor Spirit and HSD or the tampering with the weights and measurement seals because such a dispute can only be adjudicated in a manner provided for under the Standards of Weights and Measures (Enforcement) Act, 1985 (the 1985 Act), and such dispute cannot be gone into in arbitration proceedings, is wholly erroneous and cannot be sustained. With reference to the judgment of the High Court, the learned counsel also contended that the High Court has erred in coming to the conclusion that a revision petition under Section 115 of the CPC will not be available to the appellant on the facts and circumstances of this case.

Mr. Chetan Sharma, learned senior counsel appearing for the respondent, in reply, contended that the courts below have justly come to the conclusion that the arbitration clause found in the Dealership Agreement could not have contemplated an adjudication by an arbitrator in regard to a dispute arising between the parties pertaining to short-delivery of the Motor Spirit and HSD or tampering with the seal because these are the disputes which have penal consequences, hence, could only be tried by a competent criminal court on being investigated by an authorised agency as provided in the 1985 Act. He also submitted that since the dispute ex facie showed that the same cannot be adjudicated by an arbitrator, the courts below were justified in coming to the conclusion that the application filed under Sections 5 and 8 of the 1996 Act was not maintainable. Learned counsel also supported the finding of the High Court in regard to non-maintainability of the revision petition before it.

For deciding the question whether the courts below were justified in coming to the conclusion that they could go into the question of the existence or validity of the arbitration agreement, we will have to first consider the relevant clauses found in the Dealership Agreement. Clause 40 of the said agreement reads thus :

"40. Arbitration

(a) Any dispute or difference of any nature

whatsoever any claim, cross-claim, counter-claim or set off or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the Sole Arbitration of the Chairman & Managing Director of the Corporation who may either himself act as the Arbitrator or nominate some other Officer of the Corporation to act as the Arbitrator. The dealer will not be entitled to raise any objection to any such arbitrator on the ground that the Arbitrator is an officer of the Corporation.

(b) In the event of the Arbitrator to whom the matter is originally referred being transferred, he shall be entitled to continue the arbitration proceedings notwithstanding his transfer unless the Chairman & Managing Director at the time of such transfer or at any time thereafter, designates another Officer to act as Arbitrator in his place in accordance with the terms of this agreement.

(c) In the event of the arbitrator, to whom the matter is originally referred vacating his office or being unable or refusing to act for any reason, the Chairman & Managing Director at the time of vacation of office or inability or refusal to act, shall designate another Officer to act as Arbitrator in accordance with the terms of this agreement.

(d) The Arbitrator newly nominated by the Chairman & Managing Director under Clauses (b) or (c) above shall be entitled to proceed with the reference from the point at which it was left by his predecessor.

(e) It is an express term of this contract that no person other than the Chairman & Managing Director or a Director nominated as aforesaid shall act as Arbitrator. If for any reason, Chairman & Managing Director is unable or unwilling or refuses or fails to act as an Arbitrator or nominate an Arbitrator then the matter shall be referred to the Director (Marketing) who shall appoint a Officer of the Corporation to act as an Arbitrator. It being fully understood and agreed by and between the parties hereto that the vacancy should not be supplied within the meaning of sub-section 1(b) of section 8 of the Arbitration Act, 1940 (Act No.10 of 1940).

(f) The award of the Arbitrator so appointed shall be final conclusive and binding on all parties to the agreement subject to the provisions of the Arbitration Act, 1940.

(g) The award shall be made in writing and published by the Arbitrator within 12 months after entering upon the reference or within such extended time not exceeding one further year as the parties shall agree in writing. The parties hereto shall be deemed to have irrevocably given their consent to the Arbitrator to make and publish the award within the period referred to hereinabove and shall not be entitled to raise any objection or protest thereto under any circumstances whatsoever.

