
(2004) 12 DEL CK 0004
In the Delhi High Court
Case No : OMP 225 of 2004

M.M.T.C. Limited

APPELLANT

Vs

Priyanka Overseas Limited and Others

RESPONDENT

Date of Decision : 09-12-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 13, 16, 17, 2(1)
Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 5(1), Order 38 Rule 5(4), Order 39 Rule 1

Citation : (2004) 12 DEL CK 0004

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Navin Chawla and Rishi Kant, for the Appellant; G.L. Rawal and Kuljit Rawal, for the Respondent

Judgement

Vikramajit Sen, J.—The Petitioner, MMTC Limited, has filed this petition u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act') praying that the Respondent be directed to deposit in Court a sum of Rs. 2,43,45,38 9.52 along with interest at the rate of 15 per cent per annum from 1.2.2004 till the date of such deposit as security of the amount in dispute in the arbitration. It has further been prayed that an ex-parte ad-interim injunction be issued restraining the Respondent from in any manner selling, mortgaging, creating a lien or in any other manner disposing off or creating third party interests in its assets till the disposal of the arbitration proceedings and payment in terms of the Award. A retired Judge of this Court already stands appointed as the Sole Arbitrator over the disputes that have arisen between the parties.

2. Mr. Navin Chawla, learned counsel appearing for MMTC has vehemently stressed that the Respondent has illegally and surreptitiously sold approximately 10,000 MT of rice owned by MMTC while it was in the custody of Respondent No.1 (hereinafter referred to as 'PRIYANKA'). In short it is contended that this unlawful action manifests a breach of trust committed by PRIYANKA and justifies

the passing of the interim orders prayed for in the petition. Mr. G.L. Rawal, learned counsel for the Respondents, submits that the contract between the parties was in the nature of a finance agreement whereby MMTC was entitled to payment of 1 per cent of the capital made available for the purchase of subject Rice. It has further been contended that since the subject Rice was to be procured from the Food Corporation of India (FCI) it was necessary for PRIYANKA to effect exports through the aegis of MMTC since both of them are Public Sector Undertakings. It has further been contended that the Rice remained the property of PRIYANKA entitling it to sell it at its discretion. Without prejudice to these contentions Mr. Rawal has further argued that the subject Rice was stored in Kandla and the officials of MMTC at Kandla had been informed of PRIYANKA's intention to sell the subject Rice in the market. It has also been submitted by Mr. Rawal that PRIYANKA had furnished a Bank Guarantee in the sum of Rs.1.5 crores which had been encased by MMTC thereby leaving no hurdle before MMTC to claim ownership of the subject Rice. On a consideration of the following Statement of Accounts, it is asserted on behalf of PRIYANKA that a sum of Rs.50 lacs is due and payable by MMTC to PRIYANKA. ACCOUNT OF MMTC Amount paid by MMTC to FCI for procurement of Rice (111979.834 MT) 654,345,483.00 Add Other Expenses:

1. Service Margin @US\$2 PMT up to 31.3.03 9,626,336.00
2. Bank Interest (as per chart enclosed)8,948,796.00
3. Bank Charges 1,239,103.50
4. Insurance Premium 644,480.00 20,458,715.50 674,804,198.50 Less
1. Export Realisation 634,292,278.00
2. Refund received from FCI 30,25,770.00
3. Balance refund amount 14,88,836.00 receivable from FCI (as per chart enclosed
4. Insurance Claim for transit loss on goods covered under insurance policies (as per chart enclosed) 3,407,756.00 5. Transit Loss on goods - No Insurance Policy taken by MMTC 3,171,644.00
6. Rain damage and loss in shore at the time of loading on vessel M.V. 4,968,500.00 TAIPAN (as per Surveyor Certificate) 523.000 MT @9500 PMT
7. Physical loss of cargo I.E. 203.250 MT Barge loss in stream @9500 19,30,875.00 65,22,85,659.00 Balance 2,25,18,539.50 Les Demurrage 77,30,976.00 1,47,87,563.50 LESS SERVICE CHARGES@USD1 PMT 48,13,168.00 BALANCE DUE TO MMTC 99,74,395.00 PAID TO MMTC by encashment of Bank Guarantee 1,50,00,000.00 Payable by MTC to POL 50,25,605.00

3. A preliminary objection has been taken to the effect that this Court ought not

to exercise jurisdiction u/s 9 of the Arbitration Act since the Sole Arbitrator is already functional, before whom hearings are underway, and Section 17 sufficiently empowers the Arbitrator to pass appropriate orders in respect of the prayers made in this petition. The matter has been argued at great length and, Therefore, I feel duty bound to deal with the factual matrix of the case, albeit in a prim facie manner.

