Neutral Citation No. - 2024:AHC:76378-DB

Chief Justice's Court

Case :- APPEAL UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT 1996 No. - 161 of 2024

Appellant :- Ganga Prasad Memorial Trust and another
Respondent :- DHK Eduserve Limited
Counsel for Appellant :- Rakesh Pande (Sr.Adv.) with Sunil Kumar Singh and Utkarsh Srivastava
Counsel for Respondent :- Manish Goyal (Sr.Adv.) with Ajay Kumar Singh and Tejas Singh, Ashish Kumar Singh

Hon'ble Arun Bhansali,Chief Justice
Hon'ble Vikas Budhwar,J.

1. This appeal under Section 37 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") is directed against the order dated 18.01.2024 passed by Commercial Court, Varanasi, whereby the application, filed by the respondent, under Section 9 of the Act has been partly allowed.

2. The respondent filed application under Section 9 of the Act, *inter alia*, with the submissions that its main work was academic consultancy, teacher training and academic delivery system in education field meant for schools being run as per C.B.S.E. norms. The said services are provided to the societies, trusts, companies and other educational institutions on payment of consultancy charges for over 20 years. It was indicated that a Memorandum of Understanding was entered into between the appellant and the respondent on 30.01.2017 and a registered agreement dated 11.12.2018 was executed indicating the terms of the agreement. It was indicated that the academic consultancy charges amounting to Rs. 45,57,781/- were due for which cheques were issued, which were dishonoured. On account of violation of the agreement, notice was issued on 10.04.2023, which was not responded. However, the appellant continued to use the logo and school name which it was using under the agreement. Based on the said submissions, injunction was sought against the respondent for not using the name 'Sunbeam' and

logo etc. and not to run the school in the name of Sunbeam School, Babatpur.

3. It appears that by order dated 21.10.2023, the opportunity to file response of the respondent was closed by the Court whereafter when the matter came up for arguments on the application, the order impugned was passed.

4. Learned counsel for the appellant made submissions that the Commercial Court was not justified in accepting the application. Submissions have been made that the order has been passed in a cursory manner wherein only on account of closing of opportunity to file response, the order impugned has been passed without recording any finding on the aspects of *prima facie* case, balance of convenience and irreparable injury, which is necessary for the purpose of grant of injunction/interim order. Further submissions have been made that in view of the provisions of Section 9(3) of the Act, once the Arbitral Tribunal has been constituted, the Court cannot entertain an application, unless the Court finds that the circumstances exist which may not render the remedy provided under Section 17 efficacious. In the present case, the application under Section 9 of the Act was filed on 27.04.2023, the Arbitral Tribunal was appointed by this Court on 16.11.2023 and the impugned order has been passed on 18.01.2024. It was submitted that once the Arbitral Tribunal was constituted on 16.11.2023, the order impugned could not have been passed on 18.01.2024 and on that count also, the order impugned deserves to be set aside. Reliance was placed on **Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd. : (2022) 1 SCC 712.**

5. Learned counsel for the respondent vehemently opposed the submissions. It was submitted that the Commercial Court was justified in passing the order impugned as the response was closed. Further submissions were made that the C.B.S.E. has already directed the appellant not to use the name ‘Sunbeam’ and its logo. Further, the recognition of the appellant stood

terminated on 31st March onwards by Basic Shiksha Adhikari, Varanasi and, therefore, the appeal deserves to be dismissed. Learned counsel for the respondent further emphasized that under Section 9(3) of the Act, the Court in the present circumstances could entertain the application despite the constitution of the Arbitral Tribunal. The application was filed before the constitution of the Tribunal and the word 'entertain' has been interpreted by Hon'ble Supreme Court to mean "to consider the application by applying mind to the issues involved/raised" and as the Commercial Court had already applied its mind to the issues raised in the present matter as various applications were filed after filing of the application under Section 9 of the Act, wherein the appellant had questioned the maintainability of the proceedings, amendment applications were filed by the respondent and the Court had directed on 15.11.2023, fixing 21.11.2023 for the evidence of the respondent, which necessarily means that the matter has already been entertained by the Court and, therefore, the plea raised in this regard has no substance. Reliance was placed on observations made in **Arcelor Mittal Nippon Steel India Ltd. (supra)**.

