Nimbus Communications Limited Vs Board of Control for Cricket in India and another

Appeal (Lodg.) No. 90 of 2012 in Arbitration Petition (Lodg.) No. 43 of 2012

Court: Bombay High Court

Date of Decision: Feb. 27, 2012

Acts Referred:
Arbitration and Conciliation Act, 1996 â€" Section 36, 9#Civil Procedure Code, 1908 (CPC) â€" Order 38 Rule 5#Specific Relief Act, 1963 â€" Section 14(3)

Citation: (2012) 6 ALLMR 357 : (2012) 4 ARBLR 113 : (2012) 5 BomCR 114 : (2013) 1 MhLj 39

Hon'ble Judges: M.S. Sanklecha, J; D.Y. Chandrachud, J

Bench: Division Bench

Advocate: Virag Tulzapurkar, with Mr. Anil Menon, instructed by Anil Menon and Associates in appL 90/2012, Dr. Virendra Tulzapurkar, with Mr. H.N. Thakore, Mr. Pranav Sampat, Mr. Rizvi Nasir, instructed by Thakore Jariwala and Associates in appL 91/0212 and 92/2012, for the Appellant; Virag Tulzapurkar with Mr. Anil Menon, instructed by Anil Menon and Associates for Respondent No. 2 in APP (L) 91/2012 and 92/2012, Mr. Rafique Dada with Mr. T.N. Subramanian , Mr. P.R. Raman, Ms. Akhila Kaushik, Nikhil Sakhardande, Indranil Deshmukh, Rahul Mascarenhas and Mr. Adarsh Saxena, instructed by Amarchand Mangaldas and S.A. Shroff and Co. for Respondent No. 1 in all Appeals, for the Respondent

Judgement

Dr. D.Y. Chandrachud, J.

Admit. With the consent of Counsel and at their request the Appeals are taken up for hearing and final disposal.

1. These three appeals arise out of an order passed by a learned Single Judge on 19 January 2012 on an application for ad interim relief in a

petition u/s 9 of the Arbitration and Conciliation Act 1996 and from an ad interim order dated 27 January 2012 on a Chamber Summons for

amendment of the petition u/s 9. Two appeals against the order dated 19 January 2012 and against the order dated 27 January 2012 have been

filed by the Second Respondent to the arbitration petition. One appeal by the First Respondent is against the order dated 19 January 2012.

2. All the appeals have been placed together by consent for hearing and final disposal and since the issues are common, they have been disposed

of by this judgment. For convenience of reference it would be appropriate to refer to the parties as they appear in the arbitration petition u/s 9.

3. On 15 October 2009 a Media Rights Licensing Agreement was entered into between the Board of Control for Cricket in India (the Petitioner)

and Nimbus Communications Limited (the First Respondent). Under the agreement, the Petitioner granted to the First Respondent during the

period commencing from 1 April 2010 until 31 March 2014 inter alia television rights, radio rights, and licensee mobile rights on an exclusive basis

in relation to the territory covered by the agreement. The agreement stipulated that the First Respondent would pay to the Petitioner an amount of

Rs. 31.25 Crores for every match, be it a one day international, a test match or a 20/20 international match. The payment terms inter alia stipulated

as follows:

Licensee specifically acknowledges that Licensor is in negotiations with the ICC and the Cricket Boards of various countries to finalise the Future

Tours Programme (FTP) for all"" bilateral cricket tours by the Indian National Team from April 2010 onwards and changes are likely to take

place in the above schedule of Matches. To the extent any series or Match/Matches is/are either increased or reduced in any year during the Rights

Period, the Rights Fee payable will be pro rata increased for the extra series or Match/Matches, as the case may be, or decreased to the extent of

the series or Match/Matches reduced, as the case may be, based on the Per Match Value stated above for all the series or Matches as included in

the schedule below or New series scheduled by Licensor. It being understood and agreed by licensee that if Licensor decides to schedule a Tri

series the amount paid per match will remain as per the Per match Value defined above.

4. Under clause 7.2 the rights fee was to be paid by the licensee, the First Respondent, to the Petitioner in installments and by the due dates

indicated in the schedule. 50% of the fee was payable not later than thirty days before the commencement of each series, while the balance was

payable within sixty days after the scheduled date of the last match of the series. Clause 13 of the agreement stipulated that the First Respondent

shall not assign, sub-contract or otherwise part with the benefit of the agreement without the prior written consent of the Petitioner, which was not

to be unreasonably delayed. However, the First Respondent was entitled to assign the rights and benefits granted under the agreement to any

affiliate without the consent of the licensor, it being agreed that the First Respondent shall remain fully and primarily responsible for and liable to the

licensor for the performance of the agreement. The expression ''affiliate was'' defined in the agreement as follows :

Affiliate shall mean any person controlling, controlled by or under common control with a specified person and, for the ""control"" means the power

of a person (directly or indirectly) to direct or cause the direction of the management and polices of any other person or the ownership (directly or

indirectly) of more than fifty percent (50%) of the equity or capital of, or the voting power in, any other person.

