



However, it repeatedly informed VML that upon VML issuing the L/C as per the Sub-contract, KSS would issue the PBG for its part.

- Despite the above, the work proceeded under the Sub-contract. VML did not object to KSS' performance and paid KSS in accordance with the Sub-contract terms until the invoice for April 2020. In May 2020, VML refused to pay KSS's invoice for April 2020 on the grounds that (a) KSS had failed to furnish the PBG and (b) VML was entitled to levy potential/provisional liquidated damages inter alia for KSS' failure to complete the mandatory scope of work. Thereafter, KSS' invoice for May 2020 was also not paid by VML.
- In view of the same, KSS preferred the present petition and inter alia sought the following major reliefs:
  - pending the commencement, hearing and final disposal of the proposed arbitral proceedings, the passing of the arbitral award therein and for a period of 90 days thereafter, VML be directed to deposit a sum of USD 2.4 million with the Court.
  - pending the commencement, hearing and final disposal of the proposed arbitral proceedings, the passing of the arbitral award therein and for a period of 90 days thereafter, ONGC be directed to deposit a sum of USD 2.4 million with the Court.

### **ARGUMENTS ADVANCED BY KSS**

- On behalf of KSS, the following contentions were raised:
  - VML never objected to KSS' performance until late May 2020.
  - With respect to the non-submission of the PBG, KSS had always agreed to provide the same as long as VML opened the LC in terms of the Sub-contract as the same was a reciprocal obligation.
  - No liquidated damages can be imposed on KSS by VML as ONGC itself had never claimed any from VML. All the works performed by KSS were certified by ONGC as complete and KSS only invoiced for ONGC-certified works. Further, VML invoked liquidated damages to the full extent of 10% when there was simply no explanation as to how VML could have done the same in May 2020.
  - The withholding of KSS' dues was entirely without cause or rationale.

### **ARGUMENTS ADVANCED BY VML AND ONGC**

- On the other hand, VML opposed the petition on the grounds that:
  - The petition is not maintainable since although the petition was filed on July 4, 2020, until November 9, 2020, KSS hadn't even invoked arbitration. In this regard, VML placed reliance upon Section 9(3) of the Act and Para 34 of Ashwani Minda and Jay Ushin Ltd. v. Ushin Ltd. and Minebea Mitsumi Inc.
  - The Court lacked territorial jurisdiction since the site of work was outside the territorial limits of the Court and VML is a Liberian company having an office in Abu Dhabi.
  - KSS's obligation to furnish a PBG was not dependent or contingent on VML issuing the L/C. KSS's failure to furnish a PBG was a breach entitling VML to contractual remedies.
  - KSS was liable to VML for delay in performance and liquidated damages on account of such delay in performing the works.
  - The relief that KSS sought was not only in the nature of attachment before judgment (as under Order 38 Rule 5 of the Code of Civil Procedure, 1908 (CPC)), but was actually a proceeding in execution because it sought garnishment of funds due to VML from ONGC. Seeking such a remedy without there being an executable decree was impermissible. In any case, no case for relief was made out under Order 38 Rule 5.
- As all grievances of KSS were from and against VML, ONGC raised a limited contention that its contractual rights vis-à-vis VML ought not to be compromised by any order of the court. It further submitted that as long as ONGC's

rights vis-à-vis VML were safeguarded, ONGC was not concerned with this dispute and would be bound by the orders of the court.

## **FINDINGS OF THE COURT**

- Upon hearing the parties, the Court observed that:
  - The petition was maintainable. *Ashwani Minda* was of no assistance to VML as it re-emphasized the limited embargo in Section 9(3) only once the tribunal was constituted. The argument that the tribunal ought to have been constituted doesn't hold water; more so considering the delay was not attributable to KSS, but because the matter could not be heard in a timely fashion because of the pandemic.
  - The last set of invoices show KSS as having a local office in Mumbai and therefore, the Court therefore has the requisite territorial jurisdiction.
  - *Prima facie*, VML could not possibly have claimed the entire 10% of liquidated damages in May 2020. The explanation given by VML that the retention was now due as the amount is 0.5% per week, and KSS had stopped work since May 2020, could not justify VML's making of the claim prematurely. There was also no evidence whatsoever that ONGC had ever made any such claim against VML.
  - *Prima facie*, VML's obligation to furnish the L/C and KSS' obligation to furnish the PBG were reciprocal and KSS' failure to furnish the PBG could not be said to be a breach if VML was itself unwilling to perform its obligation.
  - Admittedly, VML had not disputed the invoices. ONGC too had certified the work performed by KSS under the said invoices. This being a claim purely on invoices, *prima facie*, there couldn't be any reason for VML to refuse to pay the invoices.
  - VML's argument that the relief sought had been framed as a garnishee proceeding which could only be made in execution was not entirely correct. Strictly speaking, no order was being made against ONGC. However, if KSS had a *prima facie* valid case for relief against VML, it could not be contended that the amounts that VML was to receive from ONGC would be excluded from consideration.
  - With respect to the general principle of Order 38 Rule 5 and its influence on Section 9 of the Act, the court has a wide discretion and is 'not unduly bound' by the principles of Order 38 Rule 5, Order 39 of CPC and Section 9 of the Court.<sup>1</sup> The underlying principle is to make arbitration an effective form of dispute resolution. In a given case, even where there is no case made out under Order 38, it is entirely within the remit of the Section 9 court to make a suitable protective order.
- Thus, in order to balance the competing cases of the parties, the Court *inter alia* allowed the following interim reliefs to KSS:
  - By December 4, 2020, Respondent No.1, VML will deposit with the Prothonotary & Senior Master an amount of USD 2.4 million or the rupee equivalent at the then prevailing exchange rate.
  - If VML fails to make the deposit by December 4, 2020, ONGC will deposit that amount out of the amounts, if any, due from it to VML by December 11, 2020 under the contract between ONGC and VML. This will be entirely without prejudice to ONGC's rights vis-à-vis VML and the making of that deposit by ONGC and a consequent reduction in the payment or payments by ONGC to VML will not, by virtue of compliance of this order by ONGC, be claimed by VML in any forum or any proceeding to be breach of their contract.

