(2011) 07 MAD CK 0292

Madras High Court

Case No: O.S.A. No. 231 of 2011 and M.P. No. 1 of 2011

A-1 Biz Solutions Chennai		APPELLANT
	Vs	
Cascade Billing Center Incorporated		RESPONDENT

Date of Decision: July 27, 2011

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 9
- Civil Procedure Code, 1908 (CPC) - Order 38 Rule 5

Hon'ble Judges: R. Banumathi, J; B. Rajendran, J

Bench: Division Bench

Advocate: M. Aravind Subramaniam, for the Appellant;

Final Decision: Dismissed

Judgement

B. Rajendran, J.

The Appellant herein has filed an application u/s 9 (ii) (e) of the Arbitration and Conciliation Act, 1996, hereinafter referred to as''Act'', seeking for a direction to the Respondent to furnish security for the outstanding amount of US $ 233,179, equivalent to Rs. 1,04,31,310/-of Indian rupees, within a time to be fixed by this Court, pending finalisation and disposal of the arbitration proceedings and enforcement of award. The said application was dismissed by the learned Judge on 17.06.2011. Aggrieved by the same, the present appeal is filed by the Appellant.

2. According to the applicant/Appellant, the Respondent originally had outsourced back office services to the Appellant by entering into a service agreement dated 13.09.2006. The agreement was initially for a period of two years, which was to be automatically renewed for one year unless either party gives a notice within 90 days for renewal expressing their intention to continue the agreement. According to the Appellant, the Respondent intended to open their own company in Chennai and therfore, they did not agree to continue the services with the Respondent further,

hence, the contract between the parties was terminated with effect from 28.02.2009. According to the Appellant, an amount of US $ 151,425 including interest is payable by the Respondent at the time of termination of the contract and the Respondent also agreed to pay the same to the Appellant. Thereafter, there has been negotiation between the parties and ultimately, after negotiation, the Respondent agreed to pay only US $ 120,000/-that too in 12 monthly instalments, but that was not acceptable to the Appellant. Inspite of the same, the Respondent paid only a sum of US $ 10,000 on 18.12.2009 and thereafter, the Respondent has not paid any amount inspite of undertaking to pay the amount. According to the Appellant, the Respondent owes a sum of US $ 1,15,000/-being the admitted amount payable by the Respondent. It is further contended by the Appellant that there is a tripartite agreement entered into between the parties thereby the amount was agreed to be paid by the Respondent within a stipulated time, but the Respondent did not adhere to the same. According to the Appellant, by means of a letter dated 19.11.2009, the Respondent admitted the liability and also agreed to pay the amount to them along with interest. Since the Respondent failed to make the payment, the applicant invoked Clause 10 of the service agreement which provides for reference of the dispute to an arbitration. The Appellant also sent a notice dated 10.06.2011 intimating the Respondent of their intention to refer the dispute to an arbitration and also for appointment of an arbitrator. Inspite of receipt of the said notice, the Respondent has not responded. According to the Appellant, the Respondent is wilfully evading to pay the outstanding amount to the Appellant, The Appellant would further claim that in order to defeat their claim, the Respondent is making all efforts to sell their property/asset. The Respondent also highly indebted and there is a genuine apprehension in the mind of the Appellant that it will be difficult to recover the amount from the Respondent. Therefore, pending finalisation of the arbitral proceedings, the Appellant has filed the application for a direction to direct the Respondent to furnish security.

3. The learned Judge rejected the application filed by the Appellant at the admission stage itself by observing that the Appellant has not made out any case for directing the Respondent to furnish security though the Respondent promised to make the payment. The learned Judge also found that the averments in the application are vague in so far as it relates to the steps taken by the Respondent company to dispose of their asset. The learned Judge disbelieved the averment of the Appellant that the act of the Respondent is only to defeat their rights. The learned Judge also observed that there is No. chance for the Respondent to abscond nor there is any material to show that there is any immediate threat to dispose of the asset, excepting a bald statement of the Appellant. The learned Judge concluded that merely because there is an outstanding amount, in the absence of any positive evidence on the part of the Appellant to show that the Respondent had taken steps to dispose of their asset with an intention to defeat their claim, the prayer sought for cannot be granted. It was also observed by the learned Judge that under the

guise of filing the present application u/s 9 of the Act, the Appellant is only attempting to pressurise the Respondent to settle the amount immediately.

