

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

% **Date of order: 13th January 2023**

+ **O.M.P.(I) (COMM.) 213/2022 and I.A. No. 14394/2022**

**M/S SURYAPUSHPA DISTRIBUTORS THROUGH ITS
PROPRIETOR MR KISHOR SURESH GADIYA & ORS.**

..... Petitioners

Through: Mr. Ashish Sheoran and Ms. Smita
Bankoti, Advocates

versus

RAIL LAND DEVELOPMENT AUTHORITY Respondent

Through: Mr. R.V. Sinha, Mr. Sugam Puri,
Mr. A.S. Singh and Mr. Amit
Sinha, Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

I.A. No. 14394/2022 (Amendment of pleadings)

1. The instant application under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908, has been filed on behalf of the petitioners/applicants seeking amendment of the relief claimed in the captioned petition.

2. Learned counsel appearing on behalf of the applicants submitted that petitioners filed the instant petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter "Arbitration Act") in view of

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threats issued by respondent vide letter dated 1st July 2022 to terminate the Letter of Acceptance (hereinafter “LoA”) dated 9th February 2022. However, the petitioners were obligated to make the payment of the Lease Premium only for an encumbrance free land, which the respondent could not provide.

3. It is submitted that the instant matter was listed on 11th July 2022 where the counsel for the respondent sought time to file a reply to the petition. On the said date, the learned counsel for the petitioners sought to press the grant of order for injunction against the respondent *qua* the termination of LoA dated 9th February 2022. However, no interim order was granted in favour of the petitioners.

4. It is submitted that the respondent in utter malice sought time to furnish reply to the petition, however, instead of filing the said reply the respondent terminated the LoA vide communication dated 19th July 2022. Therefore, by way of this application, the petitioners are seeking that this Court may allow the petitioners to amend the prayer clause to add the following prayer:-

“Interim relief of status-quo ante qua the termination LOA dated 09.02.2022 and land admeasuring 35,127 sq. mtr., which is subject matter of LOA, be directed to be maintained till disposal of the Section 9 Petition.”

5. On the contrary, the learned counsel for the respondent opposed the amendment sought on behalf of the petitioners and submitted that the instant relief sought by way of amendment is not maintainable under Section 9 of the Arbitration Act.

6. Heard learned counsel for the parties and perused the contents of the application.

7. In the instant application, the petitioners are seeking to amend the relief clause and add the prayer of *status quo ante* termination of the LoA dated 9th February 2022. However, at this stage it is crucial to examine that the termination already made final by the respondent cannot be challenged by the petitioners by way of a Section 9 petition.

8. As per Term 3 of the LoA, it is evident that the same was terminable in case of deficiencies on the part of the petitioners. Therefore, where the LoA was in fact terminated, no relief lies in favour of the petitioners/applicants for challenging the order of termination on merits. A similar view has been taken by a Division Bench of this Court in ***M/S Inter Ads Exhibition Pvt Ltd vs. Busworld International Cooperatieve Vennotschap Met Beperkte Anasprakelijkheid*, 2020 SCC Online Del 2485** while holding the following:-

“15. Since the contract in the present case was terminable and as the issue of the legality of the action of termination has yet to be determined and further, since wrongful termination can be restituted by awarding of damages, in the event the appellant is able to establish that the said termination was illegal and invalid, the learned Single Judge has rightly declined the reliefs prayed for by the appellant in the Section 9 petition.”

9. This Court, exercising its powers under Section 9 of the Arbitration Act, cannot go into the merits of the termination order and adjudicate upon a challenge to the same.

10. Therefore, this Court does not deem it fit to allow the instant application as the same goes beyond the scope of relief that may be sought along with a petition under Section 9 of the Arbitration Act.

