

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 24.02.2014

% Judgment delivered on: 26.02.2014

+ O.M.P. 1300/2013

**ORGANIZING COMMITTEE COMMONWEALTH GAMES,
2010**

..... Petitioner

**Through: Mr. Neeraj Sharma, Advocate
with Ms. Pragya Nalwa & Ms.
Anjali Aggarwal, Advocates**

versus

M/S NUSSLI (SWITZERLAND) LTD

..... Respondent

**Through: Mr. Prashant Kumar, Advocate
with Mr. Amit Singh and Mr.
Rajiv Singh, Advocates**

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

J U D G M E N T

VIPIN SANGHI, J.

1. This petition has been preferred under Section 9 of the Arbitration and Conciliation Act, 1996 ('the Act') by the petitioner to seek a stay of discharge of the performance bank guarantee dated 29.10.2010 issued by HSBC Bank at the behest of the respondent, and to seek a direction to the respondent to keep the said bank guarantee alive till the conclusion of the proceedings under Section 34 of the Arbitration and Conciliation Act,

1996. In the alternative, the petitioner seeks the permission to encash the said bank guarantee dated 29.06.2010.

2. The respondent was awarded a turnkey contract dated 02.06.2010 for providing overlays on rental basis including supply, installation, testing, commissioning, operation, maintenance, de-commissioning and removal of games overlays for Cluster II and IV, for the Commonwealth Games, 2010. The total contract value of the services defined under the contract was Rs. 57,47,77,574/- for Cluster II, and Rs. 70,42,21,779/- for cluster IV including all taxes but excluding service tax which was to be paid extra as applicable. In terms of the contract, the respondent was required to furnish a performance bank guarantee equivalent to 10% of the contract value to secure the performance, by the respondent, of its obligation under the contract. Accordingly, the performance bank guarantee in question was issued by the HSBC Bank at the behest of the respondent, in favour of the petitioner bearing No. PEBNDH100492 dated 29.06.2010 for a sum of Rs. 12,78,99,935/- (PBG).

3. After conclusion of the Commonwealth games, disputes and differences arose between the parties which were referred by the Chief Justice of India, vide order dated 11.04.2012 to arbitration, of a tribunal consisting of three retired Hon'ble Judges of the Supreme Court in Arb. Petition No. 23/2011.

4. The respondent filed two separate petitions under Section 9 of the Act being OMP No. 241/2011 and 481/2011 before this Court praying for restraint against the petitioner from encashing the PBG. It appears,

that these petitions were disposed of by this Court with the direction that the respondent shall keep the PBG alive.

5. Before Arbitral Tribunal, the respondent agreed to keep the PBG alive till December 31, 2012 and, consequently, the petitioner did not encash the same. The PBG was kept alive during the arbitration proceedings by the respondent with the consent of the parties. The Arbitral Tribunal directed the respondent to extend the validity of the PBG till the end of 2013.

6. The Arbitral Tribunal rendered its Award dated 14.12.2013. The claims of the respondent/claimant were partially allowed, and the counter claim of the petitioner was also allowed to a small extent. After granting adjustment, the Arbitral Tribunal awarded an amount of Rs. 43,96,37,047/- in favour of the respondent/claimant. At this stage, I may note that the petitioner made a counter claim for refund of the amount of Rs. 47,75,25,051/- from the respondent on the promise that the contract was vitiated by fraud. This plea of the petitioner was rejected by the appellate tribunal. The tribunal held that since the contract had been performed by the respondent, and the petitioner had availed all the services under the Contract, in any event, the respondent would be entitled to receive payment upon the application of the principle of *quantum meruit*.

7. The case of the petitioner is that the Arbitral Award is laconic. The petitioner submits that it is taking steps to challenge the arbitral award under Section 34 of the Act for which the petitioner has a statutory

period of limitation of three months. The reason for filing this petition is that the PBG furnished by the respondent would lapse before the petitioner files its objections (time where for is available till 17.03.2014), unless the respondent is directed to keep the PBG alive by renewing/extending the same. The case of the petitioner is that the respondent is a foreign entity with no assets in India. If the respondent is permitted to withdraw its PBG, and eventually the impugned Award is set aside by this Court and counter claim of the petitioner is established in other independent proceedings, the petitioner would be left remediless as it would not be in a position to recover any amount from the respondent.

8. On 20.12.2013, when the matter was taken up, the respondent appeared on caveat. The Court passed the following order in this petition:

“OMP 1300/2013

Issue notice to the respondent.

