

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ARBITRATION APPEAL NO.2 OF 2023

SHANKAR SAHKARI SAKHAR KARKHANA LTD THR ITS LE-
GAL OFFICER SACHIN B KARCHE

VERSUS

AMBIKA BIO ENERGY PVT. LTD THR ITS AUTHORIZED
PERSON DINESHKUMAR M INNANI AND ANOTHER

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Mr. S. C. Arora, Advocate for the Appellant.

Mr. Swapnil Rathi, Advocate for Respondent No.1.

CORAM : SHARMILA U. DESHMUKH, J.

RESERVED ON : 10.02.2023.

PRONOUNCED ON : 02.03.2023.

FINAL ORDER:-

1. This Arbitration Appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'Act, 1996') challenging the order dated 22.12.2022 passed in Arbitration Case No.210/2022 filed under Section 9 of the Act, 1996.

2. The facts of the case are as under:

A tripartite agreement for purchase of ethanol came to be executed between the respondent no.1, appellant and respondent no.2 on 25.07.2021, wherein Respondent No 1 was referred as "purchaser", Appellant was referred as "manufacturer" and Respondent No 2 was referred as "guarantor". Under the terms of the agreement, the manufacturer and guarantor was to supply to the purchaser or its nominee 60 lakhs bulk litre Ethanol of B heavy molasses primarily by the manufacturer and secondarily by guarantor before 28.02.2022 for sale price of Rs.39/- per bulk

litre. The payment terms are set out in clause 3 of the agreement, which is reproduced hereinbelow:

“3. Advance Payment:

In consideration of the manufacture primarily and guarantor secondarily having agreed to enter into fixed price agreement, the purchaser has at request of the manufacturer and guarantor agrees to pay a sum of Rs.20,00,00,000.00 (Rs. Twenty Crores Only). On or before 27th July 2021 and remaining payment at the time of delivery or mutual understanding. The advance payment shall be adjusted towards the basic cost of ETHANOL and taxes thereon. The taxes and duties for the materials lifted during the tenure of the agreement shall be paid by the manufacturer and guarantor from the advance amount. There shall be no interest payable on this advance payment, subject to delivery of ETHANOL as per agreed quantity as per schedule given hereunder. If manufacturer and guarantor failed to perform the agreement and failed to supply agreed quantity of ETHANOL then manufacturer and guarantor shall be liable to pay interest on advance amount as agreed in this agreement.”

3. Clause 7 of the agreement records that during the period of this agreement the appellant and respondent no.2 will duly operate the plant to produce the total quantity agreed upon and shall ensure that all times, it shall have adequate stock of raw material to produce ethanol. The relevant sub-Clause 4 of Clause 7 is reproduced hereinbelow:

“7.4. The manufacturer shall not sell, transfer, alienate, create any third party right in any manner whatsoever, otherwise dispose stock of molasses, RS, ENA, ETHANOL or the product or any portion thereof to any third party or person other than the purchaser and/or shall not enter into any negotiation, understanding or agreement for any of the aforesaid until and unless the manufacturer and guarantor has delivered to the purchaser the total quantity and the purchaser has exercised its rights of election in accordance with clause 7.3 above.”

4. Clause 11 of the agreement provided for the term of the agreement from the date of execution till its completion.

5. Clause 12 of the agreement is the agreement to refer the dispute to arbitration and is reproduced hereinbelow:

“12.ARBITRATION:

In the event of any dispute or difference including relating to the breach, default, termination, non-payment of the money due to hereunder or the validity hereof, arising between the parties under or in connection with this agreement. Such dispute or difference shall be submitted to arbitration of a Sole arbitrator. The arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996. The arbitral award shall be final and binding on both the parties. Place of arbitration shall be LATUR only.”

