

FAO-CARB-2-2023 (O&M)

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

FAO-CARB-2-2023 (O&M)

Date of decision : 28.02.2023

M/s Hopeberry Diagnostics and Healthcare LLP,
New Delhi and others

.....Appellants

VERSUS

Philips India Ltd., Gurugram

....Respondent

**CORAM:- HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE VIKRAM AGGARWAL**

Present: Mr. Anmol Singh, Advocate and
Ms. Aditi Gupta, Advocate, for the appellants.

Mr. Amandeep S. Talwar, Advocate, for the respondent.

AUGUSTINE GEORGE MASIH, J.

Challenge in this appeal is to the order dated 17.12.2022 passed by the Presiding Judge, Exclusive Commercial Court at Gurugram, whereby the petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act') preferred by the respondent – Philips India Limited, stands allowed.

Notice of motion.

Mr. Amandeep S. Talwar, Advocate, has put in appearance on behalf of the respondent. Caveat stands discharged.

Brief facts of the case are that a lease agreement dated 25.10.2019 was duly executed between the appellants and the respondent, wherein medical equipments i.e. 3T MRI-Ingenia CX 3T, 128 Slice CT-Ingenuity Elite CT and Intellispace Portal JX/LX along with third party items

of the respondent were installed on lease basis at the premises of the appellants. Appellants had agreed to pay the respondent for lease/use of the medical equipments as per monthly rental schedule which stretched over a period of 84 months (7 years), which on default having been committed by appellant No.1 in its payment obligation, a petition under Section 9 of the Arbitration Act was preferred, during the pendency of which it was agreed to restructuring the payment obligation and a supplementary agreement dated 22.07.2021 having effect from 01.07.2021 was entered into between the parties leading to the withdrawal of the said petition.

As per the supplementary agreement, advance cheques were paid to the respondent which were dishonoured, for which proceedings under Section 138 of the Negotiable Instruments Act, 1881, were initiated. Appellants having failed to honour their commitment led to the respondent serving a demand notice dated 23.02.2022 upon appellant No.1 seeking payment of ₹11,83,41,247/- as per the lease-deed to be paid within a period of 30 days from the date of receipt of notice. When no reply was received from the appellants, notice of termination of lease agreement dated 25.10.2019 was served by the respondent on the appellants on 07.04.2022 seeking handing-over of leased 'equipments' within a period of seven days of such notice. Appellants being silent on said notice, respondent issued a notice dated 25.10.2019 to the guarantors to invoke personal guarantee as was issued in favour of the respondent but without any result.

Respondent reasonably anticipated that the appellants may part with the possession of the equipments which are of very high value leading to creation of 3rd party rights with an intention to defeat the lawful and just claims of the respondent and to minimize the foreseeable risks as the

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appellants were unable to maintain the equipments which would result in breakdown and disabling the equipments leading to they being rendered unusable invoked provisions of Section 9 of the Arbitration Act. Despite opportunities having been given to the appellants for filing reply/response when they failed in it, their defence was struck off vide order dated 06.09.2022.

The Commercial Court, thereafter, proceeded to hear the counsel for the parties and decide the petition under Section 9 by allowing the same and ordering the appointment of a receiver to take possession of the medical equipments and to retain possession thereof subject to the decision of the Arbitrator. An advocate was also appointed as Local Commissioner in whose presence the medical equipments were to be taken into possession for which police help could also be taken. Inventory to be prepared and signed by the appellants/AR and on refusal thereof, the SHO of the concerned police station could sign the said document where the equipments are taken in possession in case of police assistance. Respondent has also been restrained from alienating/transferring/selling or handing-over possession of the equipments till the conclusion of the arbitration proceedings. A rider has also been put that the respondent shall ensure initiation of arbitration proceedings within a period of 90 days from the date of passing of the order dated 17.12.2022, failing which the said order shall stand automatically vacated. It is this order which has been challenged in the present appeal.