4. The learned Counsel for the Appellant mainly argued on the basis of the fact that there was an unequivocable admission on the part of the Respondent to pay the amount even as early as on 19th November 2009 itself. The learned Counsel for the Appellant also relied on an e-mail sent by the Respondent on 19.11.2009 to show that the Respondent had categorically admitted the amount due and payable by them to the Appellant in which the quantum of the amount was also mentioned as US $ 120,000 and this amount was assured to be paid by the Respondent on or before 15th December 2010. It was also admitted therein that the Respondent would pay US $ 20,000 to the Appellant on or before 15th December 2009 and the balance will be paid at the rate of US $ 10,000 per month plus 7% interest on the unpaid balance balanle on 15th of every month. According to the learned Counsel for the Appellant, inspite of such an understanding and agreement, the Respondent has not chosen to pay the amount. The learned Counsel for the Appellant further relied on another e-mail dated 16.12.2009 sent by the Respondent to show that the Respondent paid only US $ 10,000 instead of US $ 20,000 as admitted by the Respondent. The learned Counsel for the Appellant further relied on the tripartite agreement entered into between the parties during 2010 wherein the Respondent agreed to pay the amount on or before 03.05.2010, but that agreement was not signed or it was materialised and therefore, the original amount agreed between the parties during November 2009 still stands. According to the learned Counsel for the Appellant, inspite of repeated reminders, the Respondent has not chosen to pay the amount. The Appellant has even sought to invoke the arbitration clause in the agreement by issuing a notice dated 10.06.2011 expressing their intention to refer the dispute to an arbitrator and also to appoint an arbitrator and called upon the Respondent to appoint their arbitrator. The Respondent has not replied to the said notice dated 10.06.2011 or appointed an arbitrator of their choice. Therefore, the Appellant apprehended that the Respondent may dispose of the property so as to defeat their rights. Under those circumstances, the Appellant has filed an application u/s 9 of the Act seeking for a direction to the Respondent to furnish security for the outstanding amount. The learned Judge failed to consider the above said facts and dismissed the application on erroneous reasons and therefore he prayed for allowing of the appeal.

5. We have heard the learned Counsel for the Appellant. When we analyse the provisions of Section 9 of the Act and the averments made in the affidavit filed in support of the application, we find that barring paragraph No. 16 in the affidavit, nothing was stated by the Appellant regarding the intention of the Respondent in selling the property or to defeat the claim of the Appellant. Paragraph No. 16 of the affidavit reads as follows:

16. I state that the Applicant reliably understands that with the intention of defeating the claims of the creditors, the Respondent is making all efforts to sell their properties/assets. The conduct of the Respondent would clearly prove that they are heavily indebted and have No. intention to pay their outstanding to the applicant. The applicant therefore genuinely apprehends that they may be left with nothing if they do not aproach this Honourable Court u/s 9 of the Arbitration and Conciliation Act.

6. In the earlier paragraphs of the affidavit filed in support of the application, the Appellant mainly made averments relating to the admission of the Respondent to pay US $ 120,000. The Appellant also would contend that there was a tripartite agreement between the parties, but the tripartite agreement was never signed by the parties. Therefore, the Appellant would now contend that the entire amount is due and payable by the Respondent. But there is a dispute over this, hence, the Appellant intends to approach the arbitrator. The Appellant also invoked Clause 10 of the agreement between the parties which provides for referring the dispute between them before an arbitrator. According to the Appellant, he had sent a notice to the Respondent expressing their intention to refer the dispute to an arbitrator, but the Respondent has not responded.

7. The core question for adjudication before us is that merely because there is an admission on the part of the Respondent to pay certain amount to the Appellant, which was allegedly due, whether that by itself will entitle the Appellant to invoke the provisions of Section 9 of the Act for a direction to the Respondent to furnish security for the outstanding amount. As stated supra, there is a dispute between the parties because what was originally agreed to in the e-mail sent by the Respondent was only US $ 120,000 but the Appellant claimed a sum of US $ 266,642 in their legal notice dated 10.04.2011 sent to the Respondent.

