

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 12th January, 2011
Date of decision: 3rd February, 2011

+ FAO (OS) 570/2010

AMIT SINHA Appellant
Through: Mr Aman Lekhi, Sr Advocate with
Mr Prem Prakash, Advocate

versus

SUMIT MITTAL & ORS Respondents
Through: Mr Sandeep Sethi, Sr Advocate
with Mr Sanjay S. Chhabra,
Advocate

% CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | No. |
| 2. | To be referred to the Reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes. |

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. Aggrieved by the final judgment and order dated 10th August, 2010 passed in OMP No.391/2010 the present Appeal has been filed under Section 37 (1) (a) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act').

2. The Respondents had preferred a petition under Section 9 of the said Act seeking the following interim measures:-

“i) Restraining the respondent, their servants, agents, nominees, employees, assigns from alienating, transferring, dealing with, damaging the media equipment and such other properties of TML lying at the premises situated at A-37, Sector-60, Noida, and other Bureau offices of TML throughout India;

ii) Direct the respondent to hand over physical possession of the assets and properties of TML including the media equipment lying at the premises situated at A-37, Sector-60, Noida, and other Bureau offices of TML throughout India along with the management of TML including the premises situated at A-37, Sector-60, Noida in terms of Clause 10 of Supplementary Agreement dated 3rd June, 2010.

iii) Pending hearing and disposal of the present petition to appoint a Local Commissioner to immediately visit the premises situated at A-37, Sector-60, Noida (U.P.) and other Bureau offices to prepare inventory & reconcile the list of equipment installed therein with list of equipments filed as Annexure B in the Supplementary Agreement to take photographs/videography of the same and to report the condition thereof to this Hon’ble Court. The Local Commissioner be permitted to take the assistance of the local police, in case so requires;

iv) Pending hearing and disposal of the present petition restrain the respondent, his agents, assigns, nominees, employees, servants, etc from entering into the premises bearing No.A-37, Sector-60, Noida, (U.P.).”

3. The facts necessary for the adjudication of the present Appeal are as follows:-

(a) The Respondents are the original promoters and shareholders of Triveni Media Limited (TML), a company incorporated under the Companies Act, 1956 with the object of running Satellite Television Channels throughout

India. The Respondents have secured 7 licences from the Ministry of Information and Broadcasting in the name of TML.

(b) On 25th October, 2009 the parties herein entered into a Share Purchase Agreement (SPA) whereby the Appellant agreed to acquire the entire shareholding of the Respondents in TML for a total consideration of ₹ 68.52 Crores. Upon transfer of the entire shareholding, TML would vest in the Appellant, free from all debts and pending litigations. The Appellant was required to pay the above mentioned consideration for the transfer of shares in installments.

(c) The Appellants committed defaults in payments stipulated under the SPA. This led to the Respondents filing an earlier OMP No.334/2010 claiming various reliefs. During pendency of the said OMP the parties arrived at an amicable settlement which is contained in the supplementary agreement dated 3rd June, 2010. Consequently, the said OMP was disposed of by this Court on 4th June, 2010 after recording of the compromise contained in the application filed under Order XXIII Rule 3 CPC. Parties undertook that they shall honour their

commitments under the supplementary agreement dated 3rd June, 2010.

(d) The Appellant had issued fresh cheques under the said supplementary agreement with an assurance that the same would be honoured on presentation.

(e) It is pertinent to note that under the said supplementary agreement the total consideration payable by the appellant stood reduced by ₹ 5 Crores to be paid in installments which admittedly were not paid. The first installment payable after execution of the supplementary agreement dated 3rd June, 2010, fell due on 7th June, 2010. Thereafter, installments fell due on 7th July, 2010 and again on 7th August, 2010. Admittedly, none of these installments were paid. Thereby the Appellant once again defaulted and failed to make the payments as envisaged under the supplementary agreement.

(d) In the meantime, the Appellant wrote a letter on the 25th June, 2010 wherein the Appellants stated that on or before 25th July, 2010 he will pay a sum of ₹ 1,50,00,000/- and further stated that in case he fails to do so then the Appellant would hand over the entire channel and TML to the Respondents. As it transpired the Appellant once again defaulted in making the payments.

(e) Resultantly, the Respondents approached this Court by filing OMP No.391/2010 under Section 9 of the said Act. This petition was disposed of vide the impugned order dated 10th August, 2010 whereby the court allowed the Reliefs No.(i), (ii) and (iv) as prayed for by the Respondents.

