

(2004) 03 MAD CK 0051

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 432 of 2004 and C.M.P. No. 2110 of 2004

Techmo Car SPA

APPELLANT

Vs

The Madras Aluminium Company Ltd.

RESPONDENT

Date of Decision : 18-03-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37

Citation : (2004) 2 ARBLR 284 : (2004) 4 BC 101 : (2005) 123 CompCas 533 : (2004) 3 CTC 754 : (2004) 54 SCL 100

Hon'ble Judges : S.R. Singharavelu, J;P. Sathasivam, J

Bench : Division Bench

Advocate : A.L. Somayaji for AR. L. Sundaresan, for the Appellant; C.A. Sundaram for S. Raghunathan, for the Respondent

Final Decision : Allowed

Judgement

P. Sathasivam, J.—Aggrieved by the order of the Additional District Judge, Salem dated 22-10-2003, made in Arbitration O.P.No. 46 of

2003, Techmo Car SPA, Italy has filed the above appeal u/s 37 of the Arbitration and Conciliation Act, 1996.

2. The respondent herein, The Madras Aluminium Company Limited, Mettur Dam filed the above Arbitration O.P., (O.P.No.46/2003) on 12-3-

2003 u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") praying for an order directing the Techmo Car to

furnish security by depositing into Court to the credit of the said petition, a sum namely US \$5,757,565 equivalent to Rs.27,40,60,111 or in the

alternative to furnish security to the said value in the form acceptable to the petitioner which could be enforced for recovering the aforesaid amount

pending disposal of the arbitral proceedings and also an order of interim

injunction restraining the said company from removing any records, papers and documents from the petitioner's factory premises situated in Mettur Dam, Salem District, Tamil Nadu, pending disposal of the arbitral proceedings.

3. For convenience, we shall refer the parties as referred to before the District Court. The case of the petitioner is as follows:

The petitioner, Madras Aluminium Company Limited carries on business in the manufacture and sale of aluminium rods and ingots at its plant in

Mettur. In 1998 in view of steep competition, the petitioner intended to modernise its plant. The respondent who is based in Italy, promised to

bring about an overall improvement in the performance of the petitioner's plant, including increase in out-put and favourable environmental impact.

On inspecting the petitioner's plant, the respondent submitted a proposal. The said proposal was accepted by the petitioner. An Agreement was

entered into between the petitioner and the respondent on 16-02-99. Thereafter, on 8-6-2000 an Addendum to the said Agreement was also

entered into by the parties herein. In terms of the said agreement dated 16-02-99, the respondent was required to achieve the following key

performance parameters:

(a) Improve current efficiencies to a level of 88.5%

(b) Achieve specific DC power consumption of 15,525 kwh/tonne of Aluminium, inclusive of contribution of the Compensation loop energy losses;

and

(c) Achieve yearly production of 35,200 tonnes of Aluminium on an average basis.

Though the respondent failed to achieve the guaranteed parameters, they (respondent) from time to time, caused the petitioner to pay to them

(respondent) valuable consideration in all amounting to US \$ 2,965,900 towards purchase of technology, services and equipment. The petitioner

had also incurred expenses to the tune of Rs.1,25,09,903 towards payment of taxes and duties. Since the respondent failed to complete its

obligation within the prescribed period of 2 years, time was extended by further period of 13 weeks so as to enable the respondent to achieve the

parameters guaranteed by them. Even after the extension, the respondent found it impossible to achieve the parameters as guaranteed by them

under the agreement. The respondent by its letter dated 29-1-2003 sought to rescind the said agreement on wholly frivolous and baseless grounds.

Though the petitioner denied the allegations made, the agreement stood terminated owing to the respondent having admitted impossibility of

performance. The petitioner presently confines its claim only to the monies paid by it. The respondent is a foreign party. It has no assets or security

against which the petitioner can proceed in the event of any award being passed in its favour. If the respondent is not directed to furnish security,

then even if the petitioner succeeds in the arbitral proceedings to be filed, the said award would become only a paper award which will be difficult

to be enforced.

