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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
ARBITRATION PETITION NO. 105 OF 2016**

Wind World (India) Ltd

...Petitioner

~ *versus* ~

Enercon GMBH & Ors

...Respondents

Mr Ravi Kadam, Senior Advocate, with Mr Shyam Mehta, Senior Advocate, Mr Z Andhyarujina, Mr Abhishek Sharma & Mr Asad Mazgaonwala, i/b Kartikeya & Associates, for the Petitioner.

Mr Janak Dwarkadas, Senior Advocate, with Mr SU Kamdar, Senior Advocate, Mr Karl Tamboly, Mr Jehangir Jejeebhoy, Ms Kanika Sharma & Ms Shaheda madrawala, i/b Bharucha & Partners, for Respondent Nos. 1 & 2.

Mr Rohan Kelkar, with Mr Indranil Deshmukh, Mr Aditya Mehta, Mr Vineet Unnikrishnan, Ms Olga Pereira & Mr Anush Mathkar, i/b Cyril Amarchand Mangaldas, for Respondents Nos. 4 & 5.

**CORAM: G.S. PATEL, J
DATED: 7th February 2017**

ORAL ORDER:-

1. In this Petition under Section 9 of the Arbitration & Conciliation Act 1996 (“**the Arbitration Act**”), the Petitioner,

Wind World (India) Ltd (“**Wind World**”) seeks relief to continue a procedural order passed by an arbitral tribunal.

2. On 14th February 2014, the Supreme Court of India referred disputes between Wind World and the present Respondents Nos. 4 and 5 (“**Yogesh Mehra**” and “**Ajay Mehra**”) on the one hand, and Respondents Nos. 1 and 2 (“**Enercon**”) and (“**Wobben**”) to arbitration in respect of various agreements *inter partes*. Enercon and Wobben were the claimants in the arbitration, and Wind World, Yogesh Mehra and Ajay Mehra the respondents.

3. On 5th September 2014, Enercon and Wobben filed an application under Section 17 for disclosure of documents *inter alia* covering the correspondence and documents between Wind World and various third parties. Wind World and the Mehra's resisted this application on various grounds.

4. On 24th January 2015 the arbitral panel passed what it described as its first Procedural Order, “**PO-1**”. By consent, it ordered Yogesh Mehra to set out on Affidavit in 30 days various details specified in that order. The Procedural Order allowed the redaction of the names of suppliers and component manufacturers. The London Court of International Arbitration (“**LCIA**”), the 3rd Respondent before me, was to hold an un-redacted set pending further orders. Following this, redacted documents were provided to Enercon and Wobben. Complete documents without redactions were kept in seal with the LCIA. Wind World and the Mehra's

objected to the demand for production of the unredacted documents.

5. A second Procedural Order followed on 22nd June 2015. This relate to documents Enercon and Wobben sought. Again, some details were allowed to be redacted. There was then a third Procedural Order of 11th July 2015 and this time the arbitral tribunal by a majority rejected a further application by Wind World and Mehras. That third Procedural Order was ultimately set aside by this Court. A Special Leave Petition from that order was withdrawn.

6. The result of this was that Enercon and Wobben had redacted versions of documents, while the LCIA held the complete versions.

7. The arbitration proceedings ultimately culminated in an Award. This is undated, but was communicated on 3rd October 2016. I will take that as the its date.

8. Wind World filed this Petition on 7th September 2016, in anticipation of the award.

9. On 8th September 2016, Kathawalla J passed this order:

Heard the Learned Senior Advocates appearing for the parties and the following order is passed:

(i) Respondent No.3 — The London Court of International Arbitration — shall remain present before this Court through their representative and/or Advocate on 19th September, 2016 at 3.00 p.m. In the meantime, Respondent

No. 3 shall not hand over any documents deposited with them by any of the parties to the above Arbitration Petition.

(ii) Pending the Arbitral Tribunal passing its award and for a period of four weeks thereafter, the parties shall maintain confidentiality regime as established by PO-1 and prevailing during the arbitral proceedings. Stand over to 19th September, 2016.

