

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION
COMMERCIAL APPEAL [L] 46 OF 2017
IN
COMMERCIAL ARBITRATION PETITION NO.180 OF 2016
WITH
SHOW CAUSE NOTICE NO.231 OF 2017

Glam India Private Limited & Anr. Appellants
Vs.
Mode Media, Inc. (erstwhile Glam Media,
Inc.) & Anr. Respondents

Dr. Abhinav Chandrachud with Ms Meghna Rao i/by
Vertices Partners for the Appellants.
Mr. Zubin Behramkamdin with Mr. Nooruddin Dhillal
i/by M/s. Cyril Amarchand Mangaldas & Co. for the
Respondents.

CORAM: S.C. DHARMADHIKARI &
SMT. VIBHA KANKANWADI, JJ.

DATE : AUGUST 07, 2017

P.C:

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) challenges an order dated 2-5-2017 passed by a learned single Judge on a petition

under Section 9 of the Act. The learned single Judge, according to the appellants/original petitioners, refused to grant any interim measure under Section 9.

2. Dr. Chandrachud, appearing in support of this appeal, raised two-fold contentions. The first contention is that, the powers of the learned single Judge under Section 9 are in no way restricted and do not have to follow strictly the principles enshrined in Order 38, Rule 5 of Code of Civil Procedure, 1908 (for short, "the CPC"). As held by this Court, these principles are but a guide in exercising the discretionary powers conferred by Section 9. Secondly, the appellants have made out a more than *prima facie* case, in the sense respondent No.1 has admitted the liability. The respondent No.1 has no assets and whatever little is left, is likely to be frittered away in the shape of a voluntary winding up proceedings. Merely because such a proceeding is pending, that too in a Court abroad and priorities of the claims are being determined there, does not mean in Indian Law and the scheme of the Arbitration Act interim measure cannot be provided. More so, when the arbitration is going to be held in

India. The proceedings are to abide by the arbitration procedure enacted in India. In the circumstances and the conduct of respondent No.1 throughout justifies grant of interim measure.

3. In support of this submission, reliance is placed upon a Judgment of learned single Judge rendered in Arbitration Petition No.1127 of 2014, decided on 11-11-2014 {***Baker Hughes Singapore Pte. Vs. Shiv-Vani Oil and Gas Exploration Services Ltd., (2015) 1 AIR Bom R 133***}.

4. On the other hand, Mr. Behramkamdin, learned counsel appearing for the respondents, would contend that there is no merit in any of these contentions of Dr. Chandrachud. He would submit that undisputedly there is a proceeding pending in the US Court. The proceedings are pending because the second respondent had in terms of an Agreement and copy of which was on record, styled as General Assignment made on 20-9-2016, agreed to meet all the claims against the debtor/first respondent. Today, the first respondent has nothing except pending claims, including that of secured creditors. Further, an

affidavit was filed in this Court relying upon the provisions of the US Law stating very clearly that in terms of this Assignment Agreement the first respondent's assets and properties have been transferred to the second respondent. In fact, the second respondent is referred to as Mode Media (Assignment for Benefit of Creditors) LLC. It is a special purpose vehicle set up for the sole purpose of liquidating the assets of the first respondent and paying its creditors. It is in these circumstances that the US Law has to be abided by and the priority order would be determined in terms of that law by the Competent Court there. In such circumstances, it is not that because there is a winding up petition pending, or that any assets are being removed that the learned single Judge could have passed an order providing for an interim measure by taking recourse to Section 9 of the Act. On the other hand, the conduct of the appellants also has some bearing, in the sense that though the learned single Judge has agreed to appoint a Sole Arbitrator with the consent of both sides, no attempt has been made to move in the matter. The Arbitration Agreement is stated to be of October, 2016, the

Assignment Agreement is of 20-9-2016 and the impugned order has been passed on 2-5-2017. Till date no steps have been taken to move the learned Arbitrator as well. For all these reasons, he would submit that the appeal be dismissed.

5. With the assistance of the learned counsel appearing for both sides, we have perused the appeal memo and all related papers. We have also perused the impugned order. The order of the learned single Judge is assailed essentially on the observations in para 5 thereof. We do not see, on a perusal of para 5, that the learned single Judge has carved out any principle which would run counter to the settled law. True it is that if a strong *prima facie* case is made out, an order for furnishing a security can be made and the powers in that regard are conferred by the very provision relied upon, namely, Section 9. The facts and circumstances of each case would have to be borne in mind before such an order can be made.

6. Then the learned single Judge has referred to the proceedings before the US Court, but what is material for us is

that these proceedings arise out of, and as rightly contended, the Assignment Agreement. The Agreement for Assignment is dated 20-9-2016. The petition under Section 9 of the Act was filed on 19-10-2016 by the appellants before us. While replying to the contentions on behalf of the appellants and placing reliance on the General Assignment Agreement, what is material to note is that the second respondent filed an affidavit in reply. It says that the debtor is the first respondent and the second respondent having entered into an assignment agreement has taken over all the assets and properties and it is nothing but a special purpose vehicle set up for the sole purpose of liquidating its assets and paying off the creditors. This Assignment Agreement enjoys a legal support and sanction under the US and California Laws. It is in these circumstances that not only the provisions of law but the present financial position of the first respondent was highlighted. There are two secured creditors and whose debt, according to the second respondent and this affidavit, would rank higher in priority but that is an aspect which has to be determined in terms of the Law applicable in the US and by the

Competent Court/Tribunal there. We do not find that the learned single Judge has applied any principle unknown to law or contrary to the provisions and particularly Section 9, as understood and applied by this Court. He has expressed his opinion that the petition for relief under Section 9 is filed much after this Agreement of Assignment, dated 20-9-2016, and the developments post the same. Secondly, in view of the applicable US Law, in the event any order and/or direction is issued by this Court running counter to claims or priorities which have to be determined by that Court, that would create a complication about the applicability of that law abroad. Such a situation was avoided by the learned single Judge in his discretion by referring to these Agreements, particularly the Assignment Agreement and the arrangements stipulated therein. Once there is an assurance coming in terms of this Agreement and this Agreement including the law applicable in the US, particularly California, that the learned single Judge expressed the opinion and which is assailed in this appeal. We do not think that the learned single Judge has deviated from any principle, much less

the law laid down in the decision of the learned single Judge of this Court and heavily relied upon by Dr. Chandrachud. In that Judgment the learned single Judge, Shri R.D. Dhanuka, J., was really concerned with the question as to whether the powers which are conferred on a Court under Section 9 can be exercised for granting measures under Section 17 of the Act. It is during the course of deciding this issue that he referred to the guiding principles and which have been enshrined and set out in Order 38 Rule 5 of the CPC. We do not think that the learned single Judge in the order impugned in the present appeal has ignored or brushed aside the same.

7. On facts, the learned single Judge found that this is not a fit case for making any order, much less in the form of an interim measure under Section 9. That is also justified because we find that beyond filing a petition under Section 9 and seeking a modification by consent of the Clauses/Agreements for Arbitration, nothing has been done in furtherance thereof. This is an additional reason for our disinclination to interfere in our appellate jurisdiction.

8. As a result of the above discussion, the appeal fails and is dismissed. No costs.

(SMT. VIBHA KANKANWADI, J.)

(S.C. DHARMADHIKARI, J.)