

(2009) 03 GAU CK 0043
In the Gauhati High Court

SREI Infrastructure Finance Ltd.

APPELLANT

Vs

Bhageeratha Engineering Ltd. and Others

RESPONDENT

Date of Decision : 25-03-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2, 36, 9
Civil Procedure Code, 1908 (CPC) — Section 151
Partnership Act, 1932 — Section 69

Citation : AIR 2009 Guw 110 : (2009) 6 GLR 828

Hon'ble Judges : H. Baruah, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

H. Baruah, J.—By this common Order, it is proposed to dispose of both the C. M. Applications being No. 118 of 2008 and 119 of 2008 since in both the applications the same question of law and facts are involved.

2. By application u/s 151 of the CPC registered as C M. Application No. 118 of 2008, the applicant SREI Infrastructure Finance Ltd. (formerly known as International Financial Ltd.) prays for intervention and impleadment as respondent No. 2 in RFA No. 5 of 2008. By another application preferred u/s 151 of CPC which has been registered as. CM. Application No. 119 of 2008, the applicant has sought for an order to allow the receiver to take possession of the equipments and removal of the same so as to enable to comply the terms of settlement dated 29-3-2006, arbitral award dated 28-9-2006 and Order dated 2.3-2-2007 of the Hon''ble Calcutta High Court.

3. Facts involved in these applications can be summarized as under:

The applicant is a Ltd. Company duly incorporated under the provisions of the Company Act and is dealing with business of financing, leasing and hire purchase of various equipments, vehicles and other business. The opposite party No. 1, Bhageeratha Engineering Ltd. for the purpose of acquiring financial assistance

entered into several hire purchase agreement being No. HOC-004, HOC-005, HOB-660, HOB-659, HOB-293, HOB-661 and HOB.673 dated 7-11-2002, 7-11-2002, 2-9-2002, 3-8-2002, 15-6-2002, 2-9-2002 and 6-9-2002 respectively, with the applicant and under the said agreements, the opposite party No. 1 obtained financial assistance on hire purchase basis from the applicant for acquiring 1 No. Escorts LCB Loader, 1 No. Greaves Bomang Vibratory Soll Compactor BW212-292A. 1 No. 8 T Komatsu Hydraulic Excavator (PC200-6), 2 Nos. Greaves Bomang Vibratory Soll Compactor BW212-2(2A), 1 No. Apollo Model AP-550 Hydrostatic Paver Finisher, 1 No. BEML BD65 E-8 Bulldozer and 1-No. Escorts, JCB 3D Excavator Loader. In terms of the agreements between the parties the amount financed was required to be repaid by 48 instalments as described in the schedule of the agreements. Being financed, the opposite party No. 1. purchased the equipments on hire purchase basis. But the opposite party No. 1 failed and neglected to make repayment as per agreement for which the matter was referred to arbitrator namely Shri Pulin Behari Das, Advocate. Before the start of the arbitration proceeding, the applicant and the opposite Party No. 1 settled disputes by executing an agreement wherein terms of settlement incorporated on 29-3-2006. The terms of settlement dated 29-3-2006 were submitted before the learned arbitrator who accordingly passed the Award dated 28-9-2006 in terms of the settlement. In spite of the award and terms of settlement, the opposite party No. 1 failed to adhere to the terms of settlement for which the applicant was prompted to file an Execution case being No. 16 of 2007 before the Calcutta High Court, Calcutta High Court accordingly passed an order dated 20-3-2007 in the following terms:

There will be an order in terms of prayers (a) and (f) of the Tabular Statement.

The Receiver shall, if necessary, be entitled, to obtain police assistance for implementation of this order.

Returnable 3 weeks.

The Receiver shall file a report on the returnable date.

Urgent certified copy of this order, if applied for, be supplied to the parties subject to compliance of all requisite formalities.

4. Pursuant to the order passed by the Calcutta High Court the receiver tried to take possession of the equipments. In the process, the applicant came to learn that out of 8 equipments purchased on hire purchase basis by the opposite party No. 1, 6 (six) equipments were in Mizoram and 2 (two) of which were used in their contract work under the National Highway Authority of India. Further the applicant also came to know of the Order dated; 7-7-2008 passed by the District Judge in Arbitration Case, No. 7/2007. The said order was passed by the District Judge on an application filed u/s 9 of Arbitration and Conciliation Act, 1996. It is also contended that the order dated 7-7-2008 passed by the District Judge had been stayed by this Court vide Order dated 28-7-2008 passed in Civil Misc. Case Application No. 100/2008 in RFA 5/2008. It is also contended that the

equipments; being purchased on hire purchase basis by the respondent No. 1 being financed by the applicant, applicant, became the owner of the equipments. The use of the equipments and the materials by the opposite party No. 2 to 4 is without express permission and consent of the applicant Equipment numbering 6 owned by the applicant are still in Mizoram. Whereabout of the two other equipments could not be located till date, which prevented the receiver to take possession. The applicant thus, in view of the facts and circumstance appearing, has prayed this Court to allow intervention and impleadment as respondent No. 2 in RFA No. 5 of 2008.

