

# Nimbus Communications Limited vs Board Of Control For Cricket In India on 27 February, 2012

**Author: D.Y.Chandrachud**

**Bench: D.Y.Chandrachud, M.S. Sanklecha**

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APPL90-27.2

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (LODG.) NO.90 OF 2012  
IN

ARBITRATION PETITION (LODG.) NO.43 OF 2012  
Nimbus Communications Limited

..Appellant.

versus  
Board of Control for Cricket in India  
and another

..Respondents.

WITH

APPEAL (LODG.) NO.91 OF 2012  
igWITH  
CHAMBER SUMMONS NO.249 OF 2012  
IN  
ARBITRATION PETITION NO.167 OF 2012

NEO Sports Broadcast Pvt. Limited  
versus  
Board of Control for Cricket in India

..Appellant.

and another

..Respondents.

WITH  
APPEAL (LODG.) NO.92 OF 2012  
IN  
ARBITRATION PETITION NO.167 OF 2012

NEO Sports Broadcast Pvt. Limited  
versus  
Board of Control for Cricket in India

..Appellant.

and another

..Respondents.

.....  
Mr. Virag Tulzapurkar, Senior Advocate with Mr. Anil Menon i/b Anil  
Menon & Associates for the Appellant in APP(L) 90/2012 and for  
Respondent No.2 in APP(L) 91/2012 and 92/2012.

Dr. Virendra Tulzapurkar, Senior Advocate with Mr. H.N. Thakore, Mr.  
Pranav Sampat, Mr. Rizvi Nasir i/b Thakore Jariwala & Associates for  
the Appellant in APP(L) 91/0212 and 92/2012.

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Mr. Rafique Dada, Senior Advocate with Mr. T.N.Subramanian, Senior  
Advocate, Mr. P.R. Raman, Ms. Akhila Kaushik, Mr. Nikhil Sakhardande,  
Mr. Indranil Deshmukh, Mr. Rahul Mascarenhas and Mr. Adarsh

Saxena i/b Amarchand Mangaldas & S.A. Shroff & Co. for Respondent  
No.1 in all the appeals.

.....  
CORAM : DR.D.Y.CHANDRACHUD &  
M.S. SANKLECHA, JJ.

27 February 2012.

ORAL JUDGMENT (Per DR.D.Y.CHANDRACHUD, J.) :

Admit. With the consent of Counsel and at their request the

1. Appeals are taken up for hearing and final disposal.

These three appeals arise out of an order passed by a learned Single Judge on 19 January 2012 on an application for ad interim relief in a petition under Section 9 of the Arbitration and Conciliation Act 1996 and from an ad interim order dated 27 January 2012 on a Chamber Summons for amendment of the petition under Section 9.

Two appeals against the order dated 19 January 2012 and against the order dated 27 January 2012 have been filed by the Second Respondent to the arbitration petition. One appeal by the First Respondent is against the order dated 19 January 2012.

2. All the appeals have been placed together by consent for hearing and final disposal and since the issues are common, they have been disposed of by this judgment. For convenience of reference it would be appropriate to refer to the parties as they appear in the arbitration petition under Section 9.

3. On 15 October 2009 a Media Rights Licensing Agreement was PNP 3/29 APPL90-27.2.sxw entered into between the Board of Control for Cricket in India (the Petitioner) and Nimbus Communications Limited (the First Respondent). Under the agreement, the Petitioner granted to the First Respondent during the period commencing from 1 April 2010 until 31 March 2014 inter alia television rights, radio rights, and licensee mobile rights on an exclusive basis in relation to the territory covered by the agreement. The agreement stipulated that the First Respondent would pay to the Petitioner an amount of Rs.31.25 Crores for every match, be it a one day international, a test match or a 20/20 international match. The payment terms inter alia stipulated as follows :

"Licensee specifically acknowledges that Licensor is in negotiations with the ICC and the Cricket Boards of various countries to finalise the Future Tours Programme ('FTP') for all bilateral cricket tours by the Indian National Team from April 2010 onwards and changes are likely to take place in the above schedule of Matches. To the extent any series or Match/ Matches is/are either increased or reduced in any year during the Rights Period, the Rights Fee payable will be pro rata increased for the

extra series or Match/Matches, as the case may be, or decreased to the extent of the series or Match/Matches reduced, as the case may be, based on the Per Match Value stated above for all the series or Matches as included in the schedule below or New series scheduled by Licensor. It being understood and agreed by licensee that if Licensor decides to schedule a Tri series the amount paid per match will remain as per the Per match Value defined above."

