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

% *Date of Decision: 07th December 2021*

\+ **ARB. A. (COMM.) 75/2021 & IA Nos. 16156/2021 & 16157/2021**

SPML INFRA LIMITED ..... Appellant

Through Mr. Mukul Talwar, Sr. Adv. with Mr. Samrat Sengupta, Mr. Udayaditya Banerjee & Mr. Ishan Thakur, Advs.

Versus

HITACHI INDIA (P) LTD ..... Respondent

Through Mr. Rajshekhar Rao, Sr. Adv. with Mr. P. Jain & Ms. Mansi Sood, Advs.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J. ***(ORAL)***

1. The appellant has filed the present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') impugning the order dated 16.11.2021 passed by the Arbitral Tribunal under Section 17 of the A&C Act. The respondent had filed an application, *inter alia,* praying that directions be issued to the respondent to secure the appellant to the extent of ₹3,40,66,948/-. The Arbitral Tribunal has allowed the same in terms of the impugned

order and had directed the appellant to furnish a Bank Guarantee in the sum of ₹1,51,40,981/- for securing the respondent.

Factual Context

2. The appellant was awarded a contract by the Bhavnagar Irrigation Project Division, Government of Gujarat (BIPD). The said contract was referred to as "Sauni Yojna, Link 2, Package 3". The appellant, in turn, engaged the respondent as a sub-contractor to perform the following works under the EPC contract:

> "(i) design, engineering, supply, shifting, transportation, erection, commissioning and testing storage, loading and unloading of turnkey package with 30 days of trial run of electrical equipment pertaining to switchyard and substation in pumping station including cabling, earthing, lighting and other ancillary work (the "**Electrical Work**"); and
>
> (ii) design, engineering, supply, shifting, transportation, erection, commissioning and testing storage, loading and unloading of turnkey package including supply of mandatory spares with 30 days of trial run of PLC SCADA and instrumentation package (the "**C&I Work**")."

3. It is the respondent's case that it had diligently performed its part of the work, however, could not continue the same beyond a particular point as the appellant was not clearing the invoices raised by it in terms of their agreement.

4. It is also the respondent's claim that a meeting was held in the

month of July, 2018 and the appellant had agreed that it would pay a sum of ₹1,50,00,000/- to the respondent but the appellant failed to pay the entire amount. In addition, the respondent had also relied on the Minutes of the Meeting held between the representatives of the parties in the month of October, 2018. According to the respondent, the appellant had admitted that a sum of ₹1,70,00,000/- was due and payable and had agreed to pay the same subject to confirmation.

5. There is no dispute that the appellant had raised invoices, which have remained unpaid. The Arbitral Tribunal examined the disputes and found that, *prima facie,* a sum of ₹1,51,40,981/- was admittedly outstanding and payable by the appellant in respect of the unpaid invoices for the Electrical Work. In addition, the Arbitral Tribunal also examined the Minutes of the Meeting and found that the said outstanding amount was also confirmed by the appellant.

6. The respondent has serious apprehension that the entire exercise of proceeding against the appellant in arbitration would be rendered futile as the appellant is being pursued by several creditors as well and it may be put in liquidation. It is also alleged that the appellant had defaulted in making payments to other creditors, who have since sought recourse by filing petitions under Section 7 of the Insolvency & Bankruptcy Code, 2016.

7. In the aforesaid context, the appellant contended that the award that may ultimately be made in favour of the respondent would in fact be a paper award with little hope for the respondent to enforce the

same.

8. Considering the rival contentions and after briefly surveying the disputes between the parties, the Arbitral Tribunal considered it necessary that the respondent be secured at least to the extent of ₹1,51,40,981/-.

Reasons and Conclusion

9. Mr. Mukul Talwar, learned senior counsel appearing for the appellant submits that the aforesaid decision is erroneous, essentially, on two grounds. First, he submits that there were no averments made in the application filed by the respondent to the effect that the appellant was acting in a manner so as to frustrate the arbitral award that may be passed. He pointed out that the respondent's averments were essentially to the effect that the appellant had failed to make payments to various creditors and had suffered huge losses. He submits that there is no dispute that the appellant had suffered losses, however, that fact is not sufficient for any creditor to seek an order for securing its claims. The same does not comply with the conditions as stipulated in Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908 (hereafter 'CPC').

