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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 05.07.2019

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ARB. A. (COMM.) 16/2019

SHININGKART ECOMMERCE PVT LTD. Appellant

Through Mr. Sachin Dutta, Sr. Adv with
Mr. Deepak Chaudhary and Ms.
Vinita Shahi, Advs.

versus

JIAYUN DATA LIMITED

..... Respondent

Through Mr. Darpan Wadhwa, Sr. Adv with
Mr. Ajay Bhargava, Mr. Aseem
Chaturvedi and Ms. Trishala Trivedi,
Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

I.A. No.8610/2019

1. Allowed, subject to just exception.

ARB. A. (COMM.) 16/2019

2. This is an appeal filed under Section 37 (2) of the Arbitration and Conciliation Act, 1996 (hereafter referred to as '1996 Act') against the order dated 31.05.2019. I must indicate at the very outset that in the prayer clause, which obtains in the appeal, there is no reference to the earlier order of the arbitral tribunal, which is, dated 21.04.2019 – though, a substantial part of the argument which has been advanced before me by Mr. Dutta, learned senior Advocate, appearing on behalf of the appellant, is channelized towards impugning the validity of that order of the arbitral tribunal.

2.1 I must, however, indicate that in the list of dates, the appellant does

make an assertion that the appeal is directed both against the order dated 21.04.2019 and 31.05.2019.

3. Therefore, I would grant some leeway to the appellant and, thus, allow it to contend before me as if the appeal is directed against both orders.

4. Be that as it may, the record shows that the respondent, who is the original claimant, had approached this Court by way of Section 9 petition, which was numbered as: OMP (I) (Comm.) No. 71/2019. This petition was finally disposed of by the Court on 16.04.2019. Since, a large part of the appellant's grievance veers around the order dated 16.04.2019, the relevant part of the order is extracted hereafter:

“The learned senior counsel for the petitioner prays for leave to withdraw the present petition with liberty to file the pleadings of the present petition as an application under Section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') before the Arbitrator appointed in due compliance with the Act and the Arbitration Agreement between the parties.

The petition is dismissed as withdrawn with liberty as prayed for. Dasti under the signatures of the court master.”

5. A perusal of the captioned order would show that the respondent/claimant sought leave to withdraw the Section 9 petition with liberty to file the pleadings of the Section 9 petition as an application under Section 17 of the 1996 Act, before the Arbitrator, who had to be appointed by the respondent/claimant.

5.1 As is obvious from the extract set forth above, the Court dismissed the Section 9 petition, as withdrawn, with liberty as prayed for by the respondent/claimant.

6. In consonance with the liberty given, the respondent did two things. First, *via* an e-mail of even date i.e. 16.04.2019, appointed an Arbitrator in

the matter. Second, file the pleadings which are part of the Section 9 petition before the learned Arbitrator for obtaining interim relief.

7. The record shows that on 17.04.2019, the learned Arbitrator while giving consent to his appointment, posted the matter for further proceedings on 21.04.2019.

7.1 As a matter of fact, the learned Arbitrator also filed his declaration in accordance with the provisions of the 1996 Act along with his communication dated 17.04.2019.

8. Evidently, on the same date i.e. 17.04.2019, the counsel for the appellant wrote to the arbitral tribunal that the hearing fixed on 21.04.2019 was not convenient to him as it was an “Easter Sunday” and, therefore, he would be busy with religious ceremonies. This communication of the appellant received a response, from the learned arbitrator, on 19.04.2019. The learned arbitrator, in effect, communicated to the appellant’s counsel Mr. Joseph Koshy that he could send his associate counsel as only procedural orders would be passed on 21.04.2019.

9. Accordingly, on 21.04.2019, Ms. Binita Shahi, advocate, appeared before the arbitral tribunal for the appellant. The record shows that the matter went beyond passing a procedural order, *albeit*, with consent of counsel, in particular, the consent of Ms. Binita Shahi who represents the appellant. Resultantly, arguments were heard by the learned arbitrator on the interim application placed before him which, as indicated above, were pleadings filed before this Court by treating the same as an application under Section 17 of the 1996 Act.

9.1 It is also pertinent to note that Ms. Binita Shahi did indicate to the arbitral tribunal that final arguments in the matter would be addressed by

Mr. Joseph Koshy. On that date, upon hearing counsel for parties, the arbitral tribunal passed the following interim order:-

“9. Looking to the facts and features of the case, till the next date of Hearing (SIC: hearing), it is directed that status quo shall be maintained by the Respondent as it exists today. No other amounts or funds shall be transferred by Respondent No. 1 to any other Company or its subsidiaries, if any, except for carrying a regular day-to-day business. The details thereof shall be furnished by the Respondent to the Tribunals”

10. The matter was, thereafter, taken up by the arbitral tribunal on 25.04.2019.

10.1 To be noted, proceedings of 25.04.2019 have not been placed on record by the appellant. Mr. Darpan Wadhwa, learned senior counsel, who, appears for the respondent/claimant, has placed before me a copy of order passed on 25.04.2019.

10.2 A perusal of the order dated 25.04.2019, passed by the arbitral tribunal, would show that the appellant on that date was represented by a senior counsel, who was instructed by Mr. Joseph Koshy and Ms. Binita Shahi.

