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

+ **ARB. A. (COMM.) 21/2016 & IA No.8600/2016**

NATRIP IMPLEMENTATION SOCIETY Appellant

Through: Mr Sanjay Jain, ASG with Mr Ravi
Varma, Ms Natasha Thakur and Mr
Suadat Ahmad Kirmani, Advocates.

Versus

IVRCL LIMITED

..... Respondent

Through: Dr Amit George, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **31.08.2016**

VIBHU BAKHRU, J

1. The appellant (hereafter 'NATRIP') has filed the present appeal under Section 37(2) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning the order dated 21.05.2016 passed by the Arbitral Tribunal (hereafter 'the impugned order').

2. By the impugned order, the Arbitral Tribunal (hereafter 'the Tribunal') had rejected NATRIP's application dated 22.04.2016 whereby it had prayed that the amounts claimed by it in its counter claim be secured by way of sufficient security or by bank guarantee.

3. NATRIP had invited bids for construction of Automotive Test Tracks

at Natrax - Pithampur and GARC - Chennai (hereafter 'the project'). The tracks at GARC - Chennai and Natrax -Pithampur were to be completed by September 2011 and September 2012 respectively.

4. The respondent (hereafter 'IVRCL') was successful in the bidding process and was accordingly awarded the contract for execution of the project. The negotiated value of the contract was ₹525,97,06,879/-. Admittedly, the execution of the contract was delayed. According to NATRIP, IVRCL had failed and neglected to perform the contract despite several notices.

5. In the circumstances, NATRIP issued notices calling upon IVRCL to remedy the breaches, failing which NATRIP would be entitled to terminate the contract without prejudice to its other rights and remedies. IVRCL also issued notices, *inter alia*, alleging that the delays were on account of NATRIP. NATRIP alleges that IVRCL did not resume construction activities and took no steps to remedy the defaults; consequently, NATRIP issued a letter dated 14.08.2013 terminating the contract. NATRIP further states that thereafter, it issued a tender for the balance works under the contract at the risk and cost of IVRCL. IVRCL

has its own tale of woe and *inter alia* alleges that the delay in execution of the project is on account of NATRIP and the termination of contract is wrongful. IVRCL invoked the arbitration clause. Thereafter, the Tribunal comprising of three members including a former judge of this Court was constituted. IVRCL filed its claim before the Tribunal for an aggregate sum of ₹2,13,79,04,238/- which was later amended to ₹415,27,61,238/-. NATRIP also filed its counter claim for a sum of ₹79,23,511,669/- which was subsequently increased to ₹871,05,74,323/-.

6. The Arbitral proceedings are currently at the stage of final hearing. The arguments on behalf of IVRCL have been concluded and the arguments on behalf of NATRIP would have commenced on 26.08.2016. However, the hearings scheduled on 26.08.2016, 27.08.2016 and 29.08.2016 have been adjourned at the instance of the learned counsel for NATRIP. At the stage of final hearing, NATRIP filed an application dated 22.04.2016, *inter alia*, praying that IVRCL be directed to provide security for the amount claimed by it.

7. In its application, NATRIP, *inter alia*, pleaded that certain contracts entered into by IVRCL with other agencies had been terminated on

account of failure on the part of IVRCL to perform those contracts. It was also pleaded that a flyover in Kolkata had collapsed on 31.03.2016 and this was due to “*the non-performance due to financial stringency of the IVRCL*”. It was further pleaded that the financial condition of IVRCL was precarious and it was currently under SDR (Strategic Debt Restructuring) under which all expenses of IVRCL were to be approved by representatives of the lenders. It is also stated that three winding up petitions against IVRCL had been admitted and citations had been published. NATRIP claimed that in the given circumstances, it would not only be extremely difficult but impossible for NATRIP to realise the amount of counter claim from IVRCL in the event NATRIP succeeded before the Tribunal.

8. The Tribunal rejected the application principally on the ground that the Arbitral proceedings were at a final stage. The Tribunal observed that the case was a highly contested one and both parties had made allegations and counter allegations. The Tribunal held that at the stage of final hearing, it was neither possible nor advisable to take a *prima facie* view of the matter in favour of NATRIP as the Tribunal was of the view that

the same would amount to pre-judging the case and would be prejudicial to the outcome of the decision on merit.

9. The Tribunal further held as under:-

"....Since we are not able to determine with certainty the existence of prima facie case in favour of the Respondent in the sense that the Respondent is likely to succeed in counter claims, we refrain from commenting on the alleged financial stringency of the Claimant, which are again denied and disputed questions of facts."

