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THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 22.01.2024	Delivered on 15.02.2024
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CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

OSA(CAD).No.154 of 2023
and
C.M.P.No.26352 of 2023

Sri Kauvery Medical Care (India) Ltd.,
Rep. by its Executive Chairman Dr.S.Chandrakumar,
Regd. Office at: New No.17A, (Old No.8A),
Murray's Gate Road, Alwarpet,
Chennai - 600 018.

...Appellant

Vs.

1.M/s.CeeDeeYes Health Care Services (P) Limited,
Rep. by its Chairman and Managing Director,
C.Devadasa Sundaram,
No.25, 2nd Avenue, Indira Nagar,
Adyar, Chennai - 600 020.

2.Pegasus Assets Reconstruction Private Limited,
Represented by its Authorised Officer,
N.3F, 3rd Floor, Kasthuri Apartments,
JB Avenue, 6th Street, Dr.Radhakrishnan Road,
Mylapore, Chennai - 600004.

...Respondents

Prayer: Original Side Appeal filed under Section 13 of the Commercial Courts Act, 2015, against the impugned order dated 22.08.2023 passed by the learned judge in Arb.Appln.No.55 of 2023.



For Appellant : Mr.Sashidhar Sivakumar

For Respondents : Mr.M.K.Kabir, Senior Counsel
for Ms.M.K.Padma for R1
Mr.R.Imayavarambhan for
M/s.Ramalingam Associates for R2

J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

The appeal is at the instance of the applicant in Arbitration Application No.55 of 2023 filed under Section 9(1)(ii)(e) of the Arbitration and Conciliation Act, 1996, seeking a direction to the third party to the arbitration agreement to bring on record the applicant's charge over the 1st respondent's property at Door No.383, Velacherry Tambaram Main Road, Velacherry, Chennai-600042 and to secure the interest of the applicant to the tune of Rs.3,13,84,043/- with interest at 18% per annum.

2.The said application came to be filed in the following backdrop:-

The applicant and the 1st respondent entered into a Letter of Intent (LOI) on 08.05.2017, under which, it was agreed that the applicant will take

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on lease the property belonging to the 1st respondent for the purposes of running a Hospital. The Letter of Intent also fixed the period of lease, lock-in period and the quantum of rent etc. There was an addendum to the letter of intent on 26.10.2017, which effected certain changes in the nature of the obligations of the parties. Thereafter, certain events intervened wherein, the Chennai Metropolitan Development Authority issued a lock and seal notice for the building in question on 17.05.2018. Subsequently, on 19.05.2019, the appellant and the 1st respondent entered into a memorandum of understanding in and by which, the applicant agreed to purchase the property in question for a total consideration of Rs.80,00,00,000/-. The said memorandum of understanding also provided that the applicant has paid a sum of Rs.1,88,73,281/- as advance and after acknowledging a payment of Rs.7,70,000/- towards various expenses by the applicant, the balance amount payable by the applicant was fixed at Rs.78,03,56,719/-. The said amount was also agreed to be paid in two instalments.

3.The memorandum of understanding also provided for the parties entering into a definitive agreement, which can either be a share purchase agreement for transfer of the share holdings of the 1st respondent or a



registered sale agreement for outright sale of the property in favour of the applicant. The applicant chose to cancel the memorandum of understanding on 24.08.2019 pointing out the fact that the Chennai Metropolitan Development Authority had issued a lock and seal notice and hence, the agreement between the parties became incapable of performance. By the same letter dated 24.08.2019, the applicant sought for refund of advance paid to the tune of Rs.1,96,43,281/-. This was followed up by another demand dated 27.09.2019 and lawyer's notice dated 23.01.2020. The 1st respondent, on its part, issued a notice on 25.08.2020 claiming damages at Rs.4,50,00,000/-. The said notice claiming damages was replied to by the applicant on 08.09.2020. This led to commencement of arbitration proceeding between the parties and a retired District Judge was appointed as an Arbitrator by this Court in Arbitration Case.No.320 of 2020. Claims and counter claims were lodged before the Arbitrator and the arbitration proceedings are under way. In the meanwhile, the 2nd respondent which is an Asset Reconstruction Company had issued an E-auction notice on 08.04.2021. There was another notice for E-auction issued by the 2nd respondent on 12.08.2021.



