Delhi High Court Rajasthan Breweries Ltd. vs The Stroh Brewery Company on 12 July, 2000 Equivalent citations: AIR 2000 Delhi 450, 2000 (3) ARBLR 509 Delhi, 2000 (55) DRJ 68 Author: D Gupta Bench: D Gupta, S Agarwal ORDER Devinder Gupta, J. 1. This appeal is against the order passed by learned Single Judge of this Court on 23.3.1999 dismissing the application (IA.1291/99) filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 (for short "the Act") seeking ad interim temporary injunction staying the two notices of termination dated 19.1.1999 issued by the respondent terminating the Technical Know-how Agreement as well as Technical Assistance Agreement, both dated 22.7.1994 executed between the appellant and the respond ent and also restraining the respondent from executing any fresh contract of similar nature with any third party. 2. Learned Single Judge dismissed the appellant's application on the ground that injunction prayed for was statutorily prohibited on conjoint reading of Section 41 and Section 14(i)(c) of the Specific Relief Act since the contracts in question were determinable in nature. 3. The appellant's case is that the contracts in question are not determinable in nature as contemplated by Section 14(i)(c) of the Specific Relief Act since there is no clause in the agreement, which permits the respondent to terminate the agreements by giving a notice of a few days. The contracts, which are determinable in nature have always been understood to mean those contracts, which can be put to an end to sending notice simplicitor of a few days. It was contended that contracts in question do not contain such a clause. To the contrary, the contracts in the present case specifically state and recognise that the respondent has granted to the appellant an exclusive license to produce Stroh Beer for a term of seven years. Which term was renewable successively for a period of three years at each time. It has also been contended that if the decision rendered by learned Single Judge is taken to be correct law, then in almost allcommercial contracts the remedy of injunction would be barred. Another ground urged is that the arbitration proceedings in the present case have to be conducted in accordance with English law and since procedural law is the English Arbitration Act, the same will govern the rights of the parties. Section 48(5)(b) of the English Arbitration Act, 1996 specifically empowers the Arbitrator to order specific performance of a contract. This aspect was not considered in its right prospective. 4. Two agreements i.e. (a) Technical Assistance Agreement and (b) Technical Know-how Agreement were entered into between the parties on 22.7.1994 and 7.10.1994 respectively. Under clause 9.1 of the Technical Assistance Agreement and clause 17.1. of the Technical Know-how Agreement, the parties agreed that disputes, if any, arising under or in connection with the said agreements, if not resolved through friendly consultation within 60 days after the commencement of discussions or such longer period as the parties agree to in writing at that time, the same shall be submitted to the arbi- tration in accordance with the Rules framed by the International Chamber of Commerce, London. Clause 9.2.6 of the Technical Assistance Agreement and Clause 17.7 of the Technical Know-how Agreement envisage that the governing law for arbitration shall be the laws of England. 5. The appellant filed petition (AA. No.43/99) under Section 8 of the Arbitration and Conciliation Act, 1996 seeking reference of disputes mentioned

in the petition for adjudication through the process of arbitration, in terms of the aforementioned arbitration agreements between the parties. Simultaneously, an application under Section 9 of the Act for ad interim temporary injunction was also filed. Cause of action is stated to have arisen to the appellant to file the aforementioned applications on the respondent's issuing letter dated 19.1.1999 terminating both the agreements on the ground that the appellant had failed to meet the respondent's quality and standards, inconsistent production resulting in frequent product shortages in the market, late and insufficient payment of dues due to respondent under the agreement and apparent insolvency of the appellant. The letter of termination stated that effective date of termination would be 12.2.1999. 6. The appellant's case is that the grounds stated in the letter terminating the agreement are non-existent and are false. Because of the action on the part of the respondent terminating agreement disputes had arisen requiring reference and adjudication in accordance with the terms of agreement. 7. The respondent opposed the petition on the ground that the Court has no jurisdiction to entertain the petition. It has also no jurisdiction and power to grant injunction, as sought for by the appellant. However, for the purpose of deciding the application filed by the appellant under Section 9 of the Act, it was stated by the respondent that it was not pressing the issue of lack of jurisdiction of this Court to entertain and decide the petition. Learned Single Judge considered the second preliminary objection raised on behalf of the respondent of the bar contained in Section 14(i)(c) read with Section 41(1) of the Specific Relief Act, which was upheld and on that basis application for interim relief was dismissed. 8. The appellant's case is that in 1991, Mr. Jain took over the Management of the appellant company. Between the years 1991-94, the appellant set up a state of art fully automated and computerised brewery, at a cost of more than 20 million dollars, in technical collaboration with internationally acclaimed and renowned companies. At the specific request of the respondent the appellant imported a number of costly equipment. The appellant agreed to make this huge investment as it xclusively wanted to produce and distribute Stroh's brand of Beer. The appellant had a legitimate expectation that it would be able to recover huge investment over long period of business relationship, which it was contemplating to enter into with the respondent. On 22.7.1994 two aforementioned agreements were executed between the parties. Exclusive licence was granted to the appellant to produce Stroh Beer for a term of 9 years, which was renewable successively for a period three years at each time. The two agreements provided for payment of royalty and lump sum payment of technical fees. On 12.9.1994,the Reserve Bank of India while granting approval to the Foreign Collaboration Agreements entered into with the respondent specifically stipulated that no lump sum fees would be allowed to be repatriated by the appellant to the respondent and further royalty would be permitted only up to 5% on domestic sales and 8% on export sales. The respondent on 26.10.1998 admitted that the appellant had successfully introduced the respondent's brand name in India over four years ago and has since established the popular consumer base for both mild and super strong varieties. 9. It has further been alleged that on 19.1.1999 the respondent issued two termination notices on the aforementioned