Mr. Kumar accepts notice on behalf of the respondent.

Mr. Mehra, the learned senior counsel for the petitioner says that the petitioner intends to challenge the award dated 14.12.2013 wherein the arbitral tribunal has rejected the counter claims of the petitioner except to a very small extent i.e. Rs. 2,18,79,025/-. He says that the respondent does not have any assets in India.

Mr. Kumar, the learned counsel for the respondent, who appears on advance notice does not dispute the fact that the respondent does not have any assets in India. It is

also not in dispute that the validity of the bank guarantee in issue is expiring on 31.12.2013.

Therefore, till the next date of hearing, the respondent shall keep the bank guarantee in issue alive till further orders of the court.

The aspect of charges, if any, incurred by the respondent for extension of the bank guarantee will be considered at the stage of final determination of the captioned petition or if and when a petition under Section 34 of the Arbitration and Conciliation Act, 1996, if any, is filed by the petitioner.

List on 15.05.2014.”

9. The respondent preferred an appeal under Section 37 of the Act being FAO(OS) No. 598/2013. Before the Division Bench, the submission of the respondent/appellant was that a petition under Section 9 of the Act was not maintainable at the instance of the petitioner herein, against whom the Award had been rendered. In this regard, reliance was placed on a decision of Division Bench of the Bombay High Court in ***Dirk India Pvt. Ltd.(DIPL) Vs. Maharashtra State Electricity Generation Company Limited***, MANU/MH/0268/2013 (Appeal No. 114/2013). The Division Bench noticed that the said decision was pending in appeal before the Supreme Court in SLP(C) No. 7476/2013. The grievance of the respondent-appellant was that the learned Single Judge while passing the order dated 20.12.2013, had not discussed the prima facie case and the balance of convenience and that the impugned order had been passed solely on the principle of irreparable loss and

injury. Before the Division Bench, the respondent/appellant stated that it shall keep the PBG in question alive till the end of February, 2014. This statement was made without prejudice to the rights and contentions of the respondent/appellant. This statement of the respondent-appellant was accepted by the Court and the respondent-appellant was bound by the same. The Division Bench directed that the hearing of the present petition be preponed.

10. I.A. No. 993/2014 was preferred in view of the observations made by the Division Bench on 20.01.2014. The date was, accordingly, preponed to 05.02.2014 in the presence of the parties. On 05.02.2014, on account of heavy board, no time of hearing was left. The matter was adjourned for today when the same has been heard.

11. I may note that in the meantime, in the aforesaid appeal, on 30.01.2014, the Court passed an order disposing of the appeal in the hope that the present petition would be heard. Accordingly, the arguments have been heard and I proceed to dispose of the petition.

12. Apart from the aforesaid submissions, learned counsel for the petitioner submits that the Supreme Court has entertained a Special Leave Petition from the decision in *Dirk* (supra). He submits that the judgment of the Bombay High Court in *Dirk* (supra) was rendered in its own facts and circumstances. The Court, while dealing with the scheme and scope of Section 9 proceedings, post award, was not concerned with a case like the present where the respondent is a foreign party with no assets in India. The observations made by the Division Bench of the

Bombay High Court have to be viewed in the light of the context in which the same were made. Learned counsel for the petitioner submits that there are serious charges of fraud being investigated against the respondent by the investigating agencies in relation to the execution of the contract in question.

13. Learned counsel for the petitioner submits that there is a provisional attachment of the awarded amount by the Income Tax Department. In this regard, he places reliance on the order dated 17.10.2011 passed under Section 281B of the Income Tax Act, 1961 by the Deputy Commissioner of Income Tax, Central Circle VIII, New Delhi, thereby attaching the amount payable to the respondent under the aforesaid provision for a period of six months from 20.10.2011. He submits that this attachment has been extended even thereafter, and he has tendered in Court the order dated 13.01.2014 whereby the attachment has been extended for a period of six months from 07.12.2013. He, therefore, submits that the respondent is only interested in getting its PBG released as, even if the objections to the Award that the petitioner may prefer were to fail, the respondent would not be the beneficiary of any amount so released in execution of the Award, as the amount stands attached by the Income Tax Department.