4. The parties had entered into an Memorandum of Understanding (MOU) dated 30.4.2002, the salient Clauses of which are as follows: 1. POL will secure export orders in the name of MMTC for commodities identified under this MOU. Separate export contracts will be entered between MMTC and the overseas buyer for each commodity. The terms and Conditions for export contract will be finalised by POL directly, keeping in view, the general guidelines issued by FCI/ Govt. for each commodity covered under this MOU. ...

5. MMTC shall invest their finance in procurement of different commodities covered under the MOU. POL shall pay to MMTC the cost of financing for the actual period (i.e. from the date of payment till realization of export proceeds) at EPC rate plus 1%. The actual interest amount shall be adjusted out of realization of export proceeds.

6. POL shall take adequate insurance cover on behalf of MMTC for appropriate value right from sourcing point to shipment to safeguard the mutual interest. The insurance cover taken by POL will cover all possible risks at 110% of open market sale price of the goods fixed by FCI. The insurance policy to be taken in the name of MMTC AT THE COST OF POL.

7. POL shall make all the arrangements to unload rakes/trucks at the port and undertake all handling, cleaning, repacking operations (if required) as per the terms and conditions of relevant export contract. These operations will be undertaken by POL under their supervision. The title of goods during the entire operation shall remain with MMTC and POL would furnish a BG covering 5% of value of goods held with them on behalf of MMTC.

14. The profit/losses in respect of export of commodities under the said MOU after adjusting all costs, services charges, interest and other dues if any payable to MMTC as per the provisions of this MOU, shall be to the account of POL. Similarly all dispatch/demurrage claims will be to the account of POL which will be settled by POL directly with the vessel owner/foreign buyer.

5. At a Meeting held on 27.3.2003 the discussions and decisions arrived at, inter alia, were Minuted as follows: 1. Stock of broken Rice: MMTC representatives brought to the notice of POL that as per the Physical Verification Team's report, only about 5736 MT is stored in the godowns as against the stocks of 10,477 MT earlier indicated by M/s. POL in their communication on dated 27.1.2003. M/s. POL has confirmed that a stock of 8909 MT is available in the godowns. They have furnished a copy of their message dated 26.3.03 giving details of the quantity of 8909 MT.

4. It was clarified to POL that as per the contract, the residual broken rice is to be sold in the domestic market through MMTC's Ahmedabad Office. However, POL, in their own interest, wants to export the broken rice.

6. In its letter dated 23.5.2003 PRIYANKA stated that "" we are enclosing your account as appearing in our books as on date, according to which Rs.2,45,53,018/- is payable to you in full and final settlement of your account"". MMTC, however, has maintained that Rs.3,89,61,307.28 was due as on 10.6.2003 after taking into account refunds of Rs.30 lacs received from FCI, as is evident from its letter dated 10.6.2003. So far as the service margin of two Dollar per ton receivable by MMTC is concerned, there is at best only a unilateral demand by PRIYANKA that it should be scaled down to one Dollar. It has also been pointed out that in the Statement of Claim filed before the Indian Council of Arbitration by PRIYANKA it is admitted that the left over quantity of residue/ broken rice comes to approximately 6687 MTS.