grounds. The appellant through letters dated 21.1.1999 and 25.1.1999 replied to the termination notices. The appellant alleged that the apparent insolvency is not a ground for termination of contract and in fact the appellant is not insolvent. No winding up petition is pending against the appellant and no winding up order has been passed. The allegation of late and insufficient payment of fees does not arise as in accordance with Reserve Bank of India's permission, the appellant has already remitted excess payments to the respondent. Whatever time lag has taken place in remitting payment is due to complying with governmental formalities at the Reserve Bank of India end, for which the appellant at the respondent's insistence had appointed M/s. Thakker and Thakker as their attorney. The allegations with regard to poor quality are frivolous, baseless and mischievous as the appellant has produced all Stroh products in accordance with the standards stipulated by the respondent under the supervision of the respondent's Technical Team. It was because of the quality of Stroh Beer produced and sold by the appellant that the respondent had taken the decision to further expand its business in India. Had the appellant's quality of Beer was poor, the respondent would never have allowed the appellant to dispose of the stock lying in appellant's possession. 10. The respondent's case on the other hand is that as per the amendment to the Technical Know-how Agreement, it was specifically agreed that respondent expected the appellant to meet not only production and sales of 1,00,000 hecto liters of the respondent's product and in case the appellant be not able to produce or sell the expected quantity, the respondent would have right to grant Know-how licence to other parties. The ongoing licence granted under know-how licence was also conditional upon the appellant's achieving the quality and production standards specified in report dated 25.6.1998. The appellant in a period of six months from 23.6.1998 to 28.2.1999 had produced only 8,000 hecto liters, which amount to 9% of the total quantity for the period and 16% of the target for six months i.e. approximately 8,000 hecto liters against the target of 50,000 hecto liters for six months. The respondent has also disputed the appellant's claim that the ground of late and insufficient payments is non-existent. 11. We need not go into these questions on merits while considering the instant appeal since during the course of arguments we had informed learned counsel for the parties that we would confine ourselves only to the two grounds taken by learned Single Judge in dismissing the appellant's application. 12. The application filed by the appellant, which has given rise to the instant appeal, was presented under Section 9 of the Act. Section 9 of the Act enables a party 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, to apply to a Court, amongst others for an interim measure or protection in respect of any of the matters enumerated in clauses (a) to (e), one of which is "such other interim measure or protection as may appear to the Court to be just and convenient". Section 9 of the Act says that the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. Section 9 of the Act reads as under:- "Interim measure, 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) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely: (a) the preservation, interim custody or sale of any good which are the subject matter of the arbitration agreement. (b) securing the amount in dispute in the arbitration: (c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land for building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence: (d) interim injunction or the appointment of a receiver: (e) such other interim measure of protection as may appear to the Court to be just and convenient. and the Court shall have the same power for making orders as if has for the purpose of, and in relation to, any proceedings before it." 13. As the application by the appellant was filed under Section 9 of the Act prior to commencement of the arbitration proceedings, it is not disputed that the Court is empowered to deal with the same and exercise such power for making orders as it has for the purposes of and in relation to any proceedings before it. The closing words of Section 9 of the Act empowering the Court to deal with such applications for interim measures have on the face of it to be dealt with in accordance with the law applicable to any proceedings taken out before such a Court. On the ratio of the decision of the Supreme Court in Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. the application will be governed by the law of India and not by the governing law. However, the principles of equity governing specific performance are almost same in Indian law and English law. The discretion of the Courts of England while enforcing the specific performance of a contract is subject to the same constraints as are applicable in the Courts in India. Under the English law of specific performance of contractual obligation is available only in equity and is subject to various restrictions, which have been explained by G.H. Treitel in his work "The Law of Contracts" 6th Edition pages 764 to 775 as follows:- "(i) Specific performance will not be ordered where damages are adequate remedy. (ii) If the party applying for relief is guilty of a breach of the contract or is guilty of wrongful conduct. (iii) If the Contract involves personal service. (iv) If the contract requires constant supervision. (v) If the party against whom specific performance is sought is entitled to terminate the contract." At page 775, it is stated in the aforementioned work:- "If the party against whom specific performance is sought is entitled to terminate the contract, the order will be refused as the defendant could render it nugatory by exercising his powers to terminate. This principle - applies whether the contract is terminable under its express terms or on account of the conduct of the party seeking specific performance." 14. The effect of breach of a contract by a party seeking to specifically enforce the contract under the Indian law is enshrined in Section 16(c) read with Section 41(e) of the Specific Relief Act, 1963. Clause (e) of Section 41 of the Specific Relief Act provides that injunction cannot be granted to prevent the breach of

