

ssp

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL APPEAL (L)NO.13 OF 2017
IN
COMMERCIAL ARBITRATION PETITION NO.105 OF 2016

Wind World (India) Ltd. ...Appellant
vs.
Enercon GmbH and others ...Respondents

Shri Ravi Kadam, Senior Advocate a/w Mr.Abhilesh Sharma, Mr.Asadali Mazgaonwala and Ms Eram Qureshi i/b M/s.Kartikeya and Associates for the appellant
Mr.Janak Dwarkadas, Senior Advocate a/w
Mr.S.U.Kamdar Senior Advocate, Mr.Karl Tambarly
Mr.Jehangir Jejeebhoy, Mr.Vivek Vashi, Ms Kanita Sharma, Ms Shaheda Madraswala i/b Bharucha & Partners for the respondent Nos.1 and 2
Mr.Aditya Mehta, Mr.Vineet Unnikrishnan, Ms Ayesha Talpade and Mansha S. i/b M/s.Cyril Amarchand Mangaldas for respondent Nos.4 and 5.

CORAM : A.S.OKA, &
A.K.MENON,JJ.
DATE : APRIL 19, 2017

ORAL JUDGMENT: (PER A.S.OKA,J.)

1 We have heard the learned senior counsel representing the parties yesterday. The challenge in this appeal is to the order dated 7th February 2017 passed by the learned Single Judge in a Petition under Section 9 of the Arbitration and Conciliation Act,1996 (for short "The Arbitration Act") filed by the appellant. By the impugned order, the said petition under section 9 has been rejected by the learned Single Judge on the ground that the same is not maintainable.

2 As submissions made across the bar are confined to the issue of maintainability of the Appeal. We are making a very brief reference to the facts of the case.

3 Under the orders of the Court, the dispute between the parties was referred to the arbitration. The first and the second respondents herein were the claimants before the Arbitral Tribunal and the present appellant and the fourth and fifth respondents herein were the respondents. During the pendency of the proceedings before the Tribunal, the first procedural order was passed on 24th January 2015 by the learned Arbitral Tribunal which is described as PO-1. Under the said PO-1, the Arbitral Tribunal directed disclosure of certain confidential information on condition that the appellant may redact the names of suppliers and competent manufacturers and any other parts that point to their identity from commercial documents and provide an unredacted copy of confidential information documents to the third respondent to be held in a sealed envelope pending the further proceedings. The documents were to be kept confidential by the Arbitral Tribunal. Accordingly, redacted documents were provided to the first and second respondents and a complete set of documents without redaction was kept in a sealed envelope with the third respondent.

4 The Arbitral Tribunal made an Award which was

communicated on 3rd October 2016. The petition before the learned Single Judge was filed on 7th September 2016 in anticipation of the Award being made by the Arbitral Tribunal.

5 By order dated 8th September 2016, the third respondent (the London Court of International Arbitration) was directed to remain present before the learned Single Judge through his representative and/or Advocate on 19th September 2016. A direction was issued against the third respondent not to hand over any document deposited with it. The parties were directed to maintain confidentiality regime as established by PO-1 which was operating during the pendency of the Arbitral proceedings.

6 On 28th September 2016, the learned Single Judge issued a direction to the third respondent to deposit all documents held by it with the Prothonotary and Senior Master of this Court. There is no dispute that compliance with the said order was made and ten boxes containing complete documents were placed in the custody of the Prothonotary and Senior Master.

7 At this stage, we may make a reference to the Award made by the Arbitral Tribunal. The operative part of the Award is in paragraph 331 which reads thus:

"331 We Leonard, Lord Hoffmann, Justice R. V.

