

Ladda

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION No. 681/2018

ALONG WITH

COMMERCIAL ARBITRATION PETITION No. 682/2018

Mahaguj Collieries LimitedPetitioner.

Vs

Adani Enterprises LimitedRespondent.

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Mr. Sanjay Jain a/with Ms. Sneha Phene, Mr. Jayendra Kapadia, Mr. Fozan Lakdawala, Ms. Varsha Agarwal, Ms. Janvi Manek I/by Little & Co. for the Petitioner in both the petitions.

Mr. Vikram Nankani, Senior Advocate, a/with Mr. Ashishchandra Rao, Mr. Abhileen Chaturvedi, Mr. Dhruv Jain I/by Economic Laws Practice for the Respondent in both the petitions.

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CORAM : B. P. COLABAWALLA, J.
DATE : 25TH FEBRUARY, 2019.

ORAL JUDGMENT:-

1. Admit. By consent of the parties, both the arbitration petitions are taken up for hearing and final disposal.

2. Both these petitions have been filed by the petitioner under 37 of the Arbitration and Conciliation Act, 1996 (for short **“the Act”**) challenging the order passed by the Arbitral Tribunal dated 19th March, 2018 (for short **“the impugned order”**) under which the interim reliefs sought for by the petitioner herein was rejected and the interim relief sought for by the respondent herein was partially granted. The petitioner is the respondent before the arbitral Tribunal. The respondent herein is the claimant. For the sake of convenience, I shall refer to the parties as they were arrayed before the Arbitral Tribunal.

3. By Arbitration Petition No. 681 of 2018, the petitioner (the respondent before the Tribunal) takes exception to the impugned order insofar as it restrains the petitioner (the respondent before the Tribunal) from enforcing the demand notice dated 9th November, 2017, during the pendency of the arbitration

proceedings. Arbitration Petition No. 682 of 2018 challenges that part of the impugned order by which the interim reliefs sought for by the petitioner (the respondent before the Arbitral Tribunal) were rejected by the Arbitral Tribunal. Since both the petitions arise out of the same arbitration proceedings, the facts in both the petitions are identical and hence both the petitions are being disposed of by this common order and judgment.

4. The brief facts giving rise to the arbitral proceedings are that in furtherance of the Government Company Dispensation Scheme under Section 3 (3) (a) (i) of the Coal Mines (Nationalization) Act, 1973, the Maharashtra State Power Generation Company Ltd (“**MAHAGENCO**”) and the Gujarat State Electricity Corporation Ltd (“**GSECL**”) were allotted the Machhakata and Mahanadi Coal Blocks located in the Talcher coal field in the State of Odisha. After the allocation of these Coal Blocks at Machhakata and Mahanadi, MAHAGENCO and GSECL formed a joint venture company called MAHAGUJ COLLIERIES LTD (the respondent before the Tribunal) to exploit and develop the Machhakata Coal Block. In order to develop and operate the Coal Blocks, a tender was floated by the respondent to engage a Mine

Developer-cum-Operator (**“MDO”**). In response to the aforesaid tender floated by the respondent, the claimant formed a Consortium with PT Bara Jaya Utama, as Associate Member. The Consortium submitted its bid on 27th January, 2009. As the claimant led Consortium was the lowest bidder, the respondent vide its letter dated 20th May, 2009 issued a Letter of Intent (**LOI**) to the claimant on behalf of the Machhakata and Mahanadi Coal Blocks in the Talcher Coal Field.

5. The claimant led Consortium furnished a Performance Bank Guarantee (**“PBG”**) dated 19th August, 2009 amounting to Rs.150 Crores issued by ICICI Bank Limited guaranteeing the performance of its obligations. Subsequently, a Coal Mining Services Agreement (**“CMSA”**) was entered into between M/s Adani Enterprises Limited (the claimant) and Mahaguj Collieries Limited (the respondent) on 6th May, 2010. This agreement was entered into between the parties for undertaking the exploration, development and mining of coal from the Machhakata and Mahanadi Coal Blocks in the Talcher coal field.

