

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

1.

+

ARB. A. (COMM.) 30/2016

LANCO INFRATECH LTD.

..... Petitioner

Through: Mr. Gopal Jain, Senior Advocate with
Mr. Akhil Sibal, Mr. Dhruv Madan and Ms. Kriti
Awasthi, Advocates.

versus

HINDUSTAN CONSTRUCTION COMPANY LTD. Respondent

Through: Mr. Ananya Kumar and Ms. Pragya
Chauhan, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

23.09.2016

%

1. This appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 filed by Lanco Infratech Ltd. ('Lanco') is directed against an order dated 4th June, 2016 passed by the Arbitral Tribunal ('AT') allowing the application filed by the Respondent Hindustan Construction Company Ltd. ('HCCL') under Section 17 of the Act and directing Lanco to furnish a bank guarantee to the extent of 50% of the amount claimed by HCCL within 30 days in an approved RBI format for an initial period of 12 months and to be kept renewed from time to time upto 30 days from the date of pronouncing of the Arbitral Award.

2. The background to the present appeal is that Lanco is part of the Lanco

conglomerate group known as the 'Lanco Group' which has various subsidiaries dealing with power infrastructure, construction, real estate etc. Lanco entered into two contracts for civil works of Power House, transformers and Butterfly Valve Caverns and switch yard of Teesta VI Hydroelectric Project, Sikkim and Contract No. LITC/Contract/Teesta-VI/4B i.e., LOT IV B and for civil works for various tunnels from RD 10370 upto junction with the bottom of Surge Tunnels including Adit Tunnels-IVA and IV near Subin Khore of Teesta-VI, Hydroelectric Project, LOT IV B on 25th June, 2008. Disputes that arose between the parties were unable to be resolved through mutual discussions. HCCL then invoked the arbitration clause and nominated its Arbitrator. The Institution of Engineers (India) appointed an Arbitrator on behalf of Lanco and in turn both the Arbitrators appointed the presiding Arbitrator and completed the AT.

3. The challenge to the constitution of the AT was disposed of by this Court by order dated 19th January, 2015 leaving it open to the Lanco to raise this challenge before the AT itself. Thereafter, a challenge was raised by Lanco in an application under Section 16 of the Act which was negatived by the AT by an order dated 4th April, 2015.

4. Lanco states that on 30th April, 2015 it received a copy of the Statement of Claim filed by HCCL which, for the LOT IVA, was for the sum of Rs. 32,64,31,545 and for LOT IV B in the sum of Rs.184,05,09,141. Lanco filed its Statement of Defence on 3rd December, 2015.

5. The admission/denial of documents took place on 6th January, 2016. According to Lanco, since no original document was filed by HCCL, it

made a statement that the said documents could neither be admitted nor denied as they were only photocopies. Thereafter, HCCL filed an application under Section 17 of the Act seeking interim measures requiring Lanco to furnish a suitable security in the form of a bank guarantee, fixed deposit or in any other form which would be sufficient to satisfy the arbitral award that may be passed in favour of HCCL against the claims for LOT IV-A and LOT IV-B. *Inter alia* it was contended by HCCL that it had a good *prima facie* case on merits, and that on various occasions, Lanco itself had admitted its liability and had assured to pay a certain sum to HCCL and that Lanco was suffering from financial constraints as was evident from its balance sheet, profit and loss account and the fact that winding up petitions were pending against it in various courts. Further, Lanco was stated to be undergoing a Strategic Debt Re-structuring ('SDR').

6. Before the AT, it was contended by Lanco that it had already disputed the correctness of HCCL's claims as well as the documents produced by it and that the claims were totally fictitious and arbitrary. It was stated that the claims which were essentially towards overhead costs, expenses towards retention of equipments, loss of earning capacity and profit etc. far from being admitted by Lanco were bogus, false and fabricated and without any basis and, therefore, the question of securing such claims did not arise. It was pointed out that the proceedings before the AT were on account of HCCL's own failure to meet its contractual commitment and, therefore, it could not take advantage of its own wrongs by seeking such interim measures. It was contended that the nature of the reliefs sought was beyond the scope of powers of the AT under Section 17 of the Act.