contract, the performance of which would not be specifically enforced. Clause (c) of Section 41 enumerates the nature of contracts, which could not be specifically enforced. Clause (c) to sub-section (1) of Section 14 says that a contract which is in its nature determinable cannot be specifically enforced. Learned Single Judge thus was justified in saying that if it is found that a contract which by its very nature is determinable, the same not only cannot be enforced but in respect of such a contract no injunction could also be granted and this is mandate of law. This, however, is subject to an exception, as provided in Section 42 that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. 15. Learned Single Judge considered various covenants of the agreement and referred to clause 8 of the Technical Assistance Agreement regarding termination saying that similar provision is ncorporated in the Technical Know-how Agreement and both agreements provide that the same could be terminated even by the appellant at its option at the occurrence of any of the events, which are specifically mentioned in the agreement. Learned Single udge extracted clauses relating to Technical Assistance Agreement under which the respondent could terminate the contract and as the termination had to take place at the instance of the respondent, therefore, events under which the appellant could terminate are not extracted. We were taken through various clauses and it is not disputed and has also rightly been pointed out by learned Single Judge that there is no negative covenant in the agreements in question. As there was no negative covenant, it was observed by learned Single Judge that agreements could be terminated by the respondent on the happening of any of the events mentioned in clause 8 of the Technical Assistance Agreement and under similar corresponding clause in Technical Know-how Agreement. Accordingly, learned Single Judge held that since agreement was determinable at the behest of respondent, therefore, the same was determinable in nature and is revocable at the option of both the parties at the happening of any of the events mentioned therein. 16. Learned counsel for the appellant contended that the word "determinable" used in clause (c) to Sub-section (1) of Section 14 means that which can be put an end to. Determination is putting of a thing to an end. The clause enacts that a contract cannot be specifically enforced if it is, in its nature, determinable not by the parties but only by the defendant. Although clause does not add the word "by the parties or by the defendant" yet that is the sense in which it ought to be understood. Therefore, all revocable deeds and voidable contracts may fall within "determinable" contracts and the principle on which specific performance of such an agreement would not be granted is that the Court will not go through the idle ceremony of ordering the execution of a deed or instrument, which is revocable at the will of the executant. Specific erformance cannot be granted of a terminable contract. 17. We are unable to persuade ourselves to accept the submissions put forth on behalf of the appellant that when a contract is determinable by the parties, the same cannot be treated as such a contract as is referred to in clause (c) to sub-section (1) of

Section 14 id a contract, which in its nature is determinable. 18. In Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and others, , the Supreme Court had an occasion to consider the terms of agreement of distributorship. The agreement could be terminated in accordance with the terms of the agreement as per clauses 37 and 28 thereof. The Arbitrator had also held the distributorship to be revocable in accordance with clauses 27 and 28 of the agreement. The distributorship agreement was held for indefinite period, namely, till the time it was terminated in accordance with the terms contained therein. It was the case of the respondent therein that since the contract had not been terminated in accordance with clause 27 thereof, under which termination had been made, the firm was entitled to continuance of distributorship in the spe- cial circumstances of the case, which contention was upheld by the Arbitrator. Supreme Court set aside the award of the arbitrator on the ground that there is error of law apparent on the face of the record and grant of relief in the award cannot be sustained. It was held:- "The arbitrator recorded finding on issue No.1 that termination of distributorship by the appellant Corporation was not validly made under clause 27. Thereafter, he proceeded to record the finding on issue No.2 relating to grant of relief and held that the plaintiff-respondent 1 was entitled to compensation flowing from the breach of contract till the brech was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the Distributorship Agreement was for an indefinite period till terminated in accord ance with the terms of the agreement and, therefore, the plain- tiff-respondent 1 was entitled to continuance of the distributor- ship till it was terminated in accordance with the agreed terms. 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 person al 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 its nature is determinable. This being so granting the relief of restoration of the distribu torship 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 no 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, be sustained. The facts of the present case are identical to those in aforemen tioned decision of the Supreme Court in as much as the agreements in the instant case are also terminable by the respondent on happening of certain events. In Indian Oil Corporation's case (supra) also agreement was trminable on happening of certain events. Question that whether termination is wrongful or not; the events have happened or not; the respondent is or is not justi fied in terminating the agreements are yet to be decided. There is no manner of doubt that the contracts by their nature determinable. In M/s. Classic Motors Ltd. Vs. M/s. Maruti Udyog Ltd., relying upon number of decisions, learned Single Judge of this Court rightly observed:- "In view of long catena of decisions and consistent view of the Supreme Court, I hold that in private commercial transaction the parties could terminate a contract even without assigning any reasons with a reasonable period of notice in terms of such a Clause in the agreement. The submission that there could be no termination of an agreement even in the realm of private law without there being a cause or the said cause has to be valid strong cause going to the root of the matter, therefore, is apparently fallacious and is accordingly, rejected." 19. Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statuorily prohibited with respect of a contract, which is determinable in nature. The application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same. Consequently, there being no merit in the appeal, the same is dismissed.