

[2012] 7 S.C.R. 19

COX & KINGS LTD.

v.

INDIAN RLY. CATERING & TOURISM CORPORATION
LTD.& ANR.

(Special Leave Petition (CIVIL) Nos. 965-967 of 2012)

JULY 5, 2012

[ALTAMAS KABIR AND J. CHELAMESWAR, JJ.]

Arbitration and Conciliation Act, 1996 - s.9 - Grant of interim measure - Permissibility - Luxury Tourist Train project - Expression of Interest floated by Respondent (IRCTC) for a Joint Venture partner- to operate, manage and run the train - Petitioner selected as Joint Venture shareholder - Petitioner and Respondent became equal shareholders in a Joint Venture Company in terms of a Memorandum of Understanding (MoU) - Luxury Tourist Train leased by Respondent to the Joint Venture Company - Disputes resulting in subsequent termination of the lease arrangement by Respondent - Petitioner initiated proceedings u/s.9 for staying the termination of the lease agreement and also to allow the arrangements to continue for sometime - Single Judge of the High Court deemed it fit to appoint a Receiver, as an interim measure, in the public interest, to prevent discontinuation of the running of the train for which bookings had already been made, and disposed of the s.9 application, inter alia, by directing the train to run under the supervision of the Receiver for certain period - Division Bench, however, set aside the arrangements made by the Single Judge and allowed the appeal preferred by Respondent - On appeal, held: Petitioner was not entitled to question termination of the lease agreement as by itself it had no existence as far as the running of the train was concerned and it was not a party to the proceedings - Petitioner attempted to either restore the lease agreement, which had been terminated, or to create a

A *fresh agreement to enable the Petitioner to operate the luxury train indefinitely, till a decision was arrived at in s.9 Application - No doubt the Petitioner invested large sums of money in the project, but that cannot entitle it to pray for and obtain a mandatory order of injunction to operate the train once the*
B *lease agreement/ arrangement had been terminated - Petitioner's remedy, if any, would lie in an action for damages against IRCTC for breach of any of the terms and conditions of the Joint Venture Agreement and the MoU.*

C **The Ministry of Railways (Rail Mantralaya), Railway Board, approved the proposal submitted by respondent no.1-Indian Railway Catering & Tourism Corporation Ltd. [IRCTC], for operating a Luxury Tourist Train on a Pan-India route within India. Such proposal was made in**
D **pursuance of an Expression of Interest floated by the respondent for a Joint Venture partner for the said Luxury Transit Train Project, to operate, manage and run the said train. The Petitioner came to be selected as the Joint Venture shareholder for the operation of the Luxury Tourist Train Project. In terms of a Memorandum of**
E **Understanding, the Petitioner and the Respondent became equal shareholders in a Joint Venture Company. The Luxury Tourist Train was leased by the Respondent to the Joint Venture Company for a period of 15 years, which could be extended by another period of 10 years**
F **on conditions to be mutually agreed between the Petitioner and the Respondent. Whilst the Joint Venture operations were being conducted, certain disputes arose between the shareholders regarding the working of the Joint Venture Agreement and the Memorandum of**
G **Understanding, which ultimately resulted in the termination of the lease arrangement by the Respondent, IRCTC. On account of such termination of the lease agreement, the Petitioner initiated proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 for**
H **staying the termination of the lease agreement and also**

to allow the arrangements to continue for a specified period, subject to such terms and conditions as may be imposed by the Court. A

The Single Judge of the High Court deemed it fit to appoint a Receiver, as an interim measure, in the public interest; to prevent discontinuation of the running of the train for which bookings had already been made, and disposed of the Section 9 application, inter alia, by directing that the train would continue to be run under the supervision of the Receiver for certain period. The Division Bench, however, set aside the arrangements made by the Single Judge and allowed the appeal preferred by the Respondent. The order was challenged before this Court. B C

Dismissing the Special Leave Petitions as also the connected Contempt Petitions, the Court D

HELD: 1. It is evident from the submissions made on behalf of the respective parties that the arrangement between Respondent No.1, IRCTC, was with the Petitioner Company and, although, it was the intention of the parties by virtue of the Joint Venture Agreement that the luxury train, belonging to the Respondent No.1, was to be operated by the Joint Venture Company, at least for a minimum period of 15 years, what ultimately transpired was the termination of the Agreement by Respondent No.1 in favour of the Joint Venture Company. As pointed out by the Division Bench of the High Court, the Petitioner was not entitled to question such termination as by itself it had no existence as far as the running of the train was concerned and it was not a party to the proceedings. In fact, what the Petitioner attempted to do in these proceedings was to either restore the Lease Agreement, which had been terminated, or to create a fresh Agreement to enable the Petitioner to operate the luxury H

