

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.08.2017

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble Mr.JUSTICE M.SUNDAR

Original Side Appeal Nos.125 and 126 of 2017

&

C.M.P.Nos.8212 and 8213 of 2017

1. Shinago Holdings Private Limited,
A Private Limited Company incorporated under
the provisions of the Companies Act, 1956,
having its Registered office at
No.407, Raheja Towers,
177, Anna Salai, Chennai-600 002.
 2. Padmaadevi Sugars Limited,
(Formerly known as S V Sugar Mills Limited),
A Public Limited Company incorporated under
the provisions of the Companies Act, 1956
having its Registered office at
No.106, Palayasivaram village,
Kancheepuram,
Tamil Nadu- 631 606.
- .. Appellants in
both appeals/
Respondent 1 & 2 in A.
5154&5155/2016.

Vs.

1.M.Ethiraj ..Petitioner A5154&5155/16.

- 2.Thirumagal Enterprise Limited,
(formerly known as M/s.Thirumagal Engineering
Limited, originally incorporated as
Binny Engineering Limited),
A Public Limited Company incorporated under
the provisions of the Companies Act, 1956
having its Registered office at
Meenambakkam,
P.O. Box No.8677, Chennai-600 114. .. Respondents in
both appeals/3rd
Respondent in A.5154&5155/16.

Original Side Appeals are preferred under Order XXXVI Rule 9
of the Original Side Rules read with Clause 15 of the Letters
Patent against the order and decretal order dated 13.4.2017
passed in Application Nos.5154 and 5155 of 2016.

Prayer in A 5154/2016:

Praying that this court be pleased to appoint an advocate commissioner to prepare a detailed list of inventories of the plant and machineries and other inventories of the 2nd respondent company with its present value which are available at its factory premises morefully described in the schedule annexed to Judges Summons and submit a report thereof .

Prayer in A 5155/2016:

praying this court to grant an order of interim direction directing 1st and 2nd respondents to furnish security to the tune of Rs 250 crores in favour of the applicant and his son Mr.E.Shanmugam being the liabilities arising due to the inviration of the personal guarantees promoted by the Applicant this son to Ms, Indian Overseas Bank & Ms. Bank of India(which were to discharged pursuant to clausel(C) of the agreement dated 09.10.2.2013 failing which to order attachment of the schedule mentioned properties of the 2nd respondent morefully described in the schedule annexed.

For Appellants : Mrs.Geetha Rajasekar

For Respondent : Mr.R.Venkatavaradan
(Caveat) for R-1

COMMON JUDGMENT
M.SUNDAR, J.

This intra-court appeal is directed against an order dated 13.04.2017 made by a learned Single Judge on the Original Side of this court in two applications taken out under various sub sections of Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'A and C Act' for the sake of brevity).

2 Vide the aforesaid order dated 13.4.2017, which is a common order in two applications, learned Single Judge has granted interim measures sought for in both the applications under Section 9 of the A and C Act.

3 A perusal of the memorandum of grounds of Original Side Appeals in the instant intra-court appeal before us reveals that these appeals have been filed under Order XXXVI Rule 9 of the Original Side Rules of this Court read with Clause 15 of the Letters Patent. It is clearly impermissible, in the light of section 37 of the A and C Act and in the light of the elucidation on this aspect of the matter by the Hon'ble Supreme Court of India in Fuerst Day Lawson Limited Vs. Jindal Exports Limited [(2011) 8 SCC 333]. Therefore, without standing on technicalities, we treat this as appeals under Section 37 of the A and C Act, under Section 37(1)(b) to be

precise.

4 A thumbnail sketch of facts which are absolutely essential for appreciating this judgment are given below under the caption "Factual Matrix".

FACTUAL MATRIX :

5(i) The nucleus of the entire matter is a Public Limited Company which goes by the name S.V. Sugar Mills Limited, which is hereinafter referred to as 'S.V.Sugars' for the sake of brevity and clarity.

