2014:DHC:4797-DB

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on : September 02, 2014*
Judgment Pronounced on : September 18, 2014

\+ **FAO(OS) 121/2014**

NUSSLI SWITZERLAND LTD ..... Appellant
Represented by: Mr.K.N.Bhatt, Sr.Advocate instructed by Mr.Prashant Kumar, Mr.Amit Singh, Mr.Rajan Singh and Mr.Anantha Narayana, Advocates

versus

ORGANIZING COMMITTEE COMMONWEALTH GAMES, 2010 ..... Respondent
Represented by: Mr.Rajeeve Mehra, Sr.Advocate instructed by Mr.Neeraj Sharma, Ms.Anjali Agrawala, Ms.Archana Lakhotia, Ms.Pragya Nalwa, Ms.Marisha Shukla and Mr.Anand Raja, Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Nussli Switzerland Ltd. (hereinafter referred to as Nussli) and the Organizing Committee Common Wealth Games, 2010 (hereinafter referred to as the Organizing Committee) had entered into a contract on June 02, 2010 which contained an arbitration clause.

2. Being a term of the contract, Nussli got issued a bank guarantee being issued in favour of the Organizing Committee by HSBC Bank in sum of ₹12,78,99,935/- (Rupees Twelve Crores Seventy Eight Lacs Ninety Nine Thousand Nine Hundred and Thirty Five only).

3. Nussli had a claim of ₹71,69,20,040/- (Rupees Seventy One Crores Sixty Nine Lacs Twenty Thousand and Forty only). The Organizing Committee had a counter claim of ₹47,75,24,051/- (Rupees Forty Seven Crores Seventy Five Lacs Twenty Four Thousand and Fifty One only) allegedly being over payments made, ₹3,58,291/- (Rupees Three Lacs Fifty Eight Thousand Two Hundred and Ninety One only) towards custom duty, ₹47,75,240/- (Rupees Forty Seven Crores Seventy Five Thousand Two Hundred and Forty only) being a cess levied by the Labour Commissioner, ₹31,30,200/- (Rupees Thirty One Lacs Thirty Thousand and Two Hundred only) towards penalty levied under the Delhi Value Added Tax and ₹1,71,03,781/- (Rupees One Crore Seventy One Lacs Three Thousand Seven Hundred and Eighty One only) towards compensation for damages suffered by venue owners.

4. The Arbitral Tribunal comprising three Hon'ble retired Judges of the Supreme Court : (i) Justice (Retd.) Kuldeep Singh, (ii) Justice (Retd.) B.P.Singh, and (iii) Justice (Retd.) R.B.Ravindran published an award on December 14, 2003 holding that Nussli was liable to pay ₹2,18,79,025/- (Rupees Two Crores Eighteen Lacs Seventy Nine Thousand and Twenty Five only) to the Organizing Committee and the Organizing Committee was liable to pay ₹46,15,06,072/- (Rupees Forty Six Crores Fifteen Lacs Six Thousand and Seventy Two only) to Nussli, thus the net amount was payable by the Organizing Committee to Nussli and it was ₹43,96,27,047/- (Rupees Forty Three Crores Ninety Six Lacs Twenty Seven Thousand and Forty Seven only). The sum awarded was with interest @ 6% per annum from the date of commencement of the arbitration proceedings, which was May 18, 2011, till date of payment. The bank guarantee in sum of

₹12,78,99,935/- (Rupees Twelve Crores Seventy Eight Lacs Ninety Nine Thousand Nine Hundred and Thirty Five only) issued by HSBC Bank was directed to be returned by the Organizing Committee to Nussli.

5. Published on December 14, 2013, the objections to the award could be filed, as per the provisions of Section 34 of the Arbitration and Conciliation Act, 1996, within three months of knowledge of the award being published, which obviously was the date when notice was received by the parties of the award being published.

