

(1998) 09 CAL CK 0027

In the Calcutta High Court

Case No : G.A. No"s. 2330 and 2947 of 1998 and APOT No. 467 of 1998

P.T. Tirtamas Comexindo

APPELLANT

Vs

Delta International Limited and Another

RESPONDENT

Date of Decision : 06-09-1998

Acts Referred:

Citation : (2001) 2 ARBLR 630

Hon'ble Judges : Ruma Pal, J; Basudev Panigrahi, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ruma Pal, J.—RUMA PAL, J. for the This is an appeal from an order dated 10th June, 1998 passed by the Learned Single Judge u/s 9 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as the Act) by which the appellant has been asked to furnish a bank guarantee for Rs. 1 crore within a specified period failing which pulses exported by the appellant from Myanmar to Mumbai would be separately stored.

2. The issues which have been raised in this appeal are summarised at the outset :

(1) Whether the Court exercising jurisdiction u/s 9 of the Act is empowered to form a prima facie opinion with regard to the existence of the arbitration agreement ?

(2) If the Court has the power, whether there is in fact prima facie evidence of an arbitration agreement between the parties ?

(3) Even if the Court does not have the power, whether on the materials before the Court the respondent/applicant had made out a case for the reliefs granted ?

3. These issues arise in the background of the following facts -

The appellant is an Indonesian Company. It carries on business in Indonesia. Its

business consists of exporting/arranging for the export of pulses. In the course of its business it entered into three separate contracts in writing with the respondent No. 2. The respondent No. 2 is incorporated under the relevant laws of Singapore where it also has its registered office. The three contracts between the appellant and the respondent No. 2 are respectively dated 30th July, 1997 being Contract No. 320171, 28th August, 1997 being Contract No. OGV/PC/97/010 and 4th October, 1998 being Contract No. OGV/PC/97/012A. Each of these three contracts provide for sale of diverse quantities of pulses from the Union of Myanmar. The destination in the first contract was "Any destination to be declared by the buyer at the time of vessel nomination"; the destination in the second contract was mentioned as "Mumbai, India"; and the destination in the third contract was "Mumbai/Tuticorin, India". The respondent No. 1 is a company having its registered office in Calcutta. According to it all the three contracts were superseded by an oral agreement between the appellant and the respondent No. 1 referred to as the "new contract". It is the respondent No. 1's further case that it was agreed that pulses which were the subject matter of the three contracts would be bought by the respondent No. 1 on FOB basis and at the rates mentioned in the three contracts. According to the respondent No. 1 this agreement was confirmed by a letter dated 22nd December, 1997 sent by facsimile by the respondent No. 1 to the appellant in Indonesia. The letter contains the terms and conditions including an arbitration clause allegedly agreed to in respect of the sale of the pulses by the appellant to the respondent No. 1.

4. According to the respondent No. 1, despite such agreement and several letters sent by the respondent to the appellant, the appellant refused to send the original documents in respect of the pulses agreed to be purchased under the new contract to the respondent No. 1. These letters are dated 29.1.1998, 12.2.1998 and 1.8.1998, and were sent, according to the respondent No. 1, by facsimile to the appellant in Indonesia. According to the respondent No. 1, the appellant informed the respondent over telephone that the goods were being sent by MV "Citi Wave" and MV "Citi Breeze". The documents were not sent but the appellant is said to have informed the respondent No. 1 telephonically that the vessels "Citi Wave" and "Citi Breeze" had been arrested in Colombo and that the pulses were being sent on "MV Janice". By the said reminders noted above the respondent No. 1 asked for the original documents in respect of these goods. The original documents were admittedly not sent by the appellant to the respondent No. 1. The respondent No. 1 then filed the application before this Court u/s 9 of the Act. According to the respondent No. 1 it was entitled to specific performance of the new contract recorded in the fax message dated 22nd December, 1997, alternatively, it claimed ownership of the pulses aboard the "MV Janice". On the allegation that "MV Janice" had already arrived in the Port of Mumbai and was scheduled to berth on 1st of April, 1998 and would discharge and unload the goods at the port and that the appellant would sell or dispose of the goods to third parties in derogation of the respondent No. 1's right thereto, it was prayed (i) that a Receiver should be appointed over and in respect of the pulses carried

by the vessel "MV Janice" to the extent covered by the new contract, (ii) if necessary for appropriate direction to be given to the Receiver for proper storage and preservation of the goods and (iii) for an order of injunction to restrain the appellant by its men, their servants, agent or otherwise from selling, disposing of or otherwise dealing with the pulses carried by the vessel "MV Janice" otherwise than by delivery of the same to the respondent No. 1, upon such terms and conditions as the Court would deem fit and proper.

5. An ex parte ad interim order was passed on 31st March, 1998 u/s 9 of the Act appointing a Receiver to take possession of the pulses aboard the "MV Janice" as and when the vessel reached Mumbai Port.

6. On 2nd April, 1998 the appellant appeared and prayed that the ex parte interim order be vacated. According to the appellant it had been drawn to the attention of the Learned Single Judge that there was infact no agreement at all between the appellant and the respondent No. 1 in connection with the export of pulses. An order was passed by the Learned Single Judge on 2nd April, 1998 in modification of the ad interim order dated 31st March, 1998 directing the appellant to keep the pulses segregated in a safe place after the same were off-loaded from the ship upon advice to the respondent No. 1. The appellant was also directed to intimate to the respondent No. 1 the quantities as well as the price of the goods and produce the relevant bills of lading. Upon production of the bills of lading, the respondent No. 1 was directed to deposit within 48 hours thereafter the entire price of the goods as well as the freight paid by the appellant in a short term fixed deposit account with the ANZ Grindlays Bank, Church Lane, Calcutta. Upon the deposit being made the appellant was directed to hand over the bills of the lading to the respondent No. 1 to enable it to arrange clearance of goods from the Mumbai Port. If the deposits were not made, it was directed that the order would stand vacated and the appellant was given the right to deal with the goods in the manner as it chose to do. Directions were also given for filing affidavits.

