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

Judgment reserved on: 08.08.2011

% Judgment delivered on: 01.09.2011

\+ **O.M.P. 417/2011 & I.A. No. 8837/2011**

STEEL AUTHORITY OF INDIA LTD ..... Petitioner
Through: Mr. Sanjay Jain, Senior Advocate, with Mr. Sunil Kumar Jain, Mr.Parmtma Singh and Mr. Umesh Kumar, Advocates.

versus

AMCI PTY LTD & ANR ..... Respondents
Through: Mr. Rajiv Nayar, Senior Advocate, with Mr. Dhirendra Negi and Mr.Sidharth Sethi, Advocates for the respondent No. 1.

Mr. Arvind Nigam, Senior Advocate, with Mr. Amit Sibal, Mr. Anirudh Das and Ms. Smarika Singh, Advocates for the respondent No.2.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? : **Yes**
2. To be referred to the Reporters or not? : **Yes**
3. Whether the judgment should be reported in the Digest? : **Yes**

J U D G M E N T

VIPIN SANGHI, J.

1. The present petition under Section 9 of the Arbitration & Conciliation Act, 1996 (The Act) is preferred for securing the amount awarded by the International Court of Arbitration (ICC) vide its award dated 10.03.2011 along with future interest of 18% from the date of

award till the date of payment in favour of the petitioner-Steel Authority of India (SAIL).

2. Respondent No. 1 is AMCI Pty Limited, a company incorporated under the laws of Australia and respondent No. 2 is Vale Australia Pty Limited, also a company incorporated in Australia.

3. A contract was executed between the petitioner and the respondent No. 2 dated 23.04.2007 for supply of coal. Subsequently the respondent No.2 was acquired by the respondent No.1 and vide amendment dated 07.06.2007, the respondent No. 1 was added to the contract as the sole seller, and respondent No.2 undertook the obligations as a producer of coal.

4. Though, initially supply of coal was made by respondent No. 2 to the petitioner, but subsequently there was some dispute due to which no further supply was made. The matter was referred to arbitration and the petitioner claimed breach of agreement due to non-supply of coal by the respondents, and consequent damages, which the petitioner claimed to have suffered on account of risk purchase.

5. Both respondents No. 1 and 2 filed their defence before the Arbitral Tribunal and an award was passed on 10.03.2011, inter-alia, awarding the following reliefs:

> *"The tribunal hereby Awards, Adjudges and Directs that:*
>
> *I. The Respondents shall forthwith pay to the claimant damages in the sum of US$ 152,270,789.10.*
>
> *II. The Respondents shall also pay interest on the sum of US$ 152,270,789.10 at the rate of 2.335364% per annum on a simple basis to run from 2 April 2009*

until the date of this award amounting in aggregate to US$6,897,815.48.

III. *The Respondents shall bear and pay the claimant's legal costs and expenses incurred in this arbitration assessed and fixed at US$ 420,072.15.*

IV. *The ICC Court of Arbitration has fixed the costs of arbitration at US$ 320,000. The respondents shall bear the whole of these costs. The respondents must accordingly reimburse the sum of US$ 160,000 to the claimant being the advance on costs paid by the claimant to the ICC.*

V. *All other claims are accordingly rejected."*

6. The respondents have preferred O.M.P. Nos. 414-15/2011 to assail the said arbitral award under Section 34 of the Act before this Court, wherein the Court had issued notice to the petitioner and the said petitions are still pending consideration.

7. The petitioner contends that both the respondents No. 1 and 2 are foreign entities, having no assets or place of business within the jurisdiction of this Court or even within the territory of India. The petitioner submits that respondents' intention is to try to avoid and delay the payment under the award. It is contended that the Court has power to direct preservation of the amount in dispute, in view of Section 9(ii)(b) of the Act, which entitles the Court to secure the amount even after an award has been rendered, but before it is enforced.

8. The petitioner submits that the amount awarded by the Tribunal should be secured, so that the pendency of objections of respondents

No. 1 and 2 to the said award is not exploited by them to evade and avoid payment under the award, if the objections of the respondents are ultimately dismissed by the Court. The submission of the petitioner is that the amount involved is huge, and the petitioner should be secured, so that the petitioner does not have to run after the respondents for recovering the same in different countries and different jurisdictions.

9. The petitioner argues that they are entitled for interim protection because in absence of such protection, the respondents may in the meantime dispose of their assets and there is a possibility that the award may not be executable even if it is affirmed by this Court with the dismissal of the respondents' objections thereto. It is submitted that the award may get frustrated during pendency of the respondents' objections to the award, and that the respondents cannot be allowed to make the award infructuous or redundant.