5. The State of Mizoram, Opposite Party No. 2 resisted this application for intervention and impleadment by filing counter wherein it is inter alia contended that the applicant being not a party of the arbitral proceeding cannot ask for impleadment in the RFA No. 5 of 2003 which arose out of an order dated 7-7-2008 passed by the District Judge, Aizawl District, Aizawl in connection with an application u/s 9 of the Arbitration and Conciliation Act. 1996. In the counter it is also claimed that RFA No. 5 of 2008 being arisen from the impugned order passed by the trial Court, at the belated stage appellant cannot seek impleadment since the appellate Court is only to decide the legality and validity of the order so impugned. The applicant though claimed to be the owner of the equipments of the machineries, such fact was never brought to the notice of the Courts below and the applicant if not a party to the proceeding cannot, therefore, ask impleadment and intervention. This application is also objected on the ground of delay and acquiescence. It is submitted in this connection that the agreement for execution of the project between the Opposite Party No. 2 and 1 entered into on 28-3-2002 and the applicant has sought to agitate its alleged claim over the plant and machineries in the year 2008. The factum of purchase of the plant and machineries by the Opposite Party No. 1 upon hire purchase basis obtaining financial assistance from the applicant was never brought to the notice of the learned Courts below which infers that the applicant suppressed and concealed the facts from the Courts. The applicant is, therefore, guilty of concealment and misrepresentation. That apart per agreement between the Opposite Party No. 1 and 2, the opposite party No. 2 had the right to retain the plant and machineries belonging to the respondents-opposite party No. 1 in view of termination of the contract inter alia. The opposite party No. 2, therefore, in view of the above grounds prays dismissal of the application filed by the applicant.

6. Mr. Ajoy Ray, learned Counsel for the opposite Party No. 2 and Mr. Vanlalnghaka, learned Counsel for the applicant were heard at length.

7. Mr. Vanlalnghaka, learned Counsel appearing for the applicant at the very outset of the argument submitted that since the plant and machineries were purchased by the opposite party No. 1, Bhageeratha Engineering Ltd. on hire purchase basis taking financial assistance from the applicant after entering into several agreements, failure on the part of the Bhageeratha Engineering Ltd. to

pay the installments, the ownership always lies of the plant and machineries so purchased with the applicant. Therefore, the applicant being at the footing of the owner of the plant and machineries, it has every right to protect its interest from being eroded by impleading itself in a proceeding in which dispute arose in respect of the plant and machineries between opposite Party No. 1 and 2. The learned Counsel further argued that the applicant being the owner of the said plant and machineries, purchased on hire purchase basis, is entitled to defend its interest in respect of the said equipments. It was also argued by him that the appeal being continuation of the suit, an aggrieved party has every right to implead itself as one of the parties in the appellate stage also. RFA No. 5 of 2008 has arisen out of an order dated 7-7-2008 passed by District Judge, Aizawl in arbitration case No. 7 of 2007. Therefore, this appeal being a continuation of the arbitration case, the applicant being Jeopardized, has right to intervene in the proceeding by impleading itself as one of the respondents. The objection and stand so taken by the Opposite Party No. 2, according to the counsel for the applicant cannot stand.

8. Mr. Ajoy Ray. learned Counsel appearing for and on behalf of the Opposite Party No. 2 strenuously objected/resisted the application contending that the application is not maintainable in view of the provisions of Section 9 of the Arbitration and Conciliation Act, 1996, since such proceeding can only be initiated between the parties to the arbitration agreement. Referring to the provisions of Section 9, Mr. Ray submitted that a person who is not a party to an arbitration agreement cannot ask the Court for protection as enumerated in Section 9. The application having been filed before the District Judge u/s 9 of the Arbitration and Conciliation Act, 1996 by Bhageeratha Engineering Ltd. v. State of Mizoram and Ors. the applicant being not a party to the arbitration agreement, therefore, has no scope to implead itself in the said proceeding at any stage. In support of his contention Sri Roy put reliance the law enunciated by the Supreme Court in the case of Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., Referring to paragraph 13 of the said judgment Mr. Roy submitted that the person who is not a party to an arbitration agreement cannot ask for impleadment in a proceeding u/s 9 of the Arbitration and Conciliation Act, 1996.

9. Their Lordships of the Supreme Court in para 13 of the case (supra) held as under:

13. The A & C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issue arising for decision under the new Act. An application u/s 9 under the scheme of the A & C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application u/s 9 of the Act is enforcing a right arising from a contract? "Party" is defined in Clause (h) of Sub-section (1) of Section 2 of the A & C Act to mean "a party to

an arbitration agreement". So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court u/s 9 can be: (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., the doubts stand cleared and set at rest and it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application u/s 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person-invoking jurisdiction of the Court u/s 9 must possess is of being a "party" to an arbitration agreement. A person not party to an arbitration agreement cannot enter the Court for protection u/s 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief, which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The reliefs, which the Court may allow to a party under Clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power u/s 9 is sought to be exercised is the Arbitral Tribunal. Under the scheme of the A & C Act, the arbitration clause is separable from other clauses of the partnership deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A & C Act. The relief sought for an application u/s 9 of the A & C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the Court u/s 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application u/s 9 of the A & C Act.

