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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P.(I) (COMM.) 124/2023 and IA 19447/2023

WELSPUN ENTERPRISES LTD .....Petitioner

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Aman Gandhi, Mr. Parthsarathy Bose and Ms. Panchi Agarwal, Advocates

versus

KASTHURI INFRA PROJECTS PVT LTD .....Respondent

Through: Ms. Sunita Ojha and Ms. Vasudha Priyansha, Advocates for R1
Mr. Rajat Katyal and Mr. Mayank Punia, Advocates for Yes Bank

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

O R D E R

% 15.07.2024

1. This petition has been preferred under Section 9(1)[1] of the

[1] **9. Interim measures, etc. by Court**. –
(1) 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.

Arbitration and Conciliation Act, 1996[2] seeking pre-arbitral interim reliefs.

2. During the pendency of these proceedings, a three-member Arbitral Tribunal has come into existence, which is presently in *seisin* of the disputes between the petitioner and the respondent.

3. Yes Bank Ltd[3] has, in the meanwhile, filed IA 19447/2023 for permission to intervene in the present proceedings. They have also sought a modification of the initial order passed by this Court on 19 April 2023 while issuing notice.

4. As the Arbitral Tribunal is now in place and, as I am informed, pleadings before the learned Arbitral Tribunal are also complete, I queried of learned counsel for the respondent as to why this petition should not be permitted to be decided by the learned Arbitral Tribunal, treating it as an application under Section 17 of the 1996 Act.

5. In my considered opinion, once an Arbitral Tribunal is in place, ordinarily a Court should refrain from dealing with the matter even for the purposes of passing interlocutory orders unless the order is demonstrably one which cannot await the application of mind by the learned Arbitral Tribunal. One may, for example, take a case in which there is an imminent threat of invocation of Bank Guarantee or a case in which there is an imminent threat of dispossession. If party is able to convince the Court that by the time the application is taken up by

[2] '1996 Act', hereafter
[3] "Yes Bank" hereinafter

the Arbitral Tribunal, the prejudice that may result would be irreparable, it may be justified for the Court to take up the matter even when the Arbitral Tribunal is in *seisin* of the disputes.

6. ***Arcelor Mittal Nippon Steel India Ltd v. Essar Bulk Terminal Ltd***[4] stated the principle, clearly, thus:

> "86. On a combined reading of Section 9 with Section 17 of the Arbitration Act, *once an Arbitral Tribunal is constituted, the Court would not entertain and/or in other words take up for consideration and apply its mind to an application for interim measure, unless the remedy under Section 17 is inefficacious, even though the application may have been filed before the constitution of the Arbitral Tribunal.* The bar of Section 9(3) would not operate, once an application has been entertained and taken up for consideration, as in the instant case, where hearing has been concluded and judgment has been reserved. Mr Khambata may be right, that the process of consideration continues till the pronouncement of judgment. However, that would make no difference. The question is whether the process of consideration has commenced, and/or whether the Court has applied its mind to some extent before the constitution of the Arbitral Tribunal. If so, the application can be said to have been entertained before constitution of the Arbitral Tribunal.
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> 87. *Even after an Arbitral Tribunal is constituted, there may be myriads of reasons why the Arbitral Tribunal may not be an efficacious alternative to Section 9(1). This could even be by reason of temporary unavailability of any one of the arbitrators of an Arbitral Tribunal by reason of illness, travel, etc.*"
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> (Emphasis supplied)

7. It may be possible to argue that this Court has already "entertained" the present petition before the arbitral tribunal came to be constituted and, therefore, the proscription against grant of interim relief contained in Section 9(3) would not apply. Even so, it would be for the respondent, who resists the present application being referred for adjudication to the Arbitral Tribunal, to demonstrably convince the

[4] **(2022) 1 SCC 712**

Court that emergent orders on the application are necessary and that the matter cannot await the application of mind by the Arbitral Tribunal.

8. I have, therefore, heard learned counsel on this aspect of the matter. Ms. Sunita Ojha, learned counsel for the respondent and Mr. Rajat Katyal, learned counsel for the intervenor have tried to argue that the matter should be decided by this Court, and not relegated to the Arbitral Tribunal

9. Having heard them and having heard Mr. Dayan Krishnan, learned Senior Counsel for the petitioner, I am not inclined to agree.