6. In the meanwhile, the Hon'ble Supreme Court of India,

vide its judgment dated 25th August, 2014 and order dated 24th September, 2014, in the case of **Manohar Lal Sharma Vs. The Principal Secretary & Ors [W.P. (Cri) 120 of 2012]**, cancelled the allocation of all Coal Blocks, including the Coal Blocks allocated to the respondent.

7. In view of the aforesaid Supreme Court's judgment and order, certain disputes arose between the parties under the CMSA dated 6th May, 2010. Hence, the claimant invoked the arbitration clause in the CMSA and the Arbitral Tribunal came to be constituted. Once the Tribunal was constituted, directions were given by it and pursuant thereto the claimant filed its statement of claim dated 10th May, 2017 and the respondent filed its statement of defence as well as counterclaim (dated 21st September, 2017) for an amount of Rs.7854 crores, including a counterclaim for liquidated damages. After the respective pleadings were filed, points for determination have also been framed by the Tribunal and it has fixed the Schedule for recording oral evidence of the witnesses of the parties on the dates mentioned in the impugned order. I am informed that as of now, the second witness on behalf of the claimant is being cross-examined by the respondent.

8. Be that as it may, the respondent filed an application dated 15th December, 2017 under Section 17 and 31 of the Act praying for the following interim award/ interim reliefs.

- “(a) This Hon’ble Tribunal be pleased to grant an interim award to the Respondent for a sum of Rs.150 crores being the sum payable under the Undertaking dated 24th October, 2016;**
- (b) In the alternative and only in the event that this Hon’ble Tribunal does not deem it fit to grant the interim award as prayed for, this Hon’ble Tribunal be pleased to pass an order of interim protection, directing the Claimant to deposit a sum of Rs.150 crores in an escrow account maintained by any person nominated by the Tribunal.”**

9. These reliefs were sought on the strength of an Undertaking dated 24th October, 2016 given by the claimant to the respondent which inter alia reads thus :

- “i. This Undertaking shall relate to the period from 30.11.2009 upto 24.9.2014 (hereinafter referred to as “Relevant Period”).**
- ii. AEL shall pay without any demur merely on demand from MGCL, by way of one or more such demands subject to a maximum liability of Rs.150 crore only (either in one demand or as a sum total**

of all such demands), upon MGCL stating that the amount demanded/claimed is due by way of loss, damages or liquidated damages on any other ground for the Relevant Period.

- a) Under the CMSA by reasons of any past breach by AEL of any of the terms or conditions contained in the CMSA, during the Relevant Period for which the CMSA was in force, or**
 - b) By reason of the AEL's failure to have performed its obligations as stipulated under the CMSA during the Relevant Period for which the CMSA is on force.**
- iii. AEL shall pay to MGCL any amount so demanded subject to maximum liability of Rs.150 crores within a period of 7 (seven) calendar days from the date of receipt of such demand, notwithstanding any dispute or disputes raised by AEL in any suit or proceeding pending before any court or tribunal (including Arbitration Tribunal) in relation to the CMSA or this Undertaking.**
- iv. AEL's liability pursuant to this Undertaking is absolute and unequivocal.”**

10. Before the Arbitral Tribunal, it was the case of the respondent that the claimant is in breach of its obligations under Clauses 3.2, 3.3 and 4.4 of the CMSA, by virtue of failing to achieve the Commencement Date as extended upto 30th October 2012 and the Commencement Date for Coal Production as extended upto 30th

October 2013. Accordingly, the respondent issued a demand notice dated 9th November 2017 invoking the Undertaking. The claimant replied to this Demand Notice by its letter dated 17th November, 2017 and a response to which was given by the respondent on 7th December, 2017. It was on the basis of the aforesaid Undertaking dated 24th October, 2016 and the demand notice dated 9th November, 2017 that the respondent filed the application before the Arbitral Tribunal under Section 31 and 17 of the Act asking the Tribunal to pass an interim award in the sum of Rs.150 crores or in the alternative to direct the claimant to deposit the sum of Rs.150 crores in an escrow account maintained by any person nominated by the Tribunal.

11. In support of this application, the respondent argued before the Tribunal that as per the terms of the CMSA, the claimant had furnished a Performance Bank Guarantee (**PBG**) dated 19th August, 2009 for a sum of Rs.150 crores for guaranteeing the performance of its obligations under the CMSA. The said PBG was later replaced by a bank guarantee for an amount of Rs.75 crore, which was extended by the claimant from time to time, last of which took place on 25th February, 2016 extending the bank guarantee

upto 29th May, 2016.