5. Parties therefore contemplated that the First Respondent would be entitled to assign the rights and benefits granted under the agreement inter

alia to an entity which the First Respondent controlled by exercising more than 50% of the voting power in the equity capital.

6. After the execution of the agreement, on 15 October 2009 parties arrived at two addenda respectively on 21 October 2009 and 22 August

2011.. As permitted by the agreement between the Petitioner and the First Respondent, the First Respondent in turn entered into an agreement

with the Second Respondent, called the Television Rights Agreement on 16 October 2010. The agreement stated that the First Respondent had

been granted certain exclusive commercial and media rights by the Petitioner for all international cricket matches organised by the Petitioner in

India under a Media Rights Agreement. By the agreement between the First and Second Respondents, the First Respondent granted to the

Second Respondent, in consideration for a media rights free, broadcast rights for the territory to the events taking place during the term subject to

the conditions set out in the agreement. The broadcast rights granted to the Second Respondent comprised solely of the exclusive right to

broadcast the event in the territory by means of television rights with a commentary in English. Clause 6 of the agreement sets out a Media Rights

Fee payable to the First Respondent by the Second Respondent, while clause 7 spells out the installments for making payment.

7. There is no dispute about the fact that payments which were due and payable by the First Respondent to the Petitioner in 2010-11 in respect of

the series against Australia and New Zealand were duly paid. The schedule of matches for 2011-12 included a series each against England and

West Indies. For the series against England an amount of Rs. 103.40 Crores was due and payable towards the second installment on 29

December 2011, which has not been paid. In respect of the series against West Indies, an amount of Rs. 63.78 Crores was due and payable on 6

October 2011 towards the first installment and an amount of Rs. 137.87 Crores was due and payable against the second installment on 11

February 2012 which was not paid. A total amount of Rs. 305.06 Crores is claimed by the Petitioner as being due and payable by the First

Respondent. This claim is in respect of matches which were held and which were telecast by the Second Respondent. The First Respondent has

not paid the amount which the Petitioner has claimed to be due and payable despite a demand.

8. At this stage, it may be necessary to advert to the fact that the First Respondent had furnished bank guarantees in the amount of Rs. 1647

Crores to the Petitioner. The bank guarantees were invoked and it is common ground before the Court that the banks which had issued the

guarantees have declined to pay. The Petitioner has filed three suits against three banks which are pending.

9. An arbitration petition was filed before the learned Single Judge by the Petitioner u/s 9 of the Arbitration and Conciliation Act 1996. The reliefs

which were sought in the petition were -(i) A direction to the Respondents to deposit all monies which they had received from advertisements as

consideration for the broadcast of advertisements on the television channel during the 2011 cricket series under the Media Rights Licensing

Agreement; (ii) An injunction against the Respondents restraining them from calling upon the advertisers to pay the amounts that may be due to the

Respondents or to either of them for the broadcast of advertisements on television during 2011 cricket series with a further direction to the

Respondents to call upon the advertisers to deposit the amounts owed in this Court; (iii) In the alternative, an injunction restraining the Second

Respondent from paying over any sum to the First Respondent with a further direction to deposit the amount in Court; (iv) A disclosure of the

amounts already received or receivable from the advertisers; and (v) A direction to the First Respondent to furnish security in the form of a deposit

in cash to secure the recovery and realisation of the dues payable by the First Respondent to the Petitioner. During the pendency of the arbitration

petition, a Chamber Summons has been taken out for amendment.

10. The learned Single Judge by an ad interim order dated 19 January 2012 issued the following directions :

(i) Pending the hearing and final disposal of the arbitration proceedings and the implementation of the award therein, the respondents shall deposit

all monies which they have already received from the advertisers as consideration for broadcast of advertisements on the television channel/s

owned and operated by the respondents in relation to the 2011 cricket series under the MRLA in this Court.

(ii) Pending the hearing and final disposal of the arbitration proceedings and the implementation of the award therein, the respondents shall call

upon the advertisers, listed in Exhibit "T" to the petition to deposit the amount owed by them to the respondents or either one of them towards

consideration for broadcast of advertisements on the television channel/s owned and operated by the respondents in relation to the 2011 cricket

series under the MRLA in this Court.

(iii) The respondents shall disclose the amounts already received and/or receivable from each of the advertisers listed in "T" to the petition, towards

consideration for broadcast of advertisements on the television channel/s owned and operated by the respondents in relation to the 2011 cricket

series.