4. The respondent filed a counter statement wherein it is stated that the Court below has no jurisdiction in the matter. The parties as per the

agreement were already ICC Arbitration, ICC is seized of the matter and the Arbitrators have exclusive jurisdiction in the matter. The respondent

on 13-5-2003 filed its letter of request for Arbitration with the Secretariat of the International Chamber of Commerce (ICC), Court of Arbitration,

Paris, as contemplated under the arbitration agreement set out in the agreement between the parties. Both parties have already appointed their

respective arbitrators. The petitioner has not taken any steps at all to make its claim/counter claim in the arbitral proceedings that have

commenced. The respondent is entitled to reliefs and security, as also for injunction. The petitioner by its letter dated 13-6-2003, applied that the

time limit for filing its answer/reply be extended for two months, i.e., till 20th August, 2003. The ICC Secretariat had by its letter dated 18-6-

2003, granted a preliminary extension of time till 21st July, 2003. Again the petitioner has sought for further time until 20th August, 2003. Finally,

the ICC by its letter dated 2-7-2003, granted time until 14-8-2003 to file its answer/reply. The petitioner is trying to protract the proceedings and

delay the matter. There is no provision in the Act to file a petition in the nature of the above petition filed by the petitioner. After wrongly invoking

the bank guarantees furnished by the respondent and obtaining Rs.3,10,20,000/-, the petitioner is not entitled to make a prayer again before this

Court seeking direction to direct the respondent to furnish security to the extent of Rs.27,40,60,111/-. There is no averment in the affidavit that the

respondent is trying to remove its articles and papers, etc., from the factory premises and as such a prayer for interim injunction is not

maintainable. The question as to whether the petitioner has to pay damages or the respondent has to pay damages are to be decided only in the

Arbitral proceedings.

5. In the light of the above pleadings, we have heard Mr. A.L.Somayaji, learned senior counsel for the Techmo Car Spa and Mr. C.A. Sundaram,

learned senior counsel for the Madras Aluminium Company Limited (MALCO).

6. The only point for consideration in this appeal is, whether the petitioner has made out a prima facie and strong case directing Techmo Car to

furnish security; and whether the learned Additional District Judge is right in partly allowing the said application.

7. First we shall consider the objection regarding maintainability of the petition before the District Court. There is no dispute that MALCO has filed

Arbitration O.P. u/s 9 of the Act before the District Court, Salem. The objection of the learned senior counsel for the appellant/petitioner is that at

the relevant point of time, the District Court was not having jurisdiction in respect of the matter in issue. Though learned senior counsel for the

respondent submitted that this objection was not raised in the District Court, the counter filed before that Court (District Court) shows that an

objection was raised regarding maintainability of the petition before the said Court. As per Section 9 of the Act, any party to the arbitral

proceedings can file an application before a Court having jurisdiction. The word ""Court"" has been defined in Section 2(1)(e) of the Act as follows:

2(1)(e). ""Court"" means the principal civil court of original jurisdiction in a district, and includes the High Court, in exercise of its ordinary original

civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of

a suit, but does not include any civil court of a grade inferior to such principal civil court, or any court of small causes;

Section 12 of the Tamil Nadu Civil Courts Act, 1873 as it stood prior to the Amendment Act 1/2004 shows that the jurisdiction of a District Judge

or a Subordinate Judge extends, subject to the rules contained in the Code of Civil Procedure, to all original suits and proceedings of a civil nature.

Accordingly, as rightly claimed, inasmuch as the petition u/s 9 having been filed

on 12-3-1993 i.e., prior to Act 1/2004, the proper Court is either the District Court or the Subordinate Judge's Court concerned. However, as per Section 15 of the Code of Civil Procedure, suit shall be instituted in the Court of the lowest grade competent to try it. Accordingly, at the relevant time, Subordinate Judge's Court is the competent Court to try the petition filed u/s 9 of the Act. As per Section 19 of the Arbitration and Conciliation Act, 1996, the Arbitral Tribunal shall not bound by the Civil Procedure Code, 1908 or the Indian Evidence Act, 1872. The said provision cannot come into operation when a petition u/s 9 is filed before the competent Civil Court. These aspects were not at all considered by the learned District Judge. We sustain the objection raised regarding jurisdiction and hold that the Additional District Judge, Salem who passed the impugned order, was not having jurisdiction on the date on which the petition was filed.

8. Since both sides argued at length regarding merits of the order, we are constrained to render our conclusion as hereunder. The petitioner has filed the above Original Petition u/s 9 of the Act before the District Court, Salem praying for

(a) direction to Respondent to furnish security;

(b) an order of injunction restraining the respondent from removing any records, papers and documents from the petitioner's factory premises in

Mettur Dam.

