

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 28TH DAY OF SEPTEMBER 2018

THE HON'BLE MR. JUSTICE C.SARAVANAN

A. Nos.4291 & 6765 of 2018

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Tamil Nadu Water Supply and Drainage Board,
rep. by its Managing Director,
TWAD House, Kamarajar Salai,
Chepauk, Chennai-600 005. Applicant

-Versus-

1. The Pioneer Engineering Syndicate,
Engineers and Contractors,
6th Floor, Pioneer House,
Samjiguda, Hyderabad.
2. N.Pushpalatha,
W/o.Mr.N.Manishankar,
3. N.Nagarjun,
S/o.Mr.N.Manishankar,
2 & 3 are residing at house No.6-9-2,
Ground Floor, Sugar Colony, Ward No.28,
Palakollu, West Godavari District,
Andhra Pradesh-534 260.
4. Mr.N.Maniprakash,
S/o.Late Mr.N.Subramanyom,
Managing Partner,
The Pioneer Engineering Syndicate,
residing at House No.15,
Road No.2, Castle Hills,
Masab Rank, Hyderabad-500 057.
5. Mrs.N.Rajeswari,
W/o.Mr.N.Manimahan,
Partner, The Pioneer Engineering Syndicate,
Subhagya Convention Hall,

Opposite Cancer Hospital,
Elluru, West Godavari District,
Andhra Pradesh-534 007.

6. Mr.N.Nagaraj,
S/o.Late Mr.N.Manibushan,
Partner, The Pioneer Engineering Syndicate,
House No.1-10-38, Ashok Nagar,
Hyderabad-500 020.
7. Mr.Nagabushan,
S/o.Mr.N.Maniprakash,
Partner, The Pioneer Engineering Syndicate,
residing Atg House No.15, Road No.2,
Castle Hills, Masab Tank,
Hyderabad-500 057.
8. Mr.N.Nagender,
S/o.Mr.N.Manimohan,
Partner, The Pioneer Engineering Syndicate,
Subhagya Conventgion Hall,
Opposite Cancer Hospital,
Eluru, West Godavari District,
Andhra Pradesh-534 007.
9. Mr.V.L.Narasimha Rao,
Managing Partner (Retired),
10. Ms.V.Padmini,
Partner (Retired),
11. Ms.V.Sathyavathy,
Partner (Retired), सत्यमेव जयते
12. Ms.V.Shalini Prasanna Kumari,
Partner (Retired),
13. Ms.V.S.H.Praveena,
Partner (Retired),
9 to 13 are at
The Pioneer Engineering Syndicate,
House No.1-2-593/14,
Gagan Mahal Colony, Domalgudu,
Hyderabad-500 029.

14. Ms.G.Ranga Rao,
S/o.Mr.G.A.Narayana Rao,
(Deceased Partner of
The Pioneer Engineering Syndicate),
House No.1-10-38, Ashok Nagar,
Hyderabad-500 020.
 15. Mr.J.Murali Krishna,
S/o.Mr.J.V.Sreeramamurthy,
(Deceased Partner of
The Pioneer Engineering Syndicate),
Plot No.302, Lakshmi Pride Apartment,
Srinivas Nagar, Madhura Nagar,
Nizampet, Outbuylapur Mandal,
Hyderabad-500 090.
 16. Mr.J.K.Paradesi,
S/o.Mr.J.K.V.Sarma,
(Deceased Partner of
The Pioneer Engineering Syndicate),
Flat No.3A, Khandala Block,
Maytas Hill County, Bachupally,
Hyderabad-500 090.
 17. The Pioneer Engineering Syndicate,
a firm of partnership,
rep. by its Managing Partner,
Mr.N.Maniprakash,
residing at House No.15, Road No.2,
Castle Hills, Masab Tank,
Hyderabad-500 057.
- ... Respondents

A. No.4291 of 2018:-

Application praying that this Hon'ble Court be pleased to permit the applicant/TWAD board to deposit Rs.16,69,33,890/- on the file of the Hon'ble High Court of Madras and consequently to direct the respondents M/s.Pioneer Engineering Syndicate to execute the sale deed in respect of the lands scheduled herein in the name of the TWAD Board and in the event of refusal, direct the Assistant Registrar, Hon'ble High

Court Madras to execute the sale deed on behalf of M/s.Pioneer Engineering Syndicate/Respondents.

