

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

F.A.O.No.1170 of 2016 (O&M)
Date of Decision: April 12th, 2016

M/s Dhir International Pvt.Ltd., Gurgaon

...Appellant

Versus

Jitender Lalwani & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.Virender Kumar Jain, Senior Advocate with
Mr.J.L.Malhotra, Advocate,
for the appellant.

Mr.Anil K. Kher, Senior Advocate with
Mr.Vijay Gupta, Advocate and
Mr.P.K.Khindria, Advocate,
for the respondents.

AMIT RAWAL, J.

The appellant is aggrieved of the order, whereby the petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short “1996 Act”) has been allowed during the pendency of the arbitration proceedings.

Mr.V.K.Jain, learned Senior Counsel assisted by Mr.J.L.Malhotra, Advocate, appearing on behalf of the appellant, in support of his contentions, has raised manifold arguments, which are enumerated herein below:-

He submits that as per the lease agreement dated 12.9.2002 industrial property bearing No.299, Phase-II, Udyog Vihar, Gurgaon having

plot area measuring about 2100 sq.meters with construction was rented out on a rent of ₹6,50,000/-, to be payable on or before the 7th day of each calendar month. A sum of ₹40.00 lacs as interest free security was also deposited by the appellant, to be refunded upon expiry or earlier termination of the lease. The monthly rent was to increase by 20% after every three years and it was inclusive of property tax, but exclusive of electricity, water, maintenance and service tax or any other charges. Upto September, 2008, the appellant paid the contractual rate of ₹7,80,000/- per month. For the month of October, 2008 the rent was worked upto 15.10.2008 @ ₹7,80,000/- per month and thereafter for remaining half, it was @ ₹9,36,000/- per month at the increased rate. The appellant made the payment of ₹8,58,000/- for the month of October, 2008.

Thereafter, a legal notice dated 7.1.2009 was served upon the appellant on account of alleged failure to liquidate the arrears of rent and other deeds for termination of tenancy and vacation of the premises. Since the lease deed contained the clause of resolution of dispute through arbitration, the matter was referred to the Arbitrator, though prior to the filing of the suit, the respondents had filed an eviction petition under Section 13 of the Haryana Urban (Control of Rent and Eviction) Act, 1973, which was allowed vide order dated 1.12.2011 and gave liberty to the petitioner-appellant to file appropriate proceedings. Accordingly, the Arbitrator entered into a reference vide order dated 8.2.2013 of this Court and the respective claims were filed.

The respondents filed an application under Section 17 of 1996 Act for issuing direction to the appellant to pay the arrears of rent, damages and mesne profits for use and occupation of the premises for the period

October, 2008 to March, 2015 amounting to ₹8,10,96,248/- along with service tax and interest @ 18% per annum with a further direction to continue to pay the monthly rent @ ₹13,47,840/-. The appellant instead of filing reply to the said application submitted that they want to file an application before High Court for replacement of the Arbitrator.

The Arbitrator adjourned the matter on 27.5.2015, but in the meantime, vide order dated 14.7.2015 recused. The respondents instead of waiting for appointment of an Arbitrator, erroneously invoked the jurisdiction of the Principal Court by moving an petition under Section 9 of 1996 Act, which is dated 7.8.2015. However, before the culmination of the aforementioned proceedings, a new Arbitrator was appointed vide order dated 9.10.2015 and, therefore, the application had become infructuous and the remedy, if any, for the respondent-claimants was to pursue the application filed under Section 17 of 1996 Act. The 1996 Act has been amended as per Ordinance dated 23.10.2015, which has been made applicable from such date and by the date the application was pending, had received the assent of the President of India on 31.12.2015, but has an effect w.e.f. 23.10.2015 and, thus, the petition under Section 9 of the Act was not maintainable.

The agreement is an unregistered document and, therefore, the escalation clause in the lease agreement cannot be taken into consideration. The Principal Court has erroneously allowed the petition under Section 9 of the Act and called upon the appellant to furnish the guarantee vis-a-vis ₹8,64,87,608/- on account of arrears of rent and ₹1,00,43,471/- on account of service tax payable within the period of three months from the date of passing of the order and further direction to pay the monthly rent @

₹13,47,880/- w.e.f. 1.2.2016. The escalation clause cannot be taken into consideration for want of registration of lease deed. Even otherwise, as per sub-section (3) of Section 9 of the New Act, the Arbitral Tribunal could not entertain the application under sub-section (1) unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 of 1996 Act efficacious and, thus, urges this Court for setting-aside of the order.

