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

Date of decision: 20th December, 2022

+ **O.M.P.(I) (COMM.) 327/2022 & I.A.21344-45/2022**

SAMSUNG ELECTRONICS INDIA PVT LTD. Petitioner
Through: Mr.Sameer Jain, Ms.Jayashree
Parihar, Ms.Tanya Mittal,
Mr.Anurag Iyer, Advs.

versus

TRELL EXPERIENCES PVT LTD & ORS.Respondents
Through: Mr.Nikhil Parikshith, Mr.Varun
Mathew and Mr.Tanmay Sinha,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') *inter-alia* praying for a direction to the respondents to deposit a sum of Rs.2,90,22,505/- for securing the amount due from the respondents.
2. It is the case of the petitioner that the petitioner and the respondent no.1 executed a Pre-Load Agreement dated 21.09.2020, whereunder the petitioner was to pre-load in some of its devices the Short Video Mobile Application of the respondent no.1– 'Trell', against the payment of Pre-Load Fee by the respondent no.1. The petitioner claims that the parties thereafter executed Addendum-I dated 09.11.2020 and Addendum-II dated 17.05.2021 to the original Pre-Load Agreement.

3. It is the case of the petitioner that the respondent no.1 failed to honour its commitment under the said agreements, and a payment of Rs.2,37,65,834/-, in addition to the interest thereon, totaling to a sum of Rs.2,90,22,505/- as on 11.11.2022, became due and payable by the respondent no.1 to the petitioner.

4. While the respondent no.1, through the respondent nos.2 and 4, acknowledged the debt and assured the payment of the same to the petitioner, the said amount remained outstanding. The petitioner has also issued a notice dated 21.10.2022 under Section 8 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'IBC') to the respondent no.1, however, in spite of the same, the payment has not been made by the respondent no.1. The petitioner claims that there was a serious apprehension that the respondents would alienate their assets/properties to frustrate any Arbitral Award that may be passed in favour of the petitioner. In support of such apprehension, the learned counsel for the petitioner placed reliance on certain newspaper reports which have been filed along with the petition as Document P-14, which *inter-alia* state that the respondent no.1 is laying off its workforce.

5. This Court by its order dated 18.11.2022, restrained the respondent no.1 from alienating or in any way disposing off any of its assets/properties, till further orders. The respondent no.1 was further directed to file its list of Assets and Liabilities before this Court.

6. The respondent no.1 has filed its reply to the present petition. It is contended that the respondent no.1 is a well-known Indian Technology Start-up and has a number of international and domestic investors, including the Samsung Venture Investment Corporation (in short,

‘SVIC’). The said investor had insisted upon the respondent no.1 to enter into Service Agreement with its Indian Group Subsidiary, that is, the petitioner herein. The respondent no.1 had no choice but to agree to such arrangement.

7. It is further alleged that the arrangement between the petitioner and the respondent no.1, as has been encapsulated in the Pre-Load Agreement, had not been functioning appropriately since the very beginning. It is for this reason that the same has been amended on two occasions by way of the Addendums I and II. The respondent no.1 also raised complaints about the functioning of the arrangement with the petitioner. In fact, it was found that only 25% to 30% of the claimed pre-loads and installations, as set out in the invoices of the petitioner, were accurate. There were other problems also noticed in the invoices raised by the petitioner.

8. The learned counsel for the respondents submits that in terms of the Shareholder Agreement dated 28.07.2020 with the SVIC, the respondent no.1 was constrained in taking action against the petitioner inasmuch as, any action against the petitioner would fall under the “Reserved Matters” list, for which the respondent no.1 needed to take approval from the SVIC. The petitioner, being an Indian Subsidiary of the SVIC, such approval was not forthcoming.

9. The learned counsel for the petitioner, on the other hand, places reliance on the email dated 17.11.2022 addressed by the respondent no.1 in reply to the notice of the petitioner under the IBC. The same reads as under:

“As you would have known from outside sources and based on our call yesterday, Trell has already closed most of its operations and sent almost all employees. They are just managing the show for few small vendors to be settled at 20% and decide the future then.

Below are the Samsung's transactions with Trell:

	INR Crores	%
Total revenue billed	19.16	100%
Paid by Trell	16.86	88%
Due	2.30	12%

The revenue billed by Samsung on Trell from Feb'21 to Sep'21 (eight months) was INR 19.16 crores and Trell paid INR 16.86 crores and there is a claimed due of INR 2.30 crores which is around 12% of the entire business done with Trell by Samsung.