A train indefinitely, till a decision was arrived at in Section 9 Application. [Para 22] [31-F-H; 32-A]

2. It is no doubt true that the Petitioner has invested large sums of money in the project, but that cannot entitle it to pray for and obtain a mandatory order of injunction to operate the train once the lease agreement/arrangement had been terminated. It cannot be said that the Joint Venture Agreement was akin to a partnership. Such submission had been rightly rejected by the Division Bench. As rightly pointed out by the Division Bench of the High Court, the Petitioner's remedy, if any, would lie in an action for damages against IRCTC for breach of any of the terms and conditions of the Joint Venture Agreement and the Memorandum of Understanding. [Para 23] [32-B-D]

3. Taking into consideration the totality of the circumstances, this Court is inclined to agree with the suggestions made by IRCTC before the Division Bench of the High Court regarding the operation of the train by IRCTC, with liberty to the parties to appoint an Arbitral Tribunal to settle their disputes. It is made clear that if an Arbitral Tribunal is appointed, the aforesaid arrangement will be subject to the decision of the Arbitral Tribunal. [Para 24] [32-E-F]

F CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 965-967 of 2012 etc.

From the Judgment & Order dated 06.01.2012 of the High Court of Delhi at New Delhi in FAO (OS) No. 433-435 of 2011.

G WITH

Conmt. Pet.(C) No. 41-43 of 2012 in SLP (C) No. : 965-967 of 2012.

H Mukul Rohatgi, Nikhil Rohatgi, Misha Rohatgi, Peter Lobo, Mahesh Agrawala, Akshay Runge, E.C. Agrawala for the

Petitioner.

A

R.F. Nariman, S.G.I., Shyam Diwan, Saurav Agrawal, Abhijeet Sinha, Ashish Tiwari, Titash Sen, Vipul Sharda, Kamendra Mishra, Siddharth Singla for the Respondents.

The Judgment of the Court was delivered by

B

ALTAMAS KABIR, J. 1. In June/July 2007, The Ministry of Railways (Rail Mantralaya), Railway Board, approved the proposal submitted by the Indian Railway Catering & Tourism Corporation Ltd., hereinafter referred to as "IRCTC", for operating a Luxury Tourist Train on a Pan-India route within India. Such proposal was made in pursuance of an Expression of Interest floated by the Respondent for a Joint Venture partner for the said Luxury Transit Train Project, to operate, manage and run the said train. The proposal was approved subject to certain broad principles for running the said train, set out by the Indian Railways in its letter dated 29th November, 2007, addressed to the Respondent, namely,

C

D

"(a) The Respondent will own the rake;

E

(b) The Respondent will pay to the Indian Railways the cost of maintenance and periodical overhaul of the rake;

(c) Railways be entitled to recover the haulage cost;

F

(d) The Respondent with their associate agencies will manage on board/off board services, marketing, booking, pricing, etc."

2. The Petitioner came to be selected as the Joint Venture shareholder for the operation of the Luxury Tourist Train Project. On 11th January, 2008, the Respondent forwarded the draft Memorandum of Understanding, which was proposed to be executed between the Petitioner and the Respondent, to the Indian Railways. In terms of the said Memorandum of

G

H

A Understanding, the Petitioner and the Respondent would be equal shareholders of the Joint Venture Company and the project cost was estimated at Rs.37.5 crores, out of which an amount of Rs.7.5 was to be contributed by the Ministry of Tourism as a grant and an amount of Rs.15 crores was to be
B contributed as advance lease rental by the Petitioner as its share. In addition to the above, the Petitioner was to bring in the funding for the project and the Luxury Tourist Train was to be leased by the Respondent to the Joint Venture Company for a period of 15 years, which could be extended by another
C period of 10 years on conditions to be mutually agreed between the Petitioner and the Respondent. The Joint Venture Company was incorporated under the name and style of "Royale India Rail Tours Ltd."

D 3. Upon receiving the approval of the Indian Railways, the Respondent executed a Memorandum of Understanding with the Petitioner dated 10th July, 2008, wherein it was stated that the Ministry of Railways had given the permission to the Respondent to own and operate the Luxury Tourist Train for the exclusive use of the Joint Venture Company for a period of 15
E years, which was renewable for a further period of 10 years. The said Memorandum of Understanding also contained the various terms and conditions on which the train was to be operated. In terms of the Joint Venture Agreement and the
F Memorandum of Understanding, a Service Agreement dated 5th March, 2010, was executed between the Joint Venture Company and the Ninth Dimension Hotel and Resorts Pvt. Ltd., hereinafter referred to as "MAPPLE Hotels", for providing hospitality services on board and their respective roles and responsibilities were set out in the said agreement.