7. The appellant appealed against the ad interim orders on 7th April, 1998 before the Division Bench (referred to as the first appeal). The first appeal as well as the stay application filed by the appellant were disposed of by one order passed on 7th April, 1998. The Appellate Court set aside both the orders dated 31st March, 1998 and 2nd April, 1998 and accepted the suggestion of the respondent No. 1's counsel that the goods should be kept under the safe custody of the appellant. Accordingly, an order was passed to the effect that the appellant would keep the goods in a godown and undertake that the goods would be kept in a safe condition. After the goods were kept in the godown an intimation thereof was to be sent to the respondent No. 1. The Appellate Court remanded the matter back to the Learned Single Judge for urgent consideration and to be disposed of expeditiously. It was made clear that the Appellate Court had not adjudicated on the merits and contentions raised by the respective parties before it. Two separate appeals were sought to be filed before the Supreme Court from this

order by the appellant and the respondent No. 1 by way of Special Leave. The appellant's SLP was dismissed. According to the appellant the Supreme Court did not interfere because the appeal sought to be preferred was from an ad interim order. The respondent No. 1's SLP was dismissed as withdrawn.

8. A contempt application was moved by the respondent No. 1 before the Appellate Court alleging violation of the order dated 7th April, 1998 by the appellant. No contempt rule was issued by the Appellate Court but directions were given that expeditious steps should be taken after the ship was berthed at the port to unload the goods at Mumbai Port. The port authorities of Mumbai were also directed to submit a report to the Appellate Court.

9. The appellant sought for a final disposal of the application u/s 9 of the Act on 15th May, 1998 before the Learned Single Judge. However by an order dated 15th May, 1998 the Learned Single Judge refused to hear the application u/s 9 of the Act on the ground that the appellant could not be heard since it had not complied with the order of the Appeal Court dated 7th April, 1998.

10. The appellant again appealed from the order dated 15th May, 1998 (referred to as the second appeal). The second appeal was disposed of by the Appeal Court by an order dated 3rd June, 1998 by making it dear that it would be open to the Learned Judge to hear the application u/s 9 and that the Learned Single Judge need not feel embarrassed because the contempt matter was pending before the Appellate Court. The Appellate Court observed that it was expected that the Learned Single Judge would hear out the matter expeditiously according to his convenience. The respondent No. 1 filed a SLP against this order before the Supreme Court which was pending when hearing of the matter was concluded on 21st August, 1998. We were informed on 4th September, 1998 that the SLP was dismissed on 24th August, 1998 as infructuous. The matter was ultimately taken up for hearing by the Learned Single Judge on 10th June, 1998. To substantiate its case that there was never any agreement nor exchange of correspondence between the appellant and the respondent No. 1, the appellant sub-poenaed the office of the Calcutta Telephone on 1st June, 1998 to produce the relevant records relating to fax messages from the respondent No. 1's fax number. The records were produced by the Divisional Engineer (Calcutta Phones).

11. The Learned Single Judge disposed of the respondent No. 1's application u/s 9 by an order on 10th June, 1998. This order is impugned in this appeal. By the impugned order the appellant was directed to furnish bank guarantee to the sum of Rs. 1 crore of any nationalized or scheduled bank in favour of and to the satisfaction of the Registrar, Original Side within a fortnight. Subject to this order the ad interim order passed by the Appeal Court on 7th April, 1998 would stand vacated. In default of furnishing the bank guarantee liberty was granted to the parties to mention the matter before the Court. The parties were also given liberty to take inspection of the documents produced by the Calcutta Telephone authorities.

12. The only reason given by the Learned Single Judge for passing the impugned order are evident from the following extract from the order :

"It is clear from the provisions of the Arbitration and Conciliation Act, 1996, is that the question whether or not a contract was at all entered into by and between the parties or whether there is an arbitration agreement between them, is a matter which has to be decided initially by the Arbitrator.

Having regard to the aforesaid contentions as well as to the facts and circumstances of this case and in particular to the fact that respondents are both foreign companies with no assets in this country."Some further facts need to be noted before considering the issues raised. First that the respondent No. 1 sought to prefer an appeal directly to the Supreme Court for the order of the Learned Single Judge dated 10th June, 1998 by way of Special Leave. The SLP was pending when the matter was reserved for judgment but was dismissed as not pressed on 24th August, 1998. Second, that the contempt application filed by the respondent No. 1 against the appellant was ultimately dismissed by the Appellate Court on 27th July, 1998. Third, that at the time of admission of this appeal i.e. on 19.6.1998, the Appellate Court had directed "without prejudice to the rights and contentions of both the parties viz., the appellant and the respondent No. 1, the appellant will furnish a bank guarantee, as directed by the Learned Single Judge within a fortnight from date, and, upon furnishing such bank guarantee, which will be for a period of 6 months initially and to be renewed thereafter on the same terms and conditions until disposal of the appeal, the order passed by us on 7.4.1998 will stand vacated. In default of furnishing such security the order passed by us on 7.4.1998 will come into force immediately". The respondent No. 1 filed a third SLP against this ad interim order before the Supreme Court which was also pending during the hearing before us, but subsequently dismissed as not pressed on 24th August, 1998.

