

ESSAR HOUSE PRIVATE LIMITED

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v.

ARCELLOR MITTAL NIPPON STEEL INDIA LIMITED

(Civil Appeal No. 6574 of 2022)

SEPTEMBER 14, 2022

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[INDIRA BANERJEE AND A.S. BOPANNA, JJ.]

Arbitration and Conciliation Act, 1996 – s.9 – Insolvency and Bankruptcy Code, 2016 – ss.7, 14 – Code of Civil Procedure, 1908 – Or.38, r.5 – A sum of about Rs.35 crores and Rs.47 crores was paid by Essar Steel to the appellant shere in (Essar House Private and Essar Services) respectively, by way of refundable security deposit – A petition was filed u/s.7, IBC for initiation of CIR Pagainst Essar Steel – Respondent, as resolution applicant submitted a Resolution Plan in respect of Essar Steel which was approved– Respondent took over Essar Steel – Sent legal notices calling upon the appellants to refund the security deposits – Denied – Application filed by respondent u/s.9, Arbitration Act was allowed, appellants were directed by Single Bench of High Court to deposit Rs.35.5 crores and Rs.47.41 crores respectively or to furnish bank guarantee for the entire amount with interest – Order confirmed by Division Bench – On appeal, held: Obligations under a contract cannot be assigned, without consent of the counterparty – Novation of contract or set off is not allowed in respect of a corporate entity undergoing CIRP without the consent of the Resolution Professional – In the present case, admittedly, the CIRP of Essar Steel commenced when the Resolution Professional took over the management of the affairs of Essar Steel under the IBC – Even if any prior inter se arrangement existed between the parties, Essar Services could not have adjusted the security deposit payable to Essar Steel under the amended agreement against the alleged dues of Essar Steel to a third party during the CIRP – Further, while it is true that the power u/s.9, Arbitration Act should not ordinarily be exercised ignoring the basic principles of procedural law in the CPC, the technicalities of CPC cannot prevent the Court from securing the ends of justice – Besides the specific power of securing the amount in dispute, the Courts are empowered to pass any interim measure of protection, keeping in view the purpose of the proceedings before it – If a

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- A *strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power u/s.9 should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment u/Or. 38, r.5, CPC – Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat*
- B *or delay the realisation of an impending Arbitral Award is not imperative for grant of relief u/s.9 – A strong possibility of diminution of assets would suffice– In the instant case, prima facie, the refundable security deposit was not released to respondent on the purported ground of a convoluted series of internal arrangements*
- C *between group companies for diversion of the security deposits towards liquidation of alleged dues of Essar Steel to third parties – This contention of the appellant was considered by the Division Bench –No infirmity in the well-reasoned judgment of the Division Bench – Contract.*
- D *Arbitration and Conciliation Act, 1996 – s.9 –Power of Court – Scope of– Discussed– Code of Civil Procedure, 1908.*

Dismissing the appeals, the Court

- HELD: 1.1 Obligations under a contract cannot be assigned, without consent of the counterparty. In any case, novation of**
- E **contract or set off is not allowed in respect of a corporate entity undergoing CIRP without the consent of the Resolution Professional. Section 14 of the IBC bars action to foreclose, recover or enforce any security interest created by a Corporate Debtor undergoing CIRP. Admittedly, the CIRP of Essar Steel**
- F **commenced on 2nd August 2017 when the Resolution Professional took over the management of the affairs of Essar Steel under the IBC. Even if any prior inter se arrangement existed between the parties, Essar Services could not have adjusted the security deposit payable to Essar Steel under the amended agreement against the alleged dues of Essar Steel to a third party during the**
- G **CIRP. [Paras 33-36][1011-E; G-H; 1012-A-B]**

Citibank N.A. v. Standard Chartered Bank &Ors. (2004)
1 SCC 12 : [2003] 4 Suppl. SCR 489; Khardah
Company Ltd. v. Raymon& Co. (India) Pvt. Ltd. (1963)
3 SCR 183 – relied on.

