

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION

Present:

The Hon'ble Justice Shekhar B. Saraf

A.P.O. No. 26 of 2023

IA G.A. No. 1 of 2023

Santosh Kumar Shaw

VS

***M/s Ramgarh Swami Ranganathananda Educational & Welfare
Society***

For the Petitioner:

Mr. Arnab Mukherjee, Adv.
Mr. B.K. Upadhyay, Adv.

For the Respondent:

Mr. Suman Kr. Dutta, Adv.
Mr. Bhaskar Mukherjee, Adv.
Mr. Debraj Sahu, Adv.
Mr. Nafisa Yasmin, Adv.
Mr. Debdeetta Dutta, Adv.

Last heard on: March 20, 2023

Judgement on: March 29, 2023

Shekhar B. Saraf, J:

1. The petitioner in the instant application [being A.P.O. No. 26 of 2023] under section 37 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "the Act"] is engaged in the business of civil

construction and is carrying his business under the name and style of 'S.K. Shaw'.

2. The respondent is a charitable society registered society under the Societies Registration Act, 1961. It was formed with the object to promote study of man making and character building ideas on the teachings and messages of Sri Ramakrishna Sri Maa Sarada Debi Vivekananda.
3. The petitioner has challenged the Order dated 15th February, 2023 [hereinafter referred to as the "Impugned Order"] passed by the learned tribunal consisting of sole arbitrator [hereinafter referred to as "the Tribunal"] Mr. Swarnendu Ghosh, Learned Advocate vide the instant application. The IA G.A. No. 1 of 2023 has identical prayers to the instant application.

Relevant facts

4. The petitioner and the respondent entered into an agreement dated April 10, 2019, wherein the petitioner was engaged as a contractor to construct a G+6 building upon a land admeasuring 45 cottahs situated within Mouza Baluria, J.L. No. 37, R.S. and L.R. Dag No. 774 and 775, L.R. Khatian No. 8948 under P.S. and Municipality Barasat, Ward No. 05, Holding No. 1139, District North 24 Parganas, West Bengal [hereinafter referred to as 'the land']. The remuneration fixed was Rs. 1200/- per sq ft.

5. The construction was completed till the 3rd Floor and stopped thereafter due to disputes arising with regards to payments between the parties.
6. This Court vide order dated March 15, 2022 in an application under Section 11 of the Act appointed an arbitrator to resolve the disputes between the parties.
7. During the arbitral proceedings, the respondent filed an application under Section 17(e) of the Act before the Tribunal to engage a new contractor “Lokenath Traders” to complete the construction of the building.
8. The petitioner filed an application under section 17(d) of the Act before the Tribunal for passing necessary order of ad-interim injunction restraining the claimant to appoint any other contractor to complete the balance work.
9. The learned tribunal vide the Impugned Order dated 15th February 2023 disposed of both the applications filed before it by a common order. In the Impugned Order, the Tribunal directed the respondent to not interfere in any way by encumbering and/or dealing with the land on which the construction is made till disposal of the proceeding. However, it was made clear that this order would not stop the

respondent from engaging a third-party contractor for the purpose of completing the unfinished work.

10. In light of the permission granted to the respondent to engage a third party for the completion of construction, the petitioner has filed the current application.

Submissions

11. Mr. Arnab Mukherjee, counsel appearing on behalf of the petitioner propounded the following arguments :-
 - a. The Tribunal failed to appreciate that huge amounts of the petitioner are still unpaid by the respondent and several machineries, articles and building materials are lying at the site.
 - b. The Tribunal failed to appreciate that upon allowance of such prayer by the claimant to engage a new contractor to complete the rest of the work, the arbitral proceedings would be frustrated.
 - c. The Tribunal overlooked the calculation submitted by the petitioner before it.
 - d. The Tribunal permitted the claimant to proceed with the construction without securing the interest of the petitioner.
 - e. The Tribunal failed in discharging his duties of equal treatment to the parties.
 - f. The petitioner had constructed 52000-53000 sq ft. area and is entitled to the contract price of the same at the rate of Rs. 1200/sq ft.

12. Mr. Suman Kr. Dutta, appearing on behalf of the respondent made the following submissions :-

- a. When a pure construction contract is entered into, then the contractor has no interest in either the land or the construction which is carried out.
- b. Principles of Order 38 Rule 5 of the Code of Civil Procedure, 1908 have to be followed to ascertain if the purpose and essence of the final award will be defeated.
- c. Restitution of the petitioner, in the form of damages in the ultimate arbitral award, is always possible therefore nullifying any need of injunctions as prayed for by the petitioner.

