

(2009) 09 MAD CK 0247

In the Madras High Court

Case No : O.S.A. No's. 31 and 32 of 2006 and C.M.P. No's. 2749 to 2752 of 2006

TVS Finance and Services Ltd.

APPELLANT

Vs

Divya Enterprises

RESPONDENT

Date of Decision : 29-09-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22, 22(1)

Citation : (2009) 09 MAD CK 0247

Hon'ble Judges : R. Subbiah, J; M. Chockalingam, J

Bench : Division Bench

Advocate : Abdul Hameed, for Anand Abdul and Vinodh, Associates, for the Appellant; N.L. Rajah, for the Respondent

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—These two appeals challenge the common order of the learned Single Judge of this Court made in Application No. 310 of 2005 and Application No. 1446 of 2005 whereby the appellant has sought for furnishing security from the respondents herein and also for injunction pending disposal of the arbitral proceedings.

2. The appellant herein aggrieved over the common order of dismissal of the above applications have sought the said reliefs before the learned Single Judge alleging that the appellant/applicant was carrying on business of Hire Purchase, Finance, Leasing and Bill Discounting. The first respondent entered into lease agreement on 16.3.1994 where the second and third respondents stood as guarantors. There was default in payments, pursuant to which notices were issued invoking a clause in the Hire Purchase Agreement and part of the machineries were taken possession and the part of the machineries were also sold for a sum of Rs. 1,71,560/- and it was also given credit to. The first respondent also issued a cheque for Rs. 3,16,000/- and the cheque was

dishonoured, pursuant to which a private complaint was lodged before the Metropolitan Magistrate Court, Egmore, in C.C. No. 4234 of 1998 and the same is also pending. There was due of Rs. 34,35,979.29 from all the respondents. The applicant came to know that the second and third respondents who are the guarantors were about to alienate the property. Under such circumstances, there arose a necessity for getting a direction from this Court to direct the second and third respondents to furnish the security and also for injunction restraining them from dealing with the property pending arbitral proceedings.

3. The applications were resisted by the respondents inter alia stating that regarding the question as to the liability, it has to be decided by the arbitral proceedings. Both the applications were made against the second and third respondents/ guarantors. No relief was sought for against the principal debtor. In so far as arbitral clause is concerned, an application was made u/s 9 of the Arbitration and Conciliation Act 1996. A very reading of the arbitral clause would clearly indicate that it is binding upon the lessee and lessor namely the appellant and the first respondent. Thus, it would not bind the second and third respondents. Hence, the applications filed against the second and third respondents are not maintainable. Apart from that, the first respondent company was declared as a Sick Industry and the proceedings are pending before B.I.F.R. u/s 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, sanction from the Board was necessary and it has not been done. Added further learned Counsel, in respect of the injunction sought for, the third respondent has actually entered into development agreement with the third party. Under such circumstances, there is no question of injunction would arise.

4. The learned Single Judge after hearing the submissions made and looking into the materials available, took a view that both the applications were liable to be dismissed and thus, made an order of dismissal. Hence, these appeals have arisen.

5. The learned Counsel for the appellant, after reiterating the submissions made before the learned Single Judge, inter alia would submit, a very reading of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 would indicate that it would be applicable only to the suit and not for arbitral proceedings. Thus, in the instant case, actually applications were taken out u/s 9 of the Arbitration and Conciliation Act and apart from that, the arbitration proceedings are yet to be commenced and one of the arbitrator was appointed by the appellant side but the respondent did not co-operate. Under such circumstances, the matter is pending before the Court for appointment of another arbitrator. Added further learned Counsel, in the instant case the learned Single Judge has invoked the provision u/s 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 which is not applicable to the present facts of the case since it is not a suit. A very reading of Section 9 of the Arbitration and Conciliation Act would clearly indicate that pending arbitral proceedings, in order to secure the amount due, which is actually the subject matter of arbitration,

interim order could be granted. Under such circumstances, there cannot be any impediment in law in making an order directing the second and third respondents to furnish security.

6. Added further learned Counsel insofar as the liability of guarantors/respondents 2 and 3 are concerned, they are coextensive to that of the first respondent. The learned Counsel, in support of his contention relied on the decision of the Honourable Supreme Court reported in II(2003) BC 296 (SC) Kailashnath Agarwal v. Pradeshia Industrial and Investment Corporation.

7. The learned Counsel would further submit insofar as interim injunction is concerned, the third respondent has entered into development agreement with the third party whereby 50% of the undivided share are retained and there cannot be any impediment in granting interim injunction restraining the respondents from dealing with the shares and interest in the suit property. Under such circumstances, both the orders of the learned Single Judge have got to be set aside and the reliefs have got to be granted.