There is no dispute that both parties, namely, the petitioner and the respondent entered into an Agreement on 16-2-99 and followed by Addendum

dated 8-6-2000. As per the terms of the said Agreement, according to the petitioner, the respondent was required to achieve certain performance

within the time prescribed. It is also their claim that since the respondent was not in a position to complete the work in terms of the Agreement, in

spite of extending the time, it decided to file arbitral proceedings as per the Agreement. It is also their claim that during that interim period if the

respondent is not directed to furnish security for the amount mentioned in the petition, then in such an event, if the petitioner succeeds in the arbitral

proceedings to be filed and if any award is passed, it would be difficult to enforce. Therefore, according to the petitioner, it has become necessary

to seek an order directing the respondent to furnish security for the amount

mentioned in the petition. According to them, they got a prima facie case and balance of convenience lies in their favour. Before going into the claim of both parties, it is useful to refer the relevant provisions under which the petitioner has filed the petition for direction.

Section 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) xx xx
- (ii) for an interim measure of protection in respect of any of the following matters, namely:-
 - (a) xx xx
 - (b) securing the amount in dispute in the arbitration.
 - (c) xx xx
 - (d) xx xx
 - (e) xx xx

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.

Section 41(b) of the Arbitration Act, 1940 corresponds with Section 9 of the Arbitration and Conciliation Act, 1996. Under the Act of 1940, the

Court could grant the interim order while there was some proceeding or during the pendency of the suit and while that was not so, there could not

be the maintenance of the application u/s 41. As far as the present Act of 1996 is concerned, the court u/s 9 shall have as regards the interim

measures the same powers for making orders on it as it has for the purpose of and in relation to any proceeding before it. In order to get an interim

injunction, the principle is that existence of a prima facie case must be shown that no grant of injunction must result in irreparable injury to the party

seeking relief. Therefore, the burden is on the petitioner by evidence or by affidavit or otherwise that there is "a prima facie case" in his favour

which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition

for the grant of temporary injunction. The Court has to satisfy that non-interference by the Court would result in "irreparable injury" to the party

seeking relief and that there is no other remedy available to the party except one to grant injunction or direct to furnish security. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages. It is well established principle that the Court while granting or refusing to grant injunction or petition for direction for furnishing security etc., should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the interim order is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If one weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus, as said earlier, the Court has to exercise its sound judicial discretion in granting or refusing the relief of an interim injunction pending the proceedings.

9. While exercising the discretion the Court applies the following tests: (i) whether the petitioner has a prima facie case; (ii) whether the balance of convenience is in favour of the petitioner; and (iii) whether the petitioner would suffer an irreparable injury if his prayer for interim order is disallowed. It is also settled principle that the object of interim order is to protect the party against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. It is equally to be noted that the need for such protection has, however, to be weighed against the corresponding need of the opposite party to be protected against injury resulting from his having been protected from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine whether the balance of convenience lies. The concept of discretion implies good faith in discharging public duties. The exercise of discretion has to be based on relevant considerations. When it is exercised by taking into extraneous considerations, such action has to be quashed. The concept of absolute, untrammelled or unfettered discretion is wholly inappropriate to a public authority. When given power to exercise discretion it has to be used for public good. When it is found that no right thinking or conscientious person

would have exercised the discretion in the manner it was exercised, the action will have to be quashed. The power is to use the discretion and not abuse it. The authority granted discretion has to exercise power in a fiduciary capacity. As said earlier, Section 9 of the Act deals with interim measures.

10. In the light of the above back ground, let us consider various decisions cited on either side with reference to ""prima facie case"" and ingredients

to be followed while granting interim order u/s 9 of the Act. Mr. A.L. Somayaji, learned senior counsel for the petitioner, at the foremost relied on

a decision of the Bombay High Court in Newage Fincorp (India) Ltd., vs. Asia Corp. Securities Ltd., reported in 2000 (3) A L R 687 . While

considering the prayer for grant of interim measure u/s 9 of the Act, the Bombay High Court has enunciated the following principles: (para 31)

31. The principles of granting interim reliefs can very well be applied while considering the prayer for grant of interim measures u/s 9 of the Act.

