Capt. M.R. HussaIn and Another Vs. Intertek Testing Services India Ltd. and Another

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SooperKanoon Citation : sooperkanoon.com/346830

Court : Mumbai

Decided On : Dec-15-1999

Reported in : 2000(1)ALLMR596; 2000(2)BomCR473; (2000)1BOMLR855

Judge : D.K. Deshmukh, J.

Acts : Arbitration and Conciliation Act, 1996 - Sections 9; Code of Civl Procedure, 1908 - Order 39, Rules 1 & 2

Appeal No. : Arbitration Petition No. 278 of 1999

Appellant : Capt. M.R. HussaIn and Another

Respondent : intertek Testing Services India Ltd. and Another

Advocate for Def. : Anand Grover, Adv. i/b ;V.V. Jusris and ;C.V. Singh, Adv. i/b ;Sanjay Udeshi & Co.

Advocate for Pet/Ap. : Gautam Patel, Adv. i/b ;Hariani & Comapny

Judgement :
ORDER

D.K. Deshmukh, J.

1. This is a petition filed under section 9 of the Arbitration & Conciliation Act, 1996. It appears that by an agreement dated 6th August 1998, which is an agreement between the petitioners and respondent No. 1, the amounts released from certain transactions were to be deposited with an Escrow Agent, respondent No. 2. It further appears that the parties on the same day, entered into another agreement, which specifically deals with the disbursal of the amounts that are kept with respondent No. 2 as an Escrow Agent. It appears that the dispute arose between the petitioners and respondent No. 1 about the release of amounts kept with the Escrow Agent. The petitioners, therefore, filed the present dispute principally for an order of injunction restraining respondent No. 1 from seeking release of the funds from respondent No. 2, the Escrow Agent. This Court, by an order dated 24th August 1999, directed respondent No. 2 to release the amounts from theescrow funds in excess of Rs. 17,82,500/-. Thus, presently an amount of Rs. 17,82,500/- is lying with respondent No. 2 as Escrow Agent.

2. The learned Counsel appearing for the petitioners submits that there is an arbitration clause contained in the agreement between the parties dated 6th August 1998 and that the petitioners have invoked that Arbitration clause. He submits the amounts were to be released in the month of August and therefore, the present petition was filed for urgent reliefs and the petitioners in para 15 of the petition have made a statement that the petitioners are in the process of having an Arbitrator appointed by the International Chamber of Commerce (ICC). According to the petitioners, thereafter, there were negotiations between the parties for settling the dispute and therefore, steps were not taken for referring the dispute to ICC. The learned Counsel for the petitioners made a statement before me that when the negotiations between the parties failed in the last weak, a reference has been made to the ICC for appointment of Arbitrator. The learned Counsel submits that therefore, it is necessary that the amounts, which are lying with the Escrow Agent should be secured during the pendency of the arbitration proceedings. The learned Counsel for respondent No. 1 firstly submitted that there is no valid arbitration agreement between the parties. However, such a contention has not been raised in the affidavit filed by respondent No. 1, and therefore in my opinion, that question cannot be gone into. The learned Counsel further submitted, relying on a judgment of the Supreme Court in the case of Sundaram Finance Limited v.

NEPC India Ltd., : [1999]1SCR89 , that unless there is a manifest intention on the part of the petitioners to go to arbitration, they cannot invoke arbitration clause under section 9 of the Act. The learned Counsel submits that though the petition was filed in July 1999 the petitioners have not yet taken effective steps for referring the matter to the Arbitrator. Therefore, according to the learned Counsel, the petition under section 9 is not maintainable. The learned Counsel submits that even it is assumed that the petition under section 9 is maintainable, according to the learned Counsel, as the petitioners are claiming payment money in case the injunction is refused, there is no irreparable loss to the petitioners and therefore, the injunction sought by the petitioners should not be granted. Now it is clear that in the petition there is a statement made in para 15 that the petitioners are in the process of having an Arbitrator appointed by the ICC. Perusal of the order of this Court dated 24th August 1999 shows that the parties had agreed to made attempt to settle the dispute by negotiations and for that purpose the matter was adjourned. I find from the order sheet that thereafter the matter was adjourned from time to time by consent of the parties for the purposes of settlement. It is clear that the negotiations were going on between the parties and the parties had agreed before the Court to explore the possibility of settlement by negotiations. It is clear from the Rules governing arbitration by ICC that a request has to be made by the petitioners for referring the dispute to the Arbitrator. The learned Counsel for the petitioners have made a statement before me that when ultimately the negotiations failed a request has been made to the ICC and a statement of claim also has been filed. It is thus clear that the petitioners have taken effective steps for appointment of Arbitrator and forreferring dispute to the Arbitrator. Perusal of the judgment of the Supreme Court in the case of Sundaram Finance Limited shows that if the Court is satisfied that the petitioners have taken effective steps for referring dispute to the Arbitrator, the Court can pass orders under section 9 of the Act. In the present case, I find that due to negotiations going on between the parties for settlement of dispute, the petitioners did not take any effective steps. However, now as the petitioners have taken steps, in my opinion the petition filed by the petitioners under section 9 of the Act is maintainable. The petitioners are, however, directed to furnish a copy of the reference and other correspondence that it may have entered into with the ICC within a period of one week from today.

3. As urged by learned Counsel for the petitioners, as the petitioners are seeking an injunction against payment of money, in my opinion, the Court will not be justified in making an order of injunction because there is no possibility of any irreparable loss being caused to the petitioners in case the amount is paid by respondent No. 2. However, considering the pros and cons of the matter, in my opinion, following order would meet the ends of justice.

4. Respondent No. 1 shall furnish a bank guarantee to the satisfaction of the Prothonotary & Senior Master of this Court and on such bank guarantee being furnished and on intimation being received from the Prothonotary & Senior Master in that regard, respondent No. 2 shall deposit the money immediately with the Prothonotary & Senior Master. The Prothonotary & Senior Master shall permit to withdraw the amounts so deposited i.e. Rs. 17,82,500/ - by respondent No. 1. Respondent No. 1, before withdrawing the money, shall also furnish an undertaking to this Court undertaking therein to redeposit or repay the money with such interest as may be directed by the Arbitrator in the Award. It is further directed that in case respondent No. 1 fails to furnish the bank guarantee to the satisfaction of the Prothonotary & Senior Master within a period of 8 weeks from today, the amounts shall continue to be with respondent No. 2 on the same terms and conditions on which it is presently with them and it is further directed that respondent No. 2 shall not permit respondent No. 1 to withdraw the amounts. It is further directed that any expenses or fees to which respondent No. 2 may be entitled to, according to the agreement, shall be paid to respondent No. 2 by respondent No. 1. However, this payment shall be subject to the directions that may be issued by Arbitrator in that regard.

5. The petition is disposed of accordingly.

6. Order accordingly.