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1.2 In deciding a petition under Section 9 of the Arbitration Act, the Court cannot ignore the basic principles of the CPC. At the same time, the power Court to grant relief is not curtailed by the rigours of every procedural provision in the CPC. In exercise of its powers to grant interim relief under Section 9 of the Arbitration Act, the Court is not strictly bound by the provisions of the CPC. While it is true that the power under Section 9 of the Arbitration Act should not ordinarily be exercised ignoring the basic principles of procedural law as laid down in the CPC, the technicalities of CPC cannot prevent the Court from securing the ends of justice. It is well settled that procedural safeguards, meant to advance the cause of justice cannot be interpreted in such manner, as would defeat justice. Besides the specific power of securing the amount in dispute, the Courts have been empowered to pass any interim measure of protection, keeping in view the purpose of the proceedings before it. The said provision confers a residuary power on the Court to pass such other interim measures of protection as may appear to be just and convenient. Many High Courts have also proceeded on the principle that the powers of a Court under Section 9 of the Arbitration Act are wider than the powers under the provisions of the CPC. [Paras 39-43][1012-F-H; 1013-A-B]

Ajay Singh &Ors. v. Kal Airways Private Limited and Ors (2017) SCC Online Del 8934; Jagdish Ahuja & Anr. v. Cupino Limited 2020 SCC Online Bom 849; Valentine Maritime Ltd. v. Kreuz Subsea Pte. Ltd. &Anr. 2021 SCC Online Bom 75; Srei Infrastructure Finance Limited v. M/s. Ravi Udyog Pvt. Ltd & Anr. A.P. No. 522 of 2008 – approved.

1.3 Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is, whether the applicant for interim measure has a good prima facie case, whether the balance of

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- A convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition. If a strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC. Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending Arbitral Award is not imperative for grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice. To assess the balance of convenience, the Court is required to examine and weigh the consequences of refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail. It is not in dispute that a sum of about Rs.35 crores odd was paid by Essar Steel to Essar House Private and Rs.47 crores odd to Essar Services, being the appellants in the respective appeals, by way of security deposit which is a refundable security deposit. Prima facie, the refundable security deposit is not being released to Arcellor on the purported ground of a convoluted series of internal arrangements between group companies for diversion of the security deposits towards liquidation of alleged dues of Essar Steel to third parties. The Division Bench considered this contention of the Appellant. No infirmity in the well-reasoned judgment and order of the Division Bench. [Paras 48-53][1017-B-H; 1018-A-B; 1019-B]

Committee of Creditors of Essar Steel India through Authorised Signatory v. Satish Kumar Gupta &Ors. (2020) 8 SCC 531 : [2019] 16 SCR 275; *Raman Tech. & Process Engg. Co. &Anr. v. Solanki Traders* (2008) 2 SCC 302 : [2007] 12 SCR 409 – referred to.

Case Law Reference

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|-------------------------|-------------|---------|
| [2019] 16 SCR 275 | referred to | Para 21 |
| [2007] 12 SCR 409 | referred to | Para 30 |
| [2003] 4 Suppl. SCR 489 | relied on | Para 32 |

ESSAR HOUSE PRIVATE LIMITED v. ARCELLOR MITTAL 1005
NIPPON STEEL INDIA LIMITED

CIVIL APPELLATE JURISDICTION : Civil Appeal No.6574 A
of 2022.

From the Judgment and Order dated 01.02.2021 of the High Court
of Judicature at Bombay in Commercial Arbitration Appeal (L) No.1022
of 2021 in Comm. Arbitration Petition (L) No.6602 of 2020.

With B

Civil Appeal No.6575 of 2022.

Shyam Divan, Sajan Poovayya, Sr. Advs., Mahesh Agarwal, Rishi
Agrawala, Rishabh Parikh, S. Sahil Reddy, E. C. Agrawala, Advs. for
the Appellant. C

Neeraj Kishan Kaul, Sr. Adv., Siddhant Kant, Avishkar Singhvi,
Ms. Misha, Ms. Prabh Simran Kaur, Deepak Joshi, S. S. Shroff, Advs.
for the Respondent.

The Judgment of the Court was delivered by

INDIRA BANERJEE, J. D

Leave granted.

2. These appeals are against a common judgment and order dated
1st February 2021 passed by a Division Bench (Commercial Appellate
Division) of High Court of Judicature at Bombay, dismissing the appeal E
being Commercial Arbitration Appeal (L) No. 1022 of 2021 filed by the
Appellant in the Civil Appeal arising out of SLP (C) No.3187 of 2021,
Essar House Private Limited, hereinafter referred to as “Essar House
Private”, under Section 37 of the Arbitration and Conciliation Act, 1996,
hereinafter referred to as the “Arbitration Act” and confirming an order F
dated 10th December 2020 passed by the Commercial Division (Single
Bench) of the High Court allowing an application filed by the Respondent-
Arcellor Mittal Nippon Steel India Limited, hereinafter referred to as
the “Arcellor”, under Section 9 of the Arbitration Act and directing Essar
House Private to deposit an amount of Rs.35.5 crores with the
Prothonotary and Senior Master of the High Court or, in the alternative, G
to furnish bank guarantee of any nationalised bank for the entire amount
along with interest thereon.