(iv) The 1st respondent shall, within four weeks from today, furnish security by depositing in this Court, a sum of Rs. 305 crores.

(v) Upon receipt of any amounts, the Prothonotary & Senior Master shall invest the same in fixed deposit of a Nationalized bank, initially for a

period of one year and thereafter for like periods of one year each.

(vi) Liberty to apply for enhancement of the security and further orders.

(vii) It is clarified that this order shall operate to an aggregate extent of only Rs. 305 crores. For instance, if security is furnished under clause (iv)

above, it will not be necessary to deposit further amounts under clauses (i) and (ii) above.

11. By a separate order that was passed on 27 January 2012, the learned Single Judge has issued the following directions on the application for

amendment:

Respondent No.1 shall not dispose of, alienate, encumber, part with possession of or create any third party rights in respect of the shares held by

respondent No.1 in respondent No.2, without giving the petitioner s advocates notice of at least two weeks." This injunction shall apply in respect

of the shares held and the accretions thereto of any nature whatsoever. Further the shareholding pattern of respondent No.2 shall also not be

modified without giving the petitioner s advocates notice of two" weeks.

12. The Second Respondent to the arbitration petition has filed two appeals against the orders respectively passed by the learned Single Judge on

19 and 27 January 2012. The First Respondent has filed an appeal which is confined to the correctness of the order passed by the learned Single

Judge on 19 January 2012. The learned Single Judge was of the view prima facie that an amount of Rs. 305 Crores is due and payable by the First

Respondent to the Petitioner under the Media Rights Licensing Agreement dated 15 October 2009. The learned Judge held that- (i) There were

defaults in the payment of the outstandings by the First Respondent; (ii) The First Respondent is under financial distress; (iii) The Second

Respondent is a wholly owned subsidiary of the First Respondent as stated by the First Respondent before this Court in a prior arbitration petition;

(iv) The agreement between the First and Second Respondents was an internal commercial arrangement designed to implement the Media Rights

Licensing Agreement between the Petitioner and the First Respondent; (v) The First Respondent has in fact averred in its arbitration petition that

the broadcast business which is being conducted by the Second Respondent is the business of the First Respondent; (vi) The Petitioner is no

longer secured by the bank guarantees because the banks have refused to pay; (vii) There is an admission of liability contained in the balance-sheet

of the First Respondent as of 31 March 2010; (viii) The Second Respondent being a wholly owned subsidiary of the First Respondent, the

shareholding of the Second Respondent constitutes a valuable asset of the First Respondent. In that view of the matter, the Second Respondent

being a separate entity would make no difference. On these findings, the learned Single Judge directed the Respondents to deposit all amounts

which may have been received from the advertisers and which may be received hereafter in Court to secure the claim in arbitration. The First

Respondent has been directed to furnish security in the amount of Rs. 305 Crores by a deposit in Court. The learned Single Judge has clarified that

the order would operate only to the extent of an aggregate amount of Rs. 305 Crores. Moreover, if the First Respondent complies with the

direction to furnish security in the amount of Rs. 305 Crores, then it would not be necessary to deposit any further amount out of the revenues

earned through advertisements.

13. All the three appeals have been heard together. During the course of the hearing of the appeals, the extent of the controversy that arises in

these appeals has narrowed down in view of the statement which has been made on behalf of the original Petitioners before the Court. Learned

senior counsel appearing on behalf of the Petitioners has stated before the Court that since only an application for ad interim relief was made

before the learned Single Judge, the Petitioner does not seek any ad interim relief as against the Second Respondent at the present stage, without

prejudice to its rights and contentions at the hearing of the arbitration petition to apply for appropriate reliefs as prayed both against the First and

Second Respondents. During the course of the hearing, it has also been agreed upon by the learned counsel before the Court that the Chamber

Summons for amendment which has been taken out by the Petitioner may be allowed. Accordingly, by consent Chamber Summons 249 of 2012

for amendment shall stand allowed and the amendment shall be carried out within a period of one week from today. Since it has been clarified

before this Court that the ad interim application is not being pressed at this stage as against the Second Respondent, that part of the order of the

learned Single Judge would have to be suitably modified in the final directions that would be issued in the appeal. The principle issue that now

remains for consideration relates to the direction that has been issued by the learned Single Judge calling upon the First Respondent to the

arbitration petition to furnish security in the amount of Rs. 305 Crores by a deposit of a like amount in Court.

14. Learned Senior Counsel appearing on behalf of the First Respondent, Nimbus Communications Ltd., submitted that -

(i) Section 9(ii)(b) empowers the Court to grant an interim measure of protection to secure the amount in dispute in arbitration. However, the

power which is exercised by the Court u/s 9(ii)(b) can be exercised only subject to the conditions which are spelt out in Order 38 Rule 5 of the

CPC 1908 in view of the judgment of the Supreme Court in Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., .