A. No.6765 of 2018:-

Application praying that this Hon'ble Court be pleased to permit the applicant/TWAD board to deposit Rs.16,69,33,890/- (Rupees sixteen crores sixty nine lakhs thirty three thousand eight hundred and ninety only) to the credit of the above main A. No.4291 of 2018, within the time stipulated by this Hon'ble Court.

These applications coming on this day before this court for hearing the court made the following order:-

A.No.4291 of 2018 has been filed to permit the applicant to deposit Rs.16,69,33,890/- (Rupees Sixteen Crores Sixty Nine Lakhs Thirty Three Thousand Eight Hundred And Ninety only) to the credit of the application no. 4291/2018 within the time stipulated by this Court and do consequently to direct the respondents particularly Respondent No. 1 to execute a Sale deed in favour of the applicant and in the right of event of refusal, to direct the Assistant Registrar, Madras High Court to execute the sale deed in favour of the applicant TWAD Board.

2. A.No.6765 of 2018 has been filed as a sub-application by the applicant to permit the applicant to deposit

Rs.16,69,33,890/- (Rupees Sixteen Crores Sixty Nine Lakhs Thirty three thousand Eight Hundred and Ninety only) to the credit of the application no.4291/2018 within the time stipulated by this Court.

3. The issue under consideration before this court is whether the applicant is entitled to invoke section 9 of the Arbitration and Conciliation Act, 1996? If so, whether the applicant is entitled to invoke the jurisdiction of this court? And whether the reliefs prayed for can be granted to the applicant?

4. The respondents 2 to 17 are the partners and the legal heirs of the some of partners of the 1st respondent herein.

5. The applicant states that three Arbitration awards dated 28.10.1997 were passed against the applicant which were ultimately affirmed by the Hon'ble Supreme Court in Special Leave to Appeal (C) Nos. 22894 to 22896 of 2017 dated 15.9.2017 whereby the applicant was directed to pay to the 1st respondent a net amount of Rs.16,69,33,890/-.

6. The applicant contends that due to muliple disputes

between the partners of the 1st respondent, the applicant be permitted to deposit the amount in the main application on the file of this Court.

7. The 1st and 4th respondents have raised a common preliminary counter. The 2nd and 3rd respondents have filed a common counter while the 6th respondent has filed a separate counter.

8. The 1st and 4th respondents have filed preliminary objection questioning the maintainability of the applications. 1st and 4th respondents aver and contend that the applicant having suffered an award, cannot seek any relief under section 9 of the Arbitration and Conciliation Act, 1996.

9. Further it is contended on behalf of the 1st and 4th respondents that there was neither a claim nor pleading in relation to the schedule mentioned property in the Arbitration proceedings. Hence, it was contended that the prayer for execution of sale deed which is nature of specific performance cannot be made under Section 9 of the Arbitration and Conciliation Act, 1996.

10. Hence the 1st and 4th respondents seeks for dismissal of the above applications.

11. The 2nd and 3rd respondents by a common counter and 6th respondent by a separate counter have pleaded for rejection of the counter filed by 1st and 4th respondent and have supported the plea of the applicant and to direct the applicant to deposit the amount to the credit of the application and transfer the same to a national bank and kept in a fixed deposit. According to them the amount due is Rs.23,48,56,181 from the applicant.

12. Prior to the awards being passed and immediately thereafter also several litigations which came to be filed before this court.

13. It is noticed that after the three awards were passed, the applicant had challenged the three awards in O.P. Nos. 77 to 79 of 1999 under section 34 of the Act. The said OP came to be dismissed by this Court by an order dated 16.6.2008.

14. Aggrieved by the said order, the applicant had filed

O.S.A. Nos.179 to 181 of 2009.

