

2003 (1) G. L. H. 191

K. M. MEHTA, J.

Avents Pastuer S.A. ...Appellants

Versus

Cadila Pharmaceuticals Ltd.. ..Respondents

First Appeal No. 1948 of 2002

With

Civil Application No. 6746 of 2002

And

Civil Application No. 6671 of 2002* D/- 24-9-2002

*Appeal preferred against the order dated 16-9-2002 passed by the learned City Civil Court, Ahmedabad in Civil Miscellaneous Application No. 499 of 2002

(A) Specific Relief Act, 1963 - Ss. 14(1)(c) & 41(e) - Code of Civil Procedure, 1908 - O. 39, Rr. 1, 2 - Parties entered into a contract which was revokable by giving 180 days' notice - Appellant revoked the contract with the respondent by giving such notice and entered into a contract with third party - Respondent approached the trial court which granted *ex parte* injunction - Held, there was inherent lack of jurisdiction to grant injunction - Ss. 14(1)(c) & 41(e) of the Specific Relief Act - If contract is revokable or determinable, it could not be specifically enforced - Further, the court before passing interim order has to apply three tests, viz. (1) *Prima facie* case (2) Balance of convenience (3) Who would suffer irreparable injury - In the instant case, Court round said three tests in favour of the appellant - Order of *ad interim* injunction suspended.

I have considered the provisions of Arbitration Act, provisions of Special Relief Act, judgements of the Hon'ble Supreme Court and other High Courts. I have also noted that the agreement entered into between the applicant and opponent in 1996 clearly provides that either party can terminate contract after giving notice. In this case opponent has already addressed a notice dated 18-3-2002 terminating the agency agreement with the original applicant. A nature of the agreement is revokable or determinable as described in the contract, the same is not enforceable at law. The order of the learned judge granting *ex parte ad interim* relief amounts to specific performance of contract between the parties. Such contracts are not [*@page191*] specifically enforced in view of provisions of Specific Relief Act particularly S. 14(1)(c) and S. 41 of the Specific Relief Act which I have quoted earlier. The order of the learned judge is contrary to and inconsistent

with the judgments of the Hon'ble Supreme Court in the cases of Indian Oil Corporation Ltd. (supra) and Her Highness Maharani Shantidevi P. Gaikwad (supra) and other judgements of the High Court which I have quoted earlier. In view of the same, the order of the learned judge granting *ex parte ad interim* injunction is without jurisdiction and there is inherent lack of jurisdiction in the trial court in granting relief. [\(Para 7.2\)](#)

In this case the original applicant has entered into an agreement with opponent somewhere in 1996. He has challenged the termination notice dated 18-8-2002 in September, 2002 before the trial court. The agreement itself shows that the opponent-can appoint any other third party as its own agent during the subsistence of the agreement. That itself shows that opponent had right to carry on business with other agencies. Therefore, the applicant has failed to show *prima facie* case in challenging the notice dated 18-3-2002. It may be noted that original applicant has failed to show any strong *prima facie* case in his favour particularly when both on facts as well as in law which I have discussed. [\(Para 7.4E\)](#)

The applicant has failed to show that if injunction is not granted it will suffer irreparable injury, loss and hardship. The applicant can challenge the notice of termination by tiling a suit for damages. As regards balance of convenience, the applicant has failed to show balance of convenience in its favour. The opponent has been able to show balance of convenience in its favour on the ground that it has already appointed other party, namely, Ranbaxy Laboratories Ltd. as agent. In this case though notice has been addressed in March 2002 the applicant has not taken any steps either to challenge the notice or to go for international arbitration. On the other hand the opponent has been able to show that if injunction as prayed for by the applicant is granted, it will suffer irreparable loss and hardship because it will not be able to carry on business with Ranbaxy Laboratories Ltd. which products are of immense importance to the public health and have a short shelf life. In view of impugned order, the life saving products have been prohibited from being made available to the public. The injunction is to be granted is a discretionary relief and in this case the applicant though notice has been issued in the month of March 2002, has come to the court in September 2002 and therefore the action of the applicant in challenging the notice is also barred by principle of delay and laches and in that regard the applicant is not entitled to injunction. The whole purpose of the applicant is to delay the arbitration proceedings between the applicant and the opponent. [\(Para 7.4F\)](#)

As regards balance of convenience the applicant failed to show that it will suffer irreparable injury, loss and hardship if injunction as prayed for is not granted. It may be noted that even if the agreement is terminated the

applicant has other rights at law against the opponent to claim damages in accordance with law. It may be noted that as regards balance of convenience, the original opponent has been able to show that if injunction as prayed for by the applicant is granted the opponent will suffer irreparable injury, loss and hardship which cannot be compensated in terms of money particularly when the opponent has entered into agreement with Ranbaxy Laboratories Ltd. and any order of injunction will suffer its business with the third party. [\(Para 7.5\)](#)

It appears to this Court that in exercise its discretion the trial court has acted unreasonably and/or ignored the relevant [\[@page192\]](#) facts, provision of law and the judgement of the Hon'ble Supreme Court. In view of the aforesaid facts, I deem it necessary to interfere with the trial court's exercise of discretion of granting *ex parte ad interim* injunction and I therefore suspend the order dated 16-9-2002. [\(Para 7.6\)](#)

(B) Arbitration & Conciliation Act, 1996 - Ss. 9 & 37 - S. 9 provides jurisdiction to the court to provide interim measure of protection as it finds just and convenient - "Order" connotes any kind of order, whether *ad interim*, interim or other kind - Once Court passes an order u/S. 9, the same is appealable u/S. 37 of the Act.