3. By the impugned judgment and order, the Division Bench has
also dismissed the appeal being Commercial Arbitration Appeal (L)
No.1023 of 2021, filed by the Appellant in the Civil Appeal arising out of H

- A SLP (C) No.3351 of 2021, Essar Services India Private Limited, hereinafter referred to as “Essar Services”, and confirming an order dated 10th December 2020 passed by the Commercial Division (Single Bench) of the High Court, allowing an application by Arcellor against Essar Services and directing Essar Services to deposit Rs.47.41 crores with the Prothonotary and Senior Master of the High Court or, in the alternative, furnish Bank Guarantee of any nationalised bank for the entire amount along with interest thereon.
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4. Essar Services is engaged in providing services of accounting, account related services, review, research etc. Essar Services is a part of the Essar Group of Companies.

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5. On or about 24th January 2012, Essar Services and Essar Steel India Limited, hereinafter referred to as “Essar Steel” entered into a Support Services Agreement, whereby Essar Services was to provide accounting and other services to Essar Steel.

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6. On 15th May 2014, Essar Services entered into an Amended and Restated Support Services Agreement with Essar Steel. Under Clause 3.2 of the said Amended and Restated Support Services Agreement, Essar Steel was required to deposit a sum of Rs.73 crores as security deposit. Essar Steel deposited a total sum of Rs.47.41 crores with Essar Services as security deposit in terms of the Support Services Agreement. Further, Essar Steel had to pay a sum of Rs.6,38,75,000/- per month to Essar Services on account of charges for the services rendered by Essar Services to Essar Steel.
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7. The Support Services were discontinued for the period from January 2016 to March 2016, but restored after some adjustments/ variations in charges, and an inter-corporate arrangement between Essar Steel, Essar Services and Equinox Business Park Private Limited, hereinafter referred to as the “Equinox”.
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8. Essar House Private, a company registered under the Companies Act, 1956, is engaged in the business of dealing in real estate. Essar House Private is the owner of the building Essar House, situated at Keshavrao Khadye Marg, Opposite Race Course, Mahalaxmi, Mumbai-400034.
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9. On or about 1st April 2016, Essar House Private entered into an agreement styled as “Rental Agreement” with Essar Steel, under which the ground floor, Podium and 20 upper floors in Essar House, was let out
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to Essar Steel on leave and license basis, for a period of 36 months commencing on 1st April 2016, at a monthly rent of Rs.78,40,000/-. In terms of the aforesaid Rental Agreement, Essar Steel was to pay an amount of Rs.25.80 crores to Essar House Private as interest free refundable security deposit. A

10. Essar House Private was a group company of Essar Steel until 2019. Many of the group companies have/had credit transactions with HDFC Bank. It is submitted that the lenders of Essar Steel started realising the dues of Essar Steel to lenders from the group companies. Equinox is another group company of Essar Steel. Equinox on the instructions of Essar Steel, made a payment of Rs.60.95 crores to HDFC bank in discharge of the financial liabilities of Essar Steel to the bank. It appears that HDFC Bank granted a loan of Rs.26,00,00,000/- (Rupees twenty six crores only) to Marvel Mines and Minerals Private Limited, hereinafter referred to as “Marvel Mines”. The said amount has apparently been appropriated towards dues of the Essar Steel of HDFC Bank. B
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11. By an email dated 26th April 2017, Essar Steel acknowledged that HDFC Bank had disbursed a loan of Rs.26 crores to Marvel Mines, of which Rs.26 crores had been appropriated towards term loan recoveries.

