

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side
Commercial Division

Present:- Hon'ble Justice I. P. Mukerji
Hon'ble Justice Md. Nizamuddin.

APO 29 of 2021
AP 255 of 2020

QUIPPO INFRASTRUCTURE LTD.
Vs.
A2Z INFRASERVICES LTD & ANR.

For the Appellant	:	Mr. Satarup Banerjee, Ms. Rajib Mullick, Mr. Shariful Haque, Mr. Rakesh Sarkar. Adv
For the Respondent	:	Mr. Utpal Bose, Sr. Adv, Ms. Hashnuhana Chakraborty, Ms. Neelina Chatterjee,
Judgment on	:	03.06.2021.

I. P. MUKERJI, J.-

This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996. It is from a judgement and order dated 21st January, 2021 made by a learned single judge of this court dismissing the application of the appellant under Section 9 of the said Act.

The first point involved in this appeal is about its maintainability. It is raised by Mr. Utpal Bose, learned senior advocate appearing for the respondents.

This point cannot be appreciated unless the facts are told in some detail.

South Delhi Municipal Corporation, and a consortium comprising of the respondents and another entity, on 2nd December, 2016, entered into an agreement called the Concession Agreement which involved collection and transportation of waste materials after undergoing a waste management procedure.

On 28th April, 2017 a sub contract to get done part of the project was made by the respondents with the appellant through a Master Service Agreement. On 4th October, 2017 another agreement called the Escrow agreement was entered into by the parties and some other entities including Axis Bank limited. Under this agreement all money received by the respondent no.2 under the Concession Agreement would be deposited in an Escrow account with Axis Bank acting as the Escrow agent.

The Master Service agreement between the parties contained an arbitration Clause (17.2). It is set down below:

“17.2 Arbitration and Jurisdiction

(i) *All disputes, differences, claims and demands arising under or pursuant to or concerning this Agreement shall be referred to Arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendment or re amendment or re-enactment thereof, subject to following rules:*

(a) *The Arbitration tribunal shall comprise of three arbitrators as follows:*

- i. one will be appointed by the Client and the Confirming Party;*
- ii. one will be appointed by QUIPPO; and*
- iii. the third arbitrator shall be appointed as per provision mentioned under Schedule V and VII of the aforesaid Arbitration Act.*

(b) *The language of the arbitration proceedings shall be English and the venue of arbitration shall be Kolkata, India.*

(c) *The respective costs of arbitration shall be borne equally by the parties in the first instance; however, the successful party shall be entitled to the costs of arbitration including legal and recovery costs.*

(d) *The arbitrator to be appointed hereunder shall either be a retired judge having held a position not lower than that of Additional District Judge or an advocate recognised by the Bar Council of India, having an experience of not less than 10 (ten) years in practice.*

(e) *The decision of arbitrators shall be final and binding on the Parties.*

(ii) *The laws of India shall govern this Agreement. Subject to provisions of Article 17.2(i), the courts in Kolkata shall have exclusive*

jurisdiction in respect of any matter, claim or dispute arising out of or in any way, relating to this Agreement.”

On 14th September, 2020, the appellant filed the Section 9 application. It was moved before this court on 29th September, 2020. Thereafter, in it affidavits were exchanged by the parties.

During the pendency of this application the parties entered into a written agreement appointing Mr. Jayanta Kumar Mitra, a senior advocate of this court as the arbitrator to adjudicate upon the disputes that had arisen between them while performing the agreement. It was filed in court on 14th January, 2021.

On 21st January, 2021 the Section 9 application was dismissed.

Now, Section 9 of the said Act comes into play. The most important is sub-section 3 thereof introduced by amendment with effect from 23rd October, 2015. Section 9 is set out below:

“9. Interim measures, etc. by Court.—*(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—*

- (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or*
- (ii) for an interim measure of protection in respect of any of the following matters, namely:—*
 - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*
 - (b) securing the amount in dispute in the arbitration;*
 - (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*
 - (d) interim injunction or the appointment of a receiver;*
 - (e) such other interim measure of protection as may appear to the court to be just and convenient,*

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(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.”

The point raised by the respondents is that since the arbitral tribunal has been constituted this court can no longer entertain the appeal. Any prayer for interim relief can be made only before the learned arbitrator.

When Mr. Bose was asked why the point was only raised after the impugned judgement and order dated 21st January, 2021 was passed, he said that his clients by their letter dated 27th January, 2021 to the learned arbitrator and the respondents had requested the learned arbitrator to enter upon the reference. The learned arbitrator had entered upon the reference. The arbitral tribunal then stood constituted.

Mr. Swatarup Banerjee, learned counsel appearing for the appellant tried to meet this point by contending that the arbitral tribunal had not been constituted as the arbitrator had not entered upon the reference. In those circumstances the appeal is maintainable.

This point is very substantial. No authority has been cited by either counsel. We do not know whether there is any authority on this point to guide us.

What is the meaning that is to be ascribed to the term “constitution of the tribunal.”