4. Under clause 7.2 the rights fee was to be paid by the licensee, the First Respondent, to the Petitioner in installments and by the due dates indicated in the schedule. 50% of the fee was payable not later than thirty days before the commencement of each series, while the balance was payable within sixty days after the scheduled date of PNP 4/29 APPL90-27.2.sxw the last match of the series. Clause 13 of the agreement stipulated that the First Respondent shall not assign, sub-contract or otherwise part with the benefit of the agreement without the prior written consent of the Petitioner, which was not to be unreasonably delayed.

However, the First Respondent was entitled to assign the rights and benefits granted under the agreement to any affiliate without the consent of the licensor, it being agreed that the First Respondent shall remain fully and primarily responsible for and liable to the licensor for the performance of the agreement. The expression 'affiliate' was defined in the agreement as follows :

"Affiliate shall mean any person controlling, controlled by or under common control with a specified person and, for the purposes of this Agreement, "control" means the power of a person (directly or indirectly) to direct or cause the direction of the management and policies of any other person or the ownership (directly or indirectly) of more than fifty percent (50%) of the equity or capital of, or the voting power in, any other person."

5. Parties therefore contemplated that the First Respondent would be entitled to assign the rights and benefits granted under the agreement inter alia to an entity which the First Respondent controlled by exercising more than 50% of the voting power in the equity capital.

6. After the execution of the agreement, on 15 October 2009 parties arrived at two addenda respectively on 21 October 2009 and 22 August 2011.. As permitted by the agreement between the Petitioner and the First Respondent, the First Respondent in turn entered into an agreement with the Second Respondent, called the PNP 5/29 APPL90-27.2.sxw Television Rights Agreement on 16 October 2010. The agreement stated that the First Respondent had been granted certain exclusive commercial and media rights by the Petitioner for all international cricket matches organised by the Petitioner in India under a Media Rights Agreement. By the agreement between the First and Second Respondents, the First Respondent granted to the Second Respondent, in consideration for a media rights free, broadcast rights for the territory to the events taking place during the term subject to the conditions set out in the agreement. The broadcast rights granted to the Second Respondent comprised solely of the exclusive right to broadcast the event in the territory by means of television rights with a commentary in English. Clause 6 of the agreement sets out a Media Rights Fee payable to the First Respondent by the Second Respondent, while clause 7 spells out the

installments for making payment.

7. There is no dispute about the fact that payments which were due and payable by the First Respondent to the Petitioner in 2010-11 in respect of the series against Australia and New Zealand were duly paid. The schedule of matches for 2011-12 included a series each against England and West Indies. For the series against England an amount of Rs.103.40 Crores was due and payable towards the second installment on 29 December 2011, which has not been paid. In respect of the series against West Indies, an amount of Rs.63.78 Crores was due and payable on 6 October 2011 towards the first installment and an amount of Rs.137.87 Crores was due and payable against the second installment on 11 February 2012 which was not paid. A total amount of Rs.305.06 Crores is claimed by the Petitioner as being due PNP 6/29 APPL90-27.2.sxw and payable by the First Respondent. This claim is in respect of matches which were held and which were telecast by the Second Respondent. The First Respondent has not paid the amount which the Petitioner has claimed to be due and payable despite a demand.

8. At this stage, it may be necessary to advert to the fact that the First Respondent had furnished bank guarantees in the amount of Rs. 1647 Crores to the Petitioner. The bank guarantees were invoked and it is common ground before the Court that the banks which had issued the guarantees have declined to pay. The Petitioner has filed three suits against three banks which are pending.

9. An arbitration petition was filed before the learned Single Judge by the Petitioner under Section 9 of the Arbitration and Conciliation Act 1996. The reliefs which were sought in the petition were - (i) A direction to the Respondents to deposit all monies which they had received from advertisements as consideration for the broadcast of advertisements on the television channel during the 2011 cricket series under the Media Rights Licensing Agreement; (ii) An injunction against the Respondents restraining them from calling upon the advertisers to pay the amounts that may be due to the Respondents or to either of them for the broadcast of advertisements on television during 2011 cricket series with a further direction to the Respondents to call upon the advertisers to deposit the amounts owed in this Court; (iii) In the alternative, an injunction restraining the Second Respondent from paying over any sum to the First Respondent with a further direction to deposit the amount in Court;

(iv) A disclosure of the amounts already received or receivable from PNP 7/29 APPL90-27.2.sxw the advertisers; and (v) A direction to the First Respondent to furnish security in the form of a deposit in cash to secure the recovery and realisation of the dues payable by the First Respondent to the Petitioner. During the pendency of the arbitration petition, a Chamber Summons has been taken out for amendment.

10. The learned Single Judge by an ad interim order dated 19 January 2012 issued the following directions :

"(i) Pending the hearing and final disposal of the arbitration proceedings and the implementation of the award therein, the respondents shall deposit all monies which they have already received from the advertisers as consideration for broadcast of

advertisements on the television channel/s owned and operated by the respondents in relation to the 2011 cricket series under the MRLA in this Court.

