Mcarbon Tech Innovation Pvt. Ltd. vs Rajesh Razdan on 14 May, 2020

Equivalent citations: AIR 2021 (NOC) 266 (DEL.), AIRONLINE 2020 DEL 737

Author: Jyoti Singh

Bench: Jyoti Singh

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on: 27.02.2020
   Pronounced on: 14.05.2020

+ ARB. A. (COMM.) 23/2019, I.A. No. 11953/2019

   MCARBON TECH INNOVATION PVT. LTD. ..... Appellant
   Through Mr. Rajeev Sharma, Mr. Nishant
   Menon and Mr. Deepesh,
   Advocates.
   versus

   RAJESH RAZDAN ..... Respondent
   Through Mr. Sanjeev Puri, Senior Advocate
   with Ms. Pragya Puri, Advocate.
   CORAM:
   HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. Present appeal has been filed by the Appellant under Section 37 (2)

(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act). Challenge in the appeal is to an interim order dated 12.08.2019 passed by the Learned Arbitrator on an application filed by the Respondent under Section 17 of the Act. By way of the said impugned order, the Arbitrator has directed the Appellant to furnish a Bank Guarantee in favour of the Respondent in the sum of Rs.30 crores from State Bank of India or HDFC Bank, initially valid for a period of six months and to be kept alive thereafter, till the passing of the Award. The Appellant herein is the Respondent before the Arbitrator and the Respondent herein is the Claimant.

2. Shorn of unnecessary details, the facts necessary to decide the present appeal are that the Appellant is engaged in the business of provision of applications for telecom companies with its products including Happy Hours and USSD Push Campaign Manager, Pick Pack Interactive pre-call announcement, Loan Advance Solution, etc. Appellant installs the software products on servers of concerned customers i.e. the telecom service providers. Each product contains database software

which stores and processes data and the software application reads and processes data from the concerned database.

3. Respondent was the CEO of the Appellant. The Genesis of the present dispute lies in the acquisition of the Appellant by Nuance India Private Limited and Nuance Communications Netherland BV (hereinafter referred to as buyers) vide Share Purchase Agreement dated 30.12.2016 (hereinafter referred to as SPA).

4. Pursuant to the said acquisition and in terms of the SPA, Nuance Communications Inc issued an Offer Letter dated 03.02.2017 to the Respondent and upon his acceptance of the terms and conditions of the same, an Employment Agreement dated 03.02.2017 was executed between the Appellant and the Respondent herein.

5. On account of disputes and differences having arisen between the parties herein, Appellant terminated the employment of the Respondent on 09.01.2018. Aggrieved by the termination of his employment, Respondent on 14.03.2018, issued notice invoking Arbitration under the Arbitration Clause provided in the Employment Agreement. On the failure of the Appellant to appoint an Arbitrator, Respondent filed a petition under Section 11 of the Act before this Court and vide order dated 31.05.2018, this Court appointed a Sole Arbitrator to adjudicate the disputes between the parties.

6. On 21.08.2018, Respondent filed his Statement of Claim before the learned Arbitrator raising the following claims:

> "Claim No.1 - Earn-Out consideration INR 24,48,79,320/- Claim No.2 - Salary for 15 months - Rs.2,25,00,000/- Claim No.3 - Loss of Reputation -INR 20,00,00,000/- Claim No.4 - Time based and Performance based Equity - Rs.54,46,980/-
>
> Claim No.4 - Share of Escrow Amount - INR 3,74,56,860/-."

7. Appellant filed its Statement of Defence on 08.11.2018 and the rejoinder was filed by the Respondent on 30.11.2018.

8. In the interregnum, on 12.10.2018, Appellant filed an application under Section 16 of the Act challenging the jurisdiction of the learned Arbitrator. On 08.02.2019, the learned Arbitrator passed an order dismissing the objections of the Appellant qua Claim Nos. 2 to 4 and held that Claim Nos. 1 and 5 will be adjudicated at the stage of passing the final Award. Vide the said order, the learned Arbitrator also directed the Appellant to secure the Respondent by furnishing a Bank Guarantee for a sum of Rs. 30 crores. Out of the total amount of Rs. 30 crores, Claim Nos. 1 and 5, according to the Appellant constitute a sum of Rs. 28,23,36,180/- (Rupees Twenty Eight Crores Twenty Three Lacs Thirty Six Thousand One Hundred Eighty).