10. Learned senior counsel for the petitioner has placed reliance on the following decisions in support of his submissions:

(i) ***Delta Construction Systems Limited, Hyderabad Vs. Narmada Cement Company Limited, Mumbai,*** *(2002) 2 BOMLR 225;*

(ii) ***Veda Research Laboratories Limited Vs. Survi Projects,*** *164 (2009) DLT 388;*

(iii) ***CREF Finance Limited Vs. Puri Construction Limited & Others,*** *87 (2000) DLT 449;*

(iv) ***Associated Hotels of India Limited, Delhi Vs. S.B. Sardar Ranjit Singh,*** *AIR 1968 SC 933;*

(v) ***M. Anasuya Devi and Another Vs. M. Manik Reddy & Others,*** *(2003) 8 SCC 565;*

(vi) ***Hindustan Steel Limited Vs. M/s Dilip Construction Co.,*** *AIR 1969 SC 1238;*

(vii) ***M. Sons Enterprises Private Limited & Another Vs. Shri Suresh Jagasia & Another,*** *MANU/DE/0019/2011;*

(viii) ***Canoro Resources Limited Vs. Union of India (UOI),*** *179 (2011) DLT 72.*

11. Upon issuance of notice to the respondents, separate replies have been filed by the respondents No. 1 & 2. Arguments have been advanced on behalf of the respondent No. 1 by Mr. Rajiv Nayar, Senior Advocate, and on behalf of respondent No. 2 by Mr. Arvind Nigam, Senior Advocate. Since the submissions of the learned senior counsel for the respondents are common, and their interest is also common, I am dealing with the submissions of the respondents collectively.

12. The respondents' submission is that the award in question is not duly stamped and consequently the same cannot be relied upon for any purpose by the petitioner. It is urged that the present petition is not maintainable, as the award is not enforceable. Objections have been preferred thereto by the respondents. The prayer made by the petitioner, to seek deposit of the awarded amount, is not maintainable as the award cannot be enforced at this stage. It is urged that there is a casus omissus in the law noticed by the Supreme Court in ***National Aluminium Co. Ltd. Vs. Pressteel & Fabrications (P) Ltd. and***

Another, *(2004) 1 SCC 540*, which the Court cannot provide. It is also argued that the petitioner did not seek any such relief during the arbitral proceedings and, therefore, the petitioner should be taken to have waived its rights. It is submitted that the petitioner is seeking relief in the nature of attachment before judgment, however, the petitioner has failed to make out a case under Order 38 Rule 5 CPC.

13. It is contended that the respondent No. 2 is an entity with a good business and commercial standing. Respondent No. 2 is controlled by another entity called Rio Doce Australia Pty Ltd (RDA), a company incorporated pursuant to the laws of Australia under the Corporations Act, 2001 which owns all of the shares of respondent No. 2. It is submitted that on 12.12.2008, RDA and all of its wholly owned controlled entities at that time, including respondent No. 2 (the RDA Closed Group Entities), entered into a Deed of Cross-Guarantee. The effect of the Deed of Cross-Guarantee is that each of the RDA Closed Group Entities covenants with the trustee of the deed, for the benefit of each creditor of the RDA Close Group Entities, that each of the RDA Close Group Entities guarantees to each creditor payment in full of any debts due and payable. It is submitted that on account of the said Deed of Cross-Guarantee, respondent No. 2 company, a wholly owned entity of RDA, prepares consolidated financial statements in terms of the Australian Law. It is submitted that as on 31.12.2010, RDA and its controlled entities had total assets of Australian Dollars (AUD) $ 2,538,931,197 which included current assets of $ 319,219,561 and non-current assets of $ 2,219,711,636. It is also submitted that as on 31.12.2010 RDA and its controlled entities held total net assets and

equity of AUD $ 805,089,885. The total assets of RDA Closed Group Entities as on 31.12.2010 were to the tune of AUD $ 2,526,667,614. It is also submitted that the immediate parent entity of RDA is Vale International S.A., a company incorporated in Switzerland and the ultimate parent entity of RDA is Companhia Vale do Rio Doce ("Vale"), a company incorporated in Brazil. It is submitted that the Brazilian company aforesaid is one of the world's leading producers and sellers of iron ore, pellets, nickel, fertilizers, copper, aluminum products, coal, bauxite, manganese and ferroalloys. It is submitted that the ultimate parent company is engaged in mineral exploration in 21 countries and has operations in 38 countries. In Australia alone, the respondent No. 2's group employs over 1,000 full time and contract employees including highly experienced management and coal marketing teams. It is stated that the Brazilian company as on 31.12.2010 had total assets of US $ 129,139,000,000. It is submitted that the group to which respondent No. 2 belongs has decided to enter the Indian ocal and steel market and continue to do business in India. Respondent No. 2 is not a fly by night operator. The petitioner's claim for security deposit is baseless and devoid of merit.

14. The respondents have placed on record the financial statement of RDA as well as the ultimate parent entity constituted in Brazil. Both sides have sought to place reliance on various portions of these financial statements in support of their respective arguments with which I shall deal with a little later.

15. Learned senior counsel for the respondents have also relied upon the following decisions in support of their submission:

(i) ***SMJ-RK-SD (JV) Vs. National Highways Authority of India,*** *164 (2009) DLT 655;*

(ii) ***Sterling & Wilson Electricals Pvt. Ltd. Vs. M/s Silicon Graphics Systems (India) Pvt. Ltd,*** *159 (2009) DLT 634;*

(iii) ***Avinash Kumar Chauhan Vs. Vijay Krishna Mishra,*** *(2009) 2 SCC 532;*

(iv) ***State Bank of India and Others Vs. S.N. Goyal,*** *(2008) 8 SCC 92;*

(v) ***Bachhaj Nahar Vs. Nilima Mandal and Another,*** *(2008) 17 SCC 491;*

(vi) ***Maulavi Hussein Haji Abraham Umarji Vs. State of Gujarat and Another,*** *(2004) 6 SCC 672;*

