IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB. A. No. 5 of 2012 & I.A. No. 22361 of 2012

Reserved on: 11th January, 2013
Decision on: 4th February, 2013

INTERTOLL ICS CECONS. O & M CO. PVT. LTD. ..... Appellant
Through: Mr. Ciccu Mukhopadhaya, Senior Advocate with Mr. Balaji Subramanian, Ms. Jasleen Oberoi and Ms. Rohini Sisodia, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA .... Respondent
Through: Mr. Parag P. Tripathi, Senior Advocate with Mr. Abhimanyu Bhandari, Mr. Samanvya Dwivedi, Mr. Kunal Bahari and Ms. Monisha Handa, Advocates.

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CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
04.02.2013

1. Intertoll ICS Cecons O & M Co. Pvt. Ltd. ('Appellant') has in these two appeals under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 ('Act') challenged two separate impugned orders dated 6th February 2012 passed by the arbitral Tribunal ('Tribunal') in applications filed by the Respondent National Highways Authority of India ('NHAI') under Section 17 of the Act. By the impugned orders the Tribunal directed the Appellant to furnish security either of immovable property or in the form of a bank guarantee ('BG') for the satisfaction of the amount of counter claims of the NHAI that may be awarded by the Tribunal. The amount of such security was determined as Rs.2,93,70,70,025 as regards Package-1 and Rs. 32,85,12,572 as regards Package-2.

Background Facts

2. The facts leading to the filing of the present appeals are that pursuant to the bids invited by NHAI for operation and maintenance of four lane highway sections in NH-2 (Delhi Agra-Km 18.80 to Km. 198.00) and NH-24 (Moradabad Bypass Km. 148.43 to Km. 166.65) ('Package-2'), a joint venture agreement ('JVA') was entered into between Intertoll ICS Pvt. Ltd., CE Constructions Ltd., and a South African company, Intertoll (Pty) Ltd. The JV submitted a bid on 22nd October 2001 which was accepted by NHAI on 1st July 2002. As required by NHAI, the Appellant (i.e the JV) was incorporated on 26th July 2002 specifically to enter into and execute the contract for operation and maintenance of the above stretches of NH-2 and NH-24. On 8th August 2002, an agreement was executed by the Appellant and NHAI. A similar agreement was executed by the parties for the maintenance and

operation of a four lane highway on NH-8 (Gurgaon-Kotputli-Amer sections) in the States of Haryana and Rajasthan ('Package-1').

3. In terms of Clause 10.16.1 of the contract the Appellant submitted performance bank guarantees ('PBGs') of a total value of Rs.18,10,97,371. The Apellant states that although Clause 10.16.5 of the contract stated that in addition the 'Operator' i.e. the Appellant "shall provide a parent company guarantee in the form attached thereto", there was no such form attached to the agreement. In fact the said clause was in fact not acted upon as NHAI did not require the Appellant to furnish any 'parent company guarantee'.

4. The Appellant states that in regard to both the contracts its efforts were frustrated on account of persistent breaches by NHAI. As regards Package-2 the Appellant contends that apart from wrongly calling the PBGs, NHAI also unjustifiedly withheld retention money of Rs.5,42,96,773. Likewise in relation to Package-1, NHAI withheld the retention money of Rs.4,21,52,472. In both contracts NHAI also additionally withheld certain other amounts payable to the Appellant.

5. The Appellant terminated both contracts by notices dated 21st November 2005. The Appellant states that, as a counter measure, NHAI issued letters on 30th November 2005 terminating both contracts. On 3rd April 2006, the Appellant raised final bills in respect of each contract setting out the amount due and payable to it by NHAI. On its part NHAI issued final certificates on 15th and 29th May 2007 in respect of Packages 2 and 1 respectively, claiming certain amounts from the Appellant. On 20th November 2008, an arbitration

agreement was entered into between the Appellant and NHAI agreeing to refer all their disputes to arbitration.