6. The bank guarantee being valid, as per the extended period of its validity, pursuant to the orders passed by the Arbitral Tribunal till December 31, 2013, the Organizing Committee, having three months' time to file objections to the award was faced with the problem of the bank guarantee lapsing on December 31, 2013. The award pronounced on December 14, 2013 had discharged the bank guarantee and had required the guarantee bond to be returned by the Organizing Committee to Nussli.

7. Organizing Committee filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 which was registered as OMP No.1300/2013 in which it prayed that Nussli should be directed to extend validity of the bank guarantee till conclusion of proceedings which the Organizing Committee would initiate under Section 34 of the Arbitration and Conciliation Act, 1996 concluded.

8. Nussli opposed the petition. The debate between the parties was two fold. Firstly, post award, can the loosing party which has to recover nothing from the victorious party seek any interim measure from the Court pending determination of objections by it to the award; and secondly whether on merits case was made out to grant the relief prayed for.

9. Vide impugned order dated February 26, 2014 the learned Single Judge has held in favour of the Organizing Committee.

10. Nussli had, before the learned Single Judge relied upon a decision of a Division Bench of the Bombay High Court passed in Appeal No.114/2013 *Dirk India Pvt. Ltd. Vs. Maharashtra State Electricity Generation Company Ltd.* and a connected appeal decided on March 19, 2013, holding that the remedy under Section 9 of the Arbitration and Conciliation Act, 1996 was not available to a loosing party under an award. The view taken was that the interim measure contemplated by Section 9 would relate to the fruits of success at an arbitral proceedings. A party which had failed in the arbitration proceedings, could at best have the award set aside, but could not have an order decreeing the claim. The view taken was that an interim measure post an award had to be a step in aid of the enforcement of the award.

11. The learned Single Judge has distinguished the said decision on the reasoning that the situation in the instant case was entirely different because Nussli was a foreign company and had no assets or presence in India.

12. Ex-facie, said reasoning of the learned Single Judge is incorrect for the reason Section 9 of the Arbitration and Conciliation Act, 1996 draws no distinction between a foreign company or an Indian company. Its application in the context of one party having no assets in India may be relevant on the analogy of Order 38 Rule 5 of the Code of Civil Procedure, but would have no relevance at all on the interpretation of the Section with reference to the legal question : whether a loosing party having nothing awarded in its favour can seek an interim measure under Section 9 of the Arbitration and Conciliation Act, 1996.

13. Now, the decision of the Division Bench of the Bombay High Court would not be binding on this Court, and perhaps would have only a persuasive value.

14. We do not find any reasons in the impugned decision by the learned Single Judge interpreting Section 9 of the Arbitration and Conciliation Act, 1996. After distinguishing the law declared by the Bombay High Court in *Dirk*'s case (supra), the decision proceeds as if the law is that even a loosing party, having no enforceable claim under an award, can seek an interim measure against the opposite party.

15. We thus proceed to answer the basic question : Whether a party which has lost before an Arbitral Tribunal and has no enforceable claim under an award is entitled to seek an interim measure against the winning party?

16. Section 9 of the Arbitration and Conciliation Act, 1996 reads as under:-

> *"**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 authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing 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."*

17. We highlight the catchwords of Section 9 : *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.*

18. A plain textual reading of the above indicates that at any stage of the proceedings, before, during or after the making of the arbitral award (but before it is executed) a party to an arbitration agreement may approach the Court seeking interim measures. The word ***'but'*** can either be a conjunction or a proposition or a noun or an adverb. In the textual setting in which the word ***'but'*** finds itself in the section, it is obviously not used as a noun or an adverb. Whether the word ***'but'*** is read as a conjunction or proposition would make no difference because if read as a conjunction, the section would read : *'A party may, before or during arbitral proceedings or at any time after the making of the arbitral award* ***and not*** *before it is enforced'*

and if read as a proposition, the section would read : *A party may, before or during arbitral proceedings or at any time after the making of the arbitral award* ***except*** *before it is enforced'.*

19. As noted by the Division Bench of the Bombay High Court Section 2(h) of the Arbitration and Conciliation Act, 1996 defines *'party'* to mean *'a party to an arbitration agreement'*. And thus literally read the section could mean that any party, irrespective of whether or not it has or can have an enforceable claim in its favour, can avail the remedy under Section 9 of the Arbitration and Conciliation Act, 1996.