On 21st July, 1998 a bank guarantee was produced by the appellant in Court and an oral prayer was made for extension of time to file the bank guarantee. This was opposed to by the Counsel for the respondent No. 1. The original bank guarantee was directed to be returned to the appellant after xerox copy of the same was made and kept with the records. The Appellate Court recorded these facts on 23rd July, 1998 stating that this had not been earlier recorded due to inadvertence. Liberty was granted to the applicant to make a formal application for extension if they were so advised. On 6th August, 1998 an application was filed by the appellant for extension of time to furnish the bank guarantee in terms of the Appeal Court's order dated 19th June, 1998. An affidavit was filed by the respondent No. 1 opposing the application. In the written note of arguments submitted by the respondent No. 1 on 4th September, 1998, it has said it was no longer opposing this application as the "MV Janice" had sailed away with its cargo. This application is also being heard and disposed of by this order. The fourth and final factual aspect which needs to be noted is that the matter was referred to arbitration by the respondent No. 1 on 6th April, 1998 to

the Indian Chamber of Commerce in terms of the arbitration clause in the "new contract". The respondent No. 1 filed a statement of claim before the Indian Chamber of Commerce (ICC) on 12th May, 1998 claiming :

"(a) Specific performance of contract recorded in the fax transmission dated December 22, 1997 between the claimant and the respondent;

(b) Alternatively, award for US \$ 16, 22500.00."

13. The ICC called upon the appellant to file its defence. The appellant refused to do so on the ground that there was no agreement between the appellant and the respondent No. 1. The ICC stated that it had the jurisdiction to decide the question u/s 16 of the Act and proceeded to say that unless the appellant paid the requisite fees and filed its statement of defence, the matter would in any event be proceeded with.

14. In this background the appellant filed an application in the this appeal seeking inter alia a stay of the arbitration proceeding. This application was disposed of by an order dated 21.7.1998 in the following manner :

"After hearing the learned Advocates for the parties, we are of the view that the appellant will be at liberty to raise the question of jurisdiction and also to raise the question of validity and existence of the arbitration agreement before the Arbitrator. In the event an application is made for extension of time to file the defence and nominate the Arbitrator by the appellant before the Indian Chamber of Commerce without prejudice to the rights and contentions of the appellant, such time may be extended. It is also made clear that the appellant will be at liberty to take such steps before the Indian Chamber of Commerce in accordance with law as they may be advised."

15. The appellant has since paid the requisite fees and filed its statement of defence. However, the arbitral tribunal is yet to be constituted.

16. This Court heard the matter at length under the impression that the parties had agreed that the appeal itself would be disposed of on the basis of the documents filed before the Trial Court and which had been annexed to the pleadings before this Court. The respondent No. 1, however, submitted that it was not agreeable that the appeal should be heard and disposed of and the matter should be heard as an interlocutory application in the pending appeal.

17. However as exhaustive arguments were made before this Court by both sides and as all the papers before the Trial Court are before the Court, in our view, there is no reason why the appeal should not be disposed of finally as far as this Court is concerned. We therefore dispose of the appeal itself by dispensing with the formalities and discharging the undertakings given by the appellant.

Re. Issue No. I

18. The 1996 Act replaced, after repealing, the Arbitration and Conciliation (Third) Ordinance, 1996, the earlier statutes governing international arbitrations

as well as the Arbitration Act, 1940. The 1996 Act covers the field of arbitration both with regard to domestic or national and international commercial disputes. Part - 1 of the 1996 Act replaces the 1940 Act and contains provisions which apply the place of arbitration is India [vide Section 2(2)]. Chapters I and II of Part II deal with matters earlier covered by the Foreign Awards (Regulation and Enforcement) Act, 1961 and Arbitration (Protocol and Convention) Act, 1937.

19. Section 9 is contained in Part I of the Act and provides for :

"9. Interim measures etc. 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 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 subject matter of the arbitration agreement;

(b) securing the amount 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 the 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 measures 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, and proceeding before it."

20. This section substantially reproduces Section 41(b) read with Second Schedule of the 1940 Act, except for two major differences. u/s 9 of the 1996 Act an application for interim relief can be made before or during arbitral proceedings and even after making of the arbitral award but before its enforcement. Section 41(b) of the 1940 Act however, was construed as limiting a party to apply for interim relief only when the arbitration proceedings were pending either before the Arbitrator or before the Court. Section 9(e) also widens the nature of interim relief that a part can pray for and empowers the Court to grant such relief if it is just and convenient. In exercising its powers to grant interim relief in appropriate cases, therefore the settled principles according to which Courts have granted

interim relief must be followed, namely, after the Court is satisfied (i) that the applicant has a prima facie right to the relief; (ii) that the refusal to grant injunction would result in irreparable injury; and (iii) that the balance of convenience was in favour of granting injunction. [See : Dalpat Kumar and Another Vs. Prahlad Singh and Others, . In the absence of the Court's satisfaction on the first principle however, it would be unnecessary to consider the second and third principles.

21. A prima facie case u/s 9 would, in my opinion, include the applicant producing sufficient evidence to reasonably hold that there is a valid arbitration agreement between the parties. This is the very foundation of the right to relief u/s 9. The use of phrases "for the purposes of arbitral proceedings"; "subject matter of the arbitration agreement"; "dispute in the arbitration" in Section 9 indicates that the Court is called upon to consider for the purposes of granting relief under the section, the existence and scope of the arbitration agreement. The observation of the Appellate Court in disposing of the first appeal on 7th April, 1998, although it an interim stage, is telling. The Appellate Court noted "it appears that the Learned Judge has not decided the basic question as to if there is at all an arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act, 1996".

22. Neither Section 5 nor Section 16 of the 1996 Act take away the Court's power to do so as contended by the respondent No. 1.

23. Section 5 reads :

"5. Extent of judicial intervention : Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part."The section deals with when a Court shall intervene. It does not deal with how the Court shall intervene or what principles the Court must follow when intervention is "so provided". The formation of a prima facie view on the merits of the applicant's case is part of the process for granting interim relief.