12. Thereafter, on the claimant's request, by its letter dated 8th March, 2016 (Exhibit R-14 to the Statement of Defence), the respondent released the PBG of the claimant on the claimant furnishing the aforesaid Undertaking (dated 24th October, 2016) that the claimant would, merely on demand by the respondent, pay a sum of upto Rs. 150 crores to the respondent on account of liquidated damages or on any other ground. It was the respondent's case that this Undertaking was in replacement of the PBG and had to be interpreted as having the same force and effect as the PBG. The respondent in its application also averred that by letters dated 18th April, 2012, 18th June, 2012, 27th September, 2012 (Exhibit R-5 to the Statement of Defence, Vol 2 pg. 123), 6th March 2014 (Exhibit 15 to the Counter Claim), 22nd April 2014 (Exhibit R-9 to the Statement of Defence, Vol.2 pg. 133) and 12th August 2014 (Exhibit 16 to the Counterclaim), the respondent informed the claimant about the claimant's default in achieving the Commencement Date and the Commencement of Coal Production date. This being the case, the claimant was liable to the respondent under the aforesaid Undertaking, was the argument.

13. The claimant resisted the application of the respondent inter alia on the ground that (a) the application raises disputed questions of fact and law including the validity of the Undertaking, and which are yet to be tried and decided at the trial; (b) the Undertaking is inexplicably linked to the respondent's claim for liquidated damages under clause 29 of the CMSA, which is pending adjudication in the counterclaim filed by the respondent and hence, the application is premature and misconceived; (c) when the claimant requested the respondent for returning the PBG after the Supreme Court judgment, the respondent refused to return the PBG and insisted for renewal of the PBG. When the project was terminated because of the judgment of the Supreme Court, there was no need for the claimant to go on incurring expenses for renewal of the PBG. Despite this, the claimant's request to return the PBG was acceptable to the respondent only if the claimant executed an Undertaking. By its letters dated 22nd and 27th April, 2015, the respondent had called upon the claimant to renew the PBGs, failing which, the respondent will invoke the PBGs to cover its "estimated losses" and it is in these circumstances, the claimant was coerced to execute the Undertaking; and (d) since the Supreme Court had

cancelled the allocation of Coal Blocks including the Coal Block for which the CMSA was executed (on the ground that the entire process relating to allocation, from inception, was illegal and null and void, and since the allocation of the Coal Blocks was ab initio null and void), the Undertaking itself was also ab initio null and void and therefore not enforceable.

14. After noting the arguments of the claimant as well as the respondent, the Arbitral Tribunal came to a prima facie view that the Undertaking dated 24th October 2016 does not contain an admission of liability by the claimant to pay an amount of Rs.150 crores to the respondent. It provides that the claimant shall pay to the respondent a sum of Rs. 150 crores upon a demand from the respondent that the amount demanded/claimed is due by way of loss, damages or liquidated damages or on any other ground for the relevant period by reason of any past breach by the claimant of any of the terms or conditions contained in the CMSA or by reason of any of the claimant's failure to perform its obligations as stipulated under the CMSA. The Tribunal recorded that the claimant had raised a serious dispute about the applicability of clause 29.2 of CMSA by invoking the force majeure clause which could be decided

only after considering the documents and oral evidence led by the parties. In these circumstances, the Tribunal held that there was no question of passing any interim award as contemplated under Section 31 (6) of the Act. I must mention that this part of the order is not challenged in this Petition, as indeed it cannot be, considering the provisions of Section 34 of the Act.

15. What is challenged before me are the findings and conclusions of the Tribunal in paragraphs 41 and 46 of the impugned order. In paragraph 41 the Tribunal deals with the alternative prayer of the respondent for directing the claimant to deposit the amount of Rs.150 crores in an escrow account and opines that for such a prayer to be granted or considered, the respondent would have to make out a case similar to one under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (for short the **“CPC”**). The Tribunal thereafter noted that the respondent has not even pleaded any such case and therefore rejected the alternative prayer. In paragraph 46 the Tribunal directed the claimant to furnish an Undertaking to the Tribunal within three weeks from the date of the impugned order that in case an award is made against the claimant, the claimant shall pay Rs.150 crores to

the respondent. While directing the claimant to give this Undertaking, the Tribunal also restrained the respondent from enforcing its demand notice dated 9th November, 2017 during the pendency of the arbitral proceedings. It is this restraint order that is challenged in Arbitration Petition No. 681 of 2018 whereas the rejection of the alternative prayer for directing the claimant to deposit the amount of Rs.150 crores is challenged in Arbitration Petition No. 682 of 2018.