14. The petition is vehemently opposed by the respondent. The cornerstone of the respondent's submission is premised on the decision of the Bombay High Court in *Dirk* (supra). In this case, DIPL and the respondent-Maharashtra State Electricity Generation Company Ltd. (MSEGCL) had entered into an agreement where under DIPL was

required to erect at its own cost Pulverized Fly Ash (PFA) hoppers for collection of PFA within the precincts of the thermal power station. Under the agreement, DIPL agreed to take off a minimum quantity of 1000 metric tons per day of PFA for a maximum period of 12 months from the commissioning, after which it was required-within a period of 48 months from the effective date, to off take a minimum quantity of 3000 metric tons per day of PFA during the remaining term of the agreement. Disputes arose between the parties. The same were referred to arbitration of an Arbitral Tribunal of three learned Arbitrators.

15. During the pendency of the arbitration proceedings, petitions were preferred under Section 9 of the Act wherein interim orders were passed by the Court on 12.02.2009 which was clarified on 18.06.2010. This order pertained to DIPL lifting the PFA generated at the thermal power plant. The Arbitral Tribunal by its Award came to the conclusion that DIPL failed to discharge its contractual obligations i.e. to erect at its costs Silos or hoppers and to ensure that the agreed quantity of PFA so stored could be transported to its PFA plant. The Tribunal returned the finding that the DIPL had agreed to lift 3000 metric tons of PFA per day after a stipulated period, yet even after three years, had not been able to lift more than 600 metric tons of PFA per day. The termination of the contract by the respondent – MSEGCL was held to be lawful and valid.

16. DIPL preferred objections under Section 34 of the Act to challenge the Award. After the Award, DIPL made an application before the learned Single Judge under Section 9 of the Act. An objection was raised to the maintainability of the petition under Section 9

by the DIPL on the ground that no award had been made in favour of DIPL which DIPL could enforce.

17. While, prima facie, agreeing with the submission and keeping the said issue open, the learned Single Judge proceeded to consider the interim arrangement which could operate during the pendency of the objection petition. The interim arrangement, which was operating during the pendency of the arbitral proceedings was modified, so as to restrict the interim order to 30% of the PFA which would be generated henceforth. Consequently, the learned Single Judge permitted DIPL to lift around 1/3rd of the PFA in terms of the earlier interim order, allowing it to choose the hoppers from which it would collect the PFA. Two appeals were preferred before the Division Bench – one by DIPL and the other by MSEGCL. The Division Bench allowed the appeal preferred by MSEGCL while dismissing that preferred by the DIPL. It was held that the petition preferred by DIPL under Section 9 was not maintainable. The reasoning adopted by the Division Bench of the Bombay High Court as found in paragraphs 11 to 13 of the judgment which read as follows:

“11. Now, at the outset, it must be noted that under Section 9, it is a party which can apply before the Court. The expression "party" is defined to mean in Section 2(h) a party to an arbitration agreement. Section 9 contemplates that a party may apply to the Court: (i) before arbitral proceedings; or (ii) during arbitral proceedings; or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. Now insofar as the stage prior to the commencement of arbitral proceedings is concerned, it is not necessary that arbitral proceedings must be pending or that a notice invoking arbitration should

have been issued before an application under Section 9 is filed. Sundaram Finance Ltd. v. NEPC India Ltd. MANU/SC/0012/1999 : (1999) 3 SCC 479. In a subsequent decision of the Supreme Court in Firm Ashok Traders v. Gurumukh Das Saluja MANU/SC/0026/2004 : (2004) 3 SCC 155, the Supreme Court observed that under Section 9, the Court formulates an interim measure to protect the right under adjudication before the arbitral tribunal from being frustrated. The reliefs which the Court may allow to a party under clauses (i) and (ii) of Section 9 were held to flow from the power vesting in the Court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings, the Court being conferred with the same power for making specified orders as it has for the purpose of and in relation to any proceedings before it. At the same time, the Supreme Court held that a party having succeeded in securing an interim measure of protection before the arbitral proceedings cannot afford to stand by and sleep over the relief because the relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made "before" that is, in contemplation of arbitral proceedings. Consequently, when approached by a party by an application under Section 9, the Court would be justified in calling upon the party to explain how and when it proposes to commence arbitral proceedings and the scheme of Section 9 would obligate the Court to do so.