The discretion of the Court can very well be summarised in order to grant interim measures. It is not enough for the petitioner to show that he has a

prima facie case but he has to further show,

(i) that in the event of withholding the relief of interim measures he will suffer an irreparable injury;

(ii) that in the event of his success in the arbitration proceedings he will not have the proper remedy, in being awarded adequate damages;

(iii) that in taking into consideration the comparative mischief of inconvenience to the parties, the balance of convenience is in his favour or in other

words;

iv) that his inconvenience in the event of withholding the relief of interim measures will in all events exceed that of the respondents in case he is not

granted relief; and lastly;

(v) the petitioner must show a clear necessity for affording immediate protection to his alleged right or interest which would otherwise be seriously

injured or impaired.

11. In Global Company Vs. National Fertilizers Ltd., , the following principle enunciated in para 11 of the decision is pressed into service:

11. It is true that the said Arbitration Act, 1940 stands repealed by the Act of 1996 and the provisions contained in the CPC are not applicable to

the proceedings under the Act, still in my opinion, in the absence of guidelines how the power for grant of relief u/s 9(ii)(b) is to be exercised by the

Court, the principles underlying the aforesaid sections are to be applied. It is on adequate material being supplied by the petitioner that the Court

can form opinion that unless the jurisdiction is exercised under the said Section 9(ii) there is real danger of the respondent defeating, delaying or

obstructing the execution of the award made against it. On the basis of the only ground of protection of financial interest of the petitioner taken in

para No.6 of the petition, the respondent, a Govt. of India Undertaking cannot be legally directed to furnish security for the amount of US\$ 88,250

together with interest @ 9% p.a. Petition thus deserves to be dismissed.

12. The other decision relied on is in B.S.M. Contractors Pvt. Ltd. Vs. Rajasthan State Bridge and Construction Corpn. Ltd. and Another, and

the relevant conclusion arrived at is extracted hereunder:- (para 9)

9. On a consideration of the facts and circumstances of the case, I am of the opinion that a building contract of the instant nature cannot be

specifically enforced by granting interim relief u/s 9 of the Act. If there is a breach of such a contract, the appropriate remedy is to compensate the

party damnified in damages. That apart, the granting of an injunction in favour of the petitioner will further delay the construction work considered

very urgent by the respondent No.3. Thus, the balance of convenience also swings against the grant of injunction sought by the petitioner.

13. In Olex Focas Pvt. Ltd. and Another Vs. Skoda export Company Ltd. and Another, , the following observation/conclusion is relevant: (para

67)

67. The question which now arises for consideration is whether the petitioner is entitled to get the relief on the strength of the facts and

circumstances of this case? In my view, though the Court is vested with the powers to grant interim relief, but the Court's discretion must be

exercised sparingly and only in appropriate cases. The Courts should be extremely cautious in granting interim relief in cases of this nature. The

Court's discretion ought to be exercised in these exceptional cases when there is adequate material on record, leading to a definite conclusion that

the respondent is likely to render the entire arbitration proceedings infructuous, by frittering away the properties or funds either before or during the

pendency of arbitration proceedings or even during the interregnum period from the date of award and its execution. In those cases, the Courts would be justified in granting interim relief.

14. In Delta Constructions Systems Ltd., Hyderabad v. Narmada Cement Company Ltd., Mumbai, reported in 2002 (2) RA J 213 , after referring to Sections 9, 2(e), 17(1), 26 and 36 of the Arbitration and Conciliation Act, 1996, the Bombay High Court has held as follows:- (para 10)

10.....All this makes it clear that Act of 1996 itself has provided for interim measures that can be granted by the Court and by the Arbitral

Tribunal. In so far as the Court is concerned, there is further power conferred that the Court meaning thereby the Court having jurisdiction can

exercise all the powers available to it as the Court under the provisions of the Code of Civil Procedure. The substantive power conferred on the

Court by section 9 is to be effected by the procedural provisions as contained in the Code of Civil Procedure. The CPC for example under Order

34, has provided for the security by way of arrest before Judgment and attachment before judgment. The Court before issuing the warrant of arrest

or attaching the property and/or in the event, defendant does not furnish security has to satisfy itself that the various predicates as set out in Order

38 of the CPC have been satisfied. The correspondent power in the Court u/s 9 would be of securing the amount in dispute in the arbitration. The

power of the Court to secure the amount in dispute under arbitration is not hedged by the predicates as set out in Order 38. All that the Court must

be satisfied is that an interim measure is required. In other words, the party coming to the Court must show that if it is not secured, the Award

which it may obtain would result in a paper decree or a decree which cannot be enforced on account of acts of a party pending arbitral process.