16. In this factual backdrop, Mr Jain, the learned Counsel appearing on behalf of the respondent before the Tribunal, submitted that considering that the Undertaking dated 24th October, 2016 given by the claimant was unequivocal and payment thereunder was to be made upon the respondent merely stating that the amount demanded/claimed is due by way of loss, damages or liquidated damages or on any other ground for the relevant period, was sufficient to infer that the liability at least to the extent of 150 crores was clearly crystallized and to secure this amount, the Arbitral Tribunal ought to have granted the alternative prayer of deposit. He submitted that this is more so when one looks at the facts of the case and considering that this Undertaking was given in

lieu of the performance bank guarantee dated 19th August, 2009 and which was released to the claimant upon furnishing the aforesaid Undertaking. Mr. Jain submitted that since the Undertaking was given in substitution of the performance bank guarantee, the same has to be interpreted as having the same force and effect as the performance bank guarantee itself. If this be the case, then the Tribunal ought to have directed the claimant to deposit the sum of Rs.150 crore in an escrow account as prayed for in the alternative prayer of the respondent's application dated 15th December, 2017. Not having done so, the Tribunal's order suffers from serious legal infirmity and therefore ought to be interfered with by me under Section 37 of the Act, was the submission of Mr. Jain.

17. Mr. Jain then submitted that in any event, considering that the Tribunal had refused to pass any interim award in favour of the respondent or even ordered deposit of the sum of Rs.150 crores, the Tribunal was fully unjustified in restraining the respondent from enforcing their demand notice dated 9th November, 2017. Mr. Jain pointed out that the notice dated 9th November, 2017 was a notice that was given by the respondent to the claimant invoking the aforesaid Undertaking. By restraining the respondent from

enforcing the said notice, it was effectively restraining the respondent from enforcing or relying upon the aforesaid Undertaking in all future proceedings, was the submission. He submitted that the Tribunal could not have passed such a drastic order especially considering that interim reliefs in favour of the respondent were already rejected by the Tribunal. He therefore submitted that even on this count, the impugned order requires interference.

18. On the other hand, Mr. Nankani, the learned Senior Counsel, appearing on behalf of the claimant, submitted that the impugned order was a well reasoned one and was certainly a plausible view taken by the Tribunal which required no interference under Section 37 of the Act. As far as the relief of deposit of Rs.150 crores is concerned, Mr Nankani submitted that the aforesaid relief was in the nature of attachment before judgment as contemplated under Order XXXVIII Rule 5 of the CPC. He submitted that it is now well settled that while granting interim relief under Section 17, the principles that apply for granting relief either for attachment, injunction or appointment of a receiver would also apply to the Arbitral Tribunal whilst passing orders under Section 17. He

submitted that in the facts of the present case, there was not even a single word in the application filed by the respondent making out a case under Order XXXVIII Rule 5 of the CPC. This being the case, the Tribunal was fully justified in rejecting the prayer for deposit of a sum of Rs.150 crores. As far as the injunction/restraint order passed against the respondent is concerned, Mr. Nankani submitted that the Tribunal's prima facie finding that there is no admission in the aforesaid Undertaking, the Tribunal was fully justified in restraining the respondent from enforcing the demand notice dated 9th November, 2017. For the all aforesaid reasons, Mr. Nankani submitted that there was no merit in either of the petitions and they ought to be dismissed.

19. I have heard the learned counsel for the parties at length and perused the papers and proceedings in both the arbitration petitions. I have also carefully gone through the impugned order. I shall first deal with the issue of deposit of Rs.150 crores and which was the alternative prayer in the application of the respondent dated 15th December, 2017 filed before the Arbitral Tribunal.