7. A perusal of the impugned order dated 4th June, 2016 passed by the AT reveals that it framed the following three questions for determination:

(i) Whether the AT has power under Section 17 of the Act to direct the party to take interim measures or directions?

(ii) Whether the Respondent/Claimant i.e., HCCL has a *prima facie* case?

(iii) Whether the Appellant i.e., Lanco is in financial distress?

8. In the impugned order, the AT held as under:

(a) Although the scope of Section 9 of the Act is wider than Section 17 thereof, in terms of the decision of the Bombay High Court in ***Baker Hughes Singapore Pte. v. Shiv-vani Oil and Gas Exploration Services Ltd. 2015 (1) Arb. LR 155 (Bom.)***, which was affirmed by the Supreme Court in the order dated 16th March, 2015 in Civil Appeal No. 2929 of 2015 (***Shiv-vani Oil and Gas Exploration v. Baker Hughes Singapore Pte.***), the AT could direct Lanco to furnish security for a portion of the amount claimed.

(b) Since the amounts claimed by the Respondents were certified amounts in terms of Clause 53 of the contract read with clause 69.4 of the General Conditions of Contract (GCC), HCCL had a *prima facie* case in its favour.

(c) The claims of HCCL were first raised before Lanco and not disputed by it. The minutes of the meetings held on 10th and 11th February, 2014 revealed that Lanco had asked HCCL to requantify/resubmit the claims and

despite resubmission by HCCL, Lanco had failed to make payment.

(d) Under Clause 53.2 of the GCC, Lanco had the right to inspect the records and if necessary, to seek clarification as well as further documents from HCCL. Since it had taken no steps to do so, Lanco was estopped from questioning or challenging the contemporary records placed before the AT.

(e) Since Lanco was under an SDR, the apprehension of HCCL that even if it succeeded in its claim before AT, it could be left remediless as no assets would be available with Lanco could not be ignored.

9. Consequently, the AT proceeded by the impugned order to direct Lanco to furnish to HCCL a bank guarantee within 30 days for 50% of the amounts claimed both in respect of LOT-IV A and LOT IV-B contracts.

10. It was submitted by Mr. Gopal Jain, learned Senior counsel, and Mr. Akhil Sibal, learned counsel appearing on behalf of Lanco as under:

(i) The AT had exceeded its powers under Section 17 of the Act and had granted a relief based on speculative claims of HCCL. The AT failed to notice that HCCL had failed to make out a case for grant of such a relief since the basic elements of Order XXXVIII Rule 5 CPC, the essential principles of which apply equally to exercise of jurisdiction under Section 17 of the Act, were not fulfilled. Reliance was placed on the decisions of this Court in *C V Rao and Krishnapatnam Port Company Limited, China Investments Private Limited v. Strategic Port Investments KPC Ltd.* 218 (2015) DLT 200 (DB) and *Intertoll ICS Cecons v. National Highways*

Authority of India 197 (2013) DLT 473.

(ii) Relying on the decision in ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd. (2007) 7 SCC 125***, it was submitted that the exercise of power of the Court under Section 9 of the Act and of the AT would be governed also by relevant provisions of the Specific Relief Act, 1963 ('SRA'). A positive mandatory direction to provide a bank guarantee at an interim stage to secure the amount claimed by way of speculative losses could not have been passed.

(iii) The AT had misinterpreted Clause 53 (2) of the GCC by observing that it is open to the Respondent to inspect the records when in fact that right was made available to the Engineer to certify the payments. In the present case, there was no certification of payments due by Lanco to HCCL by the Engineer. The AT had also overlooked Clause 69.4 of the GCC which contemplated certification by the Engineer of payments in consultation with Lanco, which process had in fact not taken place.

(iv) There was no admitted liability of HCCL as wrongly inferred by the AT. The minutes of the meetings referred to by the AT were in fact drawn unilaterally by HCCL and not countersigned by Lanco. The major portions of the claims being for losses on account of suspension of the work by HCCL on account of failure by Lanco to make payments against bills, no mandatory injunction for furnishing a bank guarantee to secure such claims could have been passed. While it is not in dispute that Lanco was under financial distress, there was no material whatsoever for the AT to come to a conclusion that the Lanco was about to either dispose of or remove the

whole or part of its properties from the local limits of the jurisdiction of the AT. Thus, there was no case made out whatsoever for passing such an interim order.

