

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

FAO No.1680 of 2017(O&M)

Date of Decision:-28.08.2017

M/s Chandigarh Spun Pipe Company & Ors.

.....Appellants.

Versus

Fornax Real Estate Ltd. & Ors.

.....Respondents.

CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH

Present:- Mr. Anand Chhibar, Sr. Advocate assisted by
Mr. Inderjit Kaushal, Advocate for the appellants.

Mr. Kanwal Goyal, Advocate and
Mr. Aman Kumar, Advocate for respondent No.1.

Mr. Jaivir Singh Chandel, Asstt. Govt. Pleader for
respondent no.3 & 4.

JASWANT SINGH, J.

The appellants (who are respondents before the Commercial Court, Chandigarh), invoking jurisdiction under section 37 of the Arbitration and Conciliation Act, 1996 (herein after referred to as Act of 1996)), have filed the present appeal, aggrieved against the order dated 28.02.2017 passed under section 9 of the Act, 1996 whereby, their application under Section 9 has been dismissed by the Commercial Court, Chandigarh on the ground that vide order dated 14/09/2015 (Annexure A-5), their earlier application under Section 9 already stands decided and an “automatic charge” stands created in favour of the appellants.

Ld. counsel for the appellants argued that the Ld. Additional District Judge, UT, Chandigarh (Commercial Court) fell in error by declining the request of the appellants for hearing the application under section 9 of the Act, 1996 for interim relief and ordered to hear the objections under Section 34 of the Act, 1996 against the award, without there being any compliance of judgment dated 15/10/2015 passed by this court in FAO No. 7020 of 2015 (A-6), arising out of order dated 14/09/2015.

Ld. Counsel has further argued that as per section 77 of the Companies Act, 2013, a clerical procedure is required whereby respondent No. 1 is under a bounden duty to submit the optional convertible debentures as disclosed by it in affidavit dated 15.10.2015, in physical form. In case, the said Optional Convertible debentures are not submitted in the physical form, as disclosed by the respondent no 1 in its affidavit dated 15.10.2015, no automatic charge is created, as has been written by National Securities Depository Limited (NSDL for short) and Central Depository Services (India) Limited (CDSL for short) to the appellants. Thus, he has argued that the observations and findings of the court that it cannot go beyond the order dated 14/09/2015 and further there is already an “automatic charge” on the Optional Convertible Debentures as disclosed by respondent no 1, in its affidavit, is wrong and liable to be set-aside. In support of his contentions, Ld. Senior Counsel has relied upon **Tata Capital Financial Services Ltd. Vs Decca Chronical Holdings Ltd 2013(12) Arb LR 181; Prema Container Line (UK) Pvt. Ltd. Vs Prema Container Line (India) Pvt. Ltd. 2010(2) Arb LR 133; Time Broadband Services Pvt. Ltd. Vs Colombian Software Solutions Pvt. Ltd. 2009(Suppl. 1) ArbLR 231;**

Kasturi and sons Ltd. Vs K.C Palaniswamy (Madras) 2012(2) RCR (Civil) 65; M/s Raja Ram Corn Products Punjab Pvt. Ltd Vs Suncity Projects Pvt. Ltd and others FAO No. 4971 of 2015 decided on 05.08.2015; M/s Raja Ram Corn Products Punjab Pvt. Ltd Vs Suncity Projects Pvt. Ltd and others FAO No. 2232 of 2015 decided on 29.05.2015.

On the other hand, Ld. counsel for the respondent No. 1 has argued that there is no infirmity and illegality in the impugned order dated 28.02.2017 because Commercial Court, Chandigarh has rightly observed that there needs to be a finality attached to an order, especially when vide order dated 14/09/2015 (A-5), the predecessor of the Commercial Court had categorically held that an automatic 1st charge would be created on the unique identification numbers disclosed by the respondent No. 1 by way of filing an affidavit. It is submitted that this order was challenged only by respondent no 1 and not by the appellant, which was ultimately confirmed by this Court in FAO No. 7020 of 2015, hence the order dated 14.09.2015 has attained finality and therefore, same matter cannot be permitted to be re-agitated again under the garb of some communication between appellants and NSDL/CDSL. He has further argued that for a liability of approximately 55 crores, 1st charge has been created for an amount of 111 crores under the orders of the Commercial Court and therefore, the rights, if any, of the appellant stands duly protected by the Judicial process itself. However, he submits that the sole purpose of appellants is to delay the entire proceedings pending under Section 34 of Act 1996 by filing numerous applications under Section 9 (this being the 4th application), which is pending consideration before Commercial Court for the last 4

years and pressurize it, by putting the entire amount of Rs. 111 crores (approx.) at stake. In support of his arguments, he has relied upon **Kasturi and sons Ltd. Vs K.C Palaniswamy (Madras) 2012(2) RCR (Civil) 65.**

After hearing Learned Counsel for the parties and perusing the paper book, this court is of the opinion that present appeal is devoid of any merit and same is liable to be dismissed.