7. I am of the prima facie view that PRIYANKA had no right to unilaterally carry out adjustments, inter alia, on account of refunds from FCI, insurance claims for transit loss, claims for transit loss not covered by insurance, rain damage and physical loss of cargo amounting to approximately Rs.2 crores. PRIYANKA is certainly not entitled to claim demurrage amounting to Rs.77.30.976.00 lacs as this would be contrary to the explicit understanding spelt out in Clause 14 of the MOU, which is reproduced above. It was also not entitled of its own volition to reduce service charges from two Dollars to one Dollar per MT without the concurrence of MMTC; consensus ad idem is missing. Since an arbitration clause existed between the parties, these sums could have been acted upon only post the award/interim award. Therefore, there is no palpable authority or justification for PRIYANKA to dispose of the subject Rice, which remained in the ownership of MMTC. In March 2003 PRIYANKA had confirmed that 5736 MT (if not 8909 MT) of Rice was stored in its godowns as against the stocks of 10,477 MT. It has also been noted that whilst the officials of MMTC had indicated that Rs.3,89,61,307.28 was due as on 10.6.2003, there is a mission of PRIYANKA of its liability at least to the extent of Rs.2,45,53,018 on 23.5.2003. Even after the value of the Bank Guarantee of Rs.1.5 crores is adjusted/deducted, large sums of money are outstanding in favor of MMTC and against PRIYANKA. The act of selling the subject Rice without the authority and consent of MMTC was contrary to the terms of engagement between the parties. Apart from Clause 14, Clause 10(n)(q) of the Agreement dated 3.9.2002 specifically records that ""MMTC shall have lien on the rice procured till it is exported. The Buyer's nominee will furnish to MMTC letter of lien on goods stored for export. ... Disposal of broken/residual rice and gunny bags will be made through MMTC, Ahmedabad. Buyer's Nominee shall arrange to deposit payment towards sale of broken/gunny bags with MMTC Ahmedabad, which will be adjusted at the time of settlement of account"".

8. The point that is to be decided is whether this Court is bereft of jurisdiction to

pass any orders u/s 9 of the Arbitration Act owing to the reason that the parties hereto are already before the Sole Arbitrator. Mr. Rawal has contended that there is unexplained delay in approaching the Court since the Objections are dated 25.5.2004 but had been filed in July 2004. It has been explained on behalf of the MMTC that the delay was because of the intervening summer vacations. I find no substance in the objection as also in the procedural hypertechnical objection that the verification by the affiant, namely Shri R.C. Menon, is not in consonance with law. 9. The respective realms of Sections 9 and 17 of the Arbitration Act need to be delineated now. Their reading will make it at once evident that the powers of the Court are of much wider amplitude than those possessed by the Arbitrator. The provisions can be conveniently compared with each other in the following juxtaposition.

9. Interim measures by court.--A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court:-- (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely:-- (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 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. Interim measures ordered by arbitral tribunal.--

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section(1).

10. In *M.D., Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd.*, although the Hon'ble Supreme Court had been called upon to interpret the provisions of the Arbitration Act, 1940. However, the following obiter dicta with reference to Section 9 and 17 of the A and C Act has been recorded therein - "A bare perusal of the aforementioned provisions would clearly show that even u/s 17 of the 1996 Act the power of the arbitrator is a limited one. He cannot issue

any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of Court; the same is enforceable on its own force. Even u/s 17 of the 1996 Act, an interim order must relate to the protection of the subject-matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even u/s 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof". Several years earlier in *M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.*, the Apex Court had already opined that "though Section 17 gives the Arbitral Tribunal the power to pass orders, the same cannot be enforced as Orders of a Court. It is for this reason that Section 9 admittedly gives the Court power to pass interim orders during the arbitration proceeding". The Court thereafter explained the interplay between these provisions in the following paragraph: 13. Under the 1996 Act, the court can pass interim orders u/s 9. Arbitral Proceedings, as we have seen, commence only when the request to refer the dispute is received by the respondent as per Section 21 of the Act. The material words occurring in Section 9 are "before or during the arbitral proceedings". This clearly contemplates two stages when the court can pass interim orders, i.e., during the arbitral proceedings or before the arbitral proceedings. There is no reason as to why Section 9 of the 1996 Act should not be literally construed. Meaning has to be given to the word "before" occurring in the said section. The only interpretation that can be given is that the court can pass interim orders before the commencement of arbitral proceedings. Any other interpretation, like the one given by the High Court, will have the effect of rendering the word "before" in Section 9 as redundant. This is clearly not permissible. Not only does the language warrants such an interpretation but it was necessary to have such a provision in the interest of justice. But for such a provision, no party would have a right to apply for interim measure before notice u/s 21 is received by the respondent. It is not unknown when it becomes difficult to serve the respondents. It was, Therefore, necessary that provision was made in the Act which could enable a party to get interim relief urgently in order to protect its interest. Reading the section as a whole it appears to us that the court has jurisdiction to entertain an application u/s 9 either before arbitral proceedings or during arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act.