Mr.Anil K.Kher, learned Senior Counsel assisted by Mr.Vijay Gupta Advocate and Mr.P.K.Khindria, Advocate, appearing on behalf of the respondents submits that on plain and simple language, Section 9 envisages three situations for aggrieved party to invoke the jurisdiction of the Principal Court, (i) before the arbitration, (ii) during the arbitration and (iii) before the award is enforced. For seeking interim relief, an application under Section 17 of 1996 Act was filed. The appointment of the arbitrator is dated 8.2.2013, who recused himself vide order dated 14.7.2015 and during the interregnum, petition under Section 9, as noticed above, was filed on 7.8.2015. The provisions of sub-section (3) of Section 9 of 1996 Act has an prospective effect and shall not apply to the pending proceedings. In support of his contention, relied upon the decision rendered by the High Court of Delhi in **National Highways Authority of India (NHAI) Versus M/s China Coal Construction Group Corpn., OMP 251/2004**, decided on 23.1.2006 where a similar question was raised and it was answered in the affirmative that in such situation, the petition under Section 9 is maintainable. No doubt, Section 17 confers power on the Arbitral Tribunal or Arbitrator to make interim orders, but it would operate only during the existence of the Arbitral Tribunal being functional. Similar view is taken by

the Division Bench of High Court of Delhi in M/s Value Source Mercantile Ltd. Versus M/s Span Mechnotronix Ltd., FAO (OS) No.141 of 2014, decided on 28.5.2014. The appellants are playing hide and sick before the Arbitrator and as well as this Court. They want to avoid their liability in one way or the other. They are enjoying the premises for more than seven years without paying any single penny, whereas every day is incurring loss to the respondents/lessors. Every possible attempt is being made to prevent the Arbitrator for proceedings with the matter by filing one application or the other and, thus, urges this Court for dismissal of the appeal.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is no merit, much less substance in the submission of Mr.Jain for the reason that Section 9 clearly specify existence of three situations. For the sake of brevity, Section 9 is reproduced herein below:-

9. Interim measures, etc. by Court.—A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) 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 goods 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 or 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 it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

Interpreting the aforementioned provisions, the learned Single Judge of Delhi High Court gave the following findings, which read thus:-

13. Under the 1996 Act, the court can pass interim orders under Section 9. Arbitral proceedings as we have seen, commence only when the request to refer the dispute is received by the respondent as per Section 21 of the Act. The material words occurring in Section 9 are “before or during the arbitral proceedings”. This clearly contemplates two stages when the court can pass interim orders, i.e., during the arbitral proceedings or before the arbitral proceedings. There is no reasons as to why Section 9 of the 1996 Act should not be literally construed. Meaning has to be given to the word “before” occurring in the said section. The only interpretation that can be given is that the court can pass interim orders before the commencement of arbitral proceedings. Any other

interpretation, like the one given by the High Court, will have the effect of rendering the word “before” in Section 9 as redundant. This is clearly not permissible. Not only does the language warrants such an interpretation but it was necessary to have such a provision in the interest of justice. But for such a provision, no party would have a right to apply for interim measure before notice under Section 21 is received by the respondent. It is not unknown when it becomes difficult to serve the respondents. It was, therefore, necessary that provision was made in the Act which could enable a party to get interim relief urgency in order to protect its interest. Reading the section as a whole it appears to us that the court has jurisdiction to entertain an application under Section 9 either before arbitral proceedings or during arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act.

12. *Mr.Sethi also referred to the decision of a Single Judge of this court in CREF Finance Ltd. v. Puri Construction Ltd & Others: 2000(55) DRJ 730 in support of his submissions. He referred to the decision of the Supreme Court in the case of Firm Ashok Traders and Another v. Gurumukh Das Saluja and Others: 2004 (3) SCC 155 and in particular paragraph 18 thereof which reads as under:-*

“18” Under the A&C Act, 1996, unlike the predecessor Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that Section 17 would operate only during the existence of the Arbitral Tribunal and its being functional. During that period, the power conferred on the Arbitral Tribunal under Section 17 and the power conferred on the court under Section 9 may overlap to some extent but so far as the period pre- and post- the arbitral proceedings is concerned, the party requiring an interim measure of protection shall have to approach only the court. The party having succeeded in securing an interim

measure of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the “proximately contemplate” or “manifestly intended” arbitral proceedings. Itself. If arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made “before” i.e. in contemplation of arbitral proceedings. The court, approached by a party with an application under Section 9, is justified in asking the party and being told how and when the party approaching the court proposes to commence the arbitral proceedings. Rather, the scheme in which Section 9 is placed obligates the court to do so. The court may also while passing an order under Section 9 put the party on terms and may recall the order if the party commits breach of the terms.” In such and substance, the submission of Mr.Sethi was that Section 9 permitted any party to an Arbitration Agreement to approach the Court for appropriate orders as provided therein. The Court could be approached in three distinct periods, i.e., pre-arbitration, during arbitration and post-arbitration but before the award is enforced in accordance with Section 36 of the Act. He submitted that the powers under Section 9 given to the court were wide and were to be the same as the court had for the purpose of and in relation to any proceedings before it.