Mr. S. B. Vakil, learned counsel for the opponent has in the rejoinder stated that in this case in view of provisions of S. 9 of the Arbitration Act which provides interim measures taken by the court particularly clause(e) which provides such other interim measure of protection as may appear to the court to be just and convenient gives jurisdiction to pass an *ex parte ad interim* order. The Trial court has passed the order under S. 9(ii)(e) of the Arbitration Act. He therefore submitted that in view of said provision, appeal under S. 37 of the Arbitration Act is clearly maintainable at law. He stated that in this case the court has granted *ex parte ad interim* injunction which is the measure under S. 9 of the Arbitration Act. The provision of the Act does not provide that any *ex parte ad interim* injunction order is not appealable under S. 37 of the Act. When Section contemplates order, the order includes all orders, namely *ex parte ad interim* injunction order, interim injunction order or any other order which has been passed by the court under S. 9 of the Act. Once the court passes by the court under S. 9 of the Act, appeal under S. 37 of the Arbitration Act is clearly maintainable at law. He submitted that judgement cited by the learned counsel for the petitioner, namely, Sundaram Finance Limited (supra). The Special Tahsilder No. III, Land Acquisition, Lignite Project (supra), etc. are not applicable to the facts of the case... [\(Para 6\)](#)

I have considered the provisions of S. 9, S. 37 of the Arbitration Act and judgement of Madhya Pradesh High Court in Software India Pvt. Ltd. (supra) and also Calcutta High Court in Harbhajan Singh Kaur (supra). In view of these decisions, the appeal filed by the original opponent is maintainable at law. The judgements of this High Court and the Madras High Court cited by the learned counsel for the original applicant are clearly distinguishable on facts of the case and I hold that appeal is maintainable at law. [\(Para 7.1\)](#)

Cases Referred :

1. Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors. (1991) 1 SCC 533 ([Paras 3.5, 7.2](#))
2. Her Highness Maharani Shantadevi P. Gaikwad v. Savjibhai Haribhai Patel & Ors. AIR 2001 SC 1462 ([Paras 3.7, 7.2](#))
3. G. E. Board v. Maheshkumar & Co. 1982 (2) GLR 479 ([Para 3.8](#))
4. S. K. Gupta v. M/s. Hyderabad Allwyn Ltd. AIR 1988 Delhi 324 ([Para 3.8](#))
5. M/s. Pepsi Food Limited v. M/s. Jai Drinks Pvt. Ltd. 1996 I AD (Delhi) 1097 ([Para 3.8](#))
6. M/s. Classic Motors Ltd. v. Maruti Udyog Ltd. 1997 I AD (Delhi) 190 ([Para 3.8](#))
7. Rajasthan Breweries Ltd. v. Stroth [*@page193*] Brewery Company, AIR 2000 Delhi 450 ([Para 3.8](#))
8. Airport Authority v. Dilbagh Singh, AIR 1997 Delhi 340 ([Para 3.8](#))
9. Sundaram Finance Ltd., Chennai v. Govind Swarup Mittal, AIR 1999 Guj. 74 ([Para 3.8](#))
10. Special Tahsildar No. III, Land Acquisition, Lignite Project, Neyveli v. Rangaswamy Reddier, AIR 1988 Mad, 162 ([Paras 4.1, 6](#))
11. 1998 (1) Madras Law Weekly 411 ([Para 4.1](#))
12. Jabalpur Cable Network Pvt. Ltd. v. E.S.P.N. Software India Pvt. Ltd., AIR 1999 Madhya Pradesh 271 ([Paras 6.1, 7.1](#))
13. Harbhajan Singh Kaur v. Unimode Finance (P) Ltd. 1998 (2) ARB.L.B. 125 . ([Paras 6.2, 7.1](#))
14. Hindustan Petroleum Corpn. Ltd. v. Sriram Narayan & Anr., (2002) 5 SCC 760 ([Paras 7.4A, 7.4D](#))
15. Dresser Rand S.A. v. K. G. Khosla Compressors Ltd. & Ors., 1995 Supp. (3) SCC 81 ([Paras 7.4C, 7.4D](#))

Appearances :

1 . First Appeal No. 1948 of 2002
Mr. S. B. Vakil, Sr. Advocate with Mr. Mayank Buch, Mr. Amar Gupta and Mr. D. Negi Instructed by M/s. Singhi & Co. Advocates for the appellant Mr. S. N. Shelat and Mr. Sudhir Nanavati, Sr. Advocates with Mr. D. S.

