

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

FAO No.891 of 2020(O&M)
Reserved on 21.11.2022
Date of Decision:22.12.2022

JITF Urban Waste Management Ltd. ... Appellant

Vs.

Municipal Corporation, Bathinda and another ... Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Anand Chhibbar, Sr. Advocate with
Mr. Manish Gopal, Advocate and
Mr. Aditya Jain, Advocate
for the appellant.

Mr. D.V. Sharma, Sr. Advocate with
Ms. Pooja Yadav, Advocate
for respondent No.1.

RAJ MOHAN SINGH, J.

[1]. The appellant has assailed the order dated 04.12.2019 passed by the Additional District Judge, Bathinda in Arbitration Case No.5 of 2019 filed under Section 9 of the Arbitration and Conciliation Act, 1996, vide which the application has been disposed of with the direction that the interim order dated 15.01.2019 shall be subject to the final outcome of the

arbitration proceedings pending between the parties.

[2]. The grievance of the appellant is that the interim order passed under Section 9 of the Arbitration and Conciliation Act has a limited life till arbitral Tribunal is constituted within the time prescribed in terms of Section 11 of the Act. The interim order under Section 9 of the Act is intended for a brief period and once the arbitral Tribunal is constituted, the parties can seek necessary relief from the arbitral Tribunal as its existence extinguishes the earlier order.

[3]. A Concession Agreement was executed between the appellant, respondent, Department of Local Government and a consortium of JITF Urban Infrastructure Ltd. and M/s Ladurner Impainti S.r.l. (i.e. Selected Bidders) on 23.11.2011 for development of an Integrated MSW Management Project which includes the collection, transportation, processing and disposal of MSW for Bathinda Cluster. Pursuant to the aforesaid Concession Agreement, the appellant started its operations of collection and transportation of MSW in Bathinda Cluster and has also established the processing facilities at Bathinda.

[4]. Learned Senior Counsel for the appellant submitted that since inception of the project, the respondent did not fulfil conditions as provided under Articles 2.2.2.1 and 2.2.3.1 of the Concession Agreement or comply with its obligations provided

under Article 6 of the Concession Agreement. The respondent also defaulted in making timely payments of the tipping fee to the appellant, despite numerous requests made by the appellant. The outstanding amounts of the appellant have not been cleared and according to the appellant, the respondent and respective Urban Local Bodies defaulted in making payment of Rs.2,24,36,450/- along with interest. The respondent has failed to create a tipping fund, failed to appoint independent expert and also failed to provide the land as stipulated under the Concession Agreement beside declaring a no development zone around the processing facilities. The respondent has not complied with the directions of the National Green Tribunal despite repeated requests of the appellant and has shown its intent to be not bound by the Concession Agreement as well as orders passed by the National Green Tribunal.

[5]. There are assertions and denial of both the parties in respect of non-compliances in terms of the Concession Agreement and inaction to give remedial measure within the time prescribed. After exchange of consultation notice dated 24.08.2018 and reply dated 19.11.2018, the appellant issued a termination notice dated 05.12.2018 to the respondent and gave the termination date as 19.01.2019 in terms of the Concession

Agreement.

[6]. After issuance of termination notice, the respondent filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 for staying the termination of Concession Agreement and direction for the parties to perform their respective obligations under the Concession Agreement till the arbitral award is published.

[7]. The Additional District Judge, Bathinda vide order dated 15.01.2019 passed an *ex parte ad* interim order, thereby directing both the parties to continue to perform their respective obligations under the Concession Agreement till further directions or until arbitral award is published without prejudice to their rights to make adjustments in accordance with the said award.

[8]. In compliance of the order dated 15.01.2019 passed by the Additional District Judge, Bathinda under Section 9 of the Act, the appellant continued with its operations of processing MSW (Municipal Solid Waste) at the Processing Facilities at Bathinda. However, the appellant vide letter dated 21.01.2019, made it clear that the continuation of the operation shall not be treated as revocation of the termination notice dated 05.12.2018.

[9]. The appellant has filed its reply to the petition of the

respondent and also moved an application under Order 39 Rule 4 CPC for vacation of *ex parte* interim order.