(f) Aggrieved by the order dated 10th August, 2010 the Appellant has preferred the present appeal as aforesaid.

(g) It is pertinent to point out that in an Execution Petition filed by the Respondent, the learned Single Judge of this Court vide an order dated 9th November, 2010 has directed the Local Commissioner to deliver all the equipments and property to the Respondents on the 10th November, 2010.

(h) It is also pertinent to notice that the Appellant thereafter filed an OMP No.691/2010 under Section 9 of the said Act seeking various reliefs, which was dismissed by the order dated 30th November, 2010. This order has not been challenged so far.

(i) It is further pertinent to mention that before this Bench the Appellant had given an oral undertaking to make a deposit of ₹ 6 Crores by 1st October, 2010. The Appellant, however, subsequently sought to be relieved

from the said undertaking but the same was declined vide order dated 7th October, 2010.

4. Before considering the contentions urged before this Court by the rival parties it would be relevant to extract a few relevant clauses of the agreement entered into between the parties. The relevant clauses of the SPA are as under:-

“Clause 2(C): Till the final payment of 36 installments is made by SLM, SLM shall only be the custodian of the properties and assets of TML and in case of default all assets shall be returned to Sumit Mittal Group in working condition.

Clause 2J(B): The parties have further agreed that for the said purpose, SLM has deposited post dated cheques for ₹ 68.52 Crores as per payment schedule which includes interest @ 12% per annum for a period of 36 months as agreed between the parties.

Clause 2(L): SLM hereby further undertakes and represents and warrants that from the date of execution of the agreement it has taken over all responsibilities for the operation and management of the channel “TML Voice of India” and hence all the claim of workforce and any other expense of whatsoever nature of TML post the execution of the present agreement shall be the sole and exclusive responsibility of SLM and the Sumit Mittal Group will be indemnified at all times by SLM in respect of any such claims, in addition to any other indemnification which may be required from SLM pursuant to this agreement:

Clause 2(N):

SLM Undertakes that;

- A. It shall deposit with the escrow agent signed and undated letters of resignation from all its newly appointed directors inducted in TML by SLM which may be delivered and accepted by the Sumit Mittal Group in the event of a default/breach by SLM.
- B. It shall not change the financial structure of TML
- C. It shall not raise any loan or incur any liability for or on behalf of TML.

Clause 4 – DEFAULT BY EITHER PARTY

- a) In the event of default by either party, the party at default will be given a maximum period of 30 days to cure the default. That all payments made in respect of dishonoured cheques during the curing/default period shall carry an additional interest of 12% per annum over and above the agreed rate of interest till the realisation of the amount against the dishonoured cheque. In case the cheque is not realised in the cure period of 30 days this agreement stands cancelled and terminated.
- b) If the default is committed by SLM at any stage during the tenure of this agreement the amount paid by SLM to the Sumit Mittal Group shall stand adjusted and the proportionate share of the said amount shall be transferred in favour of SLM upto a maximum of 49% of the total paid up capital shares of the company. It is clarified that in case the default occurs at a stage where SLM has paid amount which is over and above the proportionate share beyond 49% of the total paid-up shares of the company, then SLM would only be entitled to refund of the excess amount in 36 installments with interest thereon @ 12% per annum and not transfer of shares over and above 49% of the paid up share capital of the company. Any default prior to the limit of 49% or thereafter would not entitle SLM to reject/resile from taking over shares upto the limit of 49%.

- c) Till the payment of 36 installments is made by SLM, SLM shall only be the custodian of the properties and assets of TML and in case of default all assets and management including its premises etc. shall be returned to Sumit Mittal Group in working condition.
- d) That in the event Sumit Mittal Group falls to pay the liabilities of TML equivalent to 75% with a period of 30 months starting from the date of signing this agreement, SLM would be entitled to withhold the balance payments till such time Sumit Mittal Group furnishes proof of the said liability being paid. It is further agreed that Sumit Mittal Group shall pay to the maximum of 50% of the receivables towards the payment of liabilities per month."

