

+ OMP No. 65/2008

Date of decision: 15th July, 2009

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respondents No. 1 and 2. The respondent No.1 is a corporation incorporated in China and respondent No.2, an Indian Company, is stated to be a subsidiary of the respondent No.1. M/s ITI Limited has been impleaded as the respondent No.3. It is stated that monies are due from the respondent No.3 to the respondents No. 1 and 2.

2. The petitioner had earlier filed another petition under Section 9 of the Act against the same respondents and which was registered as OMP.No.359/2006. Vide ex parte order dated 4th August, 2006 in OMP 359/2006, on the petitioner expressing apprehension that if the respondent No.3 releases all monies due to the respondents No.1 and 2, the petitioner will be left with no means to recover the monies ultimately awarded to it, the respondent No.3 was restrained from releasing to the respondents No. 1 and 2 the amount then stated to be due to the petitioner from the respondents No. 1 and 2. The respondents No. 1 and 2 failed to appear in OMP.No. 359/2006 in spite of entering appearance and were ordered to be proceeded against ex parte. The said OMP was disposed of vide order dated 27th August, 2007. Though the said order notices that the respondent No.3 is a third party to the contract, however, on the statement at bar of the counsel for the respondent No.3 that the respondent No.3 shall not release the payment to the respondents No.1 and 2 in terms of prayer (e) of OMP 359/2006 without prior permission of the court or till the disposal of the arbitration proceedings pending in Singapore, the ex parte order was made absolute and the OMP was disposed of. The said order remains in force.

3. The petitioner has now moved this OMP for the relief of restraining the respondent No.3 from releasing the payments in the

sum of USD 3476258 to the respondent No.1 and for directing the respondent No.3 to deposit the said sum and/or its Indian equivalent in this court. The first of the aforesaid reliefs is squarely covered by the relief granted in the earlier OMP. The petition has been urged only on the ground of direction to the respondent No.3 to deposit the amounts in this court.

4. The respondent No.3 has filed reply in opposition to the petition and the grant of the relief aforesaid and has pleaded –

i) that it is not a party to the agreement containing the arbitration clause and not concerned with the dispute between the petitioner on the one hand and the respondents No.1&2 on the other hand and no petition under Section 9 of the Act lies against it, especially when the main/principle relief claimed in the petition is against a non-party to the arbitration agreement;

ii) that till the award for any amount in favour of the petitioner, the petitioner cannot be said to be entitled to any amount from the respondent No.2 and hence not entitled to deposit in this court of any amount;

iii) that even in the earlier OMP No.359/2006 the petitioner had sought the relief of deposit of the monies due from the respondents No.3 to the respondents No.1&2 in this court and the respondent No.3 had contested the said relief inter-alia on the ground that it was a sick company within the meaning of Sick Industrial Companies Act, 1985 (SICA) and was before the BIFR and petitioner in the garb of the relief under Section 9 of

the Act could not circumvent the provisions of SICA and further that any order of deposit of the monies in this court would jeopardize the scheme of rehabilitation formulated by the operating agency appointed by the BIFR for rehabilitation of the respondent No.3;

iv) the court while passing orders in OMP No.359/2006 had not returned any finding of the petition under Section 9 being maintainable against the respondent No.3, a non-party to the arbitration agreement and had merely acted on the consent given by the respondent No.3; that the order therein was in the nature of the consent order and if the petitioner desires to challenge the same, the respondent No.3 is entitled to withdraw the consent given in OMP No.359/2006.

5. Though notice of the petition was issued to all the respondents but the record reveals that the respondents No.1&2 remained unserved. However, considering that the respondents No.1&2 had failed to appear in OMP No.359/2006 also in spite of service and further considering the nature of the controversy in the present case, need was not felt to postpone the matter further for service of the respondents No.1&2 and the senior counsel for the petitioner and the counsel for the respondent No.3 have been heard.