11. Responding to the above submissions, it was urged by Mr. Ananya Kumar, learned counsel appearing for HCCL as under:

(i) Lanco had failed to disclose to this Court the documents which formed part of the arbitral record and were relied upon by HCCL and which had been considered by the AT. For instance, Lanco was relying on a Net Worth Certificate dated 23rd August, 2016 which obviously was not filed before the AT. It has also placed reliance on letters dated 10th July, 2012, 21st September, 2012 and 21st November, 2012 which were not filed by it before the AT.

(ii) Lanco could not also rely on the cross-examination of witnesses which took place before the AT after the impugned order was passed and, in any event, it was for the AT to decide what inference should be drawn from such answers given in cross-examination.

(iii) The scope of interference by the Court under Section 17 of the Act was limited and unless the order passed by the AT was perverse or unsustainable in law, the Court should not interfere. Reliance was placed on the decision in ***Ircon International Limited v. Simplex Projects Limited*** 2016 SCC Online Del 4661.

(iv) After the decision of the Bombay High Court in ***Baker Hughes***

Singapore Pte. v. Shiv-vani Oil and Gas Exploration Services Ltd. (supra), which was affirmed by the Supreme Court in *Shiv-vani Oil and Gas Exploration v. Baker Hughes Singapore Pte. (supra)*, it is no longer open to contend that in exercise of power under Section 17 of the Act, the AT could not pass an interim direction securing the disputed claim.

(v) The decision in *Intertoll ICS Cecons v. National Highways Authority of India (supra)* was distinguishable since claims by HCCL in the present case were not speculative but based on express conditions of the contract and supported by documents which were contemporarily submitted to Lanco and which were either verified or deemed to have been verified by Lanco.

(vi) The primary claim of HCCL was for additional costs and losses on account of suspension of the contracts/works which was, again, in turn was due to Lanco's inability to make payments of certified amounts. HCCL was entitled under Clause 69.4 of the GCC to suspend work if there was a delay in payment of its certified claims and, in such an event, it was also entitled to demand additional costs incurred due to suspension of work.

(vii) The claims included payments of amounts wrongly deducted as environment cess, reimbursement of service tax and failure to provide construction power from the grid which could not be stated to be speculative. At best, therefore, the matter could be sent back to the AT for deciding which of the claims could be considered to be speculative and interim relief could be moulded accordingly. Reliance was placed on the decision in *Gatix India Pvt. Ltd. v. Arshiya Rail Infrastructure Ltd. 216 (2015) DLT 20*.

(viii) From the letter dated 10th August, 2015 written by Lanco to the National Stock Exchange of India Ltd. (NSEIL), it was evident that the Lanco Group had sold some of the assets in order to consolidate their businesses and to reduce losses. This, coupled with the fact that, admittedly, the Lanco Group was suffering losses, was sufficient for the AT to infer that even if HCCL succeeded in its claims, it could not be able to enforce such Award against Lanco in future.

12. The above submissions have been considered. The submissions revolve around the scope of the powers under Section 17 of the Act as it stood prior to the amendment by the Arbitration and Conciliation (Amendment) Act, 2015 with effect from 23rd October 2015. The unamended Section 17 reads thus:

“17. Interim measures ordered by arbitral tribunal.-(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).”

13. Reference may be made at this stage to the amended Section 17 (with effect from 23rd October, 2015) which reads as under:

“17. Interim measures ordered by arbitral tribunal.

(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is

enforced in accordance with section 36, apply to the arbitral tribunal—

(i) for the appointment of a guardian for a minor or 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 arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner

as if it were an order of the Court.”