[10]. According to the appellant, the appellant was always ready and willing to argue the case including the application for early listing of the case, however, the respondent sought repeated adjournments with a view to delay the matter unnecessarily. Ultimately, the process of the dispute resolution as provided under Concession Agreement ended up with invocation of arbitration clause by the appellant through its notice of invocation dated 19.03.2019.

[11]. The Hon'ble Presiding Arbitrator entered into reference on 27.04.2019 after constitution of the arbitral Tribunal and first hearing before the Tribunal took place on 22.05.2019. Since the arbitral Tribunal was constituted on 27.04.2019, therefore, the appellant filed an application under Section 9(3) of the Arbitration and Conciliation Act, 1996 before the District Court for dismissal of the petition of the respondent in view of the fact that the arbitral Tribunal has jurisdiction under Section 17 of the Act to deal with the issue and the respondent can take recourse of Section 17 of the Act.

[12]. The respondent has also filed an application under Section 17 of the Act, claiming identical relief as claimed in its petition under Section 9 of the Act. The appellant has alleged

that the ground on which the order dated 15.01.2019 has been passed by the Additional District Judge, Bathinda is that the respondent has paid Rs.1.92 crores in excess to the appellant towards tipping fee. The said plea runs contrary to its counter claim before the arbitral Tribunal in which the respondent has stated that only Rs.40 lacs has been paid in excess to the claimant. The respondent has also filed its reply to the application under Section 9(3) of the Act filed by the appellant.

[13]. Additional District Judge, Bathinda vide order dated 04.12.2019 has disposed of the application under Section 9 of the Act with the direction that the interim order dated 15.01.2019 shall be subject to the final outcome of the arbitration proceedings pending between the parties.

[14]. Learned Senior Counsel for the appellant vehemently submitted that after constitution of the arbitral Tribunal on 27.04.2019, the Additional District Judge, Bathinda should have refrained itself from passing any order as the scope of the interim order under Section 9 of the Act has a limited life till arbitral Tribunal is constituted within the time prescribed in terms of Section 11 of the Act. Once the arbitral Tribunal is constituted, the parties can seek the necessary relief from the arbitral Tribunal as its existence extinguishes the earlier order.

[15]. Evidently, the arbitral Tribunal was constituted on

27.04.2019. The Hon'ble Presiding Arbitrator entered into reference on 27.04.2019 and first hearing was held on 22.05.2019 i.e. before passing of the impugned order dated 04.12.2019, therefore, passing of order dated 04.12.2019 by the Additional District Judge, Bathinda is without jurisdiction and against the spirit of Section 9(3) of the Arbitration and Conciliation Act, which prescribed that once the arbitral Tribunal has been constituted, the Court shall not entertain an application under sub Section (1), unless the Court finds that circumstances exist, which may not render, the remedy provided under Section 17 efficacious. Section 9(1) and 17(1) of the Act are to the same effect, which provide for grant of interim measure by the Court and the arbitral Tribunal, however, after constitution of the arbitral Tribunal, Section 9(3) of the Act would have its on say. The arbitral Tribunal shall have the same power for making orders as the Court has for the purpose of, in relation to, any proceeding before it.

[16]. Sub Section (3) of Section 9 of the Act has two limbs. The first limb prohibits an application under sub Section (1) from being entertained once an arbitral Tribunal has been constituted. The second limb carves out an exception to that prohibition, if the Court finds that circumstances exist, which may not render the remedy provided under Section 17

efficacious.

[17]. Evidently, Section 9(3) of the Act has not absolutely prohibited an application under sub Section (1) of the Act from being entertained by the Court even after arbitral Tribunal is constituted, provided the Court finds that the circumstances exist, which may not render the remedy under Section 17 efficacious. The Court while entertaining the application under Section 9(1) of the Act after composition of arbitral Tribunal, has to record its satisfaction in the context that the circumstances exist, which may not render the remedy provided under Section 17 efficacious.