(vii) ***Union of India and Others Vs. Dharamendra Textile Processors and Others,*** *(2008) 13 SCC 369;*

(viii) ***Global Company Vs. National Fertilizers Ltd,*** *AIR 1998 Delhi 397;*

(ix) ***Himachal Futuristic Communication Ltd. Vs. Union of India,*** *2009 (3) Arb. LR 394 (Delhi);*

(x) ***IOCEE Exports Ltd. Vs. Kalyanee Marine & Others,*** *III (2007) BC 93; and*

(xi) ***M/s SMS Tea Estates Pvt. Ltd. Vs. M/s Chandmari Tea Co. Pvt. Ltd,*** *2011 (7) SCALE 747.*

16. The Supreme Court in ***Pressteel & Fabrications (P) Ltd.*** (supra) has held that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the Court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. A perusal of the judgment of the Supreme Court in ***Pressteel & Fabrications (P) Ltd.*** (supra) shows that the Supreme Court did not consider the power vested in the Court under Section 9 of the Act. The observations of the Supreme Court were made *"in regard to the said award"* and not in relation to the subject matter of dispute.

17. What has been held by the Supreme Court in ***Pressteel & Fabrications (P) Ltd.*** (supra), (without stating so in express terms), is that the Court cannot invoke the principles of Order 41 Rule 5 C.P.C. while entertaining objections to an award. This is evident from the observation: *"at one point of time considering the award as a money decree we were inclined to direct the party to deposit the awarded amount in the Court below so that the applicant can withdraw it, on such terms & conditions as the Court might permit it to do as an interim measure"*. Therefore, the objections to the award are not akin

to challenge to a money decree in an Appellate Court, which enables the Appellate Court to require the deposit of the decreed amount or furnishing of security before staying the execution of the decree. In ***Pressteel & Fabrications (P) Ltd.*** (supra), the Supreme Court was dealing with the contention of the appellant that the respondent should make a deposit in terms of the award, only because an award had been rendered in favour of the applicant. It is this submission which was rejected by the Supreme Court by placing reliance on Sections 34 & 36 of the Act.

18. The automatic suspension of the award upon a challenge being raised to the award under Section 34 of the Court, which leaves no discretion in the Court to put the parties to terms, was considered by the Supreme Court as being opposed to the very objective of alternative dispute resolution system to which arbitration belongs. The Supreme Court, therefore, desired that the Parliament may look into this aspect. However, the Supreme Court did not say, and cannot be understood to have said that the rights available to the parties under Section 9 of the Act, post-award and before the award is enforced, also cannot be ventilated, because the petition under Section 34 of the Act to assail an award has been preferred by one or the other party.

19. Section 9 of the Act in terms states that "***a party may***, *before or during the 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 the Court*** *..... ....*". Therefore the power of the Court under Section 9 is not limited only in respect of

such cases, where the arbitral proceedings have either not commenced or are in progress. It extends to even such cases where an arbitral award has come into existence, but is still not in the process of being enforced under Section 36 of the Act.

20. By virtue of Section 36 of the Act, an arbitral award cannot be enforced where an application to assail the arbitral award under Section 34 of the Act is pending disposal.

21. In the present case, the petitioner has not applied, and possibly cannot apply at this stage, to enforce the award in accordance with Section 36 of the Act, for the simple reason that the respondents' objections to the award under Section 34 of the Act are pending consideration in O.M.P. Nos. 414-415/2011.

22. Reliance placed by the respondents on the decisions of this Court in ***Sterling & Wilson Electricals Pvt. Ltd.*** (supra) and ***SMJ-RK-SD (JV)*** (supra) is completely misplaced. Neither of these decisions lay down the proposition that Section 9 cannot be invoked by a party after the award has been rendered by the Tribunal, but before the award is enforced. In ***SMJ-RK-SD (JV)*** (supra), a petition under Section 9 had been preferred by the petitioner to seek a direction to the respondent to release the awarded amount to the petitioner against a matching value of Bank Guarantee during the pendency of the petition under Section 34 of the Act. The ground for seeking release of the amount under the award was the financial hardship being faced by the petitioner. In this background, it was observed by the Court that

provisions of Section 9 could not be invoked to circumvent Section 36 of the Act. The Court, in fact, observed that *"no doubt Section 9 of the Act is applicable post-award as well but it is applicable only for the purpose as provided under Section 9, namely for preservation and interim custody of the subject matter of arbitration agreement or for securing amount in dispute in arbitration or preservation or inspection of any property or things or for appointment of a Receiver"*.

23. There can be no quarrel with the aforesaid observations made by the Court in ***SMJ-RK-SD (JV)*** (supra), and this case in no way advances the submission of the respondents that post-award, and during the pendency of the objections to the award, a petition under Section 9 of the Act is not maintainable.

24. Even in ***Sterling & Wilson Electricals Pvt. Ltd.*** (supra) all that the Court observed, by placing reliance on ***Pressteel & Fabrications (P) Ltd.*** (supra), was that there was no discretion left in the Court to pass any interlocutory order *with regard to the award under challenge,* except to adjudicate on the correctness thereof. This observation has to be read and understood in the context of Section 34. What has been observed by the Court is that merely because an award has been rendered by the Arbitral Tribunal, only on that account, the party in whose favour an award has been rendered does not become entitled to seek the relief, requiring the party challenging the award and against whom it has been rendered, to deposit or pay the awarded amount during pendency of the objections to the award to the opposite party.