10. On 28th September 2016, Kathawalla J directed the LCIA to deposit all documents it held with the Prothonotary & Senior Master. The record shows that ten boxes containing the complete, unredacted documents were placed in the custody of the Prothonotary & Senior Master, where they currently remain.

11. The Arbitral Panel, by its Award of 3rd October 2016, held against Wind World and the Mehras and for Enercon and Wobben. Wind World has a pending challenge to that Award in a Petition under Section 34 of the Arbitration Act. It now seeks these reliefs pending the final disposal of its Section 34 Petition: first, a continuance of the first Procedural Order; second, a restraint order against Enercon and Wobben from addressing any correspondence to third parties in relation to these disputes; third, a restraint against the LCIA from passing on unredacted documents to Enercon and Wobben; and finally, a direction to LCIA to transfer the unredacted documents that it holds to the Prothonotary & Senior Master of this Court. The third and fourth of these reliefs obviously do not survive, since the documents in question are now with the Prothonotary & Senior Master. Mr Kadam for the Petitioner explains that the relief he seeks, however moulded or crafted, is to prevent Enercon and Wobben from accessing the un-redacted

documents, and, of course, a restraint against them from writing to outsiders about these disputes.¹

12. Mr Kadam straightaway says there is a decision of a Division Bench of this Court where, too, a losing party in the arbitration sought reliefs under Section 9. This is the decision in *Dirk India Pvt Ltd v Maharashtra State Electricity Generation Company Ltd.*² There, the petitioner seek Section 9 interim relief had lost in arbitration. The learned single Judge who heard the Section 9 petition passed an order slightly modifying the previous interim arrangement, one that held the field pending arbitration.³

13. In paragraph 6, the Division Bench summarized the submissions of the respondents on the maintainability of the Petition:

1 On facts: Wind World has not applied for a stay of the award. Enercon and Wobben have put it into execution. In separate proceedings, also before me, and which I will decide independently of this case, Wind World seeks a dismissal of the execution applications. It says that the arbitral proceedings having commenced before 23rd October 2015, the effective date of the Arbitration Amending Act, Wind World's Section 34 petition is governed by the law before the amendment; more precisely, that its mere filing of the Section 34 challenge petition results in an automatic stay.

2 (2013) 7 Bom CR 493.

3 Part of the issue in *Dirk India* related to the collection by Dirk India of Pulverized Fly Ash ("PFA"). This was to be lifted and transported. As an interim arrangement, the learned Single Judge hearing the Section 9 petition allowed Dirk India to lift about one third of the PFA from its choice of hoppers in terms of an earlier interim order. For the rest, the respondent was set at liberty to dispose of the PFA by auction, at which DIPL could also bid.

“6. Two appeals have been filed from the order of the learned Single Judge. In the appeal filed by MSEGCL, the maintainability of the petition under Section 9 of the Arbitration and Conciliation Act, 1996 is questioned. Learned Senior Counsel appearing in support of the appeal by MSEGCL submitted that:

(i) The scheme of Section 9 is that a protective order can be passed before or during the arbitral proceedings and after the making of the arbitral Award, but before it is enforced in accordance with Section 36;

(ii) The power of the Court to order an interim measure after the making of the arbitral Award and before it is enforced in accordance with Section 36 is to protect the party which has succeeded in the arbitral proceedings until the award is enforced;

(iii) The Court exercising jurisdiction under Section 34 does not exercise the powers of a Court of appeal and can only set aside an award on a petition under Section 34 if the challenge were to succeed. **Where a claim in arbitration has been dismissed, the Court under Section 34 cannot pass a decree in the manner of a Court of appeal. An interim measure under Section 9 is in aid of the final order that can be passed and even if the petition under Section 34 were to succeed, that would result in setting aside of the award.**

(iv) **A proceeding under Section 9 after the making of an arbitral award is at the instance of a party who wants the award to be enforced. If the arbitral tribunal has held against a party and has rejected its claim, there would be no occasion to maintain a petition under Section 9 since there is no question of the enforcement of the arbitral award at the behest of that party; and**

(v) What DIPL in substance seeks is an interim specific performance of its claim and the agreement despite the fact that the arbitral tribunal has specifically rejected the claim holding that specific performance was not to be granted.”