8. As rightly pointed out by the learned Judge, the Respondent is not an individual, but a Company incorporated under the Companies Act and it is based at U.S.A. It is not the case of the Appellant that the Respondent is going to completely wind up their operations or close down their company. Even as admitted by the Appellant, the Respondent is intending to extend their operations in India and to continue to do the same service in India. If the intention of the Respondent is to settle down and to do business in India, it is not known as to how the Appellant could contend that the Respondent is trying to dispose of their property, especially without any document. Merely because the Respondent has not replied to the notice sent by the Respondent, the Appellant is not entitled to invoke the provisions of Section 9 of the Act and seek interim orders.

9. Section 9 of the Act contemplates interim measure to protect and secure the amount in dispute in arbitration. But that does not mean even without any pleadings in respect of the fact that the asset of the Respondent company will be lost, the Appellant is entitled to file the application u/s 9 of the Act. In fact, in

granting injunction or passing any order u/s 9, three golden principles under law have to be taken note of by the Courts and they are (i) prima facie case (ii) balance of convenience and (iii) irreparable loss and injury. In this case, the Appellant has not come forward with a clear pleading to seek for a direction to the Respondent to furnish security. In the absence of any pleading that the attitude of the Respondent is only to obstruct or delay the recovery of money or the Respondent is about to dispose of the whole or any part of the property, the Appellant is not entitled to the relief of direction. As mentioned above, in paragraph 16, the Appellant only stated that the Respondent is attempting to dispose of the property. Further, as rightly pointed out by the learned Judge, the Appellant has not produced any material to substantiate this claim. The Appellant has not stated the reasons for filing the present application u/s 9 of the Act before the arbitral proceedings commenced. In fact, a notice was issued by the Appellant expressing their intention to invoke the arbitration proceedings and also appointed an arbitrator. After such appointment of an arbitrator, the Appellant could have ventilated their grievance before the arbitrator appointed by them and not before this Court. It is well settled law that security can be ordered only in cases where the other party is likely to abscond or there is positive evidence to show that the other party is taking steps to dispose of the property with an intention to deceive or defeat the decree or award to be passed by the Courts or Tribunal. In this case, the Respondent being a company, it is not possible for them to abscond so easily or they could dispose of their asset immediately. Therefore, the conclusion arrived at by the learned Judge that the present application has been filed by the Appellant only to pressurise the Respondent to settle the amount is well founded. It is needless to mention that filing of an application u/s 9 of the Act can be entertained by this Court only in exceptional case and this is not a case where this Court find it fit and proper to entertain the application of the Appellant.

10. In this context, it is relevant to refer to the decision of the Honourable Supreme Court reported in (Aravind Construction v. Kalinga Mineral Corporation) 2007 6 SCC 798 wherein the Honourable Supreme Court held that the exercise of powers u/s 9 of the Act must be based on well settled principles governing grant of interim relief. Further, in the decision of the Honourable Supreme Court in Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., it was held as follows:

It is true that Section 9 of the Act speaks of the Court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the Court tobe just and convenient. The grant of aninterim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in,

the concept of ''just and convenient'' while speaking of passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same powr for making orders as it has for the purpose and in relation to any proceedings before it" also suggests that the normal rules that govern the Court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures u/s 9 of the Act.

11. Therefore, it is evident from the decision of the Honourable Supreme Court that wherever the powers of the Court are invoked with the objective of supporting the arbitration, the Courts must act cautiously. The Court would not be justified in granting interim orders and relief merely for the asking of it. In fact, if a similar analogy is worked out in case of attachment of immovable property and seeking security under Order 38 Rule 5 of Code of Civil Procedure, the Honourable Supreme Court as well as this Court have time and again held that the intention of the parties to deprive the other party from enforcing the decree should be manifestly clear, pleaded, proved and orders of attachment cannot be granted as a matter of routine. The same principle will also apply to the cases governing Section 9 of the Act. Here is a case where the Appellant has not made out any case or produced any material to show that there is an apprehension or danger that the amount could not be recovered by them from the Respondent, especially when the Appellant alleged that the Respondent is going to start a new company in India itself for the very same purpose. Under those circumstance, we are of the considered view that the learned Judge is right in holding that the application filed by the Appellant u/s 9 of the Act was filed only with an intention to mount pressure on the Respondent to settle the amount. We do not find any reason, much less justifiable reason to interfere with the order passed by the learned Judge.

12. Accordingly, we dismiss the Original Side Appeal. However, there shall be No. order as to costs. Consequently, connected miscellaneous petition is closed.