12. It is the case of the Appellant that on the instructions of Essar Steel and on behalf of Essar Steel, Equinox made payments to HDFC Bank from time to time in discharge of debts due from Essar Steel to Equinox. As on 31st March 2018, the total dues payable by the Essar Steel to Equinox was Rs.74,84,39,302/- (Rupees seventy four crores, eighty four lacs, thirty nine thousand, three hundred and two only) inclusive of interest. E
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13. On or about 2nd August 2017, the Standard Chartered Bank and the State Bank of India jointly filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) for initiation of the Corporate Insolvency Resolution Process (CIRP) against Essar Steel in the Ahmedabad Bench of the National Company Law Tribunal (NCLT). On 14th August 2017, Essar House Private filed its claim against Essar Steel with the Resolution Professional appointed for Essar Steel. G

14. On 17th September 2018, Essar Steel entered into an agreement, hereinafter referred to as the “Business Centre Agreement” in terms H

A whereof Essar Steel was allowed to use six floors of the Essar House, i.e., 10th, 12th, 13th, 15th, 16th and 17th floor at a monthly rent of Rs.1,78,80,000/- (Rupees one crore seventy eight lacs and eighty thousand only).

B 15. Under the said agreement, Essar Steel was required to make a security deposit of Rs.35,51,89,875/- (Rupees thirty five crores, fifty one lacs, eighty nine thousand, eight hundred and seventy five only). However, out of Rs.35,51,89,875/-, the security deposit of Rs.25,80,00,000/- paid by the Essar Steel under the Rental Agreement was adjusted towards the security deposit payable to Essar House Private under the Business Centre Agreement.

C 16. By a letter dated 17th September 2018, Essar Infrastructure Services Private Limited claimed that it had transferred the balance security deposit of Rs.9,71,89,875/- (Rupees nine crores, seventy one lacs, eighty nine thousand, eight hundred and seventy five only) to Essar House Private.

D 17. In the meanwhile, on 16th August 2017, Essar Services filed a proof of claim as an Operational Creditor in respect of unpaid invoices under the Support Services Agreement, with the Resolution Professional of Essar Steel.

E 18. Essar Services and Essar Steel mutually reconciled their accounts, in March 2018, acknowledging that Rs.47,41,00,000/- was paid to Essar Services as security deposit and sum of Rs.23,21,93,750/- was payable by Essar Steel to Essar Services.

F 19. Sometime in 2018-19, Equinox allegedly assigned its receivable from Essar Steel to one Edwell Infrastructure Hazira Limited, hereinafter referred to as “Edwell”, to whom Essar Steel had owed an aggregate amount of Rs.88,13,03,623/- inclusive of interest as on November 2019. Later in 2019, the obligation of Essar Services to make payment of Rs.47.41 crores to Essar Steel was novated to Edwell and it was agreed that payment would be made to Edwell.

G 20. Arcellor as resolution applicant submitted a Resolution Plan in respect of Essar Steel. The said Resolution Plan was approved by the Adjudicating Authority (NCLT), Ahmedabad Bench by an order dated 8th March 2019. By an order dated 4th June 2019, the Appellate Tribunal (NCLAT) confirmed the order dated 8th March 2019 of Adjudicating
H Authority.

21. The Resolution Plan submitted by Arcellor in respect of Essar Steel was approved by this Court in *Committee of Creditors of Essar Steel India through Authorised Signatory v. Satish Kumar Gupta & Ors.*¹ A

22. On 27th November 2019, Essar House Private sent an email to Arcellor stating that the Business Centre Agreement as extended was expiring on 30th November 2019 and called upon Arcellor to vacate Essar House by 15th December 2019. On 15th December 2019, Arcellor vacated Essar House. On 16th December 2019, Arcellor took over Essar Steel pursuant to the judgment dated 15th November 2019 of this Court. B

23. By an email dated 11th January 2020, Arcellor called upon the Essar House Private to refund the interest free security deposit amounting to Rs.35,51,89,875/-. The email was followed by a reminder email dated 19th January 2020 and more emails. C

24. On 17th June 2020, Arcellor sent a legal notice to Essar House Private calling upon the Essar House Private to refund the security deposit to Arcellor within seven days along with interest. D

25. By an email dated 27th June 2020, Essar House Private acknowledged that Essar House Private had received security deposit of Rs.25,80,00,000/- from Essar Steel, but contended that Essar House Private had taken over loan of Rs.26 crores due from Essar Steel to Marvel Mines and had adjusted the same against the security deposit kept by Essar Steel with Essar House Private. The balance amount of Rs.9,71,89,875/- had allegedly been paid by the Essar House Private to Edwell Infrastructure in discharge of debt owed by Essar Steel to Edwell Infrastructure. There was, therefore, no security deposit left to be refunded by the Essar House Private to the Arcellor. E F

