

**HIGH COURT OF GUJARAT**

**MUNDRA INTERNATIONAL CONTAINER TERMINAL PVT LTD  
V/S  
MUNDRA PORT & SPECIAL ECONOMIC ZONE LTD**

**Date of Decision:** 18 February 2008

**Citation:** 2008 LawSuit(Guj) 474

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**Hon'ble Judges:** [D N Patel](#)

**Case Type:** Appeal From Order; Civil Application

**Case No:** 31, 1260 of 2008

**Subject:** Civil, Constitution

**Acts Referred:**

[CONSTITUTION OF INDIA ART 226](#), [ART 14](#)

CODE OF CIVIL PROCEDURE, 1908 [SEC 80\(2\)](#)

[GUJARAT MARITIME BOARD ACT, 1981 SEC 107](#)

**Final Decision:** Appeal dismissed

**Advocates:** [Mihir Joshi](#), [Singhi & Co](#), K S Nanavati, [Trivedi & Gupta](#)

**Reference Cases:**

[Cases Referred in \(+\): 1](#)

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**Judgement Text:-**

D N Patel, J

[1] This Appeal from Order has been preferred against the order dated 6th February, 2008 passed by City Civil Court at Ahmedabad in Civil Suit No.282 of 2007, whereby interim order has not been extended as Gujarat Maritime Board (hereinafter referred to as "G.M.B.") was not a party before the Court. Gujarat Maritime Board regulates the development of ports, entire water front and coast line, under the provisions of Gujarat Maritime Board Act, 1981.

[2] Having heard the learned counsel appearing for both the parties, I see no reason to interfere with the order dated 6th February, 2008 passed by the City Civil Court, Ahmedabad in Civil Suit No.282 of 2007, mainly for the following facts and reasons:

(i) The appellant is original plaintiff, who has instituted Civil Suit No.282 of 2007, with the following prayers:

"91. The Plaintiff therefore prays:

(a) for a declaration of this Hon'ble Court that the Sub-Concession Agreement dated 7th January, 2003 (as amended) and Framework Agreement dated 8th November, 2002 are valid, subsisting and binding.

(b) for a declaration that the purported termination of the Sub-Concession Agreement dated 7th January, 2003 by the said letters dated 3rd November, 2007 and/or 8th November, 2007 is illegal and/or ultra vires and ab-initio;

(c) for a perpetual order and injunction restraining MPSEZL, by themselves, their servants, agents, officers and subordinates, from taking any steps or measures or action whatsoever to, in any manner, use the said Second Stage Assets to handle container cargo or operate, directly or indirectly, a container handling facility thereat;

(d) for a perpetual order and injunction restraining MPSEZL, by themselves, their servants, agents, officers and subordinates, from taking any steps or measures or action whatsoever in any manner whatsoever, against the plaintiff pursuant to and/or in implementation of and/or in furtherance of the said letter dated 3rd November, 2007 and/or the consequential letter dated

8th November, 2007;

(f) for such further and other relief as this Hon'ble Court may deem fit in the nature and circumstances of the case."

(Emphasis supplied)

(ii) It also appears from the facts of the case that initially Learned City Civil Court at Ahmedabad passed an order on 31st January, 2008, the operative part whereof, reads as under:

"The Court has heard Ld. Senior Counsel Mr. Mihir Thakore for the plaintiff and Ld. Advocate Mr. Sanjay Mehta for caveator defendant. On oral instruction from the officer present, Ld. Advocate Mr. Mehta states that the operations of the first stage assets are continuing till the date and as he has been served upon the documents by the plaintiff at 5:05 p.m. today, he seeks time to file the reply till 06.02.2008.

Under the circumstances, without prejudice to the rights of either side in the future, the defendant is directed not to discontinue the present arrangement till filing of its reply so as not to non-suit the plaintiff. Both the sides agree to early hearing of the matter and ensure cooperation for the same."

(Emphasis supplied)

(iii) It appears that an order was passed on 6th February, 2008 by the Learned City Civil Court at Ahmedabad, main part whereof, reads as under:

"ORDER BELOW EXHIBIT 6 & 7

Having heard the Ld. Senior Counsels Shri K.S. Nanavati, it prima facie appears that it is on account of the direction issued by G.M.B. i.e. Gujarat Maritime Board to the defendant by letter dated 3.11.2007 that the

Defendant by its letter 8.11.2007 terminated the contract of the plaintiff. Gujarat Maritime Board is not a party before this Court. Passing of any order requiring the defendant to stay its hands would result into making the directions of G.M.B. without having G.M.B. Although the statutory notice has been issued by the plaintiff to G.M.B. but a period of 30 days required under the law has not expired and therefore, G.M.B. is not made a party. However, the fact remains that G.M.B. who has ultimate control over the Ports in Gujarat will be adversely affected. If any order as prayed for is passed the question of irreparable loss and non-compensable injury arise only can be considered only in presence of G.M.B. Hence, it is not possible to extend or pass any interim order at this stage. Therefore, oral application of the plaintiff is rejected."