20. In paragraph 12 and 13 of its opinion, the Division Bench of the Bombay High Court has opined as under:-

> *" 12. Two facets of Section 9 merit emphasis. The first relates to the nature of the orders that can be passed under clauses (i) and (ii). Clause (i) contemplates an order appointing a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings. Clause (ii) contemplates an interim measure of protection for: (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; and (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration; (d) an interim injunction or the appointment of a receiver; and (e) such other interim measure of protection as may appear to the Court to be just and convenient. The underlying theme of each one of the sub-clauses of clause (ii) is the immediate and proximate nexus between the interim measure of protection and the preservation, protection and securing of the subject-matter of the dispute in the arbitral proceedings. In other words, the orders that are contemplated under clause (ii) are regarded as interim measures of protection intended to protect the claim in arbitration from being frustrated. The interim measure is intended to safeguard the subject-matter of the dispute in the course of the arbitral proceedings. The second facet of Section 9 is the proximate*

nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement. Now it is in this background that it is necessary for the Court to impart a purposive interpretation to the meaning of the expression "at any time after the making of the arbitral award but before it is enforced in accordance with section 36". Under Section 36, an arbitral award can be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the Court. The arbitral award can be enforced where the time for making an application to set aside the arbitral award under Section 34 has expired or in the event of such an application having been made, it has been refused. The enforcement of an award enures to the benefit of the party who has secured an award in the arbitral proceedings. That is why the enforceability of an award under Section 36 is juxtaposed in the context of two time frames, the first being where an application for setting aside an arbitral award has expired and the second where an application for setting aside an arbitral award was made but was refused. The enforceability of an award, in other words, is defined with reference to the failure of the other side to file an application for setting aside the award within the stipulated time limit or having filed such an application has failed to establish a case for setting aside the arbitral award. Once a challenge to the arbitral award has either failed under Section 34 having been made within the stipulated period or when no application for setting aside the arbitral award has been made within time, the arbitral award becomes enforceable at the behest of the party for whose benefit the award enures. Contextually, therefore, the scheme of Section 9 postulates an application for the grant of *an interim measure of protection after the making of an arbitral award and before it is enforced for the benefit of the party which seeks enforcement of the award. An interim measure of protection within the meaning of Section 9(ii) is intended to protect through the measure, the fruits of a successful conclusion of the arbitral proceedings. A party whose claim has been rejected in the course of the arbitral proceedings cannot obviously have an arbitral award enforced in accordance with Section 36. The object and purpose of an interim measure after the passing of the arbitral award but before it is enforced is to secure the property, goods or amount for the benefit of the party which seeks enforcement.*

13. The Court which exercises jurisdiction under Section 34 is not a court of first appeal under the provisions of the Code of Civil Procedure. An appellate court to which recourse is taken against a decree of the trial Court has powers which are co-extensive with those of the trial Court. A party which has failed in its claim before a trial Judge can in appeal seek a judgment of reversal and in consequence, the passing of a decree in terms of the claim in the suit. The court to which an arbitration petition challenging the award under Section 34 lies does not pass an order decreeing the claim. Where an arbitral claim has been rejected by the arbitral tribunal, the court under Section 34 may either dismiss the objection to the arbitral award or in the exercise of its jurisdiction set aside the arbitral award. The setting aside of an arbitral award rejecting a claim does not result in the claim which was rejected by the Arbitrator being decreed as a result of the judgment of the court in a petition under Section 34. To hold that a petition under Section 9 would be maintainable after the passing of an arbitral award at the behest of DIPL whose claim has been rejected would result in a perversion of the object and purpose underlying Section 9 of the Arbitration and Conciliation Act, 1996. DIPL's application under Section 9, if allowed, would result in the grant of interim specific performance of a contract in the teeth of the findings recorded in the arbitral award. The interference by the Court at this stage to grant what in essence is a plea for a mandatory order for interim specific