13. *On the other hand, Section 17 provided for interim measures to be ordered by the Arbitral Tribunal. Under Section 17, the Arbitral Tribunal can only order a party to take an interim measure of protection and to provide appropriate security in connection with such measure. There are various limiting factors. Therefore, Mr.Sethi submitted that although there may be some degree of overlap between the provisions of Section 17 and 9, there is no bar to an order being made under Section 9 by a court of competent jurisdiction during the*

pendency of the arbitration proceedings before an Arbitral Tribunal. To counteract these submissions, Mr.Chadha submitted that the order passed by the Arbitral Tribunal and particularly the order passed on 24.01.2005 is not “toothless” as suggested by the learned counsel for NHAI. He submitted that if China Coal violated that order, it stood to loose much more. The bank guarantees would then immediately become encashable. He submitted that while the bank guarantees were approximately for an amount of Rs.51 crores, the equipments that were lying at site were worth only about Rs.8 crores. He further submitted that he was willing to give an undertaking to abide by the Arbitral Tribunal's orders in order to ally any fears that the petitioner (NHAI) may have with regard to enforceability of the order dated 24.01.2005 passed by the Arbitral Tribunal. He also referred to a decision of a Constitution Bench of the Supreme Court in the case of S.B.P. & Co. v. Patel Engineering Ltd. And another: 2005(3) Arb.I.R. 285 (SC) and in particular he referred to paragraph 46 of the majority opinion which was a summation of the court's conclusions. In that case, the Supreme Court was considering the nature of the function of the Chief Justice or his designate under Section 11 of the said Act. Essentially, the court concluded that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the said Act was not an administrative power, but, a judicial power. While considering this aspect of the matter, the court made certain observations with regard to Section 9 and 17 of the said Act and the same would be worth reproducing:-

“4.Section 9 deals with with the power of the Court to pass interim orders and the power to give interim protection in appropriate cases. It gives a right to a party, before or during arbitral proceedings or at any time after the making of the arbitral award but before its enforcement in terms of Section 36 of the Act, to apply to a Court for any one of the orders specified therein.....”

“6. ...Section 17 confers powers on the arbitral tribunal to make interim orders...”

“12.It has to be noted that under Section 9 of the Act, the District Court or the High Court exercising jurisdiction, has the power to make interim orders prior to, during or even post-arbitration....”

“18. Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding to grant interim relief as contemplated by the section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involves was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf “the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceeding before it....”

The Supreme Court, inter-alia, concluded that:-

(vi) *Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator, or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.*

Mr.Chadha relied heavily on the above conclusion to submit that once the Arbitral Tribunal is seized of the dispute and in particular for considering an application under Section 17 of

the Act for interim measures, a petition under Section 9 would not be maintainable. I am unable to agree with this submission of Mr.Chadha. The aforesaid conclusion has to be reconciled with the earlier observations noted above in the said judgment itself which clearly show that the court can pass interim orders during the pendency of arbitral proceedings. The aforesaid conclusion does not impinge upon the powers of the court under Section 9 of the said Act. In fact, it does not deal with the question of interim measures at all. What the Supreme Court has concluded is in essence what Section 5 of the Act itself provides and that is that notwithstanding anything contained in any other law for the time being in force in matters governed by Part-I of the Act, no judicial authority shall interfere except where so provided in the said Part-I. Section 9 falls within Part-I and, therefore, falls within the exception carved out in Section 5 of the said Act. Therefore, even during arbitral proceedings, interim measures can be passed by a court provided the same fall within the measures specified under Section 9(ii). In the present case, NHAI claims a lien on the equipments brought by China Coal to the site for the project. That forms the subject matter of the Arbitration Agreement and, therefore, an application seeking interim measures of protection pertaining to the preservation, interim custody of sale of the said equipments would be covered under Section (ii)(a) of the Act as also under Section 9(ii)(c), (d) and (e) of the said Act.”

I am not in agreement with the submission of Mr.Jain vis-a-vis applicability of the new Act as it shall come into force w.e.f. 23.10.2015 to the matters which are already pending adjudication. The appointment of the new Arbitrator after the recusal of the previous Arbitrator is dated 9.10.2015, whereas the relevant date of the new Act is 23.10.2015. There is also no force in the submission of Mr.Jain vis-a-vis increased of the rent as the appellant had been paying the rent as per the escalation clause and not

paying only rent at the rate of 6,50,000/- and the last payment was at the rate of 8,58,000/-. The direction given under Section 9 read thus:-

"As sequel to the above, the present petition is allowed and respondent is directed to furnish bank guarantee of Rs.8,64,87,608/- on account of arrears of rent and Rs.1,00,43,471/- on account of service tax payable within period of three months from the date of passing of this order and further continuing paying the monthly rent at the rate of Rs.13,47,840/- w.e.f. 1.2.2016 and in case of non compliance of the same, the defence of the respondent shall be liable to be struck off. Memo of costs be prepared accordingly. File be consigned to record room."

Keeping in view of the aforementioned facts and circumstances, I am of the view that the aforementioned direction contained in the order is perfect, legal and justified and has been passed after taking into consideration all the factors as noticed above. Accordingly, the impugned order is upheld.

The appeal is dismissed.

However, the appellant shall be at liberty to take the plea vis-a-vis non-registration of the lease deed before the Arbitrator, but not in this Court.

April 12th, 2016
ramesh

(AMIT RAWAL)
JUDGE