5. Relevant Clauses of the supplementary agreement dated 3rd June, 2010 are as follows:-

"3. That the SLM have carried out detail verification and due diligence of the liabilities of TML prior to the execution of the MOU and SPA dated 25.10.2009. The list of the said liabilities has been annexed as **Annexure A** to the present agreement. The parties further agree that the responsibility for payment of the said liability would be that of Sumit Mittal Group and in case for any reason any liability is discharged by the SLM of the TML prior to SPA the said amount can be set off from the amount payable to the Sumit Mittal Group on furnishing of proof to Sumit Mittal Group of actual payment made by SLM. The parties further agree that in case it is subsequently found that there are other liabilities of any third party prior to the SPA then the onus to discharge the said liability would be that of Sumit Mittal Group in terms of the SPA and payment made if any by SLM of any such additional liability would also be set off from the amount payable to the Sumit Mittal Group. However in the event the said liability come to light

after the completion of the SPA, SMG do hereby indemnify SLM to the extent the amount is payable by SMG to the third party under SPA.

4. The Sumit Mittal Group and SLM hereby jointly and severally represent and warrant that the list of **Assets** worth Rs.27.00 Cr as inventory cost annexed to this Agreement as **Annexure B** is the true and correct list. The said value of the assets has been arrived at after due verification of the assets and pursuant to such negotiations between the parties.

5. That it is once again agreed between the parties that till the final payment of 36 installments are made by SLM, SLM shall only be the custodian of the properties and assets of TML and in case of default in payment on any account whatsoever all assets shall be returned to Sumit Mittal Group in working condition forthwith. The share certificates will be released to SLM against the payment made by SLM in terms of Share Purchase Agreement dated 25.10.2009.

6. That the Sumit Mittal Group acknowledges the payment of Rs.5,49,62,700 (Five Crores Fourty Nine Lakhs Sixty Two Thousand Seven Hundred Only) inclusive of Rs.2.00 Cr advance as mentioned in SPA towards principal and interest due and payable under the SPA. The SLM at the same time also confirms that there is a total outstanding of Rs.4,00,37,300 (Four Crores Thirty Seven Thousand Three Hundred Only) upto 15th May 2010 due and payable to Sumit Mittal Group by SLM.

7. That the parties on account of revision in the total Sale Consideration and pursuant to such discussions and negotiations to accommodate SLM have agreed to reschedule the payment plan/structure set out in **Annexure C**. The SLM undertakes to abide by and make the payment in terms of Annexure C. The balance amount payable and the schedule of payment is specifically acknowledged and admitted by SLM which is in due

discharge of its Liability under the SPA. SLM to make this payment under the re-structured schedule of payment has issued cheques drawn on HDFC Bank by SLM and cheques drawn on ICICI Bank issued by Search Light both represented by its proprietor Mr. Amit Sinha details whereof are mentioned in **Annexure D**.

8. That SLM shall abide by his undertaking given to the Hon'ble Delhi High Court in OMP No.196 of 2009 and in compliance thereof shall continue to deposit the amounts payable as per the order dated 18.1.2010 passed by the Hon'ble High Court.

9. That SLM undertakes to payoff and clear the past dues accrued on TML more particularly towards "Rent of the premises situated at Noida", "Dues towards salary", "Rent for the Bureau offices", "Arrears of electricity charges for the Noida premises", "Statutory Payments towards Provident Fund, Income Tax dues and other taxes", "Up linking Charges" etc. in term of the MOU & SPA both dated 25/10/2009. SLM shall furnish list of unpaid liabilities accrued by SLM on TML after MOU and SPA dated 25/10/2009 respectively to Sumit Mittal Group within a period of 15 days and clear off the said liabilities within a period of three months from the date of execution of this agreement and furnish proof thereof to the Sumit Mittal Group. It is agreed by SLM that on completion of the SPA or any date prior thereto in the event any liabilities are revealed to be unpaid otherwise payable by SLM under the MOU and SPA and in case paid by SMG Group, SLM undertakes to indemnify SMG to the extent of the amount paid by SMG in discharge of the liability payable by SLM.

10. That in the event SLM defaults in any of the payments contemplated under the present agreement and not restricted to the payment as per revised/restructured payment schedule and not cured as per the SPA dated 25/10/2009, the Sumit Mittal Group is unequivocally entitled to forthwith takeover the possession of all the assets including

management of TML. On default of payments by SLM payable under the agreement and not cured as per SPA, SMG or its nominee or representative shall have full right to deal with all the “7Licences of Channels” owned by TML and will have unfettered rights of broadcasting of the same which includes uplinking, down linking and related actions thereof. The said broadcasting rights would solely vest with the Sumit Mittal Group without taking recourse to the legal remedies. However in the event the default is cured to the satisfaction of the Sumit Mittal Group the assets and broadcasting rights shall be restored back to SLM forthwith.

