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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO.201 OF 2017

Tata Capital Financial Services Ltd. ..Petitioner
Vs.
Kapsons Industries Pvt.Ltd. & Ors. ..Respondents

Mr.Mayur Khandeparkar with Mr.Biswadeep Chakravarty i/b. Mr.M.J. Humranwala for Petitioner.
Mr.Rajiv Singh with Mr.Yuvraj Singh i/b. M/s.Desai & Diwanji for Respondents.

CORAM : G.S. KULKARNI, J.
DATE : 21st JANUARY, 2019

P.C.:

This petition under section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the ACA") is pending for some time.

2. This Court on 2 November 2017 after hearing the parties had passed the following order:-

> "1 Heard the counsel for petitioner and counsel for respondents. Petitioner is seeking various prayers including deposit of Rs.14,72,07,971/due as on 17th March, 2017 together with interest at 14% p.a. and additional interest at 2% p.a. from 18th March, 2017 till payment and/or realisation under the Term Loan Agreement dated 22nd September, 2015, disclosure of all assets, restraining respondents from transferring or selling or creating any third party rights over any of the assets, etc.
> 2 In the affidavit in reply, in paragraph 10 (d) (i) respondent no.1 has admitted its liability. The affidavit in reply has been affirmed by one Surinder Kumar Sehgal, director of respondent no.1 and who is also respondent no.3 to the petition. Other respondents, viz., respondent nos.2,4 and 5 have chosen not to file any affidavit in reply. Respondent nos.2 to 5 are guarantors and have signed various documents in favour of petitioner guarantying

payment by respondent no.1.

3 The counsel for respondents states that before arbitration is commenced, the agreement stipulates that parties will use all reasonable endeavors to resolve disputes amicably. The counsel for respondents further states that unless the attempt to amicably settle the differences has not been adopted, petitioner cannot commence arbitration.

4 Admittedly, petitioner has sent demand notice dated 7th September, 2016 and 2nd November, 2016, copies whereof are at Exhibit 'O' and Exhibit 'Q' to the petition. Certainly respondents could have reverted with the settlement proposal. Respondents have not, except writing a letter stating that the repayment could be restructured. Therefore, for respondents to come and say settlement talks have not been adopted cannot be accepted.

5 The counsel for respondents also tenders an email dated 1st November, 2017 from the Managing Director of respondent no.1 N.K. Sehgal, who is also respondent no.2, stating that respondent no.1 is under stress due to financial losses and they do not have enough fund to pay salaries, statutory dues and transportation and production expenses. It is also stated that all their assets fixed as well as current are also pledged to financial institutions and they are in negotiation with the banks with a request to refer their case to Assets Reconstruction Company. However, a blunt statement is made at the end of the email stating that "as company has started generating the fund we will start distributing fund between expenses and lenders from Nov. end after knowing exact position of fund flow".

6 Therefore, since respondent no.1 itself does not know what will be the fund flow, the statement appears to be nothing but a hoax to delay the inevitable. The said email dated 1st November, 2017 is taken on record and marked 'X' for identification.

7 In the circumstances, the following order is passed:

(a) Respondents to deposit a sum of Rs.14,72,07,971/ with the Prothonotary and Senior Master within four weeks from today.

(b) Respondents to disclose on oath details of all the assets movable and immovable, file copies of annual returns filed for the last three financial years, viz., FY 2014-2015, 2015-2016 and 2016-2017. In addition, respondent no.1 to file unaudited profit and loss statement and balance sheet for the period ending 30th September, 2017. If all the assets are pledged or mortgaged, then details of the same together with documents in support and also list of debtors of each of respondents together with documents in support thereof.

(c) The affidavit annexing the documents/disclosures

> stated in para (b) above to be filed and copy served within four weeks from today.
> (d) The petition to be listed for directions on 11th December, 2017."

3. It is now informed that the arbitral tribunal has already been constituted on 12 June 2018 and the parties are before the arbitral tribunal. The mandate of Sub-sections (2) and (3) of Section 9 as amended by Act No.3 of 2016 with effect from 23 October 2015 is as follows:-

> "(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."

4. The order dated 2 November 2017 passed by this Court has remained in operation and considering the above provisions of Sub-sections (2) and (3) of Section 9 of the ACA, as the tribunal is already constituted and in my opinion as there are no circumstances which may render the remedy provided under Section 17 inefficacious, it would be appropriate that the parties agitate all the issues before the arbitral tribunal.

5. It needs to be observed that the petitioner had also challenged the order dated 2 November 2017 passed by this Court in Commercial

Appeal No.170 of 2018. The said appeal was disposed of by the Division Bench by an order dated 23 July December 2018 which reads thus:-

> " The appellant has placed on record an email addressed by the appellant to respondents. It is submitted that parties are working on a possible settlement. This appeal has been adjourned from time to time.
> 2. We have perused the order passed by the Division Bench of this Court on 21st December, 2017. Section-9 petition is pending before the learned Single Judge. If the parties desire to settle on certain terms, they are at liberty to approach the learned Single Judge.
> 3. The Commercial Appeal stands disposed of with liberty.
> 4. In case the settlement fails, the appellant is at liberty to revive the proceedings of this appeal. "

6. The above order of the Division Bench subsists. Learned Counsel for the parties also submit that the parties are still desirous to settle the disputes and talks in that regard are going on.

7. In the above circumstances, it would be appropriate that the present petition under Section 9 of the ACA is disposed of in terms of the order dated 2 November 2017 passed by this Court, leaving the parties to espouse their respective pleas before the arbitral tribunal.

8. All contentions of the parties in that regard are expressly kept open.

9. The petition is accordingly disposed of. No costs.

[G.S. KULKARNI, J.]