8. The learned Counsel for the respondents in his sincere attempt to sustain the common order reiterated the very same submissions made before the learned single Judge.

9. The Court paid it anxious consideration on the submissions made and looked into the material available.

10. It is not in controversy that there was an Hire Purchase Agreement entered into between the appellant company and the first respondent and the second and third respondents stood as guarantors. According to the appellant, there was default in payments. Under such circumstances, there arose a necessity for taking possession of the machineries and part of the machineries were sold and the sale price was also given credit to. There was balance of Rs. 34,35,979.29 due from the respondents. Under such circumstances, there arose a necessary for invoking arbitral clause.

11. It is an admitted fact that one of the arbitrator has been appointed by the appellant company and second arbitrator is yet to be appointed and the matter is pending before the Court. The contention put forth by the learned Counsel for the appellant that it is a case where Section 9 of the Arbitration and Conciliation Act has got to be applied is concerned, a very reading of Section 9 of the Arbitration and Conciliation Act would clearly indicate that such a kind of order directing the parties to furnish security can be well done under the provision of Section 9 of the Arbitration and Conciliation Act, but at the same time it should not be forgotten that Section 9 of the Arbitration and Conciliation Act would cover the subject matter and only for the purpose of safeguarding the subject matter and securing the interest of the parties, Section 9 has got to be invoked. At this juncture, the arbitral clause that has entered into between the parties has got to be looked into. The arbitral clause entered into between the parties reads as follows:

31. All disputes, differences, claims and questions, which may arise during the subsistence of this Agreement between the Lessor and the Lessee touching any matter covered by this Agreement shall be referred to the arbitration of two arbitrators one to be appointed by each party to the dispute in accordance with the provisions of the Arbitration act, 1940.

A very reading of the above clause would indicate that it is binding both the parties viz., lessee and lessor. It is pertinent to point out that the first respondent is the lessee and insofar as the second and third respondents are concerned, they stood as guarantors and it is needless to say, they stand outside the scope of Clause 31. Further, in the instant case, Section 9 of the Arbitration and Conciliation Act would clearly indicate that for the purpose of securing the subject matter, Section 9 has got to be invoked. From the reading of the above clause, it is quite clear that it could be invoked as against the first respondent and it cannot be a binding force against the second and third respondent. Now, the appellant cannot be permitted to say that liability of the second and third respondent who are the guarantors are coextensive and Section 9 of the Arbitration and Conciliation Act could be invoked for the purpose of interim relief. The Court is unable to countenance the arguments of the learned Counsel for the appellant which did not stand the scrutiny of law.

12. Further, in the instant case, the learned Single Judge has invoked Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 for the purpose that no sanction has been obtained from the BIFR. As rightly pointed out by the learned Counsel for the appellant, a very reading of Section 9 of the Arbitration and Conciliation Act would indicate that it is applicable to the suit proceedings. In the case referred to by the learned Counsel i.e., II (2003) BC 296 (SC) Kailashnath Agarwal v. Pradeshia Industrial and Investment Corporation) the Lordship of the Supreme Court has clearly stated that liability of the guarantors would remain unaffected and also observed that u/s 22(1) of SICA, there was no protection afforded to the guarantors against the Recovery Proceedings under U.P. Act. Under such circumstances, the contention of the learned Counsel for the respondents in this regard has got to be discountenanced. However, the Court is of the considered opinion that Section 9 of the Arbitration and Conciliation Act, in the present circumstances, cannot be applied for the reason that the arbitral clause referred to above can have binding force against the lessee and the lessor and not the second and third respondents. Application is filed u/s 9 of the Arbitration and Conciliation Act, taking advantage of the arbitral clause and such interim relief cannot be granted as against the second and third respondents. Hence, a direction to furnish security as against the second and third respondents cannot be granted.

13. So far as the second relief as to granting of interim injunction is concerned, there is controversy on both sides. According to the third respondent, regarding the undivided share, he had entered into a development agreement with the third party and no question of interim injunction could be granted. Contrarily, the

learned Counsel for the appellant would submit that so far as the development agreement is concerned, 50% of the shares is retained by the respondents and under such circumstances, interim injunction could be granted. Once the Court has taken a view that Section 9 of the Arbitration and Conciliation Act cannot be invoked for furnishing security, interim injunction also cannot be granted.

14. Accordingly, both the appeals fail and the same are dismissed. No costs. Consequently, C.M.P. Nos. 2749 to 2752 of 2006 are closed.