> *performance will negate the sanctity and efficacy of arbitration as a form of alternate disputes redressal. What such a litigating party cannot possibly obtain even upon completion of the proceedings under Section 34, it cannot possibly secure in a petition under Section 9 after the award. The object and purpose of Section 9 is to provide an interim measure that would protect the subject-matter of the arbitral proceedings whether before or during the continuance of the arbitral proceedings and even thereafter upon conclusion of the proceedings until the award is enforced. Once the award has been made and a claim has been rejected as in the present case, even a successful challenge to the award under Section 34 does not result an order decreeing the claim. In this view of the matter, there could be no occasion to take recourse to Section 9. Enforcement for the purpose of Section 36 as a decree of the Court is at the behest of a person who seeks to enforce the award."*

21. No doubt, literally read, as observed by us in paragraph 19 above, Section 9 of the Arbitration and Conciliation Act, 1996 can be availed of even by the loosing party having no enforceable claim.

22. It may be true that there are a large number of decisions and notably the decisions reported as (1832) 2 D. & Cl. (H.L.) 480 *Warburton v. Loveland*; (1864) 2 H. & C. 431 *Att.- Gen. v. Sillem*; (1881) 8 Q.B.D. 125 *Att.- Gen. V. Noyes*; (1889) 24 Q.B.D. 1 *Hornsey L.B. v. Monarch Investment Building Society*; [1891] A.C. 401 *M'Cowan v. Baine*; [1897] A.C. 22 *Salomon v. Salomon*; [1922] 1 A.C. 1 *Sutters v. Briggs*; [1959] 1 W.L.R. 995 *I.R.C. v. Collco Dealings, Same v. Lucbor Dealings*; [1954] 1 Q.B. 439 (D.C.), *Cf. Gluchowska v. Tottenham Borough Council* wherein it has been held that where the language of an Act is clear and explicit, effect must be given to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.

23. But, that is not the end of the matter because those who are in the know of the affairs of the law, would accept that law is not a logical code and this explains a series of judgments that the ratio of a decision is the law declared in the context of the facts of a particular case and not what logically flows there from.

24. It has been pertinently observed in the decision reported as (1914) 1KB 641 *Camden (Marquis) v. IRC*:-

> *"It is for the court to interpret the statute as best it can. In so doing the court may no doubt assist itself in the discharge of its duty by any literary help which it can find, including of course the consultation of standard authors and references to well known and authoritative dictionaries."*

25. In the decision reported as AIR 1963 SC 1241 *State of W.B. v. Union of India*, the Supreme Court held that a Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs.

26. In the decision reported as (1871) L.R. 6 C.P. 365 *Abel v. Lee* it was observed by Willes J. that *'no doubt the general rule is that the language of an Act is to be read according to its ordinary grammatical construction unless so reading it would entail some absurdity, repugnancy, or injustice.'*

27. Thus, we would find that there are two underlying principles while interpreting a statute and the same would be that one fundamental rule : '*verbis legis non est recedendum'* which means that the words of a statute must not be varied has to be harmoniously applied with the second rule that the intention of the legislature has also to be given effect to because *'Index animi sermo est - Speech after all is the index of the mind'.*

28. As was held in the decisions reported as AIR 1961 SC 1491 *Jivabhai*

v. Chhagan, and (2008) 9 SCC 527 *Union of India v. Prabhakaran Vijaya Kumar* if a provision is capable of more than one construction, that construction should be preferred which furthers the policy of the Act and is more beneficial to those in whose interest the Act may have been passed and the doubt, if any, should be resolved in their favour.

29. In the decision reported as (1982) 1 SCC 159 *Chinnamarkathian alias Muthu Gounder v. Ayyavoo alias Periana Counder*, the Supreme Court observed that it is a well settled canon of construction that in construing the provisions of such enactments, the Court should adopt that construction with advances, fulfils and furthers the object the Act rather than the one which would defeat the same and render the protection illusory.