10. Second, he submits that the respondent had sought a similar prayer by filing a petition under Section 9 of the A&C Act [OMP(I)(COMM) No.235/2021 captioned ***Hitachi India Pvt. Ltd. v. SPML Infra Ltd. & Anr.***]. The said petition was disposed of by a consent order dated 22.07.2021 whereby the appellant had agreed not

to invoke the bank guarantee furnished by the respondent for a period of eighteen months subject to the said bank guarantee being kept alive. He submits that in the aforesaid circumstances, it must be construed that the respondent had given up its prayer for securing its claim to the extent of ₹1,66,43,857/- (Claim towards the principal amount in dispute).

11. Insofar as the first contention is concerned, this Court is not persuaded to accept the same. The provisions of CPC are not *sensu stricto* applicable to arbitral proceedings including proceedings for interim measures of protection under Section 17 of the A&C Act. However, there is merit in Mr. Talwar's submission that the provisions of CPC do provide guidance in respect of interim measures of protection that may be granted under Section 17 of the A&C Act.

12. Section 17(1) of the A&C Act reads as under:

> "17. Interim measures ordered by arbitral tribunal. —
>
> (1) A party may, during the arbitral proceedings, apply to the arbitral tribunal—
>
> (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:—
>
> (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 arbitral tribunal to be just and convenient,
>
> and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it."

13. The last sentence of Section 17(1) of the A&C Act makes it clear that the arbitral tribunal has the same power for making orders, as the court has for the purpose of and in relation to, any proceedings before it. It is also relevant to refer to Clause (e) of Section 17(1) of the A&C Act, which empowers the arbitral tribunal to make such other interim measures of protection as may appear to the arbitral tribunal to be just and convenient.

14. The language of Section 9(1) of the A&C Act is also materially

similar to the language of Section 17(1) of the A&C Act. The question whether the powers of the Court under Section 9 of the A&C Act are circumscribed by the provisions of CPC has been considered by the Court in various decisions.

15. In ***Ajay Singh v. Kal Airways Private Limited: 2017 SCC OnLine Del 8934,*** a Division Bench of this Court had observed as under:-

> "27. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles."

16. The Division Bench of this Court in ***National Highways Authority of India v. Punjab National Bank and Ors: 2017 SCC OnLine Del 11312*** held that the Court could draw powers from the various provisions of the CPC. The relevant extract of the said decision is set out below:-

> 37. On the question of exercise of power under Section 9 of the A&C Act, we have already referred to Clauses 37.3.1 of the Concessionaire Agreement

which is an express and mandatory provision when said agreement is terminated on account of concessionaire fault. We have also referred to Clauses 3.2 and 4.2 of the tripartite Escrow Agreement which refers to termination O.M.P.(I) (COMM)211/2020 Page 32 of 40 payment. To accept the plea of NHAI that section 9 of the A&C Act cannot be invoked, would negate and obliterate the aforesaid Clauses and their effect. In the aforesaid circumstances the ratio of decision of the Division Bench of this Court in *Value Source Mercantile Limited v. Span Mechnotronix Limited***:** (2014) 143 DRJ 505, is apposite, if not definite and conclusive. Referring to Section 9 of the A&C Act, this decision emphasized that the said provision uses the expression 'interim measure of protection' as distinct from the expression 'temporary injunction' used in Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908. Interim injunction is one of the measures or orders prescribed in Clause (d) to Section 9(ii) of the A&C Act, albeit a party to the arbitration agreement is entitled to apply for an seek 'interim measure of protection'. Clause (e) to Section 9(ii) is a residuary power of the court to issue or direct other "interim measures of protection". Thus, the court has the power to issue or direct other interim measurers of protection as may appear to the court to be just and convenient. Section 9 encompass the power of making orders as the Civil Court has for the purpose of, and in relation to any proceedings before it. This decision refers to Rule 10 of Order XXXIX of the aforesaid Code which empowers the Court to direct to deposit payment of the admitted amount. Therefore the court exercising power under Section 9 of the A&C Act has the same power as that of a civil court during pendency of the suit."