10. Aggrieved by the aforesaid decision, NATRIP has preferred the present appeal.

11. Mr Sanjay Jain, learned ASG appearing for NATRIP contended that the financial condition of IVRCL was precarious and that winding up petitions against IVRCL have been admitted. He submitted that in the circumstances, it was necessary for the Tribunal to have considered NATRIP's application on merits. He submitted that NATRIP had established that IVRCL was debt ridden and not in a position to meet its liabilities and therefore, an order for securing the amount in dispute ought to have been passed. He referred to the decision of a Coordinate Bench of this Court in **Gatx India Pvt Ltd. v. Arshiya Rail Infrastructure Limited & Anr: 216 (2015) 216 DLT 20** and on the strength of the said decision contended that

the fact that IVRCL's financial condition was precarious would be sufficient for directing IVRCL to provide a security for the counter claims preferred by NATRIP. He submitted that it was not necessary for NATRIP to allege that IVRCL was siphoning of its funds or alienating its assets, in order to succeed in its prayer for securing its counter claims. He submitted that even if the financial incapacity of IVRCL was caused for reasons beyond its control, the award that would follow would be impossible to enforce; and, therefore, it was necessary that NATRIP be secured immediately without awaiting the publishing of the award.

12. Dr Amit George who appeared for IVRCL on advance notice, countered the contentions advanced by Mr Jain. He submitted that almost all counter claims made by NATRIP were in the nature of damages and indisputably NATRIP would not be entitled to such claims if the Tribunal found that the termination of the contract was wrongful or that the delay in execution of the project was not caused by IVRCL. He further submitted that NATRIP had filed the application for securing the counter claims only with a view to pressurise IVRCL. He handed over the copy of the minutes of the proceedings of the 36th hearing of the Tribunal held on 30.07.2016 which indicated that the Tribunal had scheduled hearings on 26.08.2016,

27.08.2016 and 29.08.2016 as well as 19.09.2016, 20.09.2016 and 21.09.2016 for hearing the final arguments on behalf of NATRIP. However, on the insistence of NATRIP's counsel, the dates fixed in August 2016 were cancelled. He submitted that on one hand NATRIP was insisting for urgent orders for securing its counter-claim and on the other hand was delaying the conclusion of the proceedings before the Tribunal by seeking adjournments. He also relied on the decision of the Supreme Court in **Raman Tech. & Process Engineering Co. and Anr. V. Solanki Traders: (2008) 2 SCC 302** in support of his contention that an order for providing security could not be granted unless the party seeking such relief had established a good *prima facie* case and further established that the other party was attempting to dispose of properties with the intention of defeating the decree that may follow.

13. I have heard the learned counsel for the parties.

14. At the outset, it is necessary to observe that apart from claiming that the financial condition of IVRCL is precarious, NATRIP has not urged any other reason for seeking an order for securing its counter claims. Thus, the only controversy that needs to be addressed at this stage is whether an order directing a party to secure the amount in dispute can be issued only for the

reason that the said party is in financial distress and consequently the award that follows may be impossible to be enforced?

15. Before proceeding further, it would be necessary to refer to the relevant extract of Section 9 of the Act, which reads as under:-

“9. Interim measures, etc. by Court.— A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:—

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(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;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

16. As is apparent from the plain language of the opening words of Section 9(1) of the Act, a party may apply to the court for any of the reliefs as set out in clauses (i) and (ii) above. However, the power of the court to grant relief is indicated in the last line of Section 9(1) of the Act; that is, *the court has the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.* In **Firm Ashok Traders and Anr. v Guurmukh Das Saluja and Ors.**; 2004 (3) SCC 155, the Supreme Court explained as hereunder :-

“ The reliefs which the Court may allow to a party under clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to “contemplated”, “pending” or “completed” arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the Arbitral Tribunal.”

17. It is also clear from the opening sentence of section 9(1)(ii) of the Act that the measures that can be ordered are “interim measures of protection”. It, plainly, follows that the principles that would be applicable for grant of orders under section 9(1)(ii) of the Act would be the principles that may be

applicable to grant of such orders as are applicable to proceedings before the Court. An order for securing the amount claimed prior to an arbitral award is essentially in the nature of attachment before judgement and thus, the principles as applicable for grant of such orders in proceedings before the Court - that is, as applicable under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (hereafter 'the CPC') - would be equally applicable for grant of relief under Sections 9(1)(ii)(b) or 17(1)(ii)(b) of the Act (as amended by Act 3 of 2016) prior to the publishing of the arbitral award. In **Rite Approach Group Ltd. v. Rosoboronexport: 111 (2004) DLT 816, Global Company v. M/s National Fertilizers Ltd.: AIR 1998 Delhi 397 and Gatx India Pvt Ltd. (supra)**, this Court held that it would take guidance from the principles given in Order XXXVIII Rule 5 of the CPC for grant of orders under Section 9 of the Act.