In my opinion this term has to be given an interpretation. It has not been defined in the Act. Section 10 says that the number of arbitrators shall not

be an even number. Section 11 provides for appointment of arbitrators. It does not use the term constitution of the arbitral tribunal.

An agreement may provide for arbitration by one named arbitrator. Or it might provide that one arbitrator may be appointed by the parties by agreement or an arbitrator to be appointed by each of the two parties and a third arbitrator to be chosen by the appointed arbitrators. Or there might be a mechanism provided for appointment of an arbitrator by a third party. If the system provided in the agreement for appointment of an arbitrator cannot be worked out, the court will appoint an arbitrator.

Now, if you go by the ordinary meaning of the words I see no difference between “appointment of arbitrators” and “constitution of the arbitral tribunal.” If that interpretation be adopted, the moment the parties signed the agreement naming an arbitrator, the arbitral tribunal could be said to have been constituted. Or if there is provision in the agreement for two arbitrators and for a third arbitrator to be chosen by them, the moment the two agreed on the third, the arbitral tribunal would be constituted.

The first part of sub-section (1) of Section 9 is very relevant for the purpose of interpretation and is as follows:

“9. (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court.....”

Then, with effect from 23rd October, 2015, sub-section 3 was added as follows:-

“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 exist which may not render the remedy provided under section 17 efficacious.”

Sub-section (1) was not amended.

The power of the court under sub-section 1 is very wide in its amplitude and scope to be exercised throughout the arbitral proceedings. If the

intention of the legislature was that constitution of the tribunal would have the same meaning as appointment of an arbitrator, then, in that case, after amendment of Section 9 by insertion of sub-section 3 the scope and application of Section 9 would be very limited. It would only be confined to very limited cases where the arbitrator had not been named in the agreement or there was some disagreement between the parties on the appointment of an arbitrator. The language of sub-section 1 of Section 9 is so wide in its amplitude and scope and retained in that way even after the amendment, that it clearly suggests that the intention of the legislature was not to substantially restrict the application of Section 9, after its amendment.

In those circumstances, constitution of the tribunal has to be interpreted in a purposive way so as to mean assumption of jurisdiction by the arbitral tribunal after commencement of arbitral proceedings under Section 21 of the Act.

At any rate sub-section 3 of Section 9 refers to an application. It does not mention an appeal. Otherwise an anomalous situation would have been created. Suppose in a Section 9 application the court disposing of the application passes an order of injunction. An appeal is preferred from that order. Meanwhile the arbitral tribunal is constituted. If the interpretation of Mr. Bose is to be accepted then after constitution of the tribunal the appeal court would have to decline jurisdiction. The tribunal would not be able to touch the final order of the trial court.

Now the merits of the matter. It may be described shortly.

The Master Service Agreement between the parties dated 28th April 2017 contained a payment procedure (Clause 5.1.3). Another Clause 3 in the agreement dated 4th October 2017 provided for an Escrow account where under all monies received by the respondents under the Concession agreement would be deposited (Clause 4). From this account payments

under the subject contract along with payments required to be made by the respondents to other parties would be made.

On 28th May 2020 the respondent terminated the Master Service contract.

Mr. Banerjee urged only the prayer to compel the respondents to deposit all money received by them from the Concession Agreement into the Escrow account. He made it specific that he was not seeking any judgment upon admission from this court on the basis of the respondents' admission or any directions for any payment to be made over to his client.

He showed us paragraph 29 of the Section 9 petition in which a reference was made to a Whats App message dated 19th March, 2020, a screenshot of which was included in the paper book. The screenshot contained a statement of account between the parties according to which a sum of Rs.8,17,93,600/- was due and payable by the respondents to the appellant. He submitted that there was clear admission of liability on the part of the respondents. Learned counsel also showed us an email dated 27th August, 2018 wherein the respondents assured that all payments received by them would be routed through the Escrow account. Mr. Banerjee submitted that the respondents should be held to their promise.

On the other hand Mr. Bose for the respondents submitted that on termination of the agreement his clients were not bound by any covenant. They could not be forced to deposit the receivables into a particular account. That would amount to attachment before judgment. The appellant had not been able to make out any case for attachment before judgment. Payments had been made by his clients from other accounts to the appellant.

The genuineness of the Whats App message was denied by learned counsel him. He submitted that the document was forged or fabricated and should not be countenanced by the court.

The appellant in the Section 9 application was not asking for attachment of the bank account of the respondents. Neither were they seeking a judgment upon admission for the admitted amount.

The clauses regarding creation of an escrow account and the payment procedure have been placed by both learned counsel.