(ii) The entire basis on which relief has been sought u/s 9(ii)(b) as spelt out in paragraph 9 of the arbitration petition is on the hypothesis that the

First Respondent may secrete monies receivable from the advertisers in order to obstruct or delay the execution of the dues of the petitioner. The

First Respondent, it has been urged, has stated on an affidavit and reiterates before the Court that no amount is due and receivable from

advertisers by the First Respondent and hence the basis on which relief has been sought u/s 9 is not existent. Except for this circumstance, no case

has been made out for the grant of any order on principles analogous to those set out in Order 38 Rule 5; and

(iii)The First Respondent has a substantial defence to urge as against the claim of the Petitioner on the following grounds:

(a) The scheme of payment in the Media Rights Licensing Agreement contemplated that a series between India and Pakistan would be held in

2011-12 which did not take place;

(b) In breach of the representations and warranties made by the petitioner to the First Respondent in clause 9 of the agreement the best possible

team was not selected to tour the West Indies and all the top players of the Indian Team were rested during the series;

(c) The addendum to the agreement would require that the guarantee of Rs. 1600 Crores would have to be reduced pro rata upon the cancellation

of the series with Pakistan. As a matter of fact, the Petitioner did not reduce the quantum of the guarantees and proceeded to invoke the full

amount. Consequently, even assuming that the Petitioner has a claim as against the First Respondent on account of dues which were payable for

the matches which were telecast in the series against England and West Indies, the First Respondent would be entitled to set up a counter claim

and/or to set up a claim for damages in the arbitral proceedings.

15. On the other hand it has been urged on behalf of the original Petitioner by the learned senior counsel that -

(i) The object and purpose of an interim measure of protection u/s 9(ii)(b) is to secure the amount in dispute in arbitration and those provisions are

not curtailed or restricted by those contained in Order 38 Rule 5 of the CPC 1908. The judgment of the Supreme Court in Adhunik Steels (supra)

was specifically in the context of the grant of an interlocutory injunction where the Supreme Court held that the general principles relating to the

grant of injunction inter alia in the Specific Relief Act would govern;

(ii) The basis on which the Court has been moved u/s 9 for securing the amount in dispute is that there is an amount admittedly due and payable as

a result of the fact that the matches in question were telecast and despite the clear terms of the agreement payment of Rs. 31.25 crores per match

has not been effected. The First Respondent is in grave financial difficulty and it is on the record of the Court to state that the main source of

revenue generation is the exploitation of the media rights which are traceable to the agreement with the Petitioner. The First Respondent is a

chronic defaulter suffering from paucity of funds and an order u/s 9(ii)(b) is necessary in order to secure the claim of the Petitioner in arbitration;

(iii) Even a bare perusal of the nature of the defence is sufficient to indicate that there is absolutely no substance in the contentions raised.

16. Section 9 of the Arbitration and Conciliation Act, 1996 enables a party to apply to the Court either before or during the arbitral proceedings or

at any time after the making of an award but before it is enforced in accordance with Section 36. Clause (ii) enables a party to seek an interim

measure of protection in respect of the following matters :

(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.

17. The provision enunciates that 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. Now it is in this background, that it would be necessary to consider the basic issue raised. The submission of the First

Respondent is that when a Court passes an order providing for an interim measure of protection for securing the amount in dispute in arbitration,

the power can be exercised only subject to the restrictions which are spelt out in Order 38 Rule 5 of the CPC 1908. Order 38 Rule 5 applies in a

situation where at any stage of a suit, the Court is satisfied that the defendant (i) is about to dispose of the whole or part of his property or (ii) is

about to remove the whole or part of his property from the local limits of the jurisdiction of the Court with intent to obstruct or delay the execution

of any decree that may be passed against him. In such an event the Court may direct the defendant either to furnish security in such sum as may be

specified in the order, to produce the property and place it at the disposal of the Court when required or the value of the same or such portion as

may be sufficient to satisfy the decree. The exercise of the power under Rule 5 of Order 38 is thus conditioned by two requirements, the first being

in regard to the conduct of the defendant, in that he is about to alienate his property or to remove it from the jurisdiction of the Court and the

second, the intention of the defendant to obstruct or delay the execution of a decree that may be passed against him. Parliament in the provisions of

Section 9(ii)(b) contemplated an interim measure of protection to secure the amount in dispute in the arbitration. The object underlying the

conferment of the power upon the Court is to ensure that the fruits of an arbitral award which may eventually be passed against the defendant to

the claim are not lost to the claimant by a dissipation of the property in the meantime. The issue as to whether the power which has been conferred

on the Court u/s 9 is hedged in by the specific provisions of the CPC 1908 came up before a Division Bench of this Court initially in National