(h) It is hereby expressly agreed that the powers of the Arbitrator appointed in the matter hereinabove mentioned shall include the power to make interim award/awards as the circumstances of the case may justify to appoint a receiver,

commissioner or custodian by whatever name called to take possession of the property in dispute during the pendency of the proceedings and subject to such final order as may be passed by the Arbitrator and shall also have the power to issue such further orders from time to time as he may deem fit, on an application being made to him by any of the parties to the dispute where it is apprehended that the property to which it relates is in danger of being wasted, damaged, deteriorated or parted with or rights of other parties are likely to be created thereon.

(i) The Arbitrator shall be at liberty to appoint, if necessary, any accountant or engineer or other technical person to assist him and to act on the opinion taken from such person.

(j) The Arbitrator shall be entitled to direct anyone of the parties to pay the costs of the other party in such manner and to such extent as the Arbitrator may in his discretion determine and shall also be entitled to require on or both the parties to deposit funds in such proportion to meet the Arbitrator's fees and expenses as and when called upon to do so.

(k) The venue of the Arbitration shall be as decided by the Arbitrator."

A perusal of this clause clearly shows that the parties to the Dealership Agreement had agreed to refer their dispute arising out of the agreement, of whatever nature it may be, to an arbitrator as contemplated in that agreement. Section 8 of the Act in clear terms mandates that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement to refer such parties to arbitration, the language of this Section is unambiguous.

This Court in the case of P. Anand Gajapathi Raju & Ors. v. P. V. G. Raju (Dead) & Ors. [2000 (4) SCC 539] has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration.

The question then would arise: what would be the role of the Civil Court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand ? Learned counsel for the appellant contends that it is a matter which should be raised before the arbitrator who is competent to adjudicate upon the same and the Civil Court should not embark upon an inquiry in regard to the applicability

of the arbitration clause to the facts of the case. While learned counsel appearing for the respondent contends that since the applicability of the arbitration clause to the facts of the case goes to the very root of the jurisdiction of the reference to arbitration, this question will have to be decided by the Civil Court before referring the matter to arbitration even in cases where there is admittedly an arbitration clause. The answer to this argument, in our opinion, is found in Section 16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. That apart, a Constitution Bench of this Court in Konkan Railway (supra) with reference to the power of the arbitrator under Section 16 has laid down thus :

"It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction. That the Arbitral Tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction." (emphasis supplied)

It is clear from the language of the Section, as interpreted by the Constitution Bench judgment in Konkan Railway (supra) that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the concerned Arbitral Tribunal. Therefore, in our opinion, in this case the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in Clause 40 of the Dealership Agreement and as required under Sections 8 and 16 of the Act.

In the normal circumstances, the above finding of ours should have sufficed to dispose of this appeal before us. But in view of the categoric findings given by the two courts below in regard to the non-applicability of Clause 40 of the Dealership Agreement to the facts of the case, and also in view of the arguments addressed before us, we are constrained to examine the correctness of the findings of the two courts below to avoid multiplicity of proceedings.

It was argued before the courts below as also before us that the mis-conduct, if any, pertaining to short-supply of petroleum products or tampering with the seals would be a criminal offence under the 1985 Act. Therefore, the investigation into such conduct of the dealer can only be conducted by such officers and in a manner so specified in the said Act, and it is not open to the appellant to arrogate to itself such statutory power of search and seizure by relying on some contractual terms in the Dealership Agreement. It is further argued that such disputes involving penal consequences can only be tried by a court of competent jurisdiction and cannot be decided by an arbitrator.

Having considered the above arguments addressed on behalf of the respondent as also the findings of the courts below, we are of the opinion that the same cannot be accepted because the appellant is neither exercising the power of search and seizure conferred on a competent authority under the 1985 Act nor does the Dealership Agreement contemplate the arbitrator to exercise the power of a criminal court while arbitrating on a dispute which has arisen between the contracting parties. This is clear from the terms of the Dealership Agreement. In our opinion, the findings of the courts below in this regard run counter to the clauses of the said Agreement, as could be seen from the following clauses of the Dealership Agreement which read thus :

"20. Dealer to comply with provisions of Acts, Rules & Regulations

(a) The Dealer shall at all times faithfully, promptly and diligently observe and perform and carry out at all times, all directions, orders, rules, terms and conditions as may be issued by the Corporation or its representatives from time to time on safe practices and marketing discipline and for the proper carrying on of the Dealership of the Corporation.