11. That SMG shall be entitled to inspect the premises after giving due intimation to SLM and SLM shall not cause any hindrance in the free ingress and egress of any of the representative of SMG for inspection of the assets and properties of the company before completion of the SPA.

12. SLM hereby further reiterates and represents and warrants that from the date of execution of SPA it has taken over all responsibilities for operation and management of the television channel TML Voice of India and hence all the claims of the work force, infringement action and any other liabilities of whatsoever nature of TML post the execution of the MOU and SPA dated 25.10.2009 (as contemplated therein) and the present agreement shall be the sole and exclusive responsibility of SLM and the Sumit Mittal Group will be indemnified at all times by SLM in respect of any such claims, in addition to any other indemnification which may be required from SLM pursuant to this Agreement.”

6. It would also be necessary here to reproduce the letter dated 25th June, 2010 addressed to the Respondent by the Appellant.

“Date:-25/6/10

To,
Sri Sumit Mittal
Sumit Mittal Group
Mathura Road
New Delhi.

Dear Sir,

As per our commitment, I hereby confirm that on or before 5th July I will pay to High Court Rs.1 Cr. on behalf of you and 50 Lacs to your Account. If I unable to pay then I will handover the entire channel and Triveni Media Ltd. to you.

In 50 Lacs we will pay Rs.20 Lacs to you and 30 Lacs to Jagran directly.

Your 10 lacs on 26th
10 lacs on 28th
10 lacs on 30th to Jagran
20 lacs on 5th to Jagran

Thanking for Co-operation,

Sd/-
Amit Sinha"

7. On behalf of the Appellant Mr Aman Lekhi, learned Senior Counsel first submitted that although the Appellant has paid a sum of ₹ 5,49,62,700 to the Respondents, however, not even a single share certificate has been transferred in his favour so far and if the Appellant is now asked to deposit another ₹ 6 crore as per his oral undertaking, it would amount to undue harassment of the Appellant. Learned Senior Counsel next urged that the jurisdiction under the provision of Section 9 of the said Act is very limited and the Court cannot thereunder

direct specific performance of the contract. Consequently, the impugned order having directed so, is perverse and without jurisdiction. Learned Senior Counsel also argued that once the Arbitrator had been appointed by the impugned order with the consent of the parties, interest of justice could have been met by directing the parties to maintain status quo with respect to the subject matter of the dispute. Hence, the learned Single Judge erred in directing the Appellants to pay the outstanding dues inasmuch as the same per se is a dispute to be adjudicated by the Arbitrator. Lastly, it was urged by learned Senior Counsel that unless the Respondents disclose their liabilities and the Appellant is allowed to run the company and generate resources, the huge amounts involved in the installments cannot be paid by the Appellants.

8. Per contra it was urged by Mr Sandeep Sethi, learned Senior Counsel appearing on behalf of the Respondents that firstly, the Appellant defaulted in making the payments as per the share purchase agreement; then as per the supplementary agreement; then in terms of the hand written letter dated 25th June, 2010; thereafter in terms of the order dated 10th August, 2010 and lastly, in terms of the undertaking given before this Division Bench. Consequently, it was argued that the conduct of the appellant dis-entitles him to any relief on the ground of

equity and even otherwise no case for interference is made out. Counsel for the Respondents submitted that there cannot be a grievance with regard to the transfer of the shares as the Respondents had already deposited with the Escrow Agent the shares along with blank transfer deeds and the Respondents have no control over the same. Further, they have also given their consent for transfer of 2.2% of shareholdings in favour of the Appellant and despite the date fixed by the Escrow Agent for that purpose, Appellant remained absent and did not collect the shares.

9. Before adverting to the merits of the contentions and submissions made on behalf of counsel for the parties it would be necessary to extract the relevant paragraphs of the decisions relied upon by them.