G 4. The Maharaja Express commenced operations on 20th March, 2010, and completed 4 journeys in the inaugural runs till 31st March, 2010, and 30 journeys between April, 2010, till April, 2011.

H 5. Whilst the Joint Venture operations were being

conducted, certain disputes arose between the shareholders regarding the working of the Joint Venture Agreement and the Memorandum of Understanding, which ultimately resulted in the termination of the lease arrangement by the Respondent, IRCTC, by its letter dated 12th August, 2011, on the grounds indicated therein.

A
B

6. On account of such termination of the lease agreement, the Petitioner initiated a proceeding under Section 9 of the Arbitration and Conciliation Act, 1996, under the Arbitration Agreement contained in Article 30 of the Joint Venture Agreement, for staying the termination of the lease agreement and also to allow the arrangements to continue till the month of April, 2012, subject to such terms and conditions as may be imposed by the Court.

C

7. As has been submitted by Mr. Mukul Rohatgi, learned Senior Advocate, appearing for the Petitioner, what was of utmost importance and concern to the Petitioner was not only the huge investment made by the Petitioner in the project, but the loss of goodwill and reputation in the eyes of its clients, who were mainly from foreign countries. Discontinuance of operation would also besmirch the reputation of the Indian Government.

D
E

8. One of the other concerns of the Petitioner was that it had been looking after the marketing and the bookings internationally and within India and such bookings had been made much in advance. It was the case of the Petitioner that the Joint Venture Company had received and was holding approximately 400 bookings up to December, 2011 and such bookings had been made by various international travel companies.

F
G

9. The prayer for interim directions was contested by the Respondent on several grounds. One of the grounds taken was that by making relief on the basis of the Joint Venture Agreement, the Petitioner was trying to get a lease in favour of the Joint Venture Company, which was neither a party to the

H

A proceedings nor to the Agreement. It was further contended that, in fact, the lease was never executed in favour of the Joint Venture Company and the rights of the Petitioner could not go beyond what had been laid down in the Articles of Association of the Joint Venture Company. It was also urged that since the
B relationship between the Joint Venture Company and the Respondent had been terminated, the Petitioner was trying to create a right in its favour for operating the train, which was never in its individual possession. It was urged that such a prayer was not maintainable and it was not open to the
C Petitioner to claim any relief in relation to the train, which was the subject matter of the termination letters issued by the Respondent to the Joint Venture Company, in its capacity as owner of the train. Noting the interest of the parties and keeping in mind the fact that advance bookings had been made, the
D learned Single Judge of the Delhi High Court, who heard the Application under Section 9 of the Arbitration and Conciliation Act, 1996, came to the conclusion that, although, in terms of the Joint Venture Agreement in which there was a separate provision for arbitration, the arbitral dispute would have to be confined to the disputes between the parties to the Agreement,
E under the wider connotation of the Agreement between the Respondent and the Joint Venture Company, certain interim orders were required to be made. More so, when the main grievance of the Respondent against the Petitioner and the Joint Venture Company was in respect of inflated bills raised
F by the Petitioner and non-payment of the amounts payable in terms of the Agreement. In such circumstances, the learned Single Judge found it fit to appoint a Receiver, as an interim measure, in the public interest, to prevent discontinuation of the running of the train for which bookings had already been made.
G The learned Judge appointed one Shri Sudhir Nandrajog, a Senior Advocate of the Delhi High Court, as Receiver, and disposed of the Section 9 application, inter alia, by directing that the train would continue to be run under the supervision of the learned Receiver for the period commencing from 14th
H September, 2011, upto 31st December, 2011, which was the

major period for which the bookings had been effected, as per the arrangement which was continuing during the earlier season. Various other directions were given to enable the learned Receiver to operate the Maharaja Express and for maintenance of accounts. The parties were also granted leave to approach the Court or Arbitrator (if appointed) for modification of the order in case such need arose.

10. In addition to the above, the parties were also given liberty to take necessary steps to have their disputes resolved by the appointment of an Arbitral Tribunal which would be at liberty to decide the disputes without being influenced by the order passed on the application under Section 9 of the 1996 Act. The rights and contentions of both sides were also kept open for submission before the Arbitral Tribunal, if appointed.

