

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

Date of decision: January 28, 2016

+ **O.M.P.(I) (COMM.) 32/2016**

SINGHANIA HORIZONS Petitioner

Through: Mr.Raj Shekhar Rao, Adv.
with Ms. Renu Gupta, Adv.

versus

HRC ENGINEERS ESTATE PRIVATE LIMITED & ANR.

..... Respondent
Through: Mr. Sanjeev Anand, Adv.
with Mr. Arush Khanna, Adv.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

1. This is a petition filed by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 for interim protection.

2. It is the case of the petitioner that the petitioner and the respondent No. 1 entered into a Joint Venture Agreement intending to develop and sell; (i) residential units on a piece of land measuring 3.436 hectares, situated in Khara No. 201 of Village Kalwadi on 125 road of Vayu Vihar, Shastripuram, Agra, Uttar Pradesh; (ii) a group housing project on the project land in the name and style of HRC Horizons and (iii) a commercial strip of land on the project land. The profits were to be shared by the petitioner and respondent No. 2 in the ratio of 25:75 respectively.

3. It is the petitioner's case that on March 28, 2007, an Exit Agreement was executed between the petitioner, respondent No. 1 and the respondent No. 2, wherein the respondent No. 2 agreed to purchase the twenty five percent share of the petitioner, in the business of the joint venture for a fraction of its actual market value. It is also the petitioner's case that in addition to Exit Agreement, the petitioner and the respondents entered into a Shareholder Agreement on November 28, 2007, whereby the business of the joint venture was to be transferred to the company, shares were to be issued to the petitioner which would eventually be purchased by the respondent for a total consideration of Rs. 16,60,000/-, including the sum of Rs. 6,60,000/- paid under the Exit Agreement, leading to the exit of the petitioner from the business.

4. It is the case of the petitioner that earlier, it had filed OMP No. 505/2010, wherein, this Court had protected the petitioner by restraining the respondents from selling, mortgaging, transferring and encumbering, alienating, disposing of the properties situated over land bearing Khasra No. 201, Village Kalwari, Shastri Puram, Agra, forming the part of the Exit Agreement. It is also its case that in OMP 574/2011, titled as ***HRC Engineers Estate Private Limited and Ors. Vs. Piyush Singhania***, this Court restrained the respondents from selling, mortgaging, transferring, alienating, disposing of the property situated at land bearing Khasra No.

201, Village Kalwari, Shastri Puram, Agra, forming part of the Exit Agreement, including certain substituted properties.

5. The learned counsel for the petitioner states that the parties were relegated to the arbitration proceedings and the learned Arbitrator has held as under:

1. Claim of Mr. Piyush Singhania, Sole Proprietor of Singhania, the Claimant is rejected.

(2) Counter Claim of HRC Engineers Estate Private Limited, Respondent No.1 and Mr. Bikram Upadhaya, Respondent No.2 is rejected.

(3) Parties shall bear their own costs of the arbitration proceedings.

6. Mr. Sanjeev Anand, learned counsel, who appears for the respondent on advance notice, had taken a preliminary objection about the maintainability of the petition under Section 9 of the Arbitration and Conciliation Act, 1996 in view of the fact that the disputes/claims between the parties/filed by the petitioner have not been decided by the learned Arbitrator in favour of the petitioner. He had relied upon the judgment of the Division Bench of this Court reported as **2014 (145) DRJ 399 (DB) Nussli Switzerland Ltd. Vs. Organising Committee Commonwealth Games, 2010.**

7. Mr. Rajshekhar Rao, learned counsel appearing for the petitioner

would state that the aforesaid judgment of *Nussli Switzerland Ltd. (supra)* would not be applicable to the facts of this case in view of the conclusion of the Division Bench in para 34 of the judgment inasmuch as the Organising Committee, which had its claims rejected, except a part, but which subsumes into the larger amount awarded in favour of the opposite party, even if succeeds in the objections to the award would at best have the award set aside for the reason the Arbitration and Conciliation Act, 1996 as distinct from the power of the Court under the Arbitration and Conciliation Act, 1940, does not empower the Court to modify an award. He would also state that the Division Bench in *Nussli Switzerland Ltd. (supra)* has not considered the ratio of the judgment of the Supreme Court in *(1999) 2 SCC 479 Sundaram Finance Ltd. Vs. NEPC India Limited*. He has taken me through the judgment of the Supreme Court to contend that even the Supreme Court has held that on a reading of Section 9 of the Arbitration and Conciliation Act, 1996, the Court has jurisdiction to entertain the application under Section 9 either before the arbitral proceedings or during the arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with the Section 36 of the Act. He has also taken me through the award passed by the learned Arbitrator on January 22, 2016 to contend that the findings of the learned Arbitrator are perverse.

8. Having heard the learned counsel for the parties, the only issue which arises for consideration is, the party whose claims have been rejected by the Arbitral Tribunal is entitled to protection under Section 9 of the Arbitration and Conciliation Act, 1996. Suffice to state, that this issue is no more res-integra in view of the fact that this Court in *Nussli Switzerland Ltd. (supra)* has agreed with the reasoning of the Bombay High Court in Appeal No. 114/2013, *Dirk India Private Limited Vs. Maharashtra State Electricity General Co. Ltd. and connected appeal decided on March 19, 2013, 2013 (7) BCR 493*. In the said case, Bombay High Court, has in para 12 and 13 has held as under:

“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.