(ii) Pending the hearing and final disposal of the arbitration proceedings and the implementation of the award therein, the respondents shall call upon the advertisers, listed in Exhibit "T"

to the petition to deposit the amount owed by them to the respondents or either one of them towards consideration for broadcast of advertisements on the television channel/s owned and operated by the respondents in relation to the 2011 cricket series under the MRLA in this Court.

(iii) The respondents shall disclose the amounts already received and/or receivable from each of the advertisers listed in Exhibit "T" to the petition, towards consideration for broadcast of advertisements on the television channel/s owned and operated by the respondents in relation to the 2011 cricket series.

(iv) The 1st respondent shall, within four weeks from today, furnish security by depositing in this Court, a sum of Rs.305 crores.

(v) Upon receipt of any amounts, the Prothonotary & Senior

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Master shall invest the same in fixed deposit of a Nationalized bank, initially for a period of one year and thereafter for like periods of one year each.

(vi) Liberty to apply for enhancement of the security and further orders.

(vii) It is clarified that this order shall operate to an aggregate extent of only Rs.305 crores. For instance, if security is furnished under clause (iv) above, it will not be necessary to deposit further amounts under clauses (i) and (ii) above."

11. By a separate order that was passed on 27 January 2012, the learned Single Judge has issued the following directions on the application for amendment :

"Respondent No.1 shall not dispose of, alienate, encumber, part with possession of or create any third party rights in respect of the shares held by respondent No.1 in respondent No.2, without giving the petitioner's advocates notice of at least two weeks. This injunction shall apply in respect of the shares held and the accretions thereto of any nature whatsoever. Further the shareholding pattern of respondent

No.2 shall also not be modified without giving the petitioner's advocates notice of two weeks."

12. The Second Respondent to the arbitration petition has filed two appeals against the orders respectively passed by the learned Single Judge on 19 and 27 January 2012. The First Respondent has filed an appeal which is confined to the correctness of the order passed by the learned Single Judge on 19 January 2012. The learned Single Judge was of the view prima facie that an amount of Rs.305 Crores is due and payable by the First Respondent to the Petitioner under the Media Rights Licensing Agreement dated 15 October 2009. The learned Judge held that - (i) There were defaults in the payment of PNP 9/29 APPL90-27.2.sxw the outstandings by the First Respondent; (ii) The First Respondent is under financial distress; (iii) The Second Respondent is a wholly owned subsidiary of the First Respondent as stated by the First Respondent before this Court in a prior arbitration petition; (iv) The agreement between the First and Second Respondents was an internal commercial arrangement designed to implement the Media Rights Licensing Agreement between the Petitioner and the First Respondent;

(v) The First Respondent has in fact averred in its arbitration petition that the broadcast business which is being conducted by the Second Respondent is the business of the First Respondent; (vi) The Petitioner is no longer secured by the bank guarantees because the banks have refused to pay; (vii) There is an admission of liability contained in the balance-sheet of the First Respondent as of 31 March 2010; (viii) The Second Respondent being a wholly owned subsidiary of the First Respondent, the shareholding of the Second Respondent constitutes a valuable asset of the First Respondent. In that view of the matter, the Second Respondent being a separate entity would make no difference. On these findings, the learned Single Judge directed the Respondents to deposit all amounts which may have been received from the advertisers and which may be received hereafter in Court to secure the claim in arbitration. The First Respondent has been directed to furnish security in the amount of Rs.305 Crores by a deposit in Court. The learned Single Judge has clarified that the order would operate only to the extent of an aggregate amount of Rs.305 Crores. Moreover, if the First Respondent complies with the direction to furnish security in the amount of Rs.305 Crores, then it would not be necessary to deposit any further amount out of the revenues earned through advertisements.

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13. All the three appeals have been heard together. During the course of the hearing of the appeals, the extent of the controversy that arises in these appeals has narrowed down in view of the statement which has been made on behalf of the original Petitioners before the Court. Learned senior counsel appearing on behalf of the Petitioners has stated before the Court that since only an application for ad interim relief was made before the learned Single Judge, the Petitioner does not seek any ad interim relief as against the Second Respondent at the present stage, without prejudice to its rights and contentions at the hearing of the arbitration petition to apply for appropriate reliefs as prayed both against the First and Second Respondents. During the course of the hearing, it has also been agreed upon by the learned counsel before the Court that the Chamber Summons for amendment which has been taken out by the Petitioner may be allowed. Accordingly, by consent

Chamber Summons 249 of 2012 for amendment shall stand allowed and the amendment shall be carried out within a period of one week from today. Since it has been clarified before this Court that the ad interim application is not being pressed at this stage as against the Second Respondent, that part of the order of the learned Single Judge would have to be suitably modified in the final directions that would be issued in the appeal. The principle issue that now remains for consideration relates to the direction that has been issued by the learned Single Judge calling upon the First Respondent to the arbitration petition to furnish security in the amount of Rs.305 Crores by a deposit of a like amount in Court.