25. Reliance placed by the respondents on ***Himachal Futuristic Communication Ltd.*** (supra) is also misplaced. This Court did not hold that a petition under Section 9 is not maintainable after the making of the award and before its enforcement. The Court refused to grant the relief sought under Section 9 on the merits of the case before it. The petitioner had sought an interim measure to direct the respondent to deposit the awarded amount in the Court and to keep it in a Fixed Deposit in a nationalised bank.

26. ***Global Company*** (supra) relied upon by the respondents also has no relevance as that was a case decided on its own merits. Considering the fact that the respondent was a Government of India undertaking, the Court held that there was no real danger of the respondent defeating, delaying or obstructing the execution of the award and on that basis the Court rejected the petition to seek interim measures of protection.

27. Similarly, the decision of the Madras High Court in ***IOCEE Exports Ltd.*** (supra) is a case turning on its own facts and does not support the contention of the respondent.

28. This Court in ***Veda Research Laboratories Ltd.*** (supra) considered a similar objection raised on the maintainability of an application under Section 9 of the Act in proceedings under Section 34 of the Act to challenge the award. The Court held that the ingredient of a prima-facie case is made out once an arbitral award has found a case in favour of a party. The Court also held that while dealing with

an application under Section 9, the Court does not impose any condition on the petitioner challenged in award under Section 34 of the Act to maintain its petition under Section 34 of the Act. An order would be passed under Section 9 of the Act only upon finding a case in favour of the applicant. The Court also observed that the observations of the Supreme Court in ***Pressteel & Fabrications (P) Ltd.*** (supra) were made in the context of imposing conditions on the maintainability of a petition under Section 34, and not in the context of Section 9 of the Act.

29. In ***CREF Finance Limited*** (supra) also, this Court rejected a similar submission. It was held *"In the hiatus created by the conjoint operation of Sections 34(3) and Section 36, a party to the Arbitration cannot be held remediless in this interregnum if the Court is convinced that interim protection, negative or positive, is called for. The Court has not been rendered impotent by the Act even where it desires to grant relief since the circumstances call or it. This would be a logical extension of the ratio established in the* ***Sundaram Finance Ltd. Vs. NEPC India Ltd.****, (1999) 2 SCC 479, and especially in conformity with the opinion expressed in para 11 of the judgment, extracted above. Justice and equity would not countenance a Judge standing by as a mute spectator while a party renders an award worthless and practically unenforceable and nonimplementable."*

30. It was further held that: *"If the Court has power to grant interim relief in anticipation of arbitral proceedings being commenced, there is no warrant for canvassing the stance that it did not have the*

complementary assistery power to ensure that the orders passed in arbitral proceedings are not rendered nugatory".

31. Mr. Jain has submitted that Section 48, which falls in Part II Chapter I of the Act, relates to enforcement of New York Convention awards. Sub-Section (3) for Section 48 enables the Court to order the party challenging the award to give suitable security. He submits that in contradistinction, Section 34 does not enable the Court to require the party challenging the award to furnish a security for the reason that under Section 9, which also falls in part-I like Section 34, the Court is empowered to require the furnishing of the security after the making of the award and before its enforcement, which would include the period during which the award is under challenge under Section 34 of the Act. In the light of the above discussion, I see merit in this submission and accept the same.

32. The submission of the learned senior counsel for the respondents that there is a casus omissus or hiatus in the law does not impress me at all. The scheme of the Act to my mind is very clear. An application under Section 9 can be maintained either before the arbitration proceedings, during the arbitration proceedings or even thereafter till the award is enforced under the Act. Consequently, where an award is under challenge under Section 34 of the Act (which obviously would mean that it is not in the process of enforcement under Section 36 of the Act in the same manner as if it were a decree of the Court), the right to apply for interim measure of protection under Section 9 by one or the other party to the arbitration agreement/ arbitration

proceedings/ arbitration award is preserved. The exclusion of the jurisdiction of the Court under Section 9 to cases where the arbitral award is in the process of being enforced in accordance with Section 36 is easy to explain. Once the award is in the process of being enforced under Section 36 of the Act in the same manner as if it were a decree of the Court, it shall be for the Executing Court enforcing the award to pass appropriate orders of injunction/attachment in respect of the subject matter of the arbitration agreement/award as permitted under the C.P.C.

33. The law should not be interpreted so as to render it ineffective or otiose. The submission of the respondents that merely because the arbitral award is under challenge, the right of the petitioner to invoke Section 9 of the Act is suspended is not only against the express language of Section 9 of the Act, it also does not stand to reason.

34. The hiatus in the law referred to by the Supreme Court in ***Pressteel & Fabrications (P) Ltd.*** (supra) is in relation to the absence of the power of the Court to put the party challenging the arbitral award to terms at the time of entertaining such a challenge. The said hiatus does not relate to the power of the Court to deal with a petition under Section 9 of the Act for grant of interim measures of protection after the making of the award, but before its enforcement.