14. It will straightway be seen that while under the unamended Section 17 of the Act, there was no specific power for the AT to order interim measures to secure the amount in dispute, that power has been expressly provided under the amended Section 17(1) (ii) (b) of the Act. The other important change is in Section 17 (2) which states that the interim order passed by the AT would be enforceable as if it were an order of a Court under the CPC. This makes it explicit that the purpose of these changes was to bring the powers of the AT under Section 17 of the Act on par with that of the Court under Section 9 of the Act. In the amended forms both Section 9 and Section 17 read alike. This is therefore a significant change and not one, as contended by counsel for HCCL, one that is clarificatory of an implicit legal position. This distinction is necessary to be kept in mind because both parties here do not dispute that the application filed by HCCL before the AT was governed by Section 17 of the Act as it stood prior to its amendment. It is also significant that the decisions cited by both parties seek to interpret Section 17 as it stood prior to its amendment.

15.1 In *Intertoll ICS Cecons v. National Highways Authority of India* (*supra*), this Court examined the powers of the AT under Section 17 of the Act in the context of an interim order passed by the AT requiring the party which was defending a counter claim to furnish security at the interlocutory stage as an interim measure of protection. Referring to the decisions in *National Highways Authority of India v. M/s. China Coal Construction Group Corporation AIR 2006 Delhi 134* and *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd. (2008) DLT 604*, the Court drew a distinction between

the powers under Sections 9 and Section 17 of the Act and observed as under:

“17. This Court is of the view that to the extent that there is a clear enunciation in Section 9 of the types of interim relief that can be granted it does appear that powers of the Court thereunder are by their very nature wider than the powers of a Tribunal under Section 17 of the Act. Therefore, it is not possible to accept the contention of NHAI, which found favour with the Tribunal in the instant case, that the powers of the Tribunal under Section 17 are as wide as that of the Court under Section 9 of the Act and that the principle underlying Section 9 of the Act would ipso facto be applicable to Section 17 of the Act.”

15.2 The Court in *Intertoll ICS Cecons v. National Highways Authority of India* (*supra*) then delved into what could be considered to be the ‘subject matter of dispute’ for the purposes of Section 17(1) of the Act and held as under:

“18. However, for examining the question as to what could constitute the ‘subject-matter of the dispute’ in the context of Section 17 of the Act, it would be useful to draw a comparison with Section 9 of the Act. A reading of the various sub-clauses of Section 9 makes it apparent that a distinction has been drawn between the words ‘subject-matter of the dispute’ [used in Section 9(ii)(a) and (c)] and ‘amount in dispute’ [used in Section 9(ii)(b)]. It is arguable that where the legislature in the same provision uses the words ‘subject-matter of the dispute’ in two sub-clauses and uses the words ‘amount in dispute’ in another sub-clause it intends to draw a distinction between the two. When Section 9(ii)(a) use the words ‘subject matter of the dispute’, they refer to ‘goods’ in respect of which there could be an order of ‘preservation’ or ‘interim custody’. The same words in

Section 9(ii)(c) refer to ‘any property or thing’ in respect of which there could be an order of ‘detention, preservation or inspection of.’ Where the claim is of a monetary nature Section 9(ii)(b) talks of ‘securing the amount in dispute in the arbitration.’ By the same analogy the words ‘subject-matter of the dispute’ in Section 17 should be understood as referring to a tangible ‘subject matter of dispute’ different from an ‘amount in dispute’.”

15.3 It was further clarified that even if it were presumed that the ‘subject matter of the dispute’ could include mandatory claims and the provision of security in relation to subject matter could be in the form of the bank guarantee, such a direction at an interlocutory stage “would indeed be an extraordinary one and has to necessarily be preceded by a determination of the possible extent of the claim that is likely to be awarded. In other words, the power of the Tribunal under Section 17 of the Act, even if assumed to be as wide as that of the Court under Section 9 of the Act, cannot extend to directing the provision of security in the form of a bank guarantee in relation to a speculative claim for damages.”

