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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P.(I) (COMM.) 103/2021 , IA 12013/2013 and IA 12095/2021

CYFUTURE INDIA PRIVATE LIMITED Petitioner
Through Mr. Pankaj Bhagat, Adv

versus

FUTURETIMES TECHNOLOGY
INDIA PRIVATE LIMITED Respondent
Through Ms Raddhika Khanna,
Advocate

+ O.M.P.(I) (COMM.) 130/2021, IA 12105/2021, IA 12106/2021,
IA 12107/2021, IA 12071/2021 and IA 12096/2021

AEGIS COSTUMER SUPPORT
SERVICES PVT LTD Petitioner
Through Mr. Pankaj Bhagat, Adv

versus

FUTURETIMES TECHNOLOGY
INDIA PRIVATE LIMITED Respondent
Through Ms Raddhika Khanna,
Advocate

CORAM:
HON'BLE MR. JUSTICE C .HARI SHANKAR

JUDGEMENT (ORAL)

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17.09.2021

(Video-Conferencing)

1. *Ad interim* orders already stand passed in favour of the petitioner.

2. Subsequently, applications have been filed in these petitions before this Court, *inter alia*, for modification of the *ad interim* order in OMP (I) (COMM) 130/2021.

3. An arbitrator already stands appointed in both these matters and the next date of hearing before the learned Arbitrator is stated to be 30th September, 2021.

4. In these circumstances, Section 9(3) of the Arbitration and Conciliation Act, 1996 (“1996 Act”, in short) would ordinarily proscribe this Court from continuing with these proceedings, which ought to be relegated for decision by the learned Arbitrator as proceedings under Section 17 of the 1996 Act. The only exception is if “circumstances exist, which may not render the remedy provided under Section 17 efficacious”.

5. The law in this regard stands authoritatively expounded in the recent decision of the Supreme Court in *Arcelor Mittal Nippon Steel India v Essar Bulk Terminal*¹. That was a case in which, after judgement was reserved on the applications of the petitioner under Section 9 by the District Court, the Arbitral Tribunal came to be constituted, and, in view thereof, petitioner had moved an application before the District Court for referral of both applications under Section 9. On dismissal of the said applications, the High Court, on being approached under Article 227 of the Constitution of India, expressed the view that the Commercial Court had the power to consider

¹ 2021 SCC OnLine SC 718

whether the remedy under Section 17 of the Arbitration Act was ineffectual and pass necessary orders under Section 9. The said order was challenged before the Supreme Court. The following passages from the report (of the Supreme Court) illumine the legal position:

“68. With the law as it stands today, the Arbitral Tribunal has the same power to grant interim relief as the Court and the remedy under Section 17 is as efficacious as the remedy under Section 9(1). There is, therefore, no reason why the Court should continue to take up applications for interim relief, once the Arbitral Tribunal is constituted and is in seisin of the dispute between the parties, unless there is some impediment in approaching the Arbitral Tribunal, or the interim relief sought cannot expeditiously be obtained from the Arbitral Tribunal.

83. Even after enforcement of the 2015 Amendment Act, an application for interim relief may be filed in Court under Section 9 of the 1996 Act, before the commencement of arbitration proceedings, during arbitration proceedings or at any time after an award is made, but before such award is enforced in accordance with Section 36 of the 1996 Act. The Court has to examine whether the remedy available to the Applicant under Section 17 is efficacious. In *Energco Engineering Projects Ltd. v. TRF Limited*², the remedy of interim relief under Section 17 was found to be ineffectual in view of an interim order passed by this Court in a Special Leave Petition.