PNP 11/29 APPL90-27.2.sxw

14. Learned Senior Counsel appearing on behalf of the First Respondent, Nimbus Communications Ltd., submitted that -

(i) Section 9(ii)(b) empowers the Court to grant an interim measure of protection to secure the amount in dispute in arbitration.

However, the power which is exercised by the Court under Section 9(ii)(b) can be exercised only subject to the conditions which are spelt out in Order 38 Rule 5 of the Code of Civil Procedure 1908 in view of the judgment of the Supreme Court in Adhunik Steels Limited v. Orissa Manganese and Minerals (P) Ltd.<sup>1</sup>

(ii) The entire basis on which relief has been sought under Section 9(ii)(b) as spelt out in paragraph 9 of the arbitration petition is on the hypothesis that the First Respondent may secrete monies receivable from the advertisers in order to obstruct or delay the execution of the dues of the petitioner. The First Respondent, it has been urged, has stated on an affidavit and reiterates before the Court that no amount is due and receivable from advertisers by the First Respondent and hence the basis on which relief has been sought under Section 9 is not existent. Except for this circumstance, no case has been made out for the grant of any order on principles analogous to those set out in Order 38 Rule 5; and

(iii) The First Respondent has a substantial defence to urge as against the claim of the Petitioner on the following grounds :

(a) The scheme of payment in the Media Rights Licensing 1 (2007) 7 SCC 125.

PNP 12/29 APPL90-27.2.sxw Agreement contemplated that a series between India and Pakistan would be held in 2011-12 which did not take place;

(b) In breach of the representations and warranties made by the petitioner to the First Respondent in clause 9 of the agreement the best possible team was not selected to tour the West Indies and all the top players of the Indian Team were rested during the series;



(c) The addendum to the agreement would require that the guarantee of Rs.1600 Crores would have to be reduced pro rata upon the cancellation of the series with Pakistan.

As a matter of fact, the Petitioner did not reduce the quantum of the guarantees and proceeded to invoke the full amount.

Consequently, even assuming that the Petitioner has a claim as against the First Respondent on account of dues which were payable for the matches which were telecast in the series against England and West Indies, the First Respondent would be entitled to set up a counter claim and/or to set up a claim for damages in the arbitral proceedings.

15. On the other hand it has been urged on behalf of the original Petitioner by the learned senior counsel that -

(i) The object and purpose of an interim measure of protection under Section 9(ii)(b) is to secure the amount in dispute in arbitration and those provisions are not curtailed or restricted by those contained in Order 38 Rule 5 of the Code of Civil Procedure 1908. The judgment of the Supreme Court in *Adhunik Steels* (supra) was specifically in the context of the grant of an interlocutory injunction where the Supreme Court PNP 13/29 APPL90-27.2.sxw held that the general principles relating to the grant of injunction inter alia in the Specific Relief Act would govern;

(ii) The basis on which the Court has been moved under Section 9 for securing the amount in dispute is that there is an amount admittedly due and payable as a result of the fact that the matches in question were telecast and despite the clear terms of the agreement payment of Rs.31.25 crores per match has not been effected. The First Respondent is in grave financial difficulty and it is on the record of the Court to state that the main source of revenue generation is the exploitation of the media rights which are traceable to the agreement with the Petitioner. The First Respondent is a chronic defaulter suffering from paucity of funds and an order under Section 9(ii)(b) is necessary in order to secure the claim of the Petitioner in arbitration;

(iii) Even a bare perusal of the nature of the defence is sufficient to indicate that there is absolutely no substance in the contentions raised.

16. Section 9 of the Arbitration and Conciliation Act, 1996 enables a party to apply to the Court either before or during the arbitral proceedings or at any time after the making of an award but before it is enforced in accordance with Section 36. Clause (ii) enables a party to seek an interim measure of protection in respect of the following matters :

"(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property PNP 14/29 APPL90-27.2.sxw or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) 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."