(Emphasis added)

The submission made in paragraph 6(ii) is the exactly the one made by Enercon and Wobben before me today.

14. In paragraphs 12 to 14, this is how the Division Bench dealt with the rival submissions.

“12. Now, at the outset, it must be noted that under Section 9, it is a party which can apply before the Court. The expression “party” is defined to mean in Section 2(h) a party to an arbitration agreement. Section 9 contemplates that a party may apply to the Court: (i) before arbitral proceedings; or (ii) during arbitral proceedings; or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. Now insofar as the stage prior to the commencement of arbitral proceedings is concerned, it is not necessary that arbitral proceedings must be pending or that a notice invoking arbitration should have been issued before an application under Section 9 is filed. (*Sundaram Finance Ltd. v. NEPC India Ltd.*). In a subsequent decision of the Supreme Court in *Firm Ashok Traders v. Gurumukh Das Saluja*, the Supreme Court observed that under Section 9, the Court formulates an interim measure to protect the right under adjudication before the arbitral tribunal from being frustrated. The reliefs which the Court may allow to a party under clauses (i) and (ii) of Section 9 were held to flow from the power vesting in the Court exercisable by reference to

“contemplated”, “pending” or “completed” arbitral proceedings, the Court being conferred with the same power for making specified orders as it has for the purpose of and in relation to any proceedings before it. At the same time, the Supreme Court held that a party having succeeded in securing an interim measure of protection before the arbitral proceedings cannot afford to stand by and sleep over the relief because the relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made “before” that is, in contemplation of arbitral proceedings. Consequently, when approached by a party by an application under Section 9, the Court would be justified in calling upon the party to explain how and when it proposes to commence arbitral proceedings and the scheme of Section 9 would obligate the Court to do so.

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 judgement 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 judgement 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.**”

(Emphasis added)

15. Mr Kadam has no quarrel with the propositions regarding the ambit of Sections 34 and 36. He does not suggest that in his Section 34 petition he can obtain a reversal of the award and a decree against Enercon and Wobben. All he says is this: should his Section 34 petition succeed, and he has every confidence that it will, the award will be set aside. The parties will then be in their respective positions *before* the arbitration. This is a situation in which Enercon and Wobben did *not* have the confidential, un-redacted documents. It cannot be, he says, that though their defence of the award fails, Enercon and Wobben nonetheless gain an advantage or benefit from an interim, procedural order passed during the arbitral proceedings. Once his challenge succeeds, parties must be relegated to their position before the arbitration commenced; to the *status quo ante*, as it were. For this reason, he submits that *Dirk India* must be read narrowly in the facts of that case. According to him, the crucial distinction between this case and *Dirk India* is that Wind World (and the Mehras), although respondents in the arbitration, enjoyed some protection at least to the extent that they were permitted to withhold from Enercon and Wobben complete (un-redacted) copies of documents. They were required to supply only redacted versions. This purpose is all but lost, Mr Kadam says, if he does not get immediate relief. The *Dirk India* Court had not before it anything remotely resembling such a situation. Indeed, the observations of

the *Dirk India* court on Sections 34 and 36 support him, says Mr Kadam: Enercon and Wobben cannot be better off if the Section 34 challenge succeeds and the award is set aside, which is one of the only two alternatives available to the court in that petition, than they were before the arbitration began. In Mr Kadam's Section 34 award challenge, Enercon and Wobben cannot simultaneously fail and yet succeed, coming out ahead with a benefit they did not earlier enjoy.

16. Mr Kadam also says that PO-1, the procedural order in question, was not on a finding in favour of Enercon and Wobben. It did not come about as part of the final award. It was an interim procedural order and it segregated the redacted documents from those that were not. The latter were held by a neutral third party. They were not allowed to pass into Enercon's and Wobben's hands. That is a position that continues to this day. There is no reason to alter that *status quo*, and Mr Kadam says he seeks nothing more than this.