11. Accordingly, the instant application stands dismissed.

O.M.P.(I) (COMM.) 213/2022

1. The instant petition under Section 9 of the Arbitration and Conciliation Act, 1996 has been filed on behalf of the petitioners seeking *inter alia* the following reliefs:-

“a. Restrain the Respondent from taking any action in terms of their letter/reply dated 01.07.2022 or terminate the Letter of Acceptance dated 09.02.2022 till the Respondent make available the land under reference, free of all encumbrances;

b) Directing the Respondent to maintain status quo qua the Letter of Acceptance dated 09.02.2022 issued by the Respondent in favour of the Petitioners, till the time, the appeal filed by Respondent under Section 247 of Maharashtra Land Revenue Code before the District Superintendent of Land records, Aurangabad, seeking cancellation of PR card of CTS no. 20295/A/1 is decided in favour of the Respondent;

c) Direct the Respondent to furnish security in the form of Bank Guarantee before this Hon'ble Court, for an equivalent amount of Rs.1 crore paid by the Petitioners as bid security with the Respondent;”

FACTUAL MATRIX

2. The respondent, being a statutory authority under the Ministry of Railways, is responsible for creating assets for the Indian Railways by

developing vacant railway land for commercial use. For the said purpose, the respondent issued a Request for Proposal Notice No. RLDA/RFP/CD/38 dated 15th September 2021 for grant of lease for the purposes of commercial development on railway land admeasuring 35,127 sq. mtrs. at Off Jaina Road, Aurangabad.

3. The petitioners, consortium members, came together to jointly bid for Rs. 95,05,05,211/- for the grant of lease for the commercial development of the said railway land and succeeded in their bid. The petitioners made a payment of Rs. 1,00,00,000/- as bid security to the respondent.

4. Pursuant to the successful bid, LoA dated 9th February 2022 was issued in favour of the petitioners. As per the financial bid submitted by petitioners, the Annual Lease Rent for the said land was offered to be Rs.1,00,000/- per annum plus applicable taxes, which would be payable to respondent every year in advance.

5. The petitioners were liable to pay a sum of Rs. 23,76,26,303/- to the respondent as per the payment schedule of Bid Form-12 read with Clause 6.0, Part II of the ITB, Bid Documents, as the first installment of the Lease Premium, within 60 days from the issuance of the LoA, failing which Note (2) and (3) of the Bid Form-12 was to apply.

6. It is the case of the petitioners, that while inspecting the site in question, they were obstructed by people acting on behalf of one Vidya Bhalchandra Kulkarni, who were claiming ownership of the land. The presence of encroachers on the land was brought to the knowledge of the

respondent vide letter dated 13th April 2022. The petitioners also requested that an extension of 120 days may be granted to them for the payment of the first installment towards Lease Premium.

7. The respondent vide its reply dated 14th June 2022 declined the request of the petitioners for an extension of time for 120 days for payment of the first installment. The respondent, however, allowed the petitioners to make the installment of the premium alongwith interest on or before 8th July 2022.

8. The petitioner vide communication dated 1st July 2022 requested the respondent that, since the title of the land in question was not clarified and the same remains encroached, *status quo* may be maintained with respect to the LoA. The respondent also made a communication dated 1st July 2022 reiterating that the petitioners had to make the payment of the first installment on or before 8th July 2022, failing which the LoA would be cancelled and security would be forfeited.

9. Meanwhile, the petitioner filed the instant petition before this Court seeking the reliefs as stated above upon receiving the communication dated 1st July 2022 issued by the respondent.

SUBMISSIONS

10. Learned counsel appearing on behalf of the petitioners submitted that the petitioners were under the *bona fide* belief that the land in question is free from encumbrances and therefore, had submitted the highest bid price for the same at Rs. 95 Crores and deposited Rs. 1 Crore

as earnest money with the respondent. However, during the course of cleaning the site on 6th April 2022, the petitioners found out that the site was being encroached upon. These encroachers obstructed the excavation process, filed a complaint against the petitioners in Police Station Kranti Chowk and also filed a suit for declaration and perpetual injunction before the Civil Judge, Senior Division, Aurangabad. The interim relief sought by the people against the petitioners was dismissed by the Civil Judge.