It is the contention of the learned counsel for the appellants that the Court below has failed to appreciate that the respondent had never sent a notice for invoking the arbitration clause nor any application has been moved under Section 11 of the Arbitration Act for appointment of an Arbitrator

which clearly reflects that the respondent had no intention whatsoever to commence arbitration proceedings or adjudication of the dispute between the parties. Without there being any intent before the initiation of proceedings under Section 9, the Court below could not have entertained the said petition and rejected the same on this ground itself. Counsel contends that the interim relief which has been prayed for and granted by the Court below vide the impugned order amounts to granting final relief which is not permissible in law. As an interim measure, the final relief cannot be granted which is a settled proposition of law and therefore, the order impugned is bad and unsustainable. Apart from that, it has been asserted that the respondent has abused the process of law by invoking a remedy which would not be permissible in law before commencement of the arbitration proceedings under Section 11 of the Arbitration Act.

It has further been contended that the Court below while assessing the claim for grant of interim relief is mandated to weigh the balance of convenience viz-a-viz the parties and on assessment thereof, whoever is likely to suffer an irreparable loss and hardship, should be granted or denied an interim order. In the case in hand, the balance of convenience is in favour of the appellants and therefore, the Court below has wrongly granted the benefit of interim relief.

Another plea which has been taken by the learned counsel for the appellants is that the property in question is required to be preserved which is the subject matter of the dispute till the Arbitral Tribunal decides the dispute and the scope of Section 9 cannot be extended to directing the specific performance of the contract itself. That apart, it is asserted that the property in question i.e. medical equipments are to be taken out of the territorial

jurisdiction of the Court which would lead to the Court losing control over the property and thus, is unsustainable.

Learned counsel for the appellants has further asserted that the appellants had stopped the monthly payment for the reasons that the respondent was not providing maintenance services to the medical equipments and therefore, did not comply with its responsibility as was specified in the agreement. Thus, withholding of the amount of payment was fully justified.

On these grounds, learned counsel for the appellants submits that the impugned order dated 17.12.2022 passed by the Presiding Judge, Exclusive Commercial Court at Gurugram, allowing the petition under Section 9 of the Arbitration Act, cannot sustain and deserves to be set aside.

Learned counsel for the respondent, on the other hand, has contradicted the stand as has been taken by the appellants by referring to the pleadings and the impugned order. It has been asserted that the terms and conditions of the contract/agreement leave no manner of doubt that in case of a default on the part of a party especially as in the present case, where the appellants have not honoured their part of obligation, the respondent was entitled to take possession of the medical equipments. He has further contended that the Court below had satisfied itself with regard to the ambit and scope of the agreement apart from the fact that the interim measure of protection under Section 9 of the Arbitration Act needs to be provided. The satisfaction is apparent and writ large as it has been admitted by the counsel for the appellants before the Court below that they were unable to properly maintain the equipments on their own. As per terms of Articles 11 and 12 of the agreement, the respondent had a right to re-possess the medical equipments and was rightly apprehending that the appellants did not have the

adequate resources to carry out the periodic maintenance so that they could be in good running condition for a long term. Non-providing of such maintenance would lead to deterioration of the equipments further leading to depletion of the value which would adversely affect the right of the respondent.

Learned counsel for the respondent has referred to the order passed by the Court below to contend that the initiation of the arbitration proceedings within a period of 90 days from the date of passing of the order and failing which, the same would lead to vacation of the said order takes ample care of the apprehension of the appellants that the respondent would not invoke arbitration proceedings. The order which has been passed by the Court below being in accordance with the law does not call for any interference.

Having considered the submissions made by the learned counsel for the parties and on going through the impugned order, we do not find ourselves in a position to accept the submissions as have been made by the learned counsel for the appellants for challenging the impugned order dated 17.12.2022 passed by the Presiding Judge, Exclusive Commercial Court at Gurugram.