9. On 11.05.2019, Respondent filed an application under Section 17 of the Act in which pleadings were completed on 21.05.2019. On 05.07.2019, Respondent filed an additional affidavit bringing on

record certain additional facts. According to the Respondent, majority shareholders of the Appellant were in the process of winding down the business and selling the same to potential buyers. Respondent apprehended that the Appellant in order to obstruct or delay the execution of the Award would encash and utilise the cash reserves of the company and would eventually leave the jurisdiction of the Tribunal.

10. Appellant filed a reply and contested the said position on twofold grounds. Firstly, that the Respondent had not made out a case for grant of interim relief by applying the principles of Order XXXVIII Rule 5 CPC and secondly, the company had a sound financial standing with its financial statements showing a huge net worth and there was no question of the company leaving the jurisdiction of the Tribunal or having any intent whatsoever to defeat the Award, in case the same was passed in favour of the Respondent. Learned Arbitrator allowed the application and granted the interim relief sought for by the Respondent. Operative portion of the order reads as follows:

> "57. In view of the foregoing, I am of the opinion that the Respondent must furnish a bank guarantee in favour of the Claimant in the sum of Rs. 30,00,00,000/- (Rs. Thirty Crores) only. Such bank guarantee should be from State Bank of India or HDFC Bank. This guarantee should be initially for a period of six months and should be kept alive thereafter till the award is finally made. With these directions, the application under Section 17 is disposed of."

11. Before delving into the respective contentions of the parties at this stage, it is pertinent to bring on record, that when the matter was being heard on 27.02.2020, Mr. Puri, learned senior counsel for the Respondent, on instructions from the Respondent, had made a categorical statement that the Respondent has already raised Claim nos. 1 and 5 before the Singapore International Arbitration Centre (SIAC). Learned senior counsel fairly conceded that the basis of the impugned order directing the Appellant to furnish a Bank Guarantee in the sum of Rs. 30 crores was the amount claimed under Claim nos. 1, 2, 4 and 5. However, since two claims have now been referred before SIAC, the Bank Guarantee required to be furnished by the Appellant will only be in the sum of Rs.2,79,46,980/-.

12. There is a dispute between the parties even with regard to the reason for termination of the Employment Agreement of the Respondent. While the Appellant blames the Respondent for a professional misconduct, Respondent alleges that it was a malafide act on behalf of the Appellant to dispense with the services of the Respondent as they wanted to oust the officers holding senior positions in the erstwhile management. However, this Court need not trouble itself with this controversy as the validity of termination of the Employment Agreement would be decided by the Arbitral Tribunal at the time of final adjudication. Present appeal only concerns with the interim order by which the Appellant has been directed to furnish Bank Guarantee during the pendency of the arbitration proceedings.

13. Assailing the impugned order, Mr. Rajeev Sharma, learned counsel for the Appellant contends that the impugned order has been passed in violation of the judgment of the Supreme Court in case of State Bank of India v. Ericsson India Private Limited & Ors., [(2018) 16 SCC 617] as well as of this

Court in BMW India Private Limited v. Libra Automotives Private Limited & Ors. [(2019) 261 DLT 579] and Lanco Infratech Ltd. v. Hindustan Construction Company Ltd. [(2016) 234 DLT 175], wherein it has been held that an order under Section 17 of the Act can be passed only if the Tribunal is satisfied that principles of Order XXXVIII Rule 5 CPC are met. Learned Arbitrator having held in para 49 that no single instance could justify or satisfy grant of an order under Section 17, passed an interim order. Alleged financial condition of the Appellant cannot be a ground to justify the impugned order as held in the case of Natrip Implementation Society Vs. IVRCL Limited, [2016 SCC OnLine Del 5023].