84. In *Banara Bearings & Pistons Ltd.*³ cited by Mr. Sibal a Division Bench of the Delhi High Court, speaking through Badar Durrez Ahmed J. Held:

“24..... We are of the view that Section 9(3) does not operate as an ouster clause insofar as the courts' powers are concerned. It is a well-known principle that

² 2016 SCC OnLine Del 6560

³ *Banara Bearings & Pistons Ltd v Mahle Engine Components India Pvt Ltd*, 2017 SCC OnLine Del 7226

whenever the Legislature intends an ouster, it makes it clear. We may also note that if the argument of the appellant were to be accepted that the moment an Arbitral Tribunal is constituted, the Court which is seized of a Section 9 application, becomes coram non judice, would create a serious vacuum as there is no provision for dealing with pending matters. All the powers of the Court to grant interim measures before, during the arbitral proceedings or at any time after the making of the arbitral award but prior to its enforcement in accordance with Section 36 are intact (and, have not been altered by the amendment) as contained in Section 9(1) of the said Act. Furthermore, it is not as if upon the very fact that an Arbitral Tribunal had been constituted, the Court cannot deal with an application under sub-section (1) of Section 9 of the said Act. Section 9(3) itself provides that the Court can entertain an application under Section 9(1) if it finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.

25. We may also note that there is no provision under the said Act which, even as a transitory measure, requires the Court to relegate or transfer a pending Section 9(1) application to the Arbitral Tribunal, the moment an Arbitral Tribunal has been constituted.”

93. It is now well settled that the expression “entertain” means to consider by application of mind to the issues raised. The Court entertains a case when it takes a matter up for consideration. The process of consideration could continue till the pronouncement of judgment as argued by Khambata. Once an Arbitral Tribunal is constituted the Court cannot take up an application under Section 9 for consideration, unless the remedy under Section 17 is inefficacious. However, once an application is entertained in the sense it is taken up for consideration, and the Court has applied its mind to the Court can certainly proceed to adjudicate the application.

95. On a combined reading of Section 9 with Section 17 of the Arbitration Act, once an Arbitral Tribunal is constituted, the Court would not entertain and/or in other words take up for consideration and apply its mind to an application for interim measure, unless the remedy under Section 17 is inefficacious, even though the application may have been filed before the constitution of the Arbitral Tribunal. The bar of Section 9(3) would not operate, once an application has been entertained and taken up for consideration, as in the instant case, where hearing has been concluded and judgment has been reserved. Mr. Khambata may be right, that the process of consideration continues till the pronouncement of judgment. However, that would make no difference. The question is whether the process of consideration has commenced, and/or whether the Court has applied its mind to some extent before the constitution of the Arbitral Tribunal. If so, the application can be said to have been entertained before constitution of the Arbitral Tribunal.

99. It could, therefore, never have been the legislative intent that even after an application under Section 9 is finally heard relief would have to be declined and the parties be remitted to their remedy under Section 17.

100. When an application has already been taken up for consideration and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not would not arise. The requirement to conduct the exercise arises only when the application is being entertained and/or taken up for consideration. As observed above, there could be numerous reasons which render the remedy under Section 17 inefficacious. To cite an example, the different Arbitrators constituting an Arbitral Tribunal could be located at far away places and not in a position to assemble immediately. In such a case an application for urgent interim relief may have to be entertained by the Court under Section 9(1).

107. It is reiterated that Section 9(1) enables the parties to an arbitration agreement to approach the appropriate Court

for interim measures before the commencement of arbitral proceedings, during arbitral proceedings or at any time after the making of an arbitral award but before it is enforced and in accordance with Section 36 of the Arbitration Act. The bar of Section 9(3) operates where the application under Section 9(1) had not been entertained till the constitution of the Arbitral Tribunal. Ofcourse it hardly need be mentioned that even if an application under Section 9 had been entertained before the constitution of the Tribunal, the Court always has the discretion to direct the parties to approach the Arbitral Tribunal, if necessary by passing a limited order of interim protection, particularly when there has been a long time gap between hearings and the application has for all practical purposes, to be heard afresh, or the hearing has just commenced and is likely to consume a lot of time. In this case, the High Court has rightly directed the Commercial Court to proceed to complete the adjudication.”