1. In *Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd.*; (2007) 7 SCC 12, the Supreme Court held that:

“8. There was considerable debate before us on the scope of Section 9 of the Act. According to learned counsel for Adhunik Steels, Section 9 of the Act stood independent of Section 94 and Order 39 of the Code of Civil Procedure and the exercise of power thereunder was also not trammled by anything contained in the Specified Relief Act. Learned counsel contended that by way of an interim measure, the court could pass an order for the preservation or custody of the

subject-matter of the arbitration agreement irrespective of whether the order that may be passed was in a mandatory form or was in a prohibitory form. The subject-matter of arbitration in the present case was the continued right of Adhunik Steels to mine and lift the ore to the surface on behalf of OMM Private Limited and until the arbitrator decided on whether OMM Private Limited was entitled to breach the agreement or terminate the agreement and what would be its consequences, the court had not only the power but the duty to project the right of Adhunik Steels conferred by the contract when approached under Section 9 of the Act. Learned counsel emphasized that what was liable to be protected in an appropriate case was the subject-matter of the arbitration agreement. Learned counsel referred to *The Law and Practice of Commercial Arbitration in England* by Mustill and Boyd and relied on the following passage therefrom:

“(b) Safeguarding the subject-matter of the dispute.

The existence of a dispute may put at risk the property which forms the subject of the reference, or the rights of a party in respect of that property. Thus, the dispute may prevent perishable goods from being put to their intended use, or may impede the proper exploitation of a profit-earning article, such as a ship. If the disposition of the property has to wait until after the award has resolved the dispute, unnecessary hardship may be caused to the parties. Again, there may be a risk that if the property is left in the custody or control of one of the parties, pending the hearing, he may abuse his position in such a way that even if the other party ultimately succeeds in the arbitration, he will not obtain the full benefit of the award. In cases such as this,

the court (and in some instances the arbitrator) has power to intervene for the purpose of maintaining the status quo until the award is made. The remedies available under the Act are as follows:

- (i) The grant of an interlocutory injunction.
- (ii) The appointment of a receiver.
- (iii) The making of an order for the preservation, custody or sale of the property.
- (iv) The securing of the amount in dispute.

9 to 20.....

21. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject-matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject-matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to OMM Private Limited for a period of 10 years and its attempted abrupt termination by OMM Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of OMM Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. Maybe, there is some force in this submission made on behalf of Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations an extraordinary measure in itself in the face of the attempted termination of the contract by OMM Private Limited or the termination of the contract by OMM Private Limited, could be granted or not, would again lead the court to a

consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well-settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case.

23.....

24. But, in that context, we cannot brush aside the contention of the learned counsel for Adhunik Steels that if OMM Private Limited is permitted to enter into other agreements with others for the same purpose, it would be unjust when the stand of OMM Private Limited is that it was cancelling the agreement mainly because it was hit by Rule 37 of the Mineral Concession Rules, 1960. Going by the stand adopted by OMM Private Limited, it is clear that OMM Private Limited cannot enter into a similar transaction with any other entity since that would also entail the apprehended violation of Rule 37 of the Mineral Concession Rules, 1960, as put forward by it. It therefore appears to be just and proper to direct OMM Private Limited not to enter into a contract for mining and lifting of minerals with any other

entity until the conclusion of the arbitral proceedings.”

2. The Supreme Court in *Firm Ashok Traders and Anr. vs. Gurumukh Das Saluja and Ors.*; (2004) SCC 155 observed that:

“13. The Relief sought for in an application under Section 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated.....”

3. In *Arvind Constructions Co.(P) Ltd. vs. Kalinga Mining Corporation & Ors.*; (2007) 6 SCC 798 the Hon’ble Supreme Court held that:

“15. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well-recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a Receiver.”

4. Counsel for the Respondent relied on the decision of the Supreme Court in *Dorab Cawasji Warden vs. Coomi Sorab Warden and Ors.*; (1990) 2 SCC 117 wherein the Supreme Court observed that:-

“10. The trial court gave an interim mandatory injunction directing the respondent 4 not to continue in possession. There could be no doubt that the courts can grant such interlocutory mandatory injunction in certain special circumstances. It would be very useful to refer to some of the English cases which have given some guidelines in granting such injunctions.

11. *In Shepherd Homes Ltd. v. Sandham* - (1970) 3 All ER 402, Megarry J. observed:

“(iii) On motion, as contrasted with the trial, the court was far more reluctant to grant a mandatory injunction; in a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this was a higher standard than was required for a prohibitory injunction.”

12. *In Evans Marshall & Co. Ltd. v. Bertola SA*- (1973) 1 All ER 992 the Court of Appeal held that:

“Although the failure of a plaintiff to show that he had a reasonable prospect of obtaining a permanent injunction at the trial was a factor which would normally weigh heavily against the grant of an interlocutory injunction, it was not a factor which, as a matter of law, precluded its grant;”

The case law on the subject was fully considered in the latest judgment in *Films Rover International Ltd. v. Cannon Film Sales Ltd.*- (1986) 3 All ER 772 Hoffmann, J. observed in that case: (All ER pp 780-81)

“But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category.

