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Supreme Court rules on inapplicability of rigors of Order XXXVIII Rule 5 of CPC while granting interim reliefs under Arbitration Act

On September 14, 2022, a 2 (two) judge bench of the Hon'ble Supreme Court of India ("**Supreme Court**") in *Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited*¹ has held that at the time of deciding a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), the power of the court is not curtailed by the rigors of every procedural provision in the Code of Civil Procedure, 1908 ("**CPC**"). The proof of actual attempts to deal with the property with a view to defeat or delay the realisation of an impending arbitral award under Order XXXVIII Rule 5 of CPC² is not imperative for grant of interim relief under Section 9 of the Arbitration Act³.

Brief Facts

1. Essar Services India Private Limited ("**Essar Services**") and Essar Steel India Limited ("**Essar Steel**") entered into a support services agreement ("**Service Agreement**"), whereunder Essar Steel deposited an amount of INR 47,41,00,000 (Indian Rupees forty seven crores forty one lakhs) as security deposit.
2. Essar Steel also entered into agreements with Essar House Private Limited ("**Essar House**") whereunder some portions of the Essar House property were leased to Essar Steel ("**Rental Agreement and Business Centre Agreement**"). Under these agreements, Essar Steel deposited a cumulative amount of INR 35,51,00,000 (Indian Rupees thirty five crores fifty one lakhs) as interest free refundable security deposit.
3. In 2017, Essar Steel was admitted into insolvency and subsequently, the resolution plan submitted by Arcellor Mittal Nippon Steel India Limited ("**Arcellor**") was approved by the National Company Law Tribunal in March 2019.
4. In 2019, Arcellor demanded refund of the security deposit under the Service Agreement, and Rental Agreement and Business Centre Agreement. Upon disputes arising, Arcellor filed applications under Section 9 of the Arbitration Act before the High Court of Bombay ("**High Court**") against Essar Services and Essar House. The single judge allowed these applications. Appeals against the single judge decisions were dismissed.

¹ Special Leave Petition (Civil) No.3187 of 2021.

² Under Order XXXVIII Rule 5 of CPC, courts upon being satisfied that the defendant is going to dispose of property or remove the property from local limits of the jurisdiction of the court, may direct the defendant to either furnish security or produce and place, at the disposal of the court, the said property or value of the same as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security. As per Rule 5(4), if order of attachment is made without complying with the same, the attachment will be void.

³ Under Section 9 of the Arbitration Act, courts can grant interim reliefs before or during arbitral proceedings or at any time after the making of the arbitral award.

5. Essar Services and Essar House filed the special leave petitions contending that the High Court ought to have considered the requisites of Order XXXVIII Rule 5 of CPC while granting the interim relief and it had erred in not doing so.

Issue

Whether the High Court was required to consider the requisites of Order XXXVIII Rule 5 of CPC while granting the interim relief under Section 9 of the Arbitration Act?

Contentions of the petitioners

The petitioners contended that in order to grant discretionary interim relief under Section 9 of the Arbitration Act, the High Court was required to satisfy itself that Essar House and/or Essar Services was about to remove or dispose of whole or part of its property with intent to obstruct or delay the execution. The High Court had erred in not considering the requisites of Order XXXVIII Rule 5 of CPC for grant of interim relief.

Contentions of the Respondent

The respondent, while relying on judgments of various high courts,⁴ contended that the powers of courts under Section 9 of the Arbitration Act are wider than powers under the provisions of CPC. It further relied on the provision to contend that besides the specific power of securing the amount in dispute, the courts have been empowered to pass any interim measure of protection, keeping in view the purpose of the proceedings before it. The said provision confers a residuary power on the court to pass such other interim measures of protection as may appear to be just and convenient

Supreme Court: Findings and Rationale

The Supreme Court after appreciating the submissions advanced by the parties and having regard to the law settled by various high courts held as follows:

1. While it is true that the power under Section 9 of the Arbitration Act cannot ordinarily be exercised without following the basic principles of CPC, procedural technicalities involved in CPC cannot be applied to applications under Section 9 of the Arbitration Act.
2. The technicalities of CPC and procedural safeguards contained therein cannot prevent the court from securing the ends of justice under Section 9 of the Arbitration Act.
3. The power of courts under Section 9 of the Arbitration Act are wider than the power of Courts under the provisions of CPC and that courts should not bound themselves by the provisions of CPC.
4. Under Section 9 of the Arbitration Act, all the court needs to see is that (a) a good prima facie case exists in favour of the applicant; (b) the balance of convenience lies in the applicant's favour; and (c) the applicant has approached the court with reasonable expedition. If a strong case is made out on these fronts, the court should not withhold relief on mere technicality of absence of averments incorporating the grounds for attachment before judgment envisaged in Order XXXVIII Rule 5 of CPC.
5. 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 Ajay Singh & Ors. v. Kal Airways Private Limited & Ors., 2017 SCC OnLine Del 8934; Jagdish Ahuja & Anr. v. Cupino Limited, 2020 SCC OnLine Bom 849; Valentine Maritime Ltd. v. Kreuz Subsea Pte Ltd. & Anr., 2021 SCC OnLine Bom 75; Srei Infrastructure Finance Limited v. M/s Ravi Udyog Pvt. Ltd. & Anr., A.P. No.522 of 2008, judgment dated November 17, 2008, High Court of Calcutta.

6. To assess the balance of convenience, the court is required to examine and weigh the consequences of refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail.

JSA Comment

The judgment brings much required clarity in law relating to the scope of powers which can be exercised by the courts under Section 9 of the Arbitration Act vis-à-vis Order XXXVIII Rule 5 of CPC. While the issue had been dealt with by several high courts, it has been decided by the Supreme Court for the first time. The decision reinforces the intent of the legislature in stipulating that only the basic principles of CPC apply in case of arbitrations and the technicalities of CPC cannot prevent the court from securing the ends of justice.

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This Prism has been prepared by:



Dheeraj Nair
Partner



Manish Jha
Partner



Ridhima Sharma
Junior Associate



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