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

Date of Decision: 6th April, 2022

+ O.M.P.(I) (COMM.) 47/2022 & I.As. 2258-59/2022

CANARA BANK

..... Petitioner

Through: Mr. Pradeep Dewan, Senior Advocate
with Ms. Anupam Dhingra, Advocate.

versus

HELM DUNGEMITTEL GMBH

..... Respondent

Through: Mr. A. S. Chandhiok, Senior
Advocate with Mr. Rahul P. Dave,
Mr. Amit Dhingra, Mr. Rohit
Mahajan, Ms. Neelampreet Singh
Deol, Mr. Shivam Kumar Raheja and
Mr. Pranav V. Kamnani, Advocates
for R-1.
Mr. Tarkeshwar Nath and Mr. Lalit
Mohan, Advocates for R-2.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 [*hereinafter*, "**the Act**"] has been filed seeking interim measures for securing the amount in dispute of 38 crores, pending appointment of the arbitral tribunal. Canara Bank – the Petitioner – also seeks continuation of orders of restrain against withdrawal of bank guarantee of Rs. 15 Crores, furnished by Respondent No. 1 in O.M.P. (I)

(COMM.) 318/2018.

2. Briefly stated, the background of the case is as follows:
 - 2.1. Canara Bank issued a performance bank guarantee [*hereinafter*, “**PBG**”] of USD 67,86,450/- for securing transaction between Respondent No. 1 [*hereinafter*, “**Helm**”] and Respondent No. 2 [*hereinafter*, “**STC**”]. The exposure was safeguarded by way of a counter guarantee of/by HypoVereins Bank [*hereinafter*, “**German Bank**”].
 - 2.2. Upon invocation of the PBG, Canara Bank paid the amount to STC [the beneficiary], and parallelly invoked the counter-guarantee issued by the German Bank. However, German Bank failed to make good its obligation to pay Canara Bank. Later on, in proceedings before this court, the amount of counter guarantee was deposited in court by Helm - which by then had taken over the liabilities and responsibilities of the German Bank. The said amount was subsequently released in favour of Canara Bank, pursuant to court directions. The dispute relating to invocation of the PBG by STC, rights and obligations of German Bank & Helm, including Canara Bank’s entitlement to the amount of counter guarantee - were referred to arbitration between Canara Bank, Helm (which also represented German Bank) and STC.
 - 2.3. The arbitration proceedings culminated in a majority Award dated 29th April, 2016 wherein Canara Bank’s claim was adjudicated, and it was held to be entitled to retain the amount already released to it. Several other claims *inter-se* the parties were also adjudicated. Challenge to

the said Award, at the instance of STC, was rejected right up to the Supreme Court *vide* its order dated 27th July, 2018 in an SLP.

- 2.4. Canara Bank also assailed the majority award before this Court under Section 34 of the Act [being O.M.P.(COMM.) 373/2016], limited to the extent of denial of interest on the PBG amount, for the period Canara Bank was out of pocket for the said amount. On this aspect, the Arbitral Tribunal made certain observations which favoured Canara Bank, yet, no relief was granted.
- 2.5. While considering the challenge to the award, the court found that the Nil Award in respect of interest claim was not supported with reasons and accordingly, set-aside the same *vide* Judgment dated 21st December 2021, and observed that Canara Bank could initiate fresh arbitration proceedings *qua* both Helm and STC on this limited aspect.
- 2.6. Along with the aforementioned petition, the Court also adjudicated a petition filed by Canara Bank under Section 9 of the Act on the same date, [being O.M.P.(I.)(COMM.) 318/2018] wherein Canara Bank sought to secure its claim for interest. In the said proceedings, Canara Bank was protected by way of a bank guarantee for an amount of Rs. 15 crores. Since the Nil Award was set aside by this Court, the interim protection which was continuing in O.M.P.(I.)(COMM.) 318/2018, was directed to be maintained for a brief period, to enable Canara Bank to take recourse to protect its interest, in accordance with law.
- 2.7. Subsequently, Canara Bank filed appeals - FAO(OS)(COMM.) 17/2022 impugning the judgment in O.M.P (COMM.) 373/2016; and FAO(OS)(COMM.) 18/2022 impugning the judgment in

O.M.P.(I.)(COMM.) 318/2018.