35. The decisions in ***Dharamendra Textile Processors*** (supra) and ***Maulavi Hussein*** *(supra)* relied upon by the respondents to submit

that the Court cannot provide the casus omissus, therefore, have no applicability in the light of the aforesaid discussion.

36. The submission of the learned counsel for the respondent that the award in question cannot be looked into for any purpose, on account of its not being sufficiently stamped, also does not appear to have any merit. The Supreme Court in ***M. Anasuya Devi*** (supra) rejected the specific plea raised with regard to the deficiency in stamping by holding that the said issue is not required to be gone into at this stage of proceedings under Section 34 of the Act. It was held that the said issue was premature at that stage. The Supreme Court held that: *"**The question as to whether the Award is required to be stamped and registered, would be relevant only when the parties would file the Award for its enforcement under Section 36 of the Act. It is at this stage the parties can raise objections regarding its admissibility on account of non-registration and non-stamping under Section 17 of the Registration Act**. In that view of the matter, the exercise undertaken to decide the said issue by the Civil Court as also by the High Court was entirely an exercise in futility. The question whether an Award requires stamping and registration is within the ambit of Section 47 of the Code of Civil Procedure and not covered by Section 34 of the Act."* (emphasis supplied).

37. As rightly pointed out by learned counsel for the petitioner, the Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant

with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. (See ***Hindustan Steel Limited*** (supra)).

38. In ***M. Sons Enterprises*** (supra), the Court considered and rejected the submission that the decision in ***M. Anasuya Devi*** (supra) was per-incuriam. This Court, in para 10, observed as follows:

> *"10. The recent judgment of the Apex Court in **Anasuya Devi** (supra) cannot be brushed aside as per-incuriam or as sub-silentio on the provisions of the Stamp Act. The Apex Court was very much conscious of the said provisions and it is not as if it pronounced the judgment in ignorance of the same or that the provisions of the Stamp Act have been given a go by. What the Supreme Court has held, examining the scheme of the Arbitration Act, 1996, is that the objections on account of deficiency in stamping and registration fall outside the ambit of Section 34 of the Act. It is not as if, the Supreme Court by adopting the said procedure has contravened the mandatory provisions of the Stamp Act; it is not as if benefits have been permitted to be derived under an insufficiently stamped award. The Supreme Court however has held that the said objection has to be taken at the time of enforcement of the award. In my humble opinion, this is but a pragmatic approach. The common thread running through the 1996 Act is of expediency. If objections under the Stamp Act or the Registration Act were to be permitted to be taken at the stage of Section 34, it would indefinitely delay the disposal of the said proceedings. The Supreme Court thus held that the objections under Section 34 be decided expeditiously without reference to the said pleas. In this manner, the rights of persons against whom the award is pronounced have been preserved. If they are able to establish that on*

account of insufficiency in stamping of the award or non-registration of the award, the person in whose favour the same is made is not entitled to benefit thereof, the award would not be enforced against them. I, therefore, do not find any merit in the contention of the petitioners of the award being liable to be set aside for the said reason and the same is dismissed."

39. In the light of the judgment of the Supreme Court in ***M. Anasuya Devi*** (supra), the decision in ***Avinash Kumar Chauhan*** (supra), which does not pertain to a case under the Act, has no application.

40. Reliance has also been placed by the respondents on ***M/s SMS Tea Estates Pvt. Ltd.*** (supra). This was a case where a Section 11 petition had been preferred to seek appointment of an Arbitrator in terms of an arbitration agreement contained in an unstamped and unregistered agreement. The Supreme Court held that mere non-stamping of the agreement did not render the arbitration agreement invalid and unenforceable. After the defect of stamping is cured as per the provisions of the Stamp Act, the Court could enforce the arbitration agreement. The arbitration agreement contained in an unregistered but mandatorily registerable instrument can also be enforced, as the arbitration agreement itself does not require registration. This decision has no application in the facts of this case as the petitioner is not seeking to place reliance on the agreement between the parties to seek the interim measures of protection. To establish a *prima-facie* case, the petitioner is only seeking to rely upon the arbitration award rendered by the Tribunal in its favour.

41. I may note that even prior to filing of this petition, the respondent has itself preferred a petition under Section 34 of the Act, as aforesaid. If the respondents submission with regard to non-stamping of the award were to be accepted, even the respondent's petition under Section 34 would be liable to be rejected unless the stamp duty in terms of the Stamp Act is made good. However, in view of the decision of the Supreme Court in ***M. Anasuya Devi*** (supra), that cannot be said to be the case.

42. I now turn to examine the question as to what are the guiding principles that the Court would follow while considering a petition preferred under Section 9(ii)(b), and also whether the petitioner has made out a prima-facie case in its favour; whether the balance of convenience is in favour of the petitioner, and; whether the petitioner would suffer an irreparable loss and injury in case the interim measures, as sought by the petitioner, are not granted.

43. In ***Himachal Futuristic Communication Ltd.*** (supra), this Court observed: *"once there is no decree, the powers of the Court to be exercised under Section 9, for granting interim measures in the nature of attachment before judgment, as sought, are the same as in Order 38 or Order 39 of the CPC"*.