Raveendran and Mr.V.V.Veeder QC, having read the parties written evidence, pleadings and submissions and having heard the oral evidence and submissions, and having carefully considered the same and for the reasons stated above (save for the matters as to which Mr.R.V.Raveendran expresses a minority opinion in Appendix A), make our Final Award as follows:

(1) The Tribunal declares:

(a) The IPLA executed by the parties thereto on 30th September 2006 was intended to create legal relations and was a valid and binding contract;

(b) The Mehra directors caused WWIL to repudiate liability under the IPLA and to commit breaches of the IPLA amounting to a repudiation thereof;

(c) The Claimants accepted the repudiation and terminated the IPLA on 8th December 2008;

(d) WWIL was indebted to Enercon in respect of (a) royalties due under the IPLA until its date of termination and (b) damages for wrongful use of its intellectual property and technology after termination until 8 September 2015 in the sum of Pound 55.2 million and interest;

(e) Pursuant to clause 13(1)(b) of the IPLA, WWIL is not entitled to use or exploit the confidential Technology disclosed by the Claimants to WWIL during or before the

subsistence of the IPLA and is obliged to return to Enercon documents or materials which contain such Technology;

(f) WWIL is indebted to Enercon for components and materials sold and delivered before May 2008 in the sum of Pound 19,025,296.38 and interest;

(2) The Tribunal orders WWIL -

(a) To pay to Enercon-

(i) Pound 55,200,000 in respect of royalties due under the IPLA together with interest thereon in the sum of Pound 7.9 million until 8 September 2015 and thereafter at the rate of 3% over European Central Bank rate until the date of this Award;

(ii) Pound 19,025,296.38 in respect of components and materials sold and delivered together with interest in the sum of Pound 5.9 million until 31 March 2016 and thereafter at the rate of 3% over European Central Bank rate until the date of this Award;

(b) To return to Enercon the documents and other materials containing the confidential Technology (as defined in the IPLA) disclosed to WWIL pursuant to the TKHA and IPLA;

(c) To allow Enercon, pursuant to clause 6.1(b) to inspect its books and records and take relevant copies.

(3) The Tribunal orders the Second and Third Defendants;

(a) Not to prevent or obstruct Enercon or its

nominated directions from exercising their rights under the SHA or as directors to -

(i) Receive notice of board and company meetings

(ii) Obtain information about the affairs of the company;

(iii) Secure the appointment of auditors by the company in general meeting;

(b) Jointly and severally -

(i) to pay to WWIL the sum of INR 6,772,456,570 being the profit made by Vish Wind on the sale of allotment rights to WWIL in the years ending 31 March 2011 and 2012 together with interest thereon at the rate of 3% over European Central Bank rate from those dates until the date of this Award

(ii) to pay to the Claimants their legal and other costs in the sum of Pound 3,794,970

4 All other claims and counterclaims are dismissed.

5 From the date of the award, all sums payable will carry interest in accordance with section 31(7)(b) of the Indian Arbitration and Conciliation Act,1996."

8 We may also note here that a petition under Section 34 of the Arbitration Act has been preferred by the present appellant for challenging the Award which is pending before the learned Single Judge of this Court.

9 Before the learned Single Judge in the petition under section 9 of the Arbitration Act filed by the appellant, the first prayer which was pressed into service was of continuation of PO-1 till the final disposal of the aforesaid petition under section 34 of the said Act. The second prayer which was pressed was for issuing a restraint order against the first and second respondents from addressing correspondence to the third parties. Thirdly, a restraint order was sought against the third respondent from passing of un-redacted documents to the first and second respondents. The fourth relief which was sought will not survive in view of the compliance made by the third respondent with the directions issued by the learned Single Judge on 28th September 2013. Even the third prayer will not survive in view of the said order.

10 The learned Single Judge relied upon the decision of a Division Bench of Court in the case of Dirk India Private Limited and another vs. Maharashtra State Electricity Generation Company Limited and another¹. Relying upon the said decision, the learned Single Judge held that the petition under section 9 of the Arbitration Act is not maintainable at the instance of the present appellant.

11 The learned senior counsel appearing for the appellant has taken us through the decision of the Division Bench in the case of Dirk India Private

1 2013 (7) Bom.C.R.493

Limited (supra). His submission is that the decision in the case of Dirk India Private Limited needs reconsideration by a larger Bench. His submission is that section 9 refers to a party and not to a successful party. He submitted that the Division Bench has read the term party to mean a successful party which is contrary to the definition of the term party in clause (h) of sub-section 1 of section 2. He invited our attention to phraseology used in sub-section 1 of section 9. He submitted that the phrase "before it is enforced" defines only a time line within which the party can move the Court with the petition under section 9. He submitted that it is a mistake to misconstrue the phrase restricting the right of a party under section 9 by confining it to a successful party to the Award.