24. Neither of the cases cited by the respondent No. 1 support its submission that by Section 5, the Court's jurisdiction to grant interim relief u/s 9 is in any way limited. The passages in Kihota Hollohon vs. Zachilhu (AIR 1993 SC 416), relied on by the respondent No. 1, merely lay down the rule that the rules of construction will apply only where two or more reasonably possible constructions are open on the language of the statute. If therefore a provision excluding the Court's jurisdiction is "plain and manifest", it must be given effect to. If there is any ambiguity then the "provision which seeks to exclude the jurisdiction of Courts is strictly construed".

25. As already seen, Section 5 does not seek to exclude or limit the principles on which the Court will Act u/s 9. It does not say so. If there were any doubt in the matter, and in our view there is none, the doubt must be resolved following the ratio of Kihota Hollohan's case by holding that the Court's jurisdiction to decide

prima facie on its jurisdiction to grant relief has not been curtailed by Section 5.

26. The other decision of the Supreme Court cited by the respondent No. 1 viz. Koch Navigation Inc. Vs. Hindustan Petroleum Corporation Ltd., , is in-apposite. That was a case which deal with the 1961 Act, now covered by Part II of the 1996 Act. There is no provision corresponding to Section 9 in Part II which empowers the Court to grant interim relief in respect of arbitrations covered by Part II (see the unreported decision of this Court in Keventer Agro Ltd. and another vs. Seagram Company Ltd. (Unreported) : Judgment dated.).As far as Section 16 is concerned it reads :

"16. Competence of arbitral tribunal to rule on its jurisdiction :

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void and shall not entail upso jure the validity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of statement of defence; however, a party shall not be precluded from raising such a plea merely because that he was appointed, or participated in the appointment of, or Arbitrator.

(3) A plea that the arbitral tribunal exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea; continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."

27. Section 16(1) no doubt empowers the arbitral tribunal to decide finally with respect to the existence or validity of the arbitration agreement subject the right of appeal to Court under sub-section (6). There is no conflict with Section 9 and Section 16. Section 16 does not limit the power of the Court to form a prima facie view of the rights of the parties inter se in deciding whether or not to grant interim relief. The respondent No. 1 had relied on several decisions to submit that when a statute provides for adjudication of an issue in a particular manner, such adjudication must be done only in such manner and in no other way. In other

words, since the Arbitration Act, 1996 provides for adjudication of the issue as regard existence of an Arbitration Agreement only by the Tribunal, the said issue may not be resolved in any other manner.

28. The submission is misconceived as the Court never finally "resolves" any issue by passing an interim order. It forms a prima facie view. Such prima facie finding of the Court for the purpose of Section 9 obviously will not bind the arbitrate any more than the finding of an interlocutory court on the existence of or the basis of the plaintiff's claim in a suit binds the trial Court at the final hearing of the suit.

29. Furthermore, the power of the arbitral tribunal is limited to considering the issue if it is raised once the arbitral proceedings are commenced before it u/s 16(3). The power of the Court u/s 9 may, on the other hand, be exercised before any arbitral tribunal is ever constituted, as has happened in this case. To accept the respondent No. 1's submission would lead to the absurd result that the Court would have no choice but to entertain an application u/s 9, on the averment of the applicant that an arbitration agreement exists between the parties and proceed to pass orders in respect of the subject matter of the "arbitration agreement" without reasonably satisfying itself as is the truth of the averment.

30. In this case the arbitration agreement is claimed to be in the form of an arbitration clause in the "new contract". In our view the Learned Judge erred in holding that whether the new contract exists or not is for the Arbitrators to decide. The Court can and should have prima facie considered the validity of the appellant's defence that it had never entered into any contract with the respondent No. 1 at all, that the "new contract" was a fabricated document and that it had never agreed to sell and pulses to the respondent No. 1 on the terms mentioned in the "new contract" or at all. If the Court can, as it must consider the appellant's defence to the "new contract", it would be patently illogical to hold that the Court cannot also consider the existence of a clause of the contract. It was then submitted at that hearing by the respondent No. 1 that the question whether the Court has the jurisdiction to prima facie consider the existence of the arbitration agreement must be taken to have been finally decided by an order dated 21st July, 1998 from which no appeal had been preferred. That order merely allowed the appellant to file its statement of defence and raise the issue of the existence of the arbitration agreement before the ICC without prejudice. The order did not decide the question whether the Court in granting relief u/s 9 could arrive at a prima facie view as to the existence of the arbitration agreement. Incidentally this submission does not find place in the written notes of document submitted on behalf of the respondent No. 1.

31. We therefore, decide this issue in the affirmative and in favour of the appellant.

Re. : Issue No. 2

32. An arbitration agreement for the purpose of Part I of the 1996 Act means an agreement referred to in Section 7 [See Section 2(1)].

33. Section 7 of the Act provides :

"7. Arbitration Agreement :

(1) In this part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in :

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make the arbitration clause a part of the contract."

34. This is how the "new contract" was pleaded by the respondent No. 1 in its application u/s 9 :

"Pursuant to negotiations and discussions between the parties hereto, a fresh agreement was arrived at between the parties in suppression of the aforesaid thereon contracts. Under the new agreement your petitioner agreed to purchase 11, 500 MT of Toor Whole and 6000 MT of Black Matpe directly from the respondent No. 1. The said agreement was concluded at your petitioner's registered office at 4, Council House Street, Calcutta 700001, within the aforesaid jurisdiction. Delivery of the contracted goods was to be made by the respondent No. 1 at Mumbai, outside the aforesaid jurisdiction. Payment for the goods was to be made to the respondent No. 1 against documents by the Tamil Nadu Mercantile Bank Ltd. at its Netaji Subhas Road, Calcutta branch within the aforesaid jurisdiction.