15. The applicant was directed to pay an amount of Rupees One Crore by an order dated 20.7.2009 by the Hon'ble Division Bench of this Court in miscellaneous applications filed in OSA.No. 179-181 of 2009. The amount is still laying with the Court.

16. Eventually, O.S.A.Nos.179 to 181 of 2009 came to be dismissed by the Hon'ble Division Bench of this Court by its common order dated 26.7.2016.

17. Aggrieved by the same, SLP were filed vide SLP Nos. 22894-896 of 2017.

18. The Honourable Supreme Court disposed the above case vide its order dated 15.9.2017 with the following order:

"Having heard learned counsel for the parties, we reduce the rate of interest at 9%. The amount shall be paid to the respondent within three months hence."

19. As the applicant was unable to remit the same in

time, it filed miscellaneous applications before the Hon'ble Supreme Court for extension of time to deposit the amount. The Honourable Supreme Court extended the time up to 31.5.2018 by its order dated 16.3.2018.

20. While disposing the miscellaneous applications, it was made clear Supreme Court's Registry shall not entertain any application for extension of time to deposit the amount.

21. During the interregnum dispute broke out between the partners of the first respondent firm. All the partners have been arraigned as parties before this Court though only 2nd, 3rd, 4th and 6th respondents have participated in the present case.

22. The 2nd respondent had originally filed OA. No.6405 of 2017 wherein the applicant was arraigned as garnishee by an order dated 8.11.2017, the applicant was directed to effect payment as per the order dated 15.9.2017 of the Honourable Supreme Court to the credit of the said Application .

23. The 2nd and 3rd Respondents thereafter filed OP No. 850 of 2017 for appointment of an arbitrator to adjudicate the dispute between the respondent herein.

24. As the dispute between the respondents are arbitrable and subject to the jurisdiction of the AP and Telangana High Court, both OP No. 850 of 2017 and OA. No. 6405 of 2017 were dismissed as withdrawn by a common order dated 8.2.2018. It is in this background the above applications have been filed.

25. Heard learned Counsel M/s.S.Tamilaraisi for the Applicant, learned Counsel Mr.T.K.Bhasker for the 1st and 4th Respondent, learned Counsel Mr.R.Venkatachalapaty for the 2nd and 3rd Respondent and learned Counsel Mr.V.R.Kamalanathan for the 6th Respondent.

26. The 1st respondent and the 4th Respondent press for dismissal of the two applications while the other partners namely the 2nd, 3rd and the 6th respondents pray for passing of suitable order in support of the two applications A.No.4291 and 6765 of 2018 in view of infighting among the partners of the 1st respondent who are the other respondents. They prayed that the amount of Rs.23,48,56,181/- be directed to be deposited to the credit of the above applications.

27. Learned Counsel for the 1st and 4th respondent submitted that avenue for the applicant under Section 9 is not available in view of the well settled principle of law as per the following decisions of the Court .

- i) **Dirk India Pvt., Ltd., vs. Maharashtra State Electricity Generation Co., Ltd.,**
- ii) **Archer Power Systems Private Ltd., vs. Kohli Ventures Ltd., and Ors.** O.A.No.347 of 2017
- iii) **Singhania Horizons vs. HRC Engineers Estate Private Ltd., and Ors.**
- iv) **ONGC vs. Consortium of Sime Darby Engineering Sdn Bhd and Ors.**
- i) **Wind World (India) Ltd. Vs. Enercon GmbH and Ors,** Crl.A.No.13 of 2017

28. In the case of **Dirk India Private Limited v. Maharashtra State Electricity Generation Company Ltd., 2013 SCC OnLine Bom 481**, the Division Bench of the Bombay High Court held as under: सत्यमेव जयते

"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."

29. Rest of the decisions cited by the learned counsel for the 1st and 4th respondents follow the above cited and have approved the above Judgment of the Hon'ble Division Bench of the Bombay High Court.

30. Learned Counsel submitted that the applicant is in breach of the orders of the Hon'ble Supreme Court in as much as the amount sought to deposited is contrary to order dated 15.09.2017 of the Hon'ble Supreme Court as extended on 16.03.2018.

