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

\+ FAO (COMM) 29/2021

SAVITA JAIN SOLE PROPRIETOR OF
MS NAVKAR SALES ..... Appellant
Through Mr. Namit Suri with Mr. Roshan Kumar, Advocates.

versus

MS KRISHNA SALES RAJNI MALPANI,
SOLE PROPRIETOR ..... Respondent
Through Mr. Kaushal Gautam, Mr. Gaurav Khetarpal, Mr. Abhinav and Ms.Snehpreet Kaur, Advocates

Reserved on : 26th March, 2021
% Date of Decision : 20th April, 2021

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

MANMOHAN, J:

CM APPL. 5043/2021

Allowed, subject to just exceptions.

Accordingly, the application stands disposed of.

FAO (COMM) 29/2021 & CM APPL. 5042/2021

1. Present appeal has been filed challenging the order dated 08th January, 2021 passed in OMP (I) (Comm.) No. 116/2020 (hereinafter referred to as

'the impugned order') whereby the petition filed by the appellant/petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act, 1996') was dismissed with costs.

ARGUMENTS ON BEHALF OF THE APPELLANT

2. Learned counsel for the appellant/petitioner stated that the respondent had itself in its ledger sent along with email dated 28th August, 2020 admitted liability towards the appellant/petitioner to the tune of Rs.14,73,292.99/- out of Rs.31,55,228/-. He submitted that discretionary relief enshrined under Section 9 of the Act, 1996 should have been exercised in the present case as there was adequate material on record leading to a definite conclusion that the respondent had "admitted its liability". In support of his submission, he relied upon the following judgments:-

A. ***Rajendran and Others Vs. Shankar Sundaram and Others, (2008) 2 SCC 724,*** wherein it has been held as under:-

> *"12. The appellants, in our opinion, are not seriously prejudiced thereby. The court while exercising its jurisdiction under Order 38 Rule 5 of the Code of Civil Procedure is required to form a prima facie opinion at that stage. It need not go into the correctness or otherwise of all the contentions raised by the parties. A cheque had been issued in the name of the firm. The appellants are partners thereof. A pronote had been executed by a partner of the firm. Thus, even under the Partnership Act prima facie the plaintiff could enforce his claim not only as against the firm but also as against its partners."*

B. ***M/s. Value Source Mercantile Ltd. Vs. M/s. Span Mechnotronix Ltd., 2014 (143) DRJ 505,*** wherein it has been held as under:-

> *"14. The question which thus arises is that if the dispute as aforesaid had been brought before this Court by way of a suit,*

whether this Court could have, during the pendency of the suit, granted the relief as has been granted in the impugned order. Order XXXIX Rule 10 of the CPC empowers the Court to direct deposit/payment of admitted amounts. The appellant, as aforesaid does not controvert that it continued to be the tenant of office unit B-1 and had not terminated the tenancy with respect thereto. There is thus an admission by the appellant of the liability for rent at least of office unit B-1. The appellant, if had been a defendant in a suit, could have thus been directed by an interim order in the suit to make such payment to the respondent. Order XV-A added to the CPC as applicable to Delhi and which was added, as held by us in judgment dated 15th May, 2014 in FAO (OS)597/2013 titled Raghubir Rai v. Prem Lata, to empower the Court to direct payment during the pendency of the suit at a rate other than admitted rate also, empowers the Civil Court to direct payment which is apparently wrongfully disputed. The denial by the appellant of the entire rent as agreed, on the ground of having determined the tenancy of one of the two office units taken on rent, is clearly vexatious, as in law the appellant as a tenant could not determine tenancy of part of the premises taken on rent. It is not the case of the appellant that it was entitled to do so as part of terms of its tenancy. In that view of the matter, the appellant could under Order XV-A of the CPC have been directed to pay the rent of the entire premises notwithstanding having given notice of termination of tenancy of part thereof. We are therefore satisfied that the impugned order satisfies the test of being in exercise of the same power for making orders as the Court has for the purpose of a Civil Suit and is thus within the ambit of Section 9 of the Arbitration Act."

C. ***Numero Uno International Ltd. Vs. Prasar Bharti, (2008) 150 DLT 688***, wherein it has been held as under:-

"8. The issue can be viewed from yet another angle. The making of the interim award ensures to the party in whose favour the same is made the payment of an amount which is an admitted position payable to it. There is no reason why the payment of what is admittedly due should await the determination of other disputes

which may take years before they are finally resolved. If at the conclusion of the arbitral proceedings, the defendant were to succeed in his claim, either wholly or partially, and if after adjustment of the amounts found payable to the plaintiff, any amount is eventually held payable to one or the other party, the arbitrator can undoubtedly make such an adjustment and direct payment of the amount to one or the other party, as the case may be. The final award would in any such case also take into consideration the payments, if any, made under the interim award. Suffice it to say that the making of the interim award in no way prevents the arbitrator from making adjustments of the amount in the final award and doing complete justice between the parties. By that logic even if we assume that the Prasar Bharti was to fail in substantiating its further claims which are disputed and the appellant were to succeed wholly in the counter claim that it has made, all that it would result in is an award in favour of the appellant. There is, therefore, no inherent illegality or perversity in the making of the interim award by the arbitrator so as to call for interference by this Court under Section 34 of the Act."