15.4 The Court in *Intertoll ICS Cecons v. National Highways Authority of India* (*supra*) *inter alia* referred to the decision in *Iron & Hardware (India) Co. v. Firm Shamlal & Bros.* AIR 1954 Bom 423 where Chief Justice Chagla of the Bombay High Court explained when a claim could be said to be a debt which could be enforced. In the said decision it was observed as under:

“Before it could be said of a claim that it, is a debt, the Court must be satisfied that there is a pecuniary liability upon the person against whom the claim is made, and the

question is whether in law a person who commits a breach of contract becomes pecuniarily liable to the other, party to the contract. In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party. (Emphasis added)”

15.5 It may be noted that the above decision in ***Iron & Hardware (India) Co. v. Firm Shamlal & Bros.*** (*supra*) was cited with approval by the Supreme Court in ***Union of India v. Raman Iron Foundry*** (1974) 2 SCC 231 in the following manner:

“11...a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred...”

15.6 As noticed in ***Intertoll ICS Cecons v. National Highways Authority of India*** (*supra*), while the decision in ***Union of India v. Raman Iron Foundry*** (*supra*) was overruled subsequently in ***H. M. Kamaluddin Ansari & Co. v. Union of India*** (1983) 4 SCC 417 on the point that the clause in the contract applied to the claim itself and not only to an amount due, the decision in

Union of India v. Raman Iron Foundry (*supra*) is still good law as regards the nature of the claim for damages.

15.7 In *Intertoll ICS Cecons v. National Highways Authority of India* (*supra*), the Court also discussed Order XXXVIII Rule 5 CPC and referred to the decision in *Raman Tech. & Process Engg. Co. v. Solanki Traders* (2008) 2 SCC 302 where the Supreme Court explained that the power of ordering attachment before judgment under Order XXXVIII Rule 5 CPC was drastic. The Supreme Court observed as under:

“The power under Order XXXVIII 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 XXXVIII Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order XXXVIII 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 realized by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment. (Emphasis added).”

16. In *Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.* (*supra*), the Supreme Court was dealing with the scope of the power under Section 9 of the Act. After analysing Section 9 of the Act as well as relevant provisions of the SRA and in particular Sections 36 to 42 thereof, the Court concluded that the power to grant injunction by way of specific rules was governed by the SRA. It was further observed that the question whether a termination of contract would have to be considered in the context of well-

settled principles for 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.”

17.1 The law in relation to the interplay between Section 9 of the Act and Order XXXVIII Rule 5 CPC has been discussed at length by the Division Bench of this Court in *C V Rao and Krishnapatnam Port Company Limited, Chinta Investments Private Ltd. v. Strategic Port Investments KPC Ltd.* (*supra*). The question before the Court was whether a Single Judge of this Court was justified in exercising the powers under Section 9 of the Act in issuing a series of interim directions which included interim, prohibitory, mandatory injunction restraining the Appellants from availing any additional debt or taking any action to enter into any agreement or amending the articles of the company on the basis that the Appellants would be unable to repay any amount due to the claimant and that if the Appellants were taking steps to defeat interim reliefs that may be awarded against them in the arbitration proceedings. The Court proceeded to analyse to what extent the principles of Order XXXVIII Rule 5 CPC would govern the proceedings under Section 9 of the Act. After discussing the decisions in *Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.* (*supra*) and *Nimbus Communications Limited v. Board of Control for Cricket in India 2012 (4) Arb LR 113*, the Court concluded as under:

“42. In the light of the legal position noticed above, it is clear that while exercising its jurisdiction under Section 9 of the Act the Court cannot ignore the underlying principles which govern the analogous power

conferred under Order 39 Rules 1 and 2 and Order 38 Rule 5 of CPC. It is also necessary for the Court to satisfy itself that there exists a valid arbitration agreement between the parties and that a dispute which is referable to the arbitral tribunal has arisen. Further, as is evident from the language of Section 9 itself, an order can be made under the said provision for an interim measure of protection only in respect of the matters specified in Section 9(ii)(a) to (e). The underlying object of all the Clauses (a) to (e) of Section 9(ii) is to preserve the property which is the subject matter of dispute till the arbitral tribunal decides the dispute. The scope of relief under Section 9 therefore, cannot be extended to directing specific performance of the contract itself, though the Court must have due regard to the underlying purpose of the conferment of the power upon the Court i.e. to promote the efficacy of arbitration as a form of dispute resolution.”