31. Learned Counsel further submitted the prayer of execution of a sale deed cannot be countenanced as applicant has no award in its favour to demand for the same.

32. Per contra learned counsel for the applicant submitted that the amounts were arrived by the valuer appointed by the learned arbitrator after consideration of the value of the land and the factory and therefore applicant was held entitled for the relief by way of execution facility as prayed for in A.No. 4291 of 2018.

33. Learned counsel further submitted that in view of the

infighting between the partner of the 1st respondent, the amount should be directed to be deposited as public money is involved. Payment in this case is for protecting the award amount.

34. Section 9 of the Arbitration and Conciliation Act, 1996 merely states "A party may, before or during arbitral proceedings or at any time after making of the award but before it is enforced in accordance with Section 36, apply to a court:-

"(i)

(ii) 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."

35. It however does not specifically state that an award debtor cannot invoke the jurisdiction of the court under. Section 9 of the Act. Section 9 of the Arbitration and Conciliation Act, 1996 empowers the court to grant relief by way of interim measure before or during arbitral proceeding or at any time after making of award but the arbitral award is enforced in accordance with section 36 of the Act.

36. In the present case, even though the awards came to

be passed as early as 28.10.1997 and finally concluded infavour of the 1st respondent on 15.09.2017, no attempt has been made to enforce the award under Section 36 of the Act.

37. However, a number of decisions cited by the learned counsel for the 1st respondent have followed the decision of the Division Bench of the Mumbai High Court in **Dirk India Private Limited**, case *supra*,

38. *It is therefore incumbent to see whether there is a binding ratio decidendi to bind this Court to the justice in the peculiar facts of the case, when an award debtor is itself attempting to partly enforce the award, though not to the liking of the 4th respondent who represents himself on the managing parties of the 1st respondent firm. The 4th respondent submits that the infra-firm dispute cannot detract the applicant firm complying with the award which has crystalised.*

39. In **Dirk India Private Limited Vs. Maharashtra State Electricity Generation Co. Ltd.**, 2013 (7) Bom CR 493 *supra* it was held that "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 of the Act. The object and the purpose of interim measure after 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."

40. In the aforesaid case the learned single Judge of the Bombay High Court had earlier allowed the company who had lost the case in the arbitration to lift one third of pulverised fly ash (PFA) from the hoppers while giving the liberty to the respondent therein to dispose the balance in an auction permitting the company to participate in the bid. The said order was passed by the learned Single Judge though he himself entertained a *prima facie* view that an application under Section 9 of the Arbitration and Conciliation Act, 1996 may not be maintainable.

41. In appeal, the Division Bench held that " A party whose claim has been rejected in the course of the arbitral proceedings cannot obviously have an arbitral enforced in

accordance with Section 36.

42. In appeal, the Division Bench set aside the decision of the learned single Judge.

43. From a reading of the said judgment following principles are describable:

(i) A party whose claim has been rejected in the course of arbitral proceeding cannot obviously have an arbitral award enforced in accordance with Section 36 of the Act. The object and the purpose of interim measure after 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. In term 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.

(ii) 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.

(iii) 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.

(iv) To hold that a petition under Section 9 would be maintainable after the passing of an arbitral award at the behest of a party 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.

(v) If such is allowed application under Section 9, it would result in the grant of interim specific performance of a contract in the teeth of the findings recorded in the arbitral award.

(vi) 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.

(vii) 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.

44. Though all these propositions are found, it is (iii) proposition which sums up all the other propositions.

45. The 4th respondent who claims to be the managing partner of the 1st respondent has prayed for dismissal of the above applications while the 2rd, 3rd, and the 6th respondent who are other partners of the 1st respondent have asked for the amounts to be directed pending disposal of the arbitral proceeding between the partners of the 1st respondent which

includes 4th respondent. As on date the proceedings are pending before the High Court of Hyderabad and Telangana though the status of the arbitration proceedings between the parties are not known.