11. In "International Commercial Arbitration in UNCITRAL Model Law Jurisdictions" Dr. Peter Binder has observed that "it is in most cases surely far less complicated to convince the arbitral tribunal, which is solely devoted to the case at hand and which is familiar with the circumstances, to issue an interim measure, than a Court, which only plays the role of the safety net in the background. However, to preserve the integrity of the institution of arbitration generally and to aid it in its independence from the Courts, a provision like Section 17 is of considerable importance". In *Channel Tunnel Group Ltd. v. Balfour Beatty Ltd.*, [1993] 1 All 664, the House of Lords has cautioned against

jural grant of interim measures on questions properly before the Arbitral Tribunals; primacy of the latter should Therefore be assiduously preserved and Courts may interfere only where there is a severe, irreversible and irretrievable error of gargantuan proportions.

12. The Judgment of the Apex Court in *Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc.*, is also relevant in that the enunciation of the law in the context of the present conundrum is available in these passages. The Apex Court reiterated its view that there is no ouster of jural powers contained in Section 9 merely because of the pendency of arbitration. 13. The A and C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application u/s 9 under the scheme of the A and C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application u/s 9 of the Act is enforcing a right arising from a contract? "Party" is defined in clause (h) of sub-section (1) of Section 2 of the A and C Act to mean "a party to an arbitration agreement". So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of court u/s 9 can be: (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in *Sundaram Finance Ltd. v. NEPC India Ltd.* the doubts stand cleared and set at rest and it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause have been issued before an application u/s 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the court u/s 9 must possess is of being a "party" to an arbitration agreement. A person not party to an arbitration agreement cannot enter the court for protection u/s 9. This has relevance only to his locus standing an applicant. This has nothing to do with the relief which is sought for from the court or the right which is sought to be canvassed in support of the relief. The reliefs which the court may allow to a party under clauses (i) and (ii) of Section 9 flow from the power vesting in the court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings. The court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power u/s 9 is sought to be exercised is the Arbitral Tribunal. Under the scheme of the A and C Act, the arbitration clause is separate from other clauses of the partnership deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A

and C Act. The relief sought for in an application u/s 9 of the A and C Act is neither a suit nor a right arising from a contract.

18. Under the A and C Act, 1996, unlike the predecessor Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that Section 17 would operate only during the existence of the Arbitral Tribunal and its being functional. During that period, the power conferred on the Arbitral Tribunal u/s 17 and the power conferred on the court u/s 9 may overlap to some extent but so far as the period pre-and post-the arbitral proceedings is concerned, the party requiring an interim measure of protection shall have to approach only the court.