With the kind of situation Trell is in now, it is not able to pay any of its vendors even 20% of their dues in spite of many not getting any advance payments and many not having earlier billings with Trell.

Therefore, it is requested with you to accept a full and final payment of INR 46 lacs (20% of INR 2.30 crores) and waive of INR 1.86 crores. This works out to only 9% of the entire billing with Trell where the margins itself would have been very high on the revenue generated and Samsung will never be under cash loss in this case.

Trell will be able to pay this INR 46 lacs in four monthly equal installments in Nov, Dec, Jan-23 and Feb.

Request you to consider the same and let us know.”

10. He submits that there is not only an admitted liability of Rs.2.30 Crore but also an admission of fact that the respondent no.1 is not able to pay its creditors and is offering only 20% of the admitted due as a settlement. He submits that, therefore, in case further protection is not granted to the petitioner, any Award that may be passed in favour of the petitioner in the arbitration proceedings would be otiose and remain unenforceable, as the respondent no.1 clearly is winding up its own business. In support, he places reliance on the judgment dated 20.04.2021 of this Court in **Savita Jain Sole Proprietor of M.S. Navkar v. Krishna Packaging**, 2021 SCC OnLine Del 197.

11. On the other hand, the learned counsel for the respondent no.1, apart from reiterating the submissions that have been made in the reply filed by the respondent no.1, further submits that the respondent no.1 is financially viable and has liquid assets, therefore, for the petitioner to contend that the respondent no.1 would not be able to pay its debts, may not be correct.

12. He further submits that for an order under Section 9 of the Act to be passed, the requirements of Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC') have to be satisfied by the petitioner and mere acceptance of debt is not enough. In support, he places reliance on the judgments of this Court in **BMW India Private Limited. v. Libra Automotives Private Limited & Others.**, 2019 SCC OnLine Del 9079, and of the High Court of Bombay in **Nimbus Communications Ltd v. Board of Control for Cricket in India & Another.**, 2012 SCC OnLine Bom 287. He submits that in the present case, these requirements have not been satisfied by the petitioner.

13. I have considered the submissions made by the learned counsels for the parties.

14. From a bare reading of the email dated 17.11.2022 addressed by the respondent no.1 to the petitioner, the respondent no.1 admits a liability of Rs.2.30 Crore as due to the petitioner. The said email also states that the respondent no.1 has already closed most of its operations and has retrenched almost all its employees. It appears that the respondent no.1 is in the process of winding up of its business. The respondent no.1 further states that they are managing to settle with the other creditors at 20% of the admitted dues and have offered the same to the petitioner.

15. From the above email, it is apparent that there is an admitted liability of Rs.2.30 Crore owed by the respondent no.1 to the petitioner. It also *prima facie* appears that the respondent no.1, though may be having liquidated assets, is unable to discharge its liabilities.

16. The plea that the respondent no.1 was forced to enter into an Agreement with the petitioner and/or its disputes on merits of the liabilities owed to the petitioner, have to be considered by the learned Arbitral Tribunal upon its constitution.

17. For the purpose of the present petition, in light of the email dated 17.11.2022 addressed by the respondent no.1 to the petitioner, in my opinion, the petitioner has been able to make out a good case for grant of an *ad-interim* protection, failing which any Award that may be passed in favour of the petitioner may end up being a paper decree which would remain unenforceable.

18. In **Savita Jain** (*supra*), a Division Bench of this Court, placing

reliance on the judgment of an earlier Division Bench in **Ajay Singh v. Kal Airways Private Ltd. & Ors.**, 2017 SCC OnLine Del 8934, has observed as under:

*“12. Having heard learned counsel for the parties, this Court is of the opinion that Section 9 grants wide powers to the courts in granting an appropriate interim order based on the relevant facts of the case at all stages of the arbitration proceedings, namely, before, during or after the arbitration proceedings. However, this Court is in agreement with the submission of learned counsel for respondent that the discretion under Section 9 of Act, 1996 should be exercised in exceptional cases when there is adequate material on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous or where there is an admitted liability. Needless to state, though exercise of such powers is premised on the underlying principles of Orders 38 and 39 CPC, yet it is settled law that the court is not unduly bound by the text of these provisions. A Coordinate Bench of this Court in **Ajay Singh v. Kal Airways (P) Ltd.**, 2017 SCC OnLine Del 8934 has held 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. In this regard, the observations of Lord Hoffman in **Films Rover International***

Ltd. v. Cannon Film Sales Ltd., (1986) 3 All ER 772 are fitting :

‘But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as ‘guidelines’ i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the ‘wrong’ decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.’