Therefore, the Court would not to be bound by the requirement of Order 38 Rule 5. Since the power is discretionary, the Court must be satisfied

that it is in the interest of justice, based on the material before it to pass order to secure the petitioner before it. The discretion to be exercised

would be based as set out earlier on the material before it and the petitioner making out a case that there is need for an interim measure of

protection.....

15. In Jammu and Kashmir State Forest Corporation Vs. Abdul Karim Wani and Others, , while considering relevant provisions in the Jammu and

Kashmir Arbitration Act, 2002, the Supreme Court has held that ""the interim direction can be issued only for the purpose of arbitration

proceedings and not to frustrate the same"".

16. Mr. C.A. Sundaram, learned senior counsel for MALCO, has pressed into service the following conclusion reached in the case of Ganesh

Benzoplast Ltd., v. Sundaram Finance Ltd., reported in 2002 2 CTC 238 (para 10,11,16,18 and 19)

10. Coming to the obligation of the applicant/first respondent herein to satisfy the requirement as contemplated under Order 38, Rule 5, C.P.C. is

concerned, at the outset, we have to point out that all the judgments cited by the learned senior counsel deals with the application filed either under

Order 38 Rule 5 C.P.C or u/s 18 of the Arbitration Act, 1940. If we look at the provision of Section 18 of the Arbitration Act, 1940, it is

analogous to Order 38, Rule 5, C.P.C. Further Section 41 of the Arbitration Act, 1940 provides the applicability of C.P.C. in respect of the

proceedings under the Arbitration Act.

11. The present application was filed under sub-clause (ii)(b)(e) of Section 9 of the Arbitration Act, 1996. This section do not contain such words

as that of Section 18 of the Arbitration Act, 1940. Further there is no provision in the 1996 Act similar to Section 41 of 1940 Act....

17. A perusal of Section 9 would make it clear that it is neither similar to Order 38 Rule 5 nor Section 18 of the Arbitration Act, 1940...

18.....When Section 9 of the Arbitration and Conciliation Act, 1996 do not specifically require any averment in any particular form, as

contemplated either under Order 38 Rule 5 C.P.C. or u/s 18 of the Arbitration Act, 1940 there is no need for the first respondent herein to make

such averment in the affidavit filed in support of the application seeking a prohibitory order.

19.....When the appellant do not come forward with any offer to satisfy the claim of the first respondent, except stating that they are willing to

furnish an undertaking not to alienate the machineries, we are of the view that the intention of the appellant is only to prolong and protract the

proceedings.

17. The other decision heavily relied on by the learned senior counsel for the respondent is in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India

Ltd., . The question that arose for consideration in that case was, whether u/s 9 of the Act, the Court has jurisdiction to pass interim orders even

before arbitral proceedings commence and before an arbitrator is appointed: (para 9, 11, 12, 17, 20)

9. The 1996 Act is very different from the Arbitration Act, 1940. The provisions of this Act have, therefore, to be interpreted and construed

independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words the provisions of 1996 Act have to be

interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions it is more relevant to

refer to the UNCITRAL Model Law rather than the 1940 Act.

11. The Arbitral Tribunal has also been given jurisdiction to pass interim orders by Section 17.

12. The reading of Section 21 clearly shows that the arbitral proceedings commence on the date on which a request for a dispute to be referred to

arbitration is received by the respondent. It is in this context that we have to examine and interpret the expression ""before or during arbitral

proceedings"" occurring in Section 9 of the 1996 Act. We may here observe 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 proceedings.

17. In our opinion this view correctly represents the position in law, namely, that even before the commencement of arbitral proceedings the Court

can grant interim relief. The said provision contains the same principle which underlies Section 9 of the 1996 Act.

20....If an application is so made the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to

take the dispute to arbitration. Once it is so satisfied the Court will have the jurisdiction to pass orders u/s 9 giving such interim protection as the

facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral

proceedings, the Court while exercising jurisdiction u/s 9 can pass conditional

order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the Court is not debarred from dealing with an application u/s 9 merely because no notice has been issued u/s 21 of the 1996 Act.

18. In *Bhatia International Vs. Bulk Trading S.A. and Another*, , the Supreme Court has held thus: (para 34)

34. Thus Article 23 of the ICC Rules permits parties to apply to a competent judicial authority for interim and conservatory measures. Therefore,

in such cases an application can be made u/s 9 of the said Act.

