

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 5TH DAY OF JANUARY 2004

PRESENT

THE HON'BLE MR JUSTICE TIRATH S THAKUR

AND

THE HON'BLE MR JUSTICE HULUVADI G. RAMESH

MFA No. 3349/1998

BETWEEN:

1. M/s. Yenepoy Minerals
& Granites Ltd., a
company incorporated under
the Indian Companies Act
having its registered office
at Jodumarga, Mangalore

2. Sri. Y. Abdulla Kunhi,
S/o. Sri. Y. Moideen Kunhi,
Aged 48 years,
Ashoknagar, Mangalore **...Appellants**

(By Sri. O. Shivarama Bhat, Adv.,
& Sri. Sanath Kumar Shetty, Adv.,)

AND:

Maharastra Apex Corporation
Ltd., rep. By its P.A. Holder
Umesh D. Prabhu, Manipal Center,
47, Dickenson Road,
Bangalore - 560 042. **...Respondent**

(By Sri. K. Raghavendra Rao, Adv.,
for Cavtr., -Respdt.,)

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This MFA is filed u/s 37(1)(a) of Arbitration
and Conciliation Act, 1996 against the order
dt.22.6.98 in A.C. No.13/98 on the file of I Addl.
D.J., Mangalore, allowing I.A.1 filed u/o 38 Rule 5

of CPC r/w Sec.9 of the Arbitration and Conciliation Act of 1996 etc.,.

This Appeal coming on for Final Hearing, this day, Tirath S Thakur, J., delivered the following:

JUDGMENT

This appeal arises out of an Order passed by the Principal District Judge, Dakshina Kannada, in an application under section 9 of the Arbitration and Conciliation Act, 1996 whereby the appellant herein has been directed to offer cash security of Rs.25 lakhs failing which the property mentioned in the schedule to the application would stand attached.

The appellant-company it appears had entered into a hire purchase agreement in respect of two 380 KVA Diesel Generating Sets. The total hire amount of Rs.27,35,001/- was repayable in 35 monthly installments of Rs.75,972/- each commencing from 1-3-1995. The respondent's case appears to be that while the appellant had made some payments, the remaining payments due under the agreement were not

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made thereby giving rise to a dispute regarding the recovery of the balance amount. Since the hire purchase agreement contained an arbitration clause, the dispute appears to have been referred for adjudication to one Sri. A.S.N. Hebbar. It was during the pendency of the said arbitration proceedings that the respondent appears to have moved an application under section 9 of the Arbitration and Conciliation Act, 1996 seeking an order of attachment of the property described in the schedule to the application. The respondent's case was that while the arbitration proceedings were pending, the appellant-company was contemplating the alienation of the property mentioned in the schedule with a view to defeating the award/decreed that may be passed in favour of the respondent in the arbitration proceedings. The appellant opposed the said application inter alia on the ground that it is a solvent party and the allegation that it was contemplating sale of its property with a view to defeating the rights of the claimant-respondent were



factually incorrect. The Court below has upon consideration of the rival contentions allowed the application and directed the appellant herein to furnish cash security of a sum of Rs.25 lakhs failing which the property set out in the schedule to the application would stand attached. The present appeal assails the correctness of the said Order as already noticed earlier.

Mr. Bhat, learned Counsel for the appellant made a short submission in support of the appeal. He urged that the Court below had no jurisdiction to entertain the application filed by the respondent as no such application could in the light of the provisions of Section 17 of the Act be entertained. The power to direct making of any interim measure was according to Mr. Bhat vested exclusively in the Arbitral Tribunal and not in the Civil Court. In support of that submission, Mr. Bhat placed reliance upon Section 5 of the Arbitration and Conciliation Act, 1996 and submitted that no judicial authority was empowered to intervene in matters governed by



the Act except in so far as such intervention was permitted by a specific provision to that effect.