26. On 17th November 2020, Arcellor filed an application under Section 9 of the Arbitration Act being Commercial Arbitration Petition (L) No. 6602 of 2020 in the Commercial Division of the High Court of Judicature at Bombay seeking orders directing the Essar House Private to deposit Rs.35,51,89,875/- with the Prothonotary and Senior Master of the High Court. The said application has been allowed by the Single Bench of the High Court. An appeal being Arbitration Appeal (L) No.1022 of 2021 filed against the order of the Single Bench has been dismissed G

¹ (2020) 8 SCC 531

A by the Commercial Appellate Division of the High Court (Division Bench),
by the judgment and order impugned.

27. Arcellor paid Rs.4,75,06,260 to Essar Services on behalf of
Essar Steel in settlement of its claims/dues. However, on 14th July 2020
Arcellor addressed a legal notice to Essar Services for refund of Rs.47.41
B crores. Arcellor filed an application under Section 9 of the Arbitration
Act being Commercial Arbitration Petition (L) No.6607 of 2020 in the
Commercial Division of Bombay High Court seeking orders directing
Essar Services to deposit Rs.47,41,00,000/- with the Prothonotary and
Senior Master of the High Court.

28. By an order dated 10th December 2020, the Commercial
C Division of the Bombay High Court, Single Bench directed Essar Services
to deposit Rs.47.41 crores with the Prothonotary and Senior Master of
the High Court. The Essar Services filed Arbitration Appeal No.1023 of
2021 under Section 37 of the Arbitration Act read with Section 13 of the
Commercial Courts Act in the Commercial Appellate Division of the
D High Court (Division Bench). The appeal has been dismissed by the
judgment and order impugned.

29. Mr. Shyam Divan, learned Senior Counsel appearing on behalf
of the Appellants emphatically argued that no amount was due from
Essar House Private or from Essar Services to Arcellor. The security
E deposits of Essar Steel with Essar House Private and Essar Services
had at the instructions of Essar Steel, been discharged to liquidate dues
of Essar Steel to creditors.

30. Mr. Shyam Divan further argued that, to grant discretionary
interim relief under Section 9 of the Arbitration Act, the Court would
have to satisfy itself that the applicant for interim relief, i.e., Arcellor
F had a bona fide and strong claim and that Essar House Private and/or
Essar Services was about to remove or dispose of whole or part of its
property with intent to obstruct or delay the execution. Mr. Divan argued
that the Court erred in not considering the requisites of Order XXXVIII,
Rule 5 of the Code of Civil Procedure, 1908 (CPC) for grant of interim
relief. In support of his submissions, Mr. Divan cited **Raman Tech. &**
G **Process Engg. Co. & Anr. v. Solanki Traders**² where this Court held
:-

*“5. The power under Order 38 Rule 5 CPC is a drastic and
extraordinary power. Such power should not be exercised*

H ² (2008) 2 SCC 302

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..” A

31. Mr. Neeraj Kishan Kaul, learned Senior Counsel appearing on behalf of the Respondent in the two appeals argued that the defence of the Essar House Private/Essar Services of set off was a sham defence. He argued that Essar House Private/Essar Services had not brought a single document on record to support the assertions made by them. It is well settled that novation of an agreement cannot be brought about by the unilateral action of a party to an agreement. Consent of Arcellor was necessary. B C

32. In *Citibank N.A. v. Standard Chartered Bank & Ors.*³ cited by Mr. Kaul, this Court held :-

“47. Novatio, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally...” D

33. In any case, obligations under a contract cannot be assigned, without consent of the counterparty, as laid down by this Court in *Khardah Company Ltd. v. Raymon & Co. (India) Pvt. Ltd.*⁴ :- E

“... An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognised distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities...” F

34. In any case, novation of contract or set off is not allowed in respect of a corporate entity undergoing CIRP without the consent of the Resolution Professional. Section 14 of the IBC bars action to foreclose, recover or enforce any security interest created by a Corporate Debtor undergoing CIRP. G

³ (2004) 1 SCC 12

⁴ (1963) 3 SCR 183

A 35. Admittedly, the CIRP of Essar Steel commenced on 2nd August 2017 when the Resolution Professional took over the management of the affairs of Essar Steel under the IBC.