Arbitral proceedings

6. In September 2009, a three- Member Tribunal comprising two former Chief Justices of India and a former Judge of the Supreme Court was constituted. The first sitting of the Tribunal was held on 12th September 2009. The Appellant filed in relation to Package-2 a total claim for the sum of Rs.1,68,40,14,481 (as amended) and in relation to Package-1 a claim for a sum of Rs.1,31,34,69,925 (as amended). On 31st May 2010, NHAI filed counter claims (after deducting the withheld amounts) in the sums of Rs.2,03,60,04,064 for Package-2 and Rs.4,26,91,36,681 for Package-1. Of the said counter claims, a substantial sum of Rs.2,12,88,91,779 in respect of Package-2 and Rs.4,26,99,59,941 in respect of Package-1 pertained to leakages, recovery of costs incurred in completing certain periodic maintenance work and damages for alleged breach of contract by the Appellant.

7. It is stated that after pleadings were completed and affidavits by way of evidence filed, when the cross-examination of the witnesses commenced, NHAI filed on 3rd October 2011 two separate applications under "provisions and principles analogous to Order 25 CPC read with Section 151 thereof and Section 17 of the Act" seeking directions to the Appellant to furnish security of an amount equivalent to the counter claims filed by NHAI. Replies to the said applications were filed by the Appellants on 21st October 2011. The applications were heard by the Tribunal in the first week of November 2011.

Impugned orders of the Tribunal

8. By two separate impugned orders dated 6th February 2012, the Tribunal required the Appellant to furnish security in the aforementioned sums in relation to Package-1 and Package-2. The amounts were arrived at by subtracting the amount of claim from the amount of the counter claims in respect of each package. The security was directed to be furnished to the satisfaction of the Registry of this Court.

9. In the impugned orders, on the basis of the pleadings of the parties, the Tribunal framed the following issues for determination:

> "(a) Whether an Arbitral Tribunal can, in exercise of the power conferred on it by Section 17 of the Act direct a party before it to furnish security for the amount claimed and to disclose the source wherefrom the party is arranging finances for the litigation?
>
> (b) In the event of question (a) being answered in favour of the Respondent, whether the Claimant should be directed to furnish security for the amount of counter claim? If so, in what amount?"

10. The conclusions of the Tribunal in relation to the above issues in the impugned orders were as under:

(i) The principle underlying Section 9 of the Act could determine the scope and ambit of the power conferred on the Tribunal under Section 17 of the Act. A narrow construction did not have to be placed on Section 17 of the Act.

(ii) For the purpose of Section 17 of the Act, the 'subject matter of the dispute' did not have to be only tangible property. It could include a monetary claim.

(iii) The Tribunal did have the power to call upon a party before it to furnish security for the claimed amount where it was in the interests of justice and where a case is made out for affording protection to the subject matter of litigation.

(iv) *Prima facie* the Appellant was impecunious. It was a shell company whose business activities had come to an end. It was not possessed of any property movable or immovable and certainly not in India. In the event of NHAI succeeding in its counter claims, in whole or in part, it would be practically impossible for NHAI to recover the awarded sum from the Appellant. Although the Appellant could not be attributed motives of defeating the recovery of NHAI's counter claims, yet facts existed which supported the findings arrived at by the Tribunal on the averments of NHAI.

(v) The Appellant was asked to furnish security for the differential amounts of the counter claims and the claims as an interim measure "in the peculiar facts and circumstances of this case".

11. The Court has heard the submissions of Mr. Ciccu Mukhopadhaya, learned Senior counsel appearing for the Appellant and Mr. Parag P. Tripathi, learned Senior counsel appearing on behalf of NHAI.

Scope of Section 17 and Section 9

12. The scope and powers of the Tribunal under Section 17 of the Act is one of the central issues that arise for determination in the present appeal. Section 17 of the Act reads as under:

> "**S. 17 Interim measures ordered by arbitral tribunal**.- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.
>
> (2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)."