17. Mr Kadam then says the opening lines of Section 9 of the Arbitration Act do not contain the kind of restriction that the Division Bench read into it, limiting its application post-award only to a successful party.⁴ I understood the submission to mean that I should strive to find fault with the Division Bench judgment and then refer it for reconsideration, or at least something along those lines. I confess I do not know what to make of this submission now that I have *Dirk India* in hand. I cannot possibly distinguish *Dirk*

4 **“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 to a Court:”

India on this ground, nor is it a reason to say that *Dirk India* was decided *per incuriam*, simply because it was not. To accept Mr Kadam's submission would simply be jurisprudential misadventure.

18. Returning to the earlier submissions — on the continuance of the *status quo* and PO-1 — the question is not of what is equitable, but whether Wind World's petition under Section 9 is at all maintainable. That goes to the root of the exercise of any discretion under Section 9. As the foregoing extract shows, the *Dirk India* appeal court considered the whole of Section 9, its interpretation, and the situations in which it applies. The Division Bench said a purposive and contextual interpretation of Section 9 could only yield one conclusion — the legislative intent was to allow a Court to grant interim protection post-award and before enforcement *for the benefit of the party seeking enforcement of the award*. Section 9 is intended to protect “the fruits” of a successful conclusion of the arbitration. A losing party in the arbitration cannot ‘enforce’ the award. That is to be done under Section 36 and it is always only at the instance of a person who succeeded in the arbitration and obtained a favourable award. Therefore, a petition under Section 9 at the hands of a losing party is not ‘a step in aid’. It is simply not maintainable.

19. Mr Kadam's argument that *Dirk India* was decided on the peculiar facts of the case and must be limited to those is not one that I can, therefore, accept. Of course it is settled law that a decision is an authority and precedent only for what it actually decides.⁵ But that on its own does not carry Mr Kadam the necessary distance.

⁵ *Sreenivasa General Traders & Ors v State of Andhra Pradesh & Ors*, (1983) 4 SCC 353.

Dirk India decided, on a close reasoning, the ambit, purpose and context of Section 9. I am not prepared to shoehorn it into some small box and set the law adrift. Apart from anything else, the consequences of what Mr Kadam says are unimaginable. I see no reason why, on an acceptance of his argument, every single unsuccessful party in an arbitration could not then seek all manner of interim reliefs, although he might not be able to get these in his award challenge under Section 34, that not being an appeal in the strict sense.

20. In complete fairness, Mr Kadam also points out that *Dirk India* has been followed by SC Gupte J in *Kavis Fashions Pvt Ltd v Dimple Enterprises & Ors*,⁶ a decision that was upheld in Appeal.⁷ In a Special Leave Petition from the Division Bench order, the Supreme Court ordered a *status quo*.⁸ That is surely a very different thing from saying the decision in *Dirk India* is not good law. As Gupte J said in the case before him, the ratio of *Dirk India* is clear. It squarely applies.

21. This Arbitration Petition is not maintainable. It is dismissed.

22. Mr Kadam's requests the ad-interim order of 8th September 2016 to continue. I am inclined to allow this for a short time. The first part of that order restraining LCIA from handing over documents is now redundant since the documents are already with

6 Arbitration Petition (L) No. 558 of 2015, decided on 26th March 2014.

7 Appeal (L) No 2017 of 2014, decided on 10th April 2014.

8 Special Leave Petition (Civil) No 12279 of 2014, order dated 9th May 2014.

the Prothonotary & Senior Master of this Court. Clause (ii) of that order needs some modification with the passage of time. The following order, in partial modification of the 8th September 2016 order, will, therefore, for three weeks from the day this order is uploaded:

For a period of three weeks from the day this order is uploaded, the parties will maintain the confidentiality regime established by PO-1 (Procedural Order-1), which continued during the arbitral proceedings, and was continued by the order dated 8th September 2016.

23. No costs.

(G. S. PATEL, J.)