- 2.8. In so far as FAO(OS)(COMM.) 18/2022 is concerned, the Appellate Court decided the same *vide* Order dated 01st February, 2022, extending the operation of the Order dated 21st December, 2021 in O.M.P.(I.)(COMM.) 318/2018 till 21st February, 2022, giving liberty to Canara Bank to seek appropriate orders under Section 9 of the Act.
- 2.9. In FAO(OS)COMM 17/2022, Canara Bank's challenge is limited to the court's refusal to refer the matter back to the Arbitral Tribunal for assigning reasons under Section 34(4) of the Act. The said appeal is pending consideration.
- 2.10. In light of the aforementioned circumstances, Canara Bank has now approached this Court, seeking the following reliefs:
- i. Restrain Respondent No. 1 from withdrawing the bank guarantee of Rs. 15 Crores furnished by it in O.M.P.(I.)(Comm.) 318/2018, by extending the directions given by this court order dated 28th September 2018 in O.M.P.(I.) 318/2018 and lastly by the Division Bench *vide* order dated 01st February 2022 in FAO(OS)(COMM.) 18/2022 till 21st February 2022 or to file a fresh Bank Guarantee or by passing any other appropriate orders.
 - ii. Pass interim measures of protection to secure the amount of Rs. 38 Crores which is in dispute in arbitration by directing Respondent No. 1 to disclose on affidavit the full particulars of the money to be received by it or to be owed to it by its customers or other debtors in India and direct an attachment of such amounts or issue garnishee notice to such person/parties

directing them to deposit in this Court the amount due and payable by them to Respondent No. 1.

3. Canara Bank asserts that a fresh arbitration has been requested, however, the Tribunal is not in place. The interim order of protection dated 21st December, 2021, as extended by the Division Bench till 21st February, 2022, requires further extension. It is also the case of Canara Bank that Helm - incorporated and carrying on business in West Germany - has no assets within the jurisdiction of this Court. Thus, in the event Canara Bank were to succeed in arbitration, it would be unable to enforce the arbitral award against Helm. On merits, it is argued that the erstwhile Tribunal had held in favour of Canara Bank that on invocation of bank guarantee, German Bank was bound to honour its commitment under the counter guarantee.

4. Mr. A. S. Chandhiok, Senior Counsel for Helm, contests the present petition, by urging as follows:

4.1. The petition makes no averment or allegation against the German Bank. This Court, *vide* judgement dated 21st December, 2021, has allowed Canara Bank to commence arbitration proceedings against the German Bank. However, any claim against the said bank can only succeed if Canara Bank is able to establish a case of negligence against the German Bank. In fact, the German Bank had acted prudently while declining the payment under the counter-guarantee. Subsequently, there was a stay order passed by this Court in relation to the PBG, and therefore, German bank, under any circumstance, was not obliged to make payment under the counter guarantee. These

aspects require adjudication in arbitral proceedings, and therefore, Canara Bank does not have *prima face* case in its favour to seek an order of interim protection. Reference was made to paragraphs no. 22 and 23 of the application, as well as to the prayer clause, to support the aforementioned submissions.

- 4.2. There is no allegation in the petition which could indicate that future award against Helm or German Bank, if passed, cannot be satisfied. Helm is part of a world-wide group of companies with presence in more than 30 countries. It's subsidiary, namely Helm India Pvt. Ltd., has been present in India for last more than 45 years. The balance sheets and other documents placed on record show that the said company has considerable net worth and turnover, and therefore, in the event Canara bank were to succeed, there would be sufficient means available to satisfy the Award. The second prayer of the petition indicates that on Canara Bank's own showing, Helm has on-going business in India.
- 4.3. Canara Bank has not manifested any intention to initiate arbitration proceedings, despite being giving an opportunity to do so. Instead, it has impugned the said order, which shows a clear absence of any intent to arbitrate, and thus disentitles Canara Bank to seek interim measures under the Act. Reliance is placed on the Judgment of this Court in *Avantha Holdings Limited v. Vistra ITCL India Limited*.¹
- 4.4. Whether Canara Bank has a valid claim and which Respondent [i.e., Helm or STC] is liable to pay – are pertinent questions to be

¹ 220 SCC OnLine Del 1717.

determined in fresh arbitration. The extent or quantum of such liability cannot be ascertained at this stage.