13. The interim measure of protection under Section 17 of the Act has to be understood with reference to the "subject-matter of the dispute". A plain reading of the provision shows that an arbitral Tribunal can in exercise of its powers thereunder direct a party "to take any interim measure of protection" "in respect of the subject-matter of the dispute". The words "take" and "protection" give an indication as to the legislative intent behind the words "subject-matter of the dispute." The protection envisaged is in relation to some tangile property and not an indeterminate monetary claim.

14. The scope of the powers of an arbitral Tribunal under Section 17 of the Act has been explained by the Supreme Court in ***MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. (2004) 9 SCC 619*** as under (SCC, p.649):

> "58. A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the arbitrator is a limited one. He cannot issue any direction which would go beyond

the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its own force. Even under Section 17 of the 1996 Act, an interim order must relate to the protection of the subject matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof."

15. The question whether scope of the power of the Tribunal under Section 17 of the Act is narrower than or as wide that of a Court under Section 9 of the Act calls for examination next. Section 9 of the Act reads as under:

"**S. 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 a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any

samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

16. The view expressed by the Tribunal in the impugned orders that its powers under Section 17 are as wide as that of the Court under Section 9 is not consistent with the earlier decisions of this Court. In ***National Highways Authority of India v. M/s. China Coal Construction Group Corporation AIR 2006 Delhi 134*** this Court observed as under:

> "14…In my view, the powers under Section 9 available to the Court and the powers under Section 17 available to the Arbitral Tribunal to make interim measures are independent. There may be some degree of overlap between the two provisions but the powers under Section 9 are much wider inasmuch as they extend to the period pre and post the award as well as with regard to the subject matter and nature of the orders…" (Emphasis added)

17. Likewise, in ***Shin Satellite Public Co. Ltd. v. Jain Studios Ltd. 153 (2008) DLT 604*** it was observed as under:

> "36…despite the overlap between the powers under Section 17 and Section 9 of the Arbitration and Conciliation Act, 1996, it is apparent that the powers under Section 9 of the Act are much wider inasmuch as they extend to period 'pre-and post-the award' as well

as with regard to subject matter and nature of orders." (Emphasis added)

18. This Court is of the view that to the extent that there is a clear enunciation in Section 9 of the types of interim relief that can be granted it does appear that powers of the Court thereunder are by their very nature wider than the powers of a Tribunal under Section 17 of the Act. Therefore, it is not possible to accept the contention of NHAI, which found favour with the Tribunal in the instant case, that the powers of the Tribunal under Section 17 are as wide as that of the Court under Section 9 of the Act and that the principle underlying Section 9 of the Act would *ipso facto* be applicable to Section 17 of the Act.

'Subject-matter of dispute'

19. However, for examining the question as to what could constitute the 'subject-matter of the dispute' in the context of Section 17 of the Act, it would be useful to draw a comparison with Section 9 of the Act. A reading of the various sub-clauses of Section 9 makes it apparent that a distinction has been drawn between the words 'subject-matter of the dispute' [used in Section 9 (ii) (a) and (c)] and 'amount in dispute' [used in Section 9 (ii) (b)]. It is arguable that where the legislature in the same provision uses the words 'subject-matter of the dispute' in two sub-clauses and uses the words 'amount in dispute' in another sub-clause it intends to draw a distinction between the two. When Section 9(ii)(a) use the words 'subject matter of the dispute', they refer to 'goods' in respect of which there could be an order of 'preservation' or 'interim custody'. The same words in Section 9(ii)(c) refer to 'any property or thing' in respect of which there could be an order of 'detention, preservation or inspection of.' Where the claim is of a monetary nature

Section 9 (ii) (b) talks of 'securing the amount in dispute in the arbitration.' By the same analogy the words 'subject-matter of the dispute' in Section 17 should be understood as referring to a tangible 'subject matter of dispute' different from an 'amount in dispute'.