Shipping Company of Saudi Arabia Vs. Sentrans Industries Limited, . The issue before the Court was whether the power exercisable by the Court

u/s 9(ii)(b) of passing an interim measure for securing the amount in dispute in the arbitration was restricted by the conditions of attachment before

judgment as prescribed under Order 38 Rule 5. Mr. Justice R.M. Lodha (as the Learned Judge then was) speaking for the Division Bench held

that as a principle of law a special provision of the nature embodied in Section 9(ii)(b) cannot be restricted by importing the provisions of Order 38

Rule 5. The Division Bench held that though the power u/s 9(ii)(b) has not been made subject to the stringent provisions of Order 38 Rule 5, the

exercise of the power is guided by the paramount consideration that the claimant who obtains an award in his favour before the arbitrator ultimately

is able to derive the fruits of the adjudication in executing the award. The Division Bench held as follows :

The order u/s 9(ii)(b) is in the nature of interim protection order. In a special provision of the nature like section 9(ii)(b), we are afraid, exercise of

power cannot be restricted by importing the provisions of Order 38, Rule 5 of the CPC as it is. The legislature while enacting section 9(ii)(b) does

not seem to us to have intended to read into it the provisions of Order 38, Rule 5 of the CPC as it is.

.....

The provisions of Order 38, Rule 5 C.P.C. cannot be read into the said provision as it is nor can power of the Court in passing an order of interim

measure u/s 9(ii)(b) be made subject to the stringent provision of Order 38, Rule 5. The power of the Court in passing the protection order to

secure the amount in dispute in the arbitration before or during arbitral proceedings or at any time of making of the arbitral award but before it is

enforced cannot be restricted by importing the provisions set out in Order 38 of C.P.C. but has to be exercised ex debito justitiae and in the

interest of justice. The Court while considering the application for interim protection u/s 9(ii)(b) is guided by equitable consideration and each case

has to be considered in the light of its facts and circumstances. The interim protection order contemplated u/s 9(ii)(b) is granted by the Court to

protect the interest of the party seeking such order until the rights are finally adjudicated by the Arbitral Tribunal and to ensure that the Award

passed by Arbitral Tribunal is capable of enforcement. Though the power given to the Court u/s 9(ii)(b) is very vide and is not in any way

controlled by the provisions of the Code but such exercise of power, obviously, has to be guided by the paramount consideration that the party

having a claim adjudicated in its favour ultimately by the arbitrator is in a position to get the fruits of such adjudication and in executing the Award.

While dealing with the application for direction to the other party to deposit the security of the amount in dispute in the arbitration, the Court also

has to keep in mind the drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that

denial of such order would result in grave injustice to the party seeking such protection order in as much as in the absence of such order, the

applicant party succeeding before the Arbitral Tribunal may not be able to execute the Award. The obstructive conduct of the opposite party may

be one of the relevant considerations for the Court to consider the application u/s 9(ii)(b). The party seeking protection order u/s 9(ii)(b) ordinarily

must place some material before the Court, besides the merits of the claim that order u/s 9(ii)(b) is eminently needed to be passed as there is

likelihood or an attempt to defeat the Award, though as indicated above, the provisions of Order 38, Rule 5 C.P.C. are not required to be

satisfied. The statutory discretion given to the Court u/s 9(ii)(b) must be exercised judicially in accordance with established legal principles and

having regard only to relevant considerations. In our view, this is the proper approach for consideration of the application for interim relief u/s 9(ii)

(b) and we hold that the provisions of Order 38, Rule 5 of the CPC cannot be read as it is and imported in section 9 of the Act of 1996. We also

hod without hesitation that the Court is competent to pass an appropriate protection order of interim measure as provided u/s 9(ii)(b) outside the

provisions of Order 38, Rule 5 Code of Civil Procedure. Each case u/s 9(ii)(b) of the Act of 1996 has to be considered in its own facts and

circumstances and on the principles of equity, fair play and good conscience.

18. In a subsequent decision of the Supreme Court in Arvind Constructions Co. Pvt. Ltd. Vs. Kalinga Mining Corporation and Others, the

Supreme Court held that the power u/s 9 cannot be read as independent of the Specific Relief Act and it could not be contended that the

restrictions placed by the Specific Relief Act cannot control the exercise of the power u/s 9. The Court observed that while entertaining an

application u/s 9, the Court must have the same power for making orders as it has for the purpose of and in relation to any proceedings before it.

Consequently the general rules that govern the Court while considering the grant of an interim injunction at the threshold would be attracted even

while dealing with an application u/s 9. The Court also noted the principle that when a power is conferred under a special statute and is conferred

on an ordinary court of the land, without laying down any special condition for the exercise of that power, the general rules of procedure would

apply. The Supreme Court adverted to the position which was inter alia taken by the Division Bench of this Court that the power u/s 9 is not

controlled by Order 38, Rule 5 of the CPC 1908, but left it open to be determined in an appropriate case.