6. Three principles emanate, clearly, from the above passages:

(i) The proscription under Section 9(3) applies only before an application under Section 9(1) has been “entertained”. The bar is to “entertaining” the application. The expression “entertained” has to be understood as “taken up for consideration”. Once the application has been taken up for consideration, such as where arguments are in progress or judgement reserved, Section 9(3) has no application.

(ii) Where the bar applies, the Court has to examine whether the Section 17 remedy would be efficacious. There is no absolute prohibition on deciding the Section 9 application, even where the Arbitral Tribunal stands constituted.

(iii) Where the Arbitral Tribunal stands constituted, however,

the approach of the Court has to be circumspect. Unless there is some impediment in approaching the Arbitral Tribunal under Section 17, or where the remedy under Section 17 is rendered inefficacious for some clear and apparent reason, the prayer for interim relief ought, appropriately, to be relegated to the Arbitral Tribunal.

7. As noted above, the next date before the learned Arbitrator is 30th September, 2021. Ms. Raddhika Khanna, learned Counsel for the respondent, undertakes to ensure that her client is represented before the arbitrator on the said date in both these matters.

8. This Court has yet to take up these applications for consideration on merits. In the interregnum, the Arbitral Tribunal stands constituted. The petitioner has *ad interim* orders of protection in its favour, and there is no likelihood of any prejudice, therefore, were the Arbitral Tribunal to be directed to decide these petitions as applications under Section 17 of the 1996 Act. No ground, which would indicate the Section 17 remedy to be inefficacious, has been made out, or even urged, by the petitioner.

9. In view thereof, I see no reason, why these petitions should not be directed to be decided by the learned Arbitrator, treating them as applications under Section 17 of the 1996 Act.

10. As such, both these petitions are disposed of, with liberty to the petitioner to present these petitions before the learned Arbitrator as

applications under Section 17 of the 1996 Act.

11. To expedite matters, the petitioner would not be required to re-file these petitions and the Registry is directed to return the petitions along with the entire records of these petitions to the learned Counsel for the petitioner, so that they could be presented before the learned Arbitrator who could adjudicate thereupon, treating them as applications under Section 17 of the 1996 Act.

12. The *ad interim* orders already passed in favour of the petitioner in these cases, shall continue to operate and shall abide by the orders to be passed by the learned Arbitrator in these matters.

13. Needless to say, all applications, which have been filed in these petitions, would also stand relegated to the learned Arbitrator, who may decide the applications in accordance with law.

14. Observations contained in the *ad interim* orders passed by this Court are to be treated as only intended for the passing of the said orders and would not inhibit the learned Arbitrator in taking a view in these matters, while adjudicating thereupon, treating them as applications under Section 17 of the 1996 Act.

15. Both these petitions stand disposed of in the aforesaid terms.

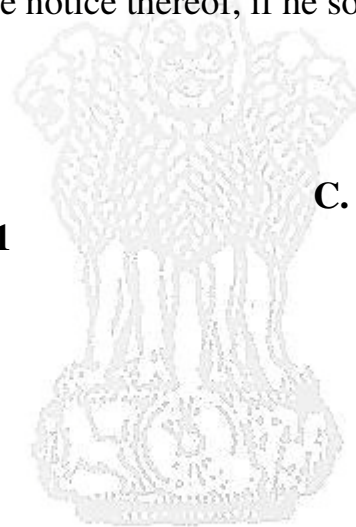
16. Mr. Bhagat, learned Counsel for the petitioner, complains that the respondent has repeatedly been absenting itself in the proceedings

before the learned Arbitrator.

17. It is made clear that any default, on the part of the respondent, in appearing before the learned Arbitrator on the next date of hearing, i.e. 30th September, 2021 would be at its own risks and peril. The statement of Ms. Khanna, ensuring that her client would enter appearance before the Arbitrator on the said date, is noted and the respondent would remain bound thereby. In case the respondent does not appear before the learned Arbitrator, the arbitrator would be at liberty to take an adverse notice thereof, if he so chooses.

SEPTEMBER 17, 2021
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C. HARI SHANKAR, J.



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