5. At the request of the respondent No. 1, by a fax message dated 22nd December, 1997 your petitioner confirmed the factum of the above agreement. In the said message your petitioner also recorded the terms and conditions thereof. A copy of the said fax message dated 22nd December, 1997 is hereto annexed and marked "B". The said fax message was transmitted by your petitioner from its registered office at, 4, Council House Street, Calcutta 700001,

within the aforesaid jurisdiction."

35. It was not the case of the respondent No. 1 before the Trial Court that the fax message was the agreement. It was merely a confirmation of an oral agreement. The respondent No. 1 has said in its affidavit in reply in the trial Court that "The contract was concluded over the telephone and was reduced in writing at the request of Comexindo in the form of the fax message dated 22nd December, 1997". The new agreement containing the arbitration clause as pleaded was not therefore a written one at all in terms of Section 7(3). According to the respondent No. 1 at the hearing the alleged fax message confirming the agreement can in law amounts to an arbitration agreement because of Section 7(4)(b). It is submitted that the fax message was sent at the telephonic request of the appellant. It is further submitted that the sending of the fax message in response to such request was in "exchange by means of telecommunication" which provides "a record of the agreement".

36. The submission is contrary to the pleading. However even otherwise we are unable to accept the submission either as a matter of interpretation of the statutory provisions or as a matter of fact on the material before us.

37. The underlying requirement u/s 7(4) is that (i) there must be an agreement, and (ii) it must be in writing. The simplest form is covered by Section 7(4)(a) - namely a signed document signed by both parties. This would satisfy both requirement of consensuality and a bilateral record of such consensus. For the same reason an exchange of statements of claim and defence where one party alleges the existence of the arbitration clause and the other does not deny it in writing, would also be an arbitration agreement u/s 7(4)(c). Read in this context, it is clear that the record" required in Section 7(4)(b) is a bilateral record of consent. This would exclude a situation where the consent of either one of the parties is not recorded. Thus a mere response in writing to a telephonic message would not do. It would be a unilateral record of the act of one of the parties. On this interpretation it would follow that there was in fact no arbitration agreement is envisaged u/s 7 of the Act.

38. But even assuming such an unilateral record is sufficient for the purpose of Section 7(4)(b), it becomes imperative in the circumstances for the respondent No. 1 to show at least prima facie that the fax message dated 22nd December, 1997 was sent to and received by the appellant. No such evidence was placed before this Court. The letter head of fax message in question is :

"DELTA INTERNATIONAL LIMITED

REGD OFFICE : 4., Council House Street, Calcutta 700001. India Phone : 248-5301-3, 248-3150 Fax : 248-4808 Telex : 21-7376 DELTA IN, Gram : DELTAJUTE

To : P.T. TIRTAMAS COMEXINDO Date : 22 DECEMBER, 1997 ATTN : MR. J. FRIIS
FROM : N. AGARWAL FAX : 00-6221-5713306 PAGES : 2 (TWO)"

39. It is to be noted that the Fax number is 248-4808. The appellant in its affidavit in opposition said that the fax message was "fabricated and false", that it had never received any alleged fax messages from the respondent No. 1 and that none of the alleged fax messages contained any date, duration of time which are invariably recorded in a fax message". In answer to this the respondent No. 1 has said in its affidavit in reply :

"It is submitted that Comexindo has received each and all the fax Transmission Message referred to in the said paragraphs as would appear from the Fax Confirmation Reports, which were produced before the Hon'ble Appeal Court whilst hearing the appeal directed against the order dated March 31, 1998 and April 2, 1998. I crave leave to refer to and rely upon the same if necessary at the time of hearing."

40. The appellant relied upon the records produced by the Divisional Engineer, Calcutta Phones including all billing particulars of the respondent No. 1's fax telephone number namely 248-4808 relating to the months of December, 1997, January, 1998, February, 1998 and March, 1998 as well as the details of the international calls during the period of 15.11.1997 to 15.1.1998. A detailed print out was enclosed with a report of the Divisional Engineer dated 10th June, 1998. The detailed print out which covers eight and half sheets for the period 15.11.1997 to 14.3.1998 with call date, E-time, called number, duration (min/sec.) and units, show that no fax message had emanated through the fax telephone number of the respondent No. 1 being 428/4808 to Indonesia nor was there any record of any telephone call from that number to Indonesia during this period. Before us the respondent No. 1 filed an affidavit-in-opposition to the stay application in which it has disputed "the authenticity, the validity and/or legality of the alleged documents allegedly produced by the authorities". It also stated "Delta does not have only one telephone connection. I have been advised to say no further at this stage since obviously the petitioner is finishing for evidence and Delta is not bound to oblige the petitioner by supplying such evidence." It was submitted by the respondent No. 1's counsel, before us at the hearing, jettisoning the case made out before the Trial Court, that the fax message dated 22nd December, 1997 might have been sent by E-mail in which case there would be no record of the transmission at all.

41. No reason has been given by the respondent No. 1 for disputing the authority of the documents produced by the Telephone Authorities under sub-poena. As noted the letter head mentions only one fax number namely 248-4808. Even if the documents produced by the Telephone Authorities is ignored no Fax Confirmation Reports were produced before this Court by the respondent No. 1. The respondent No. 1 had itself craved leave to produce and rely upon the Fax Confirmation Reports which according to its affidavit it had produced before the Appellate Court in the first appeal. The refusal in the circumstances to produce the Fax Confirmation Reports leads to an adverse presumption against the respondent No. 1 about the genuineness of the fax messages. The submission

that there may not be any records at all is rejected because of the categorical statement in the affidavit of the respondent No. 1 that there were Fax Confirmation Reports.