6. We have considered the submissions made by counsel for the parties and have perused the material available on record.

7. It would be appropriate to quote the relevant portion of the order passed by the Commercial Court, which reads as under:

> "16. आवेदक एवं विपक्षीगण के विद्वान अधिवक्तागण की बहस सुनी गयी एवं पत्रावली पर उपलब्ध अभिलेखों एवं साक्ष्यों का अवलोकन एवं परिशीलन किया।
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> 17. वादी की तरफ से वाद–पत्र के समर्थन में सूची संख्या 9ग से निम्नलिखित कागजात दाखिल किये गये है:–
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> कागज संख्या 10ग दरखास्त द्वारा शिवशक्ति सिंह दिनांकित 27.01.2017, कागज संख्या 11ग एक अदद नोटरी प्रलेख मेमोरंडम आफ अण्डरटेकिंग दिनांकित 30.1.2017, कागज संख्या 12ग एक किता पंजीकृत प्रलेख पक्की नकल दिनांकित 11.12.2018, कागज संख्या 13ग एक किता फोटोस्टेट नोटरी प्रलेख m.o.u दिनांकित 11.12.2018, कागज संख्या 14ग एक किता फोटो स्टेट नोटिस दिनांकित– 10.4.2023 मय रजिस्ट्री रसीद व स्टेटस रिपोर्ट, कागज संख्या 15ग चार किता फोटोस्टेट चेक यूनियन बैंक आफ बहक डी. एच. के. दाखिल किया गया है।
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> उक्त सूची से ही कागज संख्या 16ग एडयूसर्व लि० क्रमश० दि० 25.12.2022, 25.01.2023, 25.02.2023, 25.03.2023, फोटोस्टेट नोटिस द्वारा डी०एच०के० एडयूसर्व प्रा० किमि० बनाम गंगाप्रसाद मेमोरियल ट्रस्ट वारा० दिनांकित 17.04.2023 मय रजिस्ट्री रसीद दि०

17.04.2023, कागज संख्या 17 ग तीन किता स्टेट रिपोर्ट दिनांकित 17.04.23, कागज संख्या 18 ग 9 किता जी मेल द्वारा सनबीम एड्यूसर्व बहक सनबीम बाबतपुर दिनांकित 30.12.20, 22.6.21, 28.8.21, 7.9.21, 13.7.22, 18.10.22, 7.11.22, 24.11.22, व 6.01.23. कागज संख्या 19 ग फोटोस्टेट वाद सं. 716 सन् 2020 यूनियन बैंक ऑफ इंडिया बनाम गंगाप्रसाद मेमोरियल ट्रस्ट, कागज संख्या 20 ग फोटो स्टेट बैंक स्टेटमेन्ट फोटो स्टेट बकाया सप्लायर नाम लिस्ट सनबीम बाबतपुर बकाया के सम्बन्ध में, कागज संख्या 21 ग कि दो किता फोटो स्टेट जीमेल क्रमशः दिनांकित 26.04.23, कागज संख्या 22 ग फोटो स्टेट वाट्सएप द्वारा प्रधानाचार्य सनबीम स्कूल बाबतपुर, कागज संख्या 23 ग फोटो स्टेट प्रस्ताव हरबिन्दर पाल सिंह दिनांकित 02.09.13 तथा सूची संख्या 24 ग से कागज संख्या 25 ग एक किता फोटो स्टेट प्रमाण–पत्र द्वारा कम्पनी ऑफ रजिस्ट्रार दिनांकित 10.01.2018 दाखिल किया गया है।

इसी प्रकार सूची संख्या 59 ग से कागज संख्या 60 ग नोटिस दिनांकित 22.5.2023, कागज संख्या 61 ग रजिस्ट्री रसीद दि० 22.5.2023 छाया प्रति, कागज संख्या 62 ग डिलेवरी रिपोर्ट दिनांक 23.2.23 छाया प्रति, कागज संख्या 63 ग ईमेल दिनांक 22.05.23 छाया प्रति, कागज संख्या 64 ग नोटिस दिनांकित 02.06.23, कागज संख्या 65 ग रसीद नोटिस दिनांक 02.06.2023, कागज संख्या 66 ग नोटिस दिनांक 02.06.2023 जरिये मेल दिनांक 04.06.2023 स्क्रीन साट, कागज संख्या 67 ग माननीय उच्च न्यायालय का आदेश दिनांकित 28.07.2023 दाखिल किया गया है।

18. वादी की ओर से निम्नलिखित विधि व्यवस्थाए प्रस्तुत की गयी हैः–

1. 2019 (145) RD 429 Supreme Court M/s. SCG Contracts india Pvt. Ltd. Vs. KS Chamankar Infrastructure Pvt. Ltd. And Ors.