19. By pointing out the fact that inasmuch as the Court below which is Court of first instance exercised its discretion while directing the foreign

company to furnish security, this Court being an appellate Court, in the absence of any acceptable material, will not interfere with such discretion,

for which the learned senior counsel for the MALCO relied on a decision in *Wander Ltd., and another v. Astox India (P) Ltd.*, reported in 1991

The Patents and Trade Marks Cases 1:- (para 13)

13. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will

not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been

shown to have been exercise arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant

of refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not

reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was

reasonably possible on the materials. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal

solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been

exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify

interference with the trial court's exercise of discretion.

20. It is true that in *Ganesh Benzoplast case 2002 (2) CTC 239*, the Division

Bench has observed that Section 9 would make it clear that it is neither similar to Order 38 Rule 5 nor Section 18 of the Arbitration Act, 1940. However, it is to be noted that while considering the application for interim measure filed by any one of the parties, the Court having jurisdiction shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. This is clear from Section 9 of the 1996 Act. It is also clear that a party to arbitration agreement can approach the Court for interim relief not only during the arbitral proceedings, but even before the arbitral proceedings. This is clear from the decision of the Supreme Court in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., as well as in Bhatia International Vs. Bulk Trading S.A. and Another, . It is further clear that normally the appellate court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating the grant or refusal of interim orders.

21. With the above principles now we shall consider whether the petitioner-MALCO has made out a prima facie and strong case for ordering the respondent to furnish security as claimed by them. In the petition filed u/s 9 of the Act before the District Court, after referring to the terms of Articles of Agreement, details regarding breach, failure to complete the assignment within the stipulated period and the other party (respondent) is a foreign party and no assets or security with the petitioner, prayed for direction for furnishing security. It is relevant to refer the specific allegations in the counter filed by Techmo Car before the District Court. Apart from denying the allegations made against them, it is stated that on or about 13th May, 2003 they filed its Letter of Request for Arbitration with the Secretariat of the International Chamber of Commerce (ICC), Court of Arbitration, Paris, as contemplated under the Arbitration Agreement. It is also their claim that the arbitral proceedings have already commenced as is contemplated under the law and the relevant ICC Rules of Arbitration. The ICC has been seized of the matter and the arbitral proceedings are being proceeded with. This information has been specifically stated in para 4 (b) of the counter affidavit filed before the District Court. It is also

their claim that by filing the petition before the Court below, the petitioner is trying to delay the matter, namely, the ICC arbitration proceedings.

With regard to merits, the Techmo Car has stated that the petitioner has falsely, wrongly and fraudulently invoked and encashed the five bank

guarantees given by them, aggregating to US \$ 660,000 i.e., equivalent to about Rs.3,10,20,000/-. They also denied the allegations regarding

alleged breach and failure to performing its obligations or achieving parameters or results or carrying out performance tests as also the

respondent's alleged misrepresentation and alleged intent to defraud. According to him, it is the matter to be agitated and decided by the Arbitral

Tribunal. It is also their claim that it was the petitioner to pay huge amounts and damages to the respondent and not the respondent to the

petitioner, for which they relied on the letter dated 29-01-2003. They also contended that in any event, the petitioner's alleged claim is the very

issue in dispute both on facts and law and the same as also the quantum if any, thereof is to be ascertained only if and when the petitioner succeeds

before the Arbitral Tribunal on merits.

22. No oral evidence was let in by both parties before the District Court. However, the petitioner has filed 17 documents-Exs. A-1 to A-17 and

the respondent has filed 6 documents-Exs. B-1 to B-6 to support their respective contentions. It is seen from the impugned order that the

petitioner has very much relied on Ex. A-10 which is the expenses list prepared by a Chartered Accountant and it refers that the petitioner has

incurred Rs.27,28,89,898/- by way of purchase of equipments etc. It is also seen that the counsel for the respondent objected to rely on Ex. A-10

by saying that it is only a self serving document. Though the learned District Judge has observed that there is no specific denial with regard to the

expenses, as seen from Ex. A-10, the perusal of the entire counter would go to show that the respondent is disputing the details found in Ex.A-10

all along.