<sup>1</sup> In This Regard, The Court Relied Upon The Judgment Of The Division Bench Of The Bombay High Court In *Jagdish Ahuja V. Cupino Ltd.*, 2020 SCC Online Bom 849. The Court Also Referred To The Decisions In *Baker Hughes Singapore Pte Ltd V. Shiv-Vani Oil And Gas Exploration Services Ltd.*, (2015) Bom Cr 377 And *Nimbus Communications Ltd V. BCCI*, 2012 (5) Bom Cr 114.

## ANALYSIS

- The present decision appears to have taken a laudable approach to balancing and safeguarding each party's rights, pending the final adjudication of the dispute by the arbitral tribunal.
- VML's contention that the relief sought was in the nature of a garnishee relief or in the nature of an attachment before judgment was, in our view, fairly strong. Under CPC, grant of such relief is predicated on the applicant/plaintiff meeting well delineated high bars. However, it must be remembered that while the exercise of power under Section 9 of the Act cannot be independent of the principles for granting interim reliefs envisaged by CPC, the rigors of such principles cannot be put into place to defeat the grant of relief under Section 9 which would sub-serve the interests of justice.<sup>2</sup> Indeed, there may be a case to say that under Section 9 of the Act, a court can for *securing the amount in dispute* pass orders on a threshold lower than envisaged under CPC. However, there appears to be a divergence amongst the various decisions in the country on this issue. While in most cases similar orders have not been passed,<sup>3</sup> in certain cases such reliefs were in fact allowed by the Courts.<sup>4</sup> It also deserves mentioning that, on an earlier occasion, another Ld. Singe Judge of the Bombay High Court had denied granting similar reliefs.<sup>5</sup>
- In our opinion, the present judgement must be applied sparingly and appreciated in its correct sense. In the present case, there appeared to be a very strong *prima facie* case made out by KSS to justify such an order, which we may add is well qualified. Even in the present case, the Court has deemed it fit to impose the primary obligation for depositing the requisite sums on VML and only upon its failure, it has been directed that ONGC may be required to do the needful as ordered.

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<sup>2</sup> *Nimbus Communications Ltd. V. Board Of Control For Cricket In India*, 2012 (5) BOM.C.R. 114. The Judgment In *Nimbus Communications* Is Based On The Interpretation Of The Landmark Supreme Court Judgement On The Scope Of Powers Under Section 9 I.E. *Adhunik Steels Ltd. V. Orissa Manganese And Minerals Pvt. Ltd.*, 2007 (7) SCC 125. See Also *BMW India Pvt. Ltd. V. Libra Automotives Pvt. Ltd.*, 261 (2019) Dlt 579.

<sup>3</sup> *Sundaram BNP Paribas Home Finance Ltd. V. Mir Ali*, (2012) 2 CTC 209 (Db); *Kris Heavy Engineering V. PNH B Lanco Khec*, 2013 SCC Online Mad 1419; *L&T Finance V C T Ramanathan*, 2013 SCC Online Mad 1123; *Value Advisory Services V. Zte Corporation*, 2009 SCC Online Del 1961

<sup>4</sup> *Suryodaya Infra Projects V. Flecon Engineering Company Limited*, COMCA No.61 Of 2019 (Order Of The Telangana High Court); *Tata Capital Ltd V. Rani*, 2009 SCC Online Mad 977; *Magma Fincorp Ltd. V. Luminelle Solar Technologies & Anr.*, A.P. No. 316 Of 2020 (Order Of The Calcutta High Court).

<sup>5</sup> *Jatin Keshruwala V. Dag Creative Media Pvt. Ltd.*, 2019 SCC Online Bom 1346.