11. The order of the learned Single Judge was challenged by IRCTC Ltd. by way of FAO(OS)Nos.433-35 of 2011.

12. The submissions made before the learned Single Judge were reiterated on behalf of both the parties before the Division Bench, but a new dimension was attempted to be added to the submissions advanced on behalf of the Petitioner, M/s Cox & Kings India Ltd. An attempt was made to make out a case that the Joint Venture Company was akin to a partnership and the train in question was partnership property. The Division Bench took note of the fact that the total cost of the train was Rs.49.5 crores, which had been borne by IRCTC and was even recorded in Article 6 of the Agreement. Apart from the above, not only the shell train, but even the cost of the interior, fittings and furnishing was borne by IRCTC. The Division Bench also noted that if the train was to be regarded as a Joint Venture property, there was no reason to provide for leasing of the train by IRCTC to the Joint Venture Company.

13. The Division Bench, however, was disinclined to continue the arrangement, as directed by the learned Single Judge, and accepted the submissions made on behalf of the

A IRCTC that the mandatory injunction which had been passed, would have the effect of creating an Agreement between the Joint Venture Company and IRCTC in relation to the train, which would be influenced even though the Joint Venture Company was not a party to the proceedings. However, keeping in mind
B the prestige of the country in regard to the running of the Maharaja Express which had earned worldwide fame, the Division Bench felt that since the Court was not in a position to restore the terminated arrangement and direct the train to be managed and run by M/s. Cox & Kings under the supervision
C of the Receiver, the public interest could be subserved if the Maharaja Express continued to be operated even by the IRCTC. Also taking into account the factor relating to the bookings which had already been made in advance, the Division Bench accepted the suggestions made by IRCTC to honour the bookings, without prejudice to the rights and
D contentions of the parties, as extracted hereinbelow :

E "a) The train has to be run by the owner/respondent. All the facility material including crockery, furnish-ings etc. which are in custody of the petitioner should be handed over to respondent for executing this facility arrangement.

F b) All revenues arising therefrom without any deductions earned either by the petitioner or respondent may be deposited in the separate account from which expenditure will be funded.

G c) All the bookings may be allowed to be transferred to the respondents for honouring.

H d) All the on board or off board expenses and railway payments may be allowed to be charged to this account. In this way, the amount will be sufficient to cover the expenses and there will be no need for further loans.

e) The existing service providers may be retained." A

14. The Division Bench also directed that while running the train, the IRCTC would remain bound by the aforesaid suggestions. Whatever bookings had been made till then could be transferred by M/s. Cox & Kings to IRCTC. The Division Bench accordingly set aside the arrangements made by the learned Single and allowed the appeal preferred by the Respondent herein. B

15. It is against the said judgment and order passed by the Division Bench of the Delhi High Court on 6th January, 2012 in FAO(OS)Nos.433-35 of 2011, that the present Special Leave Petitions have been filed by M/s. Cox & Kings India Ltd. C

16. Appearing for the Petitioner Company, Mr. Mukul Rohatgi, learned Senior Advocate, submitted that the primary reason for filing of the writ petition was to protect and save the image and goodwill of the Petitioner Company in the field of global tourism. Mr. Rohtagi submitted that it is in that context that a prayer had been made on behalf of the Petitioner Company for stay of operation of the termination of the Lease Arrangement by the Respondent IRCTC by its letter dated 12th August, 2012. Mr. Rohatgi submitted that almost the entire expenses for commencing operations in respect of the Maharaja Express had been borne by the Petitioner Company in different forms, and in view of the promises contained in the Memorandum of Understanding and the Agreement executed between the Petitioner Company and the Joint Venture Company, the termination of the Lease Arrangement was not warranted. D E F

17. Mr. Rohatgi urged that it had been agreed by both the parties in the said Memorandum of Understanding and the Joint Venture Agreement and other supporting documents that the lease of the train by IRCTC to the Joint Venture Company was for a minimum period of 15 years from the date of the first commercial run of the train and in lieu whereof 50% cost of the G H

A train had been paid by way of advance lease charges which were to be adjusted over a period of 15 years from the date of the first commercial run of the train. Mr. Rohatgi urged that the said amount had been paid by the Petitioner to the IRCTC through the Joint Venture Company. It was on account of the termination letters dated 12th August, 2011, issued by IRCTC that the Petitioner Company was compelled to initiate proceedings before the High Court under Section 9 of the Arbitration and Conciliation Act, 1996. Mr. Rohatgi submitted that the relief claimed in the said application was that the Maharaja Express should be operated only through the Joint Venture Company and that the Respondent IRCTC should be restrained from using the train for any purpose other than for the exclusive use of the Joint Venture Company. Mr. Rohatgi also reiterated the fact that in order to safeguard the interest of the parties concerned, the learned Single Judge had appointed a Receiver to oversee the function and operations of the train and granted injunction to preserve the existing status-quo till the final hearing of the dispute.