12. Two facets of Section 9 merit emphasis. The first relates to the nature of the orders that can be passed under clauses (i) and (ii). Clause (i) contemplates an order appointing a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings. Clause (ii) contemplates an interim measure of protection for: (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; and (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration; (d) an

interim injunction or the appointment of a receiver; and (e) such other interim measure of protection as may appear to the Court to be just and convenient. The underlying theme of each one of the sub-clauses of clause (ii) is the immediate and proximate nexus between the interim measure of protection and the preservation, protection and securing of the subject-matter of the dispute in the arbitral proceedings. In other words, the orders that are contemplated under clause (ii) are regarded as interim measures of protection intended to protect the claim in arbitration from being frustrated. The interim measure is intended to safeguard the subject-matter of the dispute in the course of the arbitral proceedings. The second facet of Section 9 is the proximate nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement. Now it is in this background that it is necessary for the Court to impart a purposive interpretation to the meaning of the expression "at any time after the making of the arbitral award but before it is enforced in accordance with section 36". Under Section 36, an arbitral award can be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the Court. The arbitral award can be enforced where the time for making an application to set aside the arbitral award under Section 34 has expired or in the event of such an application having been made, it has been refused. The enforcement of an award enures to the benefit of the party who has secured an award in the arbitral proceedings. That is why the

enforceability of an award under Section 36 is juxtaposed in the context of two time frames, the first being where an application for setting aside an arbitral award has expired and the second where an application for setting aside an arbitral award was made but was refused. The enforceability of an award, in other words, is defined with reference to the failure of the other side to file an application for setting aside the award within the stipulated time limit or having filed such an application has failed to establish a case for setting aside the arbitral award. Once a challenge to the arbitral award has either failed under Section 34 having been made within the stipulated period or when no application for setting aside the arbitral award has been made within time, the arbitral award becomes enforceable at the behest of the party for whose benefit the award enures. Contextually, therefore, the scheme of Section 9 postulates an application for the grant of an interim measure of protection after the making of an arbitral award and before it is enforced for the benefit of the party which seeks enforcement of the award. An interim measure of protection within the meaning of Section 9(ii) is intended to protect through the measure, the fruits of a successful conclusion of the arbitral proceedings. A party whose claim has been rejected in the course of the arbitral proceedings cannot obviously have an arbitral award enforced in accordance with Section 36. The object and purpose of an interim measure after the passing of the arbitral award but before it is enforced is to secure the property, goods or amount for the benefit of the party which seeks enforcement.

13. The Court which exercises jurisdiction under Section 34 is not a court of first appeal under the provisions of the Code of Civil Procedure. An appellate court to which recourse is taken against a decree of the trial Court has powers which are co-extensive with those of the trial Court. A party which has failed in its claim before a trial Judge can in appeal seek a judgment of reversal and in consequence, the passing of a decree in terms of the claim in the suit. The court to which an arbitration petition challenging the award

under Section 34 lies does not pass an order decreeing the claim. Where an arbitral claim has been rejected by the arbitral tribunal, the court under Section 34 may either dismiss the objection to the arbitral award or in the exercise of its jurisdiction set aside the arbitral award. The setting aside of an arbitral award rejecting a claim does not result in the claim which was rejected by the Arbitrator being decreed as a result of the judgment of the court in a petition under Section 34. To hold that a petition under Section 9 would be maintainable after the passing of an arbitral award at the behest of DIPL whose claim has been rejected would result in a perversion of the object and purpose underlying Section 9 of the Arbitration and Conciliation Act, 1996. DIPL's application under Section 9, if allowed, would result in the grant of interim specific performance of a contract in the teeth of the findings recorded in the arbitral award. The interference by the Court at this stage to grant what in essence is a plea for a mandatory order for interim specific performance will negate the sanctity and efficacy of arbitration as a form of alternate disputes redressal. What such a litigating party cannot possibly obtain even upon completion of the proceedings under Section 34, it cannot possibly secure in a petition under Section 9 after the award. The object and purpose of Section 9 is to provide an interim measure that would protect the subject-matter of the arbitral proceedings whether before or during the continuance of the arbitral proceedings and even thereafter upon conclusion of the proceedings until the award is enforced. Once the award has been made and a claim has been rejected as in the present case, even a successful challenge to the award under Section 34 does not result an order decreeing the claim. In this view of the matter, there could be no occasion to take recourse to Section 9. Enforcement for the purpose of Section 36 as a decree of the Court is at the behest of a person who seeks to enforce the award.”