The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

Again at page 781 the learned Judge observed:

"The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction."

and concluded that: (All ER p782)

"These considerations lead me to conclude that the Court of Appeal in *Locabail*

International Finance Ltd. v. Agroexpon – (1986) 1 All ER 901, was not intending to 'fetter the court's discretion by laying down any rules which would have the effect of limiting the flexibility of the remedy', to quote Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd.*,-(1975) 1 All ER 504. Just as the Cyanamid guidelines for prohibitory injunctions which require a plaintiff to show no more than an arguable case recognise the existence of exceptions in Which more is required (compare *Cayne v. Global Natural Resources plc*- (1984) 1 All ER 225), so the guideline approved for mandatory injunctions in *Locabail* recognises that there may be cases in which less is sufficient."

On the test to be applied in granting mandatory injunctions on interlocutory applications in *Halsbury's Laws of England*, 4th edn., Vol.24, para 948 it is stated:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the Act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory applications."

13. The law in United States is the same and it may be found in 42 American Jurisprudence 2d page 745 et seq.

14. As far the cases decided in India we may note the following cases.

15. In one of the earliest cases in *Rasul Karim v. Pirubhai Amirbhai* - ILR (1914) 38 Bom 381, Beaman J. was of the view that the court's in India have no power to issue a temporary injunction in a mandatory form but Shah, J. who constituted a Bench in that case did not agree with Beaman, J. in this view. However, in a later Division Bench judgment in *Champsey Bhimji & Co. v. The Jamna Flour Mills Co. Ltd.* - (1914) 16 Bom LR 566, two learned Judges of the Bombay High Court took a different view from Beaman, J. and this view is now the prevailing view in the Bombay High Court. In *M. Kandaswami Chetty v. P. Subramania Chetty* - ILR (1918) 41 Mad 208, a Division Bench of the Madras High Court held that court's in India have the power by virtue of Order XXXIX Rule 2 of the Code of Civil Procedure to issue temporary injunctions in a mandatory form and differed from Beaman J.'s view accepting the view in *Champsey Bhimji & Co. v. Jamna Flour Mills Co.* (supra). In *Israil v. Shamser Rahman* - ILR (1914) 41 Cal 436 it was held that the High Court was competent to issue an interim injunction in a mandatory form. It was further held in this case that in granting an interim injunction what the Court had to determine was whether there was a fair and substantial question to be decided as to what the rights of the parties were and whether the nature and difficulty of the questions was such that it was proper that the injunction should be granted until the time for deciding them should arrive. It was further held that the Court should consider as to where the balance of convenience lies and whether it is desirable that the status quo should be maintained. While accepting that it is not possible to say that in no circumstances will the Courts in India have any jurisdiction to issue an ad interim injunction of a mandatory character, in *Nandan Pictures Ltd. v. Art. Pictures Ltd. and Ors.* - AIR 1956 Cal 428, a Division Bench was of the view that if the mandatory injunction is granted at all on an interlocutory application it is

granted only to restore the status quo and not granted to establish a new state of things differing from the state which existed at the date when the suit was instituted.

16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

- (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
- (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
- (3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive or complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

10. Now we consider the submissions made and contentions raised on behalf of the rival parties. With regard to the contention made by the Appellant that despite the fact that the Appellant has paid ₹ 5,49,62,700/- to the Respondents, however, not even a single Share Certificate has been transferred in his favour, we find no merit in the said submission for the following reason. The learned Single Judge in Para 30 and 31 of the impugned judgment found as follows:-

“30. The grievance with regard to non transfer of the shares, despite the respondent having made part payment, does not appear to carry much force. The petitioners have already deposited with the escrow agent the shares along with blank transfer deeds. The petitioners have no control over the same. The petitioners have also given their consent for transfer of over 2% of the shareholding to the respondent. Despite the date being fixed for that purpose by the escrow agent, the respondent, it appears did not present himself to collect the shares and the share transfer deeds.

