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Supreme Court of India renders differing opinion on the applicability of the principles of the Code of Civil Procedure, 1908 while granting relief under Section 9 of the Arbitration and Conciliation Act, 1996.

Recently, a division bench of the Hon'ble Supreme Court of India ("**Supreme Court**") in the case of *Sanghi Industries Ltd. vs. Ravin Cables Ltd. & Anr.*¹ ("**Sanghi Industries Judgment**") observed that unless and until the conditions under Order XXXVIII Rule 5² of the Code of Civil Procedure, 1908 ("**CPC**") are satisfied, an order granting interim relief under Section 9³ of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") cannot be passed.

Background

Sanghi Industries Ltd. ("**Appellant**") had placed certain purchase orders on Ravin Cables Ltd. ("**Respondent**") for supply of cables. The cables supplied by the Respondent were found to be defective and accordingly, a legal notice demanding payment of INR 29,31,00,000 (Indian Rupees twenty nine crores thirty one lakhs) was issued by the Appellant for the losses suffered by it. The Respondent replied to this legal notice and also issued a legal notice demanding a payment of INR 1,30,00,000 (Indian Rupees one crore thirty lakhs) from the Appellant against outstanding invoices.

Thereafter, the Appellant invoked the 3 (three) performance bank guarantees furnished by the Respondent and invoked arbitration. The Respondent filed 2 (two) applications under Section 9 of the Arbitration Act, one before the Commercial Court at Ahmedabad and the other before the Commercial Court at Bhuj, to seek injunction against the invocation of bank guarantees ("**Applications**"). However, before an order could be passed under the Applications, the bank realised the payments under the bank guarantees invoked by the Appellant.

The Commercial Court, *vide* order dated October 13, 2021, exercised its powers under Section 9(ii)(e) of the Arbitration Act and directed the Appellant to deposit the amount of the respective performance bank guarantees. An appeal against this order was dismissed by the High Court of Gujarat ("**Gujarat HC**") *vide* order dated February 11, 2022. Accordingly, the Appellant filed the present appeal before the Supreme Court challenging the orders of the Commercial Court and the Gujarat HC.

¹ Civil Appeal No. 6908 of 2022, decided on September 30, 2022.

² Order XXXVIII Rule 5 deals with the principles governing 'attachment before judgment'.

³ Section 9 of the Arbitration Act provides for interim measures that may be granted by the concerned Court at various stages of an arbitration, but before enforcement of an arbitral award under Section 36 of the Arbitration Act.

Observations and Decision

The Supreme Court noted that the Commercial Court had passed the order under Section 9(ii)(e) of the Arbitration Act to secure the amount in dispute. However, the Supreme Court opined that unless and until:

1. the preconditions under Order XXXVIII Rule 5 of the CPC are satisfied,
2. there are specific allegations with cogent material,
3. the Supreme Court *prima facie* is satisfied that a party is likely to defeat the decree/award that may be passed by the arbitrator by disposing of the properties and/or in any other manner,

the Commercial Court could not have passed such an order in exercise of powers under Section 9 of the Arbitration Act. In view of the above, the Supreme Court quashed and set aside the order passed by the Commercial Court as well as the order passed by the Gujarat HC in appeal.

Conflicting Observations

The observations of the Supreme Court in the Sanghi Industries Judgment are directly at variance with the findings of a coordinate bench of the Court in the judgment of *Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited*⁴ (“**Essar House Judgment**”).

In the Essar House Judgment, the Court was dealing with a similar fact situation wherein a challenge was raised against the judgment of the High Court of Bombay (“**Bombay HC**”). The Bombay HC had directed Essar House Pvt. Ltd. and Essar Services India Pvt. Ltd. to deposit an amount of INR 35,50,00,000 (Indian Rupees thirty five crores fifty lakhs) and INR 47,41,00,000 (Indian Rupees forty seven crores forty one lakhs) respectively with the Prothonotary and Senior Master of the court, in exercise of its powers under Section 9 of the Arbitration Act.

The Court upheld the order of the Bombay HC and categorically observed that in exercise of its powers to grant interim relief under Section 9 of the Arbitration Act, the courts are not strictly bound by the provisions of the CPC. It held that 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 courts from securing the ends of justice. Noting the scope and intent of Section 9 of the Arbitration Act, the Supreme Court, in the Essar House Judgment, observed that the said provision confers a residuary power on the courts to pass such other interim measures of protection as may appear to be just and convenient at all stages of the arbitration, but before the enforcement of the award under Section 36 of the Arbitration Act.

It categorically held that all that the courts are required to see is:

1. whether the applicant for interim measure has a good prima facie case;
2. whether the balance of convenience is in favour of the applicant; and
3. whether the applicant has approached the court with reasonable expedition.

It observed that if the abovementioned conditions are met, the courts 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 XXXVIII Rule 5 of the CPC.

It further went on to observe that 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.

⁴ SLP (C) No. 3187 of 2021, decided on September 14, 2022

JSA Comment

The variance in the views expounded by two coordinate benches of the Supreme Court in the Sanghi Industries Judgment and the Essar House Judgment have resulted in a certain amount of uncertainty with respect to the power of the court under Section 9 of the Arbitration Act. The respective tests set out in both the decisions for grant of relief akin to attachment before judgment are wholly different.

It is, therefore, necessary that this issue be finally decided at the earliest, by a larger bench, failing which the exact scope of applicability of the provisions of CPC, specifically Order XXXVIII Rule 5, while granting relief under Section 9 of the Arbitration Act would remain under a cloud.

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