

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP.No.597/2008**

Date of decision: 18th August, 2009

SRI KRISHANPetitioner

Through: Mr. R.M. Aggarwal with Mr Sidharth Aggarwal, Advocates

Versus

ANAND ... Respondent

Through: Mr Sunil Malhotra and Mr Dheeraj Gupta, Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The short question which arises for consideration is, whether a petition under Section 9 of the Arbitration Act 1996 lies for the same interim measure which has already been granted to the petitioner by the arbitral tribunal on an application being made by the petitioner under Section 17 of the Act. The petitioner seeks to justify the present petition inspite of an order of the arbitral tribunal in his favour, for the reason of the said order being toothless and unenforceable.

2. The counsel for the petitioner has urged, that this petition is maintainable because the petitioner is remediless in the event of violation by the respondent of the interim order passed by the arbitrator; however if the same order is passed against the

respondent by this court also, in exercise of powers under Section 9 of the Act, in the event of breach thereof, the petitioner shall have remedy of contempt of court against the respondent. It is further contended that the Act is a complete code within itself and nowhere provides for the consequences of breach of such an order of the Arbitral Tribunal under Section 17 of the Act; that under Section 36 of the Act it is only the award passed by the arbitral tribunal which is enforceable under the CPC and there is no such parallel provision for the enforcement of the order under Section 17 of the Act. It is further the contention that no petition for contempt of court also lies despite violation of the order of the arbitral tribunal and the provisions of the Contempt of Court 1979 also apply only to the willful disobedience of a judgment / order / direction of writ or other process of the court only – an arbitral tribunal is not a court. It is further submitted that even the provisions of Order 39 Rule 2A of the CPC apply to the breach of an order passed under Order 39 Rules 1 and 2 of the CPC only and Rule 2A also has no applicability to the orders made by the arbitral tribunal under Section 17 of the Act.

3. Reliance in this regard is placed on:

- (a) extracts from the textbook “Law of Arbitration and Conciliation” by Justice Dr B.P. Saraf wherein it is observed that Section 17 neither grants the arbitral tribunal the power to enforce its order nor provides for judicial enforcement of such order of the arbitral tribunal and that the only consequence of a party not taking the interim measure of protection as ordered by the arbitral tribunal is of such failure being taken into account in the final decision

by the arbitral tribunal, particularly in any assessment of damages.

- (b) Judgment of this court in **NHAI Vs M/s China Coal Construction Group Corporation** AIR 2006 Delhi 134 holding that the pendency of an application under Section 17 before the arbitral tribunal does not denude the court of its power to make order of interim protection under Section 9 of the Act.
- c) Judgment of the Supreme court in **M/s Sundaram Finance Ltd Vs M/s NEPC India Ltd** AIR 1999 SC 565, also observing in para 12 thereof that though Section 17 gives the arbitral tribunal the power to pass orders, the same cannot be enforced as orders of a court and it is for this reason only that Section 9 gives the court power to pass interim orders during the arbitration proceedings.

4. I may notice that the Supreme Court not only in **Sundaram Finance Ltd** (supra) but even subsequently in **M.D. Army Welfare Housing Organisation Vs Sumangal Services Pvt Ltd** AIR 2004 SC 1344 had held in para 56 of the judgment that under Section 17 of the Act no power is conferred on the arbitral tribunal to enforce its order nor does it provide the judicial enforcement thereof.

5. Per contra, the counsel for the respondent has argued that the interim order of the arbitrator under Section 17 of the Act will merge in the final award and will then be enforceable. Hence he has argued on the merits of the matter.

6. Before considering the legal aspect aforesaid, it is deemed appropriate to record that though the petitioner has in the petition claimed reliefs also, other than those already granted by the arbitral tribunal under Section 17 of the Act but during the course of hearing, as recorded on 4th August, 2009, the counsel for the petitioner did not press the other reliefs and confined the petition at this stage to only grant of interim orders which have already been granted by the arbitral tribunal.

