

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

Present :

Hon'ble Justice Moushumi Bhattacharya

AP 70 of 2023

with

AP 71 of 2023

KOSC Industries Private Limited

vs

Lakhotia Infra Technologies Pvt. Ltd.

For the petitioner : Mr. Shounak Mukhopadhyay, Adv.
Mr. Vishwarup Acharyya, Adv.

For the respondent : Mr. Siddhartha Chatterjee, Adv.
Mr. Abirlal Ghosh, Adv.

Last heard on : 10.01.2024

Delivered on : 18.01.2024

Moushumi Bhattacharya, J.

1. Both the applications have been filed under section 9 of the Arbitration and Conciliation Act, 1996 for interim relief. In one of the applications, the petitioner has prayed for a restraint on the respondent

from alienating or creating any third party rights in respect of the equipments supplied by the petitioner to the respondent under four Purchase Orders issued by the respondent. In that application, the petitioner has also prayed for a direction on the respondent to furnish security for Rs. 53,07,352/-. The relief sought for in the other application is substantially the same except that the petitioner has claimed security of Rs.7,93,268/- from the respondent.

2. The other difference is that the respondent in AP 71 of 2023 has taken a point of pecuniary jurisdiction in that the Calcutta High Court lacks jurisdiction to entertain the applications.

3. The Court proposes to dispose of the applications by way of this judgment since both the applications involve the same facts and substantially the same point of law.

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4. The undisputed facts are that petitioner supplied 2200 units of MS Props – construction scaffolding material – on rent to the respondent under 4 Purchase Orders. The rate of rent per piece on a monthly basis is an admitted sum mentioned in the Purchase Orders. The figures mentioned in the “Rental” column is a part of the Purchase Orders and has not been disputed by the respondent.

5. The petitioner, through learned counsel, has also placed and relied on a table which contains certain facts as per the affidavit-in-opposition of the respondent. The table relates to “Duration of Use of Goods” from 12.9.2019

– 18.10.2019. A total of 2000 goods were supplied by the petitioner to the respondent by October, 2019. The chart mentions the number of goods returned by the respondent together with the dates of return and states that the respondent admittedly withheld 600 units of goods. The dates of supply and of return have reference to specific pages in the affidavit-in-opposition filed by the respondent. Counsel has shared the chart with learned counsel appearing for the respondent.

6. The chart also contains a calculation of admitted rent for the 600 units which the respondent has withheld. The petitioner describes the figures as “admitted” on the basis of the calculation statement on the duration of use of goods by the respondent. The total principal amount due has been calculated at Rs. 22,29,120.00/- as the rent for the balance withheld 600 goods from November, 2019 – July, 2023 + the rent for 900 goods used from November, 2019 – February, 2020 and for 500 goods used from November, 2019 – June, 2020. The calculation also adjusts Rs. 4,90,880.00/- received by the petitioner from the respondent.

7. It is relevant to note that the petitioner’s claim in the arbitration is in excess of Rs. 70 lacs on account of the withholding of the petitioner’s goods by the respondent and the disposing of and alienating of the goods by the latter.

8. Learned counsel appearing for the respondent has objected to the maintainability of the application on the ground that the application was made after constitution of the arbitral tribunal. However, the records show that a Division Bench of this Court entertained the section 9 application by

its order dated 2nd March, 2023 and passed an injunction on the respondent from transferring or alienating the material leased to the respondent for 3 months from the date of the order. The respondent, significantly did not challenge this order.

9. Therefore, the objection made under section 9(3) of The Arbitration and Conciliation Act, 1996 on the Court not having jurisdiction to entertain an application under section 9(1) after constitution of arbitral tribunal, is no longer acceptable : *Arcelor Mittal Nippon Steel v. Essar Bulk Terminal Limited; (2022) 1 SCC 712*. It is also relevant that the respondent did not object to the maintainability of the application before the Division Bench on 6th September, 2023 when the Division Bench set aside the order dated 14th July, 2023 and thought it fit to appoint a Receiver for taking inspection of the units lying at the various sites of the respondent (appellant before the Division Bench) and deliver the same to the petitioner. The Division Bench was however pleased not to interfere with the interim order restraining the respondent from dealing with the goods till the Receiver takes actual physical position of the 800 units or lesser / greater number of units lying with the respondent.

10. The respondent's resistance to the figures mentioned in the chart relied on by the petitioner is without basis since the statement on the duration of use of goods clearly refers to specific pages in the affidavit-in-opposition of the respondent and the fact that 2000 units were admittedly supplied by the petitioner to the respondent from 12.9.2019 – 18.10.2019 and that 600 units were admittedly withheld by the respondent. It is also

significant that the only reason apparent from the order of the Division Bench dated 6th September, 2023 for remanding matter to the First Court was that the respondent failed to indicate its stand on the contents of the chart before the First Court.