6. The senior counsel for the petitioner has contended:

a) That the contention of the respondent of being sick is misconceived in as much as the courts have held that the bar under Section 22 of SICA, 1985 applies only when the amounts claimed are shown to be admitted and are part of the scheme of rehabilitation of

the sick company; the respondent No.3 has in its reply nowhere stated that the liability for the amounts to the petitioner or to the respondents No.1&2 is admitted or is shown in the scheme of rehabilitation. Reliance in this regard is placed on **Mafatlal Industries Ltd Vs MTNL** 99(2002) DLT 204;

- b) that there is no bar in Section 22 or any other provision of SICA, 1985 to the court directing a sick company to deposit the monies in the court;
- c) that the provisions of SICA, 1985 do not apply to arbitration. Reliance in this regard is placed on **Lloyd Insulations (India) Ltd. Vs. Cement Corporation of India Ltd.** 2001 II AD (Delhi) 567 (DB);
- d) that if the sick company desires to avoid an order of deposit it was for the sick company to approach the BIFR under Section 22A of SICA, 1985 and seek orders in this respect.
- e) the senior counsel fairly conceded that there was a divergence of opinion in various judgments of single judges of this court on the aspect of maintainability of a petition under Section 9 of the Act against a third party;
- f) Reference was made to:
 - i) **Arun Kapur Vs. Vikram Kapur** 95 (2002) DLT 42 where it was held in para 44 thereof that while a petition under Section 17 of the Act is moved before the Arbitral Tribunal for an order against a party to the proceedings, Section 9 vests remedy in a party to arbitration proceedings to seek interim measures of protection

against the person who need not be either party to the arbitration agreement or to arbitration proceedings.

ii) **CREF Finance Limited vs. Puri Construction Ltd.** 2000 (3) Arb. LR 331 (Delhi) where in exercise of powers under Section 9 of the Act orders were made against a third party, of course holding the said third party to be not a stranger to the covenants between the parties to the agreement containing an arbitration clause; in that case the third party against whom orders were made was an agent of the party to the agreement.

iii) **Mikuni Corporation Vs UCAL Fuel Systems Ltd** 2008 (1) Arb. LR 503 (Delhi) where it was held that since no arbitration proceedings could take place vis-à-vis the party against whom orders were sought, application under Section 9 did not lie against such party. The judgment in **CREF Finance Limited** was distinguished since in that case the third party was an agent of a party to the arbitration agreement and reliance was placed on **National Highways Authority of India Vs. China Coal Construction Group Corporation** AIR 2006 Delhi 134 holding that an interim order could be passed in respect of parties to arbitration and in connection with subject matter thereof and no interim order could be passed in respect of a party who had no privity of contract with the petitioner. Thus the petition seeking interim measures against a non party to the arbitration was held to be not maintainable.

- iv) **Smt. Kanta Vashist Vs. Shri Ashwani Khurana**
MANU/DE/0380/2008 also holding that no injunction could be issued even against companies which though of the family, members whereof were parties to the arbitration, were independent legal entities and not parties to the arbitration agreement.
- g) The senior counsel for the petitioner contended that in the present case also the respondent No.3 cannot be called a total stranger to the transaction between the petitioner and the respondents No.1&2 in as much as the claims of the petitioner against the respondents No.1&2 were for agreed commission for facilitating the contract of the respondents No.1&2 with the respondent No.3. It was contended that in fact it was the petitioner who had been negotiating and dealing with the respondent No.3 on behalf of the respondents No.1&2 and the petitioner was fully in the picture of the transaction between the respondents No.1&2 on the one hand and the respondent No.3 on the other hand and the respondent No.3 was also in the know of the same.
- h) It was further contended that it was not the case of the respondent No.3 that the amounts were not payable by it to the respondents No.1&2 and there was no bar in SICA to the respondents No.1&2 paying the said amounts to the respondent No.3 and thus no impediment to the deposit of the same in this court.
- i) It also was contended that the order sought by the petitioner was in the nature of a garnishee order and fell

within the ambit of Section 9 (ii) (b) of the Arbitration Act.