[18]. To discourage the filing of applications for interim measures in Courts under Section 9(1) of the Act, Section 17 of the Act has also been amended to clothe the arbitral Tribunal with the same powers to grant interim measures, as the Court under Section 9(1) of the Act. The amendment made in the year 2015 also introduces a deeming fiction, whereby an order passed by the arbitral Tribunal under Section 17 of the Act is deemed to be an order of Court for all purposes and is enforceable as an order of the Court. Arbitral Tribunal has the same power to grant interim relief as the Court and the remedy under Section 17 of the Act is as efficacious as the remedy under Section 9 (1) of the Act. There is no reason why the Court

should continue to take up applications for interim relief, once the arbitral Tribunal is constituted, unless there is some impediment in approaching the arbitral Tribunal, or the interim relief sought cannot expeditiously be obtained from the arbitral Tribunal.

[19]. Learned Senior Counsel placed reliance upon **LPA No.150 of 2016** titled **Talwandi Sabo Power Limited and others Vs. SEPCO Electric Power Construction Corporation and others** decided on 17.05.2016, **Arcelor Mittal Nippon Steel India Ltd. Vs. Essar Bulk Terminal Ltd., AIR 2021 SC 4350, Avantha Holdings Ltd. Vs. Vistra ITCL India Ltd., 272 (2020) DLT 664** and **DLF Ltd. and others Vs. Leighton India Contractors Private Ltd. and others, 2021(4) ArbLR 160 (Delhi)** and contended that Section 9 of the Act contemplates interim measures etc by the Court and the provision is meant to serve the temporary purpose of protecting the plaintiff's interest so that the suit is not frustrated. The Court while exercising its power under Section 9 of the Act has to be acutely conscious of the power, vested in the arbitral Tribunal by Section 17 of the Act. Sections 9 and 17 of the 1996 Act are identically worded. The interim measures, which can be ordered by the arbitral Tribunal under Section 17 are the same as those which can be ordered by the Court under Section 9 of the Act. It is for this

reason that sub Section (3) of Section 9 of the Act, proscribes grant of interim measures by the Court, consequent on constitution of the arbitral Tribunal, save and except where the Court finds that circumstances exist, which may not render the remedy under Section 17 to be efficacious. The Court while exercising jurisdiction under Section 9 of the Act, even at a pre-arbitration stage, cannot, therefore, usurp the jurisdiction which would, otherwise, be vested in the Arbitrator or the arbitral Tribunal, yet to be constituted. The Court is also required to ensure that Section 9 of the Act is not employed, by litigants, who feel that it is easier to obtain interim relief from the Court, rather than from the Arbitrator or arbitral Tribunal. While in an appropriate case, the Court must not hesitate in ordering interim measures, under Section 9 of the Act while judging whether a particular case is appropriate or not, the Court is required to form its opinion based on settled propositions i.e. existence of a *prima facie* case, balance of convenience and possibility of irreparable loss or injury or prejudice, if interim relief is not granted. The mere satisfaction of these criteria does not *ipso facto* make out a case for ordering interim measures under Section 9 of the Act. Additionally, the Court is also required to satisfy itself that the relief being sought under Section 9 of the Act, cannot await the constitution of the arbitral Tribunal or the

appointment of the Arbitrator, and the invocation before such Arbitrator or arbitral Tribunal. Emergent necessity of ordering interim measures is therefore, an additional ground *sine qua non*, to be satisfied before the Court proceeds to grant relief under Section 9 of the Act. Therefore, while invoking Section 9 of the Act, the Court is required to satisfy itself that the applicant before it manifestly intends to initiate arbitral proceedings, the criteria for grant of interim injunction, which apply to Order 39 of the CPC stands satisfied and the circumstances also exist, which renders the requirement of ordering interim measures an emergent necessity, which cannot await a Section 17 proceeding, before the Arbitrator or arbitral Tribunal. The Court is also required to satisfy that failure to order interim measures under Section 9 of the Act would frustrate or would render the recourse to Arbitration which is yet to take place-a futility.

