THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA
AND
THE HON'BLE JUSTICE B.R. MADHUSUDHAN RAO

COMCA.No.40 of 2024

Counsel for the appellants: Sri M.Ravindranath Reddy, learned Senior Counsel representing Sri B.Srinarayana.

Counsel for the respondent Nos.1,2 and 4 to 7: Sri Sunil B. Ganu, learned Senior Counsel representing Smt.Manjari S. Ganu.

JUDGMENT:(*per Justice Moushumi Bhattacharya)*

The present Commercial Court Appeal arises out of a docket order dated 11.12.2024 passed by the learned Commercial Court at Hyderabad on an application filed by the appellants under section 9 of The Arbitration and Conciliation Act, 1996 (the 1996 Act) i.e.,I.A.No.260 of 2024 in COP.No.100 of 2024. The appellant filed the COP.No.100 of 2024 for restraining the respondent Nos.1 – 7 from causing any changes to the rights of the petitioners in two projects of the respondent No.7 LLP : "SreeSumeru" and "SreeTatva".

2. The appellants filed the I.A for interim protection in line with the orders passed by this Court on 11.09.2024 as modified by orders dated 27.09.2024 and 01.10.2024. In the alternative, the petitioners sought continuation of the order dated 11.09.2024 till constitution of the Arbitral Tribunal or orders passed by the Arbitral Tribunal.

Submissions made on behalf of the Parties:

3. Learned Senior Counsel appearing for the appellants relies on the Supreme Court decision in *Arcelor Mittal Nippon Steel India Limited Vs. Essar Bulk Terminal Limited*[1] to submit that the interim protection granted by this Court in Civil Revision Petitions filed by the petitioners should continue till constitution of the Arbitral Tribunal or till the orders are passed by the Arbitral Tribunal as the Court has applied its mind to the merits of the matter. Counsel submits that the Commercial Court allowed the parties to file pleadings with extensive documents and that the I.A. filed by the petitioners was ripe for final disposal. Counsel submits that the Arbitral Tribunal was constituted on 26.11.2024 pursuant to an order dated 22.11.2024 under section 11(6) of the 1996 Act. Counsel assails the impugned order dated 11.09.2024 to urge that the Commercial Court should not have closed the appellants' application under section 9 on the ground of an efficacious remedy being available to the appellants before the Arbitral Tribunal. Counsel submits that there is every likelihood that the respondents would withdraw money from the respondent No.7 LLP and render the arbitration infructuous unless the appellants continue to remain protected.

[1](2022) 1 SCC 712

4. Learned Senior Counsel appearing for the respondent Nos.1 - 4 and 7 opposes the contentions of the appellants/petitioners and submits that the prayers in the I.A. are untenable and contrary to law. Counsel submits that the appellants failed to make out a case for interim protection before the Commercial Court and that the Commercial Court is yet to entertain the matter as per the dictum in *Arcelor Mittal* (supra). Counsel submits that there was no question of the Commercial Court continuing to adjudicate the section 9 application in the absence of having entertained the merits of the dispute.

Decision:

5. We have heard learned Senior Counsel appearing for the parties and carefully considered the material placed before us. We organize the decision under the following heads.

6. Line up of facts leading to the Impugned Order:

03.09.2024	The Commercial Court refused to pass an *ex parte* interim order in the C.O.P. filed by the appellants without issuing notice to the respondents. The matter was made returnable on 20.09.2024. The Commercial Court also refused to entertain the three interlocutory Applications filed by the appellants.
11.09.2024	The appellants filed four Civil Revision Petitions against the above orders. The Court granted limited protection to the appellants by way of suspending the impugned orders passed by the Commercial Court on

03.09.2024. The High Court made it clear that the suspension is interim in nature and the respondents shall be at liberty of taking steps for vacating the interim order of suspension.

27.09.2024 The High Court modified the order dated 11.09.2024 by permitting the respondent no.7 LLP to withdraw the amounts for payment of statutory dues and staff salaries.

The respondent No.7 was directed to give a statement of the amounts withdrawn as well as the manner in which it has been used for payment to the appellants.

30.09.2024 The respondent No.7 sought further modification of the order dated 27.09.2024 for payment to vendors subject to verification by the appellants. The respondent No.7 also sought for a direction on the Commercial Court to hear the C.O.P. within a certain timeframe.