- j) That the respondent No.3 was merely a trustee of the money and cannot take the protection of BIFR and the plea of the respondent No.3 of the order if made of deposit, interfering with the working capital of the respondent No.3 indicated that the respondent No.3 was violating the said trust and using the monies lying with it in trust, for its own purposes.
- k) That the suit by the petitioner for the same reliefs as claimed in the present petition may be barred by Section 5 r/w Section 8 of the Act and if it was to be held that the petitioner was not entitled to the relief under Section 9 also, for the reason of Respondent No.3 being a third party, the petitioner would be left remediless.
- l) That the Arbitration Act was not a complete or a self-contained code and thus the provisions of CPC as available to a court, of attachment of monies belonging to a judgment debtor in the hands of the others, were available. Reliance was placed on **Ludwig Wunsche & Co. Vs. Raunaq International Ltd.** AIR 1983 Delhi 247 and **Orient Middle East Lines Ltd. Vs. M/s Brace Transport Corporation of Monrovia** AIR 1986 Gujarat 62.

7. The counsel for the respondent No.3 besides relying on the same judgments as aforesaid holding petition under Section 9 to be not maintainable against a non-party to an arbitration agreement,

contended that in the present case the respondent No.3 had nothing whatsoever to do with the transaction, if any, between the petitioner and the respondents No.1&2; he also relied on 21st Edition of Russell on Arbitration, at paragraphs 6-131 & 6-132 prescribing that a Tribunal does not have jurisdiction over a third party even though that third party may hold the monies, goods or property in dispute and the Tribunal thus is less able to secure compliance by a third party with an injunction than it is to secure compliance by the parties to the arbitration. He further contended that the order under Section 9 was in the nature of an interim order and it was a settled principle of law that interim order could only be in aid of the final order and when there was no possibility of any final order against the respondent No.3 in an arbitration between the petitioner on the one hand and the respondents No.1&2 on the other hand, the question of granting any interim order in favour of the petitioner against the respondent No.3 did not arise. He further contended that an order in the nature of a garnishee order also could be made only where the amount was admitted or agreed and no adjudication at that stage could be undertaken. It was further contended that the Division Bench of this court in **Lloyd Insulations (India) Ltd.** (supra) had merely held Section 22 of SICA was not a bar to the continuance of the arbitration proceedings had not dealt with the execution of arbitral award as a decree and which would definitely be within the purview of the said Section 22. He vehemently contended that no reliance could be placed by the petitioner of the earlier order which was a concession given in all fairness and in retrospect erroneously.

8. The senior counsel for the petitioner after the conclusion of hearing on 6th July, 2009 had mentioned the matter to draw attention

to certain other documents which remained to be placed on record. On the next day, permission was granted to the petitioner to file an additional affidavit in the court. In the said additional affidavit it has been stated that a query under the Right to Information Act was made from the respondent No.3 and to which a reply dated 15th February, 2007 had been given by the respondent No.3 in which it is inter-alia stated that respondent No.3 has kept reserved a sum of USD 34,76,258/- out of the total payment due to the respondent No.1; that as on 4th August, 2006 a sum of USD 141,74,748/- and as on 30th December, 2006 a sum of USD 182,72,191/- were due to the respondent No.1 from the respondent No.3; that even after 1st March, 2006 till 23rd December, 2006 orders of the value of USD 244,493,283.62 had been placed by the respondent No.3 on the respondent No.1; that after the order dated 4th August, 2006 (Supra) in OMP No.359/2006 and till that date payment of USD 2,50,000/- had been made directly by respondent No.3 to the respondents No. 1 and 2 and not including payments under LC by various banks; that after 4th August, 2006 LCs for the sum USD 83,84,624.18 had been opened by respondent No.3 in favour of the respondent No.1.

