

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Date of order: 1st May, 2023**
+ **O.M.P. (I) (COMM.) 130/2023**
SMT. SUNITA GARG Petitioner

Through: Counsel for the petitioner
(Appearance not given)

versus

M/S SCRAFT PRODUCT (P) LTD & ORS. Respondents

Through: Nemo

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

I.A. 8308/2023 (Exemption)

Exemption allowed subject to just exceptions.

The application stands disposed of.

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1. The instant petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter "The Act, 1996") has been filed on behalf of petitioner seeking the following reliefs:-

"(i) The respondents No.1 may be directed to deposit a sum of Rs 71, 54,865/- (Rupees Seventy-One Lakhs Fifty-Four Thousand Eight Hundred and Sixty-Five only) before the Hon'ble Court and arrears of rent mentioned in para No.5 in the petition.

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(ii) The respondent No.1 may be directed to furnish bank guarantee towards payment of arrears of rent.

(iii) Any other relief which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case may be passed in favour of the petitioner and against the respondents."

2. Learned counsel for the petitioner submitted that the petitioner *inter alia* seeks the interim injunction directing the respondent No. 1 to deposit a sum of Rs. 71,54,865/- along with GST @ 18% in the form of bank guarantee in the Court.

3. It is submitted that the petitioner is the owner of the property bearing No. 2617(7-5),8(3-12),13(2-16),14(8-0), total area measuring 21 Kanal 13 Marle Khewat No. 384,387, Khata No. 422,425 in Village-Joshi Chauhan, Distt. Sonapat, Haryana and the respondent No. 1 is company wherein respondent No. 2 to 4 are the directors of respondent No. 1.

4. It is further submitted that the respondent is stated to have been inducted as a tenant by virtue of the Lease Deed with the petitioner dated 15th December, 2019 in respect of area admeasuring approx. 25000 sq. feet on ground floor and approx. 25000 sq. feet on the first floor, including the mezzanine floor, sides, washroom and rooms at the back, Genset, panel and the sundry asset area, etc. at monthly rent of Rs. 8,00,000 exclusive of all other charges. As per clause Clause 15 of the Lease Deed the respondent was obligated to pay monthly rent. In case of default, respondent is obligated to pay rent for two months, otherwise a legal action can be taken.

5. It is submitted by learned counsel for the petitioner that the respondent No. 1 was liable to pay an amount of Rs 71,54,865/- from 1st

January 2022 to 30th April 2023 along with GST @ 18%. The arrears of the rent are mentioned as below:

Particulars	Amount (In Rupees)
Rent @ Rs. 8,40,000/- for the period from 01.01.2022 to 31.12.2022	1,00,80,000/-
Rent @ Rs. 8,82,000/- for the period from 01.01.2023 to 30.04.2023	35,28,000/-
GST@18%	24,49,440/-
Rent Already Paid along with GST less TDS	73,02,575/-
Security Deposit	16,00,000/-
TOTAL	71,54,865/-

6. It is submitted that the petitioner has terminated the Lease Deed vide legal notice dated 4th May 2022 and claimed an outstanding amount of Rs 29, 49,350/-. The petitioner sent notice under Section 21 of the Act, 1996 on 24th May 2022, to the respondent for invoking arbitration under clause 25 of the Lease Deed dated 15th December 2019 and sought appointment of an arbitrator. The Arbitration Clause, as contained in the said lease deed is as under:

“Clause-25

That if any dispute may arise in regard to interpretation and/or implementation of terms and conditions of this deed the same shall be the same shall be referred to the Arbitrator & conciliation Act, 1996, whose decision shall be final and binding on both the parties and/ or the same may be defended subject to Delhi Court Jurisdiction only ”

7. The petitioner had filed a petition before this Court under Section 11(6) of the Act, 1996 vide Arbitration Petition No. 997/2022. This Court had appointed an Arbitrator vide order dated 23rd February, 2023.