19. In the decision of the Supreme Court in Adhunik Steels (supra) the Respondent had obtained a mining lease from the State Government of

Orissa and had an agreement with the appellant for raising manganese ore on its behalf. The term of the agreement was ten years with an option to

renew. The respondent issued a notice of termination calling upon the appellant to remove itself from the site contending that its contract was in

violation of the Mineral Concession Rules, 1960. The appellant thereupon moved the District Court u/s 9 for an injunction restraining the

respondent from terminating the contract and from dispossessing it at site. The District Court allowed the application u/s 9. The High Court in

appeal upheld the contention of the respondent that the loss if any that may be sustained by the appellant could be calculated in monetary terms

and that in view of Section 14(3)(c) of the Specific Relief Act, an injunction could not be granted. In that view of the matter, the High Court did not

consider it fit to enquire into the issue of the balance of convenience. Before the Supreme Court it was urged on behalf of the appellant that Section

9 was independent of Order 39 of the CPC 1908 and the exercise of the power was not subject to the provisions contained in the Specific Relief

Act. The Supreme Court dealt with the submission in the following terms :

The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that

the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant

of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of "just and

convenient" while speaking of passing any interim measure of protection. The concluding words of the Section, ""and the court shall have the same

power for making orders as it has for the purpose and in relation to any proceedings before it"" also suggest that the normal rules that govern the

court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary

court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would

govern the exercise of power conferred by the Act.

20. The Supreme Court noted that the power to grant injunction by way of specific relief is covered by the Specific Relief Act 1963, injunction

being a form of specific relief. Section 9, the Supreme Court noted does not contain any special condition nor does it provide for a special

procedure. The Court noted that whether an interim measure should be ordered permitting the appellant to carry on mining operations in the face

of an attempted termination of the contract would lead the court to a consideration of the classical rules for the grant of such an interim measure.

This, it was held, had to be considered based on the well settled principles in that behalf. Consequently the Supreme Court held as follows :

Therefore, on the whole, we feel that it would not be correct to say that the power u/s 9 of the Act is totally independent of the well-known

principles governing the grant of an interim injunction that generally govern the courts in this connection.

21. The Supreme Court directed that while the respondent should not enter into a contract for mining and lifting of minerals with any other entity

until conclusion of the arbitral proceedings, there was no justification in preventing it from carrying on the mining operations by itself.

22. The judgment of the Supreme Court in Adhunik Steels has noted the earlier decision in Arvind Constructions which holds that since Section 9

is a power which is conferred under a special statute, but which is exercisable by an ordinary court without laying down a special condition for the

exercise of the power or a special procedure, the general rules of procedure of the court would apply. Consequently, where an injunction is sought

u/s 9 the power of the Court to grant that injunction cannot be exercised independent of the principles which have been laid down to govern the

grant of interim injunctions particularly in the context of the Special Relief Act 1963. The Court, consequently would be obligated to consider as to

whether there exists a prima facie case, the balance of convenience and irreparable injury in deciding whether it would be just and convenient to

grant an order of injunction. Section 9, specifically provides in sub-clause (d) of clause (ii) for the grant of an interim injunction or the appointment

of a receiver. As regards sub-clause (b) of clause (ii) the interim measure of protection is to secure the amount in dispute in the arbitration. The

underlying object of Order 38 Rule 5 is to confer upon the Court an enabling power to require a defendant to provide security of an extent and

value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should

be furnished is, however, pre-conditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or

remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be passed against him. In view of the

decisions of the Supreme Court both in Arvind Constructions and Adhunik Steels, it would not be possible to subscribe to the position that the

power to grant an interim measure of protection u/s 9(ii)(b) is completely independent of the provisions of the CPC 1908 or that the exercise of

that power is untrammeled by the Code. The basic principle which emerges from both the judgments of the Supreme Court is that though the

Arbitration and Conciliation Act 1996 is a special statute, Section 9 does not either attach a special condition for the exercise of the power nor

does it embody a special form of procedure for the exercise of the power by the Court. The second aspect of the provision which has been noted

by the Supreme Court is the concluding part of Section 9 under which it has been specified that 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. This has been interpreted in both the judgments to mean that the

normal rules that govern the Court in the grant of an interlocutory order are not jettisoned by the provision. The judgment of the Division Bench of

this Court in National Shipping Company (supra) notes that though the power by Section 9(ii)(b) is wide, it has to be governed by the paramount

consideration that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the

arbitration while executing the award. The Division Bench noted that the power being of a drastic nature, a direction to secure the amount claimed

in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave injustice to the

party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought was regarded as being a material

consideration. However, the view of the Division Bench of this Court that the exercise of power u/s 9(ii)(b) is not controlled by the provisions of

the CPC 1908 cannot stand in view of the decision of the Supreme Court in Adhunik Steels.