9. It was the contention of the senior counsel for the petitioner on the basis of the aforesaid document that since the respondent No.3 had admitted to making payments from time to time to the respondent No.1, they could have no objection, if out of the said payments, the amount claimed by the petitioner is deposited in this court instead of being paid to the respondent No.3. Reliance was also placed on **K. Chandrasekharam Vs. M/s Vijay Bhargavi Chit Fund Pvt. Ltd.** 2000(1)ALD761 laying down that attachment before judgment can be ordered even against a third party and on **Goel Associates Vs. Jivan Bima Rashtriya Avas Samati Ltd.** 114(2004)

Delhi Law Times 478 (DB) laying down that the principle of Order 38 Rule 5 though not contained in the 1996 Act, the principles thereof are applicable.

10. The counsel for the respondent No.3 on the next day responded that in the short time available he could not take instructions but however contended that even if payments had been made after 4th August, 2006 by the respondent No.3 to the respondent No.1, the same were not to the detriment of the petitioner in as much as the amount which it had agreed to retain stood retained by the respondent No.3. Else, it was stated that the said documents did not change the pleas taken in the reply and during the oral submissions.

11. The points of controversy which arise for determination in this petition can be framed as:-

- A. Whether in exercise of powers under Section 9 of the Act, the court can make an order against or with respect to any party other than a party to the arbitration.
- B. If it is found that such orders can be made, whether the order as sought in the present case is in the teeth of Section 22 of SICA, 1985.

Re: Point A

12. Besides the judgments noted above, I find that recently in **NAFED Vs. Earthtech Enterprises Ltd.** MANU/DE/0534/09 also it has been held that an application under Section 9 can be made only

against the parties to the arbitration agreement and cannot be entertained against third party.

13. A conspectus of the judgments aforesaid on Section 9 would show that the court in each case has made the observation with regard to maintainability/applicability of Section 9 qua third parties depending upon facts of each case and depending upon feasibility of the order sought/required therein. In my view, no general principle of maintainability/applicability or non-maintainability/non-applicability can be laid down. It will have to be determined by the court in the facts of each case whether for the purpose of interim measure of protection, preservation, sale of any goods, securing the amount in dispute, an order affecting a third party can be made or not.

14. In my view, if as a general rule it is laid down that in exercise of power under Section 9, no direction can be issued to parties not parties to agreement containing an arbitration clause or not parties to arbitration proceedings, the same will hamper the efficacy of the said provision. Under clause (i) thereof, the guardian to be appointed may not be such a party; similarly the goods under clause (ii) (a) may be or may be required to be in custody of or delivered to or sold to such third parties – further orders against such third parties may also be required in connection with such sale; under clause (ii)(b) the amount to be secured may be in the form of money payable or property in hands of such third party – the scope cannot / ought not to be restricted to securing possible with orders against parties to arbitration only. Similar examples can be given with respect to other clauses also.

15. The proceedings in a court, as distinct from those before an arbitrator, are also between parties to an agreement/transaction only. Still, the practice of issuing interim orders/directions qua third parties exists; not only in execution proceeding, provisions wherefor exists in Sections 47, 60 and Order 21 Rules 46 and 46A to F but also in pre-decretal stage, as provided for in Order 38 Rules 6 to 11A of CPC. It is difficult to fathom and there is no indication whatsoever of it in the Act, that the legislature while empowering the court under Section 9 to grant interim measures has restricted the power aforesaid of the court in any manner. On the contrary, Section 9 provides that the court for the purposes of Section 9 “shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it”. The conclusion is thus inescapable that if the court, in relation to proceedings before it could have made an order against/qua third parties, similar order can be made under Section 9 as well, subject to the discussion below.

