

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION
COMMERCIAL APPEAL NO.141 OF 2017
FROM
ARBITRATION PETITION NO.386 OF 2016

M/s. Viram Impex & Others Appellants
Vs.
M/s. Enreach Enterprises Pvt. Ltd. Respondent

WITH
NOTICE OF MOTION NO.41 OF 2017
IN
COMMERCIAL APPEAL NO.141 OF 2017
IN
ARBITRATION PETITION NO.386 OF 2016

Viram Impex & Others Applicants
In the matter between
Viram Impex & Others Appellants
Vs.
M/s. Enreach Enterprises Pvt. Ltd. Respondent

Mrs. Bhagirathy Bahulayan for the Appellants.

Mr. Sandesh Godse i/by Vivek Patil & Associates for
the Respondent.

CORAM: S.C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.

DATE : DECEMBER 22, 2017

P.C:

1. On 28-7-2016, Arbitration Petition No.386 of 2016 invoking powers of this Court conferred by Section 9 of the Arbitration and Conciliation Act, 1996 ("the Act" for short) has been allowed *ex parte* by the learned single Judge.

2. Aggrieved respondents to that Arbitration Petition No.386 of 2016 are before us in appeal.

3. The only contention raised by the learned counsel appearing for the appellants in this appeal is that the learned single Judge proceeds on the footing that Arbitration Petition No.386 of 2016 is duly served and an affidavit proving service of the same is on record. Further, there was an earlier order of 21-4-2016 styled as an ad-interim injunction restraining the appellants before us from alienating, encumbering, parting with possession and/or creating third party rights in respect of a

mortgaged property, more particularly described in Exhibit "L" to this petition.

4. The learned single Judge, however, according to the counsel appearing for the appellants, did not bother to verify whether the affidavit placed on record is indeed proving service or it is a proof only of despatch. She would submit that all the accompaniments to this affidavit, styled as affidavit of service filed before the learned single Judge, will establish and prove that an attempt was made to serve these respondents at an address mentioned in the cause title of the petition but which premises were closed for the past more than two years. In these circumstances, no service could have been effected by any party, at these premises.

5. The counsel appearing for the respondent, however, would submit that the appellants before us had knowledge of the proceedings, the ad-interim order passed therein on 21-4-2016, they as an after-thought are raising such defences and there are materials on record which would indicate that the

service was indeed proper.

6. With the assistance of the learned Advocates appearing for both sides, we have perused the order of the learned single Judge which, with respect, is rather drastic. In addition to an initial order of injunction granted on 21-4-2016, by the order under appeal the learned single Judge went ahead and appointed Court Receiver, High Court, Bombay as a Receiver of the property. Before appointing the Receiver, the learned single Judge should have verified, firstly, whether the proceedings are duly served. Secondly, merely because the averments in the petition remain uncontroverted, that does not mean that Receiver must follow. A Receiver to be appointed of an immoveable property is not a normal and ordinary relief but an exceptional one. The Court Receiver must be appointed only if it is just and convenient to do so and the legal principles are too well-settled to be reiterated by us. We do not find, firstly, the learned single Judge recording a satisfaction from the materials produced that the related papers were duly served. We have perused the affidavit stated to be proving the service. A

copy of that affidavit was placed before us in the compilation/synopsis by the respondents themselves. That would indicate at best that the packet was despatched and at various addresses. The annexures to that affidavit do not appear to be in the nature of an acknowledgement. It is evident from the endorsement on the packet as either left, addressee not found or service could not be effected because the premises were closed. This is hardly a proof of service. It is too well-settled to again reiterate that if attempts to serve do not result in either the service being accepted or the service refused, then, the Court must insist on the party seeking relief to resort to such modes as are permissible in law to serve the other side. On every occasion and sometimes in haste the Court does not find time to peruse such affidavit and which invariably contain proof of despatch. That would be highly risky and to proceed then to accept such affidavit as proof of service would mean violating the basic tenets of fairness, justice and equity. The Court must ensure that no order passed by it in the absence of a party results in prejudice and it must proceed on the footing that

though served, the party is deliberately and intentionally avoiding to appear before it. Once there is no proof of service, further conclusions cannot be recorded.

7. In these circumstances and when no serious attempt was made to support the findings of the learned single Judge on the point of service, we are not inclined to uphold the impugned order. We proceed to quash and set aside the same. The appeal is allowed.

8. However, by consent of both sides, the Arbitration Petition No.386 of 2016 is made absolute in terms of the ad-interim order dated 21-4-2016. Meaning thereby, there will be an injunction restraining the appellants/original respondents from selling, alienating, encumbering, parting with possession and/or creating third party rights in respect of the properties, more particularly described in Exhibit "L" to Arbitration Petition No.386 of 2016. This order and injunction shall be without prejudice to the rights and contentions of both sides on merits. It would be open for the respondent/arbitral petitioner to seek

such reliefs as are permissible in law either by making a fresh application under Section 9 of the Act to this Court or under Section 17 of the Act to the Arbitration Tribunal. If such petition or application is filed, that shall be decided uninfluenced by the order under appeal or by any observations or conclusions therein. All contentions of both sides on the point of interim measures as well as ultimate award are kept open. The appeal is allowed accordingly with no order as to costs.

9. As the main appeal itself has been allowed, Notice of Motion No.41 of 2017 does not survive and it accordingly stands disposed of.

(SMT. BHARATI H. DANGRE, J.)

(S.C. DHARMADHIKARI, J.)