11. It is submitted that the aforesaid facts were brought to the knowledge of the respondents vide letter dated 13th April 2022, whereby a request for extension of stipulated time for payment of first installment towards the Lease Premium was also made, which came to be rejected by the respondent.

12. Learned counsel submitted that the petitioners enquired about the land with the Land Records Office and found that there are two Property Cards/ *Malmatta Patrak* for the railway land in question, having the same boundaries and measurements, however, showing two different CTS nos. being 20295/1 and 20295/A/1. While the respondent is shown as the owner against one of the Property Cards, for the other Card one Bhalchandra Kulkarni is shown as the owner. It further submitted that the petitioners came to know that the respondent has filed an appeal under Section 247 of the Maharashtra Land Revenue Code before the District Superintendent of Land Records, Aurangabad seeking cancellation of the Property Cards on the ground of forgery and fabrication of documents.

13. It is submitted that despite the pendency of the appeal and knowledge of the dispute *qua* the title of the land, the following General Conditions of Lease Agreement dated 23rd March 2014 were included:-

“Article 7

7.2. RLDA hereby represents and warrants to the lessee that as on the Effective Date:-

xxxxxx

7.2.2 It has full power and authority to execute, deliver and perform its obligations under the Agreement;

7.2.3 The Railway Administration has valid title to the Site and RLDA has full power and authority to grant the lease;

7.2.4 It has taken all necessary actions under Applicable Laws to authorize the execution, delivery and performance of the Agreement;

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7.2.6 It has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any legally binding order of any Government Authority which may result in any Material Adverse Effect or impairment of RLDA's ability to perform its obligations and duties under the Agreement.

7.2.7 To the best of RLDA's knowledge and belief, the Site is free from all Encumbrances and is available for Development in accordance with the terms of the Agreement;

7.2.8 To the best of RLDA's knowledge and belief, there are no actions, suits, proceedings or investigations vending against it, before any court or Government Authority in relation to the Site, the outcome of which may result in the breach of or constitute a default of RLDA under the

Agreement, or result in impairment of RLDA's ability to perform its obligations and duties under the Agreement.

7.3 Disclosure

In the event at any time after the date hereof, any event or circumstance comes to the attention of either Party that renders any of its abovementioned representations or warranties untrue, inaccurate or incorrect, then such Party shall immediately notify the other Party of the same. Such notification shall not have the effect of (i) remedying any breach of the representation or warranty that has been found to be untrue, inaccurate or incorrect; or (ii) adversely affecting or release any obligation of either Party under this Agreement."

14. It is further submitted that Clause 24, Part I of the Bid Documents along with the procedure and mandate pertaining to the issuance of the LOA and compliance post the issuance, empowers the respondent to grant an extension in respect of the payment of the premium amount. Yet, when the petitioners requested for extension of time, the respondent rejected the same.

15. Learned counsel submitted that the petitioners sent another notice dated 4th July 2022 reiterating the situation seeking extension of time, but the same was not replied to by the respondent.

16. It is, therefore, submitted that since the respondent have denied the request of the petitioners for extension of time for making the payment towards the Lease Premium and have also threatened to terminate the LoA issued in favour of the petitioners *qua* the railway land, the petitioners are left with no other remedy than that sought before this Court by way of the instant petition.

17. *Per Contra*, learned counsel appearing on behalf of the respondent vehemently opposed the instant petition, the relief prayed for and the arguments advanced on behalf of the petitioners. At the very outset, learned counsel for the respondent submitted that the petition is not maintainable in view of Sections 14(d) and 41(e) of the Specific Relief Act, 1963. It is also submitted that petitioners have no cause of action in their favour for the grant of relief sought by way of the instant petition and that the relief sought on behalf of the petitioners cannot be granted as per the terms of the Arbitration Act.

