

**(2007) 12 CAL CK 0028**

**Calcutta High Court**

**Case No:** A.P. No. 175 of 1999

National Small Industries  
Corporation

APPELLANT

Vs

Tulip Electricals P. Ltd.

RESPONDENT

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**Date of Decision:** Dec. 10, 2007

**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 21, 9

**Citation:** (2008) 1 CHN 854

**Hon'ble Judges:** Sanjib Banerjee, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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### **Judgement**

Sanjib Banerjee, J.

AP No. 175 of 1999 is a petition u/s 9 of the Arbitration and Conciliation Act, 1996. During the pendency of this petition the respondent Nos. 2 and 4 have expired. GA No. 3010 of 2007 is for recording the death of such deceased respondents, bringing their heirs on record after setting aside abatement, if any.

2. An affidavit-of-service has been filed from which it appears that the heirs of the deceased respondent Nos. 2 and 4 have refused to accept service.

3. But before the application for substitution can be taken up, there is an important matter which has come to the notice of Court. It appears that no attempt was made by the petitioner for commencing arbitral proceedings. The petitioner submits that in view of Section 9 of the 1996 Act permitting the petitioner to commence a reference after making such petition, there is no real time-limit and it is open for a petitioner to take steps well after the institution of the petition for the commencement of a reference. Section 9 of the 1996 Act, insofar as it permits a petitioner to apply to Court for an interim order before a reference is made, is to ensure that the petitioner suffers no prejudice during the period before the

Reference when the petitioner may be in the immediate need of protection in respect of a matter covered by the arbitration agreement. There is an underlying undertaking given by a petitioner who applies u/s 9 of the 1996 Act before a Reference, that such a Reference would be immediately commenced.

A petition u/s 9 is based on the arbitration agreement. An arbitration agreement is consensual. In the event a petitioner applies u/s 9 and obtains an order but chooses not to commence a Reference immediately thereafter, it may lead to an absurd situation. Since arbitration jurisdiction is consensual, a party to an arbitration agreement is not required to implement the arbitration agreement unless the other party thereto seeks to enforce it. It is possible, that a petitioner applying u/s 9 obtains an interim order and thereafter chooses not to commence Reference and files a suit instead. It is equally possible that a petitioner seeks an interim order u/s 9, is refused such order on merits and thereafter abandons the arbitration procedure and files an action before the Civil Court.

4. Court receiving a petition u/s 9 before a Reference is commenced assumes jurisdiction on the petitioner's representation that the arbitration agreement would be implemented and adhered to. There is a reasonable period that a petitioner may have after invoking the Court's jurisdiction u/s 9 for taking steps to commence the Reference. There can be no fixed time-limit for the Reference to be commenced as the statute has not stipulated any time. But such period must be reasonable. In any view of the matter, the time within which a petitioner applying u/s 9 before the Reference is commenced, is required to take steps for commencement of the arbitral proceedings is certainly before the Section 9 petition ripens for final hearing. In other cases, the Court may view the petitioners failure to not commence arbitral proceedings after a lapse of considerable period, being a breach of the implied undertaking given to Court or representation made at the time of initially invoking the Court's jurisdiction that the arbitral Reference would be commenced. The Court's authority to receive a Section 9 petition or make an order thereon is on infirm ground, till such time that arbitral proceedings commence within the meaning of Section 21 of the 1996 Act. If such a condition is not imposed on a pre-reference Section 9 petitioner or such an implied term be not read into Section 9, a recalcitrant pre-reference Section 9 petitioner may bring about an absurd, anomalous and undesirable situation by not taking steps to commence arbitral proceedings. For, in the arbitral proceedings not being commenced, the Court's jurisdiction to have entertained the Section 9 petition will remain, if not questionable, at least tentative.

5. In this case, the Court's jurisdiction u/s 9 was invoked in 1999. In the year 2007, it may not be wrong to assume that in the absence of the petitioner having taken any steps to commence the Reference, the petitioner is in breach of the undertaking given and the representation made to Court. Alternatively, the Court can view the petitioner's conduct here to be such that would disentitle the petitioner from

seeking any interim protection. Either way, this petition cannot be allowed to remain in the light of the petitioner's obvious reluctance to go to arbitration. This order should not be construed to be a pronouncement on the merits of the petitioner's claim or the worthiness of the petitioner's grounds for interim protection.

6. AP No. 175 of 1999 is dismissed with costs assessed at 100 GMs. GA No. 3010 of 2007, in the circumstances, cannot survive.

7. Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.