

ORDER SHEET

AP-COM/739/2024

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION

TATA CAPITAL LIMITED
VS
SHRI BISHNU PRASAD YADAV AND ANR.

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date: 17th September, 2024.

Appearance:

Mr. Zeeshan Haque, Adv.
Mr. Saubhik Chowdhury, Adv.
Ms. Tapasika Bose, Adv.
...for the petitioner

Mr. Shourjyo Mukherjee, Adv.
Mr. Viswarup Acharyya, Adv.
..for the respondents

The Court: The affidavit of service filed in Court today be kept on record.

Learned counsel having instruction to appear on behalf of the respondents seeks some time to file his Vakalatnama.

Accordingly, leave is granted to the learned Advocate to file his Vakalatnama by the end of this week.

An interesting question has been raised in the present matter. The instant application under Section 9 of the Arbitration and Conciliation Act, 1996 has been filed in respect of the subject-matter of an ongoing arbitral proceeding, where there is a pending application under Section 17 of the 1996 Act as well at the behest of the petitioner.

Learned counsel for the petitioner submits that the rider in Section 9(3) of the 1996 Act is satisfied in the present case inasmuch as the remedy available before the Arbitrator under Section 17 is not efficacious, thereby empowering this Court to interfere under Section 9.

Learned counsel, in support of such proposition, cites a Division Bench judgment of the Bombay High Court in the matter of *Girish Mulchand Mehta & Anr. Vs. Mahesh Mehta & Anr*, reported at 2010(2) MhLJ 658. It is contended that, as held in the said judgment, the Court's powers under Section 9 are wider than that of an arbitral tribunal under Section 17 of the 1996 Act. It is argued that the jurisdiction of the arbitral tribunal stems from the agreement between the parties and, as such, the arbitral tribunal cannot pass any binding order against any third party.

It is submitted that party autonomy and consent of the parties is the very premise of the authority of the arbitral tribunal. Hence, the Arbitrator cannot pass orders against any third party.

However, insofar as the Court is concerned, it, acting as a "Court" within the contemplation of Section 2(1)(e) of the 1996 Act, has more comprehensive

jurisdiction, even to bind third parties to a litigation, under Section 9 of the 1996 Act.

The above question acquires relevance in the present case, since as per the report of the Receiver who was appointed in respect of the asset, a proceeding has been initiated by the Enforcement Directorate (ED) under Section 17(4) of the Prevention of Money Laundering Act, 2002 (PMLA). Since the petitioner is not certain as to whether the said proceeding is still pending, the petitioner also cannot be certain of the present status of the asset, since the asset is one of the properties mentioned in the said application under Section 17 of the PMLA by the ED, in respect of which freezing has also been sought. In support of such contention, learned counsel for the petitioner takes the Court through a copy of the application under Section 17(4) which is annexed to the present application, where one of the items mentioned for freezing is the asset involved in the present case, that is, a stone crusher in the name of M/s. Maa Durga Stone Works Plant named Propel-300 TPH.

Learned counsel for the petitioner submits that it is beyond the jurisdiction of the arbitral tribunal to pass necessary directions on the ED in order to ascertain the present status of the asset and/or to pass binding directions on the ED in respect of the said asset.

Learned counsel having instruction to appear for the respondent, submits, on instruction, that the asset is still in the custody of the ED in connection with the aforesaid proceeding under Section 17(4) of the PMLA.

The question which arises, therefore, is whether the arbitral tribunal is empowered to pass directions with regard to third parties to the arbitral agreement/proceeding in an application under Section 17 of the 1996 Act. The provisions of Section 9 and Section 17 of the 1996 Act are set out below:

“9. Interim measures, etc., by Court.— (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.

17. Interim measures ordered by arbitral tribunal.—(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal—

(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 arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.”

A bare perusal of the said provisions indicates that identical powers have been conferred on the Court and the tribunal respectively under Sections 9 and 17 of the said Act. Section 9(1)(ii)(e) empowers the Court to pass such other interim measure or protection (other than those contemplated thereinabove) “as may appear to the Court to be just and convenient” and further provides that 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.