13. This very question had been argued before me in Atul Limited Vs. Prakash Industries Ltd., where I had been called upon to consider the decision of a learned Single Judge of this Court in Arun Kapur Vs. Vikram Kapur and Others, . In paragraph 56 of that decision the learned Judge has opined that "" if the party invokes preliminary alternative remedy before the Arbitral Tribunal, it is debarred from invoking the jurisdiction of the Court u/s 9 of the Act. Ordinarily if the Arbitrator is seized of the matter the interim relief should not be entertained and the parties should be advised to approach the Arbitrator for interim relief unless and until the nature of relief intended to be sought falls outside the jurisdiction of the Arbitrator or beyond terms of the agreement or reference of disputes. Otherwise the very object of adjudication of disputes by arbitration would stand frustrated."" The learned Judge merely draws a distinction between Section 9 and Section 17 of the Act. He does not state that if Section 17 is available Section 9 cannot be invoked. A Division Bench of this Court has decided in Escorts Finance Ltd. v. Mohd. Hanif D. Khan, 2001 V AD 392 that it is not proper for the Court to decline to exercise jurisdiction u/s 9 of the said Act merely because arbitral proceedings are pending. The Division Bench had applied the pronouncements in Sundaram Finance Ltd. case (supra). Attention should also be drawn to a decision of another Single Judge of this Court in SRF Finance Ltd. Vs Prakash Industries Ltd. And Anr., OMP No.184/1997 decided on 23.8.2002, where it was observed that recourse u/s 17 is an enabling additional resort and is not in substitution of Section 9 of the Act and that the former Section cannot operate as an ouster of jurisdiction of the Court granted under the latter Section. In Arun Kapur's case (supra) the learned Judge has really done no more than express the salutary practice of not rushing to Court where relief from an alternate forum is conveniently available. The learned Judge does not in terms state that the Court cannot exercise the powers given to it by virtue of Section 9 of the Act. In this analysis, I am of the view that the Court has powers to pass appropriate orders u/s 9 of the Act notwithstanding the pendency of arbitral proceedings, especially since the Act preserves the power of the Court and bestows restricted jurisdiction on the Arbitrator.

14. Having arrived at this conclusion a caution must immediately be sounded

against indiscriminate exercise of jural interference. The scheme of the Act beacons the boundaries of the exercise of a jurisdiction which should not be a parallel to that of the Arbitral Tribunal. Section 5 frowns on judicial intervention except where within the parameters provided in Part I; Section 8 prescribes that Court should abjure from continuing civil proceedings where the disputes are the subject of an arbitration agreement, even though the civil proceedings may be legally competent at the time of their initiation. Section 12 expects immaculate impartiality and unquestionable credentials of the arbitrator, but even where reservations in this regard are raised, the Act contemplates its resolution not by the Court but by the Arbitrator himself. However unpalatable this may be for a lawyer, since it is an anathema for any person to be a judge in his own cause, the arbitrator must continue the hearings, unless he refuses himself, and make an Award u/s 13 which would be assailable only thereafter. Under the 1940 regime, parties would approach the Court either to refer disputes to arbitration or define its boundaries; however Section 16 expects the Arbitral Tribunal to settle these questions also. An assault to an award can be mounted u/s 34 after it is published and on grounds which the Act attempts to circumscribe tightly and narrowly. It is thus clear to me that there must be very strong reasons to compel the Court to consider passing interim orders which could contemporaneously be passed by the Arbitral Tribunal. The Court should not arrogate to itself the role donned by Don Quixote, after all the parties have taken a conscious decision for airing and obtaining a redressed of their grievances by a body other than the Court.

15. Mr. Racal has strenuously submitted that although Section 9 of the Act has been invoked for passing of the prayers in this petition they are essentially in the nature of attachment before judgment. An Award or decree is yet to be passed and, Therefore, there is no justification or warrant for assuming that the Petitioner's claims are as good as granted. Reliance has been placed on *Sheri Hair Shaker Versus Shipmate Boor Devil* Vol. XI Delhi Law Times 159 (Civil Revision No.570 of 1973), *Bank of India Vs. National Tile Work Industries and Others*, , *K.C.V. Airways Ltd. Versus Wag. Cdr. R.K. Laguna* 1997 IV AD 31 and *Bhushan Steel and Strips Ltd. Vs. Prem H. Lalwani and Others*, .