10. The dispute arises out of a Construction, Procurement of Materials and Equipment Contract[5] dated 6 August 2021, executed between the petitioner and the respondent. Under the contract, the respondent was to complete four laning of a section of NH 45A in the State of Tamil Nadu. According to the petitioner, the respondent has committed several defaults which constitute material breach of the contract, resulting in the respondent being liable to pay damages to the petitioner. The petitioner also claims that, in these circumstances, the respondent must be injuncted from hindering/obstructing usage, by the petitioner, of the equipment, plant and machineries available on the contract site, as well as settle all outstanding dues of workers, labours, staff, suppliers, sub-contractors and vendors, among others, and terminate all other sub-contracts executed by the respondent or any other contracts in relation to the work forming subject matter of the

contracted work.

11. These arguments were noted by this Court on 19 April 2023 when the matter came up for preliminary hearing. While issuing notice on the petition, the Court restrained the equipment at site from being removed by any party till next date of hearing.

12. That order continues to operate till date.

13. On 3 July 2023, this Court was informed that both the parties had appointed their respective Arbitrators and that the Presiding Arbitrator had yet to be appointed.

14. At this stage, Yes Bank moved IA 19447/2023 under Section 151 of the CPC, claiming that some of the properties which were present at the site had been hypothecated by the respondent to Yes Bank and therefore, seeking that the injunction granted by the order dated 19 April 2023 be not extended to the said properties. That application is still pending consideration.

15. On 19 January 2024, this Court appointed a retired Judge of the Supreme Court of India as the Presiding Arbitrator, as the Arbitrators appointed by both sides were not able to arrive at a consensus in that regard.

16. Thus, a three Member Arbitral Tribunal is in place which is seized of the disputes between the parties. Mr. Dayan Krishnan,

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"the contract" hereinafter

learned Senior Counsel submits that pleadings in the matter have already been completed before the learned Arbitral Tribunal.

17. In such a situation, I am of the considered opinion that the situation that exists today is not so emergent as to justify a parallel adjudication, by this Court, of the issues raised in this petition, even while the Arbitral Tribunal continues to remain in *seisin* of the disputes between the parties. The grant of any interim relief involves considerations of the existence of a *prima facie* case, balance of convenience and irreparable loss, among others. Thus, if this Court were to adjudicate on the present application, it would have to examine the existence of a *prima facie* case in respect of one party or the other. That is an exercise which this Court would normally abjure from doing when the Arbitral Tribunal is in *seisin* of the disputes between the parties, as there is the pernicious possibility of any observation being made by this Court influencing the proceedings before the Arbitral Tribunal. At the cost of repetition, the learned counsel for the respondent have not been able to demonstrate, to the satisfaction of this Court, that the situation is so emergent as would justify this Court dealing with the matter rather than relegating it for adjudication by the Arbitral Tribunal treating the present petition as an application under Section 17 of the 1996 Act.

18. Though Ms. Ojha emphatically submits that her client is a micro industry within the meaning of the Micro, Small and Medium Enterprises Development Act, 2006 and that therefore, her client is even finding difficulty in meeting the arbitral costs, these are matters to which both parties were alive when they entered into the contract.

This contention cannot, therefore, be regarded as relevant while deciding whether to relegate the present petition to the Arbitral Tribunal for consideration or otherwise. The application filed by Yes Bank seeking intervention as well as other reliefs, in my considered opinion, can be adjudicated by the Arbitral Tribunal. This Court does not express any opinion in that regard.

19. Ms Ojha further submits that some of the said machinery has already been surrendered by her client to Yes Bank as her client has financially not been in a position to liquidate the dues to Yes Bank. She also points out that the machinery forming subject matter of the order dated 19 April 2023 is situated on a site taken by the respondent on rent, other than the project site and that therefore, her client is incurring losses on a daily basis.

20. In order to justify his right to retain the said equipment, Mr. Dayan Krishnan, *per contra*, cites Clause 12.2 of the contract.

21. In these circumstances, this petition is disposed of with a request to the learned Arbitral Tribunal to decide the present petition treating it as an application under Section 17 of the 1996 Act and also decide the intervention application IA No.19447/2023 filed by Yes Bank. In view of the urgency expressed by learned counsel for the respondent and keeping in mind the fact that the respondent is a MSME, learned Arbitral Tribunal is respectfully requested, if possible, to decide the applications expeditiously.

22. It is made clear that this Court is not expressing any opinion

either regarding the entitlement of Yes Bank to intervene in the proceedings or as to the other reliefs sought by Yes Bank in its application, as one of the reliefs sought in the application is the right to intervene. It would be for the learned Arbitral Tribunal to take a view in that regard.

C.HARI SHANKAR, J

JULY 15, 2024/yg

Click here to check corrigendum, if any