(b) The Dealer shall observe and comply with the provisions of Petroleum Act, 1934, Explosives Act, 1884, Weights & Measures Act, 1976, etc., and all rules and regulations made thereunder.

(c) The Dealer shall faithfully observe and perform all the obligations, duties and requirements under the licences required or obtained for running the dealership and shall promptly renew all licences from time to time.

(d) The Dealer shall be solely responsible for any breach or contravention by them, their employees, of any Acts, rules, regulations or bye-laws of the Central and/or State Governments and/or Municipal, Local and/or other authorities as may be applicable to the Retail Outlet business and the Corporation shall not be responsible in any manner for any of the liabilities arising out of non-compliance by the Dealer, their employees, their agents and sub-agents.

(e) The Corporation will obtain in its name a storage licence from the Controller of Explosives for the storage of petroleum products at the said premises and the dealer shall faithfully observe and perform all the terms and conditions of such licence(s).

(f) The dealer shall obtain any or every licence(s) necessary for the storage/sale of petroleum and other products at the said premises required under

any Central/State Government or local enactment for the time being in force and shall faithfully observe and perform all the terms and conditions for such licence(s) and shall promptly renew the same from time to time.

(g) The dealer shall be solely responsible for any breach or contravention by them, their servants or agents of any laws, rules, regulations or bye-laws passed or made by the Central and/or State Government and/or Municipal local and/or other Authorities as may be applicable from time to time to the business including without prejudice to the generality of the foregoing. The concerned Authorities respectively appointed under the Petroleum Act, Payment of Wages Act, Shops & Establishment Act, Factories Act and the Workmen's Compensation Act or any statutory modifications or re-enactments of the said statutes or rules and the Corporation shall not be responsible in any manner for any liability out of non-compliance by the dealer with the same. The dealer shall at all times indemnify and keep indemnified the Corporation against all actions, proceedings, claims and demands made against it by the Central and/or State Government and/or Municipal Local and/or other Authorities and/or by any customer of the product and/or any other third party as a result of or in consequence of any act or omission of whatsoever nature of the dealer, his servants or agents, including, without prejudice to the generality of the foregoing, any accident or loss or damage arising out of the storage, handling and/or sale of the products or attributable to the use of the said premises for the aforesaid purposes whether or not such act or omission or accident or loss or damage was due to any negligence, want of care or skill or any misconduct of the dealers, their servants or agents.

(h) The dealer shall indemnify and save harmless the Corporation from all losses, damages, claims, suits or actions which may arise out of or result from any injury to any person or property or from violation of any statutory enactments, rules or regulations or other written orders or other laws or caused by or resulting from non-observance by the dealer of the provisions of this Agreement."

A perusal of various sub-clauses of this Clause of the Dealership Agreement shows that the dealer is under an obligation to faithfully, promptly and diligently observe and perform and carry out at all times all directions, orders, rules, terms and conditions of safe practices and marketing discipline while carrying on the dealership of the appellant. Clause 20 of the said Agreement also requires the dealer to observe and comply with the provisions of the Petroleum Act, Explosives Act, the Weights and Measures Act, 1976 and the rules and regulations made thereunder.

Clause 30 of the Agreement reads thus :

"30. Corporation's right to stop/suspend Petrol/Diesel/Lubricants supply.

Notwithstanding anything to the

contrary herein contained the Corporation shall be at liberty upon a breach by the dealer of any covenant in this Agreement to stop and/or suspend forthwith supply of Petrol/Diesel/Lubricants and other products to the dealer and/or sales for such period or periods as the Corporation may think fit, and such right of stoppage and/or suspension shall be in addition to and/or without prejudice to any other right or remedy available to the Corporation under this Agreement. The dealer shall not be entitled to claim any compensation or damage from the Corporation on account of any such stoppage and/or suspension of supply."