16. In *Hari Shankar's* case (supra) it has been held as under: 5. It goes without saying that the jurisdiction of courts in attaching property before judgment is of an extraordinary nature and has to be exercised sparingly and strictly in accordance with the procedure prescribed by the Code. The court has to be satisfied on two points, namely, (1) that the defendant is about to dispose of the whole or part of his property and (2) that the disposal is with the intention of obstructing or delaying the execution of any decree that may be passed against him. There has to be definite evidence on these points and not merely vague allegations. An order of the court without proper investigation of the allegations constitute a grave dereliction of duty. The fact that the defendant is in uncertain circumstances and is in acute financial and embarrassment is a relevant circumstance but is not by itself sufficient. Again the fact that the plaintiff may

have cope just claim against the defendant will not entitled him in law to have an order of attachment before judgment. At the same time before exercising jurisdiction under rule 5, the Court should satisfy itself of the practical certainty of the plaintiff's success and of the existence of a grave danger and of a real fear that a dishonest defendant, undoubtedly liable, is making away with the probable fruits of the judgment and for this purpose it is not sufficient to merely allege that defendant is likely to dispose of the property. For a defendant like the present petitioner who is carrying on jeweler business, the disposal of the assets of such business is likely in the day to day conduct of the business and a mere averment in the affidavit that the defendant is disposing of the assets does not show that the disposal of the assets is with a view to obstructing or delaying the execution of any decree that may be passed against him. It is clear from the provisions of sub-rule (2) that the provisions of sub-rule (2) are mandatory.....

In National Tile Work Industries case(supra) the opinion of the Court can be gathered from the following passages --

5.The object of entire O.xxxviii of the Code is to safeguard the interest of the plaintiff and thwart any possible attempt by the defendant to obstruct or delay the satisfaction of decree which might be passed against the defendant and to achieve this purpose. R. 5 thereof enables the Court to issue attachment before judgment of the property of the defendant so that any attempt on the part of the defendant to delay or defeat the satisfaction of the decree is forestalled. In accordance with the provision of R.5 of O.xxxviii of the Code, it is incumbent upon the plaintiff to satisfy the Court that the defendant has intention to obstruct or delay the execution of any decree that may be passed in this suit and for this purpose the defendant is about to disuse of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. It is only on the satisfaction of all these conditions that the plaintiff can be said to be entitled to an order of attachment before judgment in terms of O.xxxviii, R.5 of the Code. Thus, before this R.5 can be invoked it must, inter alias, be shown by the plaintiff that defendant has acted or is about to act with intent to obstruct or delay the execution of any decree that may be passed against him. The Court must be satisfied that all the ingredients of the rule exist. Mere fact that no harm would be caused to defendant or that defendant would not be prejudiced by such an order could be no ground to pass order under Order xxxviii, Rule 5 of the Code for attachment before judgment. It is in its very nature an extraordinary jurisdiction and has to be exercised sparingly and strictly in accordance with procedure prescribed by the Code. There must be some definite evidence on these points and not mere vague allegations. The plaintiff must also prove a prima facie case in his favor. The approach of this Court has essentially to be very cautious and not casual or routine like.

7..... Some definite instances or evidence must be produced by the plaintiff to show that the defendant has made any such attempt which is totally lacking in

the present case. Mere allegations are not by themselves enough and in the instant case even clear allegations are lacking and wanting. In these circumstances I find there is no merit in this application. In the K.C.V. Airways case (supra) it has been held as under : 11. Obviously, the impugned order was passed only taking into consideration the respective pleas taken by the appellants and the respondent. Learned Single Judge has not at all recorded his satisfaction about the existence of the twin conditions as laid down in Order xxxviii Rule 5(1) CPC that the appellants with intent to obstruct or delay the execution of the decree that may be passed against them (a) are about to dispose of the whole or any part of the properties, or (b) are about to remove the whole or any part of the properties from the legal limits of the jurisdiction of this Court. Under sub-rule (4) of the said order an order of attachment is made without complying with the provision of sub-rule (1) such as attachment is rendered void. Thus, the impugned order is also bad in the eye of law on the said score.