17. The provision enunciates that 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. Now it is in this background, that it would be necessary to consider the basic issue raised. The submission of the First Respondent is that when a Court passes an order providing for an interim measure of protection for securing the amount in dispute in arbitration, the power can be exercised only subject to the restrictions which are spelt out in Order 38 Rule 5 of the Code of Civil Procedure 1908. Order 38 Rule 5 applies in a situation where at any stage of a suit, the Court is satisfied that the defendant (i) is about to dispose of the whole or part of his property or (ii) is about to remove the whole or part of his property from the local limits of the jurisdiction of the Court with intent to obstruct or delay the execution of any decree that may be passed against him. In such an event the Court may direct the defendant either to furnish security in such sum as may be specified in the order, to produce the property and place it at the disposal of the Court when required or the value of the same or such portion as may be sufficient to satisfy PNP 15/29 APPL90-27.2.sxw the decree. The exercise of the power under Rule 5 of Order 38 is thus conditioned by two requirements, the first being in regard to the conduct of the defendant, in that he is about to alienate his property or to remove it from the jurisdiction of the Court and the second, the intention of the defendant to obstruct or delay the execution of a decree that may be passed against him. Parliament in the provisions of Section 9(ii)(b) contemplated an interim measure of protection to secure the amount in dispute in the arbitration. The object underlying the conferment of the power upon the Court is to ensure that the fruits of an arbitral award which may eventually be passed against the defendant to the claim are not lost to the claimant by a dissipation of the property in the meantime. The issue as to whether the power which has been conferred on the Court under Section 9 is hedged in by the specific provisions of the Code of Civil Procedure 1908 came up before a Division Bench of this Court initially in *National Shipping Company of Saudi Arabia v. Sentrans Industries Limited*<sup>2</sup>. The issue before the Court was whether the power exercisable by the Court under Section 9(ii)(b) of passing an interim measure for securing the amount in dispute in the arbitration was restricted by the conditions of attachment before judgment as prescribed under Order 38 Rule 5. Mr. Justice R.M. Lodha (as the Learned Judge then was) speaking for the Division Bench held that as a principle of law a special provision of the nature embodied in Section 9(ii)(b) cannot be restricted by importing the provisions of Order 38 Rule 5. The Division Bench held that though the power under Section 9(ii)(b) has not been made subject to

the stringent provisions of Order 38 Rule 5, the exercise of the power is guided by 2004(2) Bom.C.R. 1 PNP 16/29 APPL90-27.2.sxw the paramount consideration that the claimant who obtains an award in his favour before the arbitrator ultimately is able to derive the fruits of the adjudication in executing the award. The Division Bench held as follows :

"The order under section 9(ii)(b) is in the nature of interim protection order. In a special provision of the nature like section 9(ii)(b), we are afraid, exercise of power cannot be restricted by importing the provisions of Order 38, Rule 5 of the Code of Civil Procedure as it is. The legislature while enacting section 9(ii)(b) does not seem to us to have intended to read into it the provisions of Order 38, Rule 5 of the Code of Civil Procedure as it is.

.....

The provisions of Order 38, Rule 5 C.P.C. cannot be read into the said provision as it is nor can power of the Court in passing an order of interim measure under section 9(ii)(b) be made subject to the stringent provision of Order 38, Rule 5. The power of the Court in passing the protection order to secure the amount in dispute in the arbitration before or during arbitral proceedings or at any time of making of the arbitral award but before it is enforced cannot be restricted by importing the provisions set out in Order 38 of C.P.C. but has to be exercised *ex debito justitiae* and in the interest of justice. The Court while considering the application for interim protection under section 9(ii)(b) is guided by equitable consideration and each case has to be considered in the light of its facts and circumstances. The interim protection order contemplated under section 9(ii)(b) is granted by the Court to protect the interest of the party seeking such order until the rights are finally adjudicated by the Arbitral Tribunal and to ensure that the Award passed by Arbitral Tribunal is capable of enforcement. Though the power given to the Court under Section 9(ii)(b) is very wide and is not in any way controlled by the provisions of the Code but such exercise of power, obviously, has to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the arbitrator is in a position to get the fruits of such adjudication and in executing the Award. While dealing with the application for direction to the other party to deposit the security of the PNP 17/29 APPL90-27.2.sxw amount in dispute in the arbitration, the Court also has to keep in mind the drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that denial of such order would result in grave injustice to the party seeking such protection order in as much as in the absence of such order, the applicant party succeeding before the Arbitral Tribunal may not be able to execute the Award. The obstructive conduct of the opposite party may be one of the relevant considerations for the Court to consider the application under section 9(ii)(b). The party seeking protection order under section 9(ii)(b) ordinarily must place some material before the Court, besides the merits of the claim that order under section 9(ii)(b) is eminently needed to be passed as there is likelihood or an attempt to defeat the Award, though as indicated above,

the provisions of Order 38, Rule 5 C.P.C. are not required to be satisfied. The statutory discretion given to the Court under section 9(ii)(b) must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. In our view, this is the proper approach for consideration of the application for interim relief under section 9(ii)(b) and we hold that the provisions of Order 38, Rule 5 of the Code of Civil Procedure cannot be read as it is and imported in section 9 of the Act of 1996. We also hold without hesitation that the Court is competent to pass an appropriate protection order of interim measure as provided under section 9(ii)(b) outside the provisions of Order 38, Rule 5 Code of Civil Procedure. Each case under section 9(ii)(b) of the Act of 1996 has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience."