10. The term "party" has been defined in Section 2(1)(h) of the Arbitration and Conciliation Act, 1996. It reads "party" means a party to an arbitration agreement. Therefore, a joint reading of Section 9 and Section 2(1)(h) of the Arbitration and Conciliation Act will go to show that an arbitration proceeding u/s 9 would only be maintainable between the parties to the arbitration agreement. Section 9 says that 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 may apply to a Court for the measures enumerated in I and II. Admittedly, the applicant herein is not a party to the arbitration

agreement. Opposite Party No. 1 and Opposite Party No. 2 are parties to the arbitration agreement and, therefore, the applicant herein would be a third party of the arbitration proceeding and being at this position cannot be impleaded as one of the respondents in appeal. Mr. Roy further relied in the decision of the case between Onyx Musicabsolute.com Pvt. Ltd. and Others Vs. Yash Raj Films Pvt. Ltd. and Others, Onyx Mobile Pvt. Ltd. and Virtual Marketing India P. Ltd., wherein it was held by the Bombay High Court that relief u/s 9 of the Arbitration and Conciliation Act can be claimed by a party to an arbitration agreement against the other. It held since the defendant No. 3 is not a party to the arbitration agreement plaintiff are not entitled to claim any relief against the defendant. In our present case it is noticed that the arbitration agreement exists in between the Opposite party No. 1 and 2 and not with the present applicant. Therefore, apparently in the proceeding in between the opposite party No. 1 and 2, in the nature of application u/s 9 of the Arbitration and Conciliation Act no relief can be sought by the applicant.

11. Mr. Ray, while arguing the case also submitted that the present application is an out come of mala fide intention on the part of the applicant and the Opposite party No. 1, Bhageeratha Engineering Ltd. to frustrate the terms of agreement between the Opposite Party No. 1 and 2. For over a period of six years the alleged ownership of the applicant was not brought to the notice of the subordinate Courts and at this stage prayer for impleadment so made by the applicant cannot be entertained. Mr. Ray, learned Counsel for the Opposite Party No. 2 put reliance in the case between Coats Viyella India Ltd. v. India Cement Ltd., reported in (2000) 9 SCC 376 : AIR 2001 SCW 2257 wherein it was held by their lordships of the Supreme Court that the contracting party cannot shift liability under a contract on to a 3rd party which has no contractual relationship with the other contracting party. Contractual relationship exists in this present case in between the Opposite Party No. 1 and 2 and not with the applicant from which the Opposite party No. 1 obtained financial assistance for purchase of plant and machineries and other equipments. Further it was argued by Mr. Ray, that the order dated 28-2-2006 passed by the subordinate Court was never challenged and it attained its finality. The Opposite Party No. 1, Bhageeratha Engineering Ltd., therefore, had no right whatsoever to adjudicate the same issue before the Court of law in view of the earlier order. But even in spite of that the opposite party No. 1, Bhageeratha Engineering Ltd. preferred application u/s 9 of the Arbitration and Conciliation Act, 1996 and obtained an order, which is now challenged under RFA No. 5 of 2008. Mr. Ray, therefore taking all the issues strenuously submitted that the. application of the applicant is without merit and cannot be entertained. Mr. Ray, therefore, prays this Court to dismiss both the applications filed by the applicant which has been registered as C. M. Application No. 118 of 2008 and C. M. Application No. 119 of 2008.

12. The facts pleaded in both the application, the grounds of objection, are considered carefully. From its perusal it is noticed that the RFA No. 5 of 2008 is the outcome of the order dated 7-7-2007 passed in Arbitration Case No. 7 of

2007 passed by the District Judge, Aizwal District, Aizawl. The said arbitration proceeding was preferred under the provision of Section 9 of the Arbitration and Conciliation Act, 1996 seeking interim measure as provided in the section. Since the applicant is not a party to the arbitration agreement, when the section provides maintainability of the proceeding between the parties to the arbitration agreement only, the applicant being a 3rd party cannot ask for impleadment so as to protect its right. The arbitration agreement exists between respondent No. 1 and 2 in respect of the execution of the project which ultimately gets terminated. The applicant can seek remedy by approaching appropriate forum even if it has the ownership over the plant and machineries purchased on higher purchase agreement. Section 9 prohibits a 3rd party in a proceeding under the section.

13. Thus after careful scrutiny of the facts involved, the objection raised and the law enunciated by the Apex Court and High Court, this Court finds force in the submission advanced by Mr. Ray, learned Counsel for the Opposite Party-2. This Court does not see any ground to offer assistance to the applicant for impleading it as one of the respondent in the RFA No. 5 of 2008.

14. Both the C. M. Applications (C. M. Appl. No. 118 of 2008 and C. M. Appl. No. 119 of 2008) accordingly stands dismissed.