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4. Contending that, as a person who had advanced monies for purchase of the property, it would be entitled to a statutory charge under Section 55(6)(b) of the Transfer of Property Act, the applicant filed the instant application seeking a direction to the 2nd respondent to set a part a sum of Rs.3,13,84,043/- out of the sale proceeds after adjusting the claim or money that is due to the 2nd respondent. It was also claimed that the property was sold for a consideration, which was over and above the amount due to the 2nd respondent and therefore, the 2nd respondent had surplus left in its hand. Therefore, the said surplus should be directed to be retained with the 2nd respondent so as to enable the applicant to enforce a statutory charge. It is with the above prayer, the applicant approached this Court under Section 9 of the Arbitration and Conciliation Act.

5. The application was resisted by the 1st respondent contending that the breach of contract was committed by the applicant and not by the 1st respondent. It was also pointed out that the 1st respondent had made a counter claim for a sum of Rs.10,91,25,945/- before the Arbitrator and therefore, securing the interest of the applicant does not arise. Alternatively,



it was pleaded that since the arbitration proceedings are pending and the Arbitrator was already in-charge of the proceedings, the Court shall not exercise its jurisdiction under Section 9, in view of the bar under Section 9(iii) of the Act. Therefore, according to the 1st respondent, the parties must be relegated to the Arbitrator, who can pass orders under Section 17 of the Arbitration and Conciliation Act. Section 9 and 17 of the Arbitration and Conciliation Act were highlighted to buttress the submission that the Court need not interfere at this stage as an efficacious remedy is available to the applicant before the Arbitrator under Section 17.

6.The learned Single Judge, who heard the application agreed with the contentions of the respondent that it is open to the applicant to move the Arbitrator under Section 17 and therefore, the Court need not entertain the application under Section 9 at this stage. Upon such conclusion, the learned Judge dismissed the application with liberty to the applicant to move the Arbitrator under Section 17. Hence, this appeal.

7.We have heard Mr.Sashidhar Sivakumar, learned counsel for the appellant, Mr.M.K.Kabir, learned Senior Counsel for Ms.M.K.Padma,



learned counsel for the 1st respondent and Mr.R.Imayavaramban for M/s.Ramalingam Associates for the 2nd respondent.

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8.Mr. Sashidhar Sivakumar, learned counsel for the appellant would vehemently contend that the learned Single Judge was not right in relegating the parties to the Arbitrator. According to the learned counsel, the 2nd respondent, being not a party to the arbitration agreement, the relief as against the 2nd respondent cannot be conveniently sought for before the Arbitrator. The learned counsel would also contend that the bar under Section 9(iii) of the Arbitration and Conciliation Act, 1996 is not an absolute bar and it is open to the Court to exercise its powers under Section 9, if it finds that the remedy under Section 17 may not efficacious in the facts and circumstances. The learned counsel for the appellant would therefore, submit that the 2nd respondent being not a party to the arbitration agreement, the remedy under Section 17 cannot be termed to be an efficacious remedy and therefore, it is for the Court to have exercised its jurisdiction under Section 9 instead of relegating the parties to arbitration.



9. The learned counsel for the appellant would invite our attention to the judgment of the single Judge of this Court in ***Abhibus Services India Pvt. Limited and Others Vs. Pallavan Transport Consultancies Services Ltd.*** reported in ***(2022) 2 Arb LR 514*** wherein, the learned Judge has considered the scope of the powers of the Arbitrator and impleading of non-parties to the arbitration proceedings. After referring to almost all the precedents on this point as well as provisions of the Arbitration and Conciliation Act, the learned Judge pointed out that the power of the Arbitral Tribunal does not extend to impleading of a non-signatory or a third party to the arbitration agreement as a party to the arbitration proceedings. In doing so, the learned Judge referred to the judgment of the Hon'ble Supreme Court in ***Chloro Controls Vs. Severn Trent Water Purification Inc.*** reported in ***(2013) 1 SCC 641*** wherein, it was held that the arbitrator cannot decide civil rights of persons, who are not parties to the arbitration agreement. The learned counsel would also draw our attention to judgment of the Delhi High court in ***Arpuri Logistics Private Limited Vs. Vilas Gupta and others 2023 SCC online Del 4297*** wherein, the Delhi High Court had taken the same view as that of this Court in ***Abhibus Services India Pvt. Limited and Others Vs. Pallavan Transport Consultancies Services Ltd.***