5(ii) While S.V.Sugars is the nucleus of the matter, the genesis of the matter is a Memorandum of Understanding (hereinafter referred to as 'MOU' for brevity) dated 31.7.2010 entered into between one T.Rajendran, representing a consortium of Investors, M.Ethiraj (respondent No.1 before us in the instant appeals) and S.V.Sugars. In sum and substance, the MOU contemplates sale of 100 % shares in S.V.Sugars to the consortium of Investors represented by Mr.T.Rajendran for a total consideration of Rs.20 Crores. To be noted, Mr.M.Ethiraj has the authority and represents all the shareholders of S.V.Sugars, M.Ethiraj himself being one of the shareholders in S.V.Sugars.

5(iii) Owing to very many reasons, time frame set out in MOU could not be adhered to, resulting in two extension agreement. The first extension agreement is dated 18.02.2011 and the second extension agreement is dated 12.12.2011.

5(iv) To be noted, two major bankers of S.V.Sugars are Indian Overseas Bank ('IOB' for brevity) and Bank of India ('BOI' for brevity). Vide letters dated 06.08.2012 and 15.11.2012, IOB and BOI respectively classified the accounts of S.V.Sugars as Non Performing Assets ('NPA' for brevity). Thereafter, there was a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI Act' for brevity) issued by BOI and One Time Settlement (hereinafter referred to as 'OTS' for brevity) acceptance letter from IOB dated 30.09.2013.

5(v) After all this, an agreement dated 09.10.2013 came to be executed. One Shinago Holdings Private Limited (hereinafter referred to as 'Shinago' for brevity), a private limited company in India, M.Ethiraj (respondent No.1 before us), Binny Engineering Limited (hereinafter referred to as 'Binny Ltd.' for brevity), a Public Limited Company incorporated under the Companies Act, 1956 and S.V.Sugars are parties to this agreement dated 09.10.2013. This agreement is hereinafter referred to as 'said agreement' for the sake of brevity, convenience and clarity.

5(vi) In and by the said agreement, parties agreed that the aforesaid MOU still holds good as on the date of the said agreement. In sum and substance, under the said agreement, it was agreed that 100% shares in S.V.Sugars (all the shareholders being represented by M.Ethiraj) will be transferred to Shinago, which is now the Investor for a consideration of Rs.20 Crores.

5(vii) Another aspect of the said agreement is that Binny Ltd. being a preferential shareholder in S.V.Sugars shall transfer its preferential shares to the investor Shinago for a total consideration of Rs.20.75 Crores.

5(viii) To be noted, some of the original investors (referred to as 'Patel Group' for the sake of convenience and clarity), who formed part of the aforementioned consortium represented by T.Rajendran in the MOU, are also now part of Shinago.

5(ix) As referred to supra, S.V.Sugars is nucleus of the matter and MOU is genesis of the matter. Said agreement (dated 09.10.2013) is the fulcrum of the matter.

5(x) There are mutual rights and obligations qua the parties to the said agreement and the same have been articulated in various covenants of the said agreement. We shall refer to relevant covenants infra under the caption 'Discussion'.

5(xi) Admittedly, there is an arbitration agreement between the parties, which is in the form of a covenant in the said agreement.

5(xii) Disputes arose between the parties to the said agreement. There are allegations and counter allegations of default and breach in performing respective obligations affecting corresponding rights. This resulted in an arbitration trigger notice dated 17.9.2016 being issued by M.Ethiraj to Shinago and S.V.Sugars (now known as Padmaadevi Sugars Limited). Shinago and S.V.Sugars sent replies dated 07.10.2016 to the trigger notice agreeing for arbitration, but not the arbitrator suggested by M.Ethiraj.

5(xiii) To be noted, though S.V.Sugars is now known as Padmaadevi Sugars Limited, for the sake of convenience and clarity, in this order, we continue to refer to the said company as S.V.Sugars.

5(xiv) In continuation of the arbitration trigger notice dated 17.9.2016 and reply notices dated 7.10.2016, M.Ethiraj (respondent No.1 before us) took out two applications under various sub clauses of sub section (1) of Section 9 of the A and C Act being Application Nos.5154 and 5155 of 2016.