18. It is also well settled that the granting of orders under section 9 of the Act are discretionary in nature and equitable considerations would apply for grant of such orders. Thus, orders as prayed under section 9(1) of the Act would be granted only if it is necessary and equitable.

19. In ***Raman Tech. & Process (supra)***, the Supreme Court explained that

the object of order XXXVIII Rule 5 of the CPC was to prevent any defendant from defeating the realisation of the decree that may be ultimately passed in favour of the plaintiff by either disposing of or removing assets from the jurisdiction of the Court. The relevant extract of the said decision is extracted below:-

"4. The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words "to obstruct or delay the execution of any decree that may be passed against him" in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able

to satisfy that he has a *prima facie* case.

5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for-out-of court settlements, under threat of attachment."

20. In order for the court to exercise its powers under Order XXXVIII Rule 5 of the CPC, it is necessary that twin conditions be satisfied. First, that the plaintiff establishes a reasonably strong *prima facie* case for succeeding in the suit; and second, that the court is *prima facie* satisfied that the defendant is acting in a manner so as to defeat the realisation of the decree that ultimately may be passed. The object of Sections 9(1)(ii)(b) and 17(1)(ii)(b) of the Act is similar to the object of order XXXVIII Rule 5 of the CPC. The Arbitral Tribunal while exercising powers under Section 17(1)(ii)(b) of the Act or the Court while exercising power under Section 9(1)(ii)(b) of the Act must be satisfied that it is necessary to pass order to secure the amount in dispute. Such orders cannot be passed mechanically.

Further, the object of the order would be to prevent the party against whom the claim has been made from dispersing its assets or from acting in a manner to so as to frustrate the award that may be passed.

21. In the present case, there is no allegation that IVRCL is dispersing its assets or acting in a manner so as to frustrate the enforcement of the award that may be passed. Thus, on the application of principles as embodied in Order XXXVIII Rule 5 of the CPC, no order for securing NATRIP can be passed.

22. Further, if the financial state of IVRCL, as pleaded by NATRIP is accepted to be correct, it is apparent that IVRCL would also be unable to provide the security as prayed for by NATRIP. NATRIP claims that three winding up petitions have been admitted against IVRCL as IVRCL has been unable to pay its debts. If the same is correct, then it is obvious that IVRCL would be unable to provide security or bank guarantee for the sums claimed by NATRIP. It follows from the above, that it is almost certain that IVRCL would not be in a position to comply with an order to provide security for the counter claims preferred by NATRIP. In the given facts, such an order would debilitate IVRCL's ability to pursue its claims against NATRIP. An

interim protection for one party cannot be granted at the cost of imposing an onerous condition on the other and thus, rendering the other party in a hapless condition.

23. It is relevant to bear in mind that if IVRCL is liable to be wound up as is urged by Mr. Jain, then NATRIP would have to stand as one amongst other unsecured creditors of IVRCL for recovery of its dues; NATRIP cannot by obtaining an order under section 17 of the Act seek to place itself in a better position than the other creditors.

24. The contention that financial distress of a party can be a sole ground for directing that party to secure a claim of unadjudicated damages as claimed by the other party is, in my view, bereft of any merit.

25. The reliance placed by Mr Jain in the case of *Gatx India Pvt Ld.* (*supra*) is misplaced. In that case, the petitioner had made a claim for lease rent of rakes as well as for liquidated damages. Since in that case, the quantum of lease rent was ascertained and the petitioner had established the case for lease rent, the Court granted an order directing furnishing of security for the lease rent. However, as far as liquidated damages were concerned, the Court denied the same because the liability on account of the

liquidated damages had not been ascertained. The said decision cannot be read as an authority to mean that financial distress of a party would be sufficient to require the said party to furnish a security.

26. In the present case, the arbitral proceedings are at the stage of final arguments and considering the stage of the proceedings, the Tribunal has declined to exercise its powers to pass an interim order. Orders under section 17 of the Act are discretionary and the Tribunal has exercised its discretion to not consider passing interim orders at the stage of final hearing. I find no infirmity with the aforesaid view.

27. In view of the above, the present appeal is dismissed. The pending application also stands disposed of.

AUGUST 31, 2016
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VIBHU BAKHRU, J