23. In a recent judgment of a learned Single Judge of the Delhi High Court in Steel Authority of India Ltd. v. AMCIPTY Ltd. O.M.P. 417/2011

decided on 1 September 2011, the judgment of the Division Bench of this Court in National Shipping Company was relied upon. The Delhi High

Court observed that the provisions of Order 38, Rule 5 would serve as a guiding principle for the exercise of the jurisdiction while dealing with a

petition u/s 9 requiring the respondent to furnish security and the basic consideration is that the Court should be satisfied that the furnishing of

security is essential to safeguard the interest of the petitioner.

24. A close reading of the judgment of the Supreme Court in Adhunik Steels would indicate that while the Court held that the basic principles

governing the grant of interim injunction would stand attracted to a petition u/s 9, the Court was of the view that the power u/s 9 is not totally

independent of those principles. In other words, the power which is exercised by the Court u/s 9 is guided by the underlying principles which

govern the exercise of an analogous power in the CPC 1908. The exercise of the power u/s 9 cannot be totally independent of those principles. At

the same time, the Court when it decides a petition u/s 9 must have due regard to the underlying purpose of the conferment of the power upon the

Court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power u/s 9 cannot

be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the CPC 1908, the rigors of every procedural

provision in the CPC 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance

has to be drawn between the two considerations in the facts of each case. The principles laid down in the CPC 1908 for the grant of interlocutory

remedies must furnish a guide to the Court when it determines an application u/s 9 of the Arbitration and Conciliation Act, 1996. The underlying

basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application u/s 9(ii)(b).

25. Now in this background it would be necessary for the Court to determine as to whether a case has been made out for the grant of an ad

interim order in terms of Section 9(ii)(b). Under the agreement dated 15 October 2009 between the petitioner and the First Respondent, the First

Respondent was under a contractual obligation during the term of the contract to deposit 50% of the fee payable not later than thirty days before

the commencement of each series and the balance within sixty days after the scheduled day of the last match of the series. The agreement between

the parties stipulates the consideration payable at Rs. 31.25 crores for each match. The agreement recognises that the Petitioner was in

negotiations with the ICC for bilateral cricket tours of the Indian National Team for April 2010 and changes were likely to be made in the schedule

of matches. Recognising the possibility of a change in schedule, the agreement postulates that to the extent to which matches were increased or

reduced, the right fee payable under the agreement would be modified on a proportionate basis. The contention of the First Respondent based on

the cancellation of the Indo-Pak cricket series would therefore prima facie be in the teeth of the specific contractual provision which parties

incorporated. The First Respondent has also sought to set up the plea in its letter dated 29 December 2011 that the Petitioner failed to perform its

contractual obligation by not selecting some of the leading players for the West Indies series. Reliance has been placed on clause 9.3(c)(iv) to the

effect that the Petitioner represented and warranted that subject to the ICC future tours programmes commitments, the Petitioner shall procure the

strongest possible Indian player representation in each bilateral BCCI event and use its best endeavours to procure the strongest possible

international player representation in such events. Prima facie, the contractual stipulation does not and cannot be read to interfere with the selection

of the Indian Cricket Team. The presence or absence of a particular player or of players cannot furnish the First Respondent a reason not to pay

its dues. The defence which is now sought to be raised appears to be a feeble attempt not to comply with the contractual obligation to pay. The

addendum to the original agreement dated 22 August 2011 similarly stipulated that the value of a bank guarantee provided by the licensee would

stand reduced at the commencement of each year of the rights period or after written confirmation from the licensor of the cancellation of any

matches whichever was later. The Indo-Pak series was proposed to be held in March 2012. The termination in the present case took place on 12

December 2011, prima facie, prior to the date on which a reduction in the value of the bank guarantee was to take effect.

26. As the learned Single Judge has noted, and prima facie for the reasons noted above, the Petitioner has made out more than a strong prima

facie case that an amount of Rs. 305 Crores is due and payable to it by the First Respondent. The First Respondent defaulted in making payments

despite being called upon to do so. The issue as to whether an order u/s 9(ii)(b) ought to have been passed by the learned Single Judge cannot,

however, be founded only on the fact that the Petitioner made out more than a strong prima facie case on merits. The learned Single Judge was

moved by the Petitioner specifically with an averment that the First Respondent had admitted including in its letter dated 12 December 2011 that it

was suffering from a severe financial crunch. The First Respondent, as the Petitioner pointed out had admitted in its arbitration petition that the main

source of revenue generation is through the exploitation of the rights under the Media Rights Licensing Agreement with the Petitioner. The entire

structure of business was built around a business plan involving the exploitation of the rights under the agreement which now stands terminated. In

the circumstances, it was urged that the First Respondent does not have the source or means to clear its outstandings for benefits which had

already been enjoyed under the agreement. Now it is in this context that the Petitioner has submitted in the arbitration petition that the First