16. The CPC, at pre decretal stage, permits attachment of property to satisfy any decree which may be passed in the suit (Order 38 Rule 6). Such attachment can also be of property of defendant, not in possession of defendant but belonging to the defendant and over which defendant has disposing power or which is in possession of another person in trust for or on behalf of judgment debtor. The rules for such attachment are the same as of attachment in execution of decree (Order 38 Rule 7). Such attachment of property of judgment debtor in hands of others is permissible under Section 60 CPC. There is no reason for holding that if the claimant in an arbitration had been a plaintiff in a suit and could have obtained attachment before judgment of property of defendant in hands of

third parties, merely because he is before an arbitrator, he is not entitled to such order. Such orders can be crucial. Normally proceedings before court or before arbitrator take time. The defendant cannot during the said time be permitted to arrange his affairs in a manner to leave the plaintiff/claimant with merely a paper decree/award. An attachment before judgment under Order 38 Rule 11 CPC continues post judgment also. If it is to be held that in arbitration proceedings such interim relief of attachment of properties of respondent/defendant is not possible, it will discourage rather than encourage arbitration, which is the need of the hour.

17. However whenever attachment qua properties/monies in hands of third parties is made, the possibility of such third party contesting the same cannot be ruled out; while the party seeking attachment may aver the property to be of person against whom he is seeking a decree, the third party may set up title in such property in himself or in yet another party or resist attachment on other grounds. Order 38 Rule 8 CPC provides for adjudication of such claims by the court. The question which arises is, whether and how such disputes to attachment, if raised pursuant to attachment under Section 9 are also to be adjudicated. The necessary corollary to what I have held above is that the court, even in a proceeding under Section 9 will have to adjudicate such disputes. Order 38 Rules 7,8 and 11A apply the provisions of attachment in relation to execution in Order 21 Rules 46, 46A to F, to attachment before judgment also. Rule 46C of Order 21 provides for trial of disputed questions where such third party disputes liability, as a suit.

18. However, considering the nature of proceeding under Section 9, I find that the court is not bound to, where the third party, with

respect to property/money in whose hands attachment is issued, denies liability and such denial raises disputed questions of fact which cannot be adjudicated without trial, to conduct trial. The court, in such cases in its discretion can on a prima facie view of the matter, either refuse to exercise powers under Section 9 or pass other appropriate order to protect the interest of all parties concerned.

19. Thus the first point of controversy framed above is answered accordingly. Axiomatically, interim measure in the nature of attachment before judgment can be sought by petitioner against respondent No.3 and the plea of respondent No.3 to such an order is to be decided in these proceedings only. That will answer the second point of controversy as well. The plea of respondent No.3 does not entail any disputed questions of facts requiring trial.

20. Under Order 21 Rule 46 attachment is prescribed to effect by prohibiting payment/delivery until further orders, to the defendant/judgment debtor. To that extent, the respondent No.3 has in the earlier OMP already consented. The question is whether an order of deposit in court of the monies due from respondent No.3 to Respondents No. 1 and 2 can be made. Prior to 1976 amendment of CPC, such order of deposit was not contemplated under Rule 46 of Order 21. Under sub-rule 3 an option was given to the third party with respect to monies/goods in whose hands attachment was issued to deposit the same in court, in discharge of his liability. However, the court could not compel such third party to deposit in court. It was so held in **Maharajadhiraj Sir Kameshwar Singh Bahadur Vs. Kuleshwar Singh and Ors.** AIR 1942 Patna 508. By the 1976 amendment of CPC, Rule 46A was introduced, whereunder the order

against third party of deposit in court also became possible. However, that provision is in Order 21 relating to execution of decree. Though by virtue of Order 38 Rules 7, 8 and 11A attachment before judgment has to be in the same manner as in Order 21, but the court is not bound to direct deposit in court. Rule 46A itself uses the word “may” and the power thereunder is discretionary.