10. Contending contra, Mr. M.K. Kabir, learned Senior Counsel appearing for the 1st respondent would submit that after the amendment of Section 17, the Scope of section 17 has been widened vesting all the powers of the Court under Section 9 of the Arbitration and Conciliation Act, 1996 in the Arbitrators to enable them to pass orders securing the amount in arbitration. Specific reference is made by the learned counsel to Section 17(ii)(b), which according to the learned Senior Counsel would take in an order directing a third person to retain the amount. The learned counsel would also draw our attention to the judgment of the single Judge of this Court in *Sundaram Finance Ltd. Vs. P.Sakthivel & another* reported in **2018 4 LW 619** wherein, this Court had considered the powers of the Arbitrator and the execution of the interim orders passed by the Arbitrator.

11. Considerable reliance is also placed by the learned counsel for the respondents on the judgment of the Bombay High Court in *Prabhat Steel Traders Pvt. Ltd. Vs. Excel Metal Processors Pvt. Ltd.* reported in **AIR online 2018 Bom 854** wherein, the learned Single Judge of the Bombay High Court had considered the position of a third party, whose rights are effected by interim measures granted by the Arbitral Tribunal. The learned



Single Judge had considered the question as to whether an appeal would lie against an order passed by the Arbitrator under Section 17 at the instance of a third party, who is not a party to the arbitration proceedings. The learned counsel would also refer to the judgment of the Hon'ble Supreme Court in ***Arcelor Mittal Nippon Steel India Limited Vs. Essar Bulk Terminal Limited*** reported in ***(2022) 1 SCC 712*** on the scope of the powers of the Arbitral Tribunal under Section 17. Therefore, according to the learned Senior Counsel for the respondents, the learned Single Judge was justified in relegating the parties to the Arbitrator.

12. Reliance is also placed by the learned Senior Counsel on the judgment of the single Judge of the Delhi High court in ***Visrat Real Estates Private Limited Vs. Asian Hotels North Ltd.***, reported in ***2022 SCC Online Del 1139*** wherein, a reference is made to the judgment of the Hon'ble Supreme Court in ***Chlora Controls India Private Ltd., Vs. Severn Trent Water Purification Inc.***, which lays down non-signatory or a third party can be subjected to the Arbitration in exceptional case and therefore, according to the learned Senior Counsel, the power under Section 17 would extend to granting orders against third parties also. Reliance is also sought



to be placed on the judgments of the Delhi High Court in *MX Media & Entertainment PTE. Ltd., Vs. Sapna*, where an application that was pending before the Court was transferred to the Arbitrator. We have considered the rival submissions.

13. Before venturing to discuss the rival contentions, it will be appropriate for us to extract the relevant provisions of the Arbitration and Conciliation Act, 1996 namely, Section 9 & Section 17 :-

Section 9:-

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 a 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.

Section 17

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, in the same manner as if it were an order of the Court.

14. On introduction of Sub-section 3 to Section 9, it is argued that there is an absolute bar on the Court from entertaining an application under Section 9 for interim measures after constitution of the Arbitral Tribunal. That is not the actual position. Sub-section 3 of Section 9 is in two parts. The first part seeks to curtail the power on the Court with reference to entertaining an application for interim measure / interim protection after



constitution of the Arbitral Tribunal. The second limb of the said section carves out an exception or is akin to a proviso which vests the discretion in the Court. It is contingent upon a finding of the Court that the remedy provided under Section 17 is not efficacious. Therefore if the Court finds that the remedy provided under Section 17 is not efficacious, de hors the prohibition contained in the earlier part of the Section, the Court can exercise jurisdiction under Section 9(1), even after the constitution of the Arbitral Tribunal. To put it simply, there is no absolute prohibition on the exercise of jurisdiction under Section 9(1).

