

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
[COMMERCIAL DIVISION]
(Via Video Conference)

BEFORE:

The Hon'ble Mr. Justice Ravi Krishan Kapur

A.P No. 78 OF 2021

M/s. Satyen Construction

-vs-

State of West Bengal & Ors.

For the Petitioner	: Mr. Jayanta Mitra, Senior Advocate Ms. Nilanjana Adhya, Advocate Mr. Aniruddha Mitra, Advocate Mr. N. Das, Advocate
For the State	: Mr. S. N. Mookerji, Advocate General Mr. Suman Dutta, Advocate Mr. Paritosh Sinha, Advocate
Heard on	: 22.12.2021, 06.01.2022, 28.01.2022
Judgment on	: 08.04.2022

Ravi Krishan Kapur, J.:

1. This is an application under Section 9 of the Arbitration and Conciliation Act, 1996 ('the Act'). The petitioner seeks liberty to withdraw a sum of Rs.4,11,89,759/- deposited by the award debtor, State of West Bengal, with the Registrar, Original Side of this Court upon furnishing of appropriate security.
2. By an award dated 24 December, 2018 (the award), the petitioner was awarded a sum of Rs.2,66,69,73/- on account of various claims and a

further sum of Rs.1,37,85,395/- on account of costs alongwith interest @18% per annum from 25 December, 2018 till the date of payment. The subject matter of the arbitration pertains to construction of a Bridge at Mahishadal, Nandigram Road, West Bengal. Being aggrieved by the award, the respondent has filed an application under Section 34 of the Act which is pending disposal. In an application under Section 36(2) of the Act, by an order dated 9 September, 2019, a Coordinate Bench had directed the award debtor to furnish security. It is submitted on behalf of the parties, that security has since been furnished by the respondent. Hence, this application.

3. At the outset, a preliminary point of maintainability has been urged on behalf of the State. It is submitted that the reliefs sought for by the petitioner are beyond the scope and ambit of Section 9 of the Act. It is also submitted that by its very nature the only order which may be passed in an application under Section 9, is an interim order for preservation or securing the subject matter of the arbitration proceeding. It is contended that Section 9 of the Act does not contemplate payment of the awarded amount to the petitioner. On merits, it is submitted that there are no facts warranting withdrawal

of the awarded amount. In support of such contentions, the respondent relies on the following decisions; *Adhunik Steel Ltd. vs. Orissa Manganese & Minerals (P) Ltd.* (2007) 7 SCC 125, *AFCONS Infrastructure Ltd. vs. Board of Trustees of Port of Mumbai* 2013 SCC OnLine Bom 1946 and *Steel Authority of India Ltd. vs. AMCI PTY Ltd. & Anr.* (2011) 3 Arbitration Law Reporter 502.

4. On behalf of the petitioner, it is contended that the applicability of Section 9 is no longer res integra in view of the decisions dated 14 February, 2020 and 6 October, 2020 passed by the Division Bench in connected proceedings. In the decision dated 14 February, 2020, it has been held that “*it will be open to the award holder to make such prayer before the Arbitration Court in course of the award debtor’s application for extension of time that is pending. It will also be open to the award debtor to seek permission to put in cash deposit instead of furnishing bank guarantee for the relevant amount.*” In the decision dated 6 October, 2020 it has been held that “*Section 9 of the Act, particularly clause (e) of sub-section 1, is wide enough to allow an application for interim measure to be made to the Arbitration Court even after an order for stay of operation of the award, conditionally or unconditionally, has already been made. As to whether an order should*

be passed on such application would depend on the quality of the application and grounds which are cited." Hence, it is urged that the scope of Section 9 is wide enough to enable the Court to allow the award holder to withdraw the amount deposited upon furnishing of security. Insofar as the decisions cited on behalf of the respondent, it is submitted that, all the decisions were passed prior to the amendment to Section 36 of the Act and are distinguishable. Accordingly, in view of the amended Section 36 the Act, the Court under Section 9 of the Act has the power to pass orders as prayed for in the petition.

