APHC010257552024

IN THE HIGH COURT OF ANDHRA PRADESH
AT AMARAVATI **[3311]**
(Special Original Jurisdiction)

THURSDAY, THE TWELFTH DAY OF SEPTEMBER
TWO THOUSAND AND TWENTY FOUR

PRESENT

THE HONOURABLE MS JUSTICE B S BHANUMATHI

I.A.No.2 of 2024
In
INTERNATIONAL COMMERCIAL ARBITRATION ORIGINAL APPLICATION NO: 14/2024

Between:

Tuf Metallurgical Private Limited and Others **…Petitioner**

AND

Bst(hk) Limited

…..Respondents

Counsel for the Petitioner:

Sri. N SIVA REDDY

Counsel for the Respondent(S):

Sri. SAI SANJAY SURANENI

The Court made the following:

ORDER:

This petition is filed to vacate the order, dated 27.06.2024, granted in ICOMAOA No.14 of 2024 by which a direction is given to issue notice to the 1st respondent to furnish security in favour of the petitioner for a sum of USD 2,423,404.58 within 48 hours on receipt of the notice failing which attach 50,000 WMT of Iron Ore Fines of the 1st respondent currently lying at the Plot of Orca Logistics Private Limited, 9-7-40/7/2, Lakshmi Nagar Layout, Sivajipalem, Visakhapatnam, Andhra Pradesh.

2. The petitioner is the 1st respondent in ICOMAOA No.14 of 2024 which is filed by the 1st respondent herein seeking the following reliefs:

A. For an order and/or direction for attachment of 50,000 WMT of Iron Ore Fines of the 1st respondent currently lying at the plot of Orca Logistics Pvt. Ltd., 9-7-40/7/2, Lakshmi Nagar Layout, Sivajipalem, Visakhatpatnam, Andhra Pradesh (Respondent No.2)
B. For an order and/or direction to the 1st respondent to furnish security in the sums of US$ 2,423,404.58 from the date of the deposit of such sums with this Hon'ble Court
C. Interim and ad interim reliefs in terms of prayer clauses A to D above
D. For costs.
E. For such further and other reliefs as this Hon'ble Court may deem fit and proper in the nature and circumstances of the case."

3. The case of the petitioner in ICOMAOA No.14 of 2024 is briefly as follows:

a. The petitioner entered into contract with the 1st respondent/ TUF Metallurgical Private Limited on 19.12.2023 as per which the iron ore fines to be supplied should have chemical composition with Fe @ 56.00% and accordingly the rate was fixed and the contract is further subject to renegotiation of price in case if it falls short of 54%. The buyer has to pay, as per the contract, 96% of the agreed price when the material is loaded if it confirms to the requirement and the balance of 4% of the price shall be paid after discharge upon submission of documents, subject to confirmation of the agreed chemical composition and in case of a change, it is again subject to renegotiation as noted above.

b. The petitioner paid 96% of the agreed price was paid at the time of loading since as per the report, the material was in confirmation with the required chemical composition, but, when the material was unloaded and tested, Fe was reported to be 52.21% and as such it was retested by the third party in furtherance of the negotiation and again the same also fell short of the requirement as the average rate is reported to be 52.60% and accordingly, both the parties entered into the negotiation and addendum dated 06.03.2024 was signed by the 1st respondent as per which the price was negotiated to be paid at the final price based on prevailing import market rate for Fe 53/52 of Indian original at the time a report of Bureau Veritas (BV) is out. Accordingly, the 1st respondent is due to the petitioner the amount of claim for USD 2,423,404.58.

C. The petitioner further claims that the material purchased by the petitioner was sold to third party at the same rate and thereafter the petitioner raised the claim from the 1st respondent and an e-mail correspondence was also made on 25.05.2024 and again e-mail was sent on 27.05.2024 due to some mistake in the description in the correspondence, dated 25.05.2024, and that 1st respondent replied to the petitioner through e-mails remarking that the 1st respondent referred to settle the matter amicably, but no payment has been made so far. Therefore, the petitioner sought the above reliefs.

4. After hearing the counsel for the petitioner, having found satisfactorily *prima facie* case, this Court directed conditional order of attachment, on 27.06.2024, as noted above.

5. Then, this petition is filed supported in the form of counter affidavit of the petitioner herein/1st respondent in ICOMAOA 14 of 2024. The petitioner herein denied all the liability made by the 1st respondent herein and further stated that there was no opportunity whatsoever for

the agent of the “TMPL” to check and find out as to whether the sampling of the very cargo was undertaken or not and such a serious and contentious issue is required to be adjudicated on the constitution of the Tribunal at Singapore and without taking such steps, recourse taken under Section 9 of the Arbitration & Conciliation Act, 1996 (‘the Act’) is highly unwarranted.

