

02-04-2024
Item no.8 CD
Subrata
Bhattacharyya
AR(C)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
(Commercial Division)

FMAT(ARBAWARD) No.12 of 2024
M/s. STA-CC (JV) & Anr.
-vs-
Eastern Coalfields Limited & Ors.
with
CAN No.1 of 2024

Mr. Subhabrata Datta
Mr. Subhajit Seal ...for the appellants

Mr. Debnath Ghosh
Mr. Syed Nurul Arefin
Mr. Syed Moyeenul Arefin ...for the respondents

Whilst this appeal under section 37 of the Arbitration and Conciliation Act, 1996 was pending before us, the arbitral tribunal has been constituted. We are told that the learned arbitrator, a retired judge of the Supreme Court, has convened a sitting today at 5 p.m.

The impugned judgement and order is dated 5th March 2024. It was made by the learned Judge, Commercial Court at Asansol in an application under section 9 of the said Act filed by the appellants.

By the said judgement and order, the learned court below has held: "Thus, this court is of the prima facie view that the contract was rightly rescinded and the respondents had every right to forfeit the performance security deposit and also impose penalty in terms of clause 9 and debar the petitioner no.1 and also black list the petitioner No.1 from future contacts. I, therefore, do not find any merit in the application under Section 9 of the A & C Act, 1996 filed by the petitioners. Misc. Arbitration Case No. 16 of 2023 [New number

miscellaneous Arbitration (Commercial) No.19 of 2024] thus stands rejected. There shall however be no order as to costs. All interims orders passed accordingly stands vacated.”

The contractor has preferred an appeal from this order.

Mr Debnath Ghosh, learned counsel appearing for the respondents, submitted that there was a little incongruity in the impugned judgement and order. Although in one part of the ordering portion the learned judge held that the respondents had the right to “blacklist the petitioner no.1”, in the ultimate sentence the court directed “all interim orders passed accordingly stands vacated”.

Mr Ghosh pointed out that the interim order, which was operative during the section 9 proceedings in the court below, was our division bench order dated 16th October 2023. One of the directions in the said order was revocation of “any existing order of debarment” or blacklisting followed by a right conferred on the respondents to initiate such a proceeding according to law. According to Mr Ghosh, a confusion was likely to be created by the impugned order to the effect that vacation of this interim order might deprive the respondents of the right to initiate proceedings to blacklist the appellants.

We find from the records that this matter has had a very long history. The proceedings have travelled up to the Supreme court. The net effect is that the appellants have kept the bank guarantee renewed, and that till date the bank guarantee has not been encashed by the respondents.

Mr Ghosh very emphatically argued that his clients should be allowed to encash the unconditional

bank guarantee.

Section 9 of the Arbitration and Conciliation Act, 1996 (the Act) was amended with effect from 23rd October, 2015 by the addition of sub-section (2) and (3). These sub-sections are as follows:-

“(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.”

What is the meaning to be ascribed to the phrase “the court shall not entertain an application under sub-Section (1)”.

First of all, take the situation where after constitution of the arbitral tribunal an application under section 9 is filed in court. The court shall reject the application straightaway relegating the applicant to the arbitral tribunal under Section 17.

Now suppose a Section 9 application is in the file of the court and during the pendency of that application the arbitral tribunal is constituted. In **Arcelor Mittal Nippon Steel India Ltd. vs. Essar Bulk Terminal Ltd.** reported in **(2022) 1 SCC 712**, the Supreme Court ruled that the word “entertain” meant “to consider by application of mind to the issues raised.” Once it has entertained an application under Section 9 it could proceed to do so till the pronouncement of the judgement.

The court said:

“84. It is now well settled that the expression “entertain” means to consider by application of mind to the issues raised. The court

entertains a case when it takes a matter up for consideration. The process of consideration could continue till the pronouncement of judgment as argued by Mr Khambata. Once an Arbitral Tribunal is constituted the Court cannot take up an application under Section 9 for consideration, unless the remedy under Section 17 is inefficacious. However, once an application is entertained in the sense it is taken up for consideration, and the Court has applied its mind to (sic the issues raised) the Court can certainly proceed to adjudicate the application."

In paragraph 98, the court added as follows:-

"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."

The principle of law which evolves is that under Sub-Section 9(3) the court shall not receive a Section 9 application to "entertain" it for the first time after constitution of the arbitral tribunal. If the arbitral tribunal has been constituted after the court has "entertained" the application it would proceed to hear out the application and pronounce the judgement.

If the arbitral tribunal is constituted after the court has "entertained" a Section 9 application the court would still retain the power to send the matter to the tribunal to

be adjudicated under Section 17 after passing a limited interim order or to proceed further and dispose of it itself.

We consider this appeal to be a continuation of the section 9 application.

Considering the above law, the arbitration tribunal should now consider the subject-matter of this appeal.

As far as the above argument made by Mr Ghosh is concerned, the learned judge has specifically stated that all interim orders were vacated. This means that our interim order which was stated to be *prima facie*, revoking the blacklisting order has been vacated by the final order in the section 9 application. If our order revoking the blacklisting order is vacated, then the blacklisting stands.

In that event there is no question of the second part of our order of giving an opportunity to the respondents to initiate fresh proceedings for blacklisting remaining operational. In any event, the learned judge has also stated that he was upholding the order of blacklisting. Hence there is no incongruity in the impugned judgement and order.

Since we had *prima facie* taken the view that the blacklisting order dealing with the matter in the division bench needed to be revisited by the respondents. We reiterate that view. In terms of our earlier order dated 16th October 2023, the appellants shall be allowed to participate in any tender floated by the respondents.

The respondents shall also have liberty to initiate proceedings for blacklisting the appellants in accordance with law.

Furthermore, since the bank guarantee has not been invoked for this considerable period of time, let it not be invoked for a further period of four weeks, subject to

any order or directions that may be passed by the learned arbitral tribunal.

The respondents shall also have the right to make an application under section 17 of the said Act before the learned arbitrator within two weeks from date for vacation, variation or modification of this interim arrangement.

Within two weeks from date, the appellants are at liberty to make an application under section 17 before the arbitral tribunal on the subject matter of this appeal, if they are so advised, where they can ask for any interim relief confined to the grounds of this appeal only.

If no such application is made within the stipulated period, the impugned judgement and order along with the interim order passed herein will stand affirmed, subject to the final award.

If such application is made, the impugned order and the interim order made herein shall abide by the interim award or direction or any order passed by the learned tribunal.

With the above observations and directions, the appeal and the connected application – FMAT(ARBAWARD) No.12 of 2024 with CAN No.1 of 2024 – are disposed of.

[I.P. Mukerji, J]

[Md. Shabbar Rashidi, J]