15. The Hon'ble Supreme Court has in fact, recognized the above position in *Arcelor Mittal Nippon Steel India Limited Vs. Essar Bulk Terminal Limited* reported in **(2022) 1 SCC 712** wherein, it observed as follows:-

"74. Even after enforcement of the 2015 Amendment Act, an application for interim relief may be filed in court under Section 9 of the A&C Act, 1996, before the commencement of arbitration proceedings, during arbitration proceedings or at any time after an award is made, but before such award is enforced in accordance with Section 36 of the A&C Act, 1996. The Court has to examine whether the remedy available to the applicant under Section 17 is efficacious."

It is therefore, clear that the bar imposed under Section 9(iii) is not absolute

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and it would depend on the facts and circumstances of each case.

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16. The other judgment that is relied upon by the learned Senior Counsel for the respondent in ***Sundaram Finance Ltd. Vs. P.Sakthivel & another*** reported in ***2018 4 LW 619*** relates to execution of the orders passed by the Arbitrators. The appeal under Section 37 before Hon'ble Justice G.R.Swaminathan in ***Sundaram Finance Vs. P.Sakthivel*** arose out of a refusal of the District Court to record attachment passed by the Arbitrator. There, the learned Judge while considering the scope of Section 17 held that the Arbitrator's powers are akin to that of the Court under Section 9.

17. In ***Prabhat Steel Traders Pvt. Ltd. Vs. Excel Metal Processors Pvt. Ltd.*** reported in ***AIRONLINE 2018 Bom 854***, the Bombay High Court was concerned with the right of appeal available to a third party under Section 37. The learned Judge after considering the wider scope of Section 17 after the amendment concluded that even a third party can appeal against an order passed under Section 17 by the Arbitrator, if it affects its rights. In course of the said judgment, the learned Single Judge of the Bombay High Court was pleased to observe as follows:-



"41.In such a situation, where third party who is the owner of such goods or properties or claiming any right, title or interest in respect of such goods or properties but may not be in physical possession thereof and such goods or properties being in possession of one of the party to the arbitration agreement, such a third party is obviously going to be affected if any order is passed by the arbitral tribunal for interim measures under Section 17 of the Act. There is no dispute about the preposition of law that a third party can appear before the arbitral tribunal and seek any interim measures under Section 17 of the Arbitration and Conciliation Act, 1996 or seek any modification or variation of the interim measures if granted by the arbitral tribunal against such third party though he may be aggrieved by such interim measures granted by the arbitral tribunal."

18.We have no quarrel with the preposition of law that after the 2015 amendment, the powers of the Arbitrator are wide enough and are almost equal to that of the Court. The bar under Section 9(iii) is not an absolute bar but, is qualified and is subject to the finding that the remedy available before the Arbitrator is efficacious. It is therefore, incumbent upon the Court to reach a conclusion that the remedy before the Arbitrator is efficacious before it relieves itself of the obligation to consider the



application filed under Section 9 of the Arbitration and Conciliation Act, 1996.

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19. While considering the powers of the Arbitrators vis-a-vis to third parties to the arbitration agreement, Hon'ble Justice V. Parthiban in ***Abhibus Services India Pvt. Limited and Others Vs. Pallavan Transport Consultancies Services Ltd.***, had held that complete third parties cannot be impleaded in arbitration proceedings. This judgment has been followed by the Delhi High Court in ***Arupri Logistics Pvt. Ltd., Vs. Vilas Gupta*** reported in ***2023 SCC Online Delhi 4297***. The learned Single Judge of the Delhi High Court has also expressed similar views ***Arupri Logistics Pvt. Ltd., Vs. Vilas Gupta***, wherein it has been held that impleading of parties, who are not parties to the arbitration agreement by the Arbitrators is not correct. As we have already pointed out, unless the Court records a finding that the remedy under Section 17 is ineffectual, it cannot exercise jurisdiction under Section 9, in view of the explicit mandate of Sub-section 3 of Section 9 of the Arbitration and Conciliation Act.