D. ***Huawei Technologies Co. Ltd. Vs. Sterlite Technologies Limited, MANU/DE/0241/2016,*** wherein it has been held as under:-

"29……I agree that the discretion should be exercised in those 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 there is an admitted liability.

30. In the present case, admittedly, the goods have been supplied by the petitioner to the respondent in terms of the supply contract and respondent has further supplied the same to MTNL. The said goods are being used and enjoyed by the MTNL. The respondent after supplying the goods to MTNL has collected substantial payment and has not paid to the petitioner for supply of the goods and the payment has been retained by the respondent.

No doubt, the claim(s) and counterclaim(s) of the parties would be adjudicated in arbitral proceedings. However, there is no reason why the petitioner's claim be not secured by requiring the respondent to furnish appropriate security, especially in the light of the contractual framework and particularly when the dues are admitted and the party has received the amount due from the employer."

3. Learned counsel for the appellant/petitioner stated that the precarious financial condition of the respondent was apparent from the documents and financial statements filed by the respondent itself. He submitted that the learned trial court despite finding a *prima facie* case in favour of the appellant got swayed by irrelevant considerations and dismissed the petition and imposed costs upon the appellant.

ARGUMENTS ON BEHALF OF THE RESPONDENT

4. *Per contra* learned counsel for the respondent stated that the appellant had failed to establish urgency in this matter, both in the application before learned District Judge and in the present appeal warranting this Court's interference.

5. He stated that there was no admitted liability as claimed by the appellant, as the respondent had categorically stated that account will be settled only if:-

(i) all the debit notes issued were adjusted;

(ii) the freight charges incurred by the respondent were credited;

(iii) rate difference of 23 mic polyester film and freight of 36 mic polyester film were credited to respondent's account; and

(iv) Due to non-submission of E-1 forms, heavy penalties were imposed

on the respondent by purchasers.

6. He stated that the fact that defective goods had been supplied was acknowledged by appellant. He emphasised that all the aforesaid issues had been raised with the appellant in the respondent's letter dated 24th October, 2019, but to no avail. Since the learned counsel for the respondent repeatedly referred to letter dated 24th October, 2019, the same is reproduced hereinbelow:-

> *"To,*
> *M/S. NAVKAR SALES* *DATE 24/OCT/2019*
> *DELHI*
> *DAR SIR,*
>
> *AS CONVERSED WITH YOU ON PHONE AND DURING YOUR VISIT TO MATHURA. WE ONCE AGAIN REQUEST YOU TO PLEASE CONSIDER THESE BELOW MENTIONED ISSUES AT YOUR EARLIEST AND OBLIGE.*
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> 1. *Material Supplied from M/s Ester Industries Limited against Bill No. IN0519001871 & IN0519001873 DATED 29.06.2019 through you is CORONA TREATED where as required material was CHEMICAL COATED 23 MIC POLYESTER FILMS.*
> 2. *20 Micron White-Opaque BOPP FILM Supplied from CHIRIPAL POLY FILMS LTD. AHMEDABAD is having a runnability problem for which Company Person has visited our work place 2 times. Hence this material is also dumped in our Godown which is not of any use. We are having the MOU signed by the company person.*
> 3. *BOPP 15/18/20 MICRON METALIZE without treatment and Heavy Micron about 25 is also not of any use. As I had a talk with you. Material was returned to you on dated 04/Oct/2019 vide Bill No. KS/19-20/662 & LR No. 7702 of A.T.S. Logistics was not accepted by you which is not tolerable.*

Hence I request you to kindly clear all the issues at your earliest and send your representative to arrange lifting of this material in his supervision.

4. *I also request you to please arrange all the E-1 forms as required and pursuance from*
   A) CHIRIPAL POLY FILMS LTD.
   B) POLYPLEX CORPORATION LTD.

5. *Kindly arrange all the Account Statements from:-*
   A) CHIRIPAL POLY FILMS LTD. AHMEDABAD
   B) POLYPLEX CORPORATION LTD.
   C) ESTER INDUSTRIES LTD.

   For the A.Y 2014-15, 2015-2016, 2016-2017, 2017-2018 and 2018-2019.

   Kindly resolve the above mentioned issues at your earliest to enable us to settle your Account.

   This attitude of yours is not appreciate as we have such a good/long Business Relations.