(Emphasis supplied)

Thus, stay was not extended mainly for the reason that Gujarat Maritime Board was not a party before the Court and passing of any order against the defendant, tantamounts to rendering the direction issued by Gujarat Maritime Board infructuous, without giving an opportunity of being heard to Gujarat Maritime Board. Against this order, the present Appeal from Order, has been preferred.

(iv) Therefore, the important question raised before this Court for adjudication is Whether interim order granted earlier should be extended or not. To answer this question, it is vehemently submitted that without joining and hearing the necessary party (i.e. Gujarat Maritime Board), the plaintiff is not entitled to get any relief, much less extension of relief. Reliance has also been placed upon prayer in the suit [i.e. para 91(b) and (d)] as well as upon Section 80(2) of the Code of Civil Procedure, 1908, and upon Section 107 of Gujarat Maritime Board Act, 1981 and it is vehemently submitted that Gujarat Maritime Board is not only a proper party but it is a necessary party, and so without giving an opportunity of being heard to Gujarat Maritime Board, no relief can be granted or extended.

(v) It appears from the facts of the case that Gujarat Maritime Board is not a party before the Trial Court. It also appears from the facts of the case that looking to the letter dated 3rd November,2007, written by Gujarat Maritime Board to the Managing Director, Gujarat Adani Port Limited, it appears that there is a breach of Concession Agreement by sub-concessionaire. It is mentioned by Gujarat Maritime Board in its letter dated 3rd November,2007 that there is a material breach of Concession Agreement / Sub-Concession Agreement by Sub-concessionaire. Several clauses of Concession Agreement and Sub-Concession Agreement have been referred by both the parties. Concession Agreement has been entered into between Gujarat Maritime Board and Gujarat Adani Port Limited (now known as 'the defendant') and Sub-Concession Agreement has been entered into between the Gujarat Adani Port Limited and the plaintiff/ appellant. The defendant terminated Sub-Concession Agreement with the plaintiff vide their letter dated 8th November,2007. Thus, looking to the prayers in the suit especially para 91(b) and (d) and also letter dated 8th November,2007 issued by the defendant is a consequential letter of a direction given by Gujarat Maritime Board vide its letter dated 3rd November,2007. Therefore, without joining Gujarat Maritime Board as a party-defendant, rightly the stay has not been extended by the Trial Court. Stay against the letter dated 8th November,2007 issued by the defendant virtually tantamounts to stay against the detailed direction given by Gujarat Maritime Board vide its letter dated 3rd November,2007. Section 80(2) of the Code of Civil Procedure, reads as under:

"80(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for

presentation to it after complying with the requirements of sub-section (1)."

(Emphasis supplied)

Thus, without joining Gujarat Maritime Board and without giving an opportunity of being heard, if there is an extension of the stay, granted by the trial court, there will be a breach of section 80(2) of Code of Civil Procedure, 1908. Section 107 of Gujarat Maritime Board Act, 1981, prohibits institution of the suit, without one month's notice to Gujarat Maritime Board. In fact, in Section 107 of the Gujarat Maritime Board Act, 1981, there is no such provision like Section 80(2) of the Code of Civil Procedure, 1908. Thus, exception attached which, Section 80(2) of the Code of Civil Procedure, 1908, is not even available under Section 107 of Gujarat Maritime Board Act, 1981. Gujarat Maritime Board and its functions are also defined under Gujarat Maritime Board Act, 1981, which includes management and control upon the ports.