17. In ***West Haryana Highways Projects Private Limited v. National Highways Authority of India and Ors: OMP (I) (COMM)***

144/2020 and OMP (I) (COMM) 263/2020 decided on 07.10.2020, a Coordinate Bench of this Court had referred to the aforesaid decisions and observed as under:

> "36. Thus, it is evident that while the well- settled principles governing grant of injunctions, as laid out under the provisions of the Specific Relief Act and Code of Civil Procedure, are to guide this Court while exercising its powers under Section 9, they do not strictly bind the course of the decision. Ultimately, the Court, after examining the facts of the case, has a duty to assess and decide which would be the most just and convenient route to take as also to prevent the ends of justice from being defeated"

18. It is not the appellant's case that the Court would not have the power to pass an order as has been passed by the Arbitral Tribunal in the given circumstances.

19. It is also relevant to bear in mind that the scope of examination under Section 37 of the A&C Act is limited. Unless the discretion exercised by the Arbitral Tribunal is found to be patently illegal**,** the Court would not interfere with such discretion.

20. In ***Wander Ltd. and Another. v. Antox India P. Ltd.: 1990 Supp SCC 727***, the Supreme Court had held as under:

> "14...the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory

> injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial courts discretion."

21. This Court in several decisions has expressed a similar view [See: ***Supreme Infrastructure India Ltd v. Central Public Works Department: 2017 SCC OnLine Del 8228; Green Infra Wind Energy Limited v. Regen Powertech Private Limited: 2018 SCC OnLine Del 8273; L&T Finance Limited v. DM South India Hospitality Private Limited And Ors.: ARB A (COMM) 14/2020, decided on 08.11.2021***].

22. The scope of interference with any decision of the arbitral tribunal is required to be considerably narrow also for the reasons that it is a decision of a forum of the choice of the parties. The scope of interference on merits of the arbitral award is confined to the grounds as set out in Section 34(2) and 34(2A) of the A&C Act. It would be apposite to extend the said principles for any challenge to orders for interim protection as well considering that they are in aid of the final relief. And, the arbitral tribunal is the final adjudicator of such relief.

23. This Court is unable to find that in this case, the view expressed by the Arbitral Tribunal is not substantiated by reason or is a manifestly erroneous exercise in discretion.

24. It is also relevant to mention the decision in ***Gatx India Pvt. Ltd. v. Arshiya Rail Infrastructure Ltd. & Anr.: (2015) 216 DLT 20.*** In that case, the Court found that the apprehension of the petitioner that it may not be able to enforce the arbitral award on account of financial position of the respondents, was justified and the Court directed the respondents to provide a solvent security.

25. It must be clarified that this Court is not expressing any view on the correctness of the decision of the Arbitral Tribunal, however, it is clear that it would be inapposite to interfere with the discretion exercised by the Arbitral Tribunal in the given facts.

26. Insofar as the appellant's contention that the respondent had waived its prayer for securing its claims in view of the order passed by this Court on 22.07.2021 in ***Hitachi India Pvt. Ltd. Vs. SPML Infra Ltd. & Anr.***: ***OMP(I)(COMM) No.235/2021*** is concerned, it is seen that the said order was a consent order, however, the Court had also clarified that all rights and contentions of the parties are reserved. The Arbitral Tribunal is correct in its understanding that the said order did not preclude the respondent from making an application under Section 17 of the A&C Act to seek such reliefs as advised. It must also be clarified that the appellant is also not precluded from seeking any variation, modification or vacation of the order dated 22.07.2021

before the Arbitral Tribunal. The said order was passed at the stage where the Court had no occasion to examine the rival claims. The respondent was directed to keep the Bank Guarantee alive to ensure that in event the appellant succeeds in its claims, it would be entitled to encash the same. However, that did not preclude the appellant from seeking modification of the order as this Court had clarified that all rights and contentions of the parties were reserved. It would necessarily also include the right of the appellant to seek modification and variation of the order.

27. The appeal is dismissed with the aforesaid observations.

VIBHU BAKHRU, J

DECEMBER 7, 2021
gsr/v

Click here to check corrigendum, if any