(2009) 09 DEL CK 0079

In the Delhi High Court

Case No : Arbitration Appeal No. 7 of 2009

Indian Oil Corporation Ltd.	APPELLANT
Vs	
Iranian Offshore Engineering and Construction Company	RESPONDENT

Date of Decision : 15-09-2009

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 17, 37(2), 9
Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5

Citation : (2009) 09 DEL CK 0079

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : A.M. Singhvi, Rakesh Sawhney and Mona Aneja, for the Appellant; V.P. Singh Kamal Budhiraja, Anil Airi and Manu Seshadhari, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—By this appeal u/s 37(2) of the Arbitration & Conciliation Act, 1996, the appellant has appealed against the order dated 20th May, 2009 of the Arbitral Tribunal.

2. Brief facts relevant for the purpose of deciding this appeal are that the appellant filed a petition u/s 9 of the Arbitrations & Conciliation Act, 1996 being OMP No. 492/2007 before this Court seeking interim measure of protection by directing arrest of the Sea Vessel "MV Abouzar 81" as security for reported claim of the appellant against the respondent arising out of contract dated 16th December, 2004. This Court passed an ex parte interim order on 10th September, 2007 restraining respondent from sailing the Sea Vessel "MV Abouzar 81" out of the Mumbai Port till next date of hearing or till such time the respondent furnished security of the amount claimed by the petitioner. The respondent entered appearance in the High Court and moved an application for vacating the aforesaid order. This Court by an order dated 14th November, 2007 modified the earlier ex parte interim order dated 10th September, 2007 and permitted the sea vessel "MV Abouzar 81" to leave Mumbai Port but directed not

to leave Indian waters. While the petition u/s 9 was pending before the Court, the arbitration proceedings were initiated at the instance of appellant and the Arbitral Tribunal was referred the dispute between the parties for adjudication. On 10th April, 2008 when the petition u/s 9 came up for hearing, this Court observed that no further orders were required in the petition. The interim order already passed by the Court was made operative in favour of the petitioner till the appropriate orders were passed on an application proposed to be filed by the respondent u/s 17 of the Arbitration & Conciliation Act, 1996 before the Arbitral Tribunal.

3. The order dated 20th May, 2009 has been passed by the Arbitral Tribunal on the application of respondent u/s 17 of the Arbitration & Conciliation Act whereunder the respondent made a prayer to release the respondent from undertaking given to the High Court on 14th November, 2007 regarding sea vessel "MV Abouzar 81" not leaving the Indian waters and seeking leave to permit it to sail the vessel out of Indian waters. Before the Arbitral Tribunal the appellant took a plea that the Arbitral Tribunal could not sit in appeal against the order passed by the High Court and therefore the order passed by the High Court could not be subject matter of jurisdiction of the Tribunal u/s 17 of the Arbitration & Conciliation Act and the application should be rejected. The other plea taken by the appellant was that the detention of the vessel within the Indian waters was the interim measure of protection necessary to protect the interest of the appellant as respondent had no other assets in India and in case of vacating the injunction order, the appellant would not be able to recover the amount claimed by it.

4. None of the contentions raised by the appellant before the Arbitral Tribunal found favour with it. The Tribunal, after considering the arguments of both the sides, came to the conclusion that the Tribunal had jurisdiction to entertain application u/s 17 filed before it. The Tribunal also observed that the order of interim measure of protection of detention of vessel could not be passed on mere asking of claimant and one had to be satisfied that the respondent was inclined to dispose of its property with intent to obstruct execution of decree, which may eventually be passed. The satisfaction of the authority passing the order must not be an illusory one and the direction to have an interim measure of the nature as prayed was undoubtedly an extra ordinary remedy and as such the Tribunal or the Court had to act with utmost circumspection. The Tribunal observed that the claimant/appellant had not been able to establish any ground to its satisfaction so that the interim measure of arrest of vessel could be allowed to continue by the Tribunal; the respondent was awarded contract after ascertaining its financial stability looking at its three years turnover prior to bidding for the contract and only when the respondent was found financially stable, the contract was awarded to the respondent. The appellant''s contention about respondent suffering other orders of attachment at the instance of other creditors was also turned down saying that such order of attachments were not enough for coming to conclusion that the respondent was in financial hardship more so, when the respondent had

averred that those matter had been settled on negotiations.

5. During arguments, the learned Counsel for the appellant pressed the point that the Tribunal exceeded its jurisdiction by vacating the interim order passed by this Court. The Tribunal had no jurisdiction to vary or set aside the order of this Court and if the respondent was aggrieved by the order, the respondent should have preferred an appeal against the order.

6. A perusal of the order passed by this Court on 10th September, 2007 would show that this order was passed ex parte at the initial stage when the petition u/s 9 was made and no notice of the petition was served upon the respondent. The respondent after receiving notice of the petition moved an application IA No. 12980/2007 for vacating the ex parte order. Notice of this application was issued to the appellant however, the ex parte interim order already passed by the Court was modified after considering the contention of the respondent that the respondent was suffering irreparable loss and damage due to each day''s delay which was causing a loss of hire charges of US $ 17,000 and was resulting into breach of agreement with the hirer of the vessel. It was submitted that the vessel was performing critical safety-related work at ONGC''s offshore oil and gas fields at Mumbai High end and was expected to remain there till 28th February, 2008. Considering the facts and circumstances, the order dated 10th September, 2008 was modified pending disposal of the application on merits. In between the Arbitral Tribunal was constituted and the matter was referred to the Arbitral Tribunal. The petition u/s 9 (OMP-492/2007) and the application made by the respondent for vacating the order remained undecided on merits. On 10th April, 2008 this Court ordered that since the respondent was taking steps to move Tribunal u/s 17 of the Arbitration & Conciliation Act, 1996 no further order was necessary and it was left to the Tribunal to pass an appropriate order. It is clear that the order passed by the Court u/s 9 was purely an ad hoc interim order on an application u/s 9 which itself is an application calling for interim order and this order was made operational till the disposal of the application u/s 17 to be made by the respondent before the Arbitral Tribunal. Thus, the order passed by this Court was to exhaust itself on the Arbitral Tribunal passing an appropriate order on the same subject. It cannot be said that the Tribunal acted without jurisdiction in entertaining an application u/s 17 of the Act or the Tribunal acted as an Appellate Court over the order of this Court. I, therefore, find no force in this contention.