Security in relation to a definitive and not an indeterminate monetary claim

20. Notwithstanding the above legal position, considering that the reliefs sought by the Appellant in its claim and by NHAI in its counter claims are monetary in nature, even if the language of the words 'subject matter of the dispute' in Section 17 are taken to include monetary claims, the provision of 'security' in relation to such subject matter can perhaps be in the form of providing a bank guarantee. However, a direction of that nature at an interlocutory stage would indeed be an extraordinary one and has to necessarily be preceded by a determination of the possible extent of the claim that is likely to be awarded. In other words, the power of the Tribunal under Section 17 of the Act, even if assumed to be as wide as that of the Court under Section 9 of the Act, cannot extend to directing the provision of security in the form of a bank guarantee in relation to a speculative claim for damages.

21. In ***Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.*** it was held that the expression "amount in dispute" in Section 9(ii)(b) had different connotation and that it should not be used to enable a person "to recover the sums on account of damages in advance" even if the liabilities are in dispute. It was further observed that "it is probable that the Court alone and not the Arbitrator, has power to make such an order" for providing a bank guarantee. Consequently, even if in the impugned orders the Tribunal has observed that

language of Section 17 is wide, it would extend to requiring a party to furnish security for a claim that is yet to be adjudicated. The expression 'any interim measure of protection' cannot obviously be stretched to include providing security for the entire possible sum of damages that could be awarded even at a stage when there is no reason or determination of what that amount might be.

22. The legal basis for the above conclusion can be traced to the decisions concerning the grant of interim mandatory injunctions that can be ordered by a civil court. In ***Jabed Sheikh v. Taher Mallick AIR 1941 Calcutta 639*** it was explained that a claim for money does not *per se* become "a suit for enforcement of a debt. The Defendant could not be regarded as a debtor either before or after the institution of the suit till a decree is passed against him making him liable for a definite sum".

23. Likewise, in ***Iron & Hardware (India) Co. v. Firm Shamlal & Bros. AIR 1954 Bom 423***, Chief Justice Chagla of the Bombay High Court explained as under:

> "Before it could be said of a claim that it, is a debt, the Court must be satisfied that there is a pecuniary liability upon the person against whom the claim is made, and the question is whether in law a person who commits a breach of contract becomes pecuniarily liable to the other, party to the contract. In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party." (Emphasis added)

24. The above legal position was reiterated by the Punjab & Haryana High Court in ***S. Milkha Singh v. M/s. N.K. Gopala Krishna Mudaliar AIR 1956 Punjab 174*** . In ***Union of India v. Raman Iron Foundry (1974) 2 SCC 231***, the Supreme Court cited all the above decisions with approval and held:

> "11…a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not *eo instanti* incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provies that a mere right to sue for damages cannot be transferred…"

25. The decision in ***Raman Iron Foundry*** was overruled in ***M/s. H.M. Kamaluddin Ansari & Co. v. Union of India (1983) 4 SCC 417*** on another point "that the clause in the contract applied to a claim itself and not only to an amount due". However, on the nature of the claim for damages the decision in ***Raman Iron Foundry*** has not been overruled and is good law.

26. Reverting to the case on hand, at the stage at which the impugned orders were passed by the Tribunal, it did not have any reasonable basis to conclude that NHAI would somehow succeed entirely in its counter claims as much as the Appellant would in its claim. If as the Tribunal has done in the instant case, security is ordered to be provided by a Claimant even at the interlocutory stage for the amount constituting the difference between the claim and the counter claims, without even a *prima facie* determination as to

the likelihood of success of the counter claims, then it might result in severe prejudice being caused to a Claimant who has a reasonable chance of success in his claim. For instance, a Claimant with a reasonably good *prima facie* case for a claim of Rs.10 crores, may have been reduced to penury on account of the failure to recover that sum. His claim can be defeated by a Defendant with a counter claims for say Rs.100 crores who is able to obtain an interim order requiring the Claimant to furnish security for the differential amount of Rs. 90 crores. That would cause severe prejudice and have a chilling effect on the ability of the Claimant to pursue his claim.