46. Whether the decision in **Dirk India Private Limited** referred to *supra* has culminated in a binding *ratio decidendi* or not is to be tested in the light of "Inversion test" recognised by the Honourable Supreme Court in **State of Gujarat versus Utility Users' Welfare Associations**, (2018) 6 SCC 21. Following passages of the Honourable Supreme Court may be relevant from the above judgment to determine whether 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 is the *ratio decidendi* or mere *obituro dictum*:-

113. In order to determine this aspect, one of the well-established tests is "the Inversion Test" propounded *inter alia* by Eugene Wambaugh, a Professor at The Harvard Law School, who published a classic text book called *The Study of Cases* [Eugene Wambaugh, *The Study of Case* (Boston: Little, Brown & Co., 1892).] in the year 1892. This textbook propounded *inter alia* what is known as the "Wambaugh Test" or "the Inversion Test" as the means of judicial interpretation. "the Inversion Test" is used to identify the *ratio decidendi* in any judgment. The central idea,

in the words of Professor Wambaugh, is as under:

"In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived this new proposition to be good, and had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also."

114. In order to test whether a particular proposition of law is to be treated as the ratio decidendi of the case, the proposition is to be inversed i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the ratio decidendi of the case. This test has been followed to imply that the ratio decidendi is what is absolutely necessary for the decision of the case. "In order that an opinion may have the weight of a precedent", according to John Chipman Grey [Another distinguished jurist who served as a Professor of Law at Harvard Law School.] , "it must be an opinion, the formation of which, is necessary for the decision of a particular case".

115. Now applying the test to the aforesaid judgment, the proposition is reversed i.e. "the Chairman need not be a Judicial Member", the fact remains that it would have no impact on the decision in that case, which was related to inter alia the interpretation of

Section 86 of the said Act. This, in fact, justifies what we have held aforesaid qua the appointment of a Chairperson from the pool of Judges.

116. In the context of the question which we are now dealing with, if we were to take the proposition as "no member having knowledge of law is required to be a member of the Commission" then we have a problem at hand. This is so because while interpreting Section 86 of the said Act, it has been expressed that the Commission has the "trappings of the court", an aspect we have agreed to hereinbefore. Once it has the "trappings of the court" and performs judicial functions, albeit limited ones in the context of the overall functioning of the Commission, still while performing such judicial functions which may be of far-reaching effect, the presence of a member having knowledge of law would become necessary. The absence of a member having knowledge of law would make the composition of the State Commission such as would make it incapable of performing the functions under Section 86(1)(f) of the said Act."

47. Thus, as per the inversion test, to determine whether the proposition is a ratio decidendi or not following must be observed:

(i) The proposition held in the case has to be inversed i.e. reversed or removed as if it did not exist.

(ii) If the conclusion of the case would still be the same after removal of the proposition, **then the said proposition cannot be regarded as ratio decidendi of the case.**

(iii) On the other hand, if the conclusion

is negative, then the case is precedent for the said proposition and possibly for other propositions also.

48. Applying the test to the facts of the case in **Dirk India Private Limited**, *supra* enquiry to be made is whether the Honourable Division Bench there would have still come to the same decision on the facts of the case if the proposition that "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 of the Act" is inversed.

49. After inverting the said proposition, Whether the Court would have come to the same decision or not?. If the answer is in the affirmative, the original proposition is not a *ratio decidendi* and therefore is not binding. If on the other hand, answer is the negative, the proposition is a *ratio decidendi* and will bind Courts.

50. Therefore, it would be necessary to see the facts of the case in **Dirk India Pvt., Ltd.**, case. They are as follows:

"(a) The arbitral tribunal by its Award

came to the conclusion that though under the contract, DIPL was to erect at its cost silos or hoppers, it failed to discharge its contractual obligation of doing so and to ensure that the agreed quantity of PFA so stored could be transported to its PFA plant.

(b) The arbitral tribunal held that right from the inception, DIPL in breach of its obligation to erect four hoppers constructed only one hopper.