11. Moreover, the Purchase Orders mention the admitted rate of rent payable by the respondent to the petitioner with individual rates of rent for the MS Props on a monthly basis. Hence, this sum cannot be disputed by the respondent. The calculation of the admitted rent due to the petitioner at the agreed rate mentioned in the Purchase Orders is hence merely a matter of arithmetical calculation. The petitioner has simply calculated the agreed rate of rent on the number of units used by the respondent from November, 2019 to July, 2023 including for the withheld 600 units.

12. The contention of the petitioner that the petitioner would have received a much higher rent on the goods if the respondent had returned the units to the petitioner within the stipulated time under the Purchase Order cannot be ignored. In the present case, the petitioner has restricted its claim of security to the aggregate sum payable by the respondent for continued use of goods till July, 2023 together with the fact that a portion of the goods has also been disposed of by the respondent despite the order of injunction passed by the Division Bench on 2nd March, 2023.

13. The Court is also not in agreement with the respondent on the issue of delay. In making such objection, the respondent has to first cross the hurdle of giving a satisfactory explanation as to why the respondent held on to 600 units from July, 2020. This is the admitted case and would be reflected from

the respondent's affidavit-in-opposition. Further, the petitioner initiated to proceed under the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED) on 15th July, 2020. The records show that proceedings initiated under the MSMED Act were prolonged due to the dilatory tactics of the respondent and the conciliation proceedings were ultimately terminated on 5th January, 2023. The application under section 9 was filed immediately thereafter on 7th February, 2023.

14. Significantly, the respondent withheld 600 units of the petitioner throughout this period which means that the cause of action continued on a day to day basis and aggravated the petitioner's claim against the respondent.

15. The powers conferred on a Court under section 9 of the 1996 Act includes the power to make an order for securing the amount in dispute in arbitration. It is also substantially settled that the Court can make such orders as may appear to be just and convenient without being fettered by the regime of Order XXXVIII Rule 5 of The Code of Civil Procedure, 1908 where the sum is admitted and the defence is prima facie untenable; *Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited*; 2022 SCC OnLine SC 1219 and *Abheya Realtors Private Limited v. SSIPL Retail Limited*; (2010) 2 CHN 203.

16. Considering the relevant facts and circumstances and the admitted amounts pertaining to the rent payable by the respondent for use of the petitioner's goods from November, 2019 to July, 2023 including withholding of 600 units of the petitioner's goods, the court accepts that the petitioner is

entitled to claim compensation and damages for the retention of the goods. The respondent should accordingly secure the amount in aid of the interim measure under section 9 of the Act.

17. AP 70 of 2023 is accordingly allowed and disposed of by directing the respondent to furnish security for a sum of Rs. 53,07,352/- on the basis of the tabulated calculation which is a part of the petition inclusive of the sum received by the petitioner as advance from the respondent. The respondent should furnish the amount, 50% by way of cash deposit and the remaining 50% by way of a bank guarantee, to be deposited to the Registrar, Original Side of this Court within two weeks from date.

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18. The petitioner has sought for a direction on the respondent to furnish security for Rs. 7,93,268/- on the same ground and on the same facts as in AP 70 of 2023. The undisputed facts which are relevant for the adjudication has already been stated above in the first section of the judgment and are not being repeated. The claim of the petitioner arises out of the MS Props unit supplied by the petitioner to the respondent. The respondent used the goods from July, 2019 – February, 2020 and also removed the units/goods from its custody which would be evident from the Receiver's Report. The Receiver was appointed by the Division Bench by its order dated 6th September, 2023 in an appeal filed by the respondent from the order of the First Court.

19. The first section of the judgment also refers to a chart handed up by learned counsel appearing for the petitioner as per facts admitted in the affidavit-in-opposition of the respondent with regard to the respondent's use of the goods and duration thereof. A statement of the admitted rent due from the respondent to the petitioner is also part of the chart. The petitioner claims a total amount of Rs. 22,29,120.00/- in the other arbitration petition being AP 70 of 2023.

20. As stated above the facts are not being repeated.

21. The only point which learned counsel appearing for the respondent has raised in the present application is the lack of the pecuniary jurisdiction for the Court to entertain the present matter. Counsel has argued that the mail from the petitioner to the respondent dated 14th July, 2020 reflects the value of the withheld goods to be lesser than Rs. 10 lacs which divests the High Court of jurisdiction to entertain the matter.