27. Consequently, in the circumstances of the present case, the Court is unable to sustain the impugned orders with reference even to the principles analogous to those governing the power of the Court under Section 9 of the Act.

Order XXXVIII Rule 5 CPC

28. The impugned orders also do not appear to be supportable on the principles underlying the grant of an order of 'attachment before judgment' under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 ('CPC'). The said provision reads as under:

> "**5. Where defendant may be called upon to furnish security for production of property**.-
> (1)Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that maybe passed against him,-
>
> (a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void."

29. The essential condition for the party seeking relief under Order XXXVIII Rule 5 CPC is to show that the Defendant is about to dispose of or to remove the whole or any part of his property from the local limits of the Court. In the instant case it is admitted by both parties that the Appellant is impecunious. The question of the Appellant removing any property from the jurisdiction of the Court simply did not arise.

30. In ***Raman Tech. & Process Engg. Co. v. Solanki Traders (2008) 2 SCC 302*** the Supreme Court explained why the power of ordering attachment before judgment under Order XXXVIII Rule 5 CPC was 'drastic'. For such

an order to be passed the Plaintiff had to satisfy the Court that it had a *prima facie* case. It was only thereafter that the Court would proceed to the next stage of examining whether the interests of the Plaintiff should be protected. It was explained as under:

> "5. The power under Order XXXVIII Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order XXXVIII Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order XXXVIII Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realized by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment." (Emphasis added)

31. In ***Rajender Singh v. Ramdhar Singh (2001) 6 SCC 213*** the requirement of the Plaintiff having to satisfy the conditions of Order XXXVIII Rule 5 was again emphasised. The decisions in ***M/s. Global Company v. M/s. National Fertilizers Ltd. AIR 1998 Delhi 397, Goel Associates v. Jivan Bima Rashtriya Avas Samiti Ltd. 114 (2004) DLT 478 (DB), Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd. (2007) 7 SCC 125*** and ***Simplex Infrastructures Ltd. v. National Highways Authority of India*** (decision dated 14th January 2011 in FAO (OS) No. 200 of 2010) are to the same effect.

32. This Court is not satisfied that the Tribunal in the instant case paid sufficient attention to the requirements of NHAI having to satisfy the conditions for availing of the relief under Order XXXVIII Rule 5 CPC.

Where even the Court exercising power under Section 9 of the Act has to be guided by the principles of the CPC then *afortiori* an interim order by a Tribunal requiring furnishing of security for the monetary amount of claim by one party had to satisfy the requirement of Order XXXVIII Rule 5 CPC.

33. The decisions relied upon by NHAI to the effect that the power under Section 9 is not hedged in by the requirement so of Order XXXVIII Rule 5 CPC are distinguishable in facts. In ***National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd. AIR 2004 Bom 136*** the Bombay High Court was dealing with a petition under Section 9 of the Act and emphasized that the powers of the Court thereunder were not limited by the provisions of the CPC. In that context it was observed that the power under Section 9 (ii) (b) was very wide and had to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the Tribunal, is in a position to get fruits of such adjudication and on executing the award. In ***Delta Construction Systems Ltd., Hyderabad v. Narmada Cement Company Ltd., Mumbai 2002 (2) Arb.LR 47 (Bombay)***, it was stated that the Court would not be bound by the requirement of Order XXXVIII Rule 5 while considering an application under Section 9 of the Act and it would not be necessary for the Court when called upon to secure the amount in dispute to find out whether the Respondent before it is seeking to dispose of the property or taking the property outside the jurisdiction of the Court. It is important to recall that these decisions were in the context of the power of a Court under Section 9 and not of the Tribunal under Section 17 of the Act. The decision of this Court in ***Steel Authority of India Ltd. v. AMCI Pty. Ltd. 2011 (3) Arb.LR 502 (Delhi)*** was also in the context of Section 9 of the Act.

Moreover, it was at the post-Award stage where the claim had already been adjudicated.