5(xv) In these applications, M.Ethiraj arrayed Shinago and S.V.Sugars as respondent Nos.1 and 2 respectively. To be noted, one Thirumagal Enterprises Limited (formerly known as M/s.Thirumagal Engineering Limited, originally incorporated as Binny Engineering Limited) was also arrayed as respondent No.3.

5(xvi) Application No.5154 of 2016 is with a prayer for appointment of an Advocate Commissioner to prepare a detailed list of inventories of the plant, machineries and other assets of S.V.Sugars which are available in its factory premises with its present value.

5(xvii) Application No.5155 of 2016 is with a prayer to direct Shinago and S.V.Sugars to furnish security to the tune of Rs.250 Crores in favour of M.Ethiraj and his son

E.Shanmugam to secure the liability said to be arising due to purported / possible invocation of personal guarantee given by M.Ethiraj and his son to IOB and BOI.

5(xviii) In and by a common order dated 13.4.2017, a learned Single Judge has acceded to the prayers in both the applications. An Advocate Commissioner has been appointed and there is a direction to Shinago and S.V.Sugars to furnish security in a sum of Rs.250 Crores within a period of four weeks. This order is called in question before us in this intra-court appeals and the same is hereinafter referred to as 'impugned order' for the sake of convenience and clarity.

5(xix) We are informed in the hearing before us by the learned counsel for the appellants as well as the learned counsel for the Caveator that post impugned order, on 05.07.2017, an Arbitrator has been appointed, Arbitral Tribunal has been constituted and that the first sitting of the Arbitral Tribunal is on the anvil. We are also informed that the Advocate Commissioner has fixed the date for inspection and that he shall carry out the inspection shortly.

5(xx) To be noted, the above submissions were made before us in the hearing on 27.7.2017.

5(xxi) We now proceed to examine the appeals on merits.

DISCUSSION :

6(i) A perusal of the affidavits filed in support of the Section 9 applications by M.Ethiraj and the impugned order, in the light of the submissions that were made before us, it is clear that the aforesaid two prayers in Section 9 applications for appointment of Advocate Commissioner and for furnishing security have been made primarily on the basis of a covenant in the said agreement, i.e., agreement dated 09.10.2013, which is to the effect that Shinago and S.V.Sugars will arrange to release the personal guarantees provided by M.Ethiraj and his son E.Shanmugam to IOB and BOI within a period of three months.

6(ii) To be precise, the said clause is Clause 1(c) of the said agreement. We deem it appropriate to extract the said clause. Clause 1(c) of the said agreement reads as follows :

"1.OBLIGATIONS OF THE INVESTORS :

The Investors shall pay the shareholders as follows:

x x x x x x x x x x x x

c.The Investors are negotiating a One Time Settlement ('OTS') on behalf of the Company with the Indian Overseas Bank, Bank of India in relation to the dues of the Company to the said Banks. The Company and Investors will arrange to release the personal guarantees provided by Mr.M.Ethurajan and Mr. E.Shanmugam to the Indian Overseas Bank and

Bank of India, within a period of three months."

6(iii) The case of M.Ethiraj (in the Section 9 applications) is predicated on the pivotal ground that Shinago and S.V.Sugars have not discharged their obligation under the aforesaid clause 1(c) of the said agreement. In other words, Shinago and S.V.Sugars have not arranged for release of personal guarantees provided by M.Ethiraj and his son E.Shanmugam to IOB and BOI.

6(iv) However, Shinago and S.V.Sugars would contend that the roadblocks in this regard are due to M.Ethiraj and non performance of obligations of shareholders of S.V.Sugars (who are represented by M.Ethiraj). Shinago would also submit that substantial funds have already been infused.

6(v) However, these are all matters which have to be gone into by the Arbitral Tribunal which, as set out supra under the caption "Factual Matrix", has now been constituted and with it's first sitting on the anvil.