The factum with regard to there being an agreement dated 25.10.2019 and thereafter, a supplementary agreement dated 22.07.2021 which was to come into effect from 01.07.2021 is not in dispute nor is it disputed that as per the supplementary agreement dated 22.07.2021, cheques were issued by the appellants qua the payment of lease amount stood dishonoured, for which proceedings under Section 138 of the Negotiable Instruments Act, 1881, were initiated. Failure to make payment of the lease

amount leads to a conclusion that there was an event of default at the hands of the appellants. Justification as has been sought to be projected by the appellants for non-payment of the lease amount is that the respondent had stopped servicing and maintaining the equipments. The said argument as has been raised has been disbelieved by the Court below on the ground that none of the communications between the parties indicates any such reason for withholding of the payment. There was rather no issue with regard to non-providing of any maintenance between the appellants or the respondent. In the reply which has been given by the appellants to the demand notice as well as legal notice, there is no whisper in this regard, which clearly shows that it is a mere afterthought which has been culled out to make an excuse showing justification for non-payment of the lease amount, which the appellants were required to pay on monthly basis for a period of 84 months i.e. seven years, as per the terms of the agreement.

In terms of Article 5 (i) (a) of the lease agreement, default in payment of monthly rent is an 'Event of Default' which has been cured as per Article 5 (ii) but despite issuance of legal notices dated 23.02.2022 and 07.04.2022, no efforts were made by the appellants to correct the default or cure it. In terms of Article 11 or 12, the medical equipments could be taken back in possession. In the absence of there being adequate resources at the hands of the appellants to carry out the necessary periodic maintenance of the equipments to keep them in good running condition which would keep the equipments from deteriorating and depletion of the value, the respondent was justified in invoking Section 9 of the Arbitration Act for an interim relief/protection. The apprehension was not mere a fiction but was based upon ground realities as were prevalent in the facts and circumstances of the

case to avoid irreparable loss to the respondent.

Learned trial Court has rightly relied upon the judgment of the Hon'ble Supreme Court in **Sundaram Finance Ltd. Vs. NEPC India Ltd.** (1999) 2 SCC 479, where it has been clearly held that the Court after having satisfied itself that there exists valid arbitration agreement and the applicant intends to take the dispute to arbitration, the Commercial Court will have jurisdiction under Section 9 giving such interim protection as the facts and circumstances warrant. The Court shall also ensure that effective steps are taken to commence arbitration proceedings even by passing conditional order to put the applicant to such terms with regard to initiation and taking effective steps for commencement of arbitration proceedings. It has categorically been held that the Court is not debarred from dealing with an application under Section 9 merely because no notice has been issued under Section 21 of the Arbitration Act.

The argument, thus, in the given facts and circumstances of the counsel for the appellants that the respondent has no intention for invoking the arbitration proceedings and could not have approached the Court under Section 9 of the Arbitration Act would not be sustainable. However, it may be added here that the Exclusive Commercial Court, vide the impugned order, has categorically held that in case the arbitration proceedings are not initiated by the respondent within 90 days of passing of the impugned order, the said order shall stand automatically vacated. So it is not the blanket order passed by the Court below as has been sought to be projected by the counsel for the appellants.

The other pleas as have been sought to be taken with regard to the territorial jurisdiction and the removal of the goods/equipments out of

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Gurugram, suffice it to say that the Court has placed ample safeguards in this regard while allowing petition under Section 9 by putting embargoes and riders to ensure that the equipment is properly kept in custody of the receiver who would not only take possession of the medical equipments but would also see to it that the respondent shall not alienate/transfer/sell or hand-over possession of the equipments till the conclusion of the arbitration proceedings. The very purpose of passing such an order was to safeguard the interest of the parties especially the respondent, who is, as per the terms of the agreement, suppliers of the said medical equipments.

Moreover, the trial Court has rightly granted the interim relief in favour of the respondent as the respondent has a *prima facie* case in its favour and balance of convenience also lies in its favour and if interim relief was not granted in favour of the respondent, an irreparable loss would be caused to it.

In the light of the above, finding no merit in the present appeal, the same stands dismissed.

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In the light of the dismissal of the main appeal, no orders are required to be passed in the present application for stay as the same has been rendered infructuous.

Disposed of as such.

(AUGUSTINE GEORGE MASIH)
JUDGE

28.02.2023
Harish

(VIKRAM AGGARWAL)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No