   Thanks & Regards
   Sd/-
   Mukesh Kumar Palpani
   Authorized Signatory"

7. Learned counsel for the respondent contended that the appellant had failed to establish that the respondent was frittering away/disposing of his assets so as to defeat the very purpose of Arbitration and if an interim relief by way of securing alleged admitted amount was not granted, the Arbitration proceedings would become infructuous. He stated that the change of address of respondent, as claimed by the appellant, as evidence of trying to evade paying outstanding liabilities was an address change from Mathura to

Vrindavan, a mere 12 kms apart. He further stated that the respondent's turnover and profit was growing progressively and in the unlikely event of an award being passed against it, respondent was capable of paying the decretal amount.

COURT'S REASONING

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. 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. THOUGH EXERCISE OF SUCH POWERS IS PREMISED ON THE UNDERLYING PRINCIPLES OF ORDERS XXXVIII AND XXXIX OF THE C.P.C, YET IT IS SETTLED LAW THAT THE COURT IS NOT UNDULY BOUND BY THE TEXT OF THESE PROVISIONS.

8. 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 XXXVIII and XXXIX of

the C.P.C, 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. Kai Airways Private Limited, 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:*
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> > *"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."*

9. 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: ***FAO(OS)(COMM) 28/2021, Mewa Mishri Enterprises Private Limited Vs. AST Enterprises Inc., decided on 23rd February, 2021.***]

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 COUNTER-CLAIM, AS CONTENDED BY THE RESPONDENT IN ITS LETTER DATED 24TH OCTOBER, 2019 AND AS BELIEVED BY THE TRIAL COURT, IT WOULD NOT HAVE SHOWN THE APPELLANT/PETITIONER IN ITS STATEMENT OF ACCOUNTS ENDING 31ST MARCH, 2020 AS ITS SUNDRY CREDITOR TO WHOM RS. 14,73,292.99/- WAS DUE AND PAYABLE WITHOUT ANY CAVEAT/ EXPLANATION. FURTHER, THE FINANCIAL CONDITION OF THE RESPONDENT IS NOT HEALTHY.

10. 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 counter-claim in its letter dated 24th October, 2019.

11. The balance sheets and statement of accounts filed by the respondent

prima facie prove that the respondent admits the appellant as his sundry creditor to the tune of Rs.14,73,292.99/- without any demur or subject to any condition. Though the respondent during the course of arguments stated that it has to effect recoveries from the appellant in accordance with its letter dated 24th October, 2019, yet the said contention is belied from the fact that the appellant is not shown as Sundry Debtor even in the subsequent balance sheet for the year ending 31st March, 2020 filed before this Court. In fact, even in the respondent's balance sheet for the subsequent Financial Year 2020-21, the appellant/petitioner is shown as a Sundry Creditor to whom an admitted amount of Rs. 14,73,292.99/- is payable.

12. The 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 counter-claim, as contended by the respondent in its letter dated 24th October, 2019 and as believed by the Trial Court, it would not have unequivocally shown the appellant/petitioner in its statement of accounts ending 31st March, 2020 as its Sundry Creditor to whom Rs. 14,73,292.99/- was due and payable. It is pertinent to mention that attention of this Court was not drawn by the respondents to any caveat or auditor's report or note on accounts with regard to the said admission in the balance sheets or statement of accounts during the course of hearing. Accordingly, this Court is of the prima facie opinion that the counter-claims raised by the respondent are an after-thought and vexatious.

13. Further, the financial condition of the respondent is not healthy as is apparent from the fact that the respondent bank's overdraft facility reflects an outstanding amount of Rs. 1,00,15,041.93/-, respondent's secured loan stands at Rs. 25,19,243.50/-, unsecured loans stand at Rs. 4,50,12,053.34/-

and Sundry creditors are to the tune of Rs. 1,61,23,678,89/-. The net profit/turnover of the respondent for the Assessment Year 2019-20 was Rs.9,98,921/- which is much less than the admitted amount and almost one fourth of the total outstanding amount claimed by the appellant.

14. Consequently, this Court is of the view that the appellant ought to be protected insofar as the admitted amount of Rs. 14,73,292.99/- is concerned.

RELIEF

15. Accordingly, the impugned order dated 08th January, 2021 passed by the Trial Court is set aside and the respondent is directed to furnish a bank guarantee of Rs. 14,73,292.99/- (being the admitted amount) to the satisfaction of the Trial Court within four weeks. The bank guarantee shall be kept alive till an award is rendered by the Arbitrator and shall abide by further orders to be passed by the learned Arbitrator while rendering the final award. This Court clarifies that the conclusions arrived at by this Court are prima facie in nature for determination of this proceeding and shall not bind the Arbitrator who shall decide the matter on its own merits without being influenced by any observation made by this Court. Consequently, present appeal and application stand disposed of.

MANMOHAN, J

ASHA MENON, J

APRIL 20, 2021
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