
(2019) 03 DEL CK 0058

In the Delhi High Court

Case No : Original Miscellaneous Petition No. 172 Of 2012

CVCIGP II Client Rosehill Limited And Others

APPELLANT

Vs

Sanjay Jain & Ors

RESPONDENT

Date of Decision : 08-03-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9, 21

Citation : (2019) 03 DEL CK 0058

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Sachin Datta, T. Sharma, P. Mehta

Judgement

Prathiba M. Singh, J

I.A. 3443/2019 in O.M.P. 172/2012

1. Ld. Counsel for the Respondents submits that she has served a copy of the application to the Ld. Counsel for the Petitioners. A perusal of the notice of motion filed with the application shows that there is an endorsement by the counsels for the Petitioners and service has been executed on 5th March, 2019. However, none appears for the Petitioners.

2. The Petitioners had filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter, "Act") seeking interim relief. Vide order dated 1st May, 2012, interim protection was granted to the Petitioners in the following terms:

"11. As per the affidavits filed and submissions made, the assets of the respondents are far more than the liabilities, which are sought to be recovered by the petitioner. Accordingly in my view a general order cannot be passed, restraining the respondents from selling of their assets especially when the petitioner has not disclosed the list of assets of the respondents, however, it is also necessary to balance the equities and to ensure that the petitioners should

not suffer, in case the respondent sells its assets to defeat the claim of the petitioner of Rs.120 crores. As per the affidavits and the undertakings which have been filed on record, the fixed assets of respondents are more than 420 crores. No doubt the properties have been mortgaged to banks, but as per the respondents, even after the limit provided by the banks more than 95 crores is available. As per the undertakings of Sh.Sanjay Jain and Sh.Rajiv Jain, they along with M/s.Surya Vinayak Hospitalities Pvt. Ltd. shall jointly or singly always hold at least 50% shareholding in SVIL Mines Ltd. throughout the pendency of this petition or as directed by the Court. As per the undertaking of Mr.Manmohan Garg, Director of respondent no.4, the respondent will not create any further third party rights of any kind whatsoever including but not limited to mortgage, lien or any other charge and will also not transfer or alienate the said fixed assets of respondent no.4 company as shown in the balance sheet until further orders of this Court. The undertakings of the Sh.Sanjay Jain (respondent no.1), Sh.Rajiv Jain (respondent no.2) and Sh.Manmohan Garg (Director of respondent no.4) are accepted and taken on record. The respondents shall be bound by the undertakings given. Counsel for the respondents submits that respondents have been explained the consequences of breach of undertaking. The respondents shall also inform the bank about the second charge created in view of the orders passed today. Interim order is modified accordingly. Undertakings shall remain in force, unless the interim order is modified by the arbitrator. Liberty is also granted to the parties to approach the arbitrator when appointed for modification or for seeking further orders, if so advised. Petition is accordingly, disposed of."

3. The said order of the Ld. Single Judge was appealed by the Petitioners in FAO(OS) 256/2012 which was disposed of vide judgment dated 7th August, 2012 in the following terms:

"21. We direct that the petition filed by the appellants shall be treated as disposed of with the direction the respondents shall furnish within four weeks from today security or bank guarantees and/or undertakings of specified unencumbered assets solely to the appellants in order to secure the amount of Rs.1,250,003,018.31 to the satisfaction of Registrar General of this Court. The matter shall be listed before him on 7th September, 2012.

22. In failure to do so within the time granted, the respondents shall have to be restrained from alienating, disposing of, dealing with, encumbering or creating any third party rights over their assets and properties, except in the ordinary course of business unless the same is modified by the Arbitral Tribunal."

4. The SLP against this order was dismissed on 22nd November, 2016 in SLP No. 26070/2012. Thus, the order of the Division Bench continues to operate against the Respondents. Since, no bank guarantee or security was given by the Respondents, the restraint order, in respect of alienating or encumbering of the assets and properties of the Respondents, continues till date.

5. Mr. Sachin Datta, Ld. Senior Counsel places reliance on the e-mail dated 3rd

January, 2019 received from the London Court of International Arbitration (hereinafter, "LCIA"), wherein the claim of the Petitioners has been treated as withdrawn under the LCIA Rules. Accordingly, it is his submission that the order passed in this petition deserves to be vacated and the petition ought to be dismissed.

6. The present petition was filed under Section 9 of the Act. In *Sundaram Finance v. NEPC India Ltd.* (1999) 2 SCC 479, the Supreme Court has held categorically that a Section 9 petition is meant to be entertained and orders can be passed prior to, during, or after arbitral proceedings. However, the Petitioners seeking such relief has to show a manifest intention to resort to arbitral proceedings, since the relief granted under Section 9 is only an interim relief. The relevant observation of the Supreme Court reads as under:

"19. When a party applies under Section 9 of the 1996 Act, it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the Arbitral Tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr Subramaniam is, therefore, right in submitting that when an application under Section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application under Section 9 is filed, the proceedings have not commenced under Section 21 of the 1996 Act. In order to give full effect to the words "before or during arbitral proceedings" occurring in Section 9, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under Section 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to an Arbitral Tribunal. But a situation may so demand that a party may choose to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made, the court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied, the court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the court while exercising jurisdiction under Section 9 can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the court is not debarred from dealing with an application under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act."

7. Since the Petitioners have not shown any inclination for the last so many years to proceed with the arbitration with diligence, under the aegis of LCIA, the claim

itself stands withdrawn, as per the e-mail dated 3rd January, 2019, sent by the LCIA. The petition under Section 9 of the Act is not liable to be entertained and is accordingly dismissed. The interim orders passed in the present petition stand vacated in the above terms.

8. I.A. is allowed in the above terms.

9. The next date before Registrar General stands cancelled.