44. There are two decisions of Bombay High Court in ***Delta Construction Systems Limited, Hyderabad*** (supra) (Single Bench) and ***National Shipping Company of Saudi Arabia Vs. Sentrans Industries Limited,*** (*2004) 1 ArbLR 409 (DB),* wherein it has been

held that the power of the Court to secure the amount in dispute under arbitration is not hedged by the predicates as set out in Order 38. All that the Court must be satisfied is that an interim measure is required. The party coming to the Court must show that if it is not secured, the award which it may obtain would result in a paper decree or a decree which cannot be enforced on account of acts of a party pending arbitration process. The Division Bench in ***National Shipping Company of Saudi Arabia*** (supra), inter alia, held:

> *"..... .... 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 Code of Civil Procedure 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 Civil Procedure Code as it is. .... the guiding factor for exercise of power by the Court under Section 9(ii)(b) has to be whether such order deserves to be passed for justice to the cause. The provisions of Order 38, Rule 5, CPC cannot be read into the said provision as it is nor can power of the Court in passing an order of interim measure under Section 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 amount 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..... .... Though the power given to the Court under Section 9(ii)(b) is very wide 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..... .... The party seeking protection order under Section 9(ii)(b) ordinarily must place some material before the Court, besides the merits of the claim that order under Section 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, CPC are not required to be satisfied. The statutory discretion given to the Court under Section 9(ii)(b) must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. .... We also hold without hesitation that the Court is competent to pass an appropriate protection order of interim measure as provided under Section 9(ii)(b) outside the provisions of Order 38, Rule 5 of the Code of Civil Procedure. Each case under Section 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. The power of the Court under Section 9(ii)(b) cannot restricted to the power conferred on the Court under Civil Procedure Code though analogous principles may be kept in mind."

45. In proceedings under Section 9 of the Act, at the highest what could be said is that the provisions of Order 38 Rule 5 CPC would serve as the guiding principle for the Court to exercise its discretion while dealing with a petition requiring the respondent to furnish security for the amount in dispute. Since the letter of the law *per se* is not applicable, the requirements set out in Order 38 Rule 5 CPC need not strictly be satisfied, and so long as the ingredients of the said

provision are generally present, the Court would not be unjustified in exercising its jurisdiction to require the respondent to furnish security. The bottom line, in my view, is that the Court should be satisfied that the furnishing of security by the respondent is essential to safeguard the interests of the petitioner.

46. The petitioner has produced the award made by the ICC International Court of Arbitration in its favour. I have already set out hereinabove the operative part of the award. Apart from interest the awarded amount comes to US$ 152,850,861.25. The award has been rendered on a contest to the petitioner's claims by the respondents. It has been conducted under the aegis of the ICC which is internationally recognized as a credible body for conduct of international commercial arbitrations. The arbitral award has been made by an independent sole arbitrator who hails from a nationality other than the nationality of the contesting parties. The award is detailed and prima-facie appears to be comprehensive. The first round in this legal battle has gone in favour of the petitioner. Therefore, the petitioner has made out a prima-facie case in its favour.

47. The relevant averments made in the petition by the petitioner are to the effect that the respondents do not have any asset or place of business within the jurisdiction of this Court, or even within the territory of India. It is also averred that the amount involved in the case is huge. It is also averred that it is most essential that the amount in question, for which the award is made, is secured so that the petitioner can recover the amount and is not forced to run after the

respondents for recovering the same in different countries and different jurisdiction. The petitioner also states that the act and conduct of the respondents may defeat and frustrate the award. They also allege that the respondents have made all attempts to circumvent the due process of law. The petitioner states that in the absence of interim protection, the petitioner will not be able to execute the award and this will frustrate the process of justice. It is also averred that the respondent cannot be allowed to make the award infructuous and/or redundant.

48. According to the respondents, the aforesaid averments are wholly deficient and do not provide justification enough to require the respondent to furnish any security, particularly, in view of the financial position of the respondents detailed hereinabove. It is submitted, by placing reliance on ***S.N. Goyal*** (supra) and ***Bachhaj Nahar*** (supra), that no amount of evidence can be put forward in the absence of necessary pleading and issue, and neither a Trial Court nor the Appellate Court can consider the contention and record a finding in that respect. It has also been held that a Court cannot make out a case not pleaded. The Court should confine its decision to the questions raised in pleadings. The Court cannot grant a relief which is not claimed, and which does not flow from the facts and the cause of action alleged in the plaint.

49. Mr. Jain has submitted that even if it were to be held that the principles of Order 38 Rule 5 CPC are applicable in the present case, even then the petitioner satisfies the conditions laid down therein. He

submits that the obstruction to the execution of any decree that may be passed against the respondents is imminent from the fact that the respondents are, year after year, running into losses. He submits that since the respondents are not having any property within the jurisdiction of this Court, the petitioner's case is on an even higher footing, when compared to one where the respondent is about to remove the whole or any part of its property from the local limits of the jurisdiction of the Court. He further submits that the satisfaction of the Court in the matter could be arrived at either by the affidavit of the petitioner *"or otherwise"*. Therefore, even if the pleadings of the petitioner in the petition are taken to be deficient, the record of the case including the documents filed by the parties can be looked into by the Court to determine whether the guidelines of Order 38 Rule 5 C.P.C. are substantially satisfied.