18. In a subsequent decision of the Supreme Court in *Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation*<sup>3</sup> the Supreme Court held that the power under Section 9 cannot be read as independent of the Specific Relief Act and it could not be contended that the restrictions placed by the Specific Relief Act cannot control the exercise of the power under Section 9. The Court 3 (2007) 6 SCC 798.

PNP 18/29 APPL90-27.2.sxw observed that while entertaining an application under Section 9, the Court must have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. Consequently the general rules that govern the Court while considering the grant of an interim injunction at the threshold would be attracted even while dealing with an application under Section 9. The Court also noted the principle that when a power is conferred under a special statute and is conferred on an ordinary court of the land, without laying down any special condition for the exercise of that power, the general rules of procedure would apply.

The Supreme Court adverted to the position which was *inter alia* taken by the Division Bench of this Court that the power under Section 9 is not controlled by Order 38, Rule 5 of the Code of Civil Procedure 1908, but left it open to be determined in an appropriate case.

19. In the decision of the Supreme Court in *Adhunik Steels* (*supra*) the Respondent had obtained a mining lease from the State Government of Orissa and had an agreement with the appellant for raising manganese ore on its behalf. The term of the agreement was ten years with an option to renew. The respondent issued a notice of termination calling upon the appellant to remove itself from the site contending that its contract was in violation of the Mineral Concession Rules, 1960. The appellant thereupon moved the District Court under Section 9 for an injunction restraining the respondent from terminating the contract and from dispossessing it at site. The District Court allowed the application under Section 9. The High Court in appeal upheld the contention of the respondent that the loss PNP 19/29 APPL90-27.2.sxw if any that may be sustained by the appellant could be calculated in monetary terms and that in view of Section 14(3)(c) of the Specific Relief Act, an injunction could not be granted. In that view of the matter, the High Court did not consider it fit to enquire into the issue of the balance of convenience. Before the Supreme Court it was urged on behalf of the appellant that Section 9 was independent of Order 39 of the Code of Civil Procedure

1908 and the exercise of the power was not subject to the provisions contained in the Specific Relief Act. The Supreme Court dealt with the submission in the following terms :

"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 de hors 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."

20. The Supreme Court noted that the power to grant injunction by way of specific relief is covered by the Specific Relief Act 1963, injunction being a form of specific relief. Section 9, the Supreme Court noted does not contain any special condition nor does it provide for a special procedure. The Court noted that whether an PNP 20/29 APPL90-27.2.sxw interim measure should be ordered permitting the appellant to carry on mining operations in the face of an attempted termination of the contract would lead the court to a consideration of the classical rules for the grant of such an interim measure. This, it was held, had to be considered based on the well settled principles in that behalf. Consequently the Supreme Court held as follows :

"Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection."

21. The Supreme Court directed that while the respondent should not enter into a contract for mining and lifting of minerals with any other entity until conclusion of the arbitral proceedings, there was no justification in preventing it from carrying on the mining operations by itself.

22. The judgment of the Supreme Court in Adhunik Steels has noted the earlier decision in Arvind Constructions which holds that since Section 9 is a power which is conferred under a special statute, but which is exercisable by an ordinary court without laying down a special condition for the exercise of the power or a special procedure, the general rules of procedure of the court would apply. Consequently, where an injunction is sought under Section 9 the power of the Court to grant that injunction cannot be exercised independent of the principles which have been laid down to govern the grant of interim injunctions particularly in the context of the Specific Relief Act 1963. The Court, consequently would be obligated to consider as to whether PNP 21/29 APPL90-27.2.sxw there exists

a prima facie case, the balance of convenience and irreparable injury in deciding whether it would be just and convenient to grant an order of injunction. Section 9, specifically provides in sub-clause (d) of clause (ii) for the grant of an interim injunction or the appointment of a receiver. As regards sub-clause (b) of clause (ii) the interim measure of protection is to secure the amount in dispute in the arbitration. The underlying object of Order 38 Rule 5 is to confer upon the Court an enabling power to require a defendant to provide security of an extent and value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should be furnished is, however, pre-conditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be passed against him. In view of the decisions of the Supreme Court both in Arvind Constructions and Adhunik Steels, it would not be possible to subscribe to the position that the power to grant an interim measure of protection under Section 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure 1908 or that the exercise of that power is untrammelled by the Code. The basic principle which emerges from both the judgments of the Supreme Court is that though the Arbitration and Conciliation Act 1996 is a special statute, Section 9 does not either attach a special condition for the exercise of the power nor does it embody a special form of procedure for the exercise of the power by the Court. The second aspect of the provision which has been noted by the Supreme Court is the concluding part of Section 9 under which it has been specified PNP 22/29 APPL90-27.2.sxw that 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. This has been interpreted in both the judgments to mean that the normal rules that govern the Court in the grant of an interlocutory order are not jettisoned by the provision. The judgment of the Division Bench of this Court in National Shipping Company (supra) notes that though the power by Section 9(ii)(b) is wide, it has to be governed by the paramount consideration that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award. The Division Bench noted that the power being of a drastic nature, a direction to secure the amount claimed in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought was regarded as being a material consideration. However, the view of the Division Bench of this Court 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 in view of the decision of the Supreme Court in Adhunik Steels.