20. The application dated 15th December, 2017 filed by the

respondent before the Tribunal was an application under Section 17 and 31 of the Act. The averments made in this application would clearly go to show that it was mainly for seeking an interim award under Section 31(6) of the Act. The averments in that regard can be found in Paragraphs 15, 16, 17 and 18 thereof. The only averments with reference to the alternative prayer regarding the deposit of Rs.150 crores can be found in paragraph 19 of this application and which reads thus:-

“Without prejudice to the aforesaid, the Respondent submits that inspite of having clearly promised to pay the amount of Rs.150 crores to the Respondent, the Claimant is completely dishonestly attempting to renege from its obligation. It is therefore likely that even in the event that a final award is passed against the Claimant by this Hon'ble Tribunal, the Claimant may attempt to dishonour the award also. It is therefore submitted that in the alternative and only in the event that this Hon'ble Tribunal does not deem it fit to grant the interim award as prayed for this Hon'ble Tribunal ought to pass an order of interim protection, directing the Claimant to deposit the sum of Rs.150 crores in an escrow account maintained by any person nominated by this Hon'ble Tribunal.”

21. As can be seen from these averments, it is quite clear that there is no averment at all and no case whatsoever has been made out for ordering the claimant to deposit a sum of Rs.150 crores. When such a relief is sought for, the principles that govern

the grant of such a relief are under the provisions of Order XXXVIII Rule 5 of the CPC. It is now well settled that the power under Order XXXVIII Rule 5 of the CPC is a drastic and extraordinary power. Such a power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the rules. The purpose of Order XXXVIII Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a party to utilize the provisions of Order XXXVIII Rule 5 as a leverage for coercing the other party to settle the claim should be discouraged. It is now also well settled that the principles on which an order can be made for deposit by a Court would also apply to the Arbitral Tribunal. The principles laid down in the CPC for grant of interlocutory remedies must furnish a guide to the Arbitral Tribunal when it determines an application under Section 17 of the Act. The underlying principles of Order XXXVIII Rule 5 of the CPC therefore have to be borne in mind while deciding an application under Section 17 of the Act. This is now well settled. A Division Bench of this Court in the case of **Nimbus Communications Ltd v. The Board of Control of Cricket in India [2012 SCC OnLine 287 : 2013 (1) MAH LJ 39]** has reviewed the law on the subject and thereafter come to the conclusion that the principles laid down in the Code of Civil

Procedure 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38, Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b). Paragraphs 16 to 24 of this decision reads thus :

“16. Section 9 of the Arbitration and Conciliation Act, 1996 enables a party to apply to the Court either before or during the arbitral proceedings or at any time after the making of an award but before it is enforced in accordance with section 36. Clause (ii) enables a party to seek an interim measure of protection in respect of the following matters:

- “(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.”*

17. The provision enunciates that 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. Now it is in this background, that it would be necessary to consider the basic issue raised. The

submission of the first respondent is that when a Court passes an order providing for an interim measure of protection for securing the amount in dispute in arbitration, the power can be exercised only subject to the restrictions which are spelt out in Order 38, Rule 5 of the Code of Civil Procedure, 1908. Order 38, Rule 5 applies in a situation where at any stage of a suit, the Court is satisfied that the defendant (i) is about to dispose of the whole or part of his property or (ii) is about to remove the whole or part of his property from the local limits of the jurisdiction of the Court with intent to obstruct or delay the execution of any decree that may be passed against him. In such an event the Court may direct the defendant either to furnish security in such sum as may be specified in the order, to produce the property and place it at the disposal of the Court when required or the value of the same or such portion as may be sufficient to satisfy the decree. The exercise of the power under Rule 5 of Order 38 is thus conditioned by two requirements, the first being in regard to the conduct of the defendant, in that he is about to alienate his property or to remove it from the jurisdiction of the Court and the second, the intention of the defendant to obstruct or delay the execution of a decree that may be passed against him. Parliament in the provisions of section 9(ii)(b) contemplated an interim measure of protection to secure the amount in dispute in the arbitration. The object underlying the conferment of the power upon the Court is to ensure that the fruits of an arbitral award which may eventually be passed against the defendant to the claim are not lost to the claimant by a dissipation of the property in the meantime. The issue as to whether the power which has been conferred on the Court under section 9 is hedged in by the specific provisions of the Code of Civil Procedure, 1908 came up before a Division Bench of this Court initially in *National Shipping Company of Saudi Arabia v. Sentrans Industries Limited*, 2004 (2) Mh.L.J. 696 : 2004 (2) Bom.C.R. 1. The issue before the Court was whether the power exercisable by the Court under section 9(ii)(b) of passing an interim measure for securing the amount in dispute in the arbitration was restricted by the conditions of attachment before judgment as prescribed under Order 38, Rule 5. Mr. Justice R.M. Lodha (as the Learned Judge then was) speaking for the Division Bench held that as a principle of law a special provision of the nature embodied in section 9(ii)(b) cannot be restricted by importing the provisions of Order 38, Rule 5. The Division Bench held that though the power under section 9(ii)(b) has not been made subject to the stringent provisions of Order 38,