14. It is further argued that the Supreme Court in Raman Tech. & Process ENGG. CO. & Anr. v. Solanki Traders, [(2008) 2 SCC 302] has held that power under Order XXXVIII Rule 5 CPC is a drastic and extra ordinary power and should be exercised sparingly and not mechanically and the mandatory precondition for passing the order would be an actual sale and purchase of the assets by the Respondent in a given case, with a view to evade the decree that may be passed in favour of a claimant. It is submitted that the Arbitrator has confused itself in as much as in one part of the order it has reached a conclusion that conditions of Order XXXVIII Rule 5 CPC have been met, while in the other it appears that the Arbitrator was of the view that such principles need not be met, while passing an order under Section 17 of the Act. It is also submitted that the Respondent was unable to point out a single incident to prove that the Appellant was selling or about to sell its properties to defeat the claim of the Respondent.

15. It is next contended that the Arbitrator completely failed to appreciate that the Appellant's letter dated 13.11.2018 regarding end-of- life and wind down process, was purely a business decision and was not with an intention to defeat the Award. Mr. Sharma submits that the circumstances set out by the Respondent for grant of relief were that shareholders of the Appellant were selling the Appellant company and the Appellant had not renewed certain contracts. He submits that in the two affidavits filed by the Respondent there was no indication that Appellant was transferring its properties to obstruct the Award and there was no mention of any conduct on the part of the company and all that was referred to was the conduct of its shareholders which would not attract Order XXXVIII Rule 5 CPC. Though it is true that the shareholders are engaged in negotiations for sale of their shares in the company, but sale of shares by shareholders only relates to the ownership of the Appellant and not to the financial condition of the company. Change of ownership of shares cannot be any indication of any change in the company's financial health.

16. Counsel contends that the impugned order overlooks the fact that the claims are seriously disputed and even application under Section 16 of the Act is pending adjudication. Arbitrator has converted an unsecured debt of the Respondent into secured debt. Power under Section 17 of the Act cannot be extended to secure speculative, undetermined and disputed claims of damages, without there being a determination of the same.

Claims of the Respondent are in the nature of damages and need to be first crystallized and adjudicated.

17. Counsel next argues that without any reason and basis the Arbitrator came to an omnibus conclusion that Appellant was packing its business from India due to dwindling business and heavy losses. It is submitted that Appellant is an Indian company which is still in existence and business. Appellant's letter dated 13.11.2018, only refers to platform- based product portfolio and also expressly states that Appellant would plan to develop new products. It is, in fact, a strange conclusion of the Arbitrator as common business sense would never allude to the fact that anyone would wind up entire business only to defeat an Award by the Arbitrator. Insofar as declining revenues are concerned, the revenues were declining even in 2016 - 2017 when the Respondent was the CEO of the Appellant.

18. Mr. Sanjeev Puri, learned senior counsel on behalf of the Respondent per contra contends that the defence of the Appellant before the Tribunal and this Court is primarily based on strict applicability of provisions of Order XXXVIII Rule 5 CPC in securing the disputed amount during the arbitration proceedings. Appellant has mainly relied on two decisions i.e. Raman Tech. (supra) and State Bank of India (supra) in support of this proposition. Mr. Puri argues that the first decision has no applicability in the present case since that case pertains to a suit and not Arbitration and Order XXXVIII Rule 5 CPC will not have strict application in the present case. Moreover, the Tribunal has itself distinguished the said judgment in paragraph 42 of the impugned order.

Insofar as the second judgment is concerned, in the said case an order under Section 17 of the Act was passed against the party who was not even a party before the Arbitral Tribunal. The Court had thus held that the Tribunal had no jurisdiction to effect rights of third parties and order for interim measures can only be passed against a party to a suit/arbitration. The said judgment has been clearly distinguished by the learned Arbitrator in paragraph 43 of the impugned order.

19. Mr. Puri, learned senior counsel further argues that in arbitration proceedings provisions of Order XXXVIII Rule 5 CPC will not have strict application and only the underlying principles are to be followed. Having applied the underlying principles, the Tribunal has in paragraph 49 clearly held that the application filed by the Respondent under Section 17, looking to its contents, broadly satisfied the conditions and requirements of Order XXXVIII Rule 5 CPC. Learned senior counsel specifically points out that in its application under Section 17 of the Act, Respondent had clearly pleaded in paragraphs 4-9 that the Appellant company had decided to initiate end-of-life and wind down process for many of its services, which were undoubtedly the major revenue generating services provided by the Respondent company. This was clear from communications dated 13.11.2018 and 16.11.2018 whereby the Appellant had notified Hutchinson, one of the most high-profiled customers, about non-renewable of their contracts with the Appellant company. It was categorically stated in the application that the business of the Appellant was being wound up and they were about to encash, appropriate, utilize the cash reserves, with the intent of leaving the Respondent with only a paper Award and no means to execute it in case the same was passed in favour of the Respondent.