6. The delivery schedule set out in the agreement is reproduced hereinbelow:

Delivery Schedule:

The delivery of the ETHANOL shall be is as under:

Sr. No.	Month	Minimum Quantity	Balance Quantity
1.	Nov 2021	1200 KL	4800KL
2.	December 2021	1200 KL	3600 KL
3.	January 2022	1200 KL	2400 KL
4.	February 2022	1200 KL	1200 KL
5.	March 2022	1200 KL	NIL

7. The various clauses of the agreement reproduced above reflects that the agreement between the parties was to supply 60 lakhs bulk litre ethanol at a sale price of Rs.39/- per bulk liter before 28.02.2022 and respondent no.1 was to pay sum of

Rs.20 crores on or before 27.07.2021 and the remaining payment at the time of delivery or mutual understanding, which advance payment was to be adjusted towards the basic cost of ethanol and taxes thereon and in event the appellant and respondent no.2 failed to perform the agreement and there was a failure of the delivery they were liable to pay interest on such advance amount during the period of this agreement i.e. till the entire transaction is completed. The appellant had undertaken not to sell, transfer, alienate, create any third party right in any manner whatsoever, otherwise dispose stock of molasses, RS, ENA, ETHANOL or the product or any portion thereof to any third party or person other than the purchaser and/or shall not enter into any negotiation unless and until the delivery of the total quantity has been completed.

8. On 12.01.2022 a communication was addressed by the appellant to respondent no.2 stating that they had lifted 499000.0 bulk liter SDS ethanol and they had balance of 60 lakhs bulk liter, which they had not picked up and were called upon to take the delivery of the ethanol. On 30.03.2022, the same request was reiterated to lift the delivery of the produced ethanol.

9. On 05.09.2022 a legal notice came to be issued by respondent no.1 to the appellant, wherein it was stated that the appellant and respondent no.2 have not complied with the terms of the agreement and failed to deliver the agreed quantity of ethanol and upto May-2022 only 3329/- KL ethanol was supplied and thereafter, appellant has withheld the supply of ethanol without any proper and justifiable reason. It was also stated that, after deduction of the costs of supplied product an amount of

Rs.4,66,46,135/- is lying with the appellant, which amounts to the unutilized advance amount. By the said notice, the appellant was directed to supply the remaining agreed quantity within a period of 15 days from the receipt of the notice, failing which the arbitration clause would be invoked.

10. On 16.09.2022, the appellant responded to the legal notice and denied that there was no failure to supply the agreed quantity. It was claimed that written communications had been issued for the purpose of taking delivery of 6 lakhs bulk litre ethanol, which respondent no.1 was unable to take and on account of failure on the part of respondent no.1 to take delivery of manufactured ethanol, they were forced to sell it out in the open market and as such, Clause 7.4 of the agreement has no bearing over the situation, as the circumstances were beyond the reasonable control of the appellant.

11. As the dispute arose between the parties an application came to be filed under Section 9 of the Act, 1996 by respondent no.1 seeking an order of injunction restraining the appellant and respondent no.2 from selling or creating any third party interest from selling molasses, RS, ENA, ETHANOL in any manner whatsoever till the supply of the agreed quantity of 2671 KL ethanol to the company.

12. Perusal of the application for interim relief indicates that, the cause of action is that appellant alienated and sold SDS to other companies such as Neha Chemicals Pvt. Ltd., Globus Petrol Additions Pvt. Ltd. etc. and as the SDS is converted into ethanol, the alienation affects the production of ethanol. The application proceeds on the basis that as the crushing season has

started the appellant is in haste to execute the agreement for supply of ethanol with the third parties despite legal obligations to supply the remaining quantity to the company. There is an admission in paragraph 18 of the application that only in the month of December 2021 due to some difficulties, respondent No 1 failed to lift the ethanol. The respondent no.1 has sought the interim measures to protect the interest of respondent no.1.

13. A reply came to be filed on 17.11.2022 to the application for interim relief opposing the application. It is stated in the reply that there was a delay on the part of respondent no.1 to fulfill its obligations to pay Rs.20 crores by 27.07.2021 resulting in delay of supply of quantity. It is further stated that, appellant has a capacity of manufacturing of 30,000 bulk litre per day and in such scenario, it is not possible to curtail the sale of heavy molasses, which gets manufactured during the crushing season and wait for respondent no.1 to take the delivery of the quantity.

14. The District Court observed that the Respondent No 1 has made out a prima facie case as from the various terms of the agreement it appears that there was an agreement to supply the agreed quantity and an agreement not to sell the Ethanol by them to any third party till the delivery of the entire quantity. It was observed that as there is no dispute that there was sale in favour of third party, prima facie the Appellant has committed breach of contract. It was observed that in the absence of any reason shown by the Appellant as to why and how they are liable to supply only to the extent of amount received in advance, the District Court held that prima facie case is made out and there is balance of convenience in favour of Respondent No 1. As regards the irrepara-

ble loss, it was held that apart from financial loss due to non supply by the Appellant, the Respondent No 1 Company will lose its goodwill. The District Court passed the following order:

“1) The application is hereby allowed with costs as under.