18. The major thrust of Mr. Rohatgi's submissions was towards the aforesaid end and was indicative of the fact that the running of the train was of primary importance and should be allowed to continue as per the earlier undertaking, without any disturbance, while the disputes before the learned Arbitrator were finally disposed of.

19. On the other hand, on behalf of the Respondent No.1 it was contended by the Learned Solicitor General that the Special Leave Petitions had been filed by M/s. Cox & Kings. Ltd. in respect of the train, which was owned by the Respondent No.1, IRCTC. The said train had been converted into a luxury train and was being operated on a seasonal basis between the months of September to April by the Joint Venture Company. However, the IRCTC had no option but to terminate the arrangement made with the Joint Venture Company to operate the luxury train on account of various reasons and, in particular, on account of non-payment of the dues of IRCTC. The learned

Solicitor General submitted that the letter terminating the Joint A
Venture Agreement was the subject matter of the Section 9
Application before the learned Single Judge of the High Court,
who, by his order dated 6th September, 2011, allowed the
prayers made therein in part and issued a mandatory injunction
and also appointed a Receiver for operation of train between B
the months of September to December, 2011. However, the
train was never operated under the Receiver on account of the
interim orders passed in the appeal on 9th September, 2011.

20. The learned Solicitor General reiterated the fact that
on 6th January, 2012, the Division Bench set aside the order C
passed by the learned Single Judge which was, in any event,
to operate only till 31st December, 2011.

21. The learned Solicitor General urged that there was no
ambiguity regarding the ownership of the train and it had been D
clearly understood by all concerned that it was IRCTC which
was to be the owner of the train and that the Joint Venture
Company was to be formed for management and operation of
the train. It had also been made clear that IRCTC's association
with other agencies was for the purpose of management of the E
train only.

22. It is evident from the submissions made on behalf of
the respective parties that the arrangement between the
Respondent No.1, IRCTC, was with the Petitioner Company
and, although, it was the intention of the parties by virtue of the F
Joint Venture Agreement that the luxury train, belonging to the
Respondent No.1, was to be operated by the Joint Venture
Company, at least for a minimum period of 15 years, what
ultimately transpired was the termination of the Agreement by
the Respondent No.1 in favour of the Joint Venture Company. G
As pointed out by the Division Bench of the High Court, the
Petitioner was not entitled to question such termination as by
itself it had no existence as far as the running of the train was
concerned and it was not a party to the proceedings. In fact,
what the Petitioner has attempted to do in these proceedings H

A is to either restore the Lease Agreement, which had been terminated, or to create a fresh Agreement to enable the Petitioner to operate the luxury train indefinitely, till a decision was arrived at in Section 9 Application.

B 23. It is no doubt true that the Petitioner has invested large sums of money in the project, but that cannot entitle it to pray for and obtain a mandatory order of injunction to operate the train once the lease agreement/arrangement had been terminated. We are also unable to accept Mr. Rohatgi's submission that the Joint Venture Agreement was akin to a partnership. Such submission had been rightly rejected by the Division Bench. As rightly pointed out by the Division Bench of the High Court, the Petitioner's remedy, if any, would lie in an action for damages against IRCTC for breach of any of the terms and conditions of the Joint Venture Agreement and the Memorandum of Understanding.

E 24. Taking into consideration the totality of the circumstances, we are inclined to agree with the suggestions which had been made by IRCTC before the Division Bench of the High Court regarding the operation of the train by IRCTC, with liberty to the parties to appoint an Arbitral Tribunal to settle their disputes. We, therefore, dismiss the Special Leave Petitions, but make it clear that if an Arbitral Tribunal is appointed, the aforesaid arrangement will be subject to the decision of the Arbitral Tribunal. We also make it clear that the observations made by the learned Single Judge, the Division Bench of the High Court and by us, shall not, in any way, influence the outcome of the arbitral proceedings, if resorted to by the parties.

G 25. Having regard to the nature of the facts of the case, the parties shall bear their own costs.

26. In view of the above, no order is required to be passed on the Contempt Petitions and the same are also dismissed.

H B.B.B. SLP & Contempt Petitions dismissed.