Nanavati for Nanavati & Nanavati for the respondent as caveator
2. Civil Application No. 6746 of 2002
Mr. S. B. Vakil, Sr. Advocate with Mr. Mayank Buch, Mr. Amar Gupta and
Mr. D. Negi instructed by M/s. Singhi & Co. Advocates for the appellant
Mr. S. N. Shelat and Mr. Sudhir Nanavati, Sr. Advocates with Mr. D. S.
Nanavati for Nanavati & Nanavati for the respondent as caveator
Mr. K. S. Nanavati, Sr. Advocate with Mr. Pranav Desai for Ranbaxy
Laboratories Ltd. as THIRD PARTY

K. M. MEHTA, J. :-

1. Aventis Pasteur S.A. - appellant -original opponent has filed this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') against the order dated 16-9-2002 passed by the learned City Civil Court, Ahmedabad in Civil Miscellaneous Application No. 499 of 2002 - an Application under Section 9 of the Arbitration Act Order below Exh. 1. The learned judge by his impugned order held that it requires proper consideration that how and when such Distribution Agreement can be terminated by either of the parties and with what effect. The learned judge further held that till final determination and conclusion of the point raised by the petitioner - M/s. Cadila Pharmaceuticals Ltd. - original applicant (respondent in appeal) in the main petition, it would be appropriate to restrain the opponent from enforcing or implementing the termination notice dated 18-3-2002, the right of the petitioner to safeguard its interest in the subject-matter would be frustrated. Thereafter the court granted further relief that in the circumstances the petitioner files an undertaking to the aforesaid extent, then the office is directed to issue an *ex parte ad interim* injunction in terms of paragraph No. 10(a), (b) and (c) against the opponent making it effective till 25th instant.

2. The facts giving rise to this appeal are as under :

2.1 M/s. Cadila Pharmaceuticals Ltd. original petitioner - applicant is a Public Limited Company incorporated under the provisions of the Companies Act, 1956, having its Registered Office at Ahmedabad. Aventis Pasteur S.A. original opponent is a Corporation existing and organized under the laws of the Republic of France having [*@page194*] its office at France. From the facts it has been stated that Distribution Agreement was entered into between the opponent (known as the first part) and the petitioner (known as the second part) of the agreement in the year 1996. The said agreement was regarding appointment of the respondent as distributor. Article 1 of the said agreement provides for appointment of distributor. Article 7 provides for trademarks. Article 11 provides for term and

termination particularly clauses 11.1 to 11.5 Clause 11.5 of Article 7 of the said agreement reads thus :

"In addition to paragraph a and b of Article 11.3 this Agreement may be terminated at any time forthwith by either party (the "Electing Party") upon prior written notice to the other 180 days before termination date."

2.1A Upon termination, the original applicant was permitted to sell the stocks of products already lying with it in terms of Article 11.6.6 which provides that -

"11.6.6 Upon termination of this Agreement, Distributor shall be permitted to market and sell products in the territory or to resell them to a new distributor, to the extent of stocks or quantities of such products which have been ordered by it

2.2 Article 12 provides applicable law -the Agreement shall be governed and construed in accordance with the laws of the Republic of France. Article 13 of the said agreement provides for disputes that the arbitration shall take place in Geneva (Switzerland). Article 13 reads as under :

"All disputes arising in connection with the present contract which will not be solved on an amicably basis shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules, rules which the parties recognize that they know.

The arbitration shall take place in Geneva (Switzerland).

The arbitrators shall apply the provision of this agreement to the merits of the dispute and for all matters not expressly settled in this agreement, French law (exclusive of international Private Laws) shall govern."

2.2A The said agreement was renewed from time to time and distribution agreement was renewed on yearly basis after 1997 and the last of such renewal was valid upto 31-12-2002. From the record it appears that the opponent had issued a notice dated 18-3-2002 purported to terminate the distribution agreement of 19-9-2002. The said notice was issued under Article 11.5 of the agreement.

2.3 It appears that being aggrieved and dissatisfied with the said notice and before entering into arbitration, the petitioner has filed application under Section 9 of the Arbitration Act before the City Civil Court at Ahmedabad being Civil Misc. Application No. 499 of 2002 challenging the said action of the appellant. The said application was filed on 16-9-2002 petitioner herein has prayed for an interim injunction as per para 10(a) (b) and (c) restraining

the opponent herein, its agents, distributors and associates from selling or marketing the specified products covered under the distribution agreement dated 1-11-1996 including its subsequent amendments including the product-trademark "Verorab" in the whole of India either directly or indirectly. It is also prayed for interim injunction restraining the opponent from appointing any other person or entity as distributor for the products covered by the distribution agreement dated 1-11-1996 including its subsequent amendments made with the petitioner including the product [/@page195] Verorab and also further injunction restraining the opponent from acting upon, enforcing or implementing the termination notice dated 18-3-2002 in any manner whatsoever.

2.4 The learned trial court, as indicated above in the said application, has granted *ex parte ad interim* injunction as prayed for in terms of para 10(a)(b)(c).

2.5 Being aggrieved and dissatisfied with the said order of the learned trial judge dated 16-9-2002, the opponent has filed this appeal before this Court on 23-9-2002.

3. Mr. S. B. Vakil, learned Sr. Advocate with Mr. Mayank Buch, appeared on behalf of the opponent. The learned counsel has submitted that the aforesaid order of the learned judge is without jurisdiction. He has invited my attention to the provisions of the Arbitration and Conciliation Act, 1996.