18. The submission of learned counsel for the respondent is that when relief is sought under Section 9 of the Act, after an arbitral award is

made-but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the Award. The measure of protection is thus a step in aid of enforcement. It is intended to ensure that the enforcement of the Award results in a realizable claim, and that the Award is not rendered illusory by dealings that would put the subject matter of the Award beyond the pale of enforcement. Learned counsel submits that the Division Bench has interpreted Section 9 of the Act contextually, and held that the Scheme of Section 9 postulates its application for grant of an interim measure of protection after the making of an arbitral award and before it is enforced, for the benefit of the party who seeks enforcement of the Award. An interim measure of protection within the meaning of Section 9(ii) is intended to protect, through the measure, the fruits of a successful conclusion of the arbitral proceedings. A party whose claim has been rejected in the course of arbitral proceedings cannot have the arbitral award enforced in accordance with Section 36, and thus cannot maintain a petition under Section 9. He submits that the object and purpose of an interim measure, after the passing of the arbitral award-but before it is enforced, is to secure the property, goods or amount for the benefit of the party which seeks enforcement. Learned counsel submits that proceedings under Section 34 of the Act are not a first appeal from the arbitral award. Even if the objection petition under Section 34 were to be allowed, it would not tantamount to allowing the counter claim of the respondent. He submits that the claim of the respondent was partially allowed in respect of services already rendered. The claim has been justified not only on the contractual terms, but also on the principle of

quantum meruit.

19. Mr. Prashant Kumar submits that the arbitral tribunal consisted of three retired Hon'ble Judges of the Supreme Court and the Tribunal was constituted by the Supreme Court itself. He submits that the counter claim of the petitioner was considered and rejected on merits. He further submits that the respondent cannot be required to continue to maintain the PBG and to keep the same extended/alive till the decision of the objections that the petitioner may prefer to the arbitral award, as the respondent is having to incur substantial expenditure in keeping the bank guarantee alive and renewed. Large amounts of funds of the respondent are held up on account of the said bank guarantee being kept alive.

20. Mr. Prashant Kumar submits that the fact that an Award has been rendered in favour of the respondent itself establishes the, *prima facie*, case of the respondent and, thus, the petitioner cannot claim that it has a prima facie case to seek the interim measure as sought for. In this regard, he places reliance on the observation made by the learned Single Judge of this Court in ***Veda Research Laboratories Ltd. Vs. Survi Projects*** 164(2009) DLT 388. The Court observed as follows:

“7. There can be no doubt as to the proposition of the touch stone on which the interim measures under Section 9 of the Act can be granted. However, in the present case, as far as ingredient of the prima facie case is concerned, once an arbitral tribunal has found a case in favour of the respondent by a unanimous award, inspite of the constitution aforesaid of the arbitral tribunal, two members whereof were technical persons and the third a retired Judge of this court, that is deemed to be sufficient for the

purpose of prima facie case. The counsel for the respondent has rightly contended in this regard that the scope of interference under Section 34 of the Act is limited.”

21. Learned counsel for the respondent submits that the respondent is interested in defending the objection petition that may be filed, and is not interested in only seeking release of the PBG. He submits that the provisional attachment under Section 281B of the Income Tax Act vide order dated 13.01.2014 is illegal inasmuch, as, under the said provision, the attachment could, at the highest, be for a period of two years in the aggregate and no more. He, therefore, submits that reliance placed on the said attachment order is of no avail.

22. Having heard the submissions of learned counsels on both sides, I am inclined to allow this petition. In my view, the judgment of the Division Bench of the Bombay High Court in *Dirk* (supra), cannot be relied upon by the respondent for the reason that the said judgment was rendered in an entirely different factual context. The Division Bench of the Bombay High Court was dealing with a case where DIPL was seeking an interim measure for continuing to perform the contract-though in a truncated manner, even after the termination of the agreement had been held to be valid by the arbitral Tribunal. The Division Bench, in that context, held that DIPL could not maintain a petition under Section 9 of the Act as the Award was not in favour of DIPL, and DIPL could not seek enforcement of the Award. It is clear from a reading of the judgment of the Division Bench of the Bombay

High Court in **Dirk** (supra) that the Division Bench did not have in its contemplation, a situation like the present where the respondent is a foreign corporation with absolutely no assets or presence in India.

