IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

Original Side

(Commercial Division)

Present :-

The Hon'ble Justice Moushumi Bhattacharya

AP 85 of 2023

Jaya Industries

Vs.

Mother Dairy Calcutta & Anr.

For the petitioner	:	Mr. Suddhasatva Banerjee, Adv. Mr. Debraj Sahu, Adv. Mr. Snehashis Sen, Adv. Mr. Abhishek Banerjee, Adv.
For the respondent nos. 1 & 2	:	Mr. B.P. Vaisay, Adv. Mr. Joydip Banerjee, Adv. Mr. Nilay Baran Mondal, Adv.
Last Heard on	:	05.07.2023
Delivered on	:	20.07.2023

Moushumi Bhattacharya, J.

1. The petitioner has filed the present application for interim relief under section 9 of The Arbitration and Conciliation Act, 1996. The only question

which arises is whether the Court should continue to entertain the application after constitution of the Arbitral Tribunal.

2. The application was filed on 10th February, 2023 and the Arbitral Tribunal was constituted by an order of a learned Single Judge of this Court on 17th May, 2023. The particulars of the orders passed in between are as follows.

3. After filing of the application on 10th February, 2023, a Co-ordinate Bench passed an order on 15th March, 2023 directing the respondents to show-cause as to why the respondents should not be directed to deposit a sum of Rs. 5,95,40,498.60/- before the Registrar, Original Side of this Court for securing the claim of the petitioner. The respondents were represented on the returnable date i.e. on 30th March, 2023 when the matter was adjourned on the request of counsel appearing for the respondents. Affidavits were exchanged between the parties and recorded in the orders passed by the Court on 10th April, 2023, 1st May, 2023 and 14th June, 2023. The respondents took an adjournment on 13th June, 2023. Learned counsel appearing for the parties were thereafter heard on the question of whether the section 9 application should continue as recorded in the order dated 22nd June, 2023.

4. Counsel appearing for the petitioner wants this Court to continue to hear the petition for interim relief while counsel appearing for the respondents relies on section 9(3) of the Act to put emphasis on the bar on the Court from entertaining an application under section 9(1) of the Act

subject to the efficacy of the remedy under section 17 before the arbitral tribunal.

5. Section 9(1) permits a party before or during arbitral proceedings or at any time after making of the arbitral award but before enforcement of the award to apply to a Court for interim measures. The width of the Court's powers to grant interim relief to a party under section 9(1) and the right of a party to seek for such relief is almost boundless but is reined-in by section 9(3) - which is reproduced below.

> *"9(3). – Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."*

6. The constitution of the arbitral tribunal hence becomes a fetter on the Court from passing interim orders under section 9(1) or even entertaining an application under section 9(1) subject to the Court being of the view that circumstances are not conducive for the party seeking such interim relief before the arbitral tribunal under section 17 of the Act. Section 17 provides for interim measures by the arbitral tribunal and grants equal leeway to an arbitral tribunal to pass orders for interim relief.

7. The language of section 9(3) is mandatory in the use of the words *"..... shall not entertain an application...."* and would have been sufficient in itself to stop the Court from entertaining an application for interim measures under section 9(1) subject to the qualification of the efficacy of section 17 application before the arbitral tribunal. The decision of the Supreme Court in *Arcelor Mittal Nippon Steel India Limited vs. Essar Bulk Terminal Limited;*

(2022) 1 SCC 712 has however softens the stiffness of section 9(3) with a purposive construction. The Supreme Court considered the expression "entertain" and held that if the Court had already applied its mind to the issues raised, then the Court can proceed to adjudicate the application under section 9(1) notwithstanding the bar of section 9(3).

8. In light of the dictum in *Arcelor Mittal*, the Court has to determine whether the present application can continue to be entertained despite the arbitral tribunal being constituted on 17th May, 2023. This would depend on whether the Court has applied its mind to the present application which is required to circumvent the mandate of section 9(3) of the Act.

9. The orders on record show that the learned Single Judge by the order dated 15th March, 2023 directed the respondents to show-cause as to why the respondents should not be directed to deposit a certain sum of money. A total of about 7 orders were passed thereafter and the respondents were represented each and every time. Affidavits were also directed which were subsequently filed by the parties. Apart from the length of the period of consideration, i.e. from 15th March, 2023 to 14th June, 2023 when affidavits were complete, the first order of 15th March, 2023 itself shows that the learned Single Judge had considered the factual contentions raised in the matter. The order directing the respondents to show-cause would otherwise not even passed at all. The order reflects that the learned Judge was satisfied on the facts and considered the necessity of passing such an order.

10. The word "entertain" requires the Court to enter into an active consideration of the issues presented by the parties and pleaded in an

application and involves the Court applying its mind to the facts and the law urged before it. It is an active and interactive process where the Court participates in the adjudication by engaging with the issues raised. The process of entertaining a matter (with or without the Court being entertained) hence commences from the day when the Court enters into the arena of the facts, law and essentially the dispute between the parties and cannot be broken up into phases of intensity or relevance. Although the degree of a Court's engagement in a matter may be subjective, the broad requirement is that a Court becomes alive and interested in the matter and applies its mind to the facts before it.

11. The brakes imposed by section 9(3) on this active engagement by the Court is only to preserve the sanctity of the arbitration. It is not to wrench territory from the Court despite the Court having put its mind to the matter – meat included - before it. Section 9(3) in any event contains an exception that the Court must also come to a finding that the relief prayed for would be equally and efficaciously available to the parties under section 17 of the Act. This would also mean that the party who disputes the efficacy of interim relief before the arbitral tribunal and the one who opposes the Court from entertaining the application under section 9(1) must discharge their respective obligations with regard to the second limb of section 9(3).

12. The intended object of section 9(3) is to allow the arbitral tribunal to consider the prayer for interim relief once the tribunal has been constituted. Section 9(3) aims to prevent multiple levels of hearing for the same relief. The section envisages a clockwise motion of considerations of the matter after an arbitral tribunal has been constituted. The hands of the clock

however stop to tick where the Court has already gone into the matter. Permitting the parties to re-agitate the matter in such cases before the arbitral tribunal would in effect rewind the clock which is not what section 9(3) intends.

13. That obligation becomes less relevant in the face of the other and more important question; whether the Court has already applied its mind to the dispute in accordance with the dictum in *Arcelor Mittal*.

14. Upon considering the orders passed by the Court particularly that on 15th March, 2023, this Court is of the view that the Court has already entertained the matter and thought it fit to direct affidavits to consider the dispute further. This, hence, is certainly a case where the Court has applied its mind to the matter and consequently "entertained" the application filed by the petitioner. The process of consideration has indeed commenced and the subsequent constitution of the Arbitral Tribunal will not act as a fetter on the Court to continue hearing the application.

15. AP 85 of 2023 will accordingly be heard by this Court.

16. The parties shall be at liberty of mentioning for early listing of the matter.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of the requisite formalities.

(**Moushumi Bhattacharya, J.**)