Respondent is unable to fulfill its obligations due to a paucity of funds and is likely to utilise the funds which it receives from advertisers. Ultimately it

has been submitted that the First Respondent may utilise the funds which it receives from the Second Respondent with a view to obstruct, defeat or

delay the claim of the Petitioner as also an arbitral award that may be passed in its favour. As the learned Single Judge noted it was necessary to

assess the claim of the Petitioner having regard to the distinct possibility of the Respondents facing a financial crisis in the event that they do not

succeed in the disputes with the Petitioner. The submissions which have been urged on behalf of the Petitioner in the arbitration petition must be

juxtaposed in the context of the case of the First Respondent in its arbitration petition (Arbitration Petition (Lodg.) No.1425 of 2011) before this

Court. Counsel appearing on behalf of the Second Respondent has stated before the Court that at present 89% of the share holding of the Second

Respondent is held by the First Respondent directly or directly. The averments in the petition are to the effect that since 2005, the First

Respondent has entirely invested into Indian cricket/BCCI events; the broadcast business is almost completely dependent on media rights from

BCCI; the most valuable asset of the business of the Second Respondent is the Media Rights Licensing Agreement and if the termination were not

to be stayed, it would result in the closure of the business of the Second Respondent. The First Respondent has also stated that the entire business

of its fully owned subsidiary, the Second Respondent, would be destroyed if the termination were allowed to stand. Hence, in the account of the

business by the First Respondent itself, it is evident prima facie that the media rights from BCCI constitute the fulcrum of the business. The

termination of that business, even according to the First Respondent, would lead to the closure of the Second Respondent, its subsidiary. The

shareholding of the First Respondent in the Second Respondent constitutes a valuable asset : its value would be liable to a serious erosion if the

business of the Second Respondent is brought to a standstill. There is also merit in the contention of the Petitioner that in the copy of the

commercial agreement between the First and Second Respondents that has been placed on the record before this Court, the actual monetary

terms have been blanked out, so as to exclude any assessment of the terms of the commercial bargain between the First and Second Respondents.

Another relevant consideration is that in an affidavit dated 10 January 2012 filed by the Second Respondent to oppose the application for ad

interim relief, it has been stated that the First Respondent has a majority shareholding in the Second Respondent. However, the Second

Respondent is stated to be at an advanced stage of inducting a strategic investor in the company, several offers have been received and as a result

it is likely that the First Respondent will be only a ""minority shareholder going forward.

27. In this view of the matter, and having due regard to the principles which are embodied in Order 38, Rule 5, we are of the view that the learned

Single Judge was justified in calling upon the First Respondent to furnish security in respect of the claim of the Petitioner in the amount of Rs. 305

Crores. Having regard to the provisions of Order 38, Rule 5, it would, however, be appropriate to direct the First Respondent to furnish security.

We are of the view that the ends of justice could be met by a direction to the effect that the First Respondent shall within a period of two weeks

from today furnish solvent security in the form of a bank guarantee of a nationalised bank in the amount of Rs. 305 Crores to the satisfaction of the

Prothonotary and Senior Master.

28. The directions which have been issued by the learned Single Judge shall accordingly stand modified by the following directions :

i) By consent, Chamber Summons 249 of 2012 filed by the Petitioner for amending the petition u/s 9 shall stand allowed. The amendment shall be

carried out within a period of one week from today;

ii) The ad interim order which was passed by the learned Single Judge on 27 January 2012 in the Chamber Summons shall stand extended for a

further period of four weeks from today so as to enable the Petitioner to apply for appropriate relief before the learned Single Judge in the

arbitration petition;

iii) In terms of the statement which has been made by the learned senior counsel appearing on behalf of the Petitioner before the Court, the

application for ad interim relief as against the Second Respondent is not pressed at this stage, leaving it open to the Petitioner to apply before the

learned Single Judge for appropriate reliefs against the Respondents. Consequently, the directions contained in the impugned order of the learned

Single Judge as against the Second Respondent shall stand vacated;

iv) The First Respondent shall furnish solvent security in the form of a bank guarantee of a nationalised bank in the amount of Rs. 305 Crores to the

satisfaction of the Prothonotary and Senior Master within two weeks;

v) All the rights and contentions of the parties are kept open to be urged before the learned Single Judge in the arbitration petition.

The Appeals are accordingly disposed of.

There shall be no order as to costs.