

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE
(COMMERCIAL DIVISION)

APO 26 OF 2021
AP 429 OF 2020
(IA NO.GA/1/2021)
BALASORE ALLOYS LTD.
VERSUS
SREI EQUIPMENT FINANCE LTD.

BEFORE:
The Hon'ble JUSTICE I.P. MUKERJI
AND
The Hon'ble JUSTICE MD. NIZAMUDDIN
Date : 24th February, 2021

Appearance :
Mr. Dhruba Ghosh, Sr. Adv.,
Mr. Rishad Medora,
Mr. Meghajit Mukherjee,
Mr. Sweta Mohanty, Advs.,
for the appellant.

Mr. Swatarup Banerjee,
Mr. Paritosh Sinha,
Mr. Saubhik Choudhury,
Mr. D. Majumder,
Ms. Ayusmita Sinha, Advs.,
for the respondent.

The Court : This is another interesting case under Section 9 of the Arbitration and Conciliation Act, 1996.

The present Section 9 application was filed by the respondent in September, 2020.

According to the papers with us, on 8th December, 2020 the respondent took time to file a supplementary affidavit before the court below. On 21st December, 2020 further time was prayed for and granted by the Court with a direction to serve a copy of the application and the supplementary affidavit on the appellant.

Meanwhile, in December 2020 the arbitral tribunal was constituted.

On 7th January, 2021 the Court recorded that there was a possibility of settlement between the parties and adjourned the application for two weeks. On 22nd January, 2021 the Court recorded some steps having been taken by the parties further to their efforts to arrive at a settlement and adjourned the application till 29th January, 2021.

It appears that the efforts to reach a settlement made no progress.

On 29th January, 2021 the Court passed the impugned judgment and order appointing a receiver to take physical possession of the hypothecated assets. His lordship also gave direction for filing affidavits.

It appears that it was only on 29th January, 2021 the appellant for the first time took the point that since the arbitral tribunal had been constituted, the Court was denuded of its jurisdiction under Section 9 of the said Act since there was no pleading that such remedy could be efficaciously obtained from the arbitral tribunal.

Now, a little discussion on the law is necessary.

Section 9 of the said Act was amended with effect from 23rd October, 2015 to the effect that 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 the Court for protective orders. Sub-section 3 provided that once the arbitral tribunal had been constituted, the Court shall not entertain an application under sub-section 1 unless the Court found that circumstances existed which may not render the remedy under Section 17 efficacious.

Therefore, the question which arises is : What was the duty of the Court after constitution of the arbitral tribunal in December, 2020?

Mr. Ghosh submits that his client contested the proceedings only from 7th January, 2021.

If this was the defence of Mr. Ghosh's client, the appellant, it ought to have been taken on 7th January, 2021 itself but for some reason it was not taken.

The Court proceeded to entertain the application on 22nd January, 2021.

On 29th January, 2021 the point was taken and the Court overruled it by holding that "no doubt, a reference is pending. Pendency of the reference ipso facto does not oust the jurisdiction of this Court under Section 9 of the Act of 1996. The petition is pending since September 2020."

We were shown our judgment rendered on 15th January, 2021 in FMAT 5 of 2021 (Kotak Mahindra Bank Limited Vs. Arjun Sharma & Anr.).

We ruled as follows.

"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”.

The facts of that case are different from those in this case.

In that case orders were passed in a Section 9 application before constitution of the tribunal. The question before the Court was with regard to the fate of the orders once the Court was denuded of its jurisdiction after constitution of the tribunal.

In this case after constitution of the arbitral tribunal, the objection with regard to the lack of jurisdiction of the Court to entertain the application was not taken and the Court proceeded to entertain it and pass orders recording the settlement efforts between the parties. Each and every order was passed after constitution of the tribunal.

In our opinion, the bar created by Section 9(3) is absolute. Once the tribunal has been constituted, the Court cannot entertain any new application or proceed to entertain any old application. We do not think that jurisdiction could have been conferred upon the Court by waiver or consent. But a situation has arisen which has not been taken care by the legislature where the Court has been led by the parties to exercise jurisdiction and thereafter the very point of jurisdiction has been taken by one of the parties.

This is such a case. To give purposive interpretation to Section 9(3) of the said Act, it has to be interpreted so as to imply that when the Court relinquishes jurisdiction after passing orders, it shall either vacate those orders and pass suitable orders to enable the parties to approach the tribunal or direct that its orders shall be subject to continuance under orders of the tribunal. In this kind of a situation, the Court is enjoined with the duty to pass orders so that the purpose of the legislation is not lost, yet justice is done to the parties.

The impugned order dated 29th January, 2021 and all previous orders in the Section 9 application passed by the Court on 21st December, 2020, 7th January, 2021 and 22nd January, 2021 are set aside.

At the present point of time there is an order of status quo under which the appellant is utilising the assets.

We direct that only for a period of two weeks from date, such status quo as conditioned hereinbelow will continue. Within this period either party may approach the arbitral tribunal under Section 17 of the said Act.

The respondent is granted full liberty to inspect the assets and keep a watch so that no loss is caused to them during this period of two weeks. The appellant will not transfer/encumber or otherwise deal with the assets. The appellant will utilise the subject assets under the status quo order strictly under the supervision of the respondent.

The appeal and the connected application (APO 26 of 2021 and GA 1 of 2020) were heard out, dispensing with all formalities. They are disposed of by the order. The Section 9 application (AP 429 of 2020) is also disposed of.

(I.P. MUKERJI, J.)

(MD. NIZAMUDDIN, J.)