31. The submission of the respondent that the petitioners have agreed to transfer only about 2% of the shareholding, even though a much larger amount stands paid, does not even appear to have been agitated by the respondent before the petitioners. Admittedly, the respondent failed to make payment of the installments on the due dates, and the share purchase agreement as well as the supplementary agreement provided for payment of interest on defaulted payments. If the respondent had any issues with regard to the accounting of the amounts paid by him, he should have raised the said issue with the petitioners. Merely because he feels justified in demanding a larger proportion of shares at this stage, is not a reason good enough to stop payment of the

installments. The payment of installments by the respondent is a fundamental obligation of the respondent. On the representation of the respondent that he would make payment of the consideration, the respondent has been put in possession and control of all the assets of the company TML. Moreover, the obligation of the petitioners to discharge the existing debts and liabilities of the company which existed on the date of the share purchase agreement can be honoured only if the respondent makes payment of the consideration. If the said amounts are not paid, obviously, the petitioners cannot be expected to discharge the said liabilities. I, therefore, reject this excuse furnished by the respondent for not making payment of the installments which have fallen due under the supplementary agreement. However, it shall be open to the respondent to seek from the petitioners the manner of accounting of the amount of Rs.5.49 crores that the respondent claims to have paid to the petitioners and to seek the petitioners consent for allotment of a larger proportion of shares of TML, if it is found that the consent given by the petitioners for transfer of 2.2% of the shareholding is not in proportion with the consideration paid by him.”

11. The Respondent herein had delivered the entire shareholding of TML to the Escrow Agent in terms of Clause 2(H) and Clause 2(L) of the Share Purchase Agreement and had also delivered the blank Share Transfer Deeds in favour of the Appellant with the Escrow Agent. The release of the blank Share Transfer Deed by the Escrow Agent to the Appellant was to take place in terms of the agreement. Further, in any event, the shares and blank transfer deeds were lying with the Escrow Agent and the Respondents had no control over the same. Also

the Respondents had given their consent for transfer of over 2% of the shareholding to the Respondent. However, despite a date being fixed for that purpose by the Escrow Agent, the Appellant, did not present himself to collect the shares and the Share Transfer Deeds. In the circumstances, we cannot but agree with the findings arrived at by the learned Single Judge in this behalf. The said submission made on behalf of the Appellant is thus without any force.

12. With regard to the second submission made on behalf of the Appellant, we proceed to consider the law governing grant of relief under Section 9 of the said Act. In a recent decision by a co-ordinate Division Bench of this Court in FAO (OS) 200/2010 titled *Simplex Infrastructures Ltd. vs. NHAI* rendered on 14th January, 2011 the Division Bench of this Court had occasion to consider this issue. The Division Bench had observed that *“Ashok Traders vs. Gurumukh Das Saluja, (2004) 3 SCC 155, however, also touches upon the wider amplitude of powers available to the Court under the A&C Act in contradistinction to those that had been bestowed on the Court under the 1940 Act.”* The decision went on to consider the decision of the Supreme Court in *Adhunik Steels Ltd. (supra)* and *Arvind Constructions Co.(P) Ltd. (supra)* and came to the following conclusion:-

“15. It appears to us, therefore, that the Learned Single Judge was not correct in declining to grant the

injunction prayed for before him viz. restraining the Respondent from implementing and/or enforcing its letter Nos. NHAI/40020/ Tech-III/EW-III/2006/WB-4/735 and NHAI/PIU/Araria/ escalation/2009 dated July 20, 2009 and July 29, 2009 respectively, erroneously feeling bound by ***Kamaluddin Ansari***. In ***Adhunik Steels Ltd. -vs- Orissa Manganese & Minerals Pvt. Ltd.***, AIR 2007 SC 2563, it has been opined that “it would not be correct to say that the power under Section 9 is totally independent of the well known principles governing the grant of interim injunction that generally govern the Courts in this connection”. Their Lordships have also extracted portions from International Commercial Arbitration in UNCITRAL Model Law Jurisdictions by Dr. Peter Binder. Several other treatise have been referred to, and we cannot do better than commend the reading of this detailed Judgment. The following paragraph justifies reproduction:-

11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of “just and convenient” while speaking of passing any interim measure of protection. The concluding words of the section, “and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it” also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a

right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

16. This is also the view preferred in *Arvind Construction Co. Ltd. -vs- M/s. Kalinga Mining Corporation*, AIR 2007 SC 2144. This position of the law would become obvious because of the introduction of Section 9(e) into the A&C Act. Under the erstwhile jural regime, postulated in Section 41 of the 1940 Act, the dictates of justice and convenience as conceptualized by the Court, has not been envisioned. The learned single Judge ought to have pursued the path traversed in *Transmission Corp.* and *Adhunik Steels Ltd.* and should have applied the principles of estoppel or the expediency of continuing the *status quo albeit* with protection. Russell on Arbitration, 21st Edition, in Chapter 7-128 opined that the power to grant a Mareva injunction or a mandatory injunction is available to the Court in light of Section 44 of the English Arbitration Act, 1996. It seems to us that there is a general consensus of opinion on this legal point.”