18. Learned counsel for the respondent submitted that the petitioner has not come before this Court with clean hands and has tried to mislead the Court to assert that the respondent concealed the fact of title of the land and encumbrances on the property. It is clear that the tender in respect of the property in question was on 'as is where is' basis and it was specifically mentioned in Clause 1.1.7 of Part-III of the Bid Document related to instructions to bidders and Bid Form that "*but the same is presently under encroachment*" and that after satisfying themselves and having visited the site, the petitioner has submitted the bid with their free will.

19. It is further submitted that the title of the property cannot be said to be in dispute, since evidently, the Property Card of the respondent bears CTS No. 20295/A/1, whereas that of the other owner was CTS No. 20295/1. It was incumbent upon the petitioners to fulfil their contractual obligations because mere pendency of court proceedings in a separate matter does not prohibit the petitioner to fulfil his obligations.

20. It is submitted on behalf of the respondent that in terms of the Clause 5 of the LoA, it was stipulated that till the time the lease was executed between the parties, the LoA constituted a binding contract for execution of the Lease Agreement. It is further submitted that Clause 9 of the aforesaid LoA provides that it shall be read in conjunction with the Bid Document, the terms of which shall be binding on the petitioners. As per Clause 3 of the payment schedule of Bid Form-12 read with Clause 6 of Part-III of ITB of Bid Document, the petitioners were requested to pay Rs.23,76,26,303/- to the respondent within interest free time period of 60 days towards payment of first installment of Lease Premium from the date of issuance of the letter failing which Note (2) and (3) of Bid Form-12 would apply.

21. It is vehemently argued on behalf the respondent that as per Term 3 of the LoA, it was unequivocal that in case the petitioner failed to deposit the first installment of Lease Premium within stipulated time, the LoA shall be cancelled without any notice to the selected bidder and bid security shall also be forfeited besides other actions, as stipulated in the Bid Document. However, despite the said provision in the LoA, the petitioners failed to perform their part of the agreement.

22. Learned counsel for the respondent also relied upon Article 21 of the Land Development handbook of the respondent which provides for termination of lease in the event of default in payment.

23. Learned counsel for the respondent also relied upon the following undertakings, as mentioned in the Bid Form-I, to submit that the

petitioners had the knowledge regarding the site in question and had submitted their bid accordingly:-

“2. *My/Our Bid is unconditional and unqualified.*

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21. *I/We have studied all the Bidding Documents carefully and have also surveyed the Site. We understand that except to the extent as expressly set forth in the Lease Agreement, we shall have no claim, right or title arising out of any documents or information provided to us by the RLDA or in respect of any matter arising out of or relating to the Bidding Process including the award of Lease.*

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27. *I/We has/have examined the relevant papers for the Site available with RLDA such as land plan and property card before submission of the Bid. Any sub-divisioning of the Site, if required, has to be done by me/us at my/our own cost. RLDA shall not be held responsible for any delay on account of any shortcoming in land plan, property card and sub-division and no demand few any compensation shall be raised against RLDA on this account.”*

24. It is, therefore, submitted that the instant petition is liable to be dismissed for being devoid of any merit.

FINDINGS AND ANALYSIS

25. Heard learned counsel for the parties and perused the record.

26. The dispute has arisen out of the LoA issued in favour of the petitioners by the respondent with respect to the railway land to be

developed for commercial use. The petitioners have approached this Court seeking remedy under Section 9(2) of the Arbitration Act.

27. For the proper adjudication of the instant dispute is narrowed down to the question '*whether the instant suit is maintainable under Section 9 of the Arbitration Act*', while deliberating upon the following considerations:-

- I. Whether the dispute there arose any cause of action till the filing of the instant petition.
- II. Whether the relief sought may be granted under Section 9 Arbitration Act proceedings.

ISSUE I

28. To evaluate the question whether a relief may be granted under Section 9 of the Arbitration Act to the petitioners, it is deemed necessary to answer whether there arose a cause of action between the parties. Another indispensable consideration to be deliberated upon is whether the petitioners had the intention of invoking arbitration proceedings or had communicated the same to the respondent with respect to the instant alleged disputes.