- 4.5. The interim measures which can be awarded by an arbitral tribunal under Section 17, are the very same as those which can be ordered by a Court under Section 9. No such circumstances either exist or are pleaded by Canara Bank, which may not render the remedy under Section 17 to be inefficacious.
- 4.6. Canara Bank has failed to disclose or even plead the essential grounds for seeking reliefs that are in the nature of attachment before judgment. Since the nature of reliefs claimed under the present petition are akin to reliefs under Order 38 Rule 5 of the CPC, 1908, Canara Bank is required to establish the debt due to them from Helm, and also validate, with cogent material, its apprehension that Helm is attempting to take steps with the intention to defeat the future award that may be eventually passed by an arbitral tribunal.
- 4.7. Instead of restraining withdrawal of the bank guarantee and directing its extension, Helm can furnish a corporate guarantee and indemnity for securing the amount in dispute. Thus, no irreparable harm would be caused to Canara Bank to warrant interim protection in the nature of reliefs prayed for.

5. The Court has considered the contentions advanced by the Senior Counsel for the parties. Indeed, at this stage, the Court is not to adjudicate upon the subject matter of *inter-se* claims or disputes between the parties. The Court is only required to consider whether Canara Bank has made out a *prima facie* case for securing interim orders pending appointment of the

arbitral tribunal. Section 9 of the Act is widely worded, which includes the power of the Court to secure the amount in dispute in arbitration. Several judgments of this Court hold that while exercising the power under Section 9 of the Act, Court would be guided by the principles granting interim measures, as provided under the Code of Civil Procedure, 1908. This would mean that the Court has to be satisfied as to the existence of the 3-pronged test of *prima facie* case, balance of convenience and irreparable loss.

6. On the first aspect, the *prima facie* view on Canara Bank's rights and corresponding obligations of the German bank under the counter-guarantee have been discussed and noted in the judgment dated 21st December 2021 and the same need not be reiterated. The Court found apposite reasons for setting aside the Nil Award (as recorded in the Judgment dated 21st December, 2021 in the Section 34 petition) which are sufficient to hold that there is a *prima facie* case in favour of Canara Bank for the claim of interest on the counter-guarantee amount, on account of German Bank not honouring its commitment under the counter-guarantee. Indeed, the award dated 29th April 2016 also holds that Canara Bank had rightly made payment under the PBG to STC and it has the legal right to claim the PBG amount from the German Bank, under the latter's counter guarantee. It has also been held that the German Bank was wrong in not honouring and not paying the amount payable under the counter guarantee after it was invoked by Canara Bank on 09th February, 2009. The German Bank, being the principal debtor, is *prima facie* liable to pay/indemnify Canara Bank, as it has been conclusively held that Canara's payment under the PBG was correct. Helm (also representing the German Bank) may have its remedy against STC,

however, the same cannot discharge its liability towards Canara Bank.

7. For the foregoing reasons, the claim of Canara Bank for interest on the amount of counter guarantee between the period 12th February 2009 to 15th April 2011 / 23rd May 2011, is *prima facie*, payable to Canara Bank by Helm (German Bank). This liability would attract further interest for the period commencing from April/May, 2011 as the transaction with German Bank is a financial transaction, attracting interest as per the usage and trade practice prevalent in the banking business. Presently, Canara Bank is secured by a bank guarantee, established by Helm in terms of directions issued in O.M.P.(I).(COMM.) 318/2018. Now that the arbitration proceedings qua the interest component have to commence afresh, the interim protection already in place should continue, in view of strong *prima facie* case in favour of Canara Bank. No adverse circumstances have arisen with passing of the judgment dated 21st December, 2021 to discontinue this protection.

8. As regards balance of convenience, it must be noted that Helm AG is not present in India and does not have any assets in India. It claims to have business within the jurisdiction of this Court, by placing reliance upon documents pertaining to its subsidiary - Helm India private Limited, which is concededly not party to the arbitration. The execution of an award against a subsidiary of the principal is always fraught with challenges, and therefore, reliance on the turnover of the subsidiary is of no consequence. Moreover, the turnover and net worth disclosed therein also does not satisfy the Court that the amount claimed in the petition will be adequately secured. In these

circumstances, the Court finds the balance of convenience to be in favour of Canara Bank. Further, the amounts claimed to be receivable by Helm AG from its customers cannot be considered as a security. The court is thus satisfied that there is adequate material placed on record which can give rise to reasonable certainty of the award being rendered infructuous in case interim protection is not granted in the instant proceedings.

9. That said, a question has also arisen regarding the quantum of amount to be secured. Canara Bank has made a claim of Rs. 38 crores towards interest, and calculation thereof is disclosed in paragraph 9 of the petition, as follows:

- “i) Interest @ 18% p.a. on Rs.30,00,28,955/- for the period 12.2.2009 to 15.4.2011 i.e. Rs.11,73,37,871.33/-*
- ii) Interest @ 18% p.a. on the sum of Rs