3A. The learned counsel has invited my attention to Section 2(1)(f) of the Arbitration Act which reads thus :

"2. Definitions -

(1) In this part, unless the context otherwise requires -

(a) to (e) xxxxxxxxxxxx

(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India where at least one of the parties is -

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India."

3.1 The learned counsel has further relied on the provisions of Section 9(ii)(d) and (e) of the Arbitration Act which read as under :

"9 - Interim measures etc. by Court -

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) xxx xxx xxx
(ii) for an interim measure of protection in respect of any of the following matters, namely :

(a) to (c) xxxxxxxx
(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.

3.2 The learned counsel has also invited my attention to Section 37 of the Arbitration Act which provides for appealable order. He has relied on Section 37(1)(a) of the Arbitration Act which reads thus :

"Section 37 - Appealable order - (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely :

(a) granting or refusing to grant any measure under Section 9."

3.3 The learned counsel for the opponent has also stated that in this case it was formerly a commercial agreement for distribution of supply of goods which the appellant has terminated on 18-3-2002. He submitted that the effect of order passed by the learned judge is nothing but granting [*@page196*] specific relief of the contractual obligation entered into between the appellant and the respondent. He submitted that the court has no power or jurisdiction to grant such type of interim injunction.

In support of the said contention, the learned counsel for the opponent has relied on Section 14 of the Specific Relief Act, 1963 (hereinafter referred to as "the Act, 1963") particularly Section 14(1)(c) of the Act 1963 which reads thus :

"Section 14 - Contracts not specifically enforceable -

(1) The following contracts cannot be specifically enforced, namely :

(a) and (b) xxxxxxxx
(c) a contract which is in its nature determinable."

3.4 The learned counsel has also relied on Section 41 (a) of the Act, 1963 which provides injunction when refused - an injunction cannot be granted. The said Section 41(e) reads as under :

"Section 41 - Injunction when refused -An injunction cannot be granted -

(a) _____ and (d) _____ xxxxxxxx
(e) to prevent the breach of a contract the performance of which would not be specifically enforced.

3.5 In support of the aforesaid contention, the learned counsel for the opponent has relied on the judgement of the Hon'ble Supreme Court in the case of *Indian Oil Corporation Ltd. v. Amritsar Gas Service and others* reported in (1991) 1 SCC 533. The learned counsel has submitted that in that case also the contract was terminated and after quoting the terms of the arbitration award, the Hon'ble Supreme Court in para 12 on page 542 has observed as follows :

"The award further says as under :

"This award will, however, not fetter the right of the defendant Corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion arises."

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is "a contract which is in its nature determinable". In the present case, it is not necessary to refer to the other clauses of sub-section (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by this nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made

according to "the law governing such cases". The grant of this relief in the award cannot, therefore, [page197] be sustained."

3.6 On the analogy of the said case, the learned counsel for the opponent submitted that the trial court cannot grant such relief.

3.7 The learned counsel for the opponent has further relied on the judgement of the Hon'ble Supreme Court in the case of *Her Highness Maharani Shantidevi P. Gaikwad v. Savjibhai. Haribhai Patel and Others* reported in AIR 2001 SC 1462 in which on page 1475 at para 48 similar contention was raised and ultimately in para 58 on page 1479 the court observed as follows:

"In view of above discussion, we find force in the contention that the agreement in question was terminable before delivery of possession; it was so determined and to the agreement clause (c) of Section 14(1) of the Specific Relief Act, 1963 applies. Therefore, agreement cannot be specifically enforced."

3.8 The learned counsel for the opponent has further relied on the judgement of this court in the case of *G. E. Board v. Maheshkumar & Co.* reported in 1982(2) G.L.R. 479 which also lays down similar principle. The learned counsel for the opponent in support of his contention has relied on the judgements of the Delhi High Court in the case of *S. K. Gupta v. M/s. Hyderabad Allwyn Ltd.* reported in AIR 1988 Delhi 324, *M/s. Pepsi Foods Limited v. M/s. Jai Drinks Pvt. Ltd.* reported in 1996 I AD (Delhi) 1097, *M/s. Classic Motors Ltd. v. Maruti Udyog Ltd.* 1997 I AD (Delhi) 190, *Rajasthan Breweries Ltd. v. Stroh Brewery Company* reported in AIR 2000 Delhi 450 particularly para 14 on page 454 and *Airport Authority v. Dilbagh Singh* reported in AIR 1997 Delhi 340.

3.9 In view of the aforesaid provisions of the agreement, provisions of Arbitration Act, Specific Relief Act and other decisions of the Hon'ble Supreme Court and other courts, the learned counsel for the opponent stated that the order of injunction granted by the trial court is without jurisdiction and the same is contrary to and inconsistent with the principles laid down by the Hon'ble Supreme Court in the aforesaid case.

4. Mr. S. N. Shelat, learned Sr. counsel with Mr. Sudhir Nanavati, learned Sr. counsel appeared on behalf of the original petitioner. He has raised preliminary contention that the present appeal filed by the original opponent herein is not maintainable at law. He submitted that Section 37 of the Arbitration Act provides that an appeal shall lie on the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the Court passing the order, namely:

(a) granting or refusing to grant any measure under Section 9.