6(vi) Most importantly, primary ground on which the interim prayers (in the Section 9 applications) have been made by M.Ethiraj, is that he reliably learnt that valuable machineries of S.V.Sugars which according to him are worth approximately Rs.150 Crores have not been categorized and inventorized. It is the further case of M.Ethiraj that these machineries are being sold piecemeal to certain persons at a value significantly less than their true worth, which according to M.Ethiraj is seriously prejudicial and detrimental to his interest, since if the last remaining assets of S.V.Sugars are frittered away, Banks will turn to the personal guarantees provided by him and his son. To be noted, it is also the case of M.Ethiraj that if the assets of S.V.Sugars are used and utilized properly and sold in a transparent manner, that would be more than sufficient to discharge the entire dues to the Banks.

6(vii) Aforesaid is the crux and gravamen of the complaint of M.Ethiraj. This is articulated in paragraph 35 of his affidavits filed in support of Section 9 applications. We deem it appropriate to extract the same. Paragraph 35 of the affidavits of M.Ethiraj in support of his two Section 9 applications reads as under :

"35.Further, the Applicant has reliably learnt that the valuable machineries of the 2nd Respondent Company which are worth approximately one hundred and fifty crores have not even been categorized / inventorized. Some of these machineries are being sold piece-meal to certain persons at a value significantly less than their true worth. This is seriously prejudicial and detrimental to the interests of the Applicant, since if the last remaining assets of the Company are frittered away in such a clandestine manner, the Banks will turn to the personal

guarantees provided by the Applicant and his son, although the assets of the Company, if used and utilised properly/sold in a transparent manner, may be more than sufficient to discharge the entire dues of the banks. It is therefore just and necessary that this Hon'ble Court may be pleased to appoint an Advocate Commissioner to prepare a detailed list of inventories of the 2nd Respondent Company and submit the same before this Hon'ble Court."

6(viii) We have already set out supra that Shinago would say that roadblocks in this regard was because of non performance of the obligation of shareholders under the said agreement. We have also observed that these are matters which the Arbitral Tribunal will decide on merits.

6(ix) Besides the above, Shinago has also raised several hyper-technical objections, which as we observe are broadly three in number and they are as follows :

(a) E.Shanmugam, S/o.M.Ethiraj is not a party to Section 9 application and therefore, there can be no complaint qua his personal guarantee;

(b) There is no default clause in the said agreement and therefore, even if there is breach / violation of clause 1(c), remedy for M.Ethiraj is only damages; and

(c) Machineries of S.V.Sugars cannot be construed as properties, things or goods, which are subject matter of disputes in arbitration.

6(x) However, we examine the prayers, impugned order wherein the prayers were acceded to and these appeals in the light of grounds available to a party for seeking such interim measures under the A and C Act.

6(xi) There is no dispute that both the interim prayers have been sought for by M.Ethiraj under Section 9(1) (ii)(c) and (e) of the A and C Act. Further more, application No.5154 of 2016 being one for appointment of Advocate Commissioner, principles adumbrated in Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC' for brevity), which deals with the appointment of Advocate Commissioner would apply.

6(xii) With regard to application No.5155 of 2016, we have no doubt in our mind that the same is in the nature of the prayer for attachment before judgment and therefore, principles contained in Order XXXVIII Rule 5 of CPC would apply.

6(xiii) That principles of CPC would apply to applications under Section 9 of the A and C Act, though the provisions of CPC may not apply to arbitration proceedings is too very well settled.

6(xiv) We, therefore, examined the matter in the light of settled principles and in the light of parameters and

ingredients governing grant of an order under Order XXXVIII Rule 5 CPC.

6(xv) A prayer to furnish security followed by attachment in the event of default will be acceded to, only when a person making the prayer is able to demonstrate and establish before the Court that the property that is being sought to be preserved is under imminent danger of being removed from the jurisdiction of the court or is under imminent threat of being liquidated and the party making such prayer should also be able to satisfy the court that such attempts for removal / liquidation of assets and properties are being done with an intention of defeating a possible decree (in arbitration proceedings, decree should be read as Award).