21. Thus in the present case, where as yet there is no decree or award in favour of petitioner and when the claims of the petitioner are being disputed by respondents No. 1 and 2, and when the interest of the petitioner is sufficiently protected by order in the earlier petition, it is not deemed appropriate to direct the respondent No.3 to deposit the monies owed by it to respondents No. 1 and 2, in this court. The reason of respondent No.3 using the said monies for its own purpose also does not sway me to direct so, for the reasons of Section 22 of SICA, 1985, though ordinarily the possibility of such third party/garnishee dissipating the monies may be a reason for directing deposit in court. I do not find the respondent No.3 to be in the position of a trustee. Also, there is considerable force in the contention of counsel for respondent No.3 that the petitioner had sought the said relief in the earlier petition also and it was not so granted. There is no change in position since then. The principles of res judicata apply to interim orders also and the petitioner cannot relitigate.

Re: Point B

22. The attachment of monies in hands of a third party/garnishee cannot be in supersession of/ detriment to rights of such third party/garnishee. Thus if respondents No. 1 and 2 as creditors of

respondent No.3 could not compel the respondent No.3 to deposit the monies in court in a proceeding initiated by them or could not recover monies from respondent No.3 owing to the bar of Section 22 SICA, 1985, the petitioner, as creditor of respondents No. 1 and 2 will have no superior rights against respondent No.3.

23. In **Syndicate Bank Vs Vijay Kumar** (1992) 2 SCC 331, attachment was effected with respect to the two FDRs of the judgment debtor with the bank. The bank claimed its general lien over the amounts of the FDRs. The Supreme Court held that in the circumstances the said FDRs could not be attached and the bank could not be directed to deposit the amount thereof in the court.

24. Mulla on CPC 16th Edition Volume 3, pages 2694-2695 with reference to **Anglo-Baltic and Mediterranean Bank Vs Barber & Co.** (1924) 2 KB 410 comments that where a judgment is recovered against a company which is in voluntary liquidation, the invariable practice of the courts is to stay execution of the judgment unless there are very exceptional reasons for exercising its discretion otherwise; it further comments that even in execution of a decree against a judgment debtor company in liquidation, a debt due by a third party to the company cannot be attached and paid to the decree holder for the reason that the said debt being general assets of the company is divisible amongst the creditors *pari passu*. Reference therein is also made to **Gauhati Bank Vs Ganpatlal Thakur** (1956) Assam 301 in which case a claim under Section 153 (2) of the Companies Act had been sanctioned with respect to the garnishee bank and whereunder the amount owed by the bank to the judgment debtor was payable in installments; the decree holder was

held to be bound by the said scheme and not held entitled to the amount in lumpsum or immediately.

25. From the aforesaid also, it follows that the objection of the respondent No.3 is to be prima facie adjudicated. It also follows that if the respondent No.3 as per the law governing it is not liable to make payment, it cannot be directed to deposit the amount in the court.

26. I have no doubt in my mind that in the circumstances aforesaid an order of deposit by the respondent no.3 of the monies, and which order is opposed by the respondent No.3, would be coercive and would be in the nature of execution, distress or the like against respondent No.3 which is a sick company. Such an order is prohibited by Section 22 (supra). The Supreme Court recently in **M.D. Bhoruka Textiles Ltd Vs Kashmiri Rice Industries** 2009 92 SCL 335 (SC) has also held that SICA is a special statute and overrides other acts. The words "or the like" in Section 22 are to be construed on the basis of ejusdem generis principle. Accordingly, those words may be taken to be referring to any proceeding for attachment or even for injunction or restraint against a sick company. An order directing respondent no.3 to deposit the monies in the court will be in the nature of order of recovery of money from respondent no.3 and which is not permissible.

27. In the circumstances, the relief claimed of directing respondent No.3 to deposit money in this court is also found to be barred by Section 22, SICA, 1985.

28. The petition is dismissed, however, with no orders as to costs.

**RAJIV SAHAI ENDLAW
JUDGE**

JULY 15, 2009
M/PP