20. Adverting to the facts of the case on hand, a protective order is



sought for as against a third party. The prayer in the Section 9 application before the learned Single Judge reads as follows:-

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"a. Treat this Application as urgent.

b. Direct the 2nd respondent to issue an addendum to the notice of sale through private treaty dated 09.11.2022 and bring on record the applicant's charge over the 1st respondent's property at Door No.383, Velacherry Tambaram Main road, Velacherry, Chennai - 600042 and further to secure the applicant's interest to the tune of Rs.3,13,84,043/- (Rupees Three Crore Thirteen Lakhs Eight Four Thousand and Forty Three only) inclusive of interest at 18% p.a. calculated on the principal amount until 24.01.2023 together with future interest, in the event of realisation of sale proceeds over and above the claim of the 2nd respondent against the 1st respondent by way of sale of the property at Door no.383, Velacherry Tambaram Main Road, Velacherry, Chennai - 600042.

c. Pass such further or other orders as may deem fit and proper."

21.It is not in dispute that the sale has happened and the 2nd respondent has realised certain monies over and above the amount that is due to it under the mortgage. We are not for a moment going into the correctness of the action of the 2nd respondent, as the sale itself is being

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questioned by the 1st respondent. The Arbitrator is seized of the dispute between the applicant and the 1st respondent. All that the applicant prays is a direction to the 2nd respondent to enable it to secure its interest to the tune of a specific sum of money, which it had claimed in the arbitration proceedings. The 1st respondent is a limited Company and it is averred that the properties subject matter of arbitration is only immovable property owned by the 1st respondent. The said property has also now been sold under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act). However, the sale consideration that has been received by the 2nd respondent by the sale of the property subject matter of arbitration is allowed to be paid over to the 1st respondent after adjusting the balance due to the 2nd respondent chances of recovery by the applicant, if it succeeds in the arbitration proceedings would be very bleak.

22.No doubt, there is a counter claim made by the 1st respondent as against the appellant. But, no interim protection has been sought for by the 1st respondent as against the applicant. The trigger for the application under Section 9 is the sale notice issued by the secured creditor namely, the



2nd respondent. The question that would loom large on the above facts and circumstances is as to whether the Arbitrator can effectively prohibit the secured creditor from parting with the sale consideration that is available with it. No doubt, Section 17 provides that the Arbitrator has got all the powers as are available to the Court under Section 9. We have extracted the provisions of both Section 9 and Section 17 of the Arbitration and Conciliation Act *supra*.

23. Needless to point out that the Arbitral Tribunal is a creation of a contract between two parties and by entering into an agreement for arbitration, the parties to the contract agree to abide by the decisions of the Arbitrator. But, if we are to ask ourselves a question as to whether by such agreement, the parties can invest the power in the Arbitrator to pass orders against third parties also, our answer will have to be an emphatic no. Therefore, whatever interim measure that could be taken under section 17 can be only between the parties to the agreement and not against the third parties. We are in complete agreement with the views of the Hon'ble Justice V. Parthiban in *Abhibus Services India Pvt. Limited and Others Vs. Pallavan Transport Consultancies Services Ltd* wherein, the learned Judge



has held that a non-signatory or a third party to the arbitration agreement cannot be even impleaded in the arbitration proceedings. As a corollary no orders could be passed by the Arbitrator against the third parties also.

Therefore, on the given facts, we find that the remedy that is available under Section 17 is actually inefficacious.

24. Once we find that the remedy is inefficacious, the order of the learned Single Judge relegating the matter to the Arbitrator needs interference at our hands. We therefore, set aside the order of the learned Single Judge and conclude that the remedy available under Section 17 is inefficacious and the Court must have exercised its jurisdiction under Section 9 and determined as to whether the applicant is entitled to an order of interim protection or not. Since the learned Single Judge has not considered the matter on merits, we do not think, it will be proper for us to go into the merits and decide the issue as we will deprive the parties a chance of an appeal under Section 37, which would be available to them otherwise.



25.Hence, this appeal is **allowed**, setting aside the order of the learned Single Judge and we remit the matter to the learned Single Judge to be decided in accordance with law on the premise that remedy under Section 17 on the given facts and circumstances is inefficacious. We direct the parties to bear their own costs in the appeal. Consequently, connected miscellaneous petition is closed.

(R.S.M., J.) (R.S.V., J.)
15.02.2024

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