50. The aforesaid submissions of the respondents could have been accepted, but for the fact that respondents have themselves placed on record the financial report of RDA and its controlled entities which includes respondent no.2, which does not inspire much confidence about the soundness of the financial health of petitioner no.2. The Court is not precluded from looking into materials/documents placed on record to determine the issue whether the respondents should be called upon to furnish security, because, even the strict provision contained in Order 38 Rule 5 C.P.C. enables the Court to arrive at its decision on the basis of an affidavit "or otherwise". The enquiry that the Court undertakes under Order 38 Rule 5 C.P.C. is not limited by the

pleadings of the applicant. This reason for the expansion of the scope of enquiry by the Court appears to be the fact that, very often, the applicant may not even be privy to the relevant facts relating to the non-applicant and they may be in the special knowledge of the non-applicant. In the light of the aforesaid discussion, the decisions of the Supreme Court in ***S.N. Goyal*** (supra) and ***Bachhaj Nahar*** (supra) have no application to the facts of this case. In this case, the respondents are foreign entities. The petitioner's ignorance about the respondents financial condition, at the time of filing of the petition is, therefore, understandable.

51. No doubt, in the present case there is no averment in the petition to the effect that the respondents with *"intent to obstruct or delay the execution"* of the award, in case it is upheld by this Court, is about to dispose of the whole or any of its property. As I have already held, the strict provision of Order 38 Rule 5 C.P.C. cannot be bodily listed and imported into Section 9(ii)(b) of the Act. The facts that RDA, of which respondent No. 2 is a constituent, is running into losses, year after year, and is heavily indebted to Vale International S.A. are sufficient to justify the seeking of an order requiring the respondents to furnish a security. After all, whether the losses are being suffered by the respondents, year after year, with intention to obstruct or delay the execution of the award (in case the award is upheld), or without any such intention, the award may be reduced to a paper award, in case the respondents go under. The position so far as the petitioner is concerned, remains unchanged. It is no solace to a petitioner, who

may not be able to eventually enforce the award because of the respondents becoming financially defunct, that the financial incapacity is not on account of any mal-intentions of the respondents but on account of the respondent going into losses, without intending to do so, so as to obstruct the execution of the award.

52. The consolidated statement of financial report of RDA and its controlled entities for the year ended 31.12.2010 shows that respondent no.2 is one of the many controlled entities of RDA. 100% interest of respondent No. 2 is held by RDA. It also shows that RDA and its controlled entities including respondent no.2 entered into deed of cross guarantee on 12.12.2008. In this deed each company guaranteed the debts of the others. The consolidated statement of comprehensive income of RDA and its controlled entities for the year 2009-10 shows that RDA and its controlled entities have been incurring losses at least for the last two years i.e. 2009 and 2010. While the losses in the year 2009 were AUD $ 134,299,600.00, in the year 2010, the losses stood at AUD $ 54,728,380.00. No doubt, the net assets of RDA and its controlled entities as on 31st December of 2009 and 2010 stood at AUD $ 682,946,636.00 and AUD $ 797,244,212.00 respectively but the same statement also shows that accumulated losses swelled from AUD $ 2,21,594,922.00 in the year ending 2009 to AUD $ 285,297,346.00 in the year ending 31.12.2010. The net cash from operating activities in the year ending 2009 stood at AUD $ 5,938,997 but for the year ending 2010 there was a deficit of AUD $ 93,077,440. The total comprehensive income as shown in the balance

sheet for the year ending on 31.12.2009 and 31.12.2010 were AUD $(-) 324,571,505 and AUD $ (-) 333,437,854.00 respectively.

53. The respondent has tendered in Court a communication dated 29.03.2011 issued by Vale International S.A., Switzerland which is the immediate parent company of RDA regarding confirmation of financial support. Vale International S.A. confirms that at least for a period of 12 months from the date of approval of financial statement of the company i.e. 31.12.2010, Vale International S.A. will not require the repayment of the loan to the company, i.e., RDA, which as on 31.12.2010 stood at AUD 1,214,216,739.00. It has been further certified that the company i.e. RDA will be able to pay the loans incurred in the ordinary course of business as and when they became due and payable.

54. On the other hand, Mr. Jain submits that this letter was "given for the benefit of the addressee only and may not, without our prior written consent, be relied upon by another persons". Moreover, this communication is valid only till 31.12.2011 and it is not likely that the award in question will become executable before that date as the objections to the award are pending consideration and would take some time for disposal. He further submits that this communication also shows that RDA itself is hugely indebted to its parent company to the tune of AUD 1,214,216,739.00. He submits that it clearly shows the lack of inherent financial strength of RDA which includes respondent No. 2.

55. It is very pertinent to note that the loan from Vale International SA. to RDA is AUD $ 1,214,216,739.00, whereas the net asset value of RDA as on 31.12.2010 stood at only AUD $ 797,244,212.00. Therefore, if the debt owed by RDA to Vale International S.A. is sought to be recovered, the entire assets of RDA would stand wiped out, and RDA would still remain indebted. It is not clear whether there are any other outstanding or debts of RDA other than potential those owned to Vale International S.A.

56. While the cross guarantee amongst the constituents of RDA provides confidence to a creditor of any of its constituents, at the same time it also presents a risk, as it is possible that to meet the liabilities of any of the constituents of RDA, the assets of respondent No. 2, shall be appropriated, leading the creditors of respondent No. 2 and other constituents as the risk of not being able to recover their dues.

