

15.01.2021
ASR(5)

F.M.A.T. 5 of 2021
With
CAN 1 of 2021
Kotak Mahindra Bank Limited
-versus-
Arjun Sharma and Anr.
(Via Video Conference)

Mr. Swatarup Banerjee,
Mr. Shibnath Bhattacharya,.....For the appellant.

Ms. Sweta Gandhi,
Mr. Rajiv Kumar.....For the respondents.

No litigant should be allowed to take advantage of
Section 9 (3) of the Arbitration and Conciliation Act,
1996 (hereafter the said Act). The provision is set out
herewith :

**“ Section 9(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 exists which may
not render the remedy provided
under section 17 efficacious.”**

In this case, the learned City Civil Court was
approached by the appellant by an application (Misc.
Case 805 of 2020) under Section 9 of the Act, before
constitution of the arbitral tribunal. An order was
passed on 13th October, 2020 appointing a Receiver to
take possession of the vehicle-in-question. Accordingly,
the Receiver took possession of the vehicle.

The Court noted that the proceeding before the arbitral tribunal was scheduled to be commenced shortly and that this Misc. Case under Section 9 of the said Act would stand disposed of on completion of three months from the date of filing of this case or on the appointment of the Arbitrator at the instance of either of the parties, whichever was earlier. Thereafter on 13th November, 2020 the arbitral tribunal was constituted.

After the arbitral tribunal was constituted, the respondent made an application in the Misc. Case before the Court under Section 151 of the Code of Civil Procedure. The Court on an interpretation of Section 9(3) of the said Act, on 23rd December, 2020 ordered that the Misc. Case be withdrawn and the Receiver be discharged.

In our view the purpose of Section 9 sub section 3 of the said Act which was brought in by way of an amendment, was not to undo any action taken by the Court under Section 9 of the said Act, upon constitution of the Tribunal. On a proper interpretation of the amendment, after constitution of the tribunal no new application under Section 9 was to be entertained by the Court and any pending application could not be entertained any further. This was subject to the exception provided in the amendment giving the court power to entertain such an application or to continue hearing the application in certain cases. When the

Court decides not to entertain an application any further, it does not mean that it will vacate all its earlier orders and create a vacuum to be filled up by the Tribunal. This could lead to absurd and undesired results. A receiver may have possession of a vehicle under orders of the Court. If this possession is relinquished by the Court along with an order discharging the injunction restraining transfer of the vehicle, by the time the other party approaches the tribunal, the hirer will have enough opportunity, if he so desires to dispose of the vehicle. The proper course for the Court is to relinquish jurisdiction, with the orders passed intact, leaving it to the arbitral tribunal to continue, vary or discharge these orders by passing its own orders in the Section 17 application.

Meanwhile, the appellant invoked the jurisdiction of the Tribunal under Section 17 of the said Act on 28th December, 2020. The Tribunal has passed an order for sale of the vehicle. The hirer respondent did not appear before the Tribunal. There was justification in not so appearing because they felt they were armed by the order of the learned City Civil Court.

In those circumstances, the impugned order dated 23rd December, 2020 has to be set aside and is set aside. To do complete justice between the parties, no effect shall also be given to the order of the Tribunal dated 28th December, 2020. The Tribunal will pass an

appropriate direction to nullify the order. The Tribunal shall hear out the Section 17 application afresh and pass a reasoned order. Till the Section 17 application is disposed of by the Tribunal, status quo regarding possession and ownership of the vehicle is to be maintained by the parties.

Any other order of the civil court or of the learned Tribunal till date inconsistent with the order stand superseded.

The appeal (FMAT 5 of 2021) along with (CAN 1 of 2021) are disposed of.

(I.P. MUKERJI, J.)

(MD. NIZAMUDDIN, J.)