7. I have recently, in **M/s Value Advisory Services Vs M/s ZTE Corporation & Ors** OMP 65/2008 decided on 15th July, 2009 dealt with the powers under Sections 9 and 17 of the Act. In the said judgment, judgments of this court in i) **Arun Kapur Vs. Vikram Kapur** 95 (2002) DLT 42 holding that while a petition under Section 17 lies only against a party to the proceedings, Section 9 vests remedy in a party to the arbitration proceedings to seek interim measures of protection against the person who need not be party to the arbitration agreement or to the arbitration proceedings; ii) **CREF Finance Limited vs. Puri Construction Ltd.** 2000 (3) Arb. LR 331 where in exercise of powers under Section 9 of the Act orders were made against a third party; iii) **Mikuni Corporation Vs UCAL Fuel Systems Ltd** 2008 (1) Arb. LR 503 (Delhi) holding that since no arbitration proceedings could take place vis-à-vis the party against whom orders were sought, application under Section 9 did not lie against such party; iv) **China Coal Construction Group Corporation** (supra) holding that interim measures could not be granted by the court against a non party to the arbitration; v) **Smt. Kanta Vashist Vs. Shri Ashwani Khurana** MANU/DE/0380/2008 also holding that no injunction could be issued under Section 9 of the

Act even against companies which though of the family, members whereof were parties to the arbitration, were independent legal entities and not parties to the arbitration and vi) **NAFED Vs. Earthtech Enterprises Ltd.** MANU/DE/0534/2009 also holding that an application under Section 9 could be made only against the parties to the arbitration agreement and could not be made against a third party, held that no general principle of maintainability/applicability or non-maintainability/non-applicability can be laid down; it will have to be determined by the court in the facts of each case whether for the purpose of interim measure of protection, preservation, sale of any goods, securing the amount in dispute, an order affecting a third party can be made or not. Suffice it is to state at this stage that the powers under Sections 9 and 17 are distinct. While the arbitral tribunal in the exercise of powers under Section 17 can order a party to the arbitration only to take interim measure of protection, since the power of the court under Section 9 is the same as the power of the court in relation to any proceedings before it and since the court in such proceedings has evolved a practice of issuing interim orders/direction qua third party also, the court even in exercise of powers under Section 9 can in the facts and circumstances of the case issue such interim orders/directions affecting the third party.

8. However, in the present case the petitioner is claiming the identical relief from this court under Section 9 as already availed by him under Section 17. The only justification thereof is the enforceability of the order granted under Section 9 and non enforceability of that under Section 17.

9. At the outset I may state that if able to find an answer to the grievance raised by the petitioner of the order under Section 17 being unenforceable and toothless, I am reluctant to hold that such repetition of orders can be sought from the court. Such an interpretation would make Section 17 otiose and redundant and open the floodgates of the court to petitions under Section 9. The legislative intent in Section 17 of the Act appears to be to make the arbitral tribunal a complete fora not only for finally adjudicating the disputes between the parties but to also order interim measures. If it were to be held that to give teeth to orders under Section 17, petitions under Section 9 are to be filed, no purpose would be served in the parties approaching the arbitral tribunal first under Section 17 of the Act inasmuch as in such situation they might well approach the court directly under Section 9. Both the court as well as the arbitral tribunal ought not to be vexed with the same issues, not only at the expense of their time but also at the costs of the parties. Such interpretation which makes one of the provisions of the statute meaningless has always to be avoided.

10. In going through the Act minutely with such intent, Section 27(5) under the heading "**Court assistance in taking evidence**" has been discovered. The same reads as under:

27. (5). Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the court."

11. Though neither of the counsel had drawn attention to the aforesaid provision but in my opinion the same is a complete answer to the cause of action for the present petition. The petitioner seeks same interim orders from the court as already granted to him by the arbitral tribunal only for the reason of the breach of the order of the arbitral tribunal being remediless. But that is not the position. The aforesaid provision provides the remedy for such breach. Any person failing to comply with the order of the arbitral tribunal would be deemed to be “making any other default” or “guilty of any contempt to the arbitral tribunal during the conduct of the proceedings”. Thus the remedy of the other party is to apply to the arbitral tribunal for making a representation to the court to meet out such punishment, penalty to the guilty party, as would have been incurred for default in or contempt of the court. Naturally, the arbitral tribunal would make such a representation to the court only upon being satisfied that the party/person is in default or in contempt. Once such a representation is received by this court from the arbitral tribunal, this court would be competent to deal with such party in default or in contempt as if in contempt of order of this court i.e., either under the provisions of the Contempt of Courts Act or under the provisions of Order 39 Rule 2A CPC.