2) The respondent No.1 and 2 shall jointly and severally supply the remaining quantity of 2671 KL of Ethanol to the applicant/company as per earlier terms agreed between the parties.

3) Pending the supply of entire quantity of 2671 KL of Ethanol to applicant company, the respondents are restrained from selling it to any third party or create any third party interest in any manner whatsoever in respect of molasses, SDS, ENA and ethanol.

4) The respondents shall supply the remaining quantity of ethanol as per agreed terms from the month of December 2022 or January 2023.

5) The above said directions are subject to the decision of Arbitrator if the arbitral proceeding is initiated and commenced by either of the parties.

6) The application is hereby disposed off in above terms.

7) Parties to note.”

15. Heard the learned counsel appearing for the parties.

16. Mr. Arora, learned counsel for the appellant submits that as per the agreement the amount of Rs.20 crores was to be paid on or before 27.07.2021, however, the amount came to be

paid on 29.11.2021. He would further submit that, inspite of the communications dated 12.01.2022 and 30.03.2022, respondent no.1 failed to lift the delivery of the ethanol and as such, there is no default on the part of the appellant to comply with its obligations under the agreement. He would further submit that there was no notice issued to the appellant invoking arbitration clause before the filing of the application under Section 9 of the Act, 1996. He would further contend that from the perusal of an application under Section 9 filed by respondent no.1 it appears that there is no submission as regards the invocation of the arbitration clause.

17. He has strenuously urged that there is no intention on the part of respondent no.1 to commence arbitration proceedings. In support of his contention he relies upon the following decisions of the Apex Court:

- (i) ***Firm Ashok Traders and another etc Vs. Gurumukh Das Saluja and others etc., reported in AIR 2004 Supreme Court 1433.***
- (ii) ***Sundaram Finance Ltd Vs. NEPC India Ltd, reported in AIR 1999 Supreme Court 565.***
- (iii) ***DLF Ltd Vs. Leighton India Contractors Private Ltd and Another, reported in 2021 SCC OnLine Del 3772.***

18. Per contra, learned counsel appearing for the respondent no.1 submits that the decisions relied upon by the appellant are not applicable in as much as there was an amendment in the year 2015 to the Arbitration Act and the plain reading of sub-Section (2) of Section 9 of the Act, 1996 shows that interim measures are contemplated only for a period of 90 days. He would further submit that in the application under Section 9 of the Act, 1996,

the chart has been produced, which shows that the appellant has breached the terms of the contract and has supplied to the other parties from the period November 2021 to June 2022 total quantity of 1635700 bulk liter. He would further submit that the appellant has admitted the capacity of manufacturing 30,000 bulk liters per day and even if, supply to respondent no.1 is concerned, it would take not less than 200 days for the entire supply to be completed. As regards the invocation of the arbitration clause is concerned, he would submit that the period of 90 days contemplated under Section 9 is not yet completed and as such, the contention of the learned counsel for the appellant that there is no intention to invoke arbitration is not correct.

19. Considered the rival submissions of the parties.

20. At this stage, it is first necessary to reproduce Section 9 of the Act, 1996, as it is the submission of the learned counsel for the appellant that there was no notice issued invoking arbitration clause before preferring the application under Section 9 of the Act, 1996. Section 9 of the Act, 1996 reads thus:

“9. Interim measures, etc., by Court.—3[(1)] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

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.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) 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.”

21. Section 9 of the Act, 1996 was enacted for the purpose of granting interim measures by the Court and as per sub-Section (1) of Section 9 a party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court for interim measures. The Apex Court in case of ***Sundaram Finance Ltd Vs. NEPC India Ltd*** (supra) held that what is

required to be considered is whether a case has been made out by respondent no.1 for grant of interim measures. In order to give full effect to the words “*before or during arbitral proceedings*” it is not necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under Section 9 of the Act, 1996 can be filed.

