

APO/100/2022
AP/393/2021

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE
(Commercial Division)

D. R. JOHN's LAB PRIVATE LIMITED
VERSUS
SAF FERMION LIMITED

BEFORE

The Hon'ble Justice HARISH TANDON

The Hon'ble Justice PRASENJIT BISWAS

Date: 10th November, 2022

Appearance
Mr. Samarendra Jha, Advocate
Mr. Somesh Ghosh, Advocate
....for the appellant
Mr. Sarvapriya Mukherjee, Advocate
Mr. Jashovardhan Kochar, Advocate
....for the respondent

The Court: This appeal arises from an order dated 4th January, 2022 confirming the interim order passed on 7th December, 2021.

A loan-cum-licence agreement was entered into on 16th September, 2018 providing the conversion of raw materials supplied by the respondent to the appellant and conversion charges are to be paid. It is alleged that a sum of Rs.60 lakh was advanced to the appellant in terms of the said agreement but there has been a default in honouring the terms

and conditions of the said agreement by the appellant. An application under Section 9 of the Arbitration and Conciliation Act, 1996 was taken out being AP No.393 of 2021 as the said agreement contained an arbitration clause for an appropriate order evident from the prayer of the said application. The said application was moved for an ad interim order and the Single Bench, however, found that a prima facie case has been made out and the balance of convenience and inconvenience lies in favour of the respondent and if an interim order is not passed, it would cause irreparable loss and injury and directed the appellant to secure the said sum of Rs.56,12,207/-. Despite notice having been served, the appellant did not participate in the proceedings and ultimately by the impugned order the said order dated 7th December, 2021 stood confirmed and the application under Section 9 of the said Act was disposed of.

It is contended by the learned Advocate for the appellant that previous to the said application being AP No.393 of 2021, the respondent had filed another application under Section 9 of the said Act being AP No.388 of 2020 and, therefore, the subsequent application is barred under Order II Rule 2 of the Code of Civil Procedure.

We could have entertained the said prayer provided there was a sufficient pleading filed by the appellant before the Trial Court. There was no contest on the part of the appellant and, therefore, the plea of Order II Rule 2 being the mixed question of fact and law cannot be agitated first

time before the Appellate Court. However, we find that certain grounds have been made out in relation to default having been committed in the Trial Court in not contesting the said application. We are satisfied with the explanation offered and we feel that an opportunity must be given to the appellant to contest the said proceeding; equally in order to strike a balance and bring equilibrium to the rights of the parties, the order directing to secure the said amount of Rs.56 lakh and odd should have been complied with.

Though a plea has been taken that the appellant is a well-known company having a Pan India existence which cannot be considered for the purpose of defending the order dated 7th December, 2021, the said order of 7th December, 2021 has not been assailed and/or challenged by the appellant before the higher forum. The said order is staring at the face of the appellant and it cannot wriggle out of the same taking a circuitous route.

In view of the fact that an opportunity to defend the said application must be provided, we, therefore, set aside the order dated 4th January, 2022 subject to the condition that the appellant shall deposit a sum of Rs.56,12,207/- with the Registrar, Original Side of this Court within three weeks from date. In the event the same is deposited, the Registrar, Original side shall invest the said amount in the fixed deposit

carrying interest in any nationalised bank and shall continue to renew the same until further order passed in AP No.393 of 2021.

In the event of default of depositing the said amount in terms of the directions passed in the preceding paragraph, this order shall automatically stand recalled and the appeal shall be treated to have been dismissed.

The appeal and all the connected applications are disposed of.

[HARISH TANDON, J.]

[PRASENJIT BISWAS, J.]

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