29. The first consideration to be seen is whether there arose any cause of action between the parties giving rise to the filing of the instant petition under Section 9 of the Arbitration Act.

30. The petitioners have alleged that the respondent was responsible

for handing over an encumbrance free land to them in terms of the LoA, as issued between the parties. On the other hand, the respondent has alleged that the petitioners were liable to make the payment of the installment towards the Lease Premium within the stipulated time. At this stage, the parties had only executed a LoA and no steps had been taken by either of the parties towards the performance of the contract.

31. It is pertinent to see that the petitioners have filed the instant petition on the basis of a Notice/reply dated 1st July 2022, whereby the respondent had intimated the petitioners that upon failing to furnish the payment of the first installment towards the Lease Premium, on or before 8th July 2022, as decided amongst the parties, the LoA may be terminated and the bid security amount paid shall be forfeited. At this stage, there were only communications that were flowing between the parties regarding the alleged encroachment and the payment of the first installment. None of the party took any steps towards the performance of the agreement or the LoA.

32. It is undisputed that the petitioners at the time of filing the instant petition were under apprehension that the LoA may be terminated in terms of what had been stipulated under the reply sent on behalf of the respondent dated 1st July 2022. The same read as under:-

“As per LOA dated 09.02.2022 and bid document, the total time period (including extensions) specified for payment of first installment of lease premium is 150 days from the date of issue of LOA which falls on 08.07.2022. As per RFP provisions, no further extension shall be given and the RLDA shall terminate the LOA and forfeit the bid security and other amounts as per

the provisions of the bid document.

In view of the above, you are requested to make payment of "First Installment of Lease Premium" amounting to Rs.23,76,26,303/- along with Interest within the extended time i.e. upto 08.07.2022.

All other terms and conditions of Letter of Acceptance and RFP shall remain unchanged."

33. However, apart from the Notice/reply by the respondent there was nothing to substantiate the apprehension of the petitioners, neither anything in derogation or contravention of the LoA was done by the respondent. The communication made by the respondent was a mere reminder to the fact that the petitioners were liable to make the payment of the installment of the Lease Premium within the stipulated time failing which the action in accordance with the terms of the LoA would be taken.

34. It is found that at this stage, no cause of action has actually and substantially arisen between the parties which could have given effect to the reliefs sought by the petitioner. An anticipation of an action does not give rise to sufficient cause of action to grant the reliefs that have been sought by the petitioners. Till the time of filing of the instant pleadings, there was no dispute of arbitrable nature that could have given rise to the right/claim under Section 9 of the Arbitration Act.

35. The petitioners and respondents are also in conflict with respect to the issue that whether the respondent could have taken the action as stated under the Notice/reply dated 1st July 2022 and thereafter, carried out during the pendency of the proceedings.

36. To settle this question, it is pertinent to refer to the relevant part of the LoA under which the parties are seeking their claims:-

“3. As per payment schedule of Bid Form-12, read with Clause- 6,0 of Part- III of 1TB of Bid Document, you are requested to pay Rs.23,76,26,303/- (Rupees Twenty Three Crore Seventy Six Lakh Twenty Six Thousand Three Hundred Three Only), to RLDA within interest free time of 60 days towards the payment of First Installment of Lease Premium from the issue of this letter, failing which, note (2) & (3) of Bid Form- 12 will apply. Applicable GST to be deposited by the developer under RCM. In case, you fail to deposit the first installment of Lease Premium within stipulated time, the LOA shall be cancelled without any notice to the Selected Bidder. Bid Security shall also be forfeited beside other actions as stipulated in Bid Document.”

37. Admittedly, the petitioners had the knowledge that they were granted time till the date of 8th July 2022, as per the terms of the LoA for making the payment of the first installment towards the Lease Premium amounting to Rs. 23,76,26,303/-. There is no dispute to the fact that the petitioners were time and again intimated and reminded that they had to abide by the terms under the LoA for the payment of Lease Premium. They were bound to take action towards the performance of their part of the agreement within the time frame stipulated. The said fact was definitively and unambiguously communicated to the petitioners that the time extension sought by them was rejected by the respondent. Moreover, the terms of the LoA as reproduced above unequivocally stated that non-payment of the installment amount of Lease Premium would lead to cancellation/termination of LoA without notice and that in such a case the

security bid amount would also stand forfeited.