Prima Facie Case

34. The grant of interim relief under Section 17 of the Act was required to be preceded by a determination that the party seeking interim relief has a *prima facie* case. In the context of applications seeking interim injunctions in civil suits, this legal requirement has been underscored by the Supreme Court in ***Kashi Math Samsthan v. Shrimad Sudhindra Thirtha Swamy (2010) 1 SCC 689*** and ***Ajay Mohan v. H.N. Rai (2008) 2 SCC 507***.

35. In the instant case, the impugned orders do not reveal that the Tribunal satisfied itself that a *prima facie* case had been made out by NHAI to justify the grant of a 'drastic' interim order requiring the Appellant to furnish security for the counter claims of the NHAI. The bulk of the counter claims of NHAI pertained to damages which were yet to be established. The Tribunal also did not deal with the contention of the Appellant that NHAI's counter claims were time barred; that it was not preceded by a notice from NHAI invoking the arbitration clause; that it was preferred by NHAI on 31st May 2010 long after the arbitration agreement was entered into on 20th November 2008 and that NHAI was aware of the extent of its counter claims on 15th May 2007 itself when it rejected the Appellant's final bill. Also the fact that NHAI filed the applications under Section 17 on 3rd October 2011, two years after the first hearing in the arbitration proceeding on 12th September 2009 was also not considered by the Tribunal.

Order XXV CPC does not apply

36. Although NHAI sought to support its applications on principles 'analogous' to Order XXV CPC, the Tribunal does not appear to have dealt with the question of the applicability of that provision which deals with providing security for costs. It does not envisage provision of security for counter claims.

37. In ***Vinod Seth v. Devinder Bajaj (2010) 8 SCC 1*** the Supreme Court explained that Order XXV Rule 1 CPC "only enables the Court to require the Plaintiff to furnish security for payment of costs incurred or likely to be incurred by the Defendant". This Court in ***New Machine Co. Ltd. v. SB Air Controls Pvt. Ltd*** (decision dated 13th February 2009 in I.A. No. 6532 of 2006 in CS (OS) No. 493 of 2006) held as under:

> "11. It appears from the provisions of Order XXV that at any stage of the suit, the court after assigning reason may direct any security for payment of costs, if incurred or likely to be incurred by the defendant and pass such order if the plaintiff does not reside and possess any immovable property within India other than the property in the suit. It is clear from the said provision that it is not a mandatory provision that in every case of such a nature the court must direct the plaintiff to furnish security for costs. The mandate of this provision is that in case, the court is satisfied that there is no resource to recover the cost incurred and likely to be incurred by defendant in the facts and circumstances of a particular case, it can pass the orders to the plaintiff for furnishing security. The court has to exercise its discretion as per the merits of each case, depending upon its own circumstances."

Question of financing of litigation

38. The contention of NHAI is that the Appellant is a shell company comprising of Intertoll ICS Pvt. Ltd., and Intertoll (Pty) Ltd., a company registered in South Africa which was fully under the control of another group called Group Five which was a global multinational corporation ('MNC') and the third entity comprising the JV was CE Constructions Ltd. which subsequently ceased to be part of the JV. The balance sheet of the Appellant showed that it did not have sufficient funds. It was obvious therefore that some other agency was funding the present litigation. The Appellant was "nothing more than a smoke screen created to hedge the losses in case the Appellant loses the litigation". It was suggested that in all probability the Appellant was pursuing the claim on behalf of Intertoll (Pty) Ltd., the parent company. In this context it is urged that NHAI never waived the requirement of the Appellant having to provide a parent performance guarantee under Clause 10.16.5. It is submitted that if an Award is passed in favour of NHAI, the Appellant will not be able to satisfy it as it had no assets. Therefore, the only way NHAI could recover the awarded amount is to seek liquidation of the Appellant. This would be futile since the Appellant's net worth was negative. After dragging NHAI into litigation the Appellant would end up not having even to pay costs.