2. The Arbitration and Conciliation Act 1996 Sec. 9.

3. The Commercial Court Act, 2015 of Section 16.

4. Amendments To the provisions of The Code of Civil procedure, 1908 of Chapter of Section VI of section 16 of The Commercial court Act, 2015, Schedule 4A of order V, 4D, in order VIII and 4D in rule 10.

19. विपक्षीगण की तरफ से प्रस्तुत जबाबदेही /प्रतिवाद–पत्र विधि में प्रावधानित समय के व्यतीत होने के उपरान्त प्रस्तुत किये जाने के कारण पठनीय नहीं है। जिसके सम्बन्ध में आदेश दिनांक 21.10.2023 विस्तृत रूप से पारित किया गया है। चूंकि आवेदक के कथनों के खण्डन में विपक्षीगण की कोई भी साक्ष्य पत्रावली पर पठनीय नहीं है। अतः आवेदक को प्रार्थना–पत्र 4 क आंशिक रूप से स्वीकार किये जाने योग्य है।

आदेश

आवेदक का प्रार्थना–पत्र 4 क Arbitration Misc. Case No. 28/2023 डी० एच० के० एड्यूसर्व लिमिटेड बनाम गंगा प्रसाद मेमोरियल ट्रस्ट व अन्य अन्तर्गत धारा 9(D) माध्यस्थम् एवं सुलह अधिनियम 1996 आंशिक रूप से स्वीकार किया जाता है। आवेदक की बकाया धनराशि मु0 49,79,015/– रूपये के सम्बन्ध में अनुबन्ध दिनांक 11.12.2018 के प्रकाश में मध्यस्थ के निर्णय के अधीन रहेगी। विपक्षीगण को जरिये अन्तरिम निषेधाज्ञा आदेशित किया जाता है कि आर्बिट्रेटर का निर्णय आवेदक के उक्त बकाये के सम्बन्ध में आने तक विपक्षीगण सनबीम नाम, लोगो चिन्ह (मार्क) आदि का इस्तेमाल किसी स्थान, वस्तु व सामग्री पर न करें और न ही आराजी नम्बर 30 क्षेत्रफल 1.1570 हे० स्थित मौजा पाण्डेयपुर, परगना अठगाँया, तहसील पिण्डरा, जिला वाराणसी पर सनबीम बाबतपुर के नाम से विद्यालय संचालित करें।

उभय पक्ष अपना–अपना वाद व्यय स्वयं वहन करेंगें।"

8. Perusal of the above would reveal that the Commercial Court merely referred to the documents produced by the respondent, the judgments and the law cited and observed that as the response has been filed by the

appellant after passage of the prescribed time, the same cannot be read regarding which order has already been passed on 21.10.2023 and as qua the averments made by the applicant no evidence on behalf of the appellant was admissible, the application deserves to be partly allowed and passed the order, as indicated.

9. It is, thus, apparent that the order impugned has been passed only on account of the fact that the response filed to the application under Section 9 of the Act was ordered not to be taken into consideration as the same was filed beyond the prescribed time. However, non filing of the response to the application/non consideration of the reply filed, by itself does not entitle the applicant to get the relief as prayed for. The Commercial Court, while dealing with an application under Section 9 of the Act, is required to record findings on the three parameters, i.e., (i) *prima facie* case, (ii) balance of convenience, and (iii) irreparable injury, which determination is *sine qua non* for the purpose of grant of relief in any application of the present nature. Failure of the Commercial Court to record any finding on the said aspects worth the name, vitiates the order impugned.

10. Coming to the issue pertaining to the order impugned being in violation of Section 9(3) of the Act, the relevant provision, *inter alia*, reads as under:

> *"**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—*
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> *(i) …….*
>
> *(ii) …….*
>
> *(2) …….*
>
> *(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."*

11. A bare reading of the above provision reveals that though a party may, before or during arbitral proceedings or any time after making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court seeking interim measures, Sub-section (3) restricts the power of the Court in entertaining an application under Sub-section (1) once the Arbitral Tribunal has been constituted, unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

12. In the present case, admittedly, the application was filed on 27.04.2023 before the Commercial Court, Varanasi, the Arbitrator was appointed by order of this Court on 16.11.2023 and the order impugned has been passed on 18.01.2024. The above provisions has been exhaustively dealt with by Hon'ble Supreme Court in the case of **Arcelor Mittal Nippon Steel India Ltd. (supra)** wherein the term 'entertain' has been explained and it has, *inter alia*, been laid down as under:

> *"**90.** In Kundan Lal v Jagan Nath Sharma and Ors. (supra), a Division Bench of Allahabad High Court held that the expression "entertain" did not mean the same thing as the filing of the application or admission of the application by the Court. The dictionary meaning of the word "enterain" was to deal with or to take matter into consideration. The High Court further held:-*
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> > *"**7.** The use of the word 'entertain' in the proviso to R. 90 of Or. XXI denotes a point of time at which an application to set aside the sale is heard by the court. This appears to be clear from the fact that in the proviso it is stated that no application to set aside a sale shall be entertained 'upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up.' Surely, the question as to the consideration of the grounds upon which the application is based can only arise when it is being considered by the court on the merits, that is, when the court is called upon to apply its mind to the grounds urged in the application. In our view the stage at which the applicant is required to make the deposit or give the security within the meaning of Cl. (b) of the proviso would come when the hearing of the application is due to commence."*
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> ***91.** In Hindustan Commercial Bank Ltd. v Punnu Sahu (supra), the Court held that the expression "entertain" in the proviso to clause (b) Order 21 Rule 90 (as amended by Allahabad High Court), means to*

"adjudicate upon" or "proceed to consider on merits" and not "initiation of proceeding."

92. *In Martin & Haris Limited (supra), the Court was considering proviso to Section 21 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 which provided that where the building was in the occupation of a tenant since before its purchase by the landlord, such purchase being made after the commencement of this Act, no application shall be entertained on the grounds mentioned in Clause (a), unless a period of 3 years has elapsed since the date of such purchase and the landlord has given a notice in that behalf to the tenant, not less than 6 months before such application, and such notice may be given before the expiration of the aforesaid period of 3 years. The Court held :-" Thus the word "entertain" mentioned in the first proviso to Section 21(1) in connection with grounds mentioned in clause (a) would necessarily mean entertaining the ground for consideration for the purpose of adjudication on merits and not at any stage prior thereto as tried to be submitted by learned Senior Counsel, Shri Rao, for the appellant."*

93. *It is now well settled that the expression "entertain" means to consider by application of mind to the issues raised. The Court entertains a case when it takes a matter up for consideration. The process of consideration could continue till the pronouncement of judgment as argued by Khambata. Once an Arbitral Tribunal is constituted the Court cannot take up an application under Section 9 for consideration, unless the remedy under Section 17 is inefficacious. However, once an application is entertained in the sense it is taken up for consideration, and the Court has applied its mind to the Court can certainly proceed to adjudicate the application.*

94. *Mr. Sibal rightly submitted that the intent behind Section 9(3) was not to turn back the clock and require a matter already reserved for orders to be considered in entirety by the Arbitral Tribunal under Section 17 of the Arbitration Act.*

95. *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."*

13. It would be seem that Hon'ble Supreme Court referred to the judgment in **Kundan Lal's case**, a Division Bench judgment of this Court, wherein it has been laid down that the question as to the consideration of the grounds, upon which the application is based can only arise when it is being considered by the Court on the merits, i.e., when the court is called upon to apply its mind to the grounds urged in the application. Further it has been categorically laid down that once an Arbitral Tribunal is constituted, the Court cannot take up an application under Section 9 for consideration, unless the remedy under Section 17 is inefficacious.

14. Merely because in the present application seeking dismissal of the proceedings under Section 9 of the Act and two amendment applications were dealt with by the Tribunal and order was passed on 15.11.2023, a day before the Tribunal was constituted, for leading evidence, it cannot be said that the Court had considered the case on merits, as the consideration on merits would necessarily mean for the purpose of grant of injunction and not for the purpose of deciding the applications filed during the pendency of the application.

15. In view of the above facts situation, it is apparent that once the Tribunal was constituted on 16.11.2023, passing of the order on 18.01.2024 by the Commercial Court was in the teeth of the provisions of Section 9(3) of the Act.

16. So far as the submissions made by counsel for the respondent on the merit of the dispute is concerned, the said aspect cannot be considered in the present appeal arising from the order passed by Commercial Court, which has been found to be in violation of provisions of Section 9(3) of the Act.

17. In view of the above discussion, the appeal filed by the appellant is allowed. The order dated 18.01.2024 is quashed and set aside. The application filed by the respondent under Section 9 of the Act is dismissed in

view of the provisions of Section 9(3) of the Act. The respondent would be free to approach the Arbitral Tribunal under the provisions of Section 17 of the Act.

Order Date :- 29.4.2024
P.Sri.

(Vikas Budhwar, J) (Arun Bhansali, CJ)