Some of the undisputed facts of the present case are that vide an award dated 21.01.2013, the Ld. Arbitrator had passed an award in favor of the appellants and awarded an amount of Rs. 45,35,31,260/- alongwith 9% interest per annum. This award has been challenged by respondent no 1 before the Commercial Court, Chandigarh and is stated to be pending consideration at the final/arguments stage. During the pendency of the objections, an application was filed by appellants under section 9 of the 1996 Act, in order to secure an amount of Rs. 45,35,31,260/- alongwith 9% interest per annum. The then District Judge, Chandigarh allowed the said application vide its order dated 14.09.2015 (Annexure A-5) and observed the following:

“ 13. Thus, looking the instant case through legal prism coupled with factual position referred to and discussed above, it is deemed expedient to direct respondent no 1(Forex real estate) to furnish the security/bank guarantee to the tune of Rs. 55,00,00,000/- (Rs. Fifty Five Crores only) to secure the awarded amount if the award is ultimately upheld against them within a period of four weeks from today, failing which respondent no 1 will disclose the Unique Identification number of optional convertible debenture as mentioned in affidavit

dated 09.09.2015 furnished by Hardeep Singh, authorized representative of respondent no 1 and first charge will automatically be created on the Optionally Convertible Debentures. And the directions issued to respondents no 3 and 4 with regard to non transfer of Rs. 4.93 crores to respondent no 1 shall remain continue. This order will continue till Award, if finally affirmed, in favor of petitioners, is satisfied. With these observations, the instant petition as well as the application filed under section 9 of the Arbitration and Conciliation Act read with Section 151 of Civil Procedure Code have been disposed off. File be consigned to record room.

”

This order was put to challenge by M/s Forex real estate-respondent no 1 before this court by way of FAO No. 7020 of 2015 and the same has been affirmed vide order dated 15.10.2015 (Annexure A-6).

Meaning thereby, the aforementioned order dated 14.09.2015 (P-5) has attained finality as it is not disputed that no further appeal was filed before the Hon’ble Supreme Court.

It is further not in dispute that on 15.10.2015 itself, an affidavit (Annexure A-7) was furnished by Hardeep Singh, authorized representative of respondent no 1, whereby the Unique Identification Number of optional convertible debenture were disclosed. The said Unique Identification Numbers are of debentures worth Rs. 111 Crores approximately (as is evident from affidavit dated 09.09.2015 (A-4)), which is much higher than the amount to be secured for the appellants.

Thereafter, two more applications have been filed by the

appellants under section 9 and the present application dated 28.03.2016 (**Annexure A-10**) is before this Court for consideration, upon which the impugned order dated 28.02.2017 has been passed. As per the contents of said application, appellants have sought directions to be issued to respondent no 1 to deposit the optional convertible debentures (OCD) bearing registered Folio number OCD-04 certificate No 4: 04 Distinctive No (s) 1932851-3047000, held in physical form by respondent no 1, on the ground that on asking of appellants from CDSL and NSDL, they have informed, vide their replies dated 24.02.2016 and 09.03.2016 (**Annexure A-9 Colly**) to the appellants that the aforesaid OCDs Nos disclosed by respondent no 1 were not in electronic form but are in physical certificates and therefore there is no first charge over the said debentures.

However, the Commercial Court, Chandigarh, vide its impugned order has refused to interfere on primarily three grounds: *i) order dated 14.09.2015 has attained finality and therefore, the court does not have the power to recall its order; ii) Rights of appellants have already been secured by the Court in its order dated 15.09.2015 and thus, no further orders are required; iii) appellants herein are trying to delay the proceedings pending under section 34 of Act, 1996.*

In light of the aforementioned factual position, the arguments raised by the Ld. Counsel for the appellants are without any force, because vide a judicial order dated 14.09.2015 (A-5), the rights of the appellants already stand protected and the mere apprehension of the appellants that CDSL and NSDL have stated that the debentures are required in physical form before creating any charge, is without any cogent reason. It is clear from the order dated 14.09.2015 that 'An automatic charge' has been

created immediately, when the numbers of Optionally Convertible Debentures were disclosed vide affidavit dated 15.10.2015 (A-7). The said order is binding upon both the parties. If the orders of the court are not enough to protect the rights of appellants, then this court fails to understand what else can dispel the apprehension of appellants.