20. It is further submitted that in reply to the application, Appellant made certain admissions which were also taken into consideration by the learned Arbitrator. Appellant clearly admitted that there was non-renewal of certain contracts and dwindling trend in the business of the company, revenues

showed declining trend and losses showed upward trend. It was also admitted that net worth of the Appellant was negative in the year ending 31.03.2018 while it was Rs. 55,40,28,507/- in the year ending 31.03.2016 and that there were negotiations by the shareholders for sale of their shares. After elaborate discussion on facts, consideration of all material on record and examining the judgments cited by both parties, the Tribunal in its wisdom came to a conclusion that looked at holistically, it appeared that the Appellant was packing up its business due to losses. The Arbitrator made observations in paragraphs 11 and 14 of the order and was of the view that an inference could be drawn that the Appellant had the intent to defeat the Award and render it a paper Award in case the same was finally passed in favour of the Respondent.

21. Mr. Puri also contends that in paragraph 50 of the order the Tribunal has clearly held that Respondent had made out a prima facie case and balance of convenience was also in its favour and thus the Respondent would suffer irreparable harm and injury if the relief prayed for was not granted. It is argued, that in the same paragraph, the learned Arbitrator considered the admissions made by the Appellant as recorded in paragraph 28 of the impugned order as also the facts recorded in paragraph 29, being financial distress, admitted losses, descaling of business operations and held that aforesaid factors individually and cumulatively show that security must be furnished so that the ultimate Award is not rendered a nullity. Respondent relies on the judgments in the case of Steel Authority of India Ltd. v. AMCI Pty Ltd. & Ors. [2011 (3) ARBLR 502 (Delhi)], Gatx India Pvt. Ltd. v. Arshiya Rail Infrastructure Ltd. [216 (2015) DLT 20], Tower Vision India Private Limited v. Videocon Telecommunications Limited [2016 SCC OnLine Del 5273] to support his case.

22. The next argument of the Respondent is that it is no longer res integra that this Court cannot sit in appeal over the orders passed by the Arbitral Tribunal under Section 17 of the Act and the scope of interference is extremely limited. So long as the order balances equities and is a plausible and equitable view, it should not be interfered with. Reliance is placed on the decisions of this Court in Shiningkart Ecommerce Pvt. Ltd. v. Jiayun Data Limited, Arb A. (Comm) 30/2019, decided on 16.10.2019 and Subhash Chander Chachra and ors. vs Ashwani Kumar Chachra and ors. [2007 (1) ARBLR 288 (Delhi)].

23. Reiterating his submissions made before the start of the arguments, Mr. Puri submits that while the amounts directed by the learned Arbitrator to be secured were calculated to be Rs. 31,02,83,160/-, however, now that the Respondent has taken certain claims before SIAC, Respondent prays that the impugned order be upheld only qua claim Nos. 2 and 4, quantification of which is given in paragraphs 51 and 54 of the impugned order. Thus, the Appellant is required to furnish a Bank Guarantee only in the sum of Rs. 2,79,46,980/- i.e. Rs.2,25,00,000/- qua Claim no.2 and Rs. 54,46,980/- qua claim no.4.

24. I have heard the Learned Counsels for the parties.

25. The proposition argued by Mr. Sharma on behalf of the Appellant can hardly be quarreled with. It is no longer res integra that an order under Section 17 of the Act can be passed only if the Tribunal is satisfied that principles of Order XXXVIII Rule 5 CPC are met. In 2007 Supreme Court in the case of Adhunik Steels Limited v. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125, while

examining the powers of the Court under Section 9 of the Act held as under :-

> "10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was 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. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."

26. A Division Bench of the Bombay High Court in the case of Nimbus Communications Limited v. Board of Control for Cricket in India and Ors., 2012 SCC OnLine Bom 287, relying on Adhunik Steels (supra) held as under:

> "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 Special Relief Act 1963. The Court, consequently would be obligated to consider as to whether 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 untrammeled 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 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.