(c) The tribunal rejected the defence of DIPL that it did not erect the remaining hoppers because the MSEB failed to deliver PFA in the required quantity.

(d) The tribunal entered a finding of fact that though DIPL agreed to lift 3,000 metric tons of PFA per day after a stipulated period, yet even after three years it had not been able to lift more than 600 metric tons of PFA per day.

(e) This was a substantial failure on the part of the company in relation to another important feature of the contract namely lifting of 3000 MTs PFA per day for effective krs 6/20 app114-30.13 prevention of pollution. It did not achieve even 1/5 th of the target it had solemnly contracted to.

51. The Arbitral Tribunal came to the conclusion that the

termination of the contract was valid and lawful. Finally, the Award summarised its findings on the breach of obligations by the company as follows:-

"To summarize we find the following substantial legal and valid reasons for termination of the contract by the Genco.

i) Total failure to achieve prevention of environmental pollution due to inaction of the Claimant Company in not fulfilling substantial terms of the contract.

ii) Failure of the company to lift 3000 MTS PFA per day though agreed specifically under the contract.

iii) Failure on the part of the Claimant Company by not transporting even 1/5th of the agreed amount of PFA per day is certainly a failure to carry out substantial part of the responsibility under the contract."

52. The company filed a Section 9 application before the learned Single Judge. The learned Single Judge while observing that the proceedings under Section 9 may not be maintainable in the absence of any award in favour of the company, yet, while keeping the issue of maintainability open, the learned Single Judge addressed the question as to what interim order should be passed to govern the rights of the parties pending the hearing of the petition under [Section 9](#) and the final hearing of the petition under [Section 34](#).

53. The interim arrangement which held the field during the pendency of the arbitral proceedings was modified so as to restrict the interim order to 30% of the PFA which would henceforth be generated in the thermal power plant of MSEGCL.

54. The Single Judge by an interim arrangement permitted company to lift around one-third of the PFA in terms of the earlier interim order, allowing it the choice of hoppers from which it would collect PFA. Liberty was also given to the respondent therein to dispose the PFA by an auction in which company has also been permitted to bid."

55. On appeal the Hon'ble Division Bench has decided as follows:

"An ad-interim measure of protection was wholly an error and in excess of jurisdiction. The learned Single Judge in the present case, it must be noted, found that *prima facie* there appeared substance in the submission of MSEGCL that proceedings under [Section 9](#) would not be maintainable in the absence of an executable award in favour of DIPL. Despite this, the learned Single Judge was completely in error in proceeding to decide as to what interim order could be passed to govern the rights of the parties pending the final hearing of

the petition under Section 34. The learned Single Judge ought to have decided the preliminary issue as to the maintainability of the petition under Section 9, particularly having come to the conclusion prima facie that there was substance in the objection to the maintainability of the petition."

56. In para 16 the Hon'ble Division Bench has articulated its decision touching on the merits of the case as follows:

"(i) The petition under Section 9 of the Arbitration and Conciliation Act, 1996 filed by DIPL was not maintainable; and

(ii) In any event, no case was made out for grant of an interim measure of protection. The appeal filed by MSEGCL shall stand allowed in the aforesaid terms. The appeal filed by DIPL shall stand dismissed. There shall be no order as to costs."

57. The Court also declined the prayer for extension of the order which again touched on the merits of the case. Relevant portion is extracted below:

"On the conclusion of the judgement, learned Senior Counsel appearing on behalf of DIPL has sought an extension of the

order dated 10 May 2012 which was passed in appeal. The learned Single Judge by his order dated 30.04.2012, while granting a stay to the operation of his order till 11 May 2012 had directed that the interim order which was already operating would continue to operate till then. In our view and having carefully considered the application for stay, there are circumstances which would weigh against the continuation of the interim order. First and the foremost, the arbitral Award contains a detailed and reasoned finding to the effect that DIPL was in breach of its contractual obligation and was unable to perform its part of the contract. Secondly, clause 11 of the agreement between the parties contemplates that it is terminable at will, with four months' notice on either side. To continue an interim mandatory order would militate against first principles. Thirdly, the grant of any interim protection would virtually tantamount to an interim specific performance of a contract which has been terminated on 23 November 2006 despite the fact that the arbitral tribunal on a considered view of the matter has come to the conclusion that no specific performance could be granted.