Rule 5, the exercise of the power is guided by the paramount consideration that the claimant who obtains an award in his favour before the arbitrator ultimately is able to derive the fruits of the adjudication in executing the award. The Division Bench held as follows:

“The order under section 9(ii)(b) is in the nature of interim protection order. In a special provision of the nature like section 9(ii)(b), we are afraid, exercise of power cannot be restricted by importing the provisions of Order 38, Rule 5 of the Code of Civil Procedure as it is. The legislature while enacting section 9(ii)(b) does not seem to us to have intended to read into it the provisions of Order 38, Rule 5 of the Code of Civil Procedure as it is.

The provisions of Order 38, Rule 5, Civil Procedure Code cannot be read into the said provision as it is nor can power of the Court in passing an order of interim measure under section 9(ii)(b) be made subject to the stringent provision of Order 38, Rule 5. The power of the Court in passing the protection order to secure the amount in dispute in the arbitration before or during arbitral proceedings or at any time of making of the arbitral award but before it is enforced cannot be restricted by importing the provisions set out in Order 38 of Civil Procedure Code but has to be exercised *ex debito justitiae* and in the interest of justice. The Court while considering the application for interim protection under section 9(ii)(b) is guided by equitable consideration and each case has to be considered in the light of its facts and circumstances. The interim protection order contemplated under section 9(ii)(b) is granted by the Court to protect the interest of the party seeking such order until the rights are finally adjudicated by the Arbitral Tribunal and to ensure that the Award passed by Arbitral Tribunal is capable of enforcement. Though the power given to the Court under section 9(ii)(b) is very wide and is not in any way controlled by the provisions of the Code but such exercise of power, obviously, has to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the arbitrator is in a position to get the fruits of such adjudication and in executing the Award. While dealing with the application for direction to the other party to deposit the security of the amount in dispute in the arbitration, the Court also has to keep in mind the drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that denial of such

order would result in grave injustice to the party seeking such protection order inasmuch as in the absence of such order, the applicant party succeeding before the Arbitral Tribunal may not be able to execute the Award. The obstructive conduct of the opposite party may be one of the relevant considerations for the Court to consider the application under section 9(ii)(b). The party seeking protection order under section 9(ii)(b) ordinarily must place some material before the Court, besides the merits of the claim that order under section 9(ii)(b) is eminently needed to be passed as there is likelihood or an attempt to defeat the Award, though as indicated above, the provisions of Order 38, Rule 5, Civil Procedure Code are not required to be satisfied. The statutory discretion given to the Court under section 9(ii)(b) must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. In our view, this is the proper approach for consideration of the application for interim relief under section 9(ii)(b) and we hold that the provisions of Order 38, Rule 5 of the Code of Civil Procedure cannot be read as it is and imported in section 9 of the Act of 1996. We also hold without hesitation that the Court is competent to pass an appropriate protection order of interim measure as provided under section 9(ii)(b) outside the provisions of Order 38, Rule 5 Code of Civil Procedure. Each case under section 9(ii)(b) of the Act of 1996 has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience.”