17.2 It was further observed in para 51 as under:

“51. Further, where Section 9 of the Act is invoked to secure the amount in dispute in arbitration, like the case on hand, it is also necessary for the Court to satisfy itself that the assets which are the subject matter of arbitration, are about to be alienated or removed beyond the limits of the court with an intent to obstruct or delay execution of the award. An order restraining the opposite party from dealing with his properties being drastic in nature, grant of such relief has necessarily to be based on the principles governing Order 38 Rule 5 CPC and before passing such an order the Court has to ensure that a specific case is made out that the party against whom such an order is proposed to be made is attempting to remove or dispose of the assets with the intention of defeating the decree/award that may be passed.”

17.3 The Court in *C V Rao and Krishnapatnam Port Company Limited*,

Chinta Investments Private Ltd (*supra*) referred to the decision in *Raman Tech. & Process Engg. Co. v. Solanki Traders* (*supra*) which reiterated that the power under Order XXXVIII Rule 5 CPC is a drastic and extraordinary power “the purpose of which is not to convert an unsecured debt into a secured debt.” What is important to note for the purposes of present case is the following observation in *Raman Tech. & Process Engg. Co. v. Solanki Traders* (*supra*):

“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.”

18. Turning to the decisions cited by learned counsel for HCCL, in ***Baker Hughes Singapore Pte. v. Shiv-Vani Oil and Gas Exploration Services Ltd.*** (*supra*), the Bombay High Court noticed the decision of this Court in ***Intertoll ICS Cecons v. National Highways Authority of India*** (*supra*) and distinguished it on the basis that what was claimed in the proceedings was not speculative in nature. The following passage in ***Baker Hughes Singapore Pte.*** (*supra*) makes the position clear:

“58. In my view even if the counter claim made by the respondent was for amount higher than the claim made by the petitioner, fact remains that the said counter claim was a speculative claim for damages whereas the claims made by the petitioner was in my prima facie view under undisputed invoices, which claim was admitted and liability was acknowledged in the correspondence by the respondent.”

19. Likewise, even in ***Gatix India Pvt. Ltd. v. Arshiya Rail Infrastructure Ltd.***(*supra*), a distinction was drawn by the Court itself between speculative and non-speculative claims and the interim direction was granted only in respect of the liabilities that could be determined. Therefore neither of the above decisions support HCCL.

20. In the present case, an analysis of the claims of the HCCL reveals that a substantial part of the claims is for losses sustained by it on account of the suspension of the contract. In other words, a substantive portion of the claim

is only in relation to speculative losses which are not quantified and in respect of which no sum can be determined till after the evidence is led by the parties. Although it was sought to be pointed out by learned counsel for the HCCL that some of the claims included amounts wrongly determined as environmental cess, re-imbursement of service tax and electricity charges, which cannot be said to be speculative, the Court finds that the AT itself has not applied its mind to the distinction between the substantive claims which are speculative in nature and those that are not. Therefore, the impugned order of the AT to that extent is erroneous.

21. The AT, in the considered view of the Court, also erred in observing that under Clause 53.2 of the GCC, the Respondent i.e., Lanco had a right to inspect the records and if necessary, seek clarification and further documents from the claimant i.e., HCCL. Clause 53.2 of the GCC in fact reads as under:

“53.2 Upon the happening of the event referred to in Sub-Clause 53.1, the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Employer’s liability, the Engineer shall on receipt of a notice under Sub-Clause 53.1 inspect such contemporary records and may instruct to keep any further contemporary records as are reasonable and may be material to the claim of which notice has been given. The Contractor shall permit the Engineer to inspect all records kept pursuant to this Sub-Clause and shall supply him with copies thereof as and when the Engineer so instructs.”

22. Under Clause 53.2 it is plain that the right of inspection is given to the Engineer and not to the contractor which in this case is Lanco. Further, the

AT also appears to have erred in overlooking Clause 69.4 of the contract which reads as under:

“69.4 Without prejudice to the Contractor’s entitlement to interest under Sub-Clause 60.10 and to terminate under Sub-Clause 69.1, the Contractor may, if the Employer fails to pay the Contractor the amount due under any certificate of the Engineer within 28 days after the expiry of the time stated in Sub-Clause 60.10 within which payment is to be made, subject to any deduction that the Employer is entitled to make under the Contract, after giving 28 days’ prior notice to the Employer with a copy to the Engineer, suspend work or reduce the rate of work. If the Contractor suspends work or reduces the rate of work in accordance with the provisions of this Sub-Clause and thereby suffers delay or incurs costs the Engineer shall, after due consultation with the Employer and the Contractor, determine:

- (a) any extension of time to which the Contractor is entitled under Clause 44, and
- (b) the amount of such costs, which shall be added to the Contract Price, and shall notify the Contractor accordingly, with a copy to the Employer.”