(vi) Learned counsel for both the sides have taken this Court to various clauses of the Concession Agreement and Sub-Concession Agreement. It appears from the facts of the case that the defendant has obtained Concession Agreement for development, construction and operation of Mundra Port. Concession Agreement dated 17th February, 2001, permits the defendant to enter into Sub-Concession Agreement, after prior consent or approval of Gujarat Maritime Board. The defendant has obtained prior approval of Gujarat Maritime Board to enter into Sub-Concession Agreement with the plaintiff. It appears that Sub-Concession Agreement was entered into on 7th January, 2003. When it was signed, it was in favour of P&O Ports, which was controlled by a British Company and there shareholders were also Britishers, which company is known as Peninsular and Oriental Steam Navigation Company (P&O SNCO). This company is now taken over by Dubai Ports World. There is a direct impact of this taking over of British company by Dubai Ports World and the Directors of the plaintiff have been changed. Dubai Ports World taken over "P&O SNCO" on 9th March, 2006. Board of Directors of plaintiff have been changed on 1st June, 2006. Thus, there is direct impact upon working of sub-concessionaire and looking to the



clauses 7.1, 7.2(d), 7.2(e) and 8.5 of the Concession Agreement to be read with Clause 2.1, 3.1.1 and 4.3 of Sub-Concession Agreement, though, prior consent/approval/permission of Gujarat Maritime Board was necessary, the same has not taken and, therefore, notices were issued in February and March,2006 by Gujarat Maritime Board to the plaintiff and upon hearing the plaintiff, a letter dated 3rd November,2007 was issued by Gujarat Maritime Board. Detailed directions have been given to the defendant, which is licensee to bring to an end the Sub-Concession Agreement, and therefore vide letter dated 8th November,2007 Sub-Concession Agreement has been terminated. Thus, upon conjoint reading of clauses, of 7.1, 7.2(d), 7.2(e) and 8.5 of the Concession Agreement and Clauses 2.1, 3.1.1 and 4.3 of Sub-Concession Agreement, there is no prima facie case in favour of the plaintiff. Activity of Port is not only very vital for interest of nation, but, is also a sensitive issue for security of nation. Looking to the clauses of Concession Agreement and looking to the interest of nation, approval can be given or it can be rejected. As the suit as well as notice of motion are pending, this Court is not much analyzing the aforesaid clauses of the Concession Agreement and Sub-Concession Agreement and fine nicety thereof. Of course, learned counsel for both the sides have read and re-read these clauses. Suffice it will be for the disposal of the present Appeal from Order to state that no error has been committed by the Trial Court in not extending the interim relief or passing any interim order, when Gujarat Maritime Board is not a party before the Trial Court and it has been rightly observed by the Trial Court that passing of any order requiring the defendant to stay its hands would result into making the directions of Gujarat Maritime Board infructuous, without having Gujarat Maritime Board, a party.

(vii) It appears from the record of the case that Gujarat Maritime Board had given notice dated 24th February,2006 to the plaintiff/appellant and after affording an opportunity of being heard, more than once (i.e. on 30th May,2006 & 31st July,2006,), Gujarat Maritime Board vide letter dated 3rd November,2007 held that the plaintiff/appellant has committed breach of Sub-Concession Agreement, by not obtaining prior approval of Gujarat Maritime Board, as required, because acquisition of more than 10% direct or indirect interest in the plaintiff/appellant by Dubai Ports World. Gujarat Maritime Board has also directed the respondent (original defendant) to

terminate the said Sub-Concession Agreement. Thus, as a consequence, the respondent (original defendant) has terminated Sub-Concession Agreement vide their letter dated 8th November,2007. Thus, to direct the defendant to stay its hands will tantamount to staying the order and directions issued by Gujarat Maritime Board vide their letter dated 3rd November,2007 and, therefore, it is correctly appreciated by the Trial Court that if Gujarat Maritime Board is not a party in litigation, the defendant cannot be directed to stay its hands. At this stage, it is not out of place to mention that the letter by Gujarat Maritime Board dated 3rd November,2007. Termination of Sub-Concession Agreement by the defendant is dated 8th November,2007 and the suit was actually filed by the plaintiff on 31st January,2008. Thus, the plaintiff has waited for much longer period. Whatever Special Civil Application has been filed before this Court, was dismissed by this Court vide order dated 7th January,2008, para-16 thereof, reads as under:

"16. Therefore, it is not possible to accept the submissions of the learned Senior Counsel appearing for the petitioners that this petition directed against arbitrary, unreasonable, unjust, unfair and colourable exercise of power of the GMB in directing respondent No.2 to terminate licence is maintainable since there is negation of Article 14 of the Constitution of India and power under Article 226 of the Constitution of India requires to be exercised. Thus, remedy for redressal of the grievances of the petitioner does not lie before this Court by invoking Article 226 of the Constitution of India, but elsewhere. This Court, while exercising power under Article 226 of the Constitution of India cannot adjudicate upon a dispute arising out of breach/violation of clauses of agreement and pass a verdict on legality or otherwise of such alleged breaches of contractual terms."