22. As per the terms and conditions of the tripartite agreement, the appellant had to supply 60 lakhs bulk litre ethanol of B heavy molasses before 28.02.2022 at the rate of Rs.39/- per bulk liter and till the delivery is completed of the total quantity, the appellant could not sell, transfer or alienate not only ethanol but stock of molasses, RS, ENA or the product or any portion thereof to any third party. As far as respondent no.1 is concerned, the obligation was on the respondent to make advance payment of Rs.20 crores on or before 27.07.2021 and the remaining payment at the time of delivery and the advance payment was to be adjusted towards the basic costs of ethanol and the taxes thereon. At page 32 of the appeal the appellant has produced a statement, which has not been disputed by the learned counsel for respondent no.1. This statement shows that the amount of Rs.20 crores was paid by 29.11.2021. Although, as per tripartite agreement an amount had to be paid on or before 27.07.2021, the payment has been accepted by the appellant and as such, the appellant is deemed to have extended the time limit set out for the payment and has accepted the performance of the contract as regards the payment.

23. Rival submissions alleging breach of contract by other party has been raised. Appellant contends that there was breach

by the Respondent No 1 as they failed to take the delivery of the product, which compelled the Appellant to issue communications dated 12.01.2022 and 30.03.2022 and as per the Respondent No 1, the Appellant is in breach in as much as instead of delivering the product to the Respondent No 1, the Appellant has sold it to third party.

24. The determination of the question of breach is required to be left for adjudication in arbitration proceedings. At present, this Court is called upon to examine the validity of the grant of interim measure under Section 9 of the Act. The application under Section 9 of the Act alleges that there is violation of the agreement executed between the parties and seeks an order of injunction restraining the Appellant from selling or creating third party interest, transferring or alienating molasses, SDS, Ethanol till the supply to the Respondent No 1 is completed. As such, respondent no.1 seeks an order of injunction pending the claim for specific performance of the agreement dated 25.07.2021.

25. There is no dispute as regards the existence of the tripartite agreement, the terms of the contract and the fact that the entire advance amount has not been utilized. The Respondent No. 1 has approached the Court with a case that there is breach of the contract and to prevent the breach of the contract interim relief of injunction is sought. The settled position is that the considerations which apply to any application for temporary injunction will apply to an application under Section 9 of the Act i.e. prima facie case, balance of convenience and irreparable loss. In the present case, as far as prima facie case is concerned, it is not disputed that SDS was supplied

to third party. In the hearing before the District Court, the submission of the Appellant was that they are ready to supply the Ethanol against the amount received as advance only. The terms of the agreement make it clear that the Appellant are bound to supply the total agreed quantity by accepting the advance and after utilising the said amount, further supply to be made by accepting the payment.

26. The terms of the agreement makes it clear that what was agreed upon between the parties was:

- i) supply by the Appellant of 60 lakhs bulk litre Ethanol of B heavy molasses to the Respondent No 1.
- ii) Respondent No 1 to make advance payment of Rs 20,00,00,000/ (Rupees Twenty Crores only) to be adjusted towards the basic cost of Ethanol and taxes thereon and remaining payment at time of delivery or mutual understanding.
- iii) Till the completion of delivery not to sell, transfer, alienate or create third party right in the stock of molasses, RS, ENA, Ethanol or the product or any portion thereof to any third party.

The delivery schedule shows that the delivery was to be completed between the period from November, 2021 to March, 2022. The chart which is annexed at Page 32 of the Petition indicates that from December, 2021 till May, 2022 the delivery was taken by the Respondent No 1 aggregating to 33,29,000 Bulk Litre. It is not denied that there was sale of SDS by the Appellant to third parties during the period November, 2021 to June, 2022. The explanation tendered is that the Appellant has capacity to manufacture 30,000 bulk litre per day and the Respondent No 1 was not taking the delivery and the agreements with third parties

was prior in time. It is evident from the chart annexed by the Appellant that there was supply of Ethanol to the Respondent No 1 and hence it cannot be said that the Respondent No 1 was not lifting the quantity. The Appellant was aware that as per Clause 7.4 of the agreement, the Appellant is restrained from selling to third party till the delivery of the Respondent No 1 is completed. As such there appears to be prima facie case made out for grant of interim protection. However alongwith the prima facie, the balance of convenience and irreparable loss is required to be considered. As regards the irreparable loss, the impugned order records that due to non supply of the material the Respondent No 1 will lose goodwill and will also suffer financial loss. The Respondent No 1 has not made out a case that the product which is agreed to be supplied cannot be procured from any other source. On the contrary, Clause 4 of the Agreement provides for such contingency.