On the other hand, Section 17(e) also provides that the tribunal has power to pass such other interim measure of protection “as may appear to the arbitral tribunal to be *just and convenient*” and that the arbitral tribunal *shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.*

The expression “it” refers back to the same term as used in Section 9.

As such, both the arbitral tribunal and the Court, for the purpose of granting interim measures, have co-equal powers on the same footing.

Although, in a somewhat different context, the Division Bench of the Bombay High Court had observed that the powers of a Court under Section 9 were “wider”, insofar as the question of whether orders can be passed in respect of third parties is concerned, the said decision, with utmost respect, is not of a binding nature, since the said question did not specifically fall for consideration before the said Division Bench. Moreover, the said decision was rendered prior to substantial alterations being effected to Section 17 and even the introduction of sub-sections (2) and (3) of Section 9 of the 1996 Act, all of which happened by virtue of the 2016 Amendment Act with effect from October 23, 2015.

In fact, a Court, exercising jurisdiction under Section 9, although exercising powers as a Court under the definition of “Court” in Section 2(1)(e) of the 1996 Act, is also fettered by the same limitations from which an arbitral tribunal may suffer, in the sense that while deciding an application under Section 9, although acting as a Court, the Court derives its powers primarily from an arbitral agreement between the parties under Section 7 of the Act. The necessary pre-requisite of exercise of power under Section 9 is an existence of an arbitration agreement between the parties and/or an arbitral clause in an agreement or document between the parties creating a jural relationship between themselves. In the absence of such agreement and consent between the parties to refer their disputes to arbitration, there cannot be any scope or option of exercise of powers even under Section 9.

Such view is further bolstered by the provisions of sub-sections (2) and (3) of Section 9.

Sub-section (2) provides that where before the commencement of the arbitral proceeding, a Court passes an order for any interim measure of protection under Section 9(1), the arbitral proceedings shall be commenced within a period of 90 days from the date of such order or within such further time as the Court may determine.

On the other hand, sub-section (3) of Section 9 provides that 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.

The last limb of sub-section (3) of Section 9, however, does not pertain to the jurisdiction of the arbitral tribunal but contemplates situations where, beyond the control of the parties or the tribunal, the tribunal is not in a position to exercise its jurisdiction, such as, when due to the illness or some other inability of the named Arbitrator or Arbitrators forming the arbitral tribunal cannot commence or cannot continue with the arbitration for the time being. However, the said expression “ circumstances exist may not render the remedy efficacious” is not relatable to the jurisdiction of the tribunal, nor is the same a commentary on the scope of exercise of power by the Tribunal.

It is thus reiterated that from a plain glance at Sections 9 and 17, it is evident that the powers of the Court and the Tribunal respectively under the said provisions are exactly co-equal. The Court, despite being a “Court”, cannot

exercise such power even under Section 9 which the Tribunal cannot exercise under Section 17 of the 1996 Act.

All said and done, it is clear from the language of Section 9 and 17 that, for the purpose of preservation of the property which is the subject-matter of the dispute or ancillary to such subject matter in an arbitral proceeding, the Court may, equally as the arbitral tribunal, pass directions on third parties in order to properly and effectively preserve the property and/or to maintain the property *in statu quo*.

Hence, there is no impediment for the arbitral tribunal in the present case to seek information from the ED in respect of the current status of the property and/or to direct the parties to disclose before it proper documents to show such current status, in order to enable it to pass appropriate orders regarding preservation, custody or consequential orders in respect of the asset.

Hence, the present application comes squarely within the ambit of the bar under Section 9(3) of the 1996 Act since this Court is of the opinion that there is no situation which might render the remedy provided under Section 17 inefficacious in the instant case. Thus, the remedy of the petitioner lies before the arbitral tribunal in the pending proceeding under Section 17 of the 1996 Act and not under Section 9.

Accordingly, AP-COM/739/2024 is dismissed as not maintainable, however, with liberty to the petitioner to pursue/seek the self-same remedy as prayed in the present application before the arbitral tribunal under Section 17

of the 1996 Act. If so approached/pursued, the tribunal shall pass appropriate orders within the contemplation of law.

(SABYASACHI BHATTACHARYYA, J.)