8. Learned counsel appearing on behalf of petitioner submitted that the petitioner reserves her right to file claim for damages before the learned Arbitral Tribunal. It is submitted that despite the appointment of Arbitrator under Section 11(6) of the Act, 1996 by this Court, the present petition is maintainable. It is further submitted that the initiation of proceedings before the learned Arbitrator takes time which would prejudice the rights of the petitioner. To bolster his submission, learned counsel for the petitioner relied upon the case of ***Arcelor Mittal Nippon Steel India Limited v. Essar Bulk Terminal Limited*, (2022) 1 SCC 712** wherein the Hon'ble Court Supreme Court held as under:

"89. The principles for grant of interim relief are (i) good prima facie case, (ii) balance of convenience in favour of grant of interim relief and (iii) irreparable injury or loss to the applicant for interim relief. Unless applications for interim measures are decided expeditiously, irreparable injury or prejudice may be caused to the party seeking interim relief.

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91. When an application has already been taken up for consideration and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not would not arise. The requirement to conduct the exercise arises only when the application is being entertained and/or taken up for consideration. As observed above, there could be numerous reasons which render the remedy under Section 17 inefficacious. To cite an example, the different arbitrators constituting an Arbitral Tribunal could be located at far

away places and not in a position to assemble immediately. In such a case, an application for urgent interim relief may have to be entertained by the Court under Section 9(1).

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98. It is reiterated that Section 9(1) enables the parties to an arbitration agreement to approach the appropriate court for interim measures before the commencement of arbitral proceedings, during arbitral proceedings or at any time after the making of an arbitral award but before it is enforced and in accordance with Section 36 of the Arbitration Act. The bar of Section 9(3) operates where the application under Section 9(1) had not been entertained till the constitution of the Arbitral Tribunal. Of course it hardly need be mentioned that even if an application under Section 9 had been entertained before the constitution of the Tribunal, the Court always has the discretion to direct the parties to approach the Arbitral Tribunal, if necessary, by passing a limited order of interim protection, particularly when there has been a long time gap between hearings and the application has for all practical purposes, to be heard afresh, or the hearing has just commenced and is likely to consume a lot of time. In this case, the High Court has rightly directed the Commercial Court to proceed to, complete the adjudication."

9. Heard learned counsel for the petitioner and perused the record.

10. Before delving into the analysis, this Court finds it necessary to briefly revisit position of law with respect to the scope of Section 9(3) of the Act, 1996 which reads as under:

"Section 9- Interim measures, etc. by Court

(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. "

11. According to Section 9(3) of the Act, 1996 the remedy under Section 9 can be availed after the commencement of the Arbitral Tribunal only if the Court is of the view that remedy cannot be efficaciously rendered by the Arbitral Tribunal. Thus, it must be exercised only in exceptional cases.

12. This Court reiterates the legislative intent behind the introduction of Section 9(3) of the Act, 1996 as per the 246th Report titled 'Amendments to the Arbitration and Conciliation Act 1996' of the Law Commission as follows:

“This amendment seeks to reduce the role of the Court in relation to grant of interim measures...after all, once the Tribunal is seized of the matter it is most appropriate for the Tribunal to hear all interim applications.”

13. In accordance with the Law Commission report, the Act was amended in 2015 to restrict the Court's power to provide interim measures. In this pursuit, Section 9(3) was added, which states that after the constitution of the Arbitral Tribunal, the Court 'shall' not entertain the application for interim measures *“unless the court finds that circumstances exist which may not render the remedy provided”* by the Arbitral Tribunal under Section 17 of the Act, 1996 'unefficacious'. Therefore, the Section 9 (3) was introduced with the intent to lessen Court's burden and intervention of the Court in the arbitral proceedings. This position of the law has been upheld by Kerela High Court in the case of ***M. Ashraf v. Kasim V.K, (2018) SCC OnLine Ker 4913***

“8.....what is provided under Section 9(3) of the Act is that, after the constitution of the Arbitral Tribunal,

the Court shall not entertain an application under Section 9(1) of the Act unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious. Normally, the Court shall not entertain an application under Section 9(1) of the Act after constitution of the Arbitral Tribunal. But, the Court has the power to entertain an application under Section 9(1) of the Act even Arb. Appeal No.53/2018 after the constitution of the Arbitral Tribunal unless the Court finds that in the circumstances of the case the party has got efficacious remedy under Section 17 of the Act. An application for interim relief under Section 9(1) of the Act shall be entertained and examined on merits, once the Court finds that circumstances exist, which may not render the remedy provided under Section 17 of the Act efficacious.

