

(2010) 11 CAL CK 0052

Calcutta High Court

Case No: G.A. No. 3352 of 2010, A.P.O.T. No. 591 of 2010 and A.P. No. 645 of 2010

Rashmi Cement Limited

APPELLANT

Vs

Trafigura Beheer B.V.

RESPONDENT

Date of Decision: Nov. 29, 2010

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 36, 9
- Civil Procedure Code, 1908 (CPC) - Order 38 Rule 5, 94

Citation: AIR 2011 Cal 37 : (2011) 1 CHN 460

Hon'ble Judges: Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Ratnanko Banerjee, K. Thakkar and L. Banerjee, for the Appellant; Tilak Bose, S.S. Bose and S. Dutta, for the Respondent

Final Decision: Allowed

Judgement

Bhaskar Bhattacharya, J.

This appeal is at the instance of a Respondent in a proceeding u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) and is directed against an order dated October 05, 2010 passed by a learned Single Judge of this Court by which His Lordship modified the earlier ad interim order of injunction passed by His Lordship dated October 01, 2010 and passed a fresh interim order directing the present Appellant to export to the Respondent the contracted quantity of 40,000 Metric tonnes of iron by 15th October, 2010 from any Port without prejudice to the rights and contentions with further condition that if such goods cannot be so exported within the stipulated time, the Appellant should furnish security by way of bank guarantee of the value of 20% of the sale price of US Dollar 4,864,000 at the conversion rate on the date of issue of the bank guarantee in favour of and to the satisfaction of the Registrar, Original Side. In default of furnishing such security, the Court proceeded, all immovable properties of the Appellant would be attached.

2. The learned Single Judge also passed direction for filing affidavit by the Appellant by 18th November, 2010.

3. Being dissatisfied, the Appellant has come up with the present appeal.

4. Mr. Banerjee, the learned Advocate appearing on behalf of the Appellant, at the very outset, has taken a pure question of law in support of this appeal.

5. According to Mr. Banerjee, the allegations of the Respondent being based on breach of an agreement to supply iron by way of export, its claim was really one for damages of unquantified amount. According to Mr. Banerjee, in such a case, a Court, by way of interim measure, cannot pass any direction which is in the nature of attachment before passing of award unless specific allegation is made in the application for interim relief that the Appellant had started transferring or had already taken step to transfer his assets for defrauding his creditors or for avoiding payment of the awarded amount that may be passed against him. Mr. Banerjee, therefore, prays for setting aside the modified interim order passed by the learned Single Judge in the impugned order on that ground alone.

6. Mr. Bose, the learned Senior Advocate appearing on behalf of the Respondent, on the other hand, has opposed the aforesaid contention advanced by Mr. Banerjee and has contended that his client having made a strong prima facie case, there was no illegality on the part of the learned Single Judge in passing the aforesaid order to protect the interest of his client. According to Mr. Bose, the learned Single Judge having exercised discretion in favour of his client by way interim measure and the main application being yet to be decided on merit on affidavit, this Court should not interfere with the discretion exercised by the learned Single Judge Mr. Bose, therefore, prays for dismissal of the present appeal.

7. Therefore, the only question that arises for determination in this appeal is whether on the basis of the averments made in the application u/s 9 of the Act, the learned Single Judge was justified in passing the interim order, which is an order in the nature of attachment before judgment.

8. In order to appreciate the question involved, it would be profitable to refer to the provisions contained in Section 9 of the Act, which is quoted below:

9. Interim measures, etc. by Court. - A party may, before or during arbitral proceedings or at any time after the making of the arbitral 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 a 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 matters, 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 authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising 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.

(Emphasis supplied by us)

9. From a plain reading of the provisions contained in Section 9(ii) of the Act, it is clear that the object of the said provisions is similar to those contained in Section 94 read with Orders 38-40 of the Code of Civil Procedure.

10. Therefore, the power conferred upon a Court in any suit or proceedings for passing orders as mentioned in the Supplemental Proceedings indicated in Part-VI of the body of the CPC has been substantially repeated in Section 9(ii) of the Act by making it clear that in dealing with such an application, the Court shall have the same power as it has for the purpose of or in relation to any proceedings before it. It is, therefore, apparent that while dealing with an application u/s 9(ii) of the Act, the Court should be guided by the same principles, which are required to be followed while disposing of the applications under Orders 38-40 of the Code.

11. In the case before us, the dispute between the parties being one of breach of agreement for supply of goods for exportation, the remedy of the Respondent now lies in getting damages, if its allegations are found to be correct. In our opinion, the learned Single Judge erred in law in passing a direction for deposit of bank guarantee on the Appellant merely on a prima facie finding on merit in the absence of any finding that the Appellant was either transferring or alienating his property to avoid payment of money that may be awarded against it or that it was threatening or intending to remove or dispose of his properties with a view to defrauding his creditors. At this stage, we may advantageously refer to the following observations of the Supreme Court in the case of [Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders](#), while considering a case of grant of relief of attachment before judgment:

5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a Plaintiff to utilise the provisions of Order 38 Rule 5 as leverage for coercing the Defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous Plaintiffs by obtaining orders of attachment before judgment and forcing the Defendants for out-of-court settlements under threat of attachment.

6. A Defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A Plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the Defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment. (See Premraj Mundra v. Md. Manech Gazi for a clear summary of the principles.)

(Emphasis given by us)

12. The principles mentioned above squarely apply to the proceedings u/s 9(ii) of the Act and a Court before passing any direction in the nature of attachment before award should follow those principles. The learned Single Judge, as it appears from the order impugned, totally ignored the abovementioned principles.

13. It is now settled law that if it appears that the learned trial judge, while exercising discretion of passing any interim order, wrongly applied the principles for grant of such discretion or if it is established that such discretion has been unreasonably or capriciously exercised, an Appellate Court should interfere. As pointed out by the Supreme Court in the case of [Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others](#), , while hearing an appeal against a discretionary order, "an appellate power interferes not when the order appealed is not right but only when it is clearly wrong. The difference is real, though fine."

14. We are of the opinion that the aforesaid observations apply to the case before us where the order impugned is clearly wrong.

15. We, therefore, set aside the order impugned and dispose of this appeal with the finding that on the basis of averments made in the application for interim relief as it stood before the learned Single Judge, no case was made out for passing an interim order directing attachment before award.

16. We make it clear that our aforesaid observation is based on the materials which were placed before the learned Single Judge as on the date of hearing of the application and we have not taken into consideration any of the defence of the Appellant or subsequent events while disposing of the present appeal.

17. The appeal is, thus, disposed of. The learned Single Judge is free to dispose of the application u/s 9 of the Act in accordance with law after taking into consideration the affidavits that will be filed by the parties.

18. In the facts and circumstances, there will be, however, no order as to costs.

Sambuddha Chakrabarti, J.

I agree.