

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1ST DAY OF JULY, 2022

BEFORE

THE HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

WRIT PETITION NO. 10281 OF 2022(GM-CPC)

BETWEEN:

GODOLPHINE INDIA PRIVATE LIMITED
(FORMERLY KNOWN AS DARVESH INDUTRIES
INDIA PRIVATE LIMITED)
A COMPANY INCORPORATED UNDER THE
COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT
SURVEY NO.1256 AND 1261, RAJPUR ZULASAN ROAD,
RAJPUR TALUKA, KADI MAHESANA,
GUJARAT-382715,
HAVING ITS REGIONAL OFFICE AT
SUITE NO.1011, FIRST FLOOR,
PRESTIGE DEJA VU TOWERS,
PROMENADE ROAD, FRAZER TOWN,
BENGALURU-560005
REPRESENTED BY ITS DIRECTOR,
SRI ABDUL RASHEED.

...PETITIONER

(BY SRI.SHRAVANTH ARYA TANDRA, ADVOCATE FOR
SRI.IRFANA NAZEER, ADVOCATE)

AND:

UM PROJECTS LLP
A LIMITED LIABILITY PARTNERSHIP INCORPORATED

UNDER THE LIMITED LIABILITY PARTNERSHIP ACT, 2008,
HAVING ITS REGISTERED OFFICE AT NO.39,
UNITED MANSIONS, FIRST FLOOR, M.G.ROAD,
BENGALURU-560001
REPRESENTED BY ITS DESIGNATED PARTNER
SRI P.S. KIRAN KUMAR.

...RESPONDENT

(BY SRI.SRINIVASA.D.C, ADVOCATE FOR
SRI.PRADEEP NAYAK, ADVOCATE FOR C/R)

THIS PETITION IS FILED UNDER ARTICLE 227 OF
THE CONSTITUTION OF INDIA PRAYING TO SET ASIDE
THE ORDER DTD. 22.04.2022 PASSED BY THE LXXXIII
ADDITIONAL CITY CIVIL AND SESSIONS JUDGE,
BANGALORE, COMMERCIAL COURT, BANGALORE IN
COMM. EX.NO. 192/2022 (AT ANNEX-J).

THIS PETITION HAVING BEEN HEARD AND
RESERVED FOR ORDERS ON 17.06.2022, COMING ON FOR
PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT
MADE THE FOLLOWING:

ORDER

The captioned writ petition is filed by the judgment debtor feeling aggrieved by order dated 22.4.2022 passed by Executing Court thereby attaching the Bank Account of the petitioner to an extent of Rs.97,58,580/-.

2. The respondent-decree holder filed an application under Section 9 of Arbitration and conciliation Act, 1996 (for short "Act, 1996") before the Commercial Court seeking a direction against the present petitioner to pay outstanding rent and maintenance charges amounting to Rs.1,93,41,675/-. The said application was contested by the petitioner herein and the Commercial Court by order dated 4.3.2022 allowed the application.

3. Feeling aggrieved by the said order, the petitioner herein preferred a Commercial Appeal in

Commercial Appeal No.140/2022. The Division Bench of this Court declined to entertain the grounds urged in the appeal and consequently, dismissed the appeal and confirmed the order passed by the Commercial Court passed under Section 9 of the Act, 1996. The Division Bench of this Court has also observed in its order that the liability of the petitioner to pay admitted rent in terms of the lease deed dated 10.6.2020 has no nexus or connection whatsoever to the permission granted by the Commercial Court to the present petitioner to deposit 40% of the monthly sums pending adjudication in AA.127/2021.

4. Based on the order of the Commercial Court passed under Section 9 and the order passed in Commercial Appeal, the respondent-decree holder has filed the present execution proceedings. The executing Court on an application filed by the respondent-decree

holder has passed the impugned order thereby attaching the account of the petitioner herein.

5. Sri. Srivasta, learned Senior Counsel appearing for the petitioner reiterating the grounds urged in the writ petition would vehemently argue and contend that the impugned order under challenge is passed in gross violation of principles of natural justice. Referring to the provisions of Order XXI Rule 22 of CPC, the learned counsel contended that a show-cause should be issued where an application for execution is levied more than two years after the date of decree. Referring to Order 21 Rule 22 (3) of CPC, he would point out that the show-cause notice has to be issued if the material on record indicated that there is substantial injury sustained by the judgment debtor.

The second limb of argument canvassed by the learned counsel is that, the remedy of the parties lies

before the Arbitration Tribunal and therefore, the respondent-decree holder cannot file an execution to recover the amount which is the subject matter of arbitration before the commencement of the arbitral proceedings.

6. After the matter was heard for some time, the learned Senior Counsel for the petitioner sought for short accommodation and at his request, the matter was adjourned and in the interregnum the petitioner sought for amendment to raise additional grounds. By way of proposed amendment, the petitioner has raised additional grounds *inter alia* contending that there is an amendment to Section 9 of the Act, 1996, wherein two further sub-Sections have been introduced. Referring to this amended sections, it is submitted by the learned counsel that the Executing Court has virtually misinterpreted the provisions of Section 9 prior to amendment which was

inapplicable to the present case on hand. He would sum up his arguments by contending that failure to issue notice violates the principal tenet of natural justice.