18. In a subsequent decision of the Supreme Court in Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation, 2008 (1) Mh.L.J. (S.C.) 7 : (2007) 6 SCC 798 the Supreme Court held that the power under section 9 cannot be read as independent of the Specific Relief Act and it could not be contended that the restrictions placed by the Specific Relief Act cannot control the exercise of the power under section 9. The Court observed that while entertaining an application under section 9, the Court must have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. Consequently the general rules that govern the Court while considering the grant of an interim injunction at the threshold would be attracted even while dealing with an application under section 9. The Court also noted the principle that when a power is conferred under a special statute

and is conferred on an ordinary Court of the land, without laying down any special condition for the exercise of that power, the general rules of procedure would apply. The Supreme Court adverted to the position which was inter alia taken by the Division Bench of this Court that the power under section 9 is not controlled by Order 38, Rule 5 of the Code of Civil Procedure 1908, but left it open to be determined in an appropriate case.

19. In the decision of the Supreme Court in Adhunik Steels (supra) the respondent had obtained a mining lease from the State Government of Orissa and had an agreement with the appellant for raising manganese ore on its behalf. The term of the agreement was ten years with an option to renew. The respondent issued a notice of termination calling upon the appellant to remove itself from the site contending that its contract was in violation of the Mineral Concession Rules, 1960. The appellant thereupon moved the District Court under section 9 for an injunction restraining the respondent from terminating the contract and from dispossessing it at site. The District Court allowed the application under section 9. The High Court in appeal upheld the contention of the respondent that the loss if any that may be sustained by the appellant could be calculated in monetary terms and that in view of section 14(3)(c) of the Specific Relief Act, an injunction could not be granted. In that view of the matter, the High Court did not consider it fit to enquire into the issue of the balance of convenience. Before the Supreme Court it was urged on behalf of the appellant that section 9 was independent of Order 39 of the Code of Civil Procedure 1908 and the exercise of the power was not subject to the provisions contained in the Specific Relief Act. The Supreme Court dealt with the submission in the following terms:

“The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in, the concept of ‘just and convenient’ while speaking of passing any interim measure of protection. The concluding words of the section, “and the Court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it” also suggest that the normal rules that govern the Court in the grant of interim

orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary Court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that Court would govern the exercise of power conferred by the Act.”

20. The Supreme Court noted that the power to grant injunction by way of specific relief is covered by the Specific Relief Act, 1963, injunction being a form of specific relief. Section 9, the Supreme Court noted does not contain any special condition nor does it provide for a special procedure. The Court noted that whether an interim measure should be ordered permitting the appellant to carry on mining operations in the face of an attempted termination of the contract would lead the Court to a consideration of the classical rules for the grant of such an interim measure. This, it was held, had to be considered based on the well settled principles in that behalf. Consequently the Supreme Court held as follows:

“Therefore, on the whole, we feel that it would not be correct to say that the power under section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the Courts in this connection.”

21. The Supreme Court directed that while the respondent should not enter into a contract for mining and lifting of minerals with any other entity until conclusion of the arbitral proceedings, there was no justification in preventing it from carrying on the mining operations by itself.

22. The judgment of the Supreme Court in Adhunik Steels has noted the earlier decision in Arvind Constructions which holds that since section 9 is a power which is conferred under a special statute, but which is exercisable by an ordinary Court without laying down a special condition for the exercise of the power or a special procedure, the general rules of procedure of the Court would apply. Consequently, where an injunction is sought under section 9 the power of the Court to grant that injunction cannot be exercised independent of the principles which have been laid down to govern the grant of interim injunctions particularly in the context of the Specific Relief Act, 1963. The Court, consequently would be obligated to consider as to whether there exists a prima facie case,

the balance of convenience and irreparable injury in deciding whether it would be just and convenient to grant an order of injunction. Section 9, specifically provides in sub-clause (d) of clause (ii) for the grant of an interim injunction or the appointment of a receiver. As regards sub-clause (b) of clause (ii) the interim measure of protection is to secure the amount in dispute in the arbitration. The underlying object of Order 38, Rule 5 is to confer upon the Court an enabling power to require a defendant to provide security of an extent and value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should be furnished is, however, preconditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be passed against him. In view of the decisions of the Supreme Court both in Arvind Constructions and Adhunik Steels, it would not be possible to subscribe to the position that the power to grant an interim measure of protection under section 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure 1908 or that the exercise of that power is untrammelled by the Code. The basic principle which emerges from both the judgments of the Supreme Court is that though the Arbitration and Conciliation Act, 1996 is a special statute, section 9 does not either attach a special condition for the exercise of the power nor does it embody a special form of procedure for the exercise of the power by the Court. The second aspect of the provision which has been noted by the Supreme Court is the concluding part of section 9 under which it has been specified that 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. This has been interpreted in both the judgments to mean that the normal rules that govern the Court in the grant of an interlocutory order are not jettisoned by the provision. The judgment of the Division Bench of this Court in National Shipping Company (supra) notes that though the power by section 9(ii)(b) is wide, it has to be governed by the paramount consideration that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award. The Division Bench noted that the power being of a drastic nature, a direction to secure the amount claimed in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave

injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought was regarded as being a material consideration. However, the view of the Division Bench of this Court that the exercise of power under section 9(ii)(b) is not controlled by the provisions of the Code of Civil Procedure 1908 cannot stand in view of the decision of the Supreme Court in Adhunik Steels.

23. In a recent judgment of a learned Single Judge of the Delhi High Court in Steel Authority of India Ltd. v. AMCIPTY Ltd., O.M.P. 417/2011 decided on 1 September, 2011, the judgment of the Division Bench of this Court in National Shipping Company was relied upon. The Delhi High Court observed that the provisions of Order 38, Rule 5 would serve as a guiding principle for the exercise of the jurisdiction while dealing with a petition under section 9 requiring the respondent to furnish security and the basic consideration is that the Court should be satisfied that the furnishing of security is essential to safeguard the interest of the petitioner.

24. A close reading of the judgment of the Supreme Court in Adhunik Steels would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under section 9, the Court was of the view that the power under section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power under section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure 1908 for the grant of

interlocutory remedies must furnish a guide to the Court when it determines an application under section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38, Rule 5 therefore has to be borne in mind while deciding an application under section 9(ii)(b)."

22. I must mention that this decision was rendered in the context of Section 9 of the Act. However, now Section 17, after its Amendment in 2015, is virtually brought on par with Section 9. This being the case, the principle laid down by the Division Bench of this Court in the aforesaid decision of **Nimbus Communications Ltd (supra)** would also apply to the Arbitral Tribunal whilst exercising powers under Section 17 of the Act.

23. As mentioned earlier and as also recorded in the impugned order, there is not a single averment in the application that would justify the order of the deposit. In fact, the impugned order categorically records that the respondent's alternative prayer for directing the claimant to deposit the amount of Rs.150 crores in an escrow account can be considered only if the respondent makes out a case similar to one under Order XXXVIII Rule 5 of the CPC. The Tribunal also records that the respondent has not even pleaded any such case. This being the position, I do not find that the Arbitral Tribunal had in any way gone wrong in refusing the prayer of the

respondent for directing the claimant to deposit the sum of Rs.150 crores.

24. This now leaves me only to deal with whether the Tribunal was justified in restraining the respondent from enforcing the demand notice dated 9th November, 2017. On going through the impugned order and the Section 17 application filed by the claimant dated 21st November, 2017, I fail to understand what was the purpose of granting such an injunction. As can be seen from the facts narrated above, this application was filed prior to the application filed by the respondent seeking an interim award or in the alternative, a prayer for deposit. It is quite clear that this application was filed to scuttle the respondent either from getting an interim award or from getting an order for deposit of the sum of Rs.150 crores. Both the applications were heard together by the Arbitral Tribunal and disposed of by the common impugned order. Once having rejected the application of the respondent on merits there was absolutely no purpose that would have been served by restraining the respondent from enforcing its demand notice. To my mind, the effect of such restraint is to prevent the respondent from relying upon the Undertaking dated 24th October, 2016 which forms

the subject matter of the demand notice. This, in my opinion, could not have been done. If the respondent, on the basis of the aforesaid Undertaking, is entitled to take recourse to any other proceedings which it may be entitled to in law, then the respondent cannot be restrained in this proceeding from adopting any such other proceeding. I therefore find that this restraint, apart from being unnecessary, was wholly unjustified. In these circumstances, the impugned order only insofar as it restrains the respondent from enforcing the demand notice dated 9th November, 2017 is set aside.

25. Both the arbitration petitions are disposed of in the aforesaid terms. However, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)