5. Section 9 of the Act provides as follows:

Interim measures, etc. by Court.—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.

6. The true object and intention behind Section 9 of the Act is to provide for interim or provisional measures to a party *before* or *during* or any time *after* making an award which are protective in nature. The orders contemplated under Section 9 inter-alia pertain to preservation, interim custody or sale of goods which are the subject matter of the arbitration agreement, securing the amount in dispute in the arbitration, detention, preservation or inspection of any property or thing which is the subject matter of the arbitration, interim injunction or appointment of a Receiver or such other interim measures of protection which may appear to be just and convenient [*Adhunik Steels (2009) 7 SCC 125 Para 11 & 21*].
7. The relief which the petitioner seeks is for withdrawal of the amount deposited by the respondent upon furnishing appropriate security by the petitioner. In my view, the scope of Section 9 of the Act cannot be extended to enforcement of the award or granting the fruits of the award to the award holder as an interim measure. The order sought

for by the petitioner goes beyond the realm of securing the petitioner and shifts to encashment of the security or equitably dealing with the same. This is not permissible even on the broadest interpretation of Section 9 of the Act. Even in a situation under Section 9(ii)(e) of the Act, which is an omnibus protection and where the Court is guided purely by equitable considerations, a Court cannot permit withdrawal as a measure of protecting the award holder. The underlying object of an order under Section 9 of the Act is to see that the award is capable of enforcement. Accordingly, even after the amended Section 36 of the Act, the right to withdraw the deposited amount by the judgment debtor cannot be stretched as an interim protection under Section 9 of the Act. The order sought for in this petition transgresses beyond the pale of protection in aid of enforcement into the exclusive domain of enforcement of an award. Thus, the prayer sought for cannot be granted in an application under Section 9 of the Act. (*AFCONS Infrastructure Ltd. vs. Board of Trustees of the Port of Mumbai* reported in 2014 (1) BomCR 794, *Steel Authority of India Ltd. vs. AMCI PTY Ltd. & Another* reported in 2011 SCC OnLine Del 3689 and *IRCON International Limited vs. Union Territory of J & K & Others* reported in 2020 SCC OnLine J & K 29).

8. Insofar as the decisions dated 14 February, 2020 and 6 October, 2020 are concerned, with the very greatest respect, I am of the view that neither of the two decisions can be treated as expositions of the law. Both the decisions contain generality of expressions and cannot be quoted as propositions of law. Neither of the decisions were passed in an application under Section 9 of the Act. In fact, the State which was a party to both the two orders had not even raised the point of maintainability before the Hon'ble Division Bench. A Court should guard itself against the danger of mechanical application of observations. *"According to the well-settled theory of precedents, every decision contains three basic ingredients (i) findings of material facts, direct and inferential. An inferential finding of fact is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above"* Bihar School Examination Board vs. Suresh Prasad Sinha reported in (2009) 8 SCC 483, Poonam vs. State of U.P. & Others reported in (2016) 2 SCC 779, Quinn vs. Leathem reported in (1901) AC 495. Accordingly, the contention of res integra urged by the petitioner is rejected.

9. It is true that there have been a number of decisions passed by the Hon'ble Supreme Court (*Manish vs. Godawari Marathawada Irrigation Development Corporation dated July 16, 2018*, *SREI Infrastructure Finance Limited vs. Candor Gurgaon Two Developers and Project Private Limited dated September 14, 2018* and *Dilip Kr. Chatterjee vs. State of West Bengal dated October 4, 2021*) wherein the petitioner has been permitted to withdraw the amount deposited. However, none of the decisions have been passed in applications arising under Section 9 of the Act. Thus, this argument also does not advance the case of the petitioner.
10. Since this application is being dismissed only on the ground of maintainability, there is no question of entering into the merits of the case of the petitioner. Accordingly, the prayer for withdrawal is rejected. AP 78 of 2021 stands dismissed. However, there shall be no order as to costs. Liberty is granted to the petitioner to make an appropriate application in accordance with law for the self same reliefs.

(Ravi Krishan Kapur, J.)