Clauses 5.1 .3 and 5.1.5 are the most important and are set out below:

“5.1.3 Payment Procedure

- (i) *For the first three months from the “Contract Start Date”, QUIPPO shall raise appropriate invoice with respect to the AMC Work and the PMC Work, as is specified under Article 5.1.1 and 5.1.2 respectively.*
- (ii) *The consolidated payment against the aforesaid invoices for the first 3 (three) months shall be paid in the 4th (fourth) month.*
- (iii) *From the 4th month onward, the Client shall pay the Monthly Fees from the Escrow Account. In the event of no sufficient amount received in the said Escrow account to pay the said Monthly Fees, balance amount for these Months shall remain outstanding, along with the Monthly Fees of first the 3 (three) months and shall be payable through its internal accruals/sources. From 4th month onward, the Client shall bear an interest of 1.5% (one point five percent) per month on the Monthly Fees which remains outstanding from the Due Date of said Monthly Fees on reducing balance till the amount is paid, which shall be paid from the additional amount in Escrow Account after making due routine payments to QUIPPO and other contractors/beneficiaries/of the Escrow Account and/or from the internal sources of the Client.*
- (iv) *Other terms for invoicing are provided in Annexure 1 hereto.*
- (v) *The Client agrees to pay the other charges as specified in Annexure 2 hereto.*

- (vi) *Any payments made by QUIPPO on behalf of the Client with prior approval from the Client or the Confirming Party pertaining to the Equipment, not covered by this Agreement shall be reimbursed by the Client to QUIPPO.*

The Client agrees with QUIPPO, and hereby authorises QUIPPO, to set off any amounts as may be due from QUIPPO to the Client against any amounts that may be payable by the Client under this Agreement.

5.1.5 Escrow Account

To discharge its obligation to pay Monthly Fees towards the AMC Works and the PMC Works, the Client and the Confirming Party have agreed upon the following terms:

- (i) *An Escrow Account shall be opened/maintained with the Escrow Bank and the Client, LPIN, QUIPPO, SREI and the Confirming Party shall be named as joint beneficiaries of the Escrow Account. The monies deposited/ to be deposited in the Escrow Account shall be utilised only in accordance with the Escrow Agreement. The monies deposited/lying in the Escrow Account shall be utilised inter alia for the payment of dues under this Agreement (if not paid in accordance with this Agreement), the Master Lease Agreement (if not paid in accordance with the Master Lease Agreement), the LPIN Agreement in the following order and priority:*
- (a) *firstly, for all the outstanding dues under this Agreement, the Master Lease Agreement and the LPIN Agreement on pro rata basis;*
- (b) *secondly, towards the costs, expenses, default interest, taxes due and payable by the Client and/or the Confirming Party to QUIPPO, SREI and LPIN on a pro rata basis;*
- (c) *thirdly, in the event of termination of this Agreement and/or the Master Lease Agreement by QUIPPO and/or SREI (as the case may be), for the termination payments payable under this Agreement and/or the Master Lease Agreement; and*

(d) fourthly, any surplus remaining in the Escrow Account shall be transferred to the Client or Confirming Party for its use and operations.

(ii) Operation of the Escrow Account

(a) All payments (including SDMC Termination Payment), without limitation or exclusion, to be made by SDMC under the Concession Agreement shall be credited to the said Escrow Account.

(b) The Escrow Account shall be operated as per the joint instructions of the Confirming Party, the Client, LPIN, SREI and QUIPPO unless otherwise agreed in the Escrow Agreement.”

The clauses are very complex but what I understand on a combined reading of them is that the payment under the subject agreement would be made according to its terms but if there was any default payments would be made from the Escrow account. If even that was not possible the outstanding would carry interest. Mr. Bose was absolutely right when he submitted that there was no obligation on the respondents under the agreement to deposit all money received by them under the Concession agreement into the Escrow account.

It, however, cannot be denied that prima facie there is an admission on the part of the respondents of their liability of Rs.8,17,93,600/- towards the appellant as evident from the statement of account contained in their Whats App message dated 19th March, 2020. Although Mr. Bose tried to suggest that this Whats App was a fabricated document there was not enough evidence to support his contention. He may or may not be able to bring additional proof during arbitration.

There is no contradiction of the email of the respondents dated 27th August, 2018 that the respondents were agreeable to deposit all future payments received by them in the Escrow bank Account.

The court under Order 39 Rule 1 of the Code of Civil Procedure has the power to pass an order of injunction in respect of the property in dispute in the suit. If money is considered as property the dispute between the parties

is whether the money received by the respondents under the Concession agreement is to be kept in the Escrow account or not. I think on the basis of the above prima facie case, admission by the respondents and their promise to deposit all payments received in the escrow account, the court has the power to direct this disputed property to be deposited in the escrow account.

In those circumstances, I direct that the respondents shall deposit all the money received by them in future from South Delhi Municipal Corporation in connection with the work covered by the Master Service Agreement in the escrow account subject to further direction in this behalf by the arbitral tribunal or the arbitral award that may be passed. A quarterly statement of account commencing from 1st June, 2021 should be furnished by the respondents to the appellant's advocate-on-record.

This appeal is allowed to the above extent.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree,

(MD. NIZAMUDDIN, J.)

(I. P. MUKERJI, J.)