

ORDER SHEET

A.P/ 239/ 2020
IA NO. GA/1/2021
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

SREI EQUIPMENT FINANCE LIMITED
Versus
ECOGREEN ENVIROTECH SOLUTION LIMITED AND ANR.

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 11th June, 2021.

Appearance:

Mr. Swatarup Banerjee, Adv.
... for the petitioner.

Mr. Utpal Bose, Sr. Adv.
Ms. H. Chakraborty, Adv.
Ms. N. Chatterjee, Adv.
... for the respondent.

The Court: The petitioner argues that there are admitted defaults on the part of the respondents, which violates the terms of the agreement-in-question, which also contains an arbitration clause.

Learned Counsel categorically relies on Clause 12.1 of the agreement in question wherein it is provided that the terms laid down therein are fundamental and essential terms. Sub clause (a) of Clause 12.1 includes payments of all rentals on time by the lessee as one of such fundamental terms.

Clause 13.1(a) provides categorically that if the lessee has not performed on time any of its obligations under the agreement, including

any of the essential terms referred to in Clause 12, an event of default shall be deemed to have occurred. Such defaults may lead to termination of the agreement in terms of Clause 14 of the agreement. Sub-clause 14.3, in particular, categorically provides that if the lessee fails to surrender the equipment the lessor shall have the right at any time at its discretion and without notice to the lessee to enter any premises where the equipment is or believed to be, dismantle and repossess the same and to take other ancillary steps.

Learned Counsel submits that the petitioner could very well have taken possession of the machinery and equipment-in-question in terms of Clause 14.3, but has been fair enough to approach Court to obtain a formal order in consonance with due process of law.

It is further contended on behalf of the petitioner that there is no obligation on the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 to refer the matter to arbitration prior to 90 days from the date of any order of interim measure for protection, if passed under Section 9(1) of the said Act. It is further contended that even such period of 90 days is not mandatory as have been held by Division Benches of this Court and as is evident from the latter portion of sub-Section (2) of Section 9 which includes the phrase “or within such further time as the Court may determine”.

Learned Counsel relies on Section 9(1) (ii) (c) of the 1996 Act to stress the point that the petitioner is entitled to seek, inter alia, an order

of preservation or inspection of any property which is a subject matter of the arbitral dispute or 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 employee to be taken or any observation to be made or experiment to be tried which may be necessary or expedient. Clause (d) of Section 9(1) (ii) categorically empowers the Court to grant interim injunction or appoint a Receiver.

In the present case, it is contended by the petitioner, in view of the admitted default of the respondents, at least a Receiver ought to be appointed not only to take inventory but also to take physical possession of the equipment and goods which are the subject matter of the dispute in arbitration and were kept as security for the loan taken by the respondents.

It is also submitted that the respondents have defaulted in putting in amounts timely in the escrow account in terms of the agreement.

Learned Senior Counsel appearing for the respondents contends at the outset that the termination of agreement, as alleged by the petitioner, is itself under challenge. It is submitted that several invoices have been raised and due amounts thereon paid by the respondents to the petitioner much after the purported termination notice, thereby giving a go-bye/ waiving such purported termination. As such, any minor default

in repayment of the instalments cannot entail an order directing a Receiver to take possession of the equipment at this juncture.

Learned Senior Counsel further contends that in about 8 months, after filing of the application and initial orders of affidavits, the petitioner has been unable to obtain any ad interim order. Moreover, no attempt has been made by the petitioner to refer the matter to arbitration to show its bona fides to attract the jurisdiction of Section 9 of the 1996 Act.

Learned Senior Counsel further submits that payments in the escrow account is not the sole liability of the present respondents but other parties are involved therein; as such, the respondents cannot be held solely liable for such alleged default, if any.

That apart, learned senior counsel submits, in the event an order as prayed for in the present application under Section 9 of the 1996 Act is passed, this Court will virtually be usurping the jurisdiction of the Arbitrator and has to go into the merits of the disputes involved between the parties, which attract the arbitration clause. Since similar remedy has been available to the petitioner at all relevant times by way of Section 17 of the 1996 Act by mere reference of a matter to an arbitrator, it would be premature and unjust if the orders prayed for are granted at this stage.

Learned counsel for the petitioner, in reply, submits that no question of non-reference to arbitration can arise as a hindrance to this Court passing an order of Receiver. Reiterating the language of Section 9

(2) of the 1996 Act, learned counsel submits that it is only the liability of the petitioner to ensure commencement of arbitral proceedings within a period of 90 days from the date of any interim order, which has not yet been passed by this Court. That apart, even such time limit is flexible.

Moreover, since the respondents concede to at least partial defaults in payment of the instalments, the agreement itself empowers the petitioner to take possession of the equipment-in-question.

Upon hearing learned counsel for the parties, it appears that the equipment and machinery in question are being used for a public purpose, that is, collection and disposal of municipal wastes by the South Delhi Municipal Corporation. Although such factum has no direct bearing on the contractual liabilities of the parties, the said point has to be taken note of prior to passing any drastic order of possession of the equipment by a Receiver.

Although there might have been certain defaults on the part of the respondents in payment of instalments, the respondents have made out a strong *prima facie* counter case of the petitioner having given a go-bye to the termination notice by its subsequent conduct in raising invoices thereafter, which were duly cleared.

Moreover, there is provision in the agreement for adjustment of the defaults from the escrow account. As such, in the absence of any valid termination being patently demonstrated from the records, keeping in mind the conduct of the petitioner in raising subsequent invoices after

the purported termination notice, it would not be prudent, at this stage, to appoint a Receiver to take possession of the equipment.

However, in view of the balance of convenience and inconvenience and concerning the respective *prima facie* cases made out by the parties, the petitioner is at best entitled to an order of injunction to preserve the equipment and machinery-in-question.

Since the equipments and machinery are being used regularly for public purpose by the South Delhi Municipal Corporation upon being taken from the respondents, which is admitted by the petitioner, there cannot arise any question of appointing a Receiver immediately in the matter. Regarding the apprehended depreciation of the value of the equipment and machinery due to wear and tear if further used, the petitioner has sufficient remedy in law before the Arbitrator, when appointed.

In such view of the matter, it would suffice in the circumstances if the equipment are preserved till the arbitral proceeding commences. The respondents are thus restrained by an order of injunction from transferring, alienating and/or encumbering the equipment and machinery as indicated at page 181 (Annexure J of the application under Section 9) in favour or third parties until further orders are passed in that regard by an Arbitrator, if and when appointed after due reference.

It is made clear that this order is of *ad interim* nature and shall be subject to any modification and/or fresh order being passed by the

Arbitrator, if appointed. The parties are given liberty to immediately refer the matter to arbitration. It is further clarified that any observation made herein will not prejudice the fate of any application under Section 17 of the 1996 Act, if similar reliefs by the petitioner before the arbitrator who will be appointed, if any, and will also not prejudice the rights and contentions of either of the parties in the proposed arbitral proceeding.

AP No.239 of 2020 and IA No.GA 1 of 2021 are accordingly disposed of.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance of all necessary formalities.

(SABYASACHI BHATTACHARYYA, J.)

mg/RS