23. Without there being a certification of the amounts due, there cannot be said to be any liability much less any admitted liability of Lanco.

24. The AT also appears to have erred in concluding in para 27 of the impugned order that the claims were on account of Lanco’s inability to make payments of certified amounts to the claimants. As has been pointed above, none of the amounts for which the claims were made at least to the extent of claims for losses and costs on account of suspension were certified

in terms of clause 69.4 GCC. In respect of this, all that the AT says is that its attention was drawn to various letters which *prima facie* establish the claimant's entitlement to payment in terms of Clause 69.4 of GCC. The AT also appears to proceed on the basis that in respect of those claims, Lanco did not deny liability but only asked for re-quantification and re-submission of the claims. Reference is then made to the minutes of the meetings dated 10th and 11th February, 2014.

25. In the considered view of the Court, what was completely overlooked by the AT in making the above observations was that there was no admission as such by Lanco of any of the claims as is evident from letters placed on record by HCCL. Even the minutes of the aforementioned receipts referred to by the AT have not been countersigned by the Lanco. Indeed, learned counsel for HCCL was unable to point out any letter in which Lanco expressly admitted to its inability. The mere fact that Lanco asked HCCL for re-quantification or re-submission of the claims cannot be understood as an implied admission by Lanco of such re-submitted claims.

26. The erroneous interpretation of Clause 53.2 of the GCC by the AT led it to further erroneously observe that since Lanco did not take steps pursuant to Clause 53.2 of the GCC, it was estopped from questioning or challenging the very same contemporary record which was part of the arbitral record. These observations are plainly unsustainable in law since the AT failed to note that no part of the substantive claim of HCCL for costs and losses on account of suspension of the contract was a certified claim in terms of Clauses 53.2 and 69.4 of the GCC.

27. It is also clear from the impugned order that the AT failed to come to any conclusion even *prima facie* that Lanco was about to dispose of or remove whole or part of its assets from the local limits of the AT which was one of the contentions warranting exercise of power under Order XXXVIII Rule 5 CPC the underlying principle of which, as explained in the decisions examined hereinbefore, apply to Section 17 of the Act as it stood prior to the amendment with effect from 23rd October, 2015.

28. Learned counsel for HCCL sought to refer to the letter dated 10th August, 2015 written by Lanco Infra Tech Ltd. to NSEIL where it was stated that “as a part of the process to consolidate business and to reduce debt, Lanco Group has undertaken sale of some of its assets and bringing in strategic investors in others.” This one sentence in the letter could not by itself lead to an inference that Lanco was about to dispose of whole or part of its property with an intention to obstruct or delay the award that might be passed against it. It was overlooked by the AT that the above move was part of the SDR for which the lenders' approval was mandatory. Consequently, the Court is unable to draw even a *prima facie* conclusion, on the basis of the said letter, that the essential prerequisites of Order XXXVIII Rule 5 CPC stand satisfied.

29. In sum, there was no case made out by HCCL for the AT to have issued the mandatory interim injunction in the manner it did, as requiring Lanco to furnish 50% of the claim amount in the form of bank guarantee.

30. Consequently, the impugned order of the AT is set aside. It is clarified

that any observation made on merits by the Court in this judgment shall not influence the final decision of the AT. However, at the same time, the AT would pass the final Award independent of and without reference to the impugned order passed by it which has been set aside by this order.

31. The appeal is allowed in the above terms but, in the circumstances, with no order as to costs.

IA No.10448/2016

32. In view of the appeal having been allowed, the application does not survive for consideration and is disposed of.

SEPTEMBER 23, 2016
dn

S. MURALIDHAR, J