

OD-8

ORDER SHEET

AP/80/2022

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

SREI EQUIPMENT FINANCE LTD.
Versus
M/S. KHUSH INFRATECH PRIVATE LIMITED (KIPL) AND ORS.

BEFORE:

The Hon'ble JUSTICE SHEKHAR B. SARAF

Date : 20th April, 2022.

Appearance:

Ms. Ridhima Goyal, Adv.
...for the petitioner

Mr. Utpal Bose, Sr. Adv.
Ms. Pritha Ghose, Adv.
... for the respondents

The Court :- This is an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") seeking interim measures against the respondents. The petitioner seeks direction upon the respondents to prevent sale of the mortgaged properties against the loan facility availed by them.

As per the order dated April 5, 2022, the Court in A.P. 81 of 2022 appointed a sole arbitrator after both the parties agreed to refer the dispute for arbitration and also agreed on the person to be appointed for adjudication of the instant dispute.

The issue involved in the present application is whether the Court should entertain this application under Section 9 of the Act after constitution of the arbitral tribunal under Section 11 of the Act. The above question has

been recently decided by the Hon'ble Supreme Court in ***Arcelor Mittal Nippon Steel India Limited –v- Essar Bulk Terminal Limited*** reported in **(2022) 1 SCC 712**. The relevant paragraphs of the judgement are delineated below :

64. 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.

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86. 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.

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91. 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 faraway 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).

In the present case, the process of consideration of the Section 9 has not started in the instant application and 28th April, 2022 has been fixed as the first date before the learned Arbitrator. Hence, the bar under Section 9(3) is applicable unless the petitioner demonstrates that the remedy under Section 17 is ineffective if the parties are sent before the Arbitral Tribunal for adjudication of the issue involved in the present ad-interim application. No such argument has been made with regard to the inefficiency of moving the Arbitral Tribunal in the present case. Ergo, this Court is relegating the remedy to the Arbitral Tribunal.

The petitioner shall be at liberty to move the Section 17 application before the Arbitrator on the first date itself subject to having served a copy of the same upon the respondent by April 26, 2022. Learned Arbitrator is requested to hear the same expeditiously and pass necessary orders.

This application is accordingly disposed of.

(SHEKHAR B. SARAF, J.)