In Bhushan Steel case (supra) I had recorded these conclusions-

8. The grant of this prayer has been forcefully resisted and opposed by Mr. Saurabh Kirpal, learned Counsel for the defendants. He has submitted that on an analysis of both Order XXXIX and Order xxxviii there are no grounds or justification for the passing of these orders. Order XXXIX, Rule 1 contemplates injunctive protection being granted to the applicant but specifically in respect of immovable property. The rider to this generality is contained in Rule 1(b) but I am unable to find in the pleadings or the application any narration of facts which would persuade the Court to come to the conclusion that the defendant threatens or intends to remove or dispose of his property with a view to defrauding the plaintiff. Orders passed under this clause necessarily are in the nature of attachment before judgment and, Therefore, Rule 5 of Order xxxviii would have to be strictly and completely fulfilled before such orders are passed. Beyond a perfunctory and bald statement, bringing the case formally within these revisions, no facts have been stated to show that the defendants have acted in a manner calculated to create any obstruction or delay in the execution of a decree. It must be borne in mind that inasmuch as a claim of damages has been preferred in the suit, no prima facie case in respect of the liability presently exists. In fact, the liability can only be taken to come into effect if and when a decree in respect of damages has been passed. Secondly it is hotly in contest whether it is the plaintiff or the defendant who has committed a breach of the Agreement to Sell. These documents witness that if the plaintiff has breached the terms of the agreement, "the earnest money and advance paid by the purchaser (plaintiff) to the seller (defendant) shall stand petrified and the seller shall be free to sell the land". Therefore, even in respect of the sums of money paid by the plaintiff to the defendants pursuant to these agreements and to the MOU, contentious issues undoubtedly arise. This is not a fit case for proceeding either under the provisions of Order xxxviii, Rule 5 or of Order XXXIX, Rule 1. The application is accordingly dismissed. In view of the circumstances of the case

there shall be no order as to costs.

17. In my view the provisions of CPC have been specifically stated not to be binding on the Arbitrator and, Therefore, while assuming jurisdiction u/s 9 of the Act the Court may also not be completely controlled by the Code, strict sensor. In the present case I have already expressed the prima facie opinion that in selling and disposing off the subject Rice contrary to the respective roles and rights of the parties, PRIYANKA has manifested an intent to obstruct or delay the execution of the Award that may be passed against it. The act of the Respondent is more heinous than if it were disposing of its own property since its actions may be viewed as synonymous to breach of trust. The Court should, Therefore not feel inhibited or constrained in any manner to pass orders restraining the alienation of immovable properties owned by the Respondents.

18. The analysis have already been expressed that the Court possesses power to pass interim measure even during the tendency of arbitral proceedings but it should do so with utmost circumspection. It has also been seen that the Court has been empowered with much wider jurisdiction than that of the Arbitrator so far as the arena of interim measures are concerned. In the present case the Arbitral Tribunal is actively functional and it has not deferred a decision on the subject. In these circumstances if the Court were to exercise jurisdiction it would tantamount to succumbing to forum shopping and establishing a parallel adjudicator system. This is not the intent of Sections 9 and 17 of the Act. However, the question that immediately arises is whether the Arbitrator can pass orders which are in the nature of attachment before judgment in respect of the properties which are distinct from those integrally comprising the arbitral dispute. The prayers in the petition are directed towards personal properties of the Respondent [PRIYANAKA in contradistinction to its Directors]. Similarly the Petitioner has prayed for the deposit of Rs.2,43,45,389.52 by PRIYANKA. The subject matter in respect of which interim measure may be passed by the Arbitrator would not extend to the above. It seems to me that the Arbitrator could not go beyond the subject Rice which has already been sold away. This is the distinction between the powers u/s 9 and 17 of the Act. Had the Court been approached with a prayer referring to the quantity of rice it would have been appropriate to point the Petitioner back to the road leading to the arbitral venue. In the present case since I have arrived at the prima facie conclusion that the Respondents ought not to have sold the quantity of the subject Rice and that for this reason it would be expedient to protect the interests of the Petitioner as envisaged in Order xxxviii of the CPC, and since these powers cannot be exercised by the Arbitrator I restrain PRIYANKA/Respondent NO.1 from selling, mortgaging, creating a lien or in any manner disposing off or creating third party interests in any of its immovable assets till the publishing of the Award by the Arbitral Tribunal. The Respondents shall file an affidavit in Court within seven days from today disclosing details of the immovable properties of the value of Rs. 2 crores failing which the prayer for the deposit of Rs.2,43,45,.389.52 may be considered by the Court.

19. The petition is disposed of in these terms.