6. It is further stated that unless and until the pre-conditions under Order XXXVIII, rule 5 CPC are satisfied as held by the Supreme Court in **Sanghi Industries Ltd. Vs. Ravin Cables Ltd.**[1], the Commercial Court could not have passed such an order in exercise of powers under Section 9 of the Act. It is also contended that the monetary value of the goods for which attachment before judgment is sought, i.e., 50,000 WMT of Iron Ore Fines, is much higher than the inflated and purported claim sought to be made by the petitioner before SIAC. It is also contended that an order for deposit of money or attachment of the property before judgment by way of interim measure ought not to have been granted when the amount is not yet crystallized and is speculative in nature.

7. Counter to this petition by way of rejoinder has been filed by the 1st respondent herein/petitioner in ICOMAOA No.14 of 2024 denying all

[1] 2022 SCC Online SC 1329

the averments in the affidavit and requested to dismiss the application in I.A.No.2 of 2024 making the interim attachment order granted on 27.06.2024 absolute.

8. Heard the counsels for both parties.

9. While vehemently denying the liability claimed in the main petition, the petitioner strenuously contended that all the rigors applicable to Order XXXVIII Rule 5 CPC shall be applied while passing the similar order under Section 9 of the Act as held by the Supreme Court in **Sanghi Industries** (1 supra).

10. On the other hand, the learned counsel for the 1st respondent/ petitioner in the main petition stated that the Supreme Court in **Essar House Private Limited Vs. Arcellor Mittal Nippon Steel India Limited**[2] [with the same strength of the Bench as in the case of **Sanghi Industries** (supra)] held that the scope of court's power under Section 9 of the Act is not controlled by mere technicality of absence of requirement under Order XXXVIII, rule 5 CPC and interim measure can be granted under Section 9 when there is good *prima facie* case, balance of convenience in favour of the petitioner and there is a strong possibility of diminution of assets when the petitioner approached the Court with reasonable expedition and it is not necessary to prove actual

[2] 2022 SCC Online SC 1219

attempts to deal with, remove or dispose of the property with a view to defeat or delay the realization of an impending arbitral award is not imperative. In this regard, he placed reliance on the observations of the Supreme Court at paragraph Nos.48 to 50 which read thus:

> "48. Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is, whether the applicant for interim measure has a good prima facie case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.
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> 49. If a strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power Under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment Under Order 38 Rule 5 of the Code of Civil Procedure.
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> 50. Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending Arbitral Award is not imperative for grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice. To assess the balance of

> convenience, the Court is required to examine and weigh the consequences of refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail."

11. *In reply*, the learned counsel for the petitioner herein submitted that the decision of the Supreme Court of a coordinate Bench in **Sanghi Industries** (1 supra) was rendered on 30.09.2022, i.e., subsequent to the decision in **Essar House Private Limited** (2 supra), dated 14.09.2022 and therefore, the decision in **Sanghi Industries Ltd** (1 supra) is binding on this Court.

12. On the rule of precedence, he placed reliance on the decision of the Full Bench of the Karnataka High Court in **Govindanaik G. Kalaghatigi vs. West Patent Press Co. Ltd. and Ors[3].** It was held at paragraph No.6 as follows:

> "6. But the difficulty may still arise for the High Court when confronted with two inconsistent decisions of the Supreme Court by Benches consisting of equal number of Judges. Both cannot be said to be binding on Courts. But the choice is still more difficult as there is no firm general rule on the principle of precedent. The learned Chief Justice has opined that in such a case the later of the two decisions should be followed

[3] AIR 1980 Kant 92

by the High Court and other courts. This practice, according to us, is neither a rule of propriety nor a rule to promote justice. It may be a convenient rule to promote consistency and avoid uncertainty. If it is meant to promote consistency in the administration of justice, we may as well ask the question, why not the High Court follow the former of the two rulings when both of them are of equal sanctity. Why alone the later carries the obligation and not the former? The adherence to one practice would be as good or as bad as adherence to the other.

In our view, a conservative approach to any of these, may deny justice in a given case or series of cases and those clients may not be in a position to approach the Supreme Court for the redressal of their grievances. When confronted with two inconsistent co-ordinate authorities, Kay., in **Miles v. Jarvis** (1883) 24 Ch D 633 at p. 636 said :

"........The question is which of these two decisions I should follow, and it seems to me that I ought to follow that of the Master of the Rolls as being the better in point of law".