42. In view of the contrary stands taken by the respondent No. 1 and its failure to even prima facie satisfy the Court on any evidence that the fax message dated 22nd December, 1997 was sent and received by the appellant, we are compelled to come to the conclusion on the basis of the material before us that the fax message containing the arbitration clause was not in fact sent by the respondent to the appellant. In our view, therefore, there is no prima facie evidence of an arbitration agreement between the parties as envisaged u/s 7 of the Act. This issue is accordingly decided in the negative and against the respondent No. 1.

Re. Issue No. 3

43. On the merits also we are not satisfied that the respondent No. 1 has made out a prima facie right to relief u/s 9.

44. First, we are not satisfied that there was in fact any "new contract" between the appellant and the respondent No. 1 as alleged by the respondent No. 1 as there is no evidence before us in support of the existence of the contract. This has been discussed more fully in answer Issue No. 2.

45. There also appears to be intrinsic evidence in support of the appellant's submission that the new contract was not genuine. We may mention a few of the reasons in support of this conclusion.

(i) The new contract is alleged to be in supersession of three contracts entered into between the appellant and the respondent No. 2. The respondent No. 2 has never entered appearance nor contested the proceedings in any manner at any stage. It may be, as claimed by the respondent No. 1, that the respondent No. 2 is its wholly own subsidiary. Nevertheless, the respondent No. 2 is a separate legal entity. There is no pleading let alone any evidence that the respondent No. 2 agreed to the supersession of these three contracts.

(ii) It appears that each of the earlier contracts were forwarded in duplicate after being signed by the appellant to the respondent No. 2 and the respondent No. 2 was asked to sign on one copy and return the same to the appellant. No such procedure was followed in connection with the "new contract". There is not even a contract number.

(iii) The terms and conditions of the original three contracts are different from the new contract in certain vital aspects. The three contracts had nothing to do with Calcutta at all. The destination under the new contract is stated as "Mumbai/ Calcutta, India". The second difference lies in the arbitration clause and the applicable laws. All the three contracts between the appellant and the respondent No. 2 provided for arbitration in the event of any dispute between the parties to the contract to be settled in accordance with the Singaporean laws and the law applicable was agreed to be the laws of Singapore. The second and the third

contracts also contained a jurisdictional clause to the effect that the Supreme Courts would have exclusive jurisdiction. In the new contract differences and disputes are to be settled by arbitration by the Indian Chamber of Commerce, Calcutta in accordance with the Indian Arbitration Laws. The new contract provides : "The Calcutta Courts shall have exclusive jurisdiction". Which Court will then decide the issue whether the three contracts were in fact superseded by the "new contract" ? According to what law will this dispute be resolved ?

(iv) By the new contract it was allegedly agreed that the pulses would be purchased at the rates mentioned in the three contracts between the appellants and the respondent No. 2. Each of the three contracts between the appellant and the respondent No. 2 specified rates. In the first contract the rate agreed upon was US \$ 240.00 per MT net FOB Yangon, Myanmar; the second contract was US \$ 226.00 per MT net FOB Yangon, Myanmar and the third contract was US \$ 205.00 per MT net FOB Yangon, Myanmar. Which of these three separate rates would apply ? Therefore it appears that there was no agreed rate at which pulses were to be supplied by the appellants to the respondent No. 1 under the new contract. Significantly the order of the Learned Single Judge dated 2nd April, 1998, provided that the appellant was to intimate the respondent No. 1 not only the quantity as well as the price of the goods which the respondent No. 1 was to deposit. (v) Each of the earlier three contracts between the appellant and the respondent No. 2 provided for payment by irrevocable letter of credit through the respondent No. 2's banker in Singapore for the full contracted quantity/value against documents to be negotiated through the appellant's bankers in Indonesia. The payment tender the new contract was not against irrevocable letter of credit but "against documents through Tamil Nadu Mercantile Bank, 58D, Netaji Subhas Road, Calcutta 700001." The respondent No. 1 has claimed that it had repeatedly sent messages asking for the original documents but there is no evidence before us that the respondent No. 1 had made arrangements with its bankers in Calcutta for payment of the purchase price.

46. Apart from the serious doubts regarding the genuineness of the new contract, admittedly, according to the respondent No. 1 it has made no payment whatsoever till date either on account of freight or towards purchase price nor have any documents of title to the pulses carried aboard "MV Janice" been sent by the appellant to the respondent No. 1. It is indeed extremely doubtful whether the respondent No. 1 has any title to this particular consignment of pulses. Significantly the claim of the respondent No. 1 before the ICC is not to the specific goods aboard the "MV Janice".

47. To have directed the storage of the pulses or the furnishing of a bank guarantee by the appellant in the circumstances of this case was in our view wholly uncalled for. The Learned Single Judge has not even come to a prima facie finding on the merits of the case. There is no law or precedent which has been shown to this Court under which a Court can direct the furnishing of security by a party only because the party does not have assets within the country. Had there

been a prima facie case there might have been some reason to put such a party on terms but in the view we have taken, the order under appeal cannot be sustained. The respondent No. 1 repeatedly submitted that the appellant had deliberately avoided compliance with the order of the Appeal Court. The submission is irrelevant and in any event of no substance as the Appeal Court itself has dismissed the contempt application filed.

48. However, assuming there were a prima facie case established by the respondent No. 1 Section 9(ii)(e) does not by using the phrase "which may appear to the Court to be just and convenient" confer an unfettered discretion to pass any order. The discretion on the Court must be exercised in accordance with law. The words "just and convenient" has been judicially construed by a Division Bench judgment of this Court in Dharendra Krishna Deb vs. Surendra Krishna Nandi (XXIV CWN 440), as follows :

"The words "just and convenient" have been taken from the Judicature Act, 1873 where the words are "just or convenient". The latter expression has been held to mean "just and convenient" and it has been held that they do not mean that the Court is to appoint a Receiver because the Court thinks it convenient, but that they mean that the Court should make the appointment for protection of rights or prevention of injury according to legal principles."

