

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side
(Commercial Division)

Present :-

The Hon'ble Justice Moushumi Bhattacharya

AP 408 of 2023

with

AP 409 of 2023

With

AP 411 of 2023

With

AP 412 of 2023

SREI Equipment Finance Limited

vs.

The Karur Vysya Bank

For the Petitioner	:	Mr. Swatarup Banerjee, Adv.
		Mr. Rajib Mullick, Adv.
		Mr. Sariful Haque, Adv.
		Ms. Sonia Mukherjee, Adv.
		Ms. Biswaroop Ghosh, Adv.

For the Respondent	:	Ms. Pallavi Gandhi, Adv.
		Ms. Sweta Gandhi, Adv.

Last Heard on : 02.08.2023

Delivered on : 09.08.2023

Moushumi Bhattacharya, J.

1. The petitioner has filed 4 applications under section 9 of The Arbitration and Conciliation Act, 1996 for orders of injunction restraining the respondent from transferring or dealing with the amounts in the escrow accounts in the respondent Bank bearing the account number stated in the prayer b of each of the applications.

2. The 4 agreements entered into between the same parties in 2019 contain arbitration clauses. Since the issues involved in all the 4 applications are identical, the said applications are being disposed of by way of this judgment.

3. The petitioner seeks a restraint on the respondent Bank from dealing with the amounts in the Escrow accounts the particulars of which have been provided respectively in the 4 applications. The accounts are maintained in the respondent Bank. The petitioner also seeks appointment of a Receiver over the escrow account in the respondent Bank.

4. The petitioner also intends to approach the arbitral tribunal in an application under section 17 of the Act. The petitioner seeks this interim relief until formation of the arbitral tribunal in accordance with the arbitration agreement contained in clause 8.3 of the Agreement for Assignment executed

between the petitioner and the respondent Bank on 17.1.2019, 4.11.2020, 4.8.2020, 30.8.2019. All the 4 applications are for interim relief.

5. Clause 2.3 of the Assignment Agreement reflects the terms as to collection of receivables between the parties described as the “assignor” (petitioner) and the “assignee” (the respondent) and that the assignee was entitled to receive all receivables from the guarantors / borrowers under the Original Master Operating Lease Agreement which had been assigned by the petitioner (assignor) to the respondent (assignee). Clause 2.3 (a) reflects the obligation of the assignee / respondent to keep the said receivables in a Designated Account in terms of a Designated Account Agreement dated 30.8.2019/4.8.2020/4.11.2020. Clause 2.3(c) provides that such amounts shall be transferred by the respondent (assignee) to the petitioner (assignor) and that the petitioner shall ensure that these amounts are deposited in the relevant government/regulatory authorities. Clause 2.3 also provides that the amounts deposited in the Designated Account shall be withdrawn in accordance with the terms and conditions of the Designated Account Agreements.

6. Clause 1.1 of the said Agreement defines “tax” to mean any direct or indirect tax, cess rate or duty on sale or lease of or any provision for goods or services and includes tax deducted at source, excise duty, import duty, export duty on import, etc. “Excluded amounts” is also defined in clause 1.1 to mean

and include any indirect taxes paid by the renter under the Renting Agreement and the relevant Rental Schedules.

7. On a plain reading of the Clauses of the Agreements for Assignment, it is clear that pursuant to the assignment made by the assignor / petitioner in favour of the assignee / respondent of the Master Operating Lease Agreement, the assignee / respondent was to collect the receivables and transfer the tax component to the assignor / petitioner who thereafter would deposit the same with the statutory authorities.

8. Learned counsel for the petitioner places demand notices from 6.8.2021 till 6.6.2023 whereby the petitioner demanded transfer of the tax component from the receivable to the Designated Account of the petitioner and submits that the respondent did not reply to any of these demand notices. Counsel hence submits that since the Assignment Agreement contains an arbitration clause, this is a fit case for a prayer for interim relief to the extent that the respondent be restrained from dealing with any amount from the Designated Accounts maintained with the respondent Bank till disposal of a requisite application before the arbitral tribunal.

9. Admittedly, the respondent / assignee did not comply with the clauses of the Agreement despite several notices being sent by the petitioner to the respondent on 6.8.2021, 20.6.2022, 16.8.2022 and 6.6.2023. The petitioner was constrained to file the present applications for interim relief.

10. The defense taken on behalf of the respondent is first that the present applications are not maintainable since the petitioner has already invoked the arbitration clauses in the Agreement by way of notices issued under section 21 of the Act. This defense is however not available to the respondent in view of section 9 of the Act itself which provides that a party can apply to a Court for interim measures before or during arbitral proceedings or even after making of the arbitral award but before the award is enforced under section 36 of the Act. Hence, the argument lacks statutory basis. In any event, it is undisputed that the petitioner did not invoke the arbitration clauses by way of a section 21 notice in respect of the Assignment Agreement dated 17.1.2019 and had instead issued a combined notice under section 21 on 10.11.2022 under several agreements. Even if the respondents' case is accepted the letters issued by the respondent in June, 2021 and June – August, 2022 show that the respondent did not agree to the contentions of the petitioner.