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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 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)."

27. Mr. Sharma is also right in his contention that in Raman Tech. (supra), Supreme Court has held that powers under Order XXXVIII Rule 5 CPC are drastic and extraordinary powers and should be exercised sparingly and not mechanically and the mandatory pre-condition for passing the order would be an actual act of the opposite party trying to remove the essence or the subject matter of the arbitration beyond the jurisdiction of the Tribunal.

28. Mr. Puri, learned senior counsel is equally right in his contention that provisions of Order XXXVIII Rule 5 CPC would not have strict application and only the underlying principles are to be followed.

29. Equally correct is the proposition argued by Mr. Puri, learned senior counsel that the scope of interference in the orders of the Tribunal passed under Section 17 is limited. So long as the order balances equities and is a plausible view, it should not be interfered with. This has been so held in the case of Shiningkart Ecommerce (supra) and Subhash Chander Chachra (supra).

30. Thus, what this Court needs to examine is whether the Tribunal while passing the impugned order has applied the well settled principles i.e. prima facie case in favour of the Respondent and prima facie satisfaction that the Appellant was in the process of removing its assets from the jurisdiction of the Tribunal to defeat the Award that may be passed in favour of the Respondent. It also needs to be examined whether the view taken by the Tribunal based on these considerations is a plausible view.

31. The Tribunal in para 11 of the impugned order takes note of a letter dated 13.11.2018 written by the Director of the Appellant to PT. Hutchinson 3 Indonesia, 10F, Menara Mulia, Jl. Jend. Gatot Subroto Kav 9-11, Jakarta Selatan 12930, Republic of Indonesia, notifying the latter that the Appellant had begun end-of-life and wind down process and that the services would be discontinued at the earliest on account of recent trends in the telecom market causing decrease in profitability. It is also notified that the Appellant will not develop any new products and would not renew any of its agreements listed in the letter. The Tribunal in para 14 extracts a table showing the declining revenues of the Appellant over the years, a position which was candidly accepted by the Appellant. Further down in para 28, the Tribunal records the bullet points which are admitted by the Appellant and which are as under :-

> "28. In the written submissions on behalf of the Claimant, it has been contended that in the reply to the application, the Respondent has made the following admissions:-
>
> a. Non-renewal of certain contracts and dwindling trend in the business of the Company - Para D Pg 3 of Reply.
>
> b. Revenues of the Respondent showing declining trend and losses showing upward trend- Para F, Pg 4 of the Reply.
>
> c. Losses in the year 2017-2018 are 46,37,82,467 which are even more than the revenue of Rs. 33,37,81, 302- Para F, Pg 4 of the Reply.
>
> d. Net worth of Respondent is negative as on year ending 31.03.2018 - Balance sheet, while it was 55,40,28,507 as on year ending 31.03.2016.
>
> e. Admits that fact of negotiations of sale by shareholder (which companies have 100% shareholding)- Para D at Pg 3 of Reply."

32. In the subsequent paras, the Tribunal discusses the judgments with respect to the powers of the Tribunal and the Guiding Principles of Order XXXVIII Rule 5 CPC. Reading of paras 33 to 37 shows that the Tribunal was conscious of the judgments of various Courts on the applicability of the tests of a prima facie case and principles of Order XXXVIII Rule 5 CPC while passing an order of interim relief under Section 17 of the Act. In the subsequent paragraphs, the Tribunal considers the judgments relied upon by the Appellant and distinguishes them on facts. Finally, in para 49, the Tribunal records that the text of the application filed by the respondent under Section 17 of the Act, broadly satisfies the requirement of Order XXXVIII Rule 5 CPC. The Tribunal finally rendered a finding that looked at holistically, it appeared that the Appellant was packing up its business from India due to heavy losses which it notes in paras 11 and 14 of the order. On the basis of the facts and figures before it, the Tribunal concludes that the Appellant is in the process of winding up its business and there is an intent to defeat the Award that may be finally passed in the matter making it a mere paper decree. Tribunal also observes that the respondent has a prima facie case and balance of convenience also lies in favour of the respondent.

