

## **Symphony Services Corp. (India) Pvt. A ... vs Mr. Sudip Bhattacharjee S/O. Late R.C. ... on 21 August, 2007**

**Equivalent citations: 2008(1)KARLJ24, AIR 2008 (NOC) 38 (KAR.) = 2007 (6) AIR KAR R 84, 2007 (6) AIR KAR R 84 2008 A I H C 278, 2008 A I H C 278, 2008 A I H C 278 2007 (6) AIR KAR R 84, 2007 (6) AIR KAR R 84**

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**Bench: Ajit J. Gunjal**

ORDER

Ajit J. Gunjal, J.

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1. The petitioner in this writ petition has called in question the order passed by the learned City Civil Judge CCH No. 11 Bangalore on an application made by the respondent herein under Section 9 of the Arbitration Act in AA No. 131/2007. The copy of the impugned order is at Annexure 'K'.
2. The facts leading to the filing of this writ petition can be summarised as follows:

The petitioner, a multi-national Company appointed the respondent as Vice President and Chief Financial Officer in terms of the letter issued to him. Pursuant to the said appointment, the petitioner and the respondent have separately entered into a Confidential Information and Invention Assignment Agreement providing for non-disclosure of confidential information, which he would have acquired in the course of his employment with the petitioner-Company. On 11.04.2007, the petitioner terminated the services of respondent from the petitioner-Company. The reason for termination was that the petitioner-Company found that the respondent did not satisfy the High standard and was found wanting in discharging his responsibilities as Vice President and Chief Financial Officer. It was also found that Page 2012 the respondent was discourteous to his colleagues and sub-ordinates. The respondent issued a legal notice on 23.04.2007 alleging that his termination was motivated, illegal, arbitrary and unilateral. Suffice it to say that the notice also contained a claim for damages to the tune of Rs. 2 crores for the alleged loss and the hardship suffered by him. A suitable reply was sent by the petitioners on 04.05.2007. The respondent initiated proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 before the Trial Court, which was registered as AA No.

131/2007 for interim measures. In the said petition the respondent sought for a direction to the petitioner to deposit a sum of Rs. 2 crores in the Trial Court and during the pendency of the said application under Section 9 of the Arbitration and Conciliation Act, 1996, to pay the applicant i.e., the respondent regular remuneration including all benefits commencing from June 2007. The respondent also maintained an interim application under Section 9 of the Act claiming certain reliefs, which was in the nature of injunction restraining the petitioner from alienating the property mentioned in the schedule. The said application was granted by the Trial Court without notice to the petitioner. The petitioner, it appears received a communication on 26.07.2007 from the counsel appearing for the respondent in the Trial Court informing that the petitioner's main Bank Account in HSBC Bank of M.G. Road, Bangalore has been attached. The petitioner has called in question the said order passed by the learned Trial Judge.

3. Mr. K.G. Raghavan, learned Senior counsel appearing for the petitioner submits that the very nature of the application filed by the respondent does not entitle him for an order of attachment. He further submits that the application, was in the nature of an ex parte order of temporary injunction restraining the respondent from alienating any portion of the property described in the schedule. But however, the learned Trial Judge has chosen to travel beyond the scope of the application and has issued an attachment warrant freezing the account of the petitioner to the extent of Rs. 2 crores. That is the subject matter of the original proceedings under Section 9 of the Act. He submits that in the very nature of things, the learned Trial Judge could not have bypassed the provisions of Order 38 Rule 5 of the Code of Civil Procedure assuming that they are applicable. He further submits that the attachment of the Bank account is the last resort and is to be exercised only when the Courts are satisfied that in the event of the applicant succeeds in the proceedings, the relief, which is granted should not go unanswered.

4. Mr. Bishwajith Bhattacharya, learned Senior counsel appearing for the respondents has taken a preliminary objection regarding the maintainability of the writ petition itself. He submits that under Section 37(1)(A) of the Act, it is an appeal able order. Hence, the petition under Article 226 of the Constitution is not maintainable. He elaborates his contention by contending that under Section 5 of the Karnataka High Court Page 2013 Act, an appeal would lie to a Division Bench. He further submits that the applicability of Order 38 Rule 5 of the Code of Civil Procedure does not arise, inasmuch as Section 9 by itself is a remedial interim measure and the learned Trial Judge was justified in attaching the money to the tune of Rs. 2 crores lying with the HSBC Bank at Bangalore in the account of the petitioner. He further submits that the order impugned cannot be characterised as arbitrary, perverse and is not liable to be interfered under Article 226 of the Constitution assuming that the appeal provisions are not applicable.