23. In a recent judgment of a learned Single Judge of the Delhi High Court in Steel Authority of India Ltd. v. AMCIPTY Ltd.<sup>4</sup>, the judgment of the Division Bench of this Court in National Shipping Company was relied upon. The Delhi High Court observed that the provisions of Order 38, Rule 5 would serve as a guiding principle for 4 O.M.P. 417/2011 decided on 1 September 2011.

PNP 23/29 APPL90-27.2.sxw the exercise of the jurisdiction while dealing with a petition under Section 9 requiring the respondent to furnish security and the basic consideration is that the Court should be satisfied that the furnishing of security is essential to safeguard the interest of the petitioner.

24. A close reading of the judgment of the Supreme Court in *Adhunik Steels* would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a 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. 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. The principles laid down in the Code of Civil Procedure 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 PNP 24/29 APPL90-27.2.sxw of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b).

25. Now in this background it would be necessary for the Court to determine as to whether a case has been made out for the grant of an ad interim order in terms of Section 9(ii)(b). Under the agreement dated 15 October 2009 between the petitioner and the First Respondent, the First Respondent was under a contractual obligation during the term of the contract to deposit 50% of the fee payable not later than thirty days before the commencement of each series and the balance within sixty days after the scheduled day of the last match of the series. The agreement between the parties stipulates the consideration payable at Rs.31.25 crores for each match. The agreement recognises that the Petitioner was in negotiations with the ICC for bilateral cricket tours of the Indian National Team for April 2010 and changes were likely to be made in the schedule of matches. Recognising the possibility of a change in schedule, the agreement postulates that to the extent to which matches were increased or reduced, the right fee payable under the agreement would be modified on a proportionate basis. The contention of the First Respondent based on the cancellation of the Indo-Pak cricket series would therefore prima facie be in the teeth of the specific contractual provision which parties incorporated. The First Respondent has also sought to set up the plea in its letter dated 29 December 2011 that the Petitioner failed to perform its contractual obligation by not selecting some of the leading players for the West Indies series. Reliance has been placed on clause 9.3(c)(iv) to the effect that the PNP 25/29 APPL90-27.2.sxw Petitioner represented and warranted that subject to the ICC future tours programmes commitments, the Petitioner shall procure the strongest possible Indian player representation in each bilateral BCCI event and use its best endeavours to procure the strongest possible international player representation in such events. Prima facie, the contractual stipulation does not and cannot be read to interfere with the selection of the Indian Cricket Team. The presence or absence of a particular player or of players cannot furnish the First Respondent a reason not to pay its dues. The defence which is now sought to be raised appears to be a feeble attempt not to comply with the contractual obligation to pay. The addendum to the original agreement dated 22 August 2011 similarly stipulated that the value of a bank

guarantee provided by the licensee would stand reduced at the commencement of each year of the rights period or after written confirmation from the licensor of the cancellation of any matches whichever was later. The Indo-Pak series was proposed to be held in March 2012. The termination in the present case took place on 12 December 2011, prima facie, prior to the date on which a reduction in the value of the bank guarantee was to take effect.