33. On these findings, the Tribunal in its wisdom concludes that an order needs to be passed to protect the respondent. Relevant part of the impugned order is as under :-

> "48. I have given my serious consideration to the case of both sides and the various judgments cited for and against seeking an order under Section 17. I am of the view that for passing an order under Section 17; an exercise of equitable jurisdiction; the Tribunal is not bound by the principles laid down in Order XXXVIII Rule 5 but has to be guided by those principles. The Tribunal has also to keep in mind the claim made and the nature of the claim in the arbitration proceedings. As held in Ajay Singh's case by the Division Bench of the Delhi High Court, there seems to be two divergent strands in judicial thinking but the matter is one of the weight to be given to the

materials on record, a fact- dependent exercise rather than principle. The Tribunal does not have to be unduly bound by the test of the provision of Order XXXVIII Rule 5.

49. In the instant case, the Claimant/applicant has pleaded in the application seeking interim relief under Section 17 which, to my mind, broadly satisfies the conditions and requirements of Order XXXVIII Rule 5. No single instance can be said to justify or satisfy the considerations for grant of an order under Section 17 but looking at the matter holistically, it appears to me that the Respondent is 'packing up' its business from India due to its dwindling business and heavy losses as noticed in paragraphs 11 and 14 herein above. From the consideration of facts in totality one can draw the inference that the intention of the Respondent Company is to wind up its business totally which would show that it intends to defeat the Award that may finally be passed in the matter thereby making the Award and decree a paper decree.

50. I am of the view that the Claimant has a prima facie good case and the balance of convenience is also in favour of the Claimant/applicant who would suffer an irreparable harm and injury if no order under Section 17 is passed in his favour. The admissions supposed to have been made by the Respondent as summarized in paragraph 28 above as well as the facts recorded in paragraph 29 make me conclude that prima facie, the Claimant/applicant is entitled to an order under Section 17. As stated in paragraph 9 of the written submissions on behalf of the Respondent, the object of such an order is to prevent a party from defeating the realization of a decree that may be passed."

34. Having gone through the impugned order, this Court is of the opinion that the order suffers from no infirmity. The view is a plausible view based on the material before the Tribunal. Documents on record prima facie indicated that the Appellant was winding up its business and in its wisdom the Tribunal thought that it was a case where the respondent needed to be protected. In Emaar MGF Land Limited v. Kakade British Realities Private Limited and Anr., 2013 (138) DRJ 507, this Court has laid down the parameter for interference in an order passed by the Tribunal under Section 17 of the Act. Relevant paras read as under :-

"6. Having heard the learned counsel for the parties, according to me, what requires to be examined is not how this court would have ruled had the matter been placed before it, in the first instance but, whether the conclusion reached by the learned arbitrator was reasonably possible based on the material placed before him. The scope of an appeal qua discretion employed by an authority of the first instance is restricted to an appeal on principle. Therefore, the appellate court is not to interdict the exercise of discretion employed by the original authority and substitute the same with its own view in the matter, except when, it is shown that the discretion exercised in the matter is imbued with arbitrariness, is capricious, or has resulted in perversity, or the impugned order is passed in ignorance of the settled principles of law for grant or refusal of interlocutory injunctions [see Wander Ltd. and Anr. (supra)].

8. I find that there is nothing in the interim order which calls for interference. None of the factor for grant of interim order are ignored. The discretion, in the grant of interlocutory orders, is that of the authority, which passed the order in the first instance, in this case, the learned arbitrator-Which I do not propose to interdict even if I were to hold a view different from that of the learned arbitrator except in situations articulated hereinabove."

35. The only other issue that needs to be considered is the amount of Bank Guarantee which the Appellant is required to furnish. As recorded above, Mr. Puri, learned senior counsel had fairly conceded that in view of the fact that only Claim nos.2 and 4 are pending adjudication before the Tribunal, the Bank Guarantee directed to be furnished may be reduced proportionately.

36. The impugned Order of the Tribunal is upheld with a modification that the amount of Bank Guarantee which the Appellant will be required to furnish will be proportionate to the two pending claims before the Tribunal, as against the sum of Rs.30 Crores directed by the impugned order. The Appellant is at liberty to file an application before the Tribunal seeking necessary modification and the Respondent undertakes not to contest the same.

37. There is no merit in the appeal and the same is hereby dismissed.

38. Pending application is also dismissed.

JYOTI SINGH, J MAY 14th , 2020 yg