OD-8 & 9

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

APO No.14 of 2019
GA No.305 of 2019
In
AP No.464 of 2018

NEW PHALTAN SUGAR WORKS LIMITED
Versus
CASTLE DISTRIBUTORS PRIVATE LIMITED

AND

APO No.24 of 2019
GA No.319 of 2019
In
AP No.464 of 2018

CASTLE DISTRIBUTORS PRIVATE LIMITED
Versus
NEW PHALTAN SUGAR WORKS LIMITED

BEFORE:
The Hon'ble JUSTICE SANJIB BANERJEE
And
The Hon'ble JUSTICE SUVRA GHOSH
Date : February 5, 2019.

Appearance:
Ms. Sanchari Chakraborty, Adv.
Ms. Debaleena Ganguli, Adv.
Mr. Soumik Chakraborty, Adv.

Mr. Samrat Sen, Sr. Adv.
Ms. Nilanjana Adhya, Adv.
Mr. Paritosh Sinha, Adv.
Mr. K.K. Pandey, Adv.
Mr. Shreyash Basu Dasgupta, Adv.

The Court : The order impugned calls for no interference in either party's appeal.

The appeals arise out of an order dated December 20, 2018 passed on a petition under Section 9 of the Arbitration and Conciliation Act, 1996. The principal

ground sought to be urged by the appellant in the first case – the respondent in the petition under Section 9 before the arbitration court – is that the arbitration agreement referred to by the respondent and in the order impugned does not cover the disputes that have been made the subject-matter of the petition under Section 9 of the said Act. On a query from the Court as to whether such ground was taken in the affidavit-in-opposition filed in the arbitration court, it is submitted on behalf of the appellant that no such affidavit-in-opposition was filed. It is of some significance that even the order impugned records that an affidavit-in-opposition was filed. It is submitted on behalf of the appellant that what was filed was a reply to a show-cause notice as to why the appellant herein should not furnish security and such a reply to show cause cannot be seen to be an affidavit-in-opposition to the petition under Section 9 of the Act. As such, it is submitted, the ground of invalidity of the arbitration agreement could not be taken.

Even though the submission is hypertechnical and bereft of any substance, so that further tomfoolery on such lines may not be indulged in to waste court time, the issue is addressed. An affidavit-in-opposition in interlocutory proceedings deals with the grounds urged by a petitioner in support of the interlocutory reliefs claimed. The object of such affidavit-in-opposition is to demonstrate that the interlocutory reliefs sought may not be obtained or should not be granted. A response to a notice to show cause why security as sought should not be furnished, is no different. In either case, the response is by way of an affidavit verified in accordance with law and is required to set out the grounds why the order sought should be refused. One of the fundamental grounds of opposition is a ground as to jurisdiction or the authority of the forum to pass an order. Since an arbitration court derives its authority from the arbitration agreement between the parties, an objection as to the existence or validity of the arbitration agreement is an objection as to the jurisdiction of the court to pass an order. It is inconceivable that a

person would respond to a notice to show cause in such a situation, but would not urge the ground of the validity of the arbitration agreement, if such ground is available.

It is, of course, a completely different matter as to how the court would approach such an objection. It is not necessary to exhaustively lay down the ground rules as to how the court should address the issue, particularly since the validity of the arbitration agreement in this case, or the lack of it, was not even urged in the affidavit filed by the appellant before the arbitration court.

It is equally alarming that the validity of the arbitration agreement is sought to be challenged as the principal point in this appeal, despite the memorandum of appeal not carrying any ground even remotely hinting at such challenge. Upon counsel for the appellant being required to cite any of the grounds in the memorandum indicating the point, it is submitted that the point has not been expressly taken in any ground. Upon counsel being, thereafter, required to show how the point may have been impliedly taken in the memorandum, none of the grounds is referred to.

The case that the respondent brought to the arbitration court was that a certain sum of money was due and owing to the respondent pursuant to a transaction and despite issuing cheques for a substantial part of such admitted amount and it being evident from the correspondence exchanged between the parties that the dues were admitted by the appellant herein, no payment in such regard had been made by the appellant. For the reasons that are not necessary to be gone into, given the limited scope of the appeal, the arbitration court found that the unimpeachable claim of the respondent herein was to the extent of about Rs.1.47 crore.

The prayers in the petition under Section 9 of the Act of 1996 were in the nature of an order for attachment before judgment. In such a scenario, the court is required to look into two aspects: the unimpeachable extent of the claim and the

likelihood of the claim remaining unsatisfied unless an order of the kind that is sought is made. Courts are now liberal with the second limb of the two parts to an order of such nature. Courts frown upon parties to commercial transactions taking advantage of the long delays in court to not pay what appears to be an admitted amount.

Against a much higher claim of about Rs.3.50 crore, the arbitration court found that about Rs.1.47 crore could be said to be without any defence and security was required to be furnished on such amount.

The order impugned sets out adequate reasons for the court rendering a prima facie view that the appellant herein had no defence to the claim, at least to the extent of Rs.1.47 crore. Upon the order impugned giving cogent reasons for arriving at such a prima facie finding, the discretion exercised in directing security to be furnished does not appear to be perverse. In such circumstances, the order impugned, as assailed in the first of the appeals, does not call for any interference.

In the appeal preferred by the petitioner in the Section 9 proceedings (referred to as the respondent earlier in this order), it is contended that in observing as follows towards the end of the order impugned, the arbitration court has not only expressed a seemingly final view on the matter, but may also have curbed the ambit of the arbitration agreement itself :

> "Accordingly, the petitioner can invoke the arbitration agreement contained in clause 8 of the said agreement dated March 2, 2017 for realising its claim against the respondent for Rs.1,47,42,709/-."

Surely, such line cannot be read or understood to either be a final expression on the merits nor a finding as to the width or ambit of the arbitration agreement. For a start, orders passed in proceedings under Section 9 of the Act are in aid of the ultimate award that may be passed and an order for interim measures is

tentative by its very nature. More importantly, in the everyday petition under Section 9 of the said Act, the existence of an arbitration agreement may be in dispute, but the ambit of the arbitration clause may not be in dispute and even if there is a dispute of such kind, only a prima facie view is expressed in course of a final order on a petition under Section 9 of the said Act. At any rate, as evident from the affidavit filed by the appellant (the respondent in the Section 9 proceedings), no ground as to the efficacy or inapplicability of the arbitration agreement was taken and, as such, the relevant line of the order impugned quoted above cannot be regarded as an impediment to the arbitral tribunal, when formed, in deciding on the scope of the arbitration agreement or the width of the authority available to such tribunal.

APO No.14 of 2019 and APO No.24 of 2019 along with GA No.305 of 2019 and GA No.319 of 2019 are dismissed.

There will be no order as to costs.

(SANJIB BANERJEE, J.)

(SUVRA GHOSH, J.)

sg/s.pal