57. Much emphasis has been laid by Mr. Arvind Nigam, learned senior counsel appearing for respondent no.2 on the annual report for the year 2010 of Vale International S.A., i.e., the ultimate parent company of respondent no.2 incorporated in Brazil. However, despite my repeated query to show as to how the assets of the ultimate parent company Vale S.A. of Brazil could be roped in for meeting the liability of respondent no.2, in case the need therefor arises on a future date, Mr. Arvind Nigam had not been able to give any satisfactory answer to the Court. Merely, because respondent no.2 may be entirely held and controlled through RDA by Vale S.A. Brazil, it does not mean that the liabilities of Vale Australian Pty Ltd., i.e., respondent no.2 would also

attach to the parent company. It is well-settled that the liabilities of the limited liability company cannot be enforced against its shareholders. Therefore, even though Vale S.A. Brazil may be owing and controlling 100% shareholding in respondent No. 2, that itself would not make Vale S.A. liable to satisfy the award in question, in the eventuality of the objection thereto dismissed by this court.

58. The various risk factors disclosed in the annual report of the Vale S.A. read as under:

> ***"(i) We may not be able to replenish our reserves, which could adversely affect our mining prospects."***
>
> ***"(ii) We face rising extraction cots over time as reserves deplete."***
> ***"(iii) We may not have adequate insurance coverage for some business risks."***
>
> ***"(iv) We are involved in several legal proceedings that could have a material adverse effect on our business in the event of an outcome that is unfavourable to us."***
>
> ***"(v) Ineffective project management and other operational problems could materially and adversely affect our business and financial performance."***
>
> ***"(vi) It could be difficult for investors to enforce any judgment obtained outside Brazil against us or any of our associates."***

59. The parent company has disclosed in its report the various legal proceedings that the parent company and its subsidiaries are defending in the normal course of business, including civil,

administrative, tax, social security and labour proceedings. The significant proceedings have been disclosed in the said report. However, the present arbitration does not even find mention in the said report and it shows that the parent company does not even consider the liability arising out of the contract in question between the petitioner and the respondents as a liability that the parent company may eventually have to bear.

60. I have already observed that there is no umbilical cord which connects respondent No. 2 to the ultimate parent company Vale S.A. Vale S.A. is not obliged to meet the liabilities of respondent No. 2. The aforesaid disclosure of risks by the ultimate parent company, also does not help the assurance sought to be given by the respondents on the basis of the financial condition of Vale S.A. at the end of the year 2010.

61. In ***Canoro Resources Limited*** (supra), while denying interim measures under Section 9, this Court had proceeded on the basis of the petitioner being a foreign entity, grant of interim injunction as sought by the petitioner could eventually result in incurring of substantial liability by the petitioner, which may not be recoverable on account of its not being an Indian entity with assets in India.

62. The submission that the petitioner did not seek any interim measure of protection either from any Court or from the arbitral tribunal during the progress of the arbitration proceedings and that, therefore, the petitioner has waived its rights to seek any interim measure of protection at this stage is meritless. It is upto the

petitioner to seek interim measures of protection based on its perception of the strength of its own case as also the need therefor considering, inter alia, the financial status of the opposite party.

63. Merely because the petitioner may not have considered it necessary to seek interim measures of protection earlier, is no ground to argue that such interim measures of protection cannot be sought subsequent to the making of the award. There is no statutory bar to the exercise of its rights by a petitioner under Section 9 of the Act, even if no such right has earlier been pressed either before the Court or before the Arbitral Tribunal.

64. Merely because the petitioner may have sought for a larger relief than what it is entitled to in law, cannot be a ground to decline even that relief to which the petitioner is otherwise entitled to. The petitioner cannot seek the relief that the respondents should pay the awarded amount to the petitioner as that would tantamount to enforcing the award which is still unenforceable. However, there is no impediment in directing the respondents to secure the awarded amount of US$ 152,850,861.25 by furnishing adequate security to the satisfaction of the Registrar General of this Court during the pendency of the respondents objection petition, being O.M.P. Nos. 414/2011 and 415/2011. The petitioner has made out a prima-facie case as already observed. Looking to the financial position of the respondents, respondent No. 2 being a part of RDA, there is every likelihood that if the objections of the respondents to the award in question are dismissed, the petitioner may not be in a position to effectively enforce

the award, as the RDA is running into losses for, at least, the last two years. Consequently, the balance of convenience is in favour of grant of the interim measure of protection. The petitioner shall suffer irreparable injury if the interests of the petitioner are not adequately protected.

65. Accordingly, for the reasons aforesaid, I allow this petition and direct the respondents to furnish security in the sum of US$ 152,850,861.25 to the satisfaction of the Registrar General of this Court within four weeks from today, which shall remain in force, unless the award in question is set aside in O.M.P. Nos. 414/2011 and 415/2011. In the event of the objections to the award dated 10.03.2011 being dismissed by this Court, the security shall continue to remain in force till the said award is enforced by the petitioner in appropriate proceedings. Parties are left to bear their respective costs.

(VIPIN SANGHI)
JUDGE

SEPTEMBER 01, 2011
AS/''BSR''/B