7. The other plea raised by the appellant is that the Tribunal wrongly vacated the interim injunction and wrongly allowed the sea vessel "MV Abouzar 81" to sail out of Indian waters. It is submitted that the injunction was in the nature of "Mareva" injunction and the court/tribunal had ample power to issue a mandamus of the nature passed by this Court or to appoint a receiver. The respondent had no assets within the country and there was every likelihood of the sole asset i.e. vessel being sailed out of the country. Reference is made to an order of Division Bench of this Court in Rite Approach Group Ltd. Vs.

Rosoboronexport, wherein this Court had observed as under:

6. The appellant is based in Singapore and Austria. The respondent is a company operating and having its registered office in Russia. Without examining and going into the question whether the injunction can be issued on an application u/s 9 of the Act by the Courts in India, it may be noticed that the Court of Appeal in the case of Mareva v. International Bulkcarriers (1980) 1 All. ER 213 had held that freezing injunction should not be granted unless a person has a legal or equitable right, it appears that a debt is due and owed and there is danger that the debtor may dispose of his assets before the judgment is passed so as to defeat the decree which may be passed. Injunction order even as per the Court of Appeal can be issued in extraordinary circumstances. Mareva or freezing injunction is passed when there is evidence or material to show that the debtor is acting in a manner or is likely to act in a manner to frustrate subsequent order/decree of the court or tribunal. The Court therefore freezes the assets of the debtor to prevent the assets from being dissipated, to prevent irreparable harm to the creditor. It prevents a foreign defendant from removing his assets from the jurisdiction of the court. It is like and akin to "attachment before judgment" and conditions mentioned in the said provision should be satisfied before freezing injunction order is passed [see Formosa Plastic Corporation Ltd. Vs. Ashok Chauhan and Others, and Uppal Eng. Co. (P) Ltd. Vs. Cimmco Birla Ltd., The respondent-company is owned by Russian Government and there is no such allegation that the respondent company is trying to defeat and play a fraud by moving/transferring its assets. We agree with the reasoning given by the learned Single Judge.

8. The appellant also sought support from Mohit Bhargava Vs. Bharat Bhushan Bhargava and Others, wherein the Supreme Court observed that it was within the jurisdiction of the court which passed the decree to issue orders of restraint to a person from handing over a property in his possession to the judgment debtor along with the documents concerned and to direct keeping the documents in safe custody. Such orders were in the nature of a "freezing order" or a "Mareva injunction" and an order akin to an Anton Piller order, orders that could be issued even if the property or the person concerned was outside the jurisdiction of the courts.

9. In "Mareva v. International Bulkcarriers" (supra) the judgment being referred, the Court of appeal of England had laid down a principle that a creditor who had a right to be paid the debt owing to him, even before he had established his right for getting judgment for it can obtain an injunction if it appeared that the debt was due and owed and there was a danger that the debtor could dispose of its assets so as to defeat it before judgment. The Court had jurisdiction in a proper case to grant an interlocutory judgment so as to prevent the debtor from disposing of those assets. The Court of Appeal observed in Mereva case that it was a proper case for exercise of the jurisdiction by it. There was money in a bank in London which stood in the name of those Charterers. The Charterers had

control over it and they may at any time dispose of it or remove it out of the country if they do so the ship owners may never get their charter hired. The ship at that time was on high seas. In face of this danger the Court of Appeal considered it appropriate to grant injunction to restrain the Charterers from disposing of the money lying in a bank in London until the trial or judgment in the case was over.

10. The Arbitral Tribunal in this case has considered all the facts and circumstances and came to the conclusion that there was nothing on record to show that the respondent, though an Iranian Company, was out to sell its assets so as to defeat the award that may be passed in favour of the appellant.

11. The order of the nature of detention of the vessel of the respondent would be an order akin to Order 38 Rule 5 CPC. The Supreme Court in Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders, observed that powers under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as leverage for coercing the defendant to settle the suit claim should be discouraged. A defendant is not debarred from dealing with his property merely because a suit was filed or about to be filed. The court should be satisfied that there was a reasonable chance of a decree being passed in the suit against the defendant and the Court should be satisfied that plaintiff had a prima facie case and after being satisfied of it, in order to exercise power under Order 38 Rule 5 CPC, a Court should be further satisfied that the defendant was attempting to remove or dispose of his assets with the intention of defeating the decree.

12. I consider that the Arbitral Tribunal in this case rightly discharged the respondent from the undertaking and allowed it to sail the vessel out of Indian waters as Tribunal was the best judge to see if there was a prima facie case or not since the Tribunal had all facts and circumstances before it. The Tribunal also considered the financial soundness of the respondent and the fact that the vessel in question was not the subject matter of the contract at any point of time.

I, therefore, find no merits in this appeal. The appeal is hereby dismissed.