13. *In any event, this Court's jurisdiction under Section 9 is to support the arbitration and to ensure that if an award is passed by the arbitrator, the same is executable and is not rendered infructuous. [See : **Mewa Mishri Enterprises (P) Ltd. v. AST Enterprises Inc., 2021 SCC OnLine Del 3332**]*

THIS COURT SETS ASIDE THE TRIAL COURT'S ORDER ON THE GROUND OF PERVERSITY AS THE APPELLANT'S CASE IS A CASE OF ADMITTED LIABILITY AS REFLECTED IN RESPONDENT'S OWN BALANCE SHEETS AND STATEMENT OF ACCOUNTS. IN FACT, BALANCE SHEETS AND STATEMENT OF ACCOUNTS OF A COMPANY ARE IN LAW SUPPOSED TO REFLECT THE TRUE AND CORRECT STATE OF AFFAIRS. CONSEQUENTLY, IF THE RESPONDENT HAD ANY TENABLE COUNTERCLAIM, AS CONTENTED BY THE RESPONDENT IN ITS LETTER DATED 24-10-2019 AND AS

BELIEVED BY THE TRIAL COURT, IT WOULD NOT HAVE SHOWN THE APPELLANT-PETITIONER IN ITS STATEMENT OF ACCOUNTS ENDING 31-3-2020 AS ITS SUNDRY CREDITOR TO WHOM RS 15,40,318 WAS DUE AND PAYABLE WITHOUT ANY CAVEAT/EXPLANATION. FURTHER, THE FINANCIAL CONDITION OF THE RESPONDENT IS NOT HEALTHY.

14. Though this Court is of the view that the jurisdiction of an appellate court while hearing an appeal against application under Section 9 of the Act, 1996 is limited as the appeal is against exercise of discretion by the learned Single Judge, yet as the trial court in the present case has acted contrary to the settled principles of law as well as facts, it sets aside the trial court's order on the ground of perversity as the appellant's case is a case of admitted liability as reflected in respondent's own balance sheets and statement of accounts without any caveat/explanation and that too post its counterclaim in its letter dated 24-10-2019."

19. In **BMW India Private Limited** (*supra*), the learned Single Judge of this Court, while holding that the power under Section 9 of the Act should be principled and premised on some known guidelines, and that hence the analogy of Order XXXVIII and XXXIX of the CPC is certainly applicable, on the facts of that case, found that various disputes had been raised by the respondent in challenge to the claim made by the petitioner. It further found that the petitioner had already encashed the bank guarantees for a substantial amount claimed by it. The same cannot be said in the present case.

20. In **Nimbus Communications Ltd.** (*supra*), the High Court of Bombay, while observing that the power under Section 9 of the Act cannot be exercised independent of principles, which have been laid

down to govern the grant of an *interim* injunction, particularly in the context of Specific Relief Act, 1963, held that the conduct of the party against whom such a direction is sought was also a material consideration. It observed that the Court when it decides a petition under Section 9 of the Act must have due regard to the underlying purpose of the conferment of powers 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 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 interest of justice. A balance has to be drawn between the two considerations in the facts of each case.’* The High Court, in the facts of that case, in fact, directed the respondent to secure the debt by furnishing a Bank Guarantee.

21. In the present case, keeping in view the admission of the liability contained in email dated 17.11.2022 of the respondent no.1; as also the admission of its inability to pay; as also of being in process of closing its business operations, in my view, the petitioner has been able to make out a case for directing the respondent to secure the amount claimed by the petitioner. However, the said security would be confined to the sum of Rs.2.30 Crore, which has been admitted by the respondent no.1 in its email dated 17.11.2022.

22. The respondent no.1 is directed to furnish a bank guarantee of the sum of Rs. 2.30 crores in favour of the learned Registrar General of this

Court within a period of four weeks from today. The *interim* order dated 18.11.2022 shall continue till such time the Bank Guarantee is furnished to the satisfaction of the learned Registrar General. The bank guarantee shall be subject to and abide with the further directions to be passed by the learned Arbitral Tribunal.

23. It is made clear that any observation made hereinabove shall not, in any manner, influence the learned Arbitral Tribunal in adjudication of the disputes on merits. It is further made clear that the parties shall be at liberty to apply for further *interim* protection/vacation of the present order/release of the bank guarantee before the learned Arbitral Tribunal, in accordance with the law.

24. The petition along with pending applications is disposed of.

DECEMBER 20, 2022/Arya

NAVIN CHAWLA, J