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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) (COMM) 76/2021**

JANTA ASSOCIATES AND CO. LTD. Appellant

Through: Mr. Vineet Bhagat, Adv.

versus

INDIAN OIL FOUNDATION & ANR. Respondents

Through: Ms. Priya Puri with Mr. Yati Sharma,
Adv. for R-1.

Mr. Navin Kumar, Ms. Rashmeet
Kaur and Ms. Priya Goyal, Adv. for
R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE AMIT BANSAL

ORDER

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24.05.2021

[VIA VIDEO CONFERENCING]

CM No.16979/2021 (for exemption)

1. Allowed, subject to just exceptions and as per extant rules.
2. The application is disposed of.

FAO(OS) (COMM) 76/2021 & CM No.16978/2021 (for stay)

3. This appeal, under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 13(1A) of the Commercial Courts Act, 2015, impugns the order dated 11th May, 2021 of the Commercial Division, of dismissal of OMP(I)(COMM) No.74/2020 preferred by the appellant.
4. The Commercial Division has dismissed the Section 9 application of the appellant, holding that (i) the relief claimed therein of directing the respondents to pay to the appellant Rs.1,89,91,737/-, was in the nature of a final relief which could not be granted in exercise of powers under Section 9

of the Act; and, (ii) the reliefs claimed, of permitting the appellant to continue and complete the works which were awarded by the respondents to the appellant, and of stay of operation of the notice issued by the respondents to the appellant to show cause why the works contract awarded by the respondents to the appellant should not be terminated, also could not be granted, considering the nature of the contract.

5. The counsel for the appellant has contended that out of the amount of Rs.1,89,91,737/- claimed by the appellant from the respondents, the respondents have admitted liability in the sum of Rs.1,15,31,770/- and the appellant was/is thus, in any case entitled to an order for payment of the said amount and which relief has been wrongly denied.

6. We have enquired from the counsel for the appellant, whether not grant of such relief on admissions would be in the nature of a final relief and which, only the Arbitral Tribunal, to whose adjudication the parties have agreed, is entitled to grant. Attention of the counsel for the appellant has been drawn to the recent dicta in ***National Highways Authority of India Vs. Bhubaneswar Expressway Private Limited*** MANU/DE/0861/2021, where it has been held that Section 9 of the Act does not empower the Court to grant reliefs in the nature of final reliefs and that Section 9 has to be read along with Section 5 of the Act. Once Section 5 has been incorporated in the 1996 Act to curb the tendency of the Courts to adjudicate whatever is coming before them, the Courts have lost the jurisdiction to adjudicate such disputes except to the extent expressly permitted by the Arbitration Act. The Arbitration Act nowhere empowers the Court to grant a relief in the nature of final relief, even if admission of the opposite party thereto is shown. It is only the Arbitral Tribunal which can grant relief in the nature of a final

relief, on admissions. Section 9 permits the Court only to grant interim preservatory measures of protection etc. The jurisdiction under Section 9 cannot extend to adjudicate what as per the agreement of the parties is to be adjudicated by the Arbitral Tribunal. Thus the question of grant of relief directing the respondents to pay to the appellant any amount, because the respondents have in the pleadings in any proceedings or elsewhere admitted liability to the appellant in the said amount, in exercise of powers under Section 9, does not arise.

7. The Commercial Division, in the impugned order, with respect to the claim of the appellant of Rs.1,89,91,737/-, has also reasoned that it was not the case of the appellant that in the event of the award for the said amount being in favour of the appellant, the appellant would not be able to recover the said amounts. The Commercial Division has further recorded that though there appeared to be some diversion of views among the Courts with regard to whether the Court can grant relief under Section 9(ii)(b) of the Act, in the nature of attachment before award, on principles other than as contained in Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908, but the said question also did not arise in the facts of the present case inasmuch as there was no plea of the appellant and the appellant had placed no material to show that the respondents would be unable to pay the amount if awarded in favour of the appellant, by the Arbitral Tribunal.

8. With respect to other reliefs claimed by the appellant, the Commercial Division, in the impugned order has held that issuance by the respondents to the appellant of the notice to show cause was/is in accordance with the terms of the contract between the parties and it was also not in dispute that the works to be completed had not been completed within the specified time and

thus the appellant was not entitled to the said relief also.

9. The counsel for the appellant has not been able to point out any error in the aforesaid reasoning of the Commercial Division or any right in the appellant, to restrain the respondents from, in exercise of powers under the contractual terms terminate the works contract awarded to the appellant.

10. The counsel for the appellant has then contended that the respondents be restrained from invoking the bank guarantee.

11. Though the appellant has not placed Section 9 application on record but a perusal of the reliefs claimed therein as recorded in the impugned order shows that no such relief was claimed in Section 9 application. Once it is so, the appellant cannot, in the appeal expand the scope of the interim measures sought, beyond what was claimed before the Commercial Division. We may however record that from the order dated 10th May, 2021 of the Commercial Division, also impugned in this appeal, it appears that there was earlier an order, in the Section 9 proceedings from which this appeal arises, directing the parties to maintain *status quo* and vide order dated 29th April, 2021 it was clarified that the same could not be construed as restraining the respondents from invoking or encashing the unconditional bank guarantees furnished at the instance of the appellant in favour of the respondents, in consideration of the works contract aforesaid. On 10th May, 2021, the application of the appellant for review of the order dated 29th April, 2021 was for consideration. The Commercial Division dismissed the review application *inter alia* reasoning, (i) that the appellant, in Section 9 application had not made any specific prayer of restraining the respondents from invoking or encashing the bank guarantee; (ii) the earlier order dated 16th March, 2020 directing *status quo* to be maintained was not on merits of

the case of the appellant but owing to the notification dated 13th March, 2020 in the wake of the pandemic, owing thereto all matters were being adjourned; and, (iii) in any case, the bank guarantees concerned were unconditional and which could not be interdicted with on account of any contractual disputes between the parties and no case of any fraud having been committed, had even been pleaded.

12. The counsel for the appellant has been unable to argue any perversity in the aforesaid reasoning either.

13. No ground, within the ambit of *Wander Ltd. Vs. Antox India P. Ltd.* 1990 Supp SCC 727, to interfere with the order of the Commercial Division is made out.

Dismissed.

RAJIV SAHAI ENDLAW, J

AMIT BANSAL, J

MAY 24, 2021

‘pp’..