4.1 He submitted that in this case the learned Trial Court has passed order though on application under Section 9 of the Act, it is only an *ex parte ad interim* order and the Legislature has not contemplated an appeal against the said order under Section 37 of the Act. In support of the aforesaid contention he has relied on the judgement of this Court in the case of *Sundaram Finance Ltd. Chennai v. Govind Swarup Mittal* reported in AIR 1999 Gujarat 74 particularly para 5 on page 77. Further relying upon the said judgement he submitted that the impugned order does not determine the rights of the parties and it does not finally adjudicate the rights of the parties. If it is not finally adjudicated the rights of the parties then the present appeal is not maintainable at law. He has also relied on the judgement of the Madras High Court in the case of *Special Tahsildar No. III, Land Acquisition, Lignite Project, Neyveli v. Rangasamy Reddiar* reported in AIR 1988 [page 198] Madras 162 in which also the court held that *ad interim* orders are not judgements within the meaning of Cl. 15 and the proper course is to approach the single Judge seeking appropriate further action and not to file appeals against interim orders. This was under Clause 15 of the Letters Patent Appeal. He has also relied on another judgement of the Madras High Court reported in 1998(1) Madras Law Weekly 411. He submitted that even assuming that the appeal is maintainable under Section 37 of the Act but the appellate court in exercise of its appellate power has to use its discretion of hearing the appeal and relevant facts. He submitted that in view of the peculiar facts and circumstances of the case where injunction is limited to 25-9-2002 this Court may not exercise power under Section 37, of the Act.

4.2 He has also submitted, from the facts of the case particularly which have been produced under Section 9 of the Arbitration Act, that the agreement was existing between the opponent and the petitioner for 11 years and the same was terminated on 18-3-2002 and the petitioner has demonstrated that the said notice is illegal and the said action of the opponent is liable to be quashed and set aside on merits of the matter. In view of the same, the petitioner had a *prima facie* case and balance of convenience also lies in favour of the petitioner and therefore the trial court was justified in granting *ex parte ad interim* injunction in favour of the petitioner.

4.2A It is stated that, effective from 1st March 2002, the opponent has entered into a distribution agreement with M/s. Ranbaxy Laboratories Ltd. to the knowledge of the original applicant. Under the said agreement, the opponent has already supplied the products to M/s. Ranbaxy Laboratories

Ltd. which products are of immense importance to public health and have a short shelf life. But by virtue of the impugned order, the said life saving products have been prohibited from being made available to the public.

4.3 Mr. K. S. Nanavati, learned senior counsel with Mr. Pranav Desai, learned advocate, submitted that Ranbaxy Laboratories Ltd. has filed Civil Application No. 6746 of 2002 for joining as party in the First Appeal. The said application is filed under Order 1 Rule 10 of the C.P.C. The prayer in terms of para 10(A) is granted and the application stands disposed of accordingly.

5. The learned senior counsel with Mr. Pranav Desai, learned advocate appeared on behalf of Ranbaxy Laboratories Ltd. in Civil Application No. 6746 of 2002 with whom the opponent has entered into agreement which has been entered into on 1-3-2002. The learned counsel has tried to support the contention of Mr. Vakil in this behalf. He has relied on clause 2.3 of the said agreement entered into between the petitioner-respondent herein and the opponent-appellant herein which reads thus :

"The distributor acknowledges and agrees that the Products can also be distributed by PMsv and/or one of its Affiliates and/or by any other third party appointed by PMsv."

5.1 In view of clause 2.3 of the said agreement, the learned counsel submitted that the opponent was clearly justified in entering into agreement with Ranbaxy Laboratories Ltd. (proposed party in this appeal). He submitted that Ranbaxy Laboratories Ltd. is a necessary party to be joined because the injunction order which has been passed by the learned trial court will clearly prejudicially affect its business with the opponent in this behalf particularly agreement dated 1-3-2002. He submitted that in this case though the agreement has been terminated on 18-3-2002 and his agreement has already commenced on 1-3-2002 the petitioner has decided to file application [@page199] only on 16-9-2002. Therefore, in any view of the matter the petitioner is not entitled to a discretionary relief of injunction on the ground of delay and laches.

6. Mr. S. B. Vakil, learned counsel for the opponent has in the rejoinder stated that in this case in view of provisions of Section 9 of the Arbitration Act which provides interim measures taken by the court particularly clause (e) which provides such other interim measure of protection as may appear to the court to be just and convenient gives jurisdiction to pass an *ex parte ad interim* order. The trial court has passed the order under Section 9(ii)(e) of the Arbitration Act. He therefore submitted that in view of said provision, appeal under Section 37 of the Arbitration Act is clearly maintainable at law. He has stated that in this case the court has granted *ex parte ad interim*