Even otherwise, in case the appellants were aggrieved against any part of the order passed by the District Judge, Chandigarh dated 14.09.2015, they could have very well approached this Court. However, the appellants, at that point of time, zealously protected the order dated 14.09.2015 and did not prefer even a cross appeal/cross objections in the appeal filed by respondent no 1. Under these circumstances, the contention of appellants is based upon more of apprehension and less on sound logic. Even otherwise, Ld. Counsel for respondent no 1 has rightly relied upon the judgment passed by Madras High Court in **Kasturi and sons Ltd. (supra)**, which has categorically held that a second application under section 9 by alleging change of circumstances, whereas there is no change of circumstances, is not maintainable. The relevant paragraph of the said judgment reads as under:

“149. In A. No. 694 of 2011, the prayer has been made for directing the third respondent to deposit all the title deeds of the property belonging to the second respondent company and fourth respondent before this Court. In A. No. 2734 of 2008, the prayer made by the applicant was allowed. It was always open to the applicant at that stage to have impleaded other parties. Once an application filed on a subject matter has attained finality, even though by way of interim direction,

though will not operate as res judicata, still it is not open to the applicant to file a second application on the same relief, by alleging change of circumstances, whereas there is no change of circumstances, as the applicant is claiming right under the agreement dated 19.7.2004. Therefore, this application is also dismissed.”

In the present case also, the appellants, under the garb of alleged changed circumstances/subsequent events are asking for the same relief, as was sought by them earlier.

As far as the argument of Ld. Senior Counsel for appellants regarding non-compliance of provisions of Section 77 of Companies Act is concerned, a bare perusal of this section would show that the physical form of debentures is required to be submitted in those cases where the company intends to create first charge of its own. In the present case, ‘an automatic charge’ has been created by the Court and therefore, the said Section is not at all applicable. Further, a judicial order carries more value than anything else. In case, respondent no 1 alienates any of the debentures as disclosed in the affidavit dated 15.10.2015, the appellants very well have a remedy of initiating contempt proceedings. However, it is apparent from the record and not disputed amongst the parties that appellants have already filed a contempt petition i.e COCP 1349 of 2016 in this Court, which is already pending consideration.

Thus, it is apparent that the appellants are approbating and re-approbating at the same time, by relying upon order dated 14.09.2015 in contempt proceedings and at the same time seeking modification of order dated 14.09.2015. However to allay the apprehension of the appellants that

the respondents are siphoning of funds and the awarded amount in their favour has not been properly secured, it is held and directed that the respondent no.1 would be bound by the contents/undertaking of their affidavit dated 15.10.2015 (A-7) submitted in compliance of the order dated 14.09.2015 (as affirmed vide order dated 15.10.2015) ; and any violation would invite strict action in contempt proceedings.

As far as the judgments relied upon by Ld. Counsel for the appellants is concerned, the same are not applicable to the facts of the present case at all. The judgments of Tata Capital Financial Services Limited(supra); Perma Container Line (UK) Line Ltd (supra); Time Broadband Services Pvt. Ltd (supra) are on the point as to whether Court has the power under section 9 to pass any interim measure to things or properties, which are not subject matter of dispute or arbitration or not and consequently protect and secure the amount of claim. The said proposition is not at all involved in the present appeal. The judgment of Kasturi and Sons Ltd (supra) in fact goes against the appellants, as discussed above. As far as the remaining two judgments passed by co-ordinate bench in M/s Raja Ram Corn Products, Punjab Pvt. Ltd (supra) cases are concerned, they again are not even remotely connected with the issue involved in the present case. Thus, none of the judgments cited by the Ld. Senior Counsel advance the case set out by him.

In view of the discussion made above, no ground for interference is made out and accordingly the instant appeal is dismissed and consequently the impugned order dated 28.02.2017 stands affirmed.

However, in view of the peculiar facts and circumstances of the case, it is appropriate to direct the Commercial Court, Chandigarh to decide

the objections pending before it since long, as early as possible, positively within the period of two months of of the next date of hearing fixed before the Court below.

**(JASWANT SINGH)
JUDGE**

August 28th, 2017
Vinay