6(xvi) When we embarked upon the exercise of examining the interim prayers in the light of the above said principle, we only searched in vain for averments in this regard. Not only are there no averments, there is absolutely no shred of material whatsoever that has been placed before the Court to support the complaint of M.Ethiraj as contained in paragraph 35 of the common affidavit filed in support of Section 9 applications. To be noted, paragraph 35 has been extracted supra.

6(xvii) We have also noticed that M.Ethiraj himself has averred that machineries of S.V.Sugars as available are more than sufficient to discharge the dues of the Banks. Therefore, the only issue that remains is whether machineries are being frittered away. For a prayer for furnishing security to be acceded to, not only should there be prima facie material before the Court to show that machineries are being frittered away, such frittering away should also be established by demonstrating that such attempts are with an intention of defeating a possible decree (Award).

6(xviii) In the normal course, there should be affidavits from third parties, who are prospective purchasers or there should be some affidavits or materials to show that attempts are being made to sell away the machineries.

6(xix) There is absolutely nothing that has been placed before the Court. There is nothing before the Court to come to any prima facie conclusion in this regard. Therefore, on that short point, we have no hesitation in holding that the order directing the appellants before us, namely, Shinago and S.V.Sugars (respondent Nos.1 and 2 in the Section 9 applications) to furnish security that too to the tune of Rs.250 Crores is not sustainable. In our opinion, requisite ingredients for such order are absent and therefore, the order cannot be sustained. In our considered opinion, it is also harsh.

6(xx) Now, turning to Application No.5154 of 2016, which is for appointment of Advocate Commissioner, as alluded to supra, an Advocate Commissioner has already been appointed, even a date for inspection has been fixed and that the same is on the anvil. No harm, prejudice or hardship will be caused to

any one, much less the appellants before us, if an Advocate Commissioner inspects, takes inventory, values the machineries and submits a report before the Court. Principles governing Order XXVI Rule 9 CPC are not non-existent in the instant case as such a report will certainly be helpful in arbitral proceedings, which we are informed is about to commence.

6(xxi) As the Arbitral Tribunal has been constituted on 5.7.2017 and the commencement of Arbitral proceedings is on the anvil, in the light of the enlarged and amplified scope of Section 17 of the A and C Act, post October, 2015, it will be open to the parties to seek appropriate interim relief/s before the Arbitral Tribunal. We make it clear that this order of ours will not preclude the parties from seeking such relief before the Arbitral Tribunal. Therefore, we have no difficulty in sustaining the order of appointment of Advocate Commissioner made in the impugned order vide Application No.5154 of 2016.

CONCLUSION :

7(i) Owing to all that have been stated supra, the impugned order appointing Advocate Commissioner is sustained and the order directing security to be furnished is set aside. To be noted, we are informed that the impugned order of directing security to be furnished within four weeks from the date of receipt of copy of the order had been passed on 13.4.2017 and these original side appeals along with interim stay applications have been filed on 16.5.2017 and that the security has not yet been furnished.

7(ii) Therefore, in the light of our order, there will be no need or necessity to furnish security. However, as set out supra, we have left the question open to be raised under Section 17 of the A and C Act before the Arbitral Tribunal, which has been constituted now post the impugned order. For the purpose of abundant clarity, we make it clear that all questions raised in these appeals are left open to be agitated before the Arbitral Tribunal, inter-alia under Section 17 of the A and C Act.

DECISION :

8(i) O.S.A.No.125 of 2017 against Application No.5154 of 2016 is dismissed, confirming the order dated 13.4.2017 appointing Advocate Commissioner.

8(ii) O.S.A.No.126 of 2017 against Application No.5155 of 2016 is allowed. The order dated 13.4.2017 directing respondents 1 and 2 (appellants before us) to furnish security to the tune of Rs.250 crores within a period of four weeks, is set aside.

8(iii) Considering the nature of the matter and the trajectory of the litigation, parties are left to bear their respective costs. Consequently, connected miscellaneous petitions are closed.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

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To

The Sub Assistant Registrar
Original Side Section
High Court, Madras.

O.S.A.Nos.125 and 126 of 2017

SVI (CO)
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