DIPL has failed in its contractual obligation to provide an important measure of environmental protection. Finally, this Court has come to the conclusion that the application under Section 9 was not maintainable. In the circumstances, the prayer for stay is refused."

58. Last passage extracted from para 17 touches on the merits of the case. Would the Hon'ble Division Bench of the Bombay Court have still come to the same decision if the proposition that "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" is inversed?

59. In my view, the Hon'ble Division Bench would have still come to the same conclusion and set aside the order the learned Single Judge as is evident from reading paragraph 17 of the judgment.

60. The appellant company had lost the case before the learned arbitrator the case and could not possibly ask for a relief pending its Section 34 petition to set aside the the award.

61. The company appears to have opted for a stay under Section 36(2) read with Section 34 of the Act as is evident from a reading of para 54 supra.

62. Applying the inversion test recognised by the Hon'ble Supreme Court in **State of Gujarat versus Utility Users' Welfare Associations**, (2018) 6 SCC 21, I am convinced that the proposition i.e., 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 is not a *ratio decidendi* of the said case as on merits also the Court has held the company was not entitled to relief under Section 9 of the Act.

63. In the facts of the said case, the company could not have obtained the relief as prayed on merits after the learned arbitrator gave a clear finding that the company had breached the agreement. On facts, the company was not entitled to relief in absence of a *prima facie* case.

64. In the facts of the present case, however the applicant being a state machinery is actually attempting to enforce the award with the permission of the Court and seeks

the Courts leave to deposit the amount to the credit of the application in view of the dispute between the parties of the 1st respondent. It is not clear who is in control of the 1st respondent.

65. Even if execution proceedings are to be initiated, the 1st respondent has to invoke Order XXI of the Civil Procedure Code. Order XXI Rule 21 of Civil Procedure Code makes it clear all money payable under a decree shall be paid as follows:

"(a) by deposit into the Court whose duty it is to execute the decree, or to that Court by postal money order or through a bank; or

(b) out of Court, to the decree-holder by postal money order or through a bank or by any other mode wherein payment is evidence in writing ; or

(c) otherwise, as the Court which made the decree, directs."

66. The Hon'ble Supreme Court in **Sundaram Finance Ltd.,**

Vs. Abdul Samad and another (2018) 3 SCC 622 has recognised the principle that an award can be enforced where the assets of the judgment debtor are located. The Hon'ble Court held

that, "an award under Section 36 of the said Act, is equated to a decree of the Court for the purposes of execution and only for that purpose." Thus, the attempt of the applicant to secure the award amount by deposit is justified.

67. In my view, the applicant is justified in asking for the relief to deposit of the award amount into Court. The respondents will have to thereafter make out an application for payment out as and when their internal disputes are resolved.

68. As far as the relief in Application No.4291 of 2018 directing the first applicant to execute a sale deed in favour of the applicant and in event of refusal to direct the Assistant Registrar, Madras High Court, Chennai to execute the sale deed in favour of the applicant/TWAD Board concerned, I am convinced that the same cannot be granted in absence of specific direction in the award.

69. Further, it appears that there was also no counter claim filed by the applicant to that effect also before the learned Arbitrator. Therefore, this issue cannot be agitated by invoking the jurisdiction of this Court under

Section of the Act, If the applicant has any remedy under law for such relief it has to work out such remedy. However, such relief cannot be granted under Section 9 of the Act.

70. In view of the above observations,

i) Application No.4291 of 2018 is partly allowed to the extent of the relief as prayed in Application No.6765 of 2018.

ii) As and when internal dispute between the partners of the 1st respondent, the respondent No.1 shall be at liberty to file appropriate application for withdrawing the amount.

Sd/-C.S.N.J
28/09/2018

//Certified to be a true copy//

Dated this the day of 2018

JJ 27.11.2018

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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