Section-9 of the Arbitration and Conciliation Act, 1996 inter alia provides that a party to an arbitration agreement may before or during arbitral proceedings or at any time after making of the arbitral award apply to a Court for any one or more of the reliefs stipulated under the said provision. The reliefs which Section-9 envisages include orders in the nature of appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings and for interim measure of protection in respect of any one of the matters stipulated in clause-(ii) to Section-9. These matters include preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement, securing the amount in dispute in the arbitration and 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. It also empowers the Court to issue interim injunctions or pass orders regarding appointment of a receiver. Clause-(e) to Section 9(ii) is a general provision which empowers the Court to take any other interim measure or protection as may appear to the Court to be just and convenient. Section-17 of the Act reliance whereupon was placed by Mr. Bhat may at this stage be extracted:

**"17. Interim measures ordered by
Arbitral Tribunal-**

(1) Unless otherwise agreed by the parties, the Arbitral Tribunal may, at the request of a party, order a party to take any interim measure of protection as the Arbitral Tribunal may consider necessary in respect of the subject matter of the dispute.

(2) The Arbitral Tribunal may require a party to provide appropriate security in connection with a measure ordered under subsection (1)."

A bare reading of the above would show that the Arbitral Tribunal is empowered to direct a party to

take any interim measure of protection considered necessary for the Arbitral Tribunal, only in cases where the parties have not contracted to exclude that power. A conjoint reading of Section 9 and Section 17 would show that there is no conflict between the two provisions. While Section-9 provides for taking of interim measures by the Court in certain matters, Section-17 provides for taking of interim measures in respect of the subject matter of the dispute by the Arbitral Tribunal. The power available to the Arbitral Tribunal is narrower than that vested in the Court under section 9. The exercise of power by the Court under section 9 is no way controlled by the power exercisable by the Arbitral Tribunal under section 17. Even assuming that the power under section 17 to direct interim measures is in certain respects and limited to certain area concurrent with the power vested in the Court under section 9, the very fact that the



Arbitral Tribunal could also be approached for a proper interim measure would not deprive the civil Court of its jurisdiction under section 9 to make an appropriate direction in an appropriate case brought before it. The contention that the existence of power under section 17 with the Arbitral Tribunal would deny to the Civil Court the power to exercise its jurisdiction under section 9 of the Act must therefore fail.

So also the contention that Section-5 of the Act forbids intervention by Civil Courts hence a Civil Court cannot intervene when the matter is before the Arbitrator has not commended itself to us. Section-5 of the Act no doubt forbids any intervention by any judicial authority, but any such exclusion of jurisdiction is only in matters which are not otherwise specifically provided for. Section-9 of the Act is however an exception to the general rule contained in Section-5 in as much as the former specifically empowers the Civil Court concerned to pass suitable orders on the subject and

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in relation to matters stipulated therein. There is therefore no merit in the contention that section-5 would exclude the jurisdiction of the Civil Court otherwise competent to entertain applications and pass orders in regard to the stipulated matters under section 9 of the Act.

The only question then is whether the Order passed in the instant case falls within the four corners of section-9. The answer to that question should also be in our opinion be in the affirmative. Clause-(b) to Section 9(ii) empowers the Civil Court concerned to secure the amount in dispute in the arbitration. The expression 'securing the amount in dispute in the arbitration' is in our view wide enough to include making of an order of conditional attachment of the property of the person from whom the amount is claimed with a view to ensuring that the amount claimed in the arbitration proceedings is secured. The order in the instant case precisely achieves that object. The Court below has on the basis of the material placed before it come to the



conclusion that the appellant is facing financial distress. The cheques issued by it have been dishonoured and its weak financial condition is acknowledged in its own correspondence addressed to the respondent-company. Mr. Bhat was fair enough to concede before us in the course of the hearing that the appellant-company is now before the BIFR which to a great extent supports the conclusion of the Court below that the appellant will not be in a position to pay the amount claimed from it if the interest of the respondents are not secured by making an order of attachment of the property that the company and the Managing Director had offered as security. It is also not in dispute that the Arbitrator has already made an award in favour of the respondent and held the respondent entitled to recover the amount claimed by it. In the totality of these circumstances therefore the order of attachment passed by the Court below pending disposal of the arbitral proceedings was perfectly justified and does not call for any interference.



This appeal accordingly fails and is hereby dismissed, but in the circumstances without any orders as to costs.

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Sd/-
Judge

Sd/-
Judge

An/-