(viii) In detail, it has been argued before this Court about what will be the effect, if the necessary party is not joined and whether stay can be granted against it or not. Learned counsel for the respondent (original defendant) has relied upon decision rendered by the Hon'ble Supreme Court in the case of *Khetrabasi Biswal V/s. Ajaya Kumar Baral and others* reported in (2004)1 SCC 317, especially para-6, which reads as under:



"6. The procedural law as well as the substantive law both mandates that in the absence of a necessary party, the order passed is a nullity and does not have a binding effect."

(Emphasis supplied)

Likewise, learned counsel for the respondent has relied upon decision rendered by the Hon'ble Supreme Court reported in (2002)2 SCC 624, especially in para 26, 27 and 28, as well as also relied upon 2006(10) SCC 96, especially para 47 and 48 and pointed out that if the the necessary party is not joined, no order of injunction can be passed. The concerned authority has no jurisdiction to pass an order of injunction. Learned counsel for the respondent (original defendant) has also argued out that looking to the facts of the case also, the stay cannot be granted in favour of the plaintiff and has submitted that the position of the plaintiff is not better than a trespasser. It is a terminated sub-licencee or is akin to a 'tenant at sufferance' and has cited various judgement that in such a situation, if such a Sub-Concession Agreement is terminated, the plaintiff is not entitled to any relief. But, as stated hereinabove, as the suit as well as notice of motion are also pending, this Court is not deciding this contention as to trespasser or a tenant at sufferance, raised by the respondent.

(ix) Learned counsel for both the sides have argued in detail about breach and material breach of Concession Agreement and Sub-Concession Agreement. Various letters written by the plaintiff as well as by defendant and by Gujarat Maritime Board, have been referred. It has also been stated by learned counsel for the appellants (original plaintiff) that merely because Dubai Ports World has taken over P&O SNCO does not tantamount to breach of Sub-Concession Agreement and/or, Concession Agreement. Learned counsel for both the sides have taken this Court to the permission given by FIPB, but as this is an Appeal from Order, is having a very narrow compass of extension of stay, I am not discussing and not deciding the various issues, which have been argued out at length. Suffice it will be for the disposal of this Appeal from Order to state that looking to the Concession Agreement and clauses thereof, which are mentioned hereinabove and

looking to the Sub-Concession Agreement for the clauses mentioned hereinabove and looking to the letters written by Gujarat Maritime Board, including letter dated 3rd November,2007, it prima facie appears that letter written by the defendant dated 8th November,2007, is a consequential letter and, therefore, it is correctly decided by the Trial Court that so long as Gujarat Maritime Board is not a party to the suit, no direction can be given to the respondent (original defendant) to stay its hands. Statutory notice has been given by the plaintiff to the Gujarat Maritime Board and as stated hereinabove under Section 107 of the Gujarat Maritime Board Act,1961, unless 30 days are over, no suit can be commenced. A suit cannot be validly instituted before expiry of thirty days and without joining Gujarat Maritime Board, what is sought to be achieved by plaintiff, is to indirectly get an order, which is not directly permissible against Gujarat Maritime Board i.e. by getting consequential letter dated 8th November,2007 stayed. A thing which cannot be done directly, can never be done indirectly. If the stay is granted against the defendant virtually, it will be the stay against the Gujarat Maritime Board.

(x) Learned counsel for the respondent is relied upon the decision for canvassing a proposition that a thing which cannot be done directly, can never be done indirectly. Learned counsel for the defendant also relied upon the decision reported in AIR 1996 SC 997 and AIR 1987 SC 579. Learned counsel for the plaintiff submitted that they have already given notice to Gujarat Maritime Board on 19th January,2008 and, therefore, on 19th February,2008, Gujarat Maritime Board will be joined as party in the pending suit. As and when the Gujarat Maritime Board is joined as party defendant, the trial court will decide the prayers independently and on its own merits and on the basis of evidence on record and without being influenced by the aforesaid observations. The aforesaid observations made in this matter are only for the purpose of disposal of this Appeal from Order. Several issues which are interwoven during the course of arguments, are left open for their adjudication by the Trial Court.

**[3]** As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, there is no substance in this Appeal from Order and, therefore, the same is hereby dismissed. In view of the aforesaid order passed in Appeal from Order, Civil Application

No.1260 of 2008, is also disposed of accordingly.

**[4]** Learned counsel for the appellant seeks stay of the aforesaid order, which is opposed by learned counsel for the original defendant. Looking to the reasons as stated hereinabove, I see no reason to stay the aforesaid order and to continue the order dated 31st January,2008 passed by the trial court, thus, the arrangement, which is not continued after 6th February,2008, is not continued further.