10.3 Furthermore, a reading of paragraph 2 of this order would show that the learned senior counsel, who, appeared on behalf of the appellant, advanced arguments on the interlocutory application filed on behalf of the respondent/claimant ‘afresh’.

10.4 This leeway was given by the arbitral tribunal despite the fact that the matter was part heard and had been argued, if not fully, substantially on behalf of the appellant by Ms. Binati Shahi.

10.5 Since, arguments on the interlocutory application could not be

concluded on 25.04.2019, the matter was posted at the request of the senior counsel appearing for the appellant, on 06.05.2019.

11. It is not in dispute that just prior to the date of hearing fixed by the arbitral tribunal i.e. 06.05.2019, the appellant moved an application on 04.05.2019 seeking vacation of the interim directions passed on 21.04.2019.

12. Pertinently, the other order which is impugned in the appeal, that is, order dated 31.05.2019, has been passed by the arbitral tribunal in respect of the application filed by the appellant on 04.05.2019.

13. A perusal of the assertions made in the application filed by the appellant would show that its grievance *qua* the order dated 21.04.2019 revolved around the fact that the respondent/claimant had chosen, according to it, at its own peril not to file a formal application under Section 17 of the 1996 Act.

14. The learned arbitrator, after hearing arguments on the application filed by the appellant on 04.05.2019, proceeded to pass the order dated 31.05.2019.

15. It is in this background that the present appeal has been filed.

16 Mr. Dutta has assailed the orders dated 21.04.2019 and 31.05.2019 principally on the ground that it is contrary to the principle set forth in Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (in short 'CPC'). In support of his submission, Mr. Dutta has placed reliance on the judgment of the learned Single Judge of this Court rendered in ***Lanco Infratech Ltd. Vs. Hindustan Construction Company Ltd.***; 2016 SCC OnLine Del 5365.

16.1 On being queried, Mr. Dutta was unable to demonstrate as to whether any such averment had been made in the application dated 04.05.2019. Notably, Mr. Dutta was also unable to draw my attention to any ground in

the appeal which would have disclosed that a legal submission to that effect was articulated before the arbitral tribunal.

17. Therefore, to my mind, the appellant cannot be permitted, for the first time, to raise such a submission, that too, across the bar, without the necessary pleadings being made in that behalf. If I were to permit Mr. Dutta to advance such a submission, it would amount to, in a sense, putting the cart before the horse. The lack of pleadings and oral submission flies in the face of the arguments which are sought to be advanced by Mr. Dutta before me on this score.

18. Furthermore, as has been pointed out by Mr. Darpan Wadhwa, the only grievance that the appellant had alluded to was that the respondent/claimant had not filed a formal application under Section 17 of the 1996 Act; nothing more nothing less.

19. According to me, even this ground is untenable and, therefore, would have to be rejected. A plain reading of the order passed by this Court on 16.04.2019 would show that it had given liberty to the respondent/claimant to file pleadings which comprised the Section 9 petition as an application under Section 17 of the 1996 Act.

19.1 The respondent/claimant understood that to mean that the pleadings in Section 9 proceedings could be placed before the learned arbitrator, who would treat the same as an application under Section 17 of the 1996 Act.

19.2 As a matter of fact, the respondent/claimant while appointing the arbitrator had indicated as much in its e-mail dated 16.04.2019 addressed to him.

19.3 Strangely, the copy of this e-mail has also not been placed on record by the appellant. Once again, Mr. Darpan Wadhwa has handed over a copy

of the e-mail dated 16.04.2019, the authenticity of which is not disputed by Ms. Binita Shahi, who instructs Mr. Dutta.

20. Therefore, for the appellant to now turn around and argue that the order dated 21.04.2019 was without jurisdiction, merely because a formal application under Section 17 of the 1996 Act had not been filed is unsustainable and completely without merit.

20.1 There is an aspect of acquiescence which obtains in the matter which is something that the learned arbitrator has noted in the order dated 31.05.2019. In this behalf, the learned arbitrator records that no such objection was raised by the appellant at least on two occasions i.e. on 21.04.2019 and 25.04.2019. As observed hereinabove, on 25.04.2019, the appellant was represented by a senior advocate.

21. This brings me to the other aspect of the matter, that is, scope, effect and the impact of the directions contained in paragraph 9 of the order dated 21.04.2019.

22. A perusal of the directions contained in paragraph 9 of the order dated 21.04.2019 clearly indicates that the appellant has not been enjoined from dealing with the amounts and funds which it may require for carrying out its regular day-to-day business. The only caveat placed in the order is that the appellant would be required to file details of the expenses incurred with the arbitral tribunal. That, to my mind, is not asking for too much.

23. As indicated above, the application filed by the respondent/claimant for grant of interim relief is still in play and has not been disposed of as yet. The impugned orders are limited to rejection of the appellant's application dated 04.05.2019.

24. Therefore, for the foregoing reasons, I find no merit in the appeal.

The appeal is, accordingly, dismissed. Needless to say, any observations made hereinabove by me will not impact the decision on merits which would be rendered by the learned arbitrator *qua* the interlocutory application filed by the respondent/claimant.

RAJIV SHAKDHER, J

JULY 05, 2019

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