[20]. *Per contra*, learned Senior Counsel for the respondent No.1 submitted that the filing of application under Section 9 of the Act by respondent No.1 is in view of Clause 11.3 of the Concession Agreement dated 23.11.2011, which provides for performance during dispute. The relief claimed in the application under Section 9(1) of the Act and the interim directions dated 15.01.2019 are in consonance with the Clause 11.3 of the Concession Agreement. Impugned order dated 04.12.2019 was

also in accordance with the provisions of Section 9 of the Act. The appellant has also filed an application under Section 17 of the Act before the arbitral Tribunal. At the same time, the respondent No.1 has also filed an application under Section 9 of the Act and the arbitral Tribunal on 09.12.2019 has passed the following order in para Nos.6, 7, 8 and 9 :-

“6. We have also heard arguments on the applications filed by both the sides under Section 17 of the Act.

7. In so far as the Claimant's application is concerned, we direct that during the pendency of these proceedings, the respondent shall not invoke the bank guarantee, subject to the condition that the respondent shall keep these guarantees alive, by renewing it every three months.

8. In so far as application of the respondent is concerned, we note that the District Court has already granted necessary relief to the respondent in its application under Section 9 of the Act. Therefore, this application does not survive for the present.

9. Both these applications are disposed of accordingly.”

[21]. Since the Additional District Judge has also granted the interim measures to the respondent No.1 under Section 9 of the Act, therefore, the arbitral Tribunal has rightly ordered that the application does not survive.

[22]. Learned Senior Counsel also placed reliance upon **Ultratech Cement Limited Vs. Rajasthan Rajya Vidyut**

Utpadan Nigam Limited, (2018) 15 Supreme Court Cases

210, wherein it has been held that the interim measures can be allowed in favour of a party, who moves such application either before the commencement of the arbitral proceedings or during the pendency of the arbitral proceedings and even after making of the arbitral award but before it is enforced in accordance with Section 36 of the Act. Apparently, an interim arrangement can be made under Section 9 of the Act not only before and during the pendency of the arbitral proceedings, but also after the arbitral award has been pronounced. Learned Senior Counsel also argued that the interim order merges with the final order and does not exist after the final order is passed.

[23]. I have heard learned counsel for the parties.

[24]. Perusal of the impugned order would show that the same came to be passed only after constitution of the arbitral Tribunal. The Court has relied the interim measure already granted on 15.01.2019 and made it operational. The Court also observed that once the arbitral Tribunal is constituted, the parties can seek necessary relief from the arbitral Tribunal as its existence extinguishes the earlier order pronounced under Section 9 of the Act. The Court ultimately by taking note of the aforesaid fact, disposed of the petition with a direction that the interim order dated 15.01.2019 shall be subject to the final

outcome of the arbitral proceedings between the parties.

[25]. Hon'ble Arbitral Tribunal after taking note of the applications filed by both the parties under Section 17 of the Act, went on to hold that the Additional District Judge has already granted necessary relief to the respondent in its application under Section 9 of the Act, therefore, the application does not survive for the present. Since the order dated 09.12.2019 came to be passed by the Hon'ble Arbitral Tribunal only after passing of the impugned order dated 04.12.2019, therefore, for the reasons recorded in the order dated 09.12.2019 by the Hon'ble Arbitral Tribunal, the same can be taken to be an order passed after due consideration of facts and circumstances of the case and grant of necessary relief to the respondent by the Court under Section 9 of the Act is taken to be intended relief to be granted under Section 17 of the Act by the Hon'ble Arbitral Tribunal. There may be some infraction where the Court is found to be lacking while passing the order under Section 9 of the Act strictly as per the requirement of satisfying itself on the parameters as laid down in **Arcelor Mittal Nippon Steel India Ltd case (supra)** and **Avantha Holdings Ltd. case (supra)**, but since after passing of the impugned order, the Hon'ble Arbitral Tribunal has also passed an order dated 09.12.2019, endorsing the impugned order,

therefore, in the fitness of things, particularly when the Hon'ble Arbitral Tribunal has already entered upon the reference and is proceeding with the proceedings, therefore, I deem it appropriate to put an end to the issue of grant of interim measures, however, the appellant would be at liberty to make a request before the Hon'ble Arbitral Tribunal for early disposal of the proceedings owing to the deliberate attempt of respondent No.1 to delay the proceedings (if any).

[26]. With these observations, the present appeal is dismissed.

22.12.2022
Prince

(RAJ MOHAN SINGH)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No