9. This Court in ***Nussli Switzerland Ltd. (supra)*** has also relying upon other judgments, wherein it has been held that, where the language of an Act is clear and explicit, effect must be given to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. In para 32 of the judgment, this Court, agreeing with the reasoning of the Bombay High Court, as correct, thus, adopted the said reasoning as its reasoning.

10. Insofar as the judgment of the Supreme Court in ***Sundaram Finance Ltd. (supra)*** is concerned, suffice to state, the Supreme Court in the said case was considering a case where the facts were, the respondent had entered into a hire-purchase agreement with the appellant therein in respect of supply of two wind turbine generators along with all accessories. The terms of the agreement contemplated payments being made in instalments by the respondent. The first instalment was payable by September 29, 1995 and the last was due by August 25, 1998. In all, the payment was to be made in 36 instalments. According to the appellant, the respondent paid the first fifteen instalments and thereafter

committed default and payment was not made in spite of several demands being made by the appellant therein. The hire purchase agreement contained an arbitration clause. The appellant filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 before the City Trial Court, Chennai praying for the appointment of an Advocate Commissioner to take custody of the hire-purchase machinery/equipment and restore the same to the interim custody of the appellant. The application was taken up for hearing on April 7, 1998 and the Trial Court passed an interim order appointing a Commissioner to take possession of the turbines with the help of the police. The aforesaid order of the Trial Court was challenged by the respondent filing a petition under Article 227 of the Constitution of India before the High Court of Madras. One of the main contentions urged on behalf of the respondent was that as no arbitration proceedings were pending and even the arbitrator had not been appointed, an application under Section 9 of the Act for getting interim relief alone was not maintainable. On merits, it was contended that the ex parte order which was passed by the Trial Court was uncalled for. The Supreme Court while considering the aforesaid facts, has in para 13 and 14 held as under:

“13. Under the 1996 Act the Court can pass interim orders under section-9. Arbitral proceedings, as we have seen,

commence only when the request to refer the dispute is received by the respondent as per Section 21 of the Act. The material words occurring in Section 9 are "before or during the arbitral proceedings". This clearly contemplates two stages when the Court can pass interim orders, i.e., during the arbitral proceedings or before the arbitral proceedings. There is no reason as to why Section 9 of the 1996 Act should not be literally construed. Meaning has to be given to the word "before" occurring in the said section. The only interpretation that can be given is that the Court can pass interim orders before the commencement of arbitral proceedings. Any other interpretation, like the one given by the High Court, will have the effect of rendering the word "before" in Section 9 as redundant. This is clearly not permissible. Not only does the language warrants such an interpretation but it was necessary to have such a provision in the interest of justice. But for such a provision no party would have a right to apply for interim measure before notice under Section 21 is received by the respondent. It is not unknown when it becomes difficult to serve the respondents. It was, therefore, necessary that provision was made in the Act which could enable a party to get interim relief urgently in order to protect its interest. Reading the section as a whole it appears to us that the Court has jurisdiction to entertain an application under Section 9 either before arbitral proceedings or during arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act.

14. Section 9 of the said Act corresponds to Article 9 of the UNCITRAL Model Law which is as follows :

"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

This article recognises, just like Section 9 of the 1996 Act, a request being made before a Court for an interim measure of protection before arbitral proceedings. It is possible that in some countries if a party went to the Court seeking interim measure of protection that might be construed under the local

law as meaning that the said party had waived its right to take recourse to arbitration. Article 9 of the UNCITRAL Model Law seeks to clarify that merely because a party to an arbitration agreement requests the Court for an interim measure "before or during arbitral proceedings" such recourse would not be regarded as being incompatible with an arbitration agreement. To put it differently the arbitration proceedings can commence and continue notwithstanding a party to the arbitration agreement having approached the Court for an order for interim protection. The language of Section 9 of the 1996 Act is not identical to Article 9 of the UNCITRAL Model Law but the expression "before or during arbitral proceedings" used in Section 9 of the 1996 Act seems to have been inserted with a view to give it the same meaning as those words have in Article 9 of the UN-CITRAL Model Law. It is clear, therefore, that a party to an arbitration agreement can approach the Court for interim relief not only during the arbitral proceedings but even before the arbitral proceedings. To that extent Section 9 of the 1996 Act is similar to Article 9 of the UNCITRAL Model Law".

11. Having noted the facts in ***Sundaram Finance Ltd. (supra)***, the reliance placed by Mr. Rao on the conclusion of the Supreme Court that application under Section 9 of the Arbitration and Conciliation Act, 1996 is maintainable after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act, is concerned, the conclusion would necessarily in those cases, where, an application under Section 9 is filed, is at the behest of a party which seeks enforcement of the award as held by the Bombay High Court, which reasoning is agreed to by this Court. In other words, as concluded by the Bombay High Court, a party whose claims have been rejected in the course of the

arbitral proceedings, cannot obviously have an arbitral award enforced in accordance with Section 36. It is precisely the position here, where the learned Arbitrator has rejected the claim of the petitioner. The submission of Mr. Rao, that the judgment of the Bombay High Court and this Court in *Nussli Switzerland Ltd. (supra)* is without considering the judgment of the Supreme Court in *Sundaram Finance Ltd. (supra)*, need to be rejected as the Supreme Court was not considering an issue which has arisen in this case. It is settled position of law that the ratio of a decision is the law declared in the context of facts of a particular case. Being bound by the judgment of this Court in *Nussli Switzerland Ltd. (supra)*, I do not see any merit in the petition.

12. The petition is accordingly dismissed.

(V.KAMESWAR RAO)
JUDGE

JANUARY 28, 2016

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