injunction which is the measure under Section 9 of the Arbitration Act. The provision of the Act does not provide that any *ex parte ad interim* injunction order is not appealable under Section 37 of the Act. When section contemplates order, the order includes all orders, namely *ex parte ad interim* injunction order, interim injunction order or any other order which has been passed by the court under Section 9 of the Act, appeal under Section 37 of the Arbitration Act is clearly maintainable at law. He submitted that judgement cited by the learned counsel for the petitioner, namely, Sundaram Finance Limited (supra), The Special Tahsildar No. III, Land Acquisition, Lignite Project (supra), etc: are not applicable to the facts of the case. He has also relied on, for the purpose of analogy, Order 39 of the C.P.C. which also provides for passing interim orders and appeal is also provided against the said orders. He has also relied on Section 9 of the C.P.C. and submitted that there is inherent lack of jurisdiction in the trial court for passing such *ex parte ad interim* injunction order and therefore the appeal filed by the opponent is clearly maintainable at law and this Court may exercise its jurisdiction for quashing and setting aside the said order or suspending the interim injunction order. The learned counsel for the opponent also stated that the judgement in the case of Sundaram Finance Limited (supra) is distinguishable on facts of the case on the ground that in that case the court was Considering as to whether appeal lies under Section 37(1)(b) of the Arbitration Act whereas in this case the court is concerned with Section 37(1)(a) of the Arbitration Act. In that case the matter arose under appeal filed by the appellant in connection with quashing and setting aside the award under Section 34 of the Arbitration Act. Therefore, the said judgement is clearly distinguishable on facts of the case.

6.1 As regards maintainability of appeal, the learned counsel for the opponent has also relied on judgement of the Madhya Pradesh High Court in the case of *Jabalpur Cable Network Pvt. v. E.S.P.N. Software India Pvt. Ltd.* reported in AIR 1999 Madhya Pradesh 271 particularly para 15 on page No. 275 which reads as under :

"In this particular case, the court below has expressed its opinion for not granting *ex parte* injunction. It is an order indicating the reason for not exercising the jurisdiction. Therefore, it is a formal expression of an adjudication. It cannot be disputed that under Section 9 of the Act the court has power to grant interim injunction or to take such other interim measure of protection as may appear to the court to be just and convenient."

6.2 The learned counsel has also relied on the judgement of the Calcutta High Court in the case of *Harbhajan Singh Kaur v. Unimode Finance (P) Ltd.* reported in 1998(2) ARB. L.R. 125 in which on page 128 at para 9 where similar principle is laid down. [*@page200*]

Conclusion :

7. I have considered the facts of the case, contentions of the learned counsel for the appellant as well as the respondent and also for intervening parties.

Maintainability of appeal :

7.1 I have considered the provisions of Section 9, Section 37 of the Arbitration Act and judgement of Madhya Pradesh High Court in Software India Pvt. Ltd. (supra) and also Calcutta High Court in Harbhajan Singh Kaur (supra). In view of these decisions, the appeal filed by the original opponent is maintainable at law. The judgements of this High Court and the Madras High Court cited by the learned counsel for the original applicant are clearly distinguishable on facts of the case and I hold that appeal is maintainable at law.

Regarding Merits of the matter :

7.2 I have considered the provisions of Arbitration Act, provisions of Special Relief Act, judgements of the Hon'ble Supreme Court and other High Courts. I have also noted that the agreement entered into between the applicant and opponent in 1996 clearly provides that either party can terminate contract after giving notice. In this case opponent has already addressed a notice dated 18-3-2002 terminating the agency agreement with the original applicant. As nature of the agreement is revokable or determinable as described in the contract, the same is not enforceable at law. The order of the learned judge granting *ex pane ad interim* relief amounts to specific performance of contract between the parties. Such contracts are not specifically enforced in view of provisions of Specific Relief Act particularly Section 14(1)(c) and Section 41 of the Specific Relief Act which I have quoted earlier. The order of the learned judge is contrary to and inconsistent with the judgements of the Hon'ble Supreme Court in the cases of Indian Oil Corporation Ltd. (supra) and Her Highness Maharani Shantidevi P. Gaikwad (supra) and other judgements of the High Court which I have quoted earlier. In view of the same, the order of the learned judge granting *ex parte ad interim* injunction is without jurisdiction and there is inherent lack of jurisdiction in the trial court in granting relief.

7.3 When a party applies under Section 9 of the 1996 Act it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the arbitral tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application under Section 9 is filed.

(Re.: M/s. Sundaram Finance Ltd. v. M/s. NEPC India Ltd. AIR 1999 SC 565 at para 20)

7.4 In my view when the applicant has filed application for interim injunction before the trial court on 16-9-2002 particularly when the agreement was terminated on 18-3-2002 he has not taken any steps to initiate arbitration proceedings from 18-3-2002 to 16-9-2002. In view of the principle laid down by the Hon'ble Supreme Court which I have quoted above, the application filed by the applicant is not in consonance with the aforesaid judgement of the Hon'ble Supreme Court and therefore interim injunction granted by the trial court is without jurisdiction.

7.4.1 In this case the applicant has entered into an agreement in realm of International Commercial Arbitration. One of the salient features of the Act is that the supervisory role of the court is reduced to a minimum under the Act and intervention by the court can be only in certain circumstances. [page 201] In this view of the matter, under the new Act when the court is dealing with International Commercial Arbitration, the court has to use its discretion very judiciously in this behalf.

7.4.2 It may be noted that court can pass an order of injunction only for the purpose and in relation to arbitration proceedings before the court. In this case injunction has been granted not for the purpose of and in relation to arbitration proceeding but to delay the effect of termination notice dated 18-3-2002.

