

**(2011) 01 CAL CK 0009**

**Calcutta High Court**

**Case No:** F.M.A.T. 1681 of 2010 and C.A.N. 10736 of 2010

M/s. Mercury Exports

APPELLANT

Vs

CLC Tanner's Association

RESPONDENT

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**Date of Decision:** Jan. 10, 2011

**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 36, 7, 8, 8(2), 9

**Citation:** AIR 2011 Cal 117 : (2011) 4 ARBLR 195 : (2011) 2 CALLT 149 : (2011) 2 CHN 492

**Hon'ble Judges:** Kalyan Jyoti Sengupta, J; Asim Kumar Ray, J

**Bench:** Division Bench

**Advocate:** S.R. Islam and Mr. Ehtesham Islam, for the Appellant; K.J. Tewari and Mr. Abid Hossain, for the Respondent

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### **Judgement**

The Judgment of the Court was as follows:

1. By consent of the parties, the appeal itself is taken up for hearing, treating the same as on day's list, dispensing with all formalities and disposed of by the following order, as we feel that a matter of this nature is not required to be heard observing all formalities.
2. This appeal is against the order passed by the learned trial Judge dismissing the application u/s 9 of the Arbitration and Conciliation Act. 1996 (hereinafter referred to as the Act) on the ground that the same is not maintainable because original agreement, as required u/s 8(2) of the Act has not been furnished.
3. Upon hearing the Learned Counsels for the parties and upon reading the impugned order, we are of the view that the learned trial Judge perhaps has equated the provisions of section 8 with section 9 of the said Act.
4. Mr. Tewari supports the order passed by the learned trial Judge saying that this judgment and order is fortified by the Supreme Court decisions reported in (i) [Atul Singh and Others Vs. Sunil Kumar Singh and Others](#),

5. We think that section 8 of the Act is applicable in a different field altogether. The judgment referred to by the learned trial Judge and the decisions relied upon by Mr. Tewari before us, in our view do not apply in case of proceedings u/s 9 of the said Act. Section 9 of the said Act reads as follows:

"Section 9: Interim measures, etc. by Court.

A party may, before or during arbitral proceedings or at any time after making of the arbitration award but before it is enforced in accordance with section 36, apply to a Court -

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings ; or

(ii) for an interim measure of protection in respect of any of the following matter, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement ;

(b) securing the amount in dispute in the arbitration ;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

6. Further, going by the recording of the learned trial Judge it appears that the appellant produced the original agreement before the learned trial Judge. In our considered view, section 9 application is maintainable whenever the following conditions are fulfilled:

1. There has been an arbitration agreement as required u/s 7 of the Act between the parties;

2. there has been a dispute between the parties to be adjudicated by the mechanism of arbitration; and

3. positive steps have been taken in relation to the arbitration proceedings.

7. If the aforesaid conditions are fulfilled, application u/s 9 of the Act is entertainable. Provisions of section 8 of the Act, in our view, operate in a different field viz. whenever any proceedings is pending before any judicial authority in relation to any dispute between the parties covered by arbitration agreement, one of the parties can approach before the judicial authority for stay of the proceedings for making a reference to the arbitrator.

8. We fail to understand how the learned trial Judge could invoke the provisions of section 8 in a proceedings u/s 9. According to us, section 9 proceedings is in aid and assistance to arbitration proceedings. The whole idea and object of section 8 is to encourage and help the arbitration proceedings; but by this process, the learned trial Judge has really stalled the arbitration proceedings.

9. Therefore, the impugned order, in our view, suffers from absolute inconsistency and is in contrary to the scheme of the Act. The aforesaid decisions of the Supreme Court nowhere mention that section 8 should be invoked in a proceedings u/s 9 and if this is allowed to be done it would be absolutely contrary to the scheme of the Act.

10. Hence, the impugned judgment and order is set aside and the application u/s 9 is restored to file to be decided on merit. The learned trial Judge will be at liberty to examine whether the aforesaid conditions have been fulfilled or not.

11. It is submitted by the Learned Counsels for the parties that after dismissal of the section 9 application, all the drainage connections have been sealed and, as such, there has been no maintenance and essential services. Mr. Tewari submits that there has been a large amount due and outstanding; however, Learned Counsel for the appellant disputes such submission.

12. We are of the view, when the association has come with the allegation of outstanding then prima facie it has to be accepted. However, the amount may not be handed over to the association, but to see the bona fide we direct the appellant to deposit a sum of Rs.2,75,000/- (Two lac seventy five thousand) with the learned trial Court and on such deposit being made the association shall de-seal the drainage and other connections and restore the original condition, as it was there. Of course, the appellant shall go on paying the current dues as and when bill for the same shall be raised. This order of deposit is without prejudice to the rights and conditions of the parties and will abide by the result of the application which has been restored by this order.

13. The post-dated cheques which have already been handed over, shall be returned to the appellant. The respondent association will be entitled to make an application for withdrawal of the aforesaid amount before the learned trial Judge, who upon hearing the contentions of the parties, shall pass appropriate order as he thinks fit and proper. This order is passed without prejudice to the rights and contentions of the parties. The learned trial Judge shall decide the matter at an early date without being swayed or influenced by the earlier decision.

14. With the aforesaid observations, the appeal and connected applications stand disposed of. There will be no order as to costs.

Urgent Xerox certified copy of this order, if applied for, be supplied to the applicants.