11. It is further submitted by learned counsel for the respondent that the petitioner has failed to comply with the pre-requisites of the Assignment Agreement and the Designated Account Agreement including the specific clauses therein. The primary contention in this regard is that the respondent Bank/assignee is entitled to retain the excess amount for adjusting any shortfall in the rent receivable due from the petitioner and that the respondent has exercised Banker's Lien under section 171 of the Indian Contract Act, 1872 for this reason. Counsel submits that the respondent has more than 30 crores outstanding from the petitioner. Counsel further submits that the schedule of

GST dues recoverable from the respondent is an unverified document. Counsel also submits that the petitioner has not been able to establish a prima facie case, irreparable injury or balance of convenience in favour of the petitioner for grant of the interim relief prayed for.

12. In any event, the Supreme Court in *Arcelor Mittal Nippon Steel India Limited vs. Essar Bulk Terminal Limited*; (2022) 1 SCC 712 held that the Court has discretion to pass a limited order of interim protection under section 9 of the 1996 Act if the application had been entertained before constitution of the tribunal and thereafter direct the parties to approach the arbitral tribunal. In that case, the Supreme Court further went to hold that the Court can entertain an application under section 9 even after constitution of the arbitral tribunal under section 9(3) of the Act where the Court had applied its mind to the matter. Hence, the respondent's objection to entertaining the present applications is contrary to statute as well as to the case law.

13. The respondent's objection on the ground of suppression of material facts is also not tenable since the respondent has only relied on 4 replies given by it which are not disclosed in the applications. It is well settled that for an application to fail on the ground of suppression, the suppression must be material and relevant to the cause of action and the relief prayed for. In the present case, the respondent's replies to the petitioner's letters do not have the weightage which would persuade this Court to reject the applications on the ground of suppression.

14. The third objection of the petitioner not showing a manifest intention to refer the disputes to arbitration would be belied from the pleadings in the applications where the petitioner has specifically stated that the interim relief is warranted only till formation of the arbitral tribunal for adjudicating the larger disputes between the parties and disposal of the applications for interim relief before the tribunal. *Sundaram Finance Ltd. vs. NEPC India Limited; (1999) 2 SCC 479* dealt with the facts where the Supreme Court was of the view that a party applying under section 9 before issuing a notice under section 21 of the Act must first satisfy the Court that there exists a valid arbitration agreement and the applicant intends to take dispute to arbitration. The Supreme Court was also of the view that in such cases, the Court can pass a conditional order to put the applicant on such terms as the Court may deem fit with a view to ensuring that the applicant takes effective steps for commencing the arbitral proceedings. The Supreme Court significantly held that the Court is not debarred from dealing with an application under section 9 merely because the arbitration agreement has not been invoked under section 21 of the Act.

15. The question whether the petitioner has refused to comply with the specific clauses of the Assignment Agreement is a question which can be entertained by the arbitral tribunal before final adjudication of the claims / counter-claims of the parties and the disputes raised therein. Section 9 of the Act contemplates interim measures which would afford relief to the applicant pending arbitration and that too for a temporary time period until the disputes

are finally adjudicated by the arbitral tribunal. Moreover, the petitioner does not seek interim relief which would have an irreversible prejudice on the respondent. The interim relief sought for is only for a direction on the respondent from dealing with the amount in the Escrow Accounts in accordance with the terms of the Assignment Agreements. This is in the nature of preservation of the subject matter of the dispute which is contemplated under section 9(i)(a) and (c) of the Act and the Court has the power to grant such relief upon exercising discretion on the facts and materials placed before it.

16. The respondent's reliance on clause 5.4 of the Designated Account Agreement by which the respondent is allegedly authorised to retain excess amounts for any shortfall in the Rent Receivables or for outstanding dues from the petitioner is again a matter which must be gone into by the arbitral tribunal on evidence placed before it. A Court exercising discretion under section 9 will assess the matter on the common tests for grant of injunction.

17. Upon considering the facts and circumstances placed before this court, the petitioner has established a case for interim relief under section 9 of the Act. The stand taken on behalf of the parties makes it abundantly clear that the subject matters of the disputes are to be preserved until the arbitral tribunal is constituted. If the respondent proceeds to deal with the money in the Escrow Accounts, the petitioner will irreversibly be prejudiced and nothing will remain to be decided in the arbitration. The balance of convenience, the

irrevocable injury and the case made out hence demands interim orders as prayed for.

18. AP 408 of 2023, AP 409 of 2023, AP 411 of 2023 and AP 412 of 2023 are accordingly allowed and disposed of by directing the respondent Bank not to transfer or deal with the amounts in the Escrow Accounts bearing the numbers namely A/c. No. 2105107000000032, A/c. No. 2105107000000126, A/c. No. 2105107000000081 and A/c. No. 2105107000000138 mentioned in the applications till formation of the arbitral tribunal and until the parties can approach the tribunal under section 17 of the 1996 Act. The parties are directed to take expeditious steps for formation of the arbitral tribunal. This direction is in keeping with section 9(2) of the 1996 Act which mandates that arbitral proceedings shall be commenced within a period of 90 days from the date of any interim measures of protection or within such time as the Court may direct.

19. There shall be no order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)