Regarding Injunction :

7.4A The learned counsel for the opponent has invited my attention to the recent judgement of the Hon'ble Supreme Court in the case of *Hindustan Petroleum Corpn. Ltd. v. Sriman Jarayan and Another* reported in (2002) 5 SCC 760 which lays down the principle for granting or refusing temporary injunction. In the said judgement at paras 7 and 8 on pages 765 & 766 the Hon'ble Supreme Court has observed as under :

"Para 7. It is elementary that grant of an interlocutory injunction during the pendency of the legal proceeding is a matter requiring the exercise of discretion of the court. While exercising the discretion the court normally applies the following tests :

- (i) whether the plaintiff has a *prima facie* case;
- (ii) whether the balance of convenience is in favour of the plaintiff; and
- (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.

Para 8. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the exercise of the legal right asserted by the plaintiff and its alleged violation are both contested and remain uncertain till they are established on evidence at the trial. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before which that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies. (See: Gujarat Bottling Co. Ltd. v. Coca Cola Co. (1995) 5 SCC 545 - at p. 574)"

7.4B The Hon'ble Supreme Court on page 768 at para 12 has further held as follows :

"The question whether, if Respondent 1 had violated the condition stipulated in the agreement by changing the structure of the firm without taking prior permission from the appellant, still the latter was bound to give to the former an opportunity for rectifying the defect; and whether passing the order revoking the agreement without affording such opportunity will render the revocation order invalid, are matters which are to be considered when the suit is taken up for hearing. These are not matters to be considered in detail for considering the prayer for interlocutory order of injunction."

7.4C The learned counsel for the opponent has further invited my attention to the decision of the Hon'ble Supreme Court in the case of Dresser Rand S.A. v. K. G. [at page 202] Khosla Compressors Ltd. and Others reported in 1995 Supp. (3) SCC 181 in which at para 2 the Hon'ble Supreme Court has held as under :

"In a matter of this nature where questions of amenability of a dispute to international arbitration arise it is not proper to let loose and keep at large orders of injunction of this kind for unduly long periods. It is inconsistent with the principles governing international arbitration. It is of utmost importance for the domestic courts to be circumspect in granting such interlocutory interdictions. At any rate, the court must ensure that the matters are dealt with and disposed of with utmost despatch."

7.4D I have considered the judgements of the Hon'ble Supreme Court in the case of M/s. Sundaram Finance Ltd. (supra), Hindustan Petroleum

Corporation Ltd. (supra) and Dresser Rand S.A. (supra) and also the submissions of the learned counsel.

7.4E In this case the original applicant has entered into an agreement with opponent somewhere in 1996. He has challenged the termination notice dated 18-3-2002 in September, 2002 before the trial court. The agreement itself shows that the opponent can appoint any other third party as its own agent during the subsistence of the agreement. That itself shows that opponent had right to carry on business with other agencies. Therefore, the applicant has failed to show *prima facie* case in challenging the notice dated 18-3-2002. It may be noted that original applicant has failed to show any strong *prima facie* case in his favour particularly when both on facts as well as in law which I have discussed.

7.4F The applicant has failed to show that if injunction is not granted it will suffer irreparable injury, loss and hardship. The applicant can challenge the notice of termination by filing a suit for damages. As regards balance of convenience, the applicant has failed to show balance of convenience in its favour. The opponent has been able to show balance of convenience in its favour on the ground that it has already appointed other party, namely, Ranbaxy Laboratories Ltd. as agent. In this case though notice has been addressed in March 2002 the applicant has not taken any steps either to challenge the notice or to go for international arbitration. On the other hand the opponent has been able to show that if injunction as prayed for by the applicant is granted, it will suffer irreparable loss and hardship because it will not be able to carry on business with Ranbaxy Laboratories Ltd. which products are of immense importance to the public health and have a short shelf life. In view of impugned order, the life saving products have been prohibited from being made available to the public. The injunction is to be granted is a discretionary relief and in this case the applicant though notice has been issued in the month of March 2002, has come to the court in September 2002 and therefore the action of the applicant in challenging the notice is also barred by principle of delay and laches and in that regard the applicant is not entitled to injunction. The whole purpose of the applicant is to delay the arbitration proceedings between the applicant and the opponent.

7.5 As regards balance of convenience the applicant failed to show that it will suffer irreparable injury, loss and hardship if injunction as prayed for is not granted. It may be noted that even if the agreement is terminated the applicant has other rights at law against the opponent to claim damages in accordance with law. It may be noted that as regards balance of convenience, the original opponent has been able to show that if injunction as prayed for by the applicant is granted the opponent will suffer irreparable

injury, loss and hardship which cannot be compensated in terms of money particularly when the opponent has entered [*@page203*] into agreement with Ranbaxy Laboratories Ltd. and any order of injunction will suffer its business with the third party.

7.6 It appears to this court that in exercise its discretion the trial court has acted unreasonably and/or ignored the relevant facts, provision of law and the judgement of the Hon'ble Supreme Court. In view of the aforesaid facts, I deem it necessary to interfere with the trial court's exercise of discretion of granting *ex parte ad interim* injunction and I therefore suspend the order dated 16-9-2002.

8. In view of my aforesaid conclusion, I suspend the order of learned trial judge dated 16-9-2002 - order below Exh. 1 Granting *ex parte ad interim* relief in favour of the original applicant. In view of the same, the appeal is admitted.