49. The first legal principle is that the applicant must establish a prima facie case. It is also a rule of law that the rights of parties who are not before the Court cannot be affected. The appellant had in its affidavit in opposition given full particulars of the consignees of the goods abroad "MV Janice". Copies of the bills of lading have been annexed with its affidavit before the trial Court. The bills of lading contain particulars of the buyers, the bankers and details of the letters of credit.

"The learned Judge could not have passed such an order effecting the right of third parties who were neither parties to the arbitration agreement nor made party respondent to the application u/s 9 of the 1996 Act." (See ABS Spinning Orissa Limited vs. Messrs Orissa Spinning Mill : Unreported Judgment A POT No. 339 of 1998 dated August 13, 1998). One of the consignees namely Veesha International has filed an Admiralty Suit No. 36 of 1998 on 14th May, 1998 before the Bombay High Court praying inter alia for arrest of the "MV Janice" and for delivery of the pulses claimed to have been purchased by Veesha from the appellant. According to Veesha it had purchased pulses on CIF freight prepaid under a sales contract dated 23rd February, 1998 with the appellant. An order was passed by a Learned Single Judge of the Bombay High Court on 18th May, 1998 directing the arrest of the vessel and directing the defendants in the Admiralty Suit to issue delivery orders to Veesha of the amounts claimed by it. To have directed the goods to be stored by the appellant on 10th June, 1998 has not only affected the holders of the bill of lading without hearing but also seeks to deprive Veesha of the benefit of the order of the Bombay High Court.

50. In the absence of prima facie case strictly speaking there is no question of balance of convenience. Even on this issue we are against the respondent No. 1. By directing storage of perishable commodities pending disposal of the arbitration proceedings the respondent No. 1 hardly stands to gain even if it were entitled to the pulses abroad the "MV Janice". On the other hand it has not been made clear by the Court as to who would pay the costs incurred in connection with the storage and clearance in the event the appellant was ultimately successful. Who would compensate the holders of the bill of lading ?

51. The respondent No. 1 had submitted at the hearing that the appellants by making the application for extension of time to furnish bank guarantee before the Appeal Court must be taken to have acquiesced in the order under appeal. The submission does not find place in the respondent No. 1's written notes of argument. In any event the submission is unacceptable. The bank guarantee was directed to be furnished by the Appellate Court as a condition precedent to the stay of the order under appeal. Merely because the party asks for time to fulfill the condition for interim stay does not deprive the party of right to finally challenge the order under appeal and contended that it should never have been passed in the first place. The appeal is accordingly allowed with costs and all interim orders are vacated.

52. In view of this decision no orders need be passed on the application of the appellant for extension of time for filing of the bank guarantee.

Basudev Panigrahi, J.

53. I went, anxiously and carefully, through the elaborate, pains-taking, exhaustive judgment prepared by My Lord Justice Ruma Pal but I wish to add a few of my own observations.

54. This is an application arising out of an appeal being APOT No. 467 of 1998 filed by the appellant against the order dated 10th January, 1998 whereunder the Learned Trial Judge directed the appellant/applicant to furnish hand guarantee of Rs. 1 crore as condition precedent for vacating the interim order dated 7th April, 1998.

55. The petitioner has stated, inter alia, in its application that it is carrying on business as an international trader in various commodities and its head office is situated at Jakarta, Indonesia. It is dealing with and selling "black matpe" which is otherwise known as "toorwhole" dal. It entered into three separate agreements for supplying 6500 MT of "toorwhole" and 3500 MT of "black matpe" on 30th July, 1997, 5000 MT of "toorwhole" on 20th August, 1997 and on 14th October, 1997, 2500 MT "black matpe" with respondent No. 2 under contract No. 20171/OGV/PC/97/010 and OGV/PC/97/0128. The aforesaid contracts could not however, be executed or carried out.

56. The claim of the respondent No. 1, however, is that these agreements executed between the appellant on one hand and respondent No. 2 on the other

hand could not materialise as there was misunderstanding between them, therefore the appellant had requested the respondent No. 1 who entered into a fresh contract. Therefore, in supersession of the previous contract between the appellant and the respondent No. 2, the respondent No. 1 agreed to taken delivery of the articles at Mumbai and the payment in lieu thereof shall be made over the appellant by the Tamil Nadu Mercantile Bank at its branch office in N.S. Road, Calcutta. It has been further claimed by the respondent that pursuant to the request of the appellant/petitioner the agreement was communicated to them by fax message dated 22nd December, 1997. All the terms and conditions between the petitioner and the respondent No. 1 have, however, been incorporated and embodied in the said agreement. Pursuant to the said agreement that petitioner No. 1 had informed the respondent No. 1 that the contracted goods were being loaded in a foreign vessel "M.V. Citi Wave" and "M.V. Citi Breeze" and that the documents would be sent by them to the respondent No. 1 in due course but notwithstanding, such assurance the respondent No. 1 did not receive any such document, therefore the respondent No. 1 submitted a facsimile transmission on 29th January, 1998 to the petitioner requesting them to despatch the goods as expeditiously as possible. It is submitted by the respondent No. 1 that even after such message the petitioner did not sent these articles, therefore, the respondent No. 1 was constrained to move an application u/s 9 of the Arbitration and Conciliation Act, 1996 (hereafter be called as the Act) in the Court below. In the said application an ex parte order was recorded at the beginning and the same was modified on 2nd April, 1998 directing the appellant that they shall keep the said goods at such place after those were off-loaded from the ship upon advise of the respondent No. 1, Delta International Limited.