39. The argument advanced on behalf of NHAI about the Appellant not disclosing its source of funding appears to overlook the fact that a separate application filed by NHAI before the Tribunal to direct the Appellant to disclose its source of fund was in fact rejected by the Tribunal. Secondly, the Appellant is a JV and a separate entity constituted solely for the purposes of executing the contracts in question. With the termination of the contracts,

there was no business left for the JV to conduct and, therefore, it obviously lost its substratum. However, there is no case made out at this stage by NHAI for lifting the veil and insisting that security should be furnished either by the Appellant or the parent company only because there is a possibility that it might be financing the litigation.

40. The Court notices that the above submissions do not appear to have been made by NHAI before the Tribunal. In any event it is not noted by the Tribunal in its impugned orders. Normally the Court would not permit such a plea to be advanced for the first time before the Court. The parent company was never called upon by NHAI to furnish a guarantee in terms of Clause 10.16.5 at any time before or after the termination of the contract. With the contract itself having been terminated, the stand of the NHAI that it could still ask for the parent corporate guarantee appears to be misconceived. There is no privity of contract between the parent company and NHAI. Certainly no arbitration agreement has been entered into with it. Therefore the Tribunal could not have under Section 17 of the Act passed an order binding the parent company or being made enforceable against it.

41. The requirement of the Appellant having to furnish a parent company guarantee was not mandatory. When the bid was submitted without such guarantee it was accepted by the NHAI without objection and, therefore, NHAI is estopped from relying on Clause 10.16.5. Moreover after the contracts themselves were terminated more than seven years ago, there was no question of the Appellant furnishing any parent company guarantee. The failure of the Appellant to furnish a parent company guarantee was not a ground for termination. In any event, relief could not be sought against the

South African company, Group Five which is not a party to the arbitration. Reference in ths regard could be made to the decision in ***Indowind Energy Ltd. v. Wescare (India) Ltd. (2010) 5 SCC 306***. Clause 10.16.5 could not cover the so-called holding company of the Appellant. A subsidiary company could never have been in a position to compel its parent company to do anything. Order XXXIII CPC also has no applicability. There is no question for lifting the corporate veil and passing any liability on to the holding or parent company of the Appellant.

Enforceability of an order under Section 17

42. Another aspect of the matter is that of enforceability of the interim order of the nature passed by the Tribunal. When clearly the Tribunal notes that the Appellant is impecunious, how did the Tribunal accept the Appellant to be able to furnish security for such huge sums? And what is the consequence of the Appellant not being able to furnish security as ordered by the Appellant? There is no provision in the Act which states that above failure by a party to comply with an order of additional security under Section 17 of the Act, its claim would be rejected. Then what would be the purpose of passing such an order at all? In any event once it is obvious that the impecuniousness of the Appellant prevents it from honouring the impugned orders of the Tribunal, it would be beside the scope of the powers of the Tribunal under the Act to reject the claim of the Appellant only on that ground.

No case for remand

43. The Court is satisfied that there was no basis whatsoever for the Tribunal to simply subtract the amount of claim from the amount of the counter claims and to ask the Appellant to furnish the security for the difference. This is pre-

judging the whole issue and proceeds on the basis that NHAI is going to entirely succeed in its counter claims. Even on this short ground the impugned orders of the Tribunal requiring the Appellant to furnish security for the sums as ordered cannot be sustained in law.

44. As regards the submissions of Mr. Tripathi that limited to the above aspect the matter should be remanded to the Tribunal, this Court is not inclined to pass such an order for the reasons that even otherwise no *prima facie* case had been made out by the NHAI for grant of interim relief in the manner prayed for by it under Section 17 of the Act.

Conclusion

45. For the aforementioned reasons, this Court sets aside the impugned orders dated 6th February 2012 passed by the Tribunal and allows Arbitration Appeal Nos. 5 and 6 of 2012 with costs of Rs.20,000 in each appeal which will be paid by the NHAI to the Appellant within four weeks.

46. In view of the above order, Application Nos. 22361 and 22363 of 2012 are rendered infructuous and are disposed of as such.

S. MURALIDHAR, J.

FEBRUARY 4, 2013
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