OCD-13 ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
COMMERCIAL DIVISION

AP-COM/85/2025

L & T FINANCE LTD.
VS
LALTA PRASAD SHAW AND COMPANY AND ORS.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date : 5th February, 2025.

Appearance:
Mr. Ritoban Sarkar, Adv.
Ms. Shrayashee Das, Adv.
Mr. Rohan Kumar Thakur, Adv.
Mr. Tridibesh Dasgupta, Adv.
For petitioner

Mr. Shiv Shankar Banerjee, Adv.
Ms. Sutapa Das, Adv.
Ms. Sumana Mukherjee, Adv.
...for the respondents

The Court : This is an application by an unsecured creditor, seeking attachment of the bank account of the respondents, details of which are given below:-

Bank Account Details
Account No. 50010718029
Bank Name – Indian Bank
Branch – A J C Bose Road, Park Street
IFSC Code – IDIB000A501

The respondents/borrowers have failed to repay the loan in terms of the schedule of repayment, and as such, the security is being prayed for by the finance company.

Mr. Sarkar, learned advocate appearing for the petitioner, relies on a decision of the Hon'ble Apex Court in the matter of ***Essar House Private Limited Vs. Arcellor Mittal Nippon Steel India Limited,*** reported in ***2022 SCC OnLine SC 1219*** and submits that the rigours of Order 38 Rule 5 of the Code of Civil Procedure should not be applied by the Court while exercising powers under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act). Although, the broad principles may apply, but the text of either Order 38 Rule 5 or Order 39 Rule 1 and 2 of Code of Civil Procedure should not be squarely made applicable. The Court should balance the rights of the parties and the loss and injury that the parties may sustain, in the event orders are either passed or refused.

Mr. Banerjee, learned advocate appearing for the respondents submits that the loan was unilaterally foreclosed, without following the terms of the contract. Such foreclosure was defective. The due process was not followed. The demand was equally erroneous. The respondents will come in possession of same money upon conclusion of a proceeding which was going on before the National Company Law Tribunal and will repay the loan. According to Mr. Banerjee, injunction on the bank account of the respondents was foreign to the nature of protective measures contemplated under Section 9 of the said Act. It is further contended that the pleadings do not indicate that, the respondents have caused depletion of the assets and the court must secure the amount in the manner as prayed for in the application, otherwise, the petitioner will not be in a position to recover the money due from the respondents.

The decision cited by Mr. Sarkar has been considered. The Hon'ble Apex Court held that Section 9 of the Act conferred wide power on the Court to pass orders to secure the amount in dispute. Such order could be passed whether before the commencement of the arbitral proceeding or during the arbitral proceeding or at any time after making of the arbitral award, but before its enforcement of the award. The Court was required to ascertain whether a strong prima facie case for an interim order has been made out, and whether the balance of convenience and inconvenience was in favour of granting such relief. The Hon'ble Apex Court went on to hold that if a strong, prima facie, case was made out and the balance of convenience was in favour of granting an interim order, the Court exercising power under Section 9 of the Act should not withhold such reliefs, on mere technicality of absence of averments incorporating the grounds for an attachment before judgment under Order 38 Rule 5 of the Code of Civil Procedure. In paragraph 50 of the said decision, the Hon'ble Apex Court held that proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay realisation of an impending arbitral award was not imperative for grant of relief under Section 9 of the said Act. A strong possibility of diminution of assets would suffice. To assess the balance of convenience, the Court was required to examine and weigh the consequences of refusal of interim relief to the applicant for such interim relief in case of success in the proceeding, against the consequence of grant of interim relief to the opponent in case the proceedings should ultimately fail. Firstly, the case before the Hon'ble Apex Court was with regard to non-refund of refundable security deposit. Secondly, the Hon'ble Apex Court held that records or the actions of the respondent must reveal that there was a strong possibility of diminution of assets.

In this case, the loan was unsecured. Thus, this Court has to decide the matter on the principles of balance of convenience and inconvenience as also irreparable loss and injury. On the basis of the averments in paragraphs 29, 30, 34 and 37 of the petition, the petitioner has made a feeble attempt to impress upon the Court that, the respondents might sell off their properties. Such pleadings, in my opinion, are not adequate to prove that, there is a strong possibility that the respondents shall indulge in various activities only to defeat the claim of the petitioner, so that the petitioner cannot recover the amounts due, even if the petitioner is ultimately successful in the arbitration proceeding.

Thus, the questions of attaching the bank account to secure the disputed claim or passing an order directing the respondents to furnish security of equivalent amount do not arise. In the absence of specific instances which indicate that the respondents, in order to deprive the petitioner from its legitimate dues, are attempting to diverts their cash reserve or sell off their properties, such order cannot be passed. Such order will amount to granting the final relief, without adjudication.

However, it is not in doubt that there was a loan agreement. The agreement contains a repayment schedule. The agreement also contains an arbitration clause. The parties agreed to the jurisdiction of the Courts in Kolkata. Before the completion of the tenure of the loan, the loan was recalled and the demand notice indicates that a substantial amount is allegedly due and payable.

Under such circumstances, even assuming that Mr. Banerjee's contention that future instalments should not be a part of the dispute is assumed to be correct, this court, prima facie, is satisfied that part of the outstanding instalments which were previously due and payable must be secured in some manner. Under such circumstances, this Court directs payment of Rs. 2 lakhs by the respondents within fifteen days from date. Within the afore-mentioned time, the respondents may approach the petitioner with the proposal for re-scheduling. The petitioner is at liberty to act accordingly and take steps for initiation of arbitration proceedings. The payment and acceptance shall be without prejudice to the rights and contentions of the parties. In case of failure on the part of the respondents to comply with this order or comply with the terms that may be subsequently decided by the petitioner, the petitioner is at liberty to approach this court for further interim reliefs. The petitioner shall take steps to invoke the arbitration clause.

Liberty is granted to the respondent to file the Vakalatnama within 12th February, 2025.

The application is disposed of.

(SHAMPA SARKAR, J.)

sb/pa /sk