01.10.2024 The High Court directed the Commercial Court to dispose of the C.O.P. by 02.12.2024 upon notice to the respondents. The order dated 27.09.2024 was thereafter modified to permit the respondent No.7 to release payments to the vendors upon verification of the withdrawn amounts by the appellants.

Learned Senior Counsel appearing for the respondent No.7 submits that the direction with regard to verification of the withdrawals shall be followed in both projects of the respondent No.7 namely, “SreeSumeru” and “SreeTatva”.

12.02.2024 The docket order was passed by the Commercial Court recording the submission made on behalf of the appellants that the respondents are alienating the properties. The respondents were directed to file their counter by 22.10.2024/the returnable date.

11.11.2024 The Commercial Court passed an order in I.A.No.203 of 2024 filed by the appellants for impleading the ICICI Bank Limited as the respondent No.10 in the C.O.P.

The Commercial Court allowed the petition for impleadment of ICICI Bank Limited as a party respondent to the C.O.P.

22.11.2024 The Division Bench presided over by the Hon’ble The Chief Justice of the High Court appointed Justice L.Nageswara Rao, Former Supreme Court Judge as the sole Arbitrator to resolve the disputes between the parties.

27.11.2024	The Arbitral Tribunal was constituted. The first procedural order was made on 01.12.2024.
05.12.2024	The appellants filed I.A.No.260 of 2024 in COP.No.100 of 2024 for interim protection in line with the order of this Court dated 11.09.2024 as modified by the later orders till appropriate orders are passed by the Arbitral Tribunal. The appellants also undertook to file an Application under section 17 of the 1996 Act before the Arbitral Tribunal within ten days from the date of interim protection granted by the Commercial Court.
10.12.2024	The appellants filed their statement of claim along with documents before the Arbitral Tribunal.
11.12.2024	The Commercial Court passed the impugned order in the appellant's I.A.No.260 of 2024 closing the I.A. on the ground that the appellant's have efficacious and alternative remedy in approaching the Arbitral Tribunal under the 1996 Act.
20.12.2024	The appellants filed the present Appeal.

The point which falls for Decision: *Are the appellants/petitioners entitled to the relief claimed in I.A.No.260 of 2024?*

7. That is whether the Commercial Court should continue interim suspension of the earlier orders passed by the Commercial Court on 03.09.2024 and the restraint on the respondents from taking money out from the LLP (R7) until orders are passed by the Arbitral Tribunal.

8. It is necessary to examine the statutory object of section 9 of the 1996 Act read with the Supreme Court decision in *Arcelor Mittal* (supra) for a just conclusion to the controversy.

Section 9 of The Arbitration and Conciliation Act, 1996 - Object:

9. Section 9 contemplates interim measures by the Court. Section 9(1) authorises a party i.e., a "party" to an Arbitration Agreement (as defined in section 2(1)(h)) to apply to the Court for interim protection before, during or after arbitral proceedings or at any time after making of the arbitral Award but before the Award is enforced in accordance with section 36 of the Act. The interim protectionsavailable to the applicant/party are primarily for preservation of the subject-matter of the Arbitration Agreement and includes a wide array of discretionary protective orders.

10. Section 9(2) contemplates a pre-arbitration scenario and after a party has obtained an interim measure of protection under section 9 (1) of the Act. Section 9(2) mandates that arbitration shall commence within 90 days from the date of such interim protection or within such further time as the Court may determine. The Court would be the Court under section 9(1) i.e., the Court which passed the interim order.

11. Section 9(3) conceives of a situation after constitution of the Arbitral Tribunal and contains an embargo on the Court from entertaining an application under section 9(1) for interim measures unless the Court finds existence of circumstances which renders the remedy available to a party under section 17 to be inefficacious. Section 17 provides for interim measures ordered by the Arbitral

Tribunal. In essence, section 9(3) mandates a seamless transition of proceedings pending before a Court under section 9(1) to the Arbitral Tribunal once the latter is constituted within the time frame provided under section 9(2) that is within 90 days from the interim order.

12. Section 9(3) aims to prevent multiple levels of adjudication for the same relief and encourages a forward-looking momentum for dispute-resolution after constitution of the Arbitral Tribunal. The only break in that momentum is wherethe section 9 Court has already dealt with the application under section 9(1) on merits. This creates an exception to the bar under section 9(3) – that the Court shall not entertain the 9(1) petition once the Arbitral Tribunal has been constituted.

