

03 19.04.23

Ct. No. 04

F.M.A.T. (ARBAWARD) 7 of 2023

CAN 1 of 2023

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Mlinda Sustainable Environment Private Limited.

Vs.

Tarun Paliwal

Mr. Saptangshu Basu,

Mr. Ayan Banerjee,

Mr. Arijit Bhowmick,

Ms. Debarsee Dhamali.

... for the appellant.

Mr. Saurapriya Mukherjee,

Mr. Prasun Bandyopadhyay.

... for the respondent.

The order no. 1 dated 1st December, 2022 passed by the District Judge, 24-Parganas (South) in Misc. Case (Arb.) No. 112 of 2022 is assailed in the instant appeal solely on the ground that while invoking the provisions under Order XXXVIII of the Code of Civil Procedure the Court has omitted to record any reason therefor.

It is manifest from the impugned order that the Court after recording the submission of the respondent surreptitiously jumped to the conclusion that prima facie case is made out and directed the appellant to file affidavit of assets (both fixed assets and bank accounts or liquid assets) within a stipulated time.

Our endeavour has failed to find out any finding returned in the impugned order on existence of prima facie case. It is an ardent duty of the Court to record independent finding on the existence of prima facie case even in an application taken out under Section 9 of the Arbitration and Conciliation Act, 1996. The Court cannot dispense with recording the finding on existence of prima facie case before it embark its journey on the peripheral of granting an interim order under the aforesaid provision. However, a shelter is

sought to be taken that the scope and power under Section 9 of the said Act is not controlled and regulated absolutely by the provisions of the Code of Civil Procedure and sometime is regarded as of wide import and, therefore, all the nuances of the Code of Civil Procedure may not be strictly followed.

The aforesaid submission is advanced drawing inspiration from the ratio of a judgement rendered by the Supreme Court in case of *Essar House Private Limited vs. Arcellor Mittal Nippon Steel India Limited* reported in 2022 SCC Online SC 1219. In the said judgement an application taken out by the respondent therein seeking direction upon the appellant to deposit a substantial amount was eventually allowed and an argument was advanced before this Court that the provisions contained under XXXVIII Rule 5 of the Code of Civil Procedure are drastic and extraordinary power which should not be exercised mechanically or merely on asking. The said provision is to be activated sparingly and it is only when a strong prima facie case is made out the Court may pass the order invoking the provisions contained under Order XXXVIII Rule 5 of the Code.

The Apex Court held that though the principles underline the various provisions of the Code of Civil Procedure may not be strictly followed in a proceeding under Section 9 of the Arbitration and Conciliation Act, 1996, yet our endeavour has failed to find out that the Apex Court has held in unequivocal terms that the principles for exercise of power has to be totally ignored. The nitty-gritty of the provisions and the strict interpretation of the language used in the Code of Civil Procedure may not be rigorously followed in a proceeding under Section 9 of the said Act, yet the basic ingredients required for exercising such

power is to be satisfied and the exercise of power ex debito justitiae without recording any reason cannot be supported. Even the power to secure ends of justice is eminently present in the Code of Civil Procedure, but it does not dispense with the requirement of providing reasons in this regard.

The Court below surreptitiously jumped to the conclusion that a prima facie case has been made out without returning any finding thereupon as to what constitute the existence of the prima facie case. Even we are not unaware of somewhat settled proposition of law that if it appears to the Court that the order is just and proper, it may pass such order, but that does not dispense with the recording of reasons that why such order is just and proper.

There is no finding recorded in the impugned order and, therefore, the order bereft of such reasons cannot be sustained in the eye of law. The order impugned is thus set aside. The matter is remitted to the Court below.

Liberty is granted to the respondent to pray for an interim order and if such prayer is made the Court below shall consider the same and pass appropriate order by recording reasons.

For abundant precaution it is hereby made clear that the observations made hereinabove cannot have any persuasive effect or impact on the Trial Court while considering the prayer for interim order as the Court shall decide the same independently.

With the above observations the appeal and the connected application are disposed of.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)