7. Per contra, the learned counsel appearing for the respondents repelling the contentions canvassed by learned Senior Counsel appearing for the petitioner would however contend that the issue in regard to whether an order passed under Section 9 assumes the status of a decree is dealt by the Apex Court in catena of judgments and the said issue is no more *res integra*. Placing reliance on the judgment rendered by this Apex Court in the case of ***State of Karantaka .vs. Vishwabharathi House Building Co-Operative Society***¹ as well as the judgment rendered in the case of ***Mysuru Mangnese Company(P) Limited .vs. Prakash Natural***

¹ 2000(3) SCC 412

Resources Limited², would contend that the order passed under Section 9 of 1996 Act are executable under the provisions of Order XXI of CPC as well as Section 36 of CPC. He would also further point that order under Section 9 of the Act, 1996 assumes a status of decree where the rights of the parties are adjudicated. Therefore, by placing reliance on the aforesaid judgments he would contend that the order under challenge does not contravenes any of the provisions of Civil Procedure Code and would further contend that the conduct of the petitioner is grossly unfair and therefore, would not warrant any interference.

8. Heard the learned Senior counsel appearing for the petitioner and the learned counsel appearing for respondent. I have given my anxious consideration to the material on record. I have also

² 2016 SCC Onlike Kar 385.

meticulously examined the judgments cited by the counsel appearing for respondent.

9. The respondent filed an application under Section 9 of the Act, 1996 before the Commercial Court. The Commercial Court has allowed the application thereby directing the present petitioner to pay the sum towards occupation of the leased premises including amount towards, maintenance along with applicable GST from December 2021. The said order is confirmed by the Division Bench of this Court in Commercial Appeal No.140/2022.

The order of the Commercial Court on an application filed under Section 9 is dated 4.3.2022. The Execution is filed in the year 2022. Therefore, I am unable to understand as to how the impugned order contravenes the amended provisions of Rule 22(1) of Order XXI of CPC. Under Rule 22(1) provides that where an application for execution is made within

two years from the date of last order, no notice is required. Therefore the grounds urged by the petitioner that it contravenes the provisions of Order XXI Rule 22 of CPC, cannot be acceded to.

10. The second limb of argument that once an arbitral Tribunal is constituted, the Court cannot entertain an application in view of restriction under Section 9(3) of the Act, 1996 is also misconceived. The Co-ordinate Bench of this Court allowed petition filed under Section 11(5) of 1996 Act and by order dated 24.3.2022 appointed a sole arbitrator. Section 9 application was dealt by the Commercial Court in a Commercial A.A. bearing No.247/2021 and the application filed under Section 9 was allowed by order dated 4.3.2022. These significant details have to be examined in the light of the ratio laid down by the Apex Court in the case of ***Arcelor Mittal Nippon***

***Steel India Ltd. Vs. Essar Bulk Terminal Limited*³.**

The Apex Court in the above said judgment has held that once an application for interim relief has been "entertained" i.e. taken up for consideration by the Court and if the Court has applied its mind, it can proceed to adjudicate the same even after constitution of Arbitral Tribunal. Therefore, the vacuum that was created in the Act, 1996 dealing with pending application under Section 9, once an Arbitral Tribunal is constituted, is dealt by the Apex Court in the judgment cited supra.

11. The Apex Court in the above cited judgment while considering the scope of the term "entertain" under Section 9(3) of the Act, 1996 had an occasion to interpret the expression "entertain". The Apex Court was of the view that the Court entertains a matter when it takes it up for consideration and such

³ (2022) 1 SCC 712.

process of consideration may continue till pronouncement of judgment.

12. Therefore, what emerges from the dictum laid down by the Apex Court in the above said judgment is restriction under Section 9(3) of the Act, 1996 would not apply once an application under Section 9(1) has been "entertained", like in the present case, before a sole arbitrator was appointed by a Co-ordinate Bench of this Court, the Commercial Court had dealt with Section 9 application and by order dated 4.3.2022 directed the petitioner to pay the sum of Rs.97,58,580/- towards leased premises.

13. Therefore, this Court is of the view that in the present case, the question of examining efficacy of remedy under Section 17 of the Act, 1996 would not arise since application under Section 9(1) of the Act, 1996 is already entertained and considered by Commercial Court. The Apex Court has adopted a

practical approach in the case of ***Arcelor Mittal Nippon Steel India Limited*** therefore, the bar enshrined in Section 9(3) of the Act does not apply to the present case on hand. Therefore, the second limb of argument canvassed by the petitioner before this Court is also not tenable.

14. In that view of the matter, the present petitioner cannot resist execution proceedings and respondent-decree holder is entitled to execute the order passed by the Commercial Court on an application filed under Section 9(1) of Act, 1996.

15. For the reasons stated supra, I pass the following:

ORDER

The writ petition is dismissed.

Sd/-
JUDGE

*alb/-