

(1999) 01 CAL CK 0002
In the Calcutta High Court
Case No : A.P. No. 286 of 1998

Alpic Finance Ltd.

APPELLANT

Vs

Allied Resins and Chemicals Ltd. and Another

RESPONDENT

Date of Decision : 25-01-1999

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2000) 102 CompCas 198

Hon'ble Judges : Vinod Kumar Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vinod Kumar Gupta, J.—By this common order and judgment, I propose to dispose of the main petition u/s 9 of the Arbitration and Conciliation Act, 1996, and the application filed by the respondents for vacating the ad interim order dated July 16, 1998.

2. The facts lie in a very narrow compass. The petitioner, Alpic Finance Limited, being a company incorporated under the Companies Act, 1956, carries on the business of financing. As a financier it entered into a hire purchase agreement with respect to the hiring/financing of an AC Transformer (Siemens Make UPS (IOKVA, Model 4110 51. 1950905) ; IOKVA, 220/110V AC Transformer). This agreement was executed on November 19, 1996. The total hire purchase value of the aforesaid machine was Rs. 1,17,94,755 and it was payable by the respondents within three years by 12 equal quarterly instalments. The possession of the machine was made over by the petitioner to respondent No. 1 in terms of the aforesaid hire purchase agreement. It is the admitted case of the parties that respondent No. 1 received the machine after the execution of the agreement and has been using the same ever since. The allegation of the petitioner is that respondent No. 1 has paid to the petitioner only an amount of Rs. 28,83,246. Thereafter he defaulted in paying the hire moneys. Some post-

dated cheques issued by respondent No. 1 in favour of the petitioner on being presented by the petitioner to the banker were dishonoured. Ultimately, the petitioner invoked the arbitration agreement existing between the parties and lodged its claims worth Rs. 1,24,33,287 before the sole arbitrator, Pulin Behari Das. The statement of claims was, accordingly, filed by the petitioner before the sole arbitrator. It is also admitted that the respondents have filed their objections to the aforesaid statement of claims before the sole arbitrator. On July 16, 1998, when this petition came up before this court for consideration, an ad interim order was passed appointing Subhas Dey, barrister-at-law, as the receiver for the purpose of making an inventory of the aforesaid machinery and for taking symbolical possession of the same. It was also directed that if the respondents deposited with the receiver an amount of Rs. 24,00,000, the receiver was not to take any further action. But if such deposit was not made, the receiver was to take actual physical possession of the machinery and remove the same to a safe place to be provided for by the petitioner. On August 5, 1998, at the instance of the respondents, the court directed that the receiver would not take any further steps, as stipulated in the order dated July 16, 1998.

3. In the application for vacating the order dated July 16, 1998, and in the affidavit-in-opposition filed by the respondents to the petition u/s 9 of the Act, two points have been urged in support of the contention that the petition u/s 9 of the Act is not maintainable. The first point relates to the very maintainability of the petition at its very threshold u/s 9 of the Act. The second point arises out of the interpretation to be put upon Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.

4. The learned advocate appearing for the respondents in support of the first point regarding maintainability of the petition urged that the existence of a dispute between the contesting parties is a condition precedent for the petitioner to invoke Section 9 of the Act to enable it to come to the court for a prayer in respect of an order in the nature of an interim measure for securing protection of the amount in dispute. The learned advocate for the respondents argued that if there was no arbitrable dispute existing between the parties, Section 9 of the Act had no applicability and, therefore, any application filed deserved to be dismissed. In elaboration of his point, he submitted that even though in the present case the petitioner had, by invoking the arbitration agreement, already approached the arbitrator, has filed its statement of claims and the arbitrator after having entered upon reference had started the proceedings, yet there being no arbitrable dispute existing between the parties, Section 9 of the Act was not attracted in the case. According to him, since the respondents did not contest the claims of the petitioner as preferred before the arbitrator, an arbitrable dispute did not come into existence and, thus, a petition u/s 9 of the Act was not maintainable. The point urged has to be rejected on all the counts.

5. Let us examine the merits of the contentions raised. First of all the existence or non-existence of a dispute is of no consequence nor has it any relation as far

as invoking or applying Section 9 of the Act is concerned. The opening part of Section 9 reads thus :

"Section 9. Interim measures, etc., by court--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. . ."