57. Therefore, the petitioner being aggrieved by the aforesaid order preferred this appeal along with an application. This Court in an earlier order directed the appellant to keep the articles in safe custody under intimation to the respondent No. 1 and this Court with the above observations sent down it to the trial Court. The appellant being aggrieved by the said order preferred a SLP in the Supreme Court but the same was dismissed as withdrawn. In this case several other interlocutory orders were passed directing the appellant/petitioner to remain in custody or to furnish security to the tune of Rs. 1 crore but till date the appellant has not complied with the same.

58. The Learned Single Judge on being asked by the Division Bench of this Court has, however, disposed of the application u/s 9 of the Act.

59. The firm stand taken by the petitioner before the Learned Single Judge was that since there was no valid agreement by and between the appellant and the respondent No. 1, there could be no occasion to refer the matter to arbitration for conciliation u/s 9 of the Act but the Learned Judge has overruled the objection of the petitioner and referred the matter to arbitration and further directed the appellant of furnish bank guarantee as security to the tune of Rs. 1

crore as directed by the Appeal Court. It may be mentioned here that even the Appeal Court has passed same direction to put in Rs. 1 crore as bank guarantee within a period of fortnight but the appellant had failed to comply with the same. The Appeal Court has further directed that on failure of compliance of the order, the order dated 7th April, 1998, shall stand revived. The applicant has filed another application by indicating therein that it could not furnish bank guarantee pursuant to the order dated 19th June, 1998 and therefore the same be suitably modified by giving a further chance to the petitioner for due compliance. From several orders passed by the trial Court and the Appellate Court as well who have asked continuously to put in the bank guarantee; We see no reason to give the applicant any further opportunity for due compliance. In the above conspectus of the case we are not inclined to allow the application for modification of the order whereunder the applicant was directed to furnish bank guarantee to the tune of Rs. 1 crore. Notwithstanding the rejection of the application, it has now to be considered whether an interim stay could be granted on the order dated 9th June, 1998 whereby the Learned Trial Judge has allowed the application for referring the matter to arbitration. The applicant has very strongly contended that there has been no agreement by and between Tirtamas Comexindo and Delta International Limited. Thus, particularly, when a party of the alleged agreement denies existence of the agreement will it be legitimate and appropriate to refer the matter u/s 9 of the Arbitration and Conciliation Act, 1996. It has been argued with great intensity of conviction that the Courts have the same power for passing orders as that of the Arbitrator. It has been further contended that before passing any interlocutory order the Court is to see whether there is prima facie case for passing an order of injunction. From the order impugned it does not appear that the interlocutory Court has applied its mind to render a finding as to the existence of a prima facie case. An exonerable plea was advanced by the applicant that the agreement under which the respondent No. 1 based its claim was not proved to have been executed by the petitioner. Therefore, in the above exigency there was no sufficient reason for referring matter to arbitration. The respondent No. 1 has however advanced a serious contention that since the petitioner has already surrendered to the jurisdiction of the Arbitrator, later on they should not be permitted to turn round and say that neither the agreement was executed nor the Arbitrator lacked its jurisdiction. Another contention has been advanced that there were no agreement between the petitioner and the third party. Therefore, there is no question of prejudice being suffered by such third party seems to be devoid of merit. No ship was ever berthed at Mumbai Port nor were the goods off-loaded from the ship.

60. After hearing the Learned Advocates appearing for both parties, we see the fact of the case lies within a narrow compass. It is now to be determined as to whether there was an agreement by and between the applicant and the respondent No. 1 and if so was there a clause whereby the parties had agreed to refer the disputes to arbitration ? An arbitration agreement, as understood in the

legal parlance must be bilateral. There cannot be any unilateral agreement. The appellant/petitioner has strongly refuted existence of the above agreement. The respondent, Delta International Limited has somehow claimed to have sent it by fax message. Even assuming the said agreement was faxed there is nothing on record to show that the appellant/petitioner has agreed with the terms and conditions of such agreement. The respondent No. 1 has, however, seriously contended that the applicant confirmed the agreement over phone. Notwithstanding several opportunities provided to the respondent No. 1 they failed to produce any tangible evidence in support of the confirmation of the fax message.

61. The arbitration agreement shall necessarily be in writing which can even be made by exchange of letters, telex message and other means of telecommunication which shall provide the record of such agreement. It is already stated that the respondent No. 1 could not satisfy us as regards the confirmation of the alleged agreement. In the aforesaid situation I am of the view that such agreement even if it's true does not bind the applicant/petitioner. It is, however, true that there cannot be any inflexible or strict jacket formula as to how an agreement would legally be construed as per the provisions of Section 7 of the Act. The agreement can be made by several means which may be by fax message in writing but it should also be confirmed by any other mode of telecommunication. Thus, before allowing the prayers for arbitral reference it is imperative upon the Court to satisfy itself whether or not there was an agreement by and between the parties and there is an arbitration clause.

62. It has been contended by the Learned Advocate appearing for the respondent No. 1 that whether such agreement was in fact executed by and between the parties can equally be answerable by the Arbitrator and the point of jurisdiction can also be decided by him. Although the Arbitrator may have his co-ordinate jurisdiction as that of the Court yet before referring the dispute the Court has to be satisfied with regard to the agreement and the arbitration clause. Thus, in the aforesaid situation we are constrained to allow the appeal and, hereby, set aside the order assailed before us.

63. The Court : Stay prayed for and refused.

64. Let a xerox copy of this Judgment duly signed by the Assistant Registrar of this Court be made available to the parties upon their undertaking to apply for and obtain certified copies thereof on payment of usual charges.