Has the section 9 Court "entertained" the dispute between the parties in the present case?

13. The penultimate paragraph of the impugned order dated 11.12.2024 passed by the Commercial Court records that

> *"..... the hearing of the main COP has not yet commenced in view of several interlocutory applications and the learned arbitral tribunal was constituted on 26.11.2024....."*

14. The Trial Court again records a few lines later

> *".... The hearing in the present COP is not yet commenced, hence, question of "entertaining" the same does not arise."*

15. Therefore, the section 9 Court makes a categorical statement that it has notentertained the petition filed by the appellants under section 9 of the Act (C.O.P.No.100 of 2024).

16. This Court is of the firm view that the Court hearing a petition is the only Court which is competent to opine whether that Court has entertained a matter or not. In this case, it is the Commercial Court and the Commercial Court alone which can form that view. The view expressed by the section 9 Court runs counter to the stand of the appellants.

17. The High Court in the present Appeal is not competent or armed with the necessary facts to arrive at an opinion on whether the Commercial Court has entertained the C.O.P. or not. We are simply not in a position to take a different view of the matter i.e., that the Commercial Court had "entertained" the C.O.P. in view of the categorical recording of the Commercial Court/Trial Court.

18. Even if we were to assume that the impugned order contains an incorrect recording and that the Commercial Court had indeed dealt with the merits of the section 9 petition filed by the appellant, the orders on record show otherwise.

19. Admittedly, there is no order on record reflecting that the Commercial Court entertained the C.O.P. i.e., dealt with it on merits.

The only orders relied upon by the appellants are docket orders passed by the Commercial Court on 15.10.2024 in the C.O.P. recording the contentions of the parties with regard to alienation of assets/apartments.

20. The other orders of the Commercial Court are in the I.A. filed by the appellant (I.A.No.203 of 2024) on 11.11.2024 with regard to impleading ICICI Bank. There are no other orders placed by the appellants to show that the Commercial Court either considered the C.O.P. or I.A.No.260 of 2024 filed by the appellants in detail, i.e., on facts or in law or reserved the same for orders.

21. Therefore, we cannot accept the contention of the appellants that the Commercial Court entertained the C.O.P. to the extent ofcircumventing the prohibition in section 9(3) and marking an exception thereto. In other words, that the Commercial Court was relieved of the statutory obligation under section 9(3) to cede territory of the section 9 petition in favour of the Arbitral Tribunal. notwithstanding its formation on 27.11.2024.

22. We therefore conclude that the Commercial Court did not "entertain" the appellants' section 9 application in line with *Arcelor Mittal* (supra).

The Supreme Court's decision in *Arcelor Mittal Nippon Steel India Limited Vs. Essar Bulk Terminal Limited* (2022) 1 SCC 712.

23. Learned Senior Counsel appearing for the appellant relies on paragraph98 of the Report in *Arcelor Mittal*tourge that the section 9 Court has the discretion to pass an interim order as the section 9 Court has already entertained the matter.

24. We find the said contention to be unacceptable for the following reasons.

25. First and foremost, the facts in *Arcelor Mittal* were entirely different. In that case the section 9 Court had concluded the hearing and reserved the matter for judgment. Hence, there was no dispute on the issue of whether the Court hadentertained the dispute between the parties. The Supreme Court came to a specific finding that the section 9 Court had entertained the application before constitution of the Arbitral Tribunal.

26. Contrary to the facts in *Arcelor Mittal,* the section 9 Court in the present case has made a specific recording in the impugned order that the hearing in the C.O.P. had not commenced at all.

27. Second, *Arcelor Mittal*explains the expression 'entertain' to mean 'admit to consideration' : *Lakshmi Rattan Engg. Works Ltd. Vs. CST*[2].as in considering a matter on merits. *Hindusthan Commercial Bank Ltd.*

[2]AIR 1968 SC 488

Vs. PunnuSahu[3]dwelt on the word 'entertain'as to 'adjudicate upon' or 'to proceed on merits' as opposed to a mere 'initiation of proceedings'. It was in the context of the meaning ascribed to the word 'entertained'in *Arcelor Mittal*that the Supreme Court preserved the sanctity of the adjudication before the section 9 Court notwithstanding constitution of the Arbitral Tribunal.

28. In our considered view, *Arcelor Mittal* does not come to the aid of the appellant since the section 9 Court has not admitted the dispute to consideration at all.