13. In *Dorab Cawasji Warden (supra)* the Supreme Court reviewed the law of mandatory injunction in England and India and observed that the High Court was competent to issue an interim injunction in a mandatory form. While laying down the guidelines for the exercise of grant of a mandatory injunction it reiterated that the grant or refusal would ultimately rest in the

sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case.

14. From the above, it is observed that the power to grant a mandatory injunction is available to the Court and that there is a general consensus of opinion on this legal point. Further, it is clear that where the case is one in which withholding a mandatory interlocutory injunction would be in fact carrying a greater risk of injustice than granting it, there cannot be any rational basis for withholding the injunction.

15. In this behalf, in the present case it is seen that the Appellant did not make the payments under the Share Purchase Agreement dated 25th October, 2009 as provided for in schedule of payments. Further, the Appellant defaulted in making the payment of the installments after execution of the supplementary agreement dated 3rd June, 2010. Not only this, the Appellant also failed to deposit another ₹ 6 Crores as per his oral undertaking before this Bench.

16. In view of the above consistent defaults, in our view, greater injustice would have resulted in withholding the grant of mandatory injunction in comparison to the granting of it and as such the jurisdiction exercised by the learned Single Judge was in consonance with the powers vested in the Court within the meaning of Section 9 of the said Act.

17. With regard to the third contention made on behalf of the Appellant that since the Arbitrator had been appointed, interest of justice would be met by directing the parties to maintain *status quo*. It is seen that the Respondents had premised the reliefs sought in the Section 9 petition on Clause 10 of the supplementary agreement which provided that the Respondent was unequivocally entitled to forthwith take over the possession of all the assets including management of TML in the event the Appellant defaulted in any of the payments contemplated under the Share Purchase Agreement.

18. Further the Appellant himself had addressed a letter dated 25th June, 2010 wherein it had been stated that if the Appellant fails to deposit a sum of ₹ 1,50,00,000/- on or before 25th July, 2010, the Appellant would hand over the entire channel and TML to the Respondents. Furthermore, it is observed that the Appellant was not even making payments of the electricity dues and preliminary charges which would lead to disconnection of the electricity supply and the seven licences owned by TML being withdrawn. In this behalf, the Local Commissioner had reported that the electricity connection of the premises was lying disconnected for about one month at the time of the report. The Local Commissioner had further been informed that there was no up-linking and down-linking facility

and the news channel “Voice of India” was not operational for about a month. In the circumstances, there was every justification for giving effect to Clause 10 of the supplementary agreement. Therefore, there is no substance in the contention made by the Appellant in this behalf.

19. With regard to the last submission made on behalf of the Appellant to the effect that unless the Respondents disclose their liabilities, the huge amounts of installments cannot be paid by the Appellant, it is without merit. In this regard it is seen that in Para 32, the learned Single Judge observed as follows:-

“32. As I have already noticed the details of the pending cases filed by the respondent shows that most of them pertain to a different company, namely, Triveni Infrastructure Development Co. Ltd. and not to TML. In any event, even if there are some litigations filed against the company TML, which have not been disclosed in the share purchase agreement or the supplementary agreement, the same cannot provide a justification to the respondent to breach its obligation to make payment under the agreements, as the petitioners have undertaken the responsibility to deal with all such cases and settle them and the respondent has also been indemnified in this regard.”

33.

34. The direction sought by the respondent that the petitioners should make a complete disclosure of pending litigations also does not appear to be justified, since the respondents have conducted their due diligence before entering into the share purchase agreement and supplementary agreement, and the pending litigations have already been disclosed in the said agreements. The petitioners have also undertaken that if there are any other litigations against TML, they would discharge the liability insofar as those obligations pertain to the

period prior to the date of the share purchase agreement.”

20. We are in complete agreement with the finding of the learned Single Judge in this regard and cannot countenance any submission made to the contrary on behalf of the Appellant.

21. From the foregoing discussion it is opined that the appeal is without any merit and is accordingly dismissed, however, without any order as to costs.

SIDDHARTH MRIDUL, J.

VIKRAMAJIT SEN, J.

February 03, 2011
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