B 36. Even if any prior inter se arrangement existed between the parties, Essar Services could not have adjusted the security deposit payable to Essar Steel under the amended agreement against the alleged dues of Essar Steel to a third party during the CIRP.

C 37. Mr. Shyam Divan argued that while deciding a Section 9 application filed under the provisions of the Arbitration Act, the principles of the CPC are to be strictly followed. The principles enunciated by this Court in **Raman Tech. & Process Engg. Co. & Anr.** (supra) were required to be followed in letter and spirit.

38. In this case, however, the High Court has taken note of the pleadings for invoking the principles of Order 38 Rule 5 CPC and observed:-

D “31. In our view, the paragraphs of the aforesaid pleadings of the respondent in arbitration petition filed under section 9 filed by the respondent were sufficient to secure the claim of the respondent under section 9 of the Arbitration Act and to invoke the principles of Order 38 Rule 5 of the Code of Civil Procedure even if it is strictly made applicable to the facts of this case.”

E 39. In deciding a petition under Section 9 of the Arbitration Act, the Court cannot ignore the basic principles of the CPC. At the same time, the power Court to grant relief is not curtailed by the rigours of every procedural provision in the CPC. In exercise of its powers to grant interim relief under Section 9 of the Arbitration Act, the Court is not strictly bound by the provisions of the CPC.

F 40. While it is true that the power under Section 9 of the Arbitration Act should not ordinarily be exercised ignoring the basic principles of procedural law as laid down in the CPC, the technicalities of CPC cannot prevent the Court from securing the ends of justice. It is well settled that procedural safeguards, meant to advance the cause of justice cannot be interpreted in such manner, as would defeat justice.

G 41. Section 9 of the Arbitration Act provides that a party may apply to a Court for an interim measure or protection *inter alia* to (i)

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secure the amount in dispute in the arbitration; or (ii) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. A

42. As argued by Mr. Kaul, besides the specific power of securing the amount in dispute, the Courts have been empowered to pass any interim measure of protection, keeping in view the purpose of the proceedings before it. The said provision confers a residuary power on the Court to pass such other interim measures of protection as may appear to be just and convenient. B

43. Many High Courts have also proceeded on the principle that the powers of a Court under Section 9 of the Arbitration Act are wider than the powers under the provisions of the CPC. C

44. In **Ajay Singh & Ors. v. Kal Airways Private Limited and Ors.**⁵ the Delhi High Court correctly held :

“...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...” D E

45. In **Jagdish Ahuja & Anr. v. Cupino Limited**⁶, the Bombay High Court correctly summarised the law in Paragraph 6 extracted hereinbelow :- F

“6. As far as Section 9 of the Act is concerned, it cannot be said that this court, while considering a relief thereunder, is strictly bound by the provisions of Order 38 Rule 5. As held by our Courts, the scope of Section 9 of the Act is very broad; the court has a discretion to grant thereunder a wide range of interim measures of protection “as may appear to the court to be just and convenient”, though such discretion has to be exercised judiciously and not arbitrarily. The court is, no doubt, guided by the principles which civil courts ordinarily G

⁵ (2017) SCC Online Del 8934

⁶ 2020 SCC Online Bom 849

A *employ for considering interim relief, particularly, Order 39 Rules 1 and 2 and Order 38 Rule 5; the court, however, is not unduly bound by their texts. As this court held in Nimbus Communications Limited v. Board of Control for Cricket in India (Per D.Y. Chandrachud J, as the learned Judge then was), the court, whilst exercising power under Section 9, “must have due regard to the underlying purpose of the conferment of the power under the court which is to promote the efficacy of arbitration as a form of dispute resolution.” The learned Judge further observed as follows:*

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C *“Just as on the one hand the exercise of the 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 interests of justice. A balance has to be drawn between the two considerations in the facts of each case.”*

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46. In *Valentine Maritime Ltd. v. Kreuz Subsea Pte. Ltd. & Anr.*⁷, the High Court held :-

E *“88. ...It is now a well settled legal position, that at least with respect to Chartered High Courts, the power to grant temporary injunctions are not confined to the statutory provisions alone. The Chartered High Courts had an inherent power under the general equity jurisdiction to grant temporary injunctions independently of the provisions of the Code of Civil Procedure, 1908...”*

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G *93. Insofar as judgment of Supreme Court in case of Raman Tech. & Process Engg. Co. (supra) relied upon by Mr. Narichania, learned senior counsel for the VML is concerned, it is held by the Hon’ble Supreme Court that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove*

H ⁷ 2021 SCC Online Bom 75

or dispose of his assets with the intention of defeating the decree that may be passed. The Hon'ble Supreme Court has further held that the purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. The said judgment of the Hon'ble Supreme Court was not in respect of the powers of court under section 9 of the Arbitration and Conciliation Act, 1996 but was in respect of power under Order 38 Rule 5 of the Code of Civil Procedure, 1908 in a suit. Even otherwise, the said judgment is distinguishable in the facts of this case.