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11. At the second stage, that is, during arbitral proceedings, the Court shall adopt a strict approach in entertaining an application under Section 9(1) of the Act. The party who approaches the Court at that stage with an application under Section 9(1) of the Act shall be required by the Court to satisfy the court regarding the existence of circumstances which would render the remedy provided to him under Section 17 not Arb. Appeal No.53/2018 efficacious. He shall plead the circumstances which may render that remedy not efficacious. He should be able to convince the Court why he could not approach the Arbitral Tribunal and obtain interim relief under Section 17(1) of the Act.”

14. Furthermore, reiterating the same position of law, the Calcutta High Court held in the case of ***Srei Equipment Finance Limited (Sefl) v. Ray Infra Services Private Limited & Anr., (2016) SCC OnLine Cal 6765*** as follows:

"6..... once the Arbitral Tribunal has been constituted, unless the circumstances exist, which may not render the remedy provided under Section 17 efficacious.

7. The hearing before the Arbitral Tribunal may have been concluded. Proceedings are, however still pending before the Arbitral Tribunal. It may have been possible to make an application before the Arbitral Tribunal.”

15. Subsequently, this position of law has been upheld in the plethora of judgments by this Court ***Energo Engineering Projects Ltd. v. TRF Limited, 2016 SCC Online Del 6560 ,Avantha Holdings Limited v. Vistra ITCL India Limited, 2020 SCC OnLine Del 1717*** and recently upheld by the Hon'ble Supreme Court in the case of ***Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd., Special Leave Petition (Civil) No.13129 of 2021*** as follows:-

“66. Sub-Section (3) of Section 9 has two limbs. The first limb prohibits an application under sub-Section (1) from being entertained once an Arbitral Tribunal has been constituted. The second limb carves out an exception to that prohibition, if the Court finds that circumstances exist, which may not render the remedy provided under Section 17 efficacious.

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68. With the law as it stands today, the Arbitral Tribunal has the same power to grant interim relief as the Court and the remedy under Section 17 is as efficacious as the remedy under Section 9(1). There is, therefore, no reason why the Court should continue to take up applications for interim relief, once the Arbitral Tribunal is constituted and is in seisin of the dispute between the parties, unless there is some impediment in approaching the Arbitral Tribunal, or the interim relief sought cannot expeditiously be obtained from the Arbitral Tribunal.”

16. This Court, at this stage, is concerned with the limited aspect that the whether there is a need for intervention of this Court under Section

9(3) of the Act, 1996 and the alternative remedy under Section 17 of the Act, 1996 is inefficacious.

17. The Court in this aspect has referred the judgment of Division Bench of the Bombay High Court in ***Jagdish Ahuja V. Cupino Ltd, 2020 SCC OnLine Bom 849*** and ***Valentine Martime Ltd Vs. Pte Ltd, 2021 SCC OnLine Bom 75*** which held that the Arbitral Tribunal under Section 17 of the Act, 1996 has power to grant interim measures and secure the claim once the amount stands admitted as liability.

18. Considering the aforementioned precedents, intent of introducing it is evident that the remedy under Section 9(3) of the Act, 1996 can be availed in case the remedy under Section 17 of the Act, 1996 is rendered inefficacious. In the present case, prayer of the petitioner is that direction be passed to deposit a sum of Rs.71, 54,865/- along with GST @ 18%. It is, furthermore, prayed that the respondent No. 1 may be directed to furnish bank guarantee towards arrears of rent. These are the remedies which can be alternatively rendered by the learned Arbitral Tribunal under Section 17 of the Act, 1996. Therefore, at this stage this Court does not find any cogent reason to allow the instant petition and granting relief sought by the petitioner.

19. In view of the discussion in the foregoing paragraphs, I don't find any merit in the instant application.

20. Accordingly, the instant petition stands dismissed along with pending applications, if any.

21. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

MAY 1, 2023

Dy/db

Click here to check corrigendum, if any