30. In the decision reported as (1986) 2 SCC 237 *Girdhari Lal & Sons Vs. Balbir Nath Mathur & Ors*. the Supreme Court observed :-

> *"The primary and foremost task of a court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the Court must then strive to so interpret the statute as to promote and advance the object and purpose of the enactment. For this purpose, where necessary the court may even depart from the rule that plain words should be interpreted according to their plan meaning. There need be no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so called golden rule of construction so as to give effect to the object and purpose of the enactment by supplementing, the written word if necessary."*

31. Words must be interpreted in a manner and given meaning to render the provision workable in a fair manner. There is a presumption that the legislature would not enact a section which produces unjust or inconvenient results. Rule of law presumes and enforces minimum standard of fairness

both substantive and procedural. In the decision reported as (2003) 3 SCC 485 *Chanchal Goel (Dr.) Vs. State of Rajasthan*, the Supreme Court referred to *D.Smith*'s Administrative Law and approved observations in the decision reported as (1997) 3 All ER 577 *Pierson v. Secretary of State for Home Department*, while discussing the plea of legitimate expectation. In *Pierson*'s case (supra), Lord Steyn referred to *Cross on Statutory Interpretation* (Third Edition, 1995), and observed:-

> *"Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules… Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament. Examples are the principles that discretionary powers conferred in apparently absolute terms must be exercised reasonably, and that administrative tribunals and other such bodies must act in accordance with the principles of natural justice. One function of the word 'presumption' in the context of statutory interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles. There is a 'presumption' that mens rea is required in the case of statutory crimes, and a 'presumption' that statutory powers must be exercised reasonably. These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction, and they may be described as 'presumptions of general application'.... These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text...."*

32. Guided as aforesaid, we agree that the reasoning by the Division Bench of the Bombay High Court is correct and thus we adopt the same as our reasoning.

33. The criticism of the view taken in *Dirk*'s case (supra) by the learned counsel for the respondent, premised on Article 9 of the UNCITRAL Model Law which reads : '*Arbitral agreement an interim measures by Court. It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure or protection and for a Court to grant such measure.*' is noted by us and rejected for the reason the legislative intent in India to confer power on a Court post award by way of an interim measure does not mean that the legislative intent was to vest an all embracing, all pervading power in favour of any party, irrespective of it being the loosing party.

34. A party like the Organizing Committee which has its claims rejected, except a part, but which subsumes into the larger amount awarded in favour of the opposite party, even if succeeds in the objections to the award would at best have the award set aside for the reason the Arbitration and Conciliation Act, 1996 as distinct from the power of the Court under the Arbitration Act, 1940, does not empower the Court to modify an award. If a claim which has been rejected by an Arbitral Tribunal is found to be faulty, the Court seized of the objections under Section 34 of the Arbitration and Conciliation Act, 1996 has to set aside the award and leave the matter at that. It would be open to the party concerned to commence fresh proceedings (including arbitration) and for this view one may for purposes of convenience refer to sub- Section (4) of Section 43 of the Arbitration and Conciliation Act, 1996. It reads: -

> "43.***Limitations-***
>
> *(1) xxxxx*
>
> *(2) xxxxx*
>
> *(3) xxxxx*
>
> *(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."*

35. In view of the opinion expressed by us with reference to Section 9 of the Arbitration and Conciliation Act, 1996, the application filed by the respondent seeking an interim measure post award was not maintainable and thus we do not decide the second issue concerning the prima-facie merits of the claim.

36. We allow the appeal and set aside the impugned order dated February 26, 2014.

37. Pursuant to interim orders passed in the OMP and thereafter in the appeal the validity of the bank guarantee in question is till September 30, 2014, needless to state the bank guarantee in question would stand discharged.

38. Parties shall bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 18, 2014
mamta/skb