$~S-23

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 05th May, 2022

\+ ARB. A. (COMM.) 46/2021

MANISH AGGARWAL & ANR. ..... Appellants
Through: Mr. Manish Vashisht, Senior Advocate with Mr. Rikky Gupta, Advocate, Mr. Manashwy Jha, Advocate and Ms. Ananya Singh, Advocate.

versus

RCI INDUSTRIES AND TECHNOLOGIES LTD ..... Respondent
Through: Dr. Anurag Kumar Agarwal, Advocate with Mr. Himanshu Gupta, Advocate, Mr. Prateek Agarwal, Advocate and Mr. Umesh Mishra, Advocate.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

By way of the present appeal under section 37(2)(b) of the Arbitration & Conciliation Act 1996 ('A&C Act'), the appellants impugn order dated 19.08.2021 made by the learned Sole Arbitrator, declining to allow an application seeking interim measures of protection under section 17 of the A&C Act. The application under section 17 was moved by the non-claimants, who are the appellants in the present appeal, who had sought to secure the amounts comprised in their counter-claims. The principal ground for seeking to secure the

amount in dispute in the counter-claims was the alleged ruinous financial position of the claimant, who is the respondent in the present appeal.

2. The transaction that is the genesis of disputes between the parties is the sale by the appellants to the respondent of a business unit called Devi Metal Technologies (DMT) alongwith its assets on a 'going concern basis' based upon three principal documents:

   i. Balance sheet dated 14.04.2016 of DMT for FY ending 31.03.2016.

   ii. Deed of reconstitution dated 15.04.2016, which was to take effect from 01.04.2016; and

   iii. Supplementary deed dated 15.04.2016, which carved-out certain exceptions to the sale of the running business unit.

Appellants' Arguments

3. Mr. Manish Vashisht, learned senior counsel appearing on behalf of appellants submits that at the time of sale of DMT to the respondent, the respondent was a 'solvent company' which had assured that the sale consideration would be paid to the appellants upon settlement and reconciliation of accounts. It is contended however, that during the pendency of arbitral proceedings, the respondent's net-worth has eroded; by reason whereof, the amount comprised in the counter-claims deserves to be secured, since otherwise the appellants would receive a mere 'paper award', which would be unenforceable. It is contended that the respondent's liabilities are much in excess of its total assets; and the respondent's balance sheet dated 14.04.2016 reflects that position, namely that the respondent's total assets are Rs.

195 crores whereas its total liabilities are Rs. 227 crores, thereby leading to a negative net-worth of Rs. 65 crores. Furthermore, it is contended that all the respondent's lenders have declared their loans as non-performing assets since the respondent is not even able to pay its interest liability on such loans.

4. The principal argument advanced on behalf of the appellants is that the learned Sole Arbitrator has declined relief under section 17 of the A&C Act holding that the counter-claims of the appellants are *'speculative, undetermined and disputed'* and therefore the powers under section 17 cannot be exercised to secure such counter-claims. In doing so, Mr. Vashisht asserts, the learned Sole Arbitrator has grossly erred and has thereby rendered the counter-claims academic, inasmuch as even if the appellants were to succeed, they would get an unenforceable 'paper award' since the respondent's net-worth is already in the negative.

Respondent's Arguments

5. On the other hand, Dr. Anurag Kumar Agarwal, learned counsel appearing for the respondent submits that the present appeal must be decided within the scope of interference permissible under section 37(2)(b) of the A&C Act, which, in essence and substance, says that if the learned Sole Arbitrator has exercised jurisdiction in a just and reasonable manner, and such exercise is not perverse or contrary to law, the court will not interfere in the order so passed.

6. Counsel submits that the section 17 application moved before the learned Sole Arbitrator was an attempt by the appellants to 'crystalize' their otherwise doubtful, bloated and speculative counter-

claims; that the appellants cannot be permitted to convert an unsecured claim or debt into a secured one, by seeking security from the respondent as an interim measure; and that there is no covert or overt act on the respondent's part in disposing of and transferring its assets, that would render any award passed a mere paper decree.

7. Dr. Agarwal further asserts that the appellants are seeking a direction to the respondent to furnish security or bank guarantee solely on the ground that the respondent company is facing 'financial hardship' as reflected in the financial results submitted by it to the Bombay Stock Exchange during FY 2021-2022. Counsel submits that these financial results are the result of the world-wide economic slow-down which has resulted from the COVID-19 pandemic and the lockdowns and restrictions imposed during that phase, which were entirely beyond the control of the respondent and the impact of which has been suffered not just by the respondent but by businesses across the world. In any case, it is argued, that that mere 'financial hardship' of a party can never be the sole ground for passing interim orders under section 17 of the A&C Act.