5. In reply Mr. K.G. Raghavan, learned Senior counsel appearing for the petitioner submits that the appeal provision is not applicable to the proceedings on hand, inasmuch as it is only an interim measure during pendency of the original proceedings. He further submits that in the very nature of things, the appeal provisions are not made applicable and the writ petition under Article 226 of the Constitution is maintainable.

6. I have given my anxious consideration to the submissions made by the learned Counsel appearing for the petitioner as well as the respondents.

7. In so far as the maintainability of the writ petition is concerned, certain provisions of the Act are required to be noticed. Section 9 of the Act would relate to the interim measures by the Court. Section 9 would contemplate that before or during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act, it is open for any of the parties to apply to the Court for certain interim measures. The interim measures are enumerated in Section 9(i) & (ii)(a-e) of the Act.

8. The interim measure, which is sought for in the present proceedings would fall in the category of Section 9(ii)(d) of the Act. Section 9(ii)(d) of the Act would relate to grant of interim injunction or appointment of a receiver during pendency of the proceedings under Section 9 of the Arbitration Act. Apparently, the application, which is maintained by the respondent herein, is in the nature of interim injunction. The anxiety of the respondent appears to be that, in the event of, he succeeding in the arbitral proceedings, assuming that he obtains an award, the said award should be capable of execution.

9. Section 9(ii)(e) of the Act is another provision, so as to give protection to the parties, as may appear to the Court to be just and convenient. Keeping these provisions in mind, one will have to see the relief, which is sought for by the respondent. The relief, which is sought for by the respondent in the main application under Section 9 of the Act would read as under:

i to deposit Rs. 2,00,00,000/- (Rupees two crores only) with the Hon'ble Court.

ii. Continue to pay the Applicant the regular monthly remuneration including all the benefits from June 2007 onwards.

iii. To comply with the laws of the land.

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2. grant stay of illegal termination of employment communication through a letter dated 11.04.2007 and 03 04.2007.

10. The interim application, a copy of which is produced at Annexure 'H' is for the following reliefs:

to pass an ad interim ex parte order of temporary injunction restraining the respondent from alienating/transferring in any manner, any portion of the property described in the schedule.

11. The schedule would include all such other materials to run an office, Computer Networking equipments, Security deposit of Rs. 35 crores with the Landlords and the main Bank Accounts with HSBC. Apparently, the application is in the nature of ad interim injunction restraining the

petitioners from alienating or transferring the schedule properties. The order which is passed on this application, to my mind cannot be construed as a finding wherein the provisions of Section 37(1)(a) of the Act is applicable treating this as an appealable order.

12. Section 37 of the Act would relate to the appealable orders. Indeed, granting or refusing to grant any interim measure under Section 9 of the Act is an appealable order. The nomenclature or the usage of the word 'granting' under Section 9 of the Act would necessarily mean the final adjudication of the application under Section 9 of the Act.

13. In the case on hand, it is to be noticed that the original proceedings under Section 9 of the Act are still pending. It is no doubt true that an application is filed treating it as under Section 9 of the Act, but however, it is not an interim measure but is an interim measure, which would necessarily mean that it is only an application, which is filed, pending adjudication of the main petition under Section 9 of the Act. Hence, I am of the view that Section 37(1)(a) of the Act is not applicable and the impugned order cannot be termed as a final order under Section 9 of the Act, which would make it an appealable order. Hence, the petition is maintainable.

14. In so far as whether the learned Trial Judge was justified in granting this extra-ordinary measure of attaching the Bank accounts of the petitioner - Company to the tune of Rs. 2 crores is concerned, it is to be noticed that the question regarding applicability of the Code of Civil Procedure to the proceedings under the Act fell for consideration before the Apex Court in the case of ITI Ltd. v. Siemens Public Communications Network Ltd. . The Apex Court has ruled that the jurisdiction of the Civil Court under Section 9 of the Act to decide the lis between the parties presumption is in favour of the jurisdiction. Exclusion of jurisdiction by a statute can be only by express words and cannot be easily inferred.