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95. *Insofar as judgment of this Court delivered by the Division Bench of this court in case of Nimbus Communications Limited v. Board of Control for Cricket in India (supra) relied upon by the learned senior counsel for the VML is concerned, this Court adverted to the judgment of Hon'ble Supreme Court in case of Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125 and held that in view of the decision of the Supreme Court in case of Adhunik Steels Ltd., (supra) the view of the Division Bench in case of National Shipping Company of Saudi Arabia (supra) that the exercise of power under section 9(ii)(b) is not controlled by the provisions of the Code of Civil Procedure, 1908 cannot stand. This court in the said judgment of Nimbus Communications Limited (supra) held that the exercise of the power under section 9 of the Arbitration Act cannot be totally independent of the basic principles governing grant of interim injunction by the civil Court, at the same time, the Court when it decides the petition under section 9, must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution.*

96. *This court held that just as on the one hand the exercise of the 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,*

H⁸ A.P. No. 522 of 2008

“An application under section 9 of the Arbitration & Conciliation Act, 1996 for interim relief is not to be judged as per the standards of a plaint in a suit. If the relevant facts pleaded, read with the documents annexed to the petition, warrant the grant of interim relief, interim relief ought not to be refused by recourse to technicalities...”

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48. Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is, whether the applicant for interim measure has a good *prima facie* case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.

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49. If a strong *prima facie* case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC.

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50. Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending Arbitral Award is not imperative for grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice. To assess the balance of convenience, the Court is required to examine and weigh the consequences of refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail.

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51. It is not in dispute that a sum of about Rs.35 crores odd was paid by Essar Steel to Essar House Private and Rs.47 crores odd to Essar Services, being the appellants in the respective appeals, by way of security deposit which is a refundable security deposit. *Prima facie*, the refundable security deposit is not being released to Arcellor on the purported ground of a convoluted series of internal arrangements between

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- A group companies for diversion of the security deposits towards liquidation of alleged dues of Essar Steel to third parties.

52. The Division Bench considered this contention of the Appellant and rightly held :-

- B “33. The affidavit of disclosure filed by the appellant on 21st January, 2021 annexed at Ex.B also clearly indicates that the appellant was heavily indebted and did not have asset other than the asset disclosed in the affidavit in reply.

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- C 39. There is no substance in the submission made by the learned counsel for the appellant that since the appellant had already disclosed in the reply to the petition under section 9 that there was only one asset in the hands of the appellant and the same was also mortgaged, learned single Judge could not have passed an order of deposit or to furnish a bank guarantee in lieu of the order of deposit under section 9 of the Arbitration Act. In our view, the Court has ample power under Section 9 to secure the claim of the applicant in arbitration. Merely because the appellant has disclosed before the learned Single Judge that it does not have any asset other than one asset and that also is fully encumbered, that does not preclude the Court under Section 9 of the Arbitration Act to pass an equitable order by securing the claim of the applicant in arbitration by directing the opponent to deposit such amount to furnish a bank guarantee once having rendered a prima-facie finding that the applicant would have good chances of succeeding in the arbitration and if the claim made by the applicant is not secured, he would not be able to enjoy fruits of the arbitral award on its execution.

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- H 43. If the Court is required to dismiss the petition under section 9 of the Arbitration Act on the ground that the opponent has no assets at all or the assets of the opponent are fully encumbered, it will be against the principles of equitable

*justice required to be exercised by the Court while exercising A
powers under section 9 of the Arbitration Act so as to secure
the claim of the applicant in the arbitral proceedings though
he may have prima-facie good chances of succeeding in
arbitration.”*

53. We find no infirmity in the well-reasoned judgment and order B
of the Division Bench. The appeals are, accordingly, dismissed.

Divya Pandey
(Assisted by : Deepak Panwar, LCRA)

Appeals dismissed.