6. A cursory look at the opening part of Section 9 clearly suggests that a party, uninhibited by any consideration, except with the purpose of securing its interests can approach a court, either before, during, or even after completion of the arbitral proceedings if the party feels that the situation at any given point of time requires it to secure or obtain an order in the nature of an interim measure for securing its interests. Since a mention has been made in the section about the arbitral proceedings, it necessarily follows that there has to be in existence an arbitration agreement between the parties because it is only out of such an arbitration agreement that arbitral proceedings can arise. Whether a dispute exists between the parties or not is of no relevance as far as invocation of Section 9 is concerned. The case of the respondents here is worse than that. As seen in the present case, the arbitral proceedings are already pending before the sole arbitrator. The petitioner has filed its statement of claims. The respondents have also filed their reply. Undoubtedly, the respondents have not admitted all the claims of the petitioner. On my persistent queries to the learned advocate for the respondents as to whether I should record unequivocal admission of the respondents to all the claims of the petitioner before the arbitrator so as to find out as to whether any dispute exists between the parties or not, the answer was in the negative. Undoubtedly, therefore, disputes do exist between the parties and irrespective of the applicability of Section 9 or the language employed in its opening part, the arbitral proceedings being there, this section is squarely attracted and the petitioner has a right to maintain it in the court. That takes care of the first point. On both the counts therefore, the pendency of arbitral proceedings, and the existence of a dispute between the parties the petitioner is entitled to invoke Section 9 of the Act and approach the court for an order of interim nature. I must however make it absolutely clear that existence of a dispute by itself cannot be termed as a condition precedent for a party to enable it to invoke Section 9 of the Act. Mere existence of an arbitration agreement between the parties is a good enough ground to enable a party to come to the court by invoking Section 9 of the Act because the language employed in the opening part of the section, namely "before, or during arbitral proceedings . . ." enables the party to do so.

7. Coming to the second point regarding the applicability of Section 22 of the 1985 Act, it is seen that Section 22 relates to the bar of proceedings for appointment of receiver, etc., in respect of the property of an industrial company. Sub-section (1) of Section 22 which is relevant for this purpose reads thus :

"22.(1) Where in respect of an industrial company, an inquiry u/s 16 is pending or any scheme referred to u/s 17 is under preparation or consideration or a

sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956, or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof... shall lie or be proceeded with further, except with the consent of the Board, or, as the case may be, the appellate authority."

8. The pendency of an inquiry u/s 16 of the Act or matters related thereto do operate as a bar u/s 22 of the 1985 Act only if this relates to the properties of the industrial company. Undoubtedly, the machinery forming the subject-matter of the petition u/s 9 of the Act is not a property of the industrial company. The industrial company in the instant case is respondent No. 1. The machinery belongs to the petitioner since in terms of the hire purchase agreement the petitioner is the owner of the machinery and respondent No. 1 is only its hirer. A hirer undoubtedly cannot be the owner of the property and, therefore, the property cannot be treated to be belonging to the hirer. The hirer at best can have the right to use the property in terms of the hire purchase agreement. It does not have the right to own the property. The right to user in the capacity as a hirer is different and distinct from the right to own as an owner of the property.

9. What Section 22 of 1985 Act says is that if the proceedings are pending before the Board or the Appellate Authority, no proceedings for appointment of a receiver will lie in respect of the property of the industrial company. The expression "property of the industrial company" clearly means that the property should belong to the company, should be in the ownership of the company. It is the undisputed case of the parties that the subject-matter of this petition, namely the plant and machinery is the property of the petitioner ; respondent No. 1 is not its owner. Respondent No. 1 is the hirer of the property. The property does not belong to respondent No. 1. It belongs to the petitioner. In that view of the matter therefore, Section 22 of 1985 Act is not attracted in this case. The petition u/s 9 of the Act therefore is maintainable on this ground as well.

10. Both the aforesaid points urged by the learned advocate appearing for the respondents having thus been negated, it is held that the petition u/s 9 of the Act is maintainable on all scores.

11. Coming to the merits of the case, it is seen that the respondents have not disputed the execution of the agreement nor have they disputed the allegation that they have committed defaults in the payment of the instalments. In that view of the matter therefore, there is no escape from the fact that the order dated July 16, 1998 earlier passed by the court has to be given effect to and implemented.

12. For the foregoing reasons, therefore, the petition u/s 9 of the Act is allowed.

The order dated July 16, 1998, is revived. The application for vacation of this order is dismissed.

13. In modification of the order dated July 16, 1998, however, it is directed that the date of deposit of Rs. 24,00,000 as appearing therein shall be changed from August 6, 1998, up till February 28, 1999.

14. The receiver appointed is directed to execute the order in all respects strictly on the terms and conditions contained in the order.

15. The petitioner shall have the liberty to apply for sale later on.

16. The receiver and all parties shall act on a xerox signed copy of this dictated order on the usual undertaking.