8. It is further pointed-out on behalf of the respondent that the application under section 17 that stands dismissed by way of the impugned order, was moved on 20.03.2021at the fag-end of the arbitral proceedings, when final arguments had been heard on behalf of the respondent (claimants), and the appellants (counter-claimants) were in the process of addressing their arguments on their counter-claims. This, it is asserted, was also one of the considerations that weighed with the learned Sole Arbitrator to dismiss the application

under section 17. In support of their rival contentions, the appellants and the respondent have drawn attention to various portions of the impugned order as also to certain judicial precedents, upon which they seek to rely. These are extracted, set-out and considered below.

Discussion & Conclusions

9. Upon an analysis of the impugned order, in the opinion of this court, the decision of the learned Sole Arbitrator to decline interim measures of protection under section 17 of the A&C Act, proceeds on the following principal considerations:

   i. That under the transaction whereby the respondent bought-over DMT as a 'going concern,' any liability not reflected in the balance sheet of DMT as on 31.03.2016 was to be the sole responsibility of the appellants, who were in fact required to *keep the respondent indemnified* against such liability at all times. This, the impugned order says, was agreed upon in the supplementary deed executed by the parties; and viewed from this perspective the counter-claims in the sum of Rs. 22,67,10,298/- preferred by the appellants, are purely speculative, disputed and remain to be determined as part of the final adjudication of the matter; and that the process of adjudication was in its final throes since the appellants were preferring their arguments in relation to their counter-claims;

   ii. That the alleged weak financial position of the respondent cannot *in itself* be a ground to justify an order directing the respondent to furnish security or bank guarantee, on point of law; and apart there from, the fact is that such apprehension on

the part of the appellants was misplaced, since the financial results submitted by the respondent to the Bombay Stock Exchange would show that the respondent had been meeting its liabilities and had in fact *reduced the total liabilities* over the years which have come down from Rs. 507 crores in March 2017 to Rs. 195 crores in March 2021, partly because the respondent had *paid-up what DMT owed to third-party creditors* as part of the transaction of purchase of DMT by the respondent;

iii. That apropos the respondent's alleged distressed financial situation, the learned Sole Arbitrator also noticed that the reduction in the respondent's total liability has occurred *despite* it sustaining business losses by reason of the COVID-19 pandemic, which shows that the respondent has been maintaining and running the company as a 'going concern' without increasing its liability, despite such losses. Even the pendency of certain proceedings before the National Company Law Tribunal (NCLT) has been considered by the learned Sole Arbitrator, and addressed by saying, that all such proceedings are being contested; none of the petitions before the NCLT have been 'admitted'; some of them have even been settled by the respondent; and the pending cases are towards 'resolution' of the debts and not towards 'liquidation' of the respondent company.

iv. That the orders prayed for by the appellants under section 17, effectively to securitise an unsecured and indeterminate sum, would be governed by the broad principles of Order XXXVIII Rule 5 of the Civil Procedure Code 1908, which powers, the Hon'ble Supreme Court has held in ***Raman Tech. & Process Engg. Co. & Anr vs. Solanki Traders*** [1] ,are drastic and extraordinary and must not be exercised mechanically but only sparingly, strictly and *not to convert an unsecured debt into a secured one*.

v. That, after considering in some detail the purport of various provisions of the supplementary deed, the learned Sole Arbitrator has inferred, for purposes of the section 17 application, that :

> *"22. It needs to be mentioned here that the dispute between the parties in the present arbitration relates to reconciliation of accounts of DMT at the time of taking over in terms of the deed of Re-constitution and the Supplementary Deed both dated 15.04.2016. This Tribunal has already heard the final arguments of the parties at great length and is in the process of formulating its opinion one way or the other as to which party shall get what amount in the present arbitration. At this stage, it may not be appropriate for the Tribunal to express its opinion on the strength or weaknesses of the claims/counter-claims filed by the parties against each other. Moreover, it may be noted that there is*

[1] 2008 (2) SCC 302

*no pleading worth the name in the application of the respondents/counter claimants to the effect that they have a strong prima facie case or even a prima facie case to succeed in their counter-claims. Be that as it may, directions for furnishing bank guarantee or security U/s 17 of the Arbitration Act, 1996 can be passed only in case the respondents/counter claimants are able to show that the claimant by any of its overt or covert act is trying to transfer its assets from the jurisdiction of this Tribunal to delay or defeat the award that may be passed in favour of the counter claimants. This Tribunal is of the firm view that the power U/s 17 of the Act cannot be exercised to secure the speculative, undetermined and disputed counter-claims preferred by the respondents against the claimant in the present arbitration unless there being a determination of the same as per applicable law. The counter-claims of the respondents need to be first crystallized and adjudicated on the basis of material already placed by the parties on record of the Tribunal. The alleged weak financial condition of the claimant alone cannot be a ground to justify the order directing the claimant to furnish security /bank guarantee as prayed by the respondents/counter claimants. Support for the said view is drawn from a judgment in "**Natrip Implementation Society Vs. IVCRL Ltd", 2016 SCC Online Del 5023**. Rather, the Tribunal is of the view that in case the directions for furnishing of bank guarantee/security as prayed for by the respondents in the present application is granted*