12 Without prejudice to the aforesaid submissions, he contended that what is held by the Division Bench in the case of Dirk India Private Limited (supra) is in the facts of the case before it. He submitted that the ratio *decidendi* will have to be ascertained with reference to the facts of the case. He invited our attention to the factual situation in the case before the Division Bench. He submitted that the facts of the case in hand are completely different and if the decision in the case of Dirk India Private Limited (supra) which is confined to the facts of the said case is applied to the present case, it will lead to unjust results. His submission is that in such eventuality, the

petition under section 34 apparently will become infructuous. His submission is that if the appellant succeeds in the petition under section 34, the Award will be set aside as a result of which the appellant will be entitled to use the confidential technology and that the first and second respondents would not be entitled to un-redacted confidential documents which were submitted on the basis of PO-1. In such event, the appellant will be entitled to return of the said documents. He submitted that once un-redacted documents are handed over to the first and second respondents, it will virtually amount to the enforcement of the Award in the Petition filed by the appellant. He submitted that that is how the petition preferred by the appellant under section 34 will become infructuous, unless the relief as sought in the petition under section 9 is granted. He invited our attention to the decision of the Division Bench dated 23rd September 2015 in the case of Home Care Retain Marts Private Limited vs. Haresh N. Sanghavi². He submitted that the Division Bench observed that the ratio of the Judgment of this Court in the case of Dirk India Pvt.Ltd. (supra) raises debatable issues. He also pointed out that that the Special Leave Petition filed before the Apex Court for challenging the decision in the case of Dirk India Private Limited (supra) was withdrawn as a result of settlement. He also invited our attention to the decision of the learned Single Judge of this Court dated 26th March 2014 in the case

2 Appeal (L) No.701 of 2015 in Arb.Petn.No.1403 of 2015

of Kavis Fasions (P) Limited vs. M/s.Dimple Enterprises and others³ by which a petition under section 9 was dismissed by the learned Single Judge relying upon the decision of the Dirk India Private Limited (supra). He pointed out that the appeal against the said decision of the learned Single Judge has been dismissed and a Special Leave Petition is pending before the Apex Court in which the Apex Court has directed status quo to be maintained till the petition under section 34 is finally decided.

13 The learned senior counsel appearing for the first and second respondents supported the impugned Judgment and urged that no departure should be made from what is held in the case of Dirk India Private Limited (supra). The learned counsel for the second respondent submitted that even if arbitration petition filed by the petitioner for challenging Award is allowed, though the impugned Award will be set aside, the appellant will not be entitled to any relief.

14 We have given careful consideration to the submissions. Section 9 of the Arbitration Act reads thus:

"9. Interim measures, etc., by Court – (1) 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

3 Arbitration Petition (L) No.558/2014

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.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.)"

(underline supplied)

15 We have carefully perused the decision of the Division Bench of this Court in the case of Dirk India Private Limited (supra). From paragraph 11 onwards, the Division Bench considered the scheme of section 9. In paragraph 12, the Division Bench referred to the definition of the term "party" under clause (h) of sub-section (1) of section 2. The Division Bench also noted that section 9 contemplates that a "party" may apply to the Court. The Division Bench referred to the nature of reliefs which can be granted under section 9. In paragraphs 13 and 14, the Division Bench held thus:

"13 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.

14. 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."