38. A perusal of the pleadings as well as the submissions made on behalf of the parties reveal that the petitioners did not make any efforts to perform their part of the agreement and make the payment of the installment towards the Lease Premium within the stipulated time despite unequivocal communication by the respondent. Hence, at this stage, the petitioners failed to show sufficient cause for granting of relief in their favour and against the respondent, especially under Section 9 of the Arbitration Act.

39. The second question for ascertaining a maintainable claim under Section 9 of the Arbitration Act, is to see whether there is a real nexus and proximity between the application/petition for interim relief and the arbitration proceedings intended to be initiated shall be apparent. The Hon'ble Supreme Court in ***Firm Ashok Traders vs. Gurumukh Das Saluja***, (2004) 3 SCC 155, made the following observations regarding this question:-

“17. There are two other factors which are weighing heavily with us and which we proceed to record. As per the law laid down by this Court in Sundaram Finance Ltd. [(1999) 2 SCC 479 : AIR 1999 SC 565] an application under Section 9 seeking interim relief is maintainable even before commencement of arbitral proceedings. What does that mean? In Sundaram Finance Ltd. [(1999) 2 SCC 479 : AIR 1999 SC 565] itself the Court has said: (SCC p. 488, para 19)

It is true that when an application under Section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the

applicant to take recourse to the arbitral proceedings.

Section 9 permits application being filed in the court before the commencement of the arbitral proceedings but the provision does not give any indication of how much before. The word “before” means, inter alia, “ahead of; in presence or sight of; under the consideration or cognizance of”. The two events sought to be interconnected by use of the term “before” must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or “within-sight” certainty. The party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the court that the arbitral proceedings are actually contemplated or manifestly intended (as Sundaram Finance Ltd. [(1999) 2 SCC 479 : AIR 1999 SC 565] puts it) and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. The purpose of enacting Section 9, read in the light of the Model Law and UNCITRAL Rules is to provide “interim measures of protection”. The order passed by the court should fall within the meaning of the expression “an interim measure of protection” as distinguished from an all-time or permanent protection.

18. Under the A&C Act, 1996, unlike the predecessor Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that Section 17 would operate only during the existence of the Arbitral Tribunal and its being functional. During that period, the power conferred on the Arbitral Tribunal under Section 17 and the power conferred on the court under Section 9 may overlap to some extent but so far as the period pre- and post-the arbitral proceedings is concerned, the party requiring an interim measure of protection shall have to approach only the

court. The party having succeeded in securing an interim measure of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the “proximately contemplated” or “manifestly intended” arbitral proceedings itself. If arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made “before” i.e. in contemplation of arbitral proceedings. The court, approached by a party with an application under Section 9, is justified in asking the party and being told how and when the party approaching the court proposes to commence the arbitral proceedings. Rather, the scheme in which Section 9 is placed obligates the court to do so. The court may also while passing an order under Section 9 put the party on terms and may recall the order if the party commits breach of the terms.”

40. The Hon’ble Supreme Court in ***Hindustan Construction Co. Ltd. vs. Union of India, (2020) 17 SCC 324*** has made similar observations which are reproduced hereunder:-

“36. Interpreting Section 9 of the Arbitration Act, 1996, a Division Bench of the Bombay High Court in Dirk (India) (P) Ltd. v. Maharashtra State Power Generation Co. Ltd. [Dirk (India) (P) Ltd. v. Maharashtra State Power Generation Co. Ltd., 2013 SCC OnLine Bom 481 : (2013) 7 Bom CR 493] held that : (SCC OnLine Bom para 13)

“13. ... 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.”