12. The aforesaid interpretation is also in consonance with the legislative intent. The whole purpose of arbitration is to expeditiously resolve the disputes between the parties. The same extends not only to adjudication of final disputes but also to adjudication of disputes as to default / breach of interim orders of the arbitral tribunal. Often, the breach/default is not obvious and the averment of one party on such breach/default may require

adjudication. Section 27(5) if interpreted as aforesaid provides for the arbitral tribunal to make the said adjudication also before making a representation to the court.

13., Though I have been unable to find the dicta of any other court dealing with the aforesaid aspect but mention must be made of the judgments of the Single Judges of the Bombay High Court in i) **M/s Anuptech Equipments Private Ltd Vs M/s Ganpati Cooperative Housing Society Ltd** AIR 1999 Bombay 219 where in para 16 reference is made to Section 27(5) in the context of holding that the arbitral tribunal discharges the inherent judicial function of the State – it is for this reason only that in a major departure from 1940 Act, power of contempt of arbitral tribunal has been conferred; once a person can be punished for contempt of the arbitral tribunal and which can bring the administration of justice into disrespect or interference with the administration of justice, it shows the legislative intent qua the arbitral tribunal and ii) **Maharashtra State Electricity Board Vs Datar Switchgear Ltd** MANU/MH/1187/2002 also holding that Section 27(5) reveals the scheme of the legislation; the contempt of the arbitral tribunal has been made subject to imposition of disadvantages, penalties and punishments by order of the court on the representation of the arbitral tribunal. The Gujarat High Court in **Saurashtra Chemicals Ltd Vs Hon'ble Mr Justice K Ramamoorthy (Retd.)** MANU/GJ/0329/2005 has also approved the view of Bombay High Court.

14. However, Section 27(5) was not noticed in **Sundaram Finance Ltd** or in **Sumangal Services Pvt Ltd** (supra). Perhaps,

because it is hedged in the heading/title of Section 27. However, the said heading/title cannot limit or narrow the otherwise wide amplitude of sub-Section (5) thereof. The default, contempt mentioned therein cannot be limited to that only in appearance of witnesses before the arbitral tribunal. To do so, would be to render the words “any other default” and “guilty of any contempt” therein otiose. It may be highlighted that under Section 37(2)(b) of the Act the order of the arbitral tribunal under section 17 of the Act granting or refusing to grant an interim measure is appealable before the court. The same also disclose the legislative intent of the same being in the exercise of the judicial functions.

15. The 1996 Act is modeled on the UNCITRAL Model and in an attempt to make uniform the arbitration law in all countries governed by the UNCITRAL Model. The UNCITRAL Model also provides for the arbitral tribunal to order interim measures. I may also notice that even the Model UNCITRAL Arbitration Law as in the year 2006 suggests a change qua the powers of the arbitrator to grant interim measures and provides for application to the court for enforcement of the said interim orders. However, the Indian Act had even prior thereto by inserting Section 27 (5) provided for the same.

16. Once it is held that the Act provides a remedy for the enforcement of the orders under section 17 of the Act, it has to be necessarily held that the party which has elected to apply for the relief under Section 17 of the Act is thereafter not entitled to seek the same relief from the court under Section 9 of the Act. Such multiplicity of proceedings ought to be avoided at all causes. The Supreme Court in **M/s Ambalal Sarabhai Enterprises Vs M/s**

Amrit Lal and Co. (2001) 8 SCC 397 has held that two separate proceedings for the same relief ought not to be entertained and the party must be asked to elect. In the present case the petitioner had already elected and had sought the same interim relief (now sought from this court) from the arbitral tribunal and was successful in obtaining the same. The petitioner is now not entitled to apply to the court for the same relief. With the aforesaid observations, the petition is dismissed. However, in view of the legal proposition involved, the parties are left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

August 18, 2009
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