

(2021) 08 CAL CK 0008
In the Calcutta High Court
Case No : Arbitration Petition No. 291 Of 2021

Bridge Track And Tower Private Limited	APPELLANT
Vs	
Simplex Infrastructures Limited	RESPONDENT

Date of Decision : 04-08-2021

Acts Referred:

Code of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 1(b), Order 38 Rule 5
Arbitration And Conciliation Act, 1996 — Section 9, 9(1)(b), 9(1)(e)

Citation : (2021) 08 CAL CK 0008

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Priyankar Saha, Aasish Chaudhury, Aindrila Basu, Anirban Ray, Snehasis Sen, Abhishek Banerjee

Judgement

This is an application under Section 9 of The Arbitration and Conciliation Act, 1996 for an order of injunction restraining the respondent from dealing with or alienating its assets or creating any third party rights in respect of such assets.

The dispute arises out of an agreement whereby the petitioner agreed to sell grooved rubber sole plates etc. by way of 6 purchase orders which were issued between June, 2016 and March, 2018. It is not in dispute that all the goods which were agreed to be sold by the petitioner were delivered to the respondent which would be evident from the challans which are on record. It is also not disputed that pursuant to a minutes of meeting held on 13th May, 2019, the petitioner agreed to replace about 681 of a particular specification of goods, namely, Chair Plates which were duly replaced. The respondent has not raised any dispute with regard to the aforesaid fact. The petitioner thereafter made repeated demands for payment of the

outstanding amount of approximately Rs.60.68 lakhs from the respondent. At least 14 reminders were sent by the petitioner to the respondent for

payment culminating in a demand notice dated 6th February, 2020 which sets out the sequence of events and the outstanding amount from the

respondent. The agreement contains an arbitration clause pursuant to which the petitioner sent a letter of invocation on 12th May, 2021 which was

received by the respondent.

The defence taken on behalf of the respondent is that the petitioner cannot be converted into a secured creditor and that the petition does not contain

sufficient pleading warranting an order under Order XXXIX Rule 1(b) or Order XXXVIII Rule 5 of The Code of Civil Procedure, 1908. A point has

also been taken with regard to the delay on the part of the petitioner in making the present application.

Counsel have relied on decisions in support of their contentions. From the material on record, it is evident that the petitioner supplied and delivered

goods to the respondents and also replaced some of the goods. The challans, invoices and the minutes of meeting held between the parties would

substantiate the aforesaid facts. There is also no dispute that outstanding amounts are due from the respondent for the delivery of goods save and

except an amount of Rs. 32 lakhs which was given by the respondent on 27th February, 2019. The respondent has also not replied to any of the

demand or invocation notices including the 14 other reminder of the petitioner requesting payment of the outstanding amount from the respondent. The

point which falls for consideration is whether the petition discloses grounds for passing an order restraining the respondent from transferring or

alienating the assets.

There can be no two views that certain factual requirements have to be satisfied by a party for obtaining an order of attachment before judgment or

an order of temporary injunction under Orders 38 Rule 5 and 39 Rule 1, respectively. An order for attachment is usually passed after affidavits since

the threshold is higher in such cases. The Supreme Court in *Raman Tech. vs. Solanki Traders*; (2008) 2 SCC 302, cautioned on the drastic effect of

such orders. In the present case, the petitioner does not seek an order of attachment but a restraint on the respondent from dealing with alienating its

assets or creating third party rights in respect thereof. *Sunil Kakrania vs. Saltee*

Infrastructure Ltd. & Anr.; AIR 2009 Cal 260 and Kohinoor Steel

Private Limited vs. Pravesh Chandra Kapoor; AIR 2011 Cal 29 held that the petitioner would be required to make out a clear case for an order in the

nature of Order XXXIX Rule I (b) which would include the defendant evincing an intention to remove or dispose of property with a view to defrauding

the creditors. In Kohinoor Steel there was no averment in the plaint or the injunction application that the defendant intended or threatened to remove

his property with a view to defrauding his creditors. The Division Bench found the allegations to be vague and insufficient for grant of order of

attachment or any order of similar effect. The Division Bench noted that apart from the allegations being vague, the only ground taken by the plaintiff

was that the defendant is in a penurious condition and held that in a money suit a defendant is not required to show that he has sufficient earnings to

pay off the decretal amount of the suit if ultimately decreed in the plaintiff's favour. In the present case, there are specific allegations in the

petition wherein it has been averred that the respondent is threatening to frustrate the dues of the petitioner with an objective of defrauding its

creditors including the petitioner. The petitioner has not prayed for interim order on the basis that the respondent is in financial distress which would

call for orders as prayed for.

In Deccan Chronicle Holdings Limited vs. L&T Finance Limited; 2013 SCC OnLine Bom 1005; are Division Bench of the Bombay High Court

relying on Adhunik Steel Ltd. vs. Orissa Manganese; 2011 5SCC 532, held that a petitioner in a Section 9 application cannot be pinned down to the

rigours of every procedural provision in The Code of Civil Procedure.

This Court finds the above approach to be apposite in respect of applications under Section 9 of the Act which entitles a party to a wide spectrum of

reliefs and includes securing the amount in dispute in the arbitration. The Court is also entitled to pass any other interim measure of protection as may

appear to the Court to be just and convenient " Section 9(1)(b) and (e) respectively. The Court has to assess the particular facts in the case before

exercising its discretion on whether to pass or refuse an interim order. A Section 9 application is intended to protect the parties even before the

commencement of the arbitration so that the purpose of the arbitration is not rendered infructuous by any act of a party in the interregnum. Hence, the

Court must step in with a prompt measure of protection where denying such relief would result in nothing remaining to be decided in the arbitration.

Since the demand notice was sent by the petitioner on 6th February, 2020 and the invocation notice is dated 12th May, 2021, there is no delay in filing the present application.

Since this Court is convinced, prima facie, that the petitioner has a bonafide claim against the respondent and the latter has not given any reassurance

that the petitioner's claim would be protected pending arbitration, the petitioner is entitled to interim protection. There shall accordingly be an order

restraining the respondent and its agents from dealing with or disposing of order encumbering any of his assets and properties or creating any third

party in respect thereof for a period of four weeks from date or until further orders, whichever is earlier.

Let affidavit in opposition be filed within two weeks from date, reply within a week thereafter. List this matter after three weeks.