27. Even if there is prima facie case in favour of the Respondent No 1, Court will refuse the temporary injunction if the injury suffered on account of refusal of temporary injunction is not irreparable. The Apex Court in the case of **Dalpat Kumar & Anr vs Pralhad Singh & Ors (1992) 1 SCC 719** held as under:

“ Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in “irreparable injury” to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be material one, namely, one that cannot be adequately compensated by way of damages.”

28. In the present case the consequence of non compliance is provided in Clause 4 of the agreement, which reads thus:

“4. DELIVERY AND PAYMENT:

1. The manufacturer primarily and in event of failure by manufacture, then, guarantor secondarily shall deliver to the purchaser or its nominee the as per the schedule of supply agreed by and between the manufacturer, guarantor and the purchaser. The manufacturer and guarantor agree that time of delivery shall be of essence.

2. If the quantity delivered by the manufacturer and guarantor in any month is more than the minimum monthly scheduled quantity than the excess quantity shall be adjusted against the delivery for the next month.

3. If the manufacturer and guarantor is unable to deliver the minimum monthly quantity in any month, then the purchaser may at its discretion, may agree to such short delivery for that specific month, provided that the shortfall shall be made up by the manufacturer and guarantor in the immediate next month.

4. If the manufacturer and guarantor fails to deliver the monthly minimum quantity or any such quantity or shall deliver less quantity than the agreed quantity, as per this agreement than the purchaser at its sole discretion shall be entitled to do the following, each of which will be in addition to and without prejudice to each other.

a) Extend the period of this agreement.

b) Claim the amount over and above the market price along with the interest @ 24% per annum.

c) If the purchaser has to purchase the quantity not supplied by the seller than the seller and the guarantor will have to pay the differential amount as the penalty for not supplying the materials along with 24 % interest on the amount of the materials till it is paid.

d) Manufacturer and the Guarantor are liable to pay interest on the remaining advance amount @ 24% PA from the date of advance.

Extension of agreement doesn't suspend or forfeit other rights of purchaser as stated above.”

Clause 4 of the Agreement anticipates the situation where the delivery is made of quantity less than the agreed quantity, then in such event, the Respondent No 1 is entitled to claim the amount over and above the market price alongwith interest @ 24% per annum and in event the purchase is required to be made by the Respondent No 1 for the quantity not supplied by the Appellant, the differential amount alongwith interest @ 24% will be imposed as penalty. Applying the principle set out by the Apex Court in the decision of **Dalpat Kumar & Anr** (supra), in my opinion, the injury complained of can adequately be compensated in terms of money and hence the respondent no.1 has failed to make out case of irreparable loss.

29. Another aspect which is required to be noted that the application for interim measure sought the relief of restrain from selling or creating third party interest or alienating molasses, SDS, ENA, Ethanol in any manner till the supply of the agreed quantity. The District Court not only passed restraining order but directed the supply of the agreed quantity of Ethanol as per the terms of the agreement, thereby granting the relief of specific performance of the agreement at the interim stage. In my opinion, the relief of specific performance of agreement was in the nature of final relief and by granting the final relief at interim stage there was nothing left for adjudication in the arbitration proceedings, if initiated.

30. The agreement executed between the parties is private commercial agreement. In the case of **Rajasthan Breweries Ltd vs The Stroh Brewery Company**, reported in **AIR 2000 Delhi 450** the

Single Judge of the Delhi High Court has observed that even in the absence of a specific clause authorising an enabling either party to terminate agreement, from the very nature of the agreement which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. Even if it is ultimately found that the termination was bad in law or contrary to the terms of the agreement, the remedy of the party would be to seek compensation for wrongful termination and not a claim for specific performance of the agreement.

31. In my opinion, even if prima facie of breach of contract is made out by the Respondent No 1, the application of injunction must fail on the ground of absence of irreparable injury in view of remedy available to the party to claim compensation according to Clause 4 of the Agreement.

32. For the reasons above, the Arbitration Appeal succeeds. The impugned order dated 22.12.2022 is hereby quashed and set aside.

(SHARMILA U. DESHMUKH)
JUDGE