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O.S.A.Nos.91 and 92 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.10.2022

CORAM

The Hon'ble Mr. Justice **PARESH UPADHYAY**
and
The Hon'ble Mr. Justice **D.BHARATHA CHAKRAVARTHY**

O.S.A.Nos. 91 and 92 of 2022
and
C.M.P. Nos.6694 and 6696 of 2022
and
C.M.P. Nos.14595 and 14596 of 2022

M/s.Poompuhar Shipping Corporation Ltd.,
rep. By its Chairman and Managing Director,
Registered Office at
No.692, Anna Salai, IV Floor,
Nandanam, Chennai – 35.

.. Appellant
in both OSAs

vs

- 1.M/s.Pallonji Shipping Private Ltd.,
rep. By its Director,
No.44, Cawasji Patel Street,
Fort, Mumbai – 400 001.
- 2.Tamil Nadu Power Finance and Infrastructure
Development Corporation Ltd.,
Tufidco – Powerfin Tower,
490/3-4, Anna Salai,
Nandanam, Chennai – 35.
- 3.State Bank of India,
Overseas Branch,
86, Rajaji Salai, Chennai – 1.



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4.State Bank of India,
Nandanam Branch,
EVR Periyar Maligai,
474, Anna Salai, Nandanam,
Chennai – 35.

5.Indian Bank,
Nandanam Branch,
480, Anna Salai,
Nandanam, Chennai – 35.

6.TANGEDCO,
800, Anna Salai, Chennai – 2.

..Respondents in
both OSAs

Appeals filed under Clause 15 of Letters Patent r/w Order XXXVI
Rule 9 of Original Side Rules and Section 37 of the Arbitration and
Conciliation Act, 1996 against the common order dated 28.10.2021 in
Arbitration Application Nos.245 and 244 of 2021 in O.A.No.329 of
2021.

For Appellant : Mr.A.Edwin Prabhakar
in both OSAs

For Respondents : Mr.S.Vasudevan
for R1 in both OSAs



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COMMON JUDGMENT

(Delivered by D.BHARATHA CHAKRAVARTHY.,J)

1. These two appeals arise out of the common order passed by the learned single Judge made in Arbitration Application Nos.244 and 245 of 2021 in and by which the learned single Judge permitted the first respondent to withdraw a sum of Rs.8,77,73,932/- and a sum of Rs.3,93,58,090/- respectively.

2. Heard Mr.A.Edwin Prabhakar, learned counsel appearing on behalf of the appellant and Mr.S.Vasudevan, learned counsel appearing on behalf of the first respondent.

3. Impugning and assailing the order of the learned single Judge, learned counsel appearing on behalf of the appellant would contend that the order of the learned single Judge in the instant case was way beyond the powers conferred under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). Section 9 of the Act merely restricts the power of the Court to pass any orders which are mentioned in sub-sections (i) and (ii) (a to e) of Section 9 of the Act as if the matter is before the Court.



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Therefore, at best, the learned single Judge could have ordered protection of the claim of the appellant and ordering withdrawal of the amounts so deposited is totally beyond the powers under Section 9 of the Act.

3.1 Learned counsel for the appellant would further submit that in this case after filing the applications under Section 9 of the Act, the first respondent did not take steps to commence the arbitration within a period of 90 days and it took almost one year for the Arbitral Tribunal to be constituted and therefore on that score also, orders ought not to have been passed by the learned single Judge. The learned counsel would further contend that in any event, now the Arbitral Tribunal has been constituted and the matter is pending before the Tribunal and when the remedy under Section 17 of the Act is available to the first respondent, at this stage, passing of such an order by the learned single Judge and permitting the said order to stand by this Court is not appropriate.

3.2 Learned counsel for the appellant even though tried to assail the factum as to the admission of liability would thereupon further contend that even for the sake of argument, it is to be taken as



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if the liability is admitted, still beyond protecting the admitted liability, the payment of amounts itself would be unfair to the appellant herein.

He would further submit that the very opportunity for the appellant to dispute the amount or to make the counter claim is defeated and the appellant is still entitled to make the counter claim in respect of the losses occurred to it due to the errors that may be committed in the execution of the charter by the first respondent. For all these reasons, learned counsel would contend that the order of the learned single Judge should be interfered with by this Court.

4. Per contra, Mr.S.Vasudevan, learned counsel appearing on behalf of the first respondent would submit that in this case, the liability was clearly and categorically admitted by the appellant in their own books of record. As a matter of fact, the internal auditor has certified the liability. This apart, till today, the appellant could not come with even any ostensible dispute as to the liability as the issues are as simple as the charter charges payable to the first respondent and it has already been clearly and categorically calculated and is reflected in the books of account of the appellant itself. He would further submit that pursuant to the earlier direction of the Division Bench, before learned single Judge also, the exercise of reconciliation



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of accounts was also carried on by both sides and even after reconciliation of accounts, total sum of Rs.19.71 crores was arrived at and since in this case, the facts are very categorical and clear, no fault can be attributed to the learned single Judge in permitting withdrawal of the sum and therefore he prays for dismissal of the appeals. In support of his claim, learned counsel for the first respondent relied upon some of the earlier decisions of this Court as well as other High Courts whereunder payments have been ordered even under Section 9 of the Act. The following are the judgmentd relied upon by the learned counsel for the first respondent:

(i) Gammon India Ltd., Vs. IVRCL Infrastructure and Projects Ltd., and Ors., (O.S.A. No.81 of 2005 dated 29.04.2005)

(ii) Value Source Mercantile Ltd., Vs. Span Mechnotronix Ltd., (2014 SCC Online Del 3313 : (2014) 143 DRJ 505)

(iii) Mysore Manganese Co. (P) Ltd. Vs. Prakash Natural Resources Ltd. (2016 SCC Online Kar 385)

(iv) Supertrack Hotels Pvt. Ltd., Vs. Friends Motels Pvt. Ltd., (2017 SCC Online Del 11662)



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(v) *Amazon.Com NV Investment Holdings LLC Vs.*

Future Retail Ltd., ((2022) 1 SCC 209)

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4. We have considered the rival submissions made on behalf of both sides and perused the material records of this case.