8.1 In Civil Application No. 671 of 2002, interim relief in terms of para 8(c) is granted to the extent that the order of the learned trial judge dated 16-9-2002 in arbitration application No. 499 of 2002 is suspended.

8.2 It will be open for the parties to appear before the trial court and make their submissions on merit of the matter in application by the original applicant. The learned trial court will hear the applicant and opponent and pass an order in accordance with law. The directions issued by the learned trial court except granting prayers in terms of para 10(a)(b) and (c) will continue.

9. After I dictated the order in the open court suspending the *ex parte ad interim* injunction order passed by the learned trial judge, Mr. Sudhir Nanavati, learned Sr. advocate for the caveator has submitted that the order which has been passed by this Court may be suspended for some time so as to enable the respondent to approach the Hon'ble Supreme Court. He submitted that if the order which has been passed by this Court is not suspended for a period of two weeks to enable the original applicant to approach the Hon'ble Supreme Court the entire suit filed by the applicant will be infructuous and the applicant will suffer irreparable loss, injury and hardship which cannot be compensated in terms of money. He submitted that by virtue of agreement the original applicant had an exclusive right to sell the goods of trademark "verorab" which is a statutory right and if the order is not suspended the applicant will not be able to carry on business of selling the said product in the said trademark. He submitted that the agreement is valid upto 31-12-2002.

9.1 On the other hand Mr. S. B. Vakil, learned senior advocate for the appellant with Mr. Mayank Buch and Mr. K. S. Nanavati, learned senior advocate with Mr. Pranav Desai strongly oppose the said request. They have stated that in this case the applicant had obtained *ex parte ad interim* injunction on 16-9-2002 which has been suspended on 24-9-2002 relying on statutory provisions as well as judgements of the Hon'ble Supreme Court and therefore this Court may not suspend its own order. Otherwise, the injunction granted by trial court which is contrary to and inconsistent with the statutory provisions and the judgements of the Hon'ble Supreme Court will continue. The learned counsel further submitted that in this case agreement has been terminated by notice dated 18-3-2002 and the period of six months from the issue of the said notice has already been expired on 18-9-2002 and if this Court suspends its order dated 24-9-2002 then it will virtually extend the terms of agreement which has been legally terminated by the opponent. They have submitted that by virtue of the said action taken the opponent has already entered into an agreement with Ranbaxy Laboratories Ltd. - applicant in Civil Application No. 6746 of 2002 which has [/@page204] been entered into on 1-3-2002 and commercial transaction entered into between the opponent and Ranbaxy Laboratories Ltd. will also be affected if the order which has been passed by this Court is suspended and the effect would be that the injunction granted by the trial court will continue and that will affect the business of the appellant with Ranbaxy Laboratores Ltd. They have also invited my attention to the amendment of agreement, 1996 which clearly provides that the opponent can appoint another agent by which they have already appointed Ranbaxy Laboratories Ltd. They have also invited my attention to Schedule A which provides list of products for which opponent has exclusive right of use of associated trademarks which itself stated that the Distributor acknowledges that it shall not have the exclusive right to distribute the products of this list and in view of the same the original applicant has no exclusive right to sell the goods in the said trademark once the agency is terminated. In view of the same balance of convenience lies in favour of the opponent and the *prima facie* case is also in favour of the original opponent.

9.2 I have considered the aforesaid aspect in this behalf. Having considered this aspect anxiously, I am of the view that once injunction which has been granted by the trial court has been suspended by me relying on statutory provisions and judgements of the Hon'ble Supreme Court and other grounds which I have set out earlier and on the ground that the original opponent has shown *prima facie* case and balance of convenience and the fact that original opponent has already entered into an agreement with third party any injunction granted at this stage will affect the business of opponent with Ranbaxy Laboratories Ltd. In view of this situation I am of the view that it

will not be proper for this Court to suspend its own order dated 24-9-2002. This is not an ordinary case in which normally the court may suspend its own order to enable the concerned aggrieved party to approach the Hon'ble Supreme Court. The agreement is in realm of International Commercial Law. It will be open for both the parties to approach the trial court. I request trial court to hear the injunction application on merit of the matter. Therefore, the request made by the learned counsel for the respondent for suspending the order dated 24-9-2002 is rejected.

10. Before I part with the judgement, I would like to have two quotations below in connection with new arbitrations.

"International Arbitration may be defined as the substitution of many burning questions for a smouldering one- - Ambrose Bierce"

(New Dimensions of Justice by Hon'ble Mr. Justice J. S. Verma, in the Article "Courts and the Arbitral Process" in Chapter 17 on page 121).

11. The difference between ordinary court of law and international commercial arbitration has been able to put by Mr. N. A. Palkhiwala in his book, *We the Nation* in Chapter "International Arbitration v. Litigation in Law Courts" on page 205. At page 209 it is noted thus :

"To sum up, a court of law is a Rolls Royce of 1907 vintage, stately and solemn, while an international commercial arbitration is a 1987 Honda car which will take you to the same destination with far greater speed, higher efficiency and dramatically less fuel consumption."

The first appeal is fixed for hearing on 22-10-2002.

(RRP) Civil Applications allowed. [*@page205*]