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15. It is no doubt true that the application of the Code of Civil Procedure is not specifically provided for. But however, there is no express prohibition against the application of Code to a proceeding arising out of the act before the Civil Court. Thus by inference it cannot be ruled that the Code of Civil Procedure is not applicable. The jurisdiction of a Civil Court to which a right to decide a lis between the parties has been conferred, can only be taken away by statute in specific and unambiguous terms. Unless there is an express provision, the applicability of the Code cannot be excluded. It could be useful to refer to the definition of 'Court' as contemplated under Section 2(e) of the Act. Section 2(e) would read as under:

"Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

16. A perusal of the said definition would clearly indicate that the proceedings under Section 9 of the Act are to be initiated before the Court. If the definition of the Court as contemplated under Section 2(e) of the Act, if it is read with the observations made by the Apex Court, it is abundantly clear that the application of the Code of Civil Procedure, is not excluded and is applicable to a proceedings under Section 9 of the Act. Indeed the Code of Civil Procedure is not applicable to proceedings before the Arbitrator. But any proceedings questioning the order of the arbitrator in the Civil Court to the extent as far as possible, the Code of Civil Procedure is made applicable. If the Code of Civil Procedure is made applicable to the proceedings on hand, Order 38 Rule 5 of the Code of Civil Procedure may have to be looked into for the purpose, whether the impugned order attaching the amount in the petitioner's Bank is justified or not. The provisions there of could be relied upon to see whether indeed the case of the respondent warranted such extraordinary direction of virtually freezing the amount to the extent of Rs. 2 crores.

17. In fact the scope of Order 38 Rule 5 fell for consideration before this Court. Before attachment warrant is issued, the Court is required to be satisfied by affidavit or otherwise that the party intends to obstruct or delay the execution of any decree passed against him, - (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court.

18. A perusal of the application does not indicate or even remotely satisfy this requirement. In the affidavit filed in support of the application, except for stating that the petitioner may windup business in India before arbitration dispute is decided, is the only statement made. A perusal of the affidavit does not even remotely satisfy the requirement of the extra ordinary measure of issuing a warrant attaching the amount to the extent of Rs. 2 crores. It is also brought to my notice by Mr. K.G. Raghavan, learned Counsel appearing for the petitioner, that the petitioner is a Multi- Page 2016 National Company and as per the un-audited balance sheet for the year ending 31st March 2007, and the profit after tax is Rs. 3,17,54,64,224/- and Rs. 45,33,45,139/- respectively. This is an affidavit sworn to, by one of the Directors of the petitioner-Company who has filed a statement. It is also to be noticed that in the said affidavit, the petitioners have stated that they will maintain a minimum balance of more than Rs. 2 crores in the main Bank at HSBC. Indeed the learned Trial Judge before passing the impugned order ought to have been more circumspect in issuing an attachment warrant to attach the amount to the tune of Rs. 2 crores. In fact a perusal of the order also does not disclose that the learned Trial Judge has satisfied himself that this extra ordinary measure is warranted, except stating that it is a fit case for grant of ex parte interim measure and if notice is ordered, it would defeat the object of issuing an interim order. Indeed the petitioner is required to appear before the learned Trial Judge on 31.08.2007.

19. Having regard to the fact that the petitioner has filed an affidavit in this Court that they would maintain a minimum balance of Rs. 2 crores and since the petitioner is required to appear before the Trial Court on 31.08.2007, I am of the view that till the application I.A.I in the original proceedings under Section 9 of the Act is disposed of, the impugned order shall stand suspended.

20. The petitioner shall appear on 31.08.2007 before the Trial Court. They shall also file their reply on the same day. The learned Trial Judge shall proceed to dispose of the matter within 15 days

thereafter.

In the mean time, the affidavit, filed in this Court regarding maintaining of the minimum balance of Rs. 2 crores is placed on record.

21. Needless to say that any observation made by this Court during the course of this proceeding is only for the purpose of disposal of the writ petition and shall not weigh with the learned Trial Judge while deciding the application on merits.

22. Petition stands disposed of accordingly.