26. As the learned Single Judge has noted, and prima facie for the reasons noted above, the Petitioner has made out more than a strong prima facie case that an amount of Rs.305 Crores is due and payable to it by the First Respondent. The First Respondent defaulted in making payments despite being called upon to do so. The issue as to whether an order under Section 9(ii)(b) ought to have been passed by the learned Single Judge cannot, however, be founded only on the fact that the Petitioner made out more than a strong prima facie case PNP 26/29 APPL90-27.2.sxw on merits. The learned Single Judge was moved by the Petitioner specifically with an averment that the First Respondent had admitted including in its letter dated 12 December 2011 that it was suffering from a severe financial crunch. The First Respondent, as the Petitioner pointed out had admitted in its arbitration petition that the main source of revenue generation is through the exploitation of the rights under the Media Rights Licensing Agreement with the Petitioner. The entire structure of business was built around a business plan involving the exploitation of the rights under the agreement which now stands terminated. In the circumstances, it was urged that the First Respondent does not have the source or means to clear its outstandings for benefits which had already been enjoyed under the agreement. Now it is in this context that the Petitioner has submitted in the arbitration petition that the First Respondent is unable to fulfill its obligations due to a paucity of funds and is likely to utilise the funds which it receives from advertisers. Ultimately it has been submitted that the First Respondent may utilise the funds which it receives from the Second Respondent with a view to obstruct, defeat or delay the claim of the Petitioner as also an arbitral award that may be passed in its favour. As the learned Single Judge noted it was necessary to assess the claim of the Petitioner having regard to the distinct possibility of the Respondents facing a financial crisis in the event that they do not succeed in the disputes with the Petitioner. The submissions which have been urged on behalf of the Petitioner in the arbitration petition must be juxtaposed in the context of the case of the First Respondent in its arbitration petition (Arbitration Petition (Lodg.) No.1425 of 2011) before this Court. Counsel appearing on behalf of the Second PNP 27/29 APPL90-27.2.sxw Respondent has stated before the Court that at present 89% of the share holding of the Second Respondent is held by the First Respondent directly or indirectly. The averments in the petition are to the effect that since 2005, the First Respondent has entirely invested into Indian cricket / BCCI events; the broadcast business is almost completely dependent on media rights from BCCI; the most valuable asset of the business of the Second Respondent is the Media Rights Licensing Agreement and if the termination were not to be stayed, it would result in the closure of the business of the Second Respondent.

The First Respondent has also stated that the entire business of its fully owned subsidiary, the Second Respondent, would be destroyed if the termination were allowed to stand. Hence, in the account of the business by the First Respondent itself, it is evident prima facie that the media rights from BCCI constitute the fulcrum of the business. The termination of that business, even according to the First Respondent, would lead to the closure of the Second Respondent, its subsidiary. The



shareholding of the First Respondent in the Second Respondent constitutes a valuable asset : its value would be liable to a serious erosion if the business of the Second Respondent is brought to a standstill. There is also merit in the contention of the Petitioner that in the copy of the commercial agreement between the First and Second Respondents that has been placed on the record before this Court, the actual monetary terms have been blanked out, so as to exclude any assessment of the terms of the commercial bargain between the First and Second Respondents. Another relevant consideration is that in an affidavit dated 10 January 2012 filed by the Second Respondent to oppose the application for ad interim relief, it has been stated that the First Respondent has a majority PNP 28/29 APPL90-27.2.sxw shareholding in the Second Respondent. However, the Second Respondent is stated to be at an advanced stage of inducting a strategic investor in the company, several offers have been received and as a result it is likely that the First Respondent "will be only a minority shareholder going forward."

27. In this view of the matter, and having due regard to the principles which are embodied in Order 38, Rule 5, we are of the view that the learned Single Judge was justified in calling upon the First Respondent to furnish security in respect of the claim of the Petitioner in the amount of Rs.305 Crores. Having regard to the provisions of Order 38, Rule 5, it would, however, be appropriate to direct the First Respondent to furnish security. We are of the view that the ends of justice could be met by a direction to the effect that the First Respondent shall within a period of two weeks from today furnish solvent security in the form of a bank guarantee of a nationalised bank in the amount of Rs.305 Crores to the satisfaction of the Prothonotary and Senior Master.

28. The directions which have been issued by the learned Single Judge shall accordingly stand modified by the following directions :

i) By consent, Chamber Summons 249 of 2012 filed by the Petitioner for amending the petition under Section 9 shall stand allowed. The amendment shall be carried out within a period of one week from today;

ii) The ad interim order which was passed by the learned Single Judge on 27 January 2012 in the Chamber Summons shall stand PNP 29/29 APPL90-27.2.sxw extended for a further period of four weeks from today so as to enable the Petitioner to apply for appropriate relief before the learned Single Judge in the arbitration petition;

iii) In terms of the statement which has been made by the learned senior counsel appearing on behalf of the Petitioner before the Court, the application for ad interim relief as against the Second Respondent is not pressed at this stage, leaving it open to the Petitioner to apply before the learned Single Judge for appropriate reliefs against the Respondents. Consequently, the directions contained in the impugned order of the learned Single Judge as against the Second Respondent shall stand vacated;

iv) The First Respondent shall furnish solvent security in the form of a bank guarantee of a nationalised bank in the amount of Rs.305 Crores to the satisfaction of the Prothonotary and Senior Master within two weeks;

v) All the rights and contentions of the parties are kept open to be urged before the learned Single Judge in the arbitration petition.

The Appeals are accordingly disposed of.

There shall be no order as to costs.

(Dr. D.Y. Chandrachud, J.) (M.S. Sanklecha, J.)