22. However, the fact remains that the present application for interim protection has already been entertained by the Court and was carried to the Division Bench which proceeded to pass orders on 2nd March, 2023 and 6th September, 2023 restraining the respondent from relying on the mail dated 14th July, 2020. Significantly, the Division Bench in its order dated 2nd March, 2023, refused to accept the stand taken by the respondent on the mail dated 14th July, 2020. The respondent has not challenged any of the orders passed by the Division Bench.

23. Learned Counsel appearing for the petitioners has also relied on a chart with a calculation of admitted rent due from the respondent as per the purchase orders. The total rent of all goods per month is Rs. 35,297/- and the outstanding principal sum of rent from July, 2019 to February, 2020 is Rs. 2,02,376.00/-. The chart contains particularised statements of claim for the goods withheld by the respondent from March, 2020 to July, 2023 which is Rs. 40,000/- and also calculates the total amount due for the withheld goods at Rs. 1,69,480.00/-. A sum of all these figures comes to Rs.3,71,856.00/-. The chart was shared with learned counsel appearing for the respondent.

24. On the point of law, the Court finds the contention made on behalf of the petitioner to be of substance, namely, that the application has been filed on the basis of the principles under section 12 of the Commercial Courts Act, 2015 under which the relief sought in the arbitration are relevant for determining the satisfied value. The petitioner has prayed for security in the application for approximately an amount of Rs. 7.93 lacs along with injunctive relief for withholding of the goods. The aggregate value of rent hence comes to above Rs. 10 lacs. Reference in this context may be made to section 12(a), (b) and (d) of The Commercial Courts Act, 2015 which takes into account the money sought to be recovered being inclusive of interest computed up to the date of filing of the application as well as the market value of the immovable property on the date of the filing of the application. Section 12(2) refers to the aggregate value of the claim and counter-claim as

set out therein in a commercial dispute which is to form the basis for determining the jurisdictional Court.

25. Hence, the consideration which is germane to the argument of pecuniary jurisdiction, or the lack thereof, is the correctness of the petitioner's valuation of the reliefs sought in the application and in the respondent's construction of the mail dated 14.7.2020.

26. Even if the specific contents of the mail are taken into consideration, the relevant column pertaining to amounts pending from the respondent on account of the materials lying at Naihati reflects the "cost" and not the value of the balance goods. The cost referred to is that of refurbishment of goods after their return to the petitioner so that the goods can be let out to other clients. The fact that "cost" is not equivalent to the value of the goods would also be evident from the respondent's purchase orders which provides for the agreed monthly rental to be paid by the respondent for these goods. The figure is slightly less than $\frac{1}{2}$ of the alleged total value of the goods. Hence, the construction given by the respondent to this mail and to the figures contained therein is untenable and reflects an erroneous understanding of the petitioner's mail. The object appears to be divesting the Court of jurisdiction on a ground which is non-existent.

27. The pecuniary jurisdiction argument is hence answered against the respondent.

28. The particulars of the basis of the petitioner's claim for security is tabulated in the petition. The petitioner has claimed the amounts due

against the bills and invoices raised by the petitioner on the respondent for the respondent's use of the petitioner's equipment on a compoundable-interest basis. The petitioner has also claimed compensation and damages for the respondent retaining 600 units / balance material and has adjusted the sum of Rs. 80 lakhs received as advance from the respondent.

28. The Court, under section 9 of The Arbitration and Conciliation Act, 1996, has plenary powers - including the power to make an order for securing the amount in dispute in the arbitration. The petitioner, as the claimant in the arbitration and as a party to the arbitration agreement has a statutory right to approach the Court for interim relief. The respondent's action of withholding a substantial quantity of the petitioner's goods till date, contrary to the agreement between the parties and alienating the goods in the face of the order of injunction passed by the Division Bench, are additional factors for the Court to pass interim measures of protection in favour of the petitioner.

29. The Court finds no basis to refuse interim protection in view of the above reasons. AP 71 of 2023 is accordingly allowed and disposed of by directing the respondent to furnish security for the sum of Rs. 7,93,268/-, 50% of which shall be in the form of cash deposit and remaining 50% by way of bank guarantee. Both the components should be furnished with the Registrar Original Side within 2 weeks from date. The petitioner shall be permitted to approach the Court for further and other injunctive reliefs against the respondent in default of these directions.

30. Connected applications, if any, are also disposed of along with the two arbitration petitions.

Urgent Photostat certified copies of this judgment, if any, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)