41. Hence, it is evident that when a party is seeking relief under Section 9 of the Arbitration Act, it is implicit that there is a final and binding arbitration agreement in existence. When an application under Section 9 of the Arbitration Act is filed before the commencement of the arbitral proceedings, there has to be “manifest intention” on the part of the applicant to take recourse to the arbitral proceedings. In the instant case, the petitioners served two notices upon the respondent whereby they conveyed their inability to make the payment of Lease Premium within the stipulated time. However, in none of the communications the petitioners conveyed their intention to invoke arbitral proceedings against the respondent. In fact, there were no disputes that were amenable to be adjudicated by way of arbitration proceedings under the Arbitration Act.

ISSUE II

42. To answer this question, it essential to see that the petitioners are seeking relief under Section 9 of the Arbitration Act, which reads as follows:-

‘9. Interim measures, etc., by Court-

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety

days from the date of such order or within such further time as the Court may determine.”

43. A bare reading of the provision reveals that the Court has the power to make orders granting interim measure of protection under the Arbitration Act. The key word used in the provision is “interim”, the literal meaning of which is “in the intervening time” or “provisional”. The contents of Section 9 of the Arbitration Act are comprehensive enough to understand the intent of incorporating the same by the application of Literal Rule of Interpretation. An interim relief may be granted by the appropriate court at any point of time but before the Arbitral award becomes enforceable under Section 36 of the Arbitration Act. The intention is to grant relief to the party(ies) in the intervening period from the till the arbitration proceedings between the parties are initiated, concluded or, if the Award has been filed, the Award made subsequent to the proceedings attains finality and is enforced as per the provisions of the Act.

44. While granting an interim relief or protection, the settled principles of law need to be borne in mind to pass an order bereft of illegalities and errors apparent on the face of record. Therefore, it is pertinent to observe the principles laid down in law, under the legislation as well as by interpretation of the Hon’ble Supreme Court, to ensure that in the process of granting interim relief and protection, the final relief sought or purported to be sought is not rendered infructuous. The practice and observation of these principles become even more necessary when the relief is being sought once the Award has already been made after much

deliberation and consideration in the arbitral proceedings.

45. The Hon'ble Supreme Court in *Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd.*, (2007) 7 SCC 125, while discussing the scope of interim reliefs, under Section 9 of the Arbitration Act, was of the view that provisions of the Code of Civil Procedure, 1908 as well as the Specific Relief Act, 1963, although not in *sensu stricto*, have to be appreciated and applied at the time of granting interim measures. The relevant portion of the judgment is reproduced hereunder:-

“11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. 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 dehors 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. On that basis also, it is not possible to keep out the concept of balance of convenience,

prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

12. The power and jurisdiction of courts in arbitral matters has been the subject of much discussion. The relationship between courts and Arbitral Tribunals have been said to swing between forced cohabitation and true partnership. The process of arbitration is dependent on the underlying support of the courts who alone have the power to rescue the system when one party seeks to sabotage it. The position was stated by Lord Mustill in Coppee Lavalin N.V. v. Ken-Ren Chemicals & Fertilizers Ltd. [(1995) 1 AC 38 : (1994) 2 WLR 631 : (1994) 2 All ER 449 : (1994) 2 Lloyd's Rep 109 (HL)] Lloyd's Rep at p. 116 : (All ER pp. 459j-460a)

“[T]here is plainly a tension here. On the one hand the concept of arbitration as a consensual process, reinforced by the ideal of transnationalism leans always against the involvement of the mechanisms of State through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of foundering...”

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14. Professor Lew in his Commentary on Interim and Conservatory Measures in ICC Arbitration Cases, has indicated:

“The demonstration of irreparable or perhaps substantial harm is also necessary for the grant of a measure. This is because it is not appropriate to grant a measure where no irreparable or substantial harm comes to the movant in the event the measure is not granted. The final award offers the means of remedying any harm, reparable or otherwise, once determined.”

