

(2005) 02 AHC CK 0183
In the Allahabad High Court
Case No : C.M.W.P. No. 5773 of 2005

Pachpeda Rice Mill and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 09-02-2005

Acts Referred:

Arbitration Act, 1940 — Section 41

Arbitration and Conciliation Act, 1996 — Section 16, 17, 17(1), 21, 36

Citation : (2005) 2 AWC 1709 : (2005) 1 ESC 766

Hon'ble Judges : Dilip Gupta, J;B.S. Chauhan, J

Bench : Division Bench

Advocate : Pramod Bhardwaj, for the Appellant;

Final Decision : Disposed Of

Judgement

B.S. Chauhan, J.—This writ petition has been filed for quashing the Demand Notice dated 24.1.2005, issued by the District Food Marketing Officer, Pilibhit.

2. The petitioner was granted the licence for running the rice mill. The petitioner was delivered Paddy for hulling/milling on contract basis. The petitioner however, failed to deliver the standard percentage of rice from the paddy receipt. This led to the issue of Demand Notice dated 24.1.2005.

3. We have heard Shri Pramod Bhardwaj, learned Counsel for the petitioner and the learned Standing Counsel appearing for the respondents. Learned Counsel for the petitioner submitted that it was because of the poor quality of paddy that was supplied to him that he could not deliver the standard percentage of rice.

4. Learned Standing Counsel however submitted that the agreement dated 12.10.2003 entered between the State Government and the petitioner clearly indicates that under Clause 12, the petitioner could take recourse to arbitration proceedings, and therefore, this Court should not entertain this petition.

5. We have carefully considered the submission advanced by the learned Counsel

for the parties and have perused the materials available on record. Clause 12 of the agreement clearly provides that every dispute, difference or question touching the agreement or the subject matter thereof, shall be referred to the arbitration, and the decision of the arbitrator shall be final and binding on the parties.

6. In view of this specific clause, we do not consider it appropriate to entertain this petition. It shall be open to the petitioner to raise the dispute before the arbitrator.

7. Learned Counsel for the petitioner however, submitted that under the Demand Notice dated 24.1.2005, coercive steps shall be taken against the petitioner and, therefore, this Court should provide some interim protection to the petitioners.

8. The learned Standing Counsel has pointed out that in case the arbitration clause is provided under the agreement, petitioners ought to have filed an application before the competent authority to refer the matter to the arbitrator, and even if such an application has not been made and reference to the arbitrator has not been made, petitioners have an efficacious remedy of moving an application u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter called the Act) for interim relief. Learned Counsel for the petitioner has some doubt of the competence of the civil Court to entertain such a suit as the recovery is to be made as an arrear of land revenue, but in the instant case, that situation has not arisen as Citation has not been issued by the District Collector. Therefore, the apprehension of the learned Counsel for the petitioner is unfounded.

9. Section 9 of the Act corresponds to the provisions of Section 41(b) of the Arbitration Act, 1940 (for short Act 1940) read with Schedule, wherein the Court had power to grant interim reliefs for the purpose of and in relation to arbitration proceedings. However, pendency of proceedings in relation to arbitration was a precondition for exercise of powers by the Court to grant interim relief u/s 41(b) of the Act 1940, [vide *Sant Ram and Company v. State of Rajasthan and Ors.* AIR 1997 SC 25571. u/s 41(b) of the Act 1940, the Court was required to pass an order keeping in view the three limitations which were imposed thereunder, namely, (i) powers could be exercised to same extent and in manner as it could for the purpose, and in relation to, any proceedings before it; (ii) powers could be exercised only for the purpose and in relation to arbitration proceedings; and (iii) exercise of those powers was not to prejudice any power which might be vested in an arbitrator or umpire. While enacting Section 9 of the Act, the limitations above referred to have been retained except the one contained in Clause (ii).

10. Section 9 of the Act enables the party before or during arbitral proceedings, or at any time after making of the Award but before it is enforced u/s 36, to apply to a Court for interim measures of protection in respect of any of the matters mentioned in the agreement including the preservation, sale of any

goods which are the subject matter of the arbitration agreement and also for interim injunction or the appointment of a receiver. While entertaining such an application, the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceeding before it. Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement. Section 17 enables the Arbitral Tribunal to grant interim measures if such power has not been withdrawn by the parties by agreement and in such an eventuality the Arbitral Tribunal may pass an order for any interim measure of protection as the Tribunal may consider necessary in respect of the subject matter in dispute. The Tribunal may also require a party to provide appropriate security in connection with a measure under Sub-section (1) thereof.

11. In *Bhatia International Vs. Bulk Trading S.A. and Another*, , the Hon"ble Apex Court held as under :

".....Section 9 does not permit any or all applications. It only permits applications for interim measures mentioned in Clauses (i) and (ii) thereof. Thus, there cannot be applications u/s 9 for stay of arbitral proceedings or to challenge the existence or validity of the arbitration agreements or the jurisdiction of the Arbitral Tribunal. All such challenges would have to be made before the Arbitral Tribunal under the said Act."

12. The basic difference in Section 9 and Section 17 appears to be that proceedings u/s 9 initiated even before resorting to the arbitration proceedings or during its pendency in certain matters and also after making of the Award but before its execution u/s 36, while u/s 17 orders can be passed only during the pendency of the arbitration proceedings. Parties by agreement may exclude the exercise of such power by the Tribunal.

13. The condition of pendency of arbitration proceedings in Court before it could grant interim relief does not exist u/s 9 of the Act. The provision thereof is a self-contained provision. The source of power of a Court to make orders by way of interim measures is in Section 9 of the Act and there is no independent power de hors the provisions contained therein.

14. In *M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.*, , the Hon"ble Apex Court held that a party can approach the Court even prior to commencement of the arbitration proceedings u/s 21 of the Act. There has been a complete departure in this respect if compared with provisions contained in the Act 1940. In large number of cases it was found very difficult to serve the respondents, therefore, the legislature considered it necessary that the provision be made in the Act which would enable a party to get interim measures urgently in order to protect its interest.

15. In a given case, a party may approach the Court u/s 9, get an interim relief, i.e., appointment of receiver or deposit of security but may not resort to the arbitration proceedings at all. This may amount to abuse of the process of the

Court. There may be instance where an application for interim measures u/s 17 is refused by the Tribunal itself and the question would arise whether in such eventuality the same party would be able to maintain application u/s 9 of the Act. Be that as it may, when a party approaches the Court u/s 9 of the Act, it is implicit that it would resort to arbitration proceedings expeditiously. Moreso, as the jurisdiction of the Court and Tribunal in this regard is concurrent. Entertaining such an application by the Court is not barred.

16. Thus, in view of the above, it is evident that application u/s 9 of the Act, seeking interim measures can be filed even before resorting to arbitration proceedings during its pendency and after the same -is made before its execution. Jurisdiction of the Court in respect of grant of interim measure is concurrent with the Arbitral Tribunal.

17. We are, therefore, unable to accept this contention of the learned Counsel for the petitioners that this Court should provide some interim protection. It would however be open to the petitioners to file a civil suit for seeking adequate protection till such time as the Arbitrator enters upon the reference under the provisions of Section 9 of the Arbitration and Conciliation Act, 1996.

18. However, for a period of two weeks, the respondents shall not take any coercive steps pursuant to the demand notice dated 24.1.2005. Once the Arbitrator enters upon the reference, it would be open to the arbitrator to pass appropriate order on the applications for interim relief.

19. Subject to the aforesaid directions, the writ petition is disposed of.