Jessel M. R. in a like circumstance said in **Baker v. White** (1877) 5 Ch D 183 at p. 190 that he was left with liberty to say which was not should law. It seems to us, therefore, the High Court would be well advised to consider which of the interest of the administration of justice and it ought to follow that which is better in point of law than in point of time.

OPINION OF THE FULL BENCH

In view of the majority opinion, the answer to the question referred to this Full Bench, is as follows:-

> "If two decisions of the Supreme Court on a question of law cannot be reconciled and one of them is by a larger Bench, the decision of the larger Bench, whether it is earlier or later in point of time, should be followed by High Courts and other Court. However, if both such Benches of the Supreme Court consist of equal number of Judges, the later of the two decisions should be followed by High Courts and other Courts".

13. On the other hand, the learned counsel for the 1st respondent herein placed reliance on the decision of the Constitution Bench of the Supreme Court in **National Insurance Company Limited v. Pranay Sethi and others**[4] at paras 27, 28 & 59 in support of his contention that the decision in **Essar House Private Limited** (2 supra) shall be followed by this Court on the ground that the judgment rendered prior in point of time binds when there is conflict in the point to be decided by different coordinate benches of the same Court. He further stated that the earlier decision if not followed by the subsequent bench of the same strength, it is *per incuriam* as held in the decision of the Supreme Court in **National Insurance Company** (4 supra). Paras 27, 28 and 59 read as under:

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[4] (2017) 16 Supreme Court Cases 680

"27. We are compelled to state here that in **Munna Lal Jain and others Vs. Vipin Kumar Sharma and others**[5], the three-Judge Bench should have been guided by the principle stated in **Reshma Kumari and others Vs. Madan Mohan and Another**[6] which has concurred with the view expressed in **Santosh Devi** or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in **Reshma Kumari** being earlier in point of time would be a binding precedent and not the decision in Rajesh.

28. In this context, we may also refer to **Sundeep Kumar Bafna v. State of Maharashtra and Anr.** [(2014) 16 SCC 623] which correctly lays down the principle that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, Rule or Regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co-equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in **Rajesh and others Vs. Rajbir Singh and others**[7] case was delivered on a later date,

[5] (2015) 6 SCC 347
[6] (2013) 9 SCC 65
[7] (2013) 9 SCC 54

> it had not apprised itself of the law stated in **Reshma Kumari** (supra) but had been guided by **Santosh Devi Vs. National Insurance Company**[8]. We have no hesitation that it is not a binding precedent on the co-equal Bench.
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> 59.(i) The two-Judge Bench in **Santosh Devi** should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in **Sarla Verma Vs. Delhi Transport Corporation and another**[9], a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench."

14. When there is contradiction in the view expressed by different benches of same strength of the Supreme Court, the High Court should try to reconcile the diversity of the decisions casting away any general observations and the *ratio decidendi* shall be followed as a binding principle.

15. In the case of **Sanghi Industries** (1 supra), the question whether Section 9 of the Act is totally controlled by the scope of authority under Order XXXVIII rule 5 CPC has not directly fell for consideration. The High Court of Guajarat at Ahmedabad dismissed the appeal confirming the order passed by the Commercial Court under Section 9 of the Act by which it directed the appellant before the Supreme Court to deposit the

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[8] (2012) 6 SCC 421
[9] AIR 2009 SC 3104

amount of performance bank guarantee. Before passing of the said order, the bank guarantees were already invoked and the amount was already paid by the bank. The order passed by the Commercial Court was challenged before the High Court in appeal under Section 13 of the Commercial Court Act, 2015. It was held by the Supreme Court at para No.4 as follows:

> "4. Having heard learned Counsel appearing on behalf of the respective parties and in the facts and circumstances of the case, more particularly, when the bank guarantees were already invoked and the amounts under the respective bank guarantees were already paid by the bank much prior to the Commercial Court passed the order under Section 9 of the Arbitration Act, 1996 and looking to the tenor of the order passed by the Commercial Court, it appears that the Commercial Court had passed the order under Section 9(ii)(e) of the Arbitration Act, 1996 to secure the amount in dispute, we are of the opinion that unless and until the pre-conditions under Order XXXVIII, rule 5 of the Code of Civil Procedure are satisfied and unless there are specific allegations with cogent material and unless prima-facie the Court is satisfied that the Appellant is likely to defeat the decree/award that may be passed by the arbitrator by disposing of the properties and/or in any other manner, the Commercial Court could not have passed such an order in exercise of powers Under Section 9 of the Arbitration Act, 1996……."