Analysis

13. The jurisprudence with respect to Section 17 orders under the Act has been underlined by me in ***Gainwell Commosales Private Limited v. Minsol Limited*** as reported in ***2022 SCC OnLineCal 3975***. The relevant portions are extracted below :-

“22. We must now discuss the powers under Section 17 of the Act. The 2015 Amendment to the Act has amplified the powers granted to arbitral tribunals to provide interim relief under Section 17. The power is now almost pari passu the powers that a court exercises under Section 9 of the Act. Therefore, it would not be innocuous to pre-suppose that the principles guiding the exercise of the powers under both these sections must be similar. The Apex Court in Essar House Private Limited v. Arcelor Mittal Nippon Steel India Limited (2022 SCC OnLine SC 1219) delineated the guiding factors in the exercise of power under Section 9 of the Act. A few relevant paragraphs are extracted below:

“39. In deciding a petition under Section 9 of the Arbitration Act, the Court cannot ignore the basic principles of the CPC. At the same time, the power Court to grant relief is not curtailed by the rigours of every procedural provision in the CPC. In exercise of its powers to grant interim relief under Section 9 of the Arbitration Act, the Court is not strictly bound by the provisions of the CPC.

40. While it is true that the power under Section 9 of the Arbitration Act should not ordinarily be exercised ignoring the basic principles of procedural law as laid down in the CPC, the technicalities of CPC cannot prevent the Court from securing the ends of justice. It is well settled that procedural safeguards, meant to advance the cause of justice cannot be interpreted in such manner, as would defeat justice.

48. Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is, whether the applicant for interim measure has a good prima facie case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.”

14. Furthermore, in ***Jagrati Services v. Deepak Bhargava & Ors.***, as reported in ***2023 Live Law (Cal) 29***, I had the occasion to highlight the principles relating to Section 17 and 37 of the Act. The relevant portion is extracted below :-

“41. For the purpose of convenience, the principles that can be culled out from a reading of the legal analysis undertaken above are mentioned herein:

a. The power of the arbitrator to grant interim reliefs under section 17 of the Act is akin to the court’s powers under section 9. The 246th Law Commission Report recommended the enhancement of arbitrator’s powers to give teeth to their orders by elevating them to the status of a statutorily

enforceable order of a court. The Parliament responded accordingly and made section 17 pari passu to that of section 9. Succeeding precedents such as that of Flywheel Logistics (supra) and my own observation in Gainwell (supra) reiterate the identical nature of sections 9 and 17 and the acceptance of the principle that applications under both these provisions would be governed under the same test of interim measures.

b. The test guiding the court's power to grant interim relief is equally applicable to the arbitrator's power under section 17. The court need not go beyond the standard, when determining appeals under Section 37 against arbitrator's orders under Section 9, than to determine:

1. prima facie case is in whose favour,

2. not granting the relief would result in irreparable harm and loss which cannot be compensated at a later stage,

3. the balance of convenience, if such interim protection is granted, must lie in favour of the applicant, and

4. the application praying for the relief is made expeditiously;

c. The grounds for appeal in the current application stems from section 37(2)(b) of the Act. The investigation as established in the precedents set in Ajay Singh (supra), Essar House (supra) and Godrej (supra) cannot extend to entertain the merits of the dispute. Instead, the degree of scrutiny is limited to a prima facie overview. Furthermore, in World Window (supra) it was settled that the Act by its very nature frowns upon judicial interference against an arbitrator's decisions and even more so when such decisions are made at interlocutory stages where the arbitral process remains to be ongoing. A constrained overview in light of the test stated above in subparagraph (b) is to be carried out."

[Emphasis Added]

Conclusion

15. On a perusal of the Impugned Order, I find that the Tribunal while allowing the respondent to engage a third party to complete the construction of the building also disallowed it to deal with it in any other manner till the disposal of the proceeding. The Tribunal has, in my opinion, balanced the

interests of both the parties. It has enabled completion of the construction work while the dispute remains to be adjudicated.

16. Furthermore, I do not see any irreparable harm to the petitioner if their prayers are not addressed. Its interests, if any that may arise, can be secured by monetary reliefs granted in the final award. Therefore, alluding to the constrained scrutiny courts should exercise under Section 37 of the Act, I am not inclined to interfere with the Impugned Order.
17. The instant application being A.P.O. 26 of 2023 and IA G.A. NO. 1 of 2023 are accordingly dismissed. There shall be no order as to costs.
18. An urgent photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J.)