then <u>it will cause a great miscarriage of justice and irreparable loss to the claimant in as much as such an order will amount to putting a death knell in the neck of the claimant which is already struggling lifeline for its survival particularly in view of the situation caused by Covid-19 pandemic</u>. If, the claimant is directed to furnish bank guarantee to secure the undetermined amount of counter-claims, then it may tantamount to paralyzing all its business operations and would compound the financial difficulties already undergone by it."

(under-scoring supplied; bold in original)

10. Now, the scope of interference by courts in arbitral proceedings is founded and defined in section 5 of the A&C Act in the following words:

> *"**5. Extent of judicial intervention.-** Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, <u>no judicial authority shall intervene **except** where so provided in this Part.</u>"*

11. A brief overview of the judicial perspective on the scope of interference by a court under section 37(2)(b) with a decision taken by an arbitrator under section 17, is found in the following precedents :

> ***<u>Dinesh Gupta & Ors vs. Anand Gupta & Ors</u>*: <u>2020 SCC Online Del 2099 :</u>**
>
> ***"64.** There can be no gainsaying the proposition, therefore, that, <u>while exercising any kind of jurisdiction, over arbitral orders, or arbitral awards, whether interim or final, or with the arbitral process itself, the Court is required to maintain an extremely circumspect approach</u>. It is always required to be borne, in mind,*

that arbitration is intended to be an avenue for "alternative dispute resolution", and not a means to multiply, or foster, further disputes. Where, therefore, the arbitrator resolves the dispute, that resolution is entitled to due respect and, save and except for the reasons explicitly set out in the body of the 1996 Act, is, ordinarily, immune from judicial interference.

"65. *Interestingly, while examining, in Snehadeep Structures (P) Ltd. v. Maharashtra Small Scale Industries Development Corporation Ltd. (2010 3 SCC 34), the scope of the expression "appeal" as employed in Section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993, the Supreme Court held that, "if ... the meaning of "appeal" is ambiguous, the interpretation that advances the object and purpose of the legislation, shall be accepted." Purposive interpretation, as has been noticed in Shailesh Dhairyawan v. Mohan Balkrishna Lulla (2016 3 SCC 619) and Richa Mishra v. State of Chhattisgarh (2016 4 SCC 179), has, over time, replaced the principle of "plain reading" as the golden rule, for interpreting statutory instruments.*

"66. *In my opinion, this principle has to guide, strongly, the approach of this Court, while dealing with a challenge such as the present, which is directed against an order which, at an interlocutory stage, merely directing furnishing of security, by one of the parties to the dispute. The power, of the learned Sole Arbitrator, to direct furnishing of security, is not under question; indeed, in view of sub-clause (b) of Section 17(1)(ii) of the 1996 Act, it cannot. The arbitrator is, under the said sub-clause, entirely within his jurisdiction in securing the amount in dispute in the arbitration. Whether, in exercising such jurisdiction, the arbitrator has acted in accordance with law, or not, can, of course, always be questioned. While examining such a challenge, however, the Court has to be mindful of its limitations, in interfering with the decision of the arbitrator, especially a decision taken* ***at the discretionary level****, and* ***at an interlocutory stage****."*

*** * * * ***

Section 17(1), and applicability of Order XXXIX, CPC, thereto

"73. *As against this, orders which are appealable under Section 37(2)(b) are orders granting, or refusing to grant, interim measures under Section 17. Section 17(1), for its part, reads thus:*

* * * * *

"75. *The scope and ambit of Section 9, especially in the light of this concluding caveat, was examined by the Supreme Court in Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation(2007 6 SCC 798) and Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.(2007 7 SCC 125) In Arvind Constructions Co. (P) Ltd., it was held thus (in para 15 of the report):*

"The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot prima facie be accepted. ..... It is also clarified that the court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. ..... we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well-recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a Receiver.