16 We have carefully analyzed what is held by the Division Bench in the case of Dirk India Private Limited (supra). After considering the reliefs which are capable of being granted in a petition under section 9, the Division Bench held that interim measures of protection can be sought under section 9 during the pendency of the arbitral proceedings or before initiation of arbitral proceedings. Interim measures can be granted in the aid of final relief which could be granted in arbitral proceedings. Thereafter, the Division Bench considered as to what interim directions can be issued under section 9 when the same are sought after arbitral Award is made but before it is enforced. The Division Bench held that the measure of protection in such a case will be always a step in aid of the enforcement of the Award. It was held that it is intended to ensure that the 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. We may also note that in paragraph 14, the Division Bench has made a distinction between the first Appellate Court dealing with a decree passed in a civil suit and this Court dealing

with the petition under section 34 of the Arbitration Act. In the case of First Appellate Court, a party who has been denied relief by the Civil Court in a Suit, can succeed in the Appeal and get the decree passed in terms of the claim made by the said party either in the suit or in the counterclaim. In a case where the claim of a party is rejected by the Arbitral Tribunal, the Court hearing the petition under section 34 does not have power to pass an Award granting claim which is rejected by the Arbitral Tribunal. In such a case, while dealing with the petition under section 34, the Court may either dismiss the petition or set aside the Arbitral Award. Even if the Arbitral Award is set aside on a petition under section 34, the same does not result in granting of the claim made by the petitioner in such petition before the Arbitral Tribunal. Thereafter, the Division Bench referred to the facts of the case before it wherein the petition was filed under section 9 by a party whose claim was rejected by the Arbitral Award. Therefore, the Division Bench held that if such a petition is held as maintainable, it could result in perversion of the object and purpose underlying of section 9 of the Arbitration Act. Coming back to the paragraph 13, the Division Bench reiterated that interim measures of protection under section 9(ii) are intended to save and protect fruits of successful conclusion of the arbitral proceedings. In the context of the phrase "or at any time after making of the Arbitral Award but before it is enforced in accordance with section 36" used in

section 9, the Division Bench held that the party whose claim has been rejected in the course of arbitral proceedings cannot obviously apply for enforcement of an Award in accordance with section 36. The Division Bench in other words observed that the object and purpose of providing for grant of interim measure after passing arbitral Award till its enforcement is to secure subject matter of Award such as property, goods or amount for the benefit of the parties which are likely to seek its enforcement.

17 Thus, section 9 of the Arbitration Act is interpreted by the Division Bench to mean that before or during the arbitral proceedings any party within the meaning of clause (h) of sub-section (1) of section 2 can make an application for interim measures provided therein. However, after making of the arbitral Award, only a successful party which is entitled to seek the enforcement of the Award can apply to the Court under section 9 for protection in terms of clause (ii) of section 9.

18 As rightly observed by the Division Bench, even if a petition under section 34 filed by an unsuccessful party is allowed, at highest, the impugned Award can be set aside. The Court dealing with a petition under section 34 is not capable of granting any further relief to the party which challenges the Award. If an application is made at the instance of such an unsuccessful party under

section 9, there will not be any occasion to grant any interim measure which will be in the aid of the execution of the arbitral Award as such a party will not be entitled to seek enforcement under section 36. We, therefore, find no reason whatsoever to take a different view from the one which is taken by the Division Bench in the case of Dirk India Private Limited (supra). We are respectfully bound by the said decision. We do not agree with the submissions made by the learned Senior Counsel for the appellant that law laid down in paragraphs 13 and 14 cannot be read as a ratio decidendi.

19 We, therefore, uphold the decision taken by the learned Single Judge that the petition under section 9 at the instance of the appellant was not maintainable. We may clarify that in this Appeal, we are dealing with the issue of maintainability of an application under section 9 of the Arbitration Act. We are not dealing with the power of the Court empowered to entertain the petition under section 34 of the Arbitration Act to grant interim relief.

20 Subject to what is observed above, we find no merit in the Appeal and the same is accordingly dismissed.

21 At this stage, the learned counsel for the appellant prays for continuance of interim orders dated 7th February 2017 and 14th February 2017. The

prayer is opposed by the learned counsel for the second and fourth respondents.

22 Considering the issues raised in the Appeal, we direct that interim orders dated 7th February 2017 and 14th February 2017 will continue to operate for a period of four weeks from the date on which this Judgment is uploaded. Notice of Motion (L) No.11 of 2017 does not survive and the same is also disposed of.

(A.K.MENON,J.)

(A.S.OKA,J.)