23. The decision in **Dirk** (supra) cannot be considered as a precedent in the facts of this case as already noticed above. In **State of Orissa Vs. Mohd. Illiyas** AIR 2006 SC 258, the Supreme Court has, inter alia, observed as follows:

*“13. A case is a precedent and binding for what it explicitly decides and no more. The words used by judges in their judgments are not to be read as if they are words in an Act of Parliament. In Quinen v. Leathem (1901) AC 495 (HL), Earl of Halsbury, L.C. observed that **every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.**”*

[emphasis supplied]

24. In **Uttaranchal Road Transport Corporation Vs. Mansaram Nainwal** (2006) III LLJ 505 SC, the Supreme Court observed as follows;

“13. The High Court unfortunately did not discuss the factual aspects and by merely placing reliance on an earlier decision of the Court held that reinstatement was mandated. Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a judge while giving judgment that constitutes a

precedent. The only thing in a judges decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedens, every decision contains three basic postulates:

(i) findings of material facts, direct and inferential. An inferential finding of fact is the inference which the judge draws from the direct, or perceptible facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

*(iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (See State of Orissa V.Sudhansu Sekhar Misra AIR 1968 SC 647:1970-I-LLJ-662 and Union of India & Ors. v. Dhanwanti Devi & Ors. 1996(6) SCC 44). A case is a precedent and binding for what it explicitly decides and no more. The words used by judges in their judgments are not to be read as if they are words in an Act of Parliament. **In Quinn v. Leathem, Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.**"*

[emphasis supplied]

25. Thus, the reliance placed on the judgment of the Bombay High Court in *Dirk* (supra) by counsel for the respondent is of no avail.

26. Though the provision contained in order 25 CPC is not strictly attracted in the facts of this case, the principles thereof cannot be ignored. Order XXV Rule 1 CPC provides that where the plaintiff is a foreign party i.e. it is residing outside India, and does not possess sufficient immovable property within India, the plaintiff would be required to furnish security for costs. The Calcutta High Court has held that the said provision is mandatory in *Revlon Inc. and Ors. Vs. Kemco Chemicals And Ors* AIR 1987 Cal. 285.

27. The counter claim of the petitioner has only partially been allowed and the petitioner is entitled to assail the arbitral award within the statutory period of limitation. The said right of the petitioner cannot be defeated by permitting the respondent to allow the PBG to lapse in the mean time. In case the petitioner succeeds in its objections that may be preferred by the petitioner, the petitioner would be entitled to re-pursue its counter claim in appropriate proceedings. The said counter claim is founded upon the petitioner's case that a fraud had been committed in the process of the contract being entered into between the parties. The said issue is a serious one, which would need examination under Section 34 of the Act.

28. The submission of learned counsel for the respondent that the petitioner has not made out a prima facie case, since the Award has been rendered in favour of the respondent does not impress me. No doubt,

this Court in *Veda Research Laboratories Ltd.*(supra) has held that once the Tribunal has found a case in favour of the respondent by a unanimous award, that would be deemed to be sufficient for the purpose of a prima facie case. This does not mean that the right of the petitioner to assail the Arbitral Award can be rendered otiose and meaningless by permitting the respondent to allow its PBG to lapse even before the said right can be exercised. The prima facie case to be considered at this stage is the fact that the petitioner has a right to prefer objections to the Award under Section 34 and the period of limitation for the same has not expired.

29. So far as the submission of learned counsel for the respondent premised on Section 281B of the Income Tax Act is concerned, I may note that the latest communication dated 13.01.2014 relied upon by the petitioner has not been assailed by the respondent in appropriate independent proceedings. It is not for this Court, in these proceedings, to take a view with regard to the interpretation of the said provision of the Income Tax Act and that too behind the back of the Income Tax Department, which has issued the said communication.

30. The balance of convenience is also in favour of the petitioner as the rights of the respondent can be adequately safeguarded by directing the petitioner to bear the reasonable charges incurred by the respondent for extension of the bank guarantee at the final determination of this petition, or if the petition under Section 34 of the Act is preferred, at the time of disposal of the said petition. In fact, while passing the order dated 20.12.2013, this Court has already safeguarded the interests of the respondent in this regard.

31. The petitioner would, undoubtedly, suffer an irreparable loss and injury if the interim order, as prayed for, is not passed.

32. Accordingly, this petition is allowed and the respondent is directed to keep the PBG renewed till the disposal of the objection petition under Section 34 of the Act that may be preferred by the petitioner within the period of limitation. In case the respondent does not renew the PBG in the aforesaid terms, the HSBC Bank shall not release the PBG and shall encash the same and transmit the proceeds to this Court in the name of the Registrar General, Delhi High Court.

33. The petition stands disposed of in the aforesaid terms leaving the parties to bear their respective costs.

34. Dasti under the signatures of the Court Master.

VIPIN SANGHI, J

FEBRUARY 26, 2014
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