15. *The question was considered in Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. [1993 AC 334 : (1993) 2 WLR 262 : (1993) 1 All ER 664 (HL)] The trial Judge in that case took the view that he had the power to grant an interim mandatory injunction directing the continuance of the working of the contract pending the arbitration. The Court of Appeal thought that it was an appropriate case for an injunction but that it had no power to grant injunction because of the arbitration. In further appeal, the House of Lords held that it did have the power to grant injunction but on facts thought it inappropriate to grant one. In formulating its view, the House of Lords highlighted the problem to which an application for interim relief like the one made in that case may give rise. The House of Lords stated at AC p. 367 : (All ER p. 690g-h)*

“It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial stage of a dispute arising under a construction contract to order the defendant to continue with a performance of the works. But the court should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief. In the combination of circumstances which we find in the present case I would have hesitated long before proposing that such an order should be made, even if the action had been destined to remain in the High Court.””

46. The said position was also reiterated in ***Arcelormittal Nippon Steel (India) Ltd. vs. Essar Bulk Terminal Ltd., (2022) 1 SCC 712***, wherein it was observed as under:-

“88. Applications for interim relief are inherently applications which are required to be disposed of urgently. Interim relief is granted in aid of final relief. The object is to

ensure protection of the property being the subject-matter of arbitration and/or otherwise ensure that the arbitration proceedings do not become infructuous and the arbitral award does not become an award on paper, of no real value.

89. The principles for grant of interim relief are (i) good prima facie case, (ii) balance of convenience in favour of grant of interim relief and (iii) irreparable injury or loss to the applicant for interim relief. Unless applications for interim measures are decided expeditiously, irreparable injury or prejudice may be caused to the party seeking interim relief. 90. It could, therefore, never have been the legislative intent that even after an application under Section 9 is finally heard, relief would have to be declined and the parties be remitted to their remedy under Section 17.”

47. Therefore, the primary consideration while passing the order is to see whether irreparable harm is likely to be caused to the party seeking the relief, while bearing in mind that granting such relief shall not render the final relief or the entire proceedings infructuous. A relief beyond the final relief as an interim measure, at the preliminary stage, shall not be granted and even if granted, has to be with utmost caution and vigilance.

48. It is, hence, evident that the relief which may be granted under Section 9 of the Act can be only to provide relief to the party claiming so to ensure that the subject matter of the arbitration is protected during and till the conclusion of proceedings and after the Award is made but is not enforced. Such a measure can certainly not be granted beyond the scope and mandate of Section 9 and in the nature of a final order/relief.

49. In the instant case, the prayer (a) sought by the petitioners, is not found fit to be granted under Section 9 of the Arbitration Act, since the

prayer that the respondent shall be restrained from taking any action in terms of their Notice/reply dated 1st July 2022 is a relief in the nature of permanent injunction/relief and hence, beyond the scope of Section 9 of the Arbitration Act.

50. With respect to prayer (b), the observations of this Court given in the aforesaid application of I.A. No. 14394/2022, shall be referred to. Once the termination of the LoA was concluded, there does not remain a relief which may be granted under Section 9 of the Arbitration Act.

CONCLUSION

51. Keeping in view the contents of the pleadings, the facts and circumstances, the contentions raised on behalf of the parties and the submissions advanced during the course of hearing, this Court is inclined to accept the position as advanced on behalf of the respondent.

52. The petitioners were, indisputably, aware of the Term 3 of the LoA which stipulated that in case of failure to make payment towards the installment of Lease Premium the LoA was liable to be terminated. Moreover, till the filing of the instant petition, there was no cause of action between the parties which could have given rise to a right, claim or relief under Section 9 of the Arbitration Act. Furthermore, the relief sought by the petitioners may not be granted in the limited scope provided for under Section 9 of the Arbitration Act.

53. Hence, this Court, at this juncture, does not find merit in the petition.

54. Accordingly, the instant petition is dismissed for being devoid of merits.

55. Pending applications, if any, also stand dismissed.

(CHANDRA DHARI SINGH)
JUDGE

JANUARY 13, 2023
SV/MS

[Click here to check corrigendum, if any](#)