5. Even though Mr.A.Edwin Prabhakar, learned counsel for the appellant has made valiant attempt to assail the order of the learned single Judge, we are of the view that it is too late in the day for him to contend so, as major material aspects of this case have already been decided in the earlier proceedings by the Division Bench. Firstly, as far as the admission of liability and direction to deposit or payment is concerned, the same is covered by the earlier order of this Court dated 17.08.2021 in O.S.A. (CAD) Nos.40 and 41 of 2021 and it is very relevant to quote para 3 of the order which reads as under:

"3.As far as the present claim is concerned, there is no defence to the extent of over Rs.19.71 crore out of a claim of about Rs.58 crore. In view of the recent Supreme Court judgment reported at AIR 2021 SC 2161 (Rahul S.Shah v. Jinendra Kumar Gandhi), it would not do for a defendant in



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a money claim to take advantage of the law's delays, particularly in a commercial matter. When a person admits any payment to be due from him to another and does not raise any counter-claim, the amount admitted to be due ought to be paid, or at the very least, deposited in court."

6. Further, as far as the permission of withdrawal of the amount is concerned, the same is again covered by the order of the Division Bench in the same appeals in O.S.A. (CAD) Nos.40 and 41 of 2021 dated 03.09.2021 and it is useful to extract paragraphs 5 to 7 of the said order, which read as under:

"5. It is an altogether different kettle of fish to allow the petitioner to appropriate all or any part of the deposit which has been made pursuant to an order for security to be furnished.

6. The ideal way in which this matter could have been concluded at this stage was to dispose of both the petition under Section 9 of the Act before the arbitration court and the present appeals by recording that the deposit has been



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made. However, since no arbitrator has been appointed yet and the arbitral reference has not commenced, so to say, it is left open to the appellant herein to approach the arbitration court to obtain payment from the deposit that has already been made in terms of the previous orders. As of now, it does not appear to be appropriate, particularly in these appeals, to allow the appellant to withdraw any sum for whatever purpose that the appellant may need the same.

7. Since the first respondent has issued a letter to the appellant herein for reconciliation of accounts, it will be open to the parties to attempt reconciliation without prejudice to their rights and contentions in the pending proceedings.”

7. It is thereafter these two applications were taken by by the first respondent for payment out of the amount. Even in the said proceedings, the learned single Judge has recorded that as directed by the Division Bench, the process of reconciliation of accounts was once again carried on and considering the fact that the appellant corporation



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was unable to raise any dispute whatsoever in respect of the balance amount outstanding, learned single Judge has ordered withdrawal of the amounts. Therefore, in that view of the matter, factually we find that even today before us, even for the sake of the case, no contra information has been projected by the appellant corporation and the earlier finding of the Division Bench that the liability of Rs.19.71 crore is admitted has become final. In that view of the matter, the claim of the first respondent to withdraw the amount already deposited is fully justified.

8. Now advertent to the contention made with reference to Section 9 of the Act, it is useful to quote sub-section 2(e) of Section 9 of the Act which clearly states that apart from the measures mentioned in (a), (b), (c) and (d), such other interim measure of protection as may appear to the Court to be just and convenient that can be passed under Section 9 of the Act 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. Therefore, the Courts are given wide powers of passing interim orders of protection if the matters were pending before the Court and it goes without saying that if it were the suit pending before the Court, interim decree of admission is very



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much permissible and therefore that the order permitting withdrawal of the admitted amount can not be said to be illegal or erroneous in any manner, much less beyond the powers granted under Section 9 of the Act.

9. As admitted by the both the learned counsel across the bar, the constitution of the Arbitral Tribunal was not made as on date of the passing of the order by the learned single Judge. In view thereof, the argument that the parties should be relegated to Section 17 of the Act is also without substance. Reference in this regard needs to be made to the decision of the Supreme Court of India in the case of *Arcelor Mittal Nippon Steel India Limited v Essar Bulk Terminal Ltd reported in (2022) 1 SCC 713*, more specifically para : 99 thereof. In view thereof, when the learned single Judge has exercised his discretion with due caution and passed the orders within the parameters of Section 9 of the Act, we feel that no ground is made out to interfere with the order of the learned single Judge within the powers under Clause 15 of the Letters Patent so as to upturn the order of the learned single Judge.



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10. Therefore, finding no merits, these appeals are dismissed.

No costs. In that view thereof, all the connected miscellaneous petitions are also closed.

(P.U., J) (D.B.C., J)
13.10.2022

Index:Yes
mmi/15

To

- 1.The Tamil Nadu Power Finance and Infrastructure Development Corporation Ltd.,
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5. The TANGEDCO,
800, Anna Salai, Chennai – 2.
- 6.The Sub Assistant Registrar,
Original Side,
High Court, Madras.



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**PARESH UPADHYAY, J.
and
D.BHARATHA CHAKRAVARTHY, J.**

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