16. Therefore, it is obvious that the challenging party has not raised the ground that the Commercial Court did not follow the procedure contemplated under Order XXXVIII rule 5 CPC. Thus, no point fell for consideration as to whether Order XXXVIII rule 5 CPC, in its full rigor, shall be followed while passing the order under Section 9 of the Act. Whereas, in the case in **Essar House Private Limited** (2 supra), it is specifically argued as noted in the para No.30 of the decision that the Court erred in not considering the requisites of Order XXXVIII rule 5 CPC for grant of the interim relief. As such, the Supreme Court has specifically dealt with the point and referred to various previous decisions on the said point, which are as follows:

a. In **Raman Tech. & Process Engg. Co Vs. Solanki Traders**[10]**,** it was held as follows:

> "5. The power under Order 38 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 38 Rule 5 is notto convert an unsecured debt into a secured debt….."

b. In **Citi Bank N.A v. Standard Chartered Bank**[11], it was held as follows:

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[10] (2008) 2 SCC 302

> "47. Novation, rescission or alteration of a contract under Section 62 of the Indian Contract Act can only be done with the agreement of both the parties of a contract. Both the parties have to agree to substitute the original contract with a new contract or rescind or alter. It cannot be done unilaterally."

c. In **Khardah Company Ltd. Vs. Raymon & Co. (India) Pvt. Ltd.**[12], it was held as follows:

> "An assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognized distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promise, and when such consent is given, it is really a novation resulting in substitution of liabilities."

Finally, the Supreme Court specifically held that a good *prima facie* case, balance of convenience are sufficient to grant interim measure as noted at paragraphs Nos.48 to 50 of the decision in **Essar House Private Limited** (supra).

17. At this juncture, it would be appropriate to note as to what is "obiter dicta" The expression "obiter" means 'by the way', 'in passing', 'incidentally'. Obiter dictum is the expression of opinion stated in the

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[11] (2004) 1 SCC 12
[12] (1963) 3 SCR 183

judgment by a Judge which is unnecessary of a particular case. Obiter dicta is an observation which is either not necessary for the decision of the case or does not relate to the material facts in issue. Whereas, ***Ratio decidendi*** is an expression or ratio of a decision which is necessary for decision in any matter. Only *ratio decidendi* of any matter is binding; the general observations made by the Supreme Court (obiter dicta) have no binding force, *vide* decision of the Supreme Court in **Orient Paper and Industries Ltd. v. State of Orissa**[13].

18. Thus, *ratio decidendi* is based upon the facts actually decided and is an authority for those facts. What is binding is the ratio of the decision and not any finding on facts, or the opinion of the Court on any question which was not required to be decided in a particular case, as observed in **Ranchhoddas Atmaram Vs. Union of India**[14]. As already stated, an *obiter dictum* is an observation by a Court on a legal question suggested by a case before it, but not arising in such manner as to require decision. It is not binding as a precedent, because the observation was unnecessary for the decision pronounced by the Court, *vide* decision of the Supreme Court in **Madhav Rao Jivaji Rao Scindia Bahadur and Ors. Vs. Union of India (UOI) and Ors**.[15]. Because an

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[13] AIR 1991 SC 672: 1991 Supp. (1) SCC 81
[14] (1961) 3 SCR 718: 1961 AIR 935
[15] AIR 1971 SC 530: (1971) 1 SCC 85

obiter is not binding as the law declared under Article 141, it cannot be relied upon, solely to hold certain statutory rules as invalid, vide **Moti Ram Deka v. N.E.F. Ry**[16].

19. Keeping the above principles in view, the *ratio decidendi* in the decision of **Essar House Private Limited** (2 supra) is followed.

20. When the facts of the case are examined, it is found by this Court in the present case that there is *prima facie* case which means the case requires adjudication by the Arbitrator. This Court restrains from making any observations on the merits of the contentions raised regarding the liability. Since the balance of convenience also exists in favour of the petitioner in the main petition, this Court does not see any merit in the contention of the petitioner herein to raise the attachment already ordered. If at all, the petitioner herein likes to offer now alternative security in substitution for the property under attachment, it is open for the petitioner to come up with appropriate petition which shall be decided subject to the objections raised by the other side on filing such an application.

22. Accordingly, I.A.No.2 of 2024 is dismissed.

B.S.BHANUMATHI, J

12-09-2024
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[16] AIR 1964 SC 600: 1964 (5) SCR 683