23. Though it is claimed that the respondent Company being a foreign company have no assets in India, it is not the claim of the petitioner that they

were not aware of the same at the time of entering into an agreement. Though Section 9 enables the party to the agreement to approach the

concerned Court for necessary interim order, there must be strong material to

substantiate their claim. We have already referred to the objection of the respondent/foreign company regarding Ex. A-10. Though the petitioner has claimed that prima facie case exists on their side and the learned District Judge has also accepted the same, as discussed earlier, after perusing the various averments in the petition as well as in the counter, we are satisfied that the petitioner has not established and substantiated their claim for the relief u/s 9 of the Act. Section 9 could be invoked for an interim measure of protection, inter alia, for securing the amount in dispute in the arbitration. To put it differently a party could seek interim measure of protection only if there is an amount in dispute in the arbitration. It is demonstrated before us that in the instant case, on the date when the petition u/s 9 of the Act was filed, there was no amount in dispute or arbitration. As a matter of fact, it is only the foreign company, namely, Techmo Car which initiated the arbitral proceedings on 9-5-2003 and the MALCO-respondent herein had not filed any claim, however, has filed a counter claim only on 14-8-2003. It is also relevant to note that though the dispute is said to have arisen pursuant to the termination of the Agreement by the petitioner on 29-1-2003, the MALCO had not taken effective steps to refer the dispute for adjudication immediately before the international Chamber of Commerce in terms of the arbitration agreement between the parties.

24. It is also brought to our notice that by the time the order was passed by the Additional District Judge on 22-10-2003, much water had flown into the arbitral proceedings as subsequent to the claim of the Techmo Car submitted on 9-5-2003, the MALCO also appointed their arbitrator under the letter dated 13-6-2003 and submitted their response on 14-8-2003. The appellant herein had also submitted its response to the claim to the respondent on 21-10-2003; accordingly the whole issue was now before the Arbitral Tribunal and, as rightly argued by Mr. A.L. Somayaji, learned senior counsel for the petitioner/Appellant, the question of interim measure would have been more appropriate for the Arbitral Tribunal to consider, as provided u/s 17 of the Act rather than the Court u/s 9 of the Act. As observed earlier, the party coming to the Court must show that if it is not secured, the award which it may obtain would result in a paper decree or a decree which cannot be enforced on account of acts of a party pending arbitral process. These aspects have not been substantiated by placing

acceptable materials for an order u/s 9 of the Act. Though the Court is vested with powers to grant interim relief, but the Court's discretion must be exercised sparingly and only in appropriate cases. The Court's discretion ought to be exercised in exceptional cases when there is adequate material on record, leading to a definite conclusion that the respondent is likely to render the entire arbitral proceedings infructuous by disposing of the properties or funds either before or during the pendency of the arbitral proceedings. We are also satisfied that in view of the fact that both parties have taken appropriate steps by appointing their respective Arbitrators and submitting their response/reply etc., any order, in the absence of adequate material, will further delay the arbitral proceedings and we are satisfied that this aspect has not been considered by the learned Additional District Judge. Though we are conscious of the fact that in spite of the proceedings before the Arbitral Tribunal, I.C.C. Rules permit the parties to apply to the competent judicial authority for interim and conservatory measures, unless the Court satisfies by placing material, there cannot be any interim order. In our case, as observed earlier, the petitioner knows that the respondent i.e., other party is a foreign party and also knows that they are not having any property in India and in spite of this, they entered into an agreement. We are satisfied that the Court below committed an error in exercising its discretion arbitrarily and without acceptable materials. We have already referred to the stand taken by the foreign company, their claim before the Arbitral Tribunal and the necessary steps taken by them for early commencement of the arbitral proceedings to solve the dispute in question. We have also held that the learned Additional District Judge committed an error in accepting the auditor's report under Ex. A-10 and we are satisfied that the petitioner has not placed acceptable material to show that prima facie case exists in their favour for grant of interim order. We have already referred to the factual information regarding the claim of Techmo Car against MALCO US \$ 27,93,60,000 whereas the claim by the MALCO against Techmo Car is to the tune of US \$ 58,91,295. These material facts were lost sight of by the learned Additional District Judge. We are also satisfied that the reasons set out by the learned Additional District Judge for allowing the O.P., are unacceptable, perverse and liable to be set aside.

25. Under these circumstances, the order dated 22-10-2003 made in Arbitral O.P.No. 46 of 2003 on the file of Additional District Judge, Salem is set aside. Civil Miscellaneous Appeal is allowed. No costs. C.M.P.No. 2110 of 2004 is closed.