A perusal of this Clause shows that if the dealer commits a default in complying with the obligations enumerated in Clause 20 of the Agreement, the appellant is entitled to stop or suspend supply of its petroleum products to such a dealer without prejudice to other remedies available under the Agreement. This right of the appellant to take action against an erring dealer under the terms of the Agreement is de hors the proceedings that may be available to be initiated against an erring dealer under the provisions of various other enactments referred to in Clause 20 of the said Agreement including under the provisions of the 1985 Act. This right of the Corporation to suspend the supply of petroleum products to an erring dealer is a right exercised under the terms of the contract and is independent of the statutory provisions of the various Acts enumerated in Clause 20 of the Agreement. The courts below, in our opinion, have committed an error by misreading the terms of the contract when they came to the conclusion that the only remedy available as against a misconduct committed by an erring dealer in regard to short-supply and tampering with the seals lies under the provisions of the 1985 Act. The courts below have failed to notice that when a dealer short-supplies or tampers with the seal, apart from the statutory violation, he also commits a misconduct under Clause 20 of the Agreement in regard to which the appellant is entitled to invoke Clause 30 of the Agreement to stop supply of petroleum products to such dealer. The power conferred under the Agreement does not in any manner conflict with the statutory power under the 1985 Act nor does the prescribed procedure under the 1985 Act in regard to search and seizure and prosecution apply to the power of the appellant to suspend the supply of its petroleum products to an erring dealer. The power exercised by the appellant in such a situation is a contractual power under the agreement and not a statutory one under the 1985 Act. The existence of dual procedure; one under the criminal law and the other under the contractual law is a well-accepted legal phenomenon in the Indian jurisprudence.

Therefore, in our opinion, the courts below have erred in coming to the conclusion that the appellant did not have the legal authority to investigate and proceed against the respondent for its alleged misconduct under the terms of the Dealership Agreement. We are also of the opinion that if the appellant is satisfied that the respondent is indulging in short-supply or tampering with the seals, it will be entitled to initiate such action as is contemplated under the agreement like suspending or stopping the supply of petroleum products to such erring dealer. If in that process any dispute arises between the appellant and such dealer, the same will have to be referred to

arbitration as contemplated under Clause 40 of the Dealership Agreement.

This brings us to consider the last question involved in this appeal, namely, the maintainability of the revision petition before the High Court under Section 115 of the CPC. The High Court by the impugned order has come to the conclusion that its jurisdiction to entertain a revision petition would only be available if the order impugned is such that if it is allowed to stand, it would occasion failure of justice or cause an irreparable injury to a party against whom the said order is made. In support of this finding, the High Court has relied upon certain judgments of this Court. Having perused the said judgments, we are of the opinion that the findings given in those judgments do not apply to the facts of this case at all. We have come to the conclusion that the Civil Court had no jurisdiction to entertain a suit after an application under Section 8 of the Act is made for arbitration. Therefore, we are of the opinion that the trial court failed to exercise its jurisdiction vested in it under Section 115 of the C.P.C. when it rejected the application of the appellant filed under Sections 8 and 5 of the Act. In such a situation, refusal to refer the dispute to arbitration would amount to failure of justice as also causing irreparable injury to the appellant. For the said reason, we are of the opinion that the High Court has erred in coming to the conclusion that the appellant was not entitled to the relief under Section 115 CPC.

For the reasons stated above, this appeal succeeds and the impugned orders of the courts below are set aside. The application filed by the appellant under Sections 8 and 5 of the Act is allowed. Consequently, the trial court is directed to refer the dispute pending in Civil Suit No.18 of 2002 before it to arbitration, as prayed for by the appellant in the said application. The interim order passed by the High Court shall stand vacated.

The appeal is allowed with costs