(Emphasis supplied)"

* * * * *

"77. *The principles governing Order XXXIX of the CPC have, therefore, also to guide the Court, while granting interim protection under Section 9(1), or the arbitrator, while granting such protection under Section 17(1), of the 1996 Act."*

* * * * *

"83. *The resultant legal position is that, while the applicability of Order XXXVIII Rule 5, CPC, to the amended Section 17(1)(ii)(b) of*

the 1996 Act, may be seriously questionable, even under the pre-amended Section 17, the provisions of Order XXXVIII Rule 5 of the CPC cannot, bodily, be incorporated into the provision, though the principles governing the exercise of jurisdiction under Order XXXVIII Rule 5 are required to inform such exercise of jurisdiction. Either which way, therefore, while exercising jurisdiction under Section 17(1)(ii)(b), the arbitrator is not strictly bound by the confines of Order XXXVIII Rule 5 of the CPC, but is also proscribed from acting in a manner completely opposed thereto. A middling approach is, therefore, required, without treating Order XXXVIII Rule 5 as entirely inapplicable to Section 17(1)(ii)(b) (as Mr. Nandrajog would contend), or as applicable with all its vigour and vitality (as Mr. Nayar would contend).

"84.** Having said that, **it is indisputable that the exercise of jurisdiction, by the arbitrator, under Section 17, is fundamentally discretionary in nature** - as contrasted with Section 16(2) and (3). Judicial interference, with the exercise of discretionary power, is, classically, limited, and is even more circumscribed, where the authority exercising discretion is itself a judicial authority - as opposed to a purely administrative or executive functionary. (One uses the expression "judicial authority", here, to denote the nature - rather than the status - of the jurisdiction exercised by the Arbitrator, it having been settled, by the Supreme Court, in M.D., Army Welfare Housing Organisation v. Sumangal Services (P) Ltd (2018 209 Comp Cas 154), that an arbitrator is not a "Court", and does not exercises judicial functions.) Discretionary orders passed by arbitral tribunals have, therefore, to be handled with kid gloves, and protected from injury by any overzealous administration, by the court, of the law as it perceives it to be. If anything, therefore, the jurisdiction of the Court, under Section 37(2)(b), is even more limited than the jurisdiction that it exercises under Section 37(2)(a) or, for that matter, under Section 34. **The discretionary jurisdiction, as exercised by the arbitrator, merits interference, under Section 37(2)(b), therefore, only where such exercise is palpably arbitrary or unconscionable.

"85.This position is additionally underscored, where the order of the arbitrator is relatable to Section 17(1)(ii)(b) or (e), and directs

furnishing of security. Direction, to litigating parties, to furnish security, is a purely discretionary exercise, intended to balance the equities*. The scope of interference, in appeal, with a discretionary order passed by a judicial forum, stands authoritatively delineated in the following passages, from Wander Ltd. v. Antox India P Ltd (2018 SCC Online Del 8273):*

*"**13.** .....*

*"**14**. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. **In such appeals, 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 court's exercise of discretion. ....""*

(emphasis supplied)

Raman Tech. & Process Engg. Co. vs. Solanki Traders : (2008) 2 SCC 302

*"5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. **The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt**. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should*

> *be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment.*
>
> *"6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment. (See Premraj Mundra v. Md. Manech Gazi [AIR 1951 Cal 156] for a clear summary of the principles.)"*

(emphasis supplied)

12. In the present case, quite clearly, the learned Sole Arbitrator has declined to grant the interlocutory order sought by the appellants *in exercise of his discretionary power* under section 17 of the A&C Act. Has this discretionary power been exercised in a manner that is palpably arbitrary, capricious, irrational or perverse? In the opinion of this court, the answer to that question is an emphatic 'No'. The interlocutory relief sought was to secure the counter-claims made by the appellants, which counter-claims are evidently disputed and the determination of which is yet to be made. In fact the learned Sole Arbitrator was in the process of hearing the appellants on their counter-claims. Interlocutory orders were sought on the ground that the respondent's financial position was weak and would render any

award granted on the counter-claims, a mere 'paper-award'. This ground was premised solely on the fact that the respondent's net-worth was in the 'negative'. However, the learned Sole Arbitrator proceeded objectively on the basis that the 'negative' net-worth had *reduced* over the period March 2017 to March 2021, partly for the reason that the respondent had discharged the dues owed by DMT, *i.e.* the unit purchased from the appellants, to third party creditors. In any case, grant of the interlocutory relief sought, would have amounted to converting the indeterminate and unsecured counter-claims preferred by the appellants, into secure claims, which is ordinarily frowned upon in law.

13. Viewed from the settled perspective of guarded and sparing use of the powers under section 37(2)(b) of the A&C Act in only exceptional circumstances; and even more so when the exercise of discretion by the arbitrator is not seen to be arbitrary, capricious, irrational or perverse, this court finds no reason to interfere in the order made by the learned Sole Arbitrator in this case.

14. In the above view of the matter, the appeal under section 37(2)(b) of the A&C Act is accordingly dismissed, as being without merit.

15. Pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J.

MAY 5, 2022
ds/Ne/*uj*