29. Jaya Industries Vs. Mother Dairy Calcutta[4]involved a specific finding of the section 9 Court having considered the matter in detail (hence entertained) upon exchange of pleadings/affidavits.

Inefficacy of the remedy under Section 17 - the second limb of Section 9(3) of The Arbitration and Conciliation Act, 1996.

30. Section 9(3) of the 1996 Act reads as under:

> "(*3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."*

[3](1971) 3 SCC 124
[4]2023 SCC OnLine Cal 2051

31. The exception to the prohibition on the section 9 Court from entertaining the section 9(1) application would only be triggered where the Court is satisfied that filing an application for interim protection before the Arbitral Tribunal under section 17(1) would not afford effective relief to the petitioner.

32. The statutory object behind the second limb of section 9(3) is clear. The Act aims to preserve the intention of the parties to arbitrate and uphold the sanctity of the arbitral process. The object is also to prevent Courts from trespassing into the arbitral domain where the parties have already taken steps in aid of arbitration by constitution of the Arbitral Tribunal. The Act also intends to prevent multi-domain and simultaneous litigationsbetween the same parties and for the same cause at the cost of the chosen dispute-resolution mechanism. The overall aim is for a clock-wise motion of adjudication as opposed to the hands of the clock ticking in reverse motion where the section 9 Court would be flooded with anxious petitions resulting in jettisoning of the arbitral process.

33. Section 17(1) of the 1996 Act, deals with interim measures ordered by the Arbitral Tribunal and after the 2015 amendment offers a generous bouquet of protections to a party during the

course of the arbitral proceedings. The power of the Arbitral Tribunal under section 17(1) is at par with that of the Court under section 9(1) and affords full-bodied relief to a party in the arbitration. This would be evident from the second part of the section 17(1)(e) providing for plenary powers to the Arbitral Tribunal to grant discretionary protection to the parties and equates that power to the section 9 Court by use of the words:

> "(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,
>
> *and the arbitaral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it."*

34. Section 17(2) fortifies this power by placing any order passed by the Arbitral Tribunal on the same plane as an order of a Court including for the purpose of enforceability purposes.

35. Therefore, the revitalized section 17(1) and (2), post-amendment, casts a weightyburden on the party to persuade the Court to hold on to the Section 9 petition despite formation of the Arbitral Tribunal. The burden of making out a case for the Court to hear the matter, even after constitution of the Arbitral Tribunal, rests on the party who resists being relegated to arbitration. The party seeking to put the breaks on arbitration, at least for a limited period of time, must discharge the onus of

proving the existence of factors which would render the relief under section 17(1) inadequate or inefficacious.

36. There may be factors to plead inefficacy before the Arbitral Tribunal including by reason of non-availability of arbitrators, infrequent sittings of the Tribunal or any other disabling factors. Notably, the appellant has not shown any reason in the present case to discharge the burden cast on the appellant under the second limb of section 9(3) i.e., the reasons for the appellants' unwillingness to approach the already-constituted Arbitral Tribunal. The appellants have also failed to show the inefficacy of the reliefs provided under section 17(1) of the Act.

37. Paragraph 4.9 of the order passed by the Arbitral Tribunal passed on 01.12.2024requiring the respondent to file a reply within two weeks from the receipt of an application made by the other party, is not reason enough to show inefficiency of the statutory remedy under section 17(1).Paragraph 4.9 simply preserves the requirement of natural justice. The procedural order does not contain any embargo in filing time-sensitive applications where a party needs urgent interim relief.

The power to make the assessment of whether a matter has been entertained under section 9(3) rests with the section 9 Court alone:

38. The appellants' prayer for setting aside of the impugned order is misconceived and contrary to law.

39. The appellants' stated position is that the Commercial Court ought to have held on to the section 9 application, or alternatively, passed an order in the nature of the order passed by this Court on 11.09.2024 until the appellants approached the Arbitral Tribunal with a section 17 application. The relief sought for is contrary to the mandate of section 9(3) as well as the decision of the Supreme Court in *Arcelor Mittal* (supra). The reason for this view is as follows:-

40. First, the assessment of whether a petition under section 9(1) of the Act has been entertained or not rests with the section 9 Court alone and cannot be decided by any other Court. The assessment is made on a subjective basis, i.e., the extent to which the Court feels it has applied its mind to the matter. In the present case, there is no record available before us to come to a conclusion that the Commercial Court hadin fact commenced hearing of the section 9 application or actively engaged with the merits of the dispute in the section 9 petition.

41. Second, by the order dated 11.09.2024 passed by this Court, the impugned orders passed by the Commercial Court on 03.09.2024 were suspended for the sole reason of not disclosing reasons. The order dated 11.09.2024 was an *ex parte* order. The respondents were not represented on that date. The order was also subsequently modified by orders dated 25.09.2024, 27.09.2024, 30.09.2024 and 01.10.2024 recording the correct facts represented on behalf of the respondents.

42. Admittedly, the Commercial Court had passed detailed orders in the four I.As filed by the appellants which were not brought to the notice of the High Court on 11.09.2024. Apart from the modifications made to the order dated 11.09.2024, the orders passed by the High Court in the four C.R.Ps. filed by the appellants make it clear that the High Court did not delve into the merits of the C.R.Ps. and only attempted to balance the interest of the parties in terms of withdrawal of amounts from the respondent No.7 (LLP). Therefore, asking the Commercial Court to continue the order passed by the High Court till the appellants filed a section 17 petition before the Arbitral Tribunal is completely misconceived since the High Court passed the order only as a stop-gap measure till the disputes were thrashed out before the section 9 Court.

43. In essence, neither the Commercial Court nor the High Court entertained the dispute between the parties (the section 9 Application

filed by the appellants/C.O.P.No.100 of 2024) in the sense as held in *Arcelor Mittal* (supra). Therefore, the matter at hand falls squarely within the embargo in section 9(3) of the Act i.e., the prohibition on the section 9 Court from entertaining a section 9 application once the Arbitral Tribunal has been constituted.

44. Third, there is a lack of clarity on the specific relief sought for by the appellants. The appellants have not been able to explain with any precision as to the relief sought in the I.A filed before the Commercial Court.

45. Admittedly, the sharpness of the order dated 11.09.2024 was later softened by giving greater leeway to the respondents to withdraw funds from the LLP. The appellants did not challenge the subsequent modifications. Moreover, the appellants also did not take steps for hearing of the C.O.P or the I.As. in the Commercial Court with any diligence.Significantly, I.A.No.260 of 2024 filed by the appellants does not contain any prayer for the Commercial Court to hear/entertain the I.A and the C.O.P. on merits.

46. We are therefore of the view that the appellants have not made out a case for setting aside the impugned order passed by the Commercial Court on any error of reasoning on facts or in law or otherwise.

The appellants have also not made out a case for urgency for continuation of interim orders:

47. Contrary to the submissions made on behalf of the appellants, we do not find any material disclosed from the records substantiating the appellants' apprehension of the respondents taking imminent steps to render the arbitration infructuous. On the other hand, we are informed that the appellants have not complied with the order passed by the High Court on 30.09.2024 in respect of payments to vendors subject to verification by the appellants.

48. Whatever may be the continuing disputes between the parties, the appellants have not shown good cause for failing to approach the Arbitral Tribunal with a section 17 Application after 27.11.2024. The appellants were further required to discharge the onus as to why the appellants refused to initiate proceedings before the Arbitral Tribunal from November, 2024 – February, 2025 despite the urgency which has been argued before this Court. The fact that the appellant filed the I.A. in the section 9 petition while seeking an extension of time to file the statement of claim before the Arbitral Tribunal is of furthersignificance.

Conclusion:

49. The appellants' lack of diligence to protect their rights or continue the interim orders passed by the High Court does not

warrant any intervention in their favour. The appellants should be relegated to the chosen alternative dispute-resolution forum for appropriate relief.

50. We are firmly of the view that there is no reason to doubt the effectiveness of a Section 17 application before the Arbitral Tribunal at this point in time. We have carefully considered each and every aspect of the matter including balancing the interest of the parties before us. We do not find any grounds to interfere with the impugned order or correct the course of action taken by the Commercial Court. In fact, there is no error in the reasons given by the Commercial Court which requires correction.

51. C.O.M.C.A No.40 of 2024 is accordingly dismissed. All connected applications are disposed of. Interim orders, if any, stand vacated. There shall be no order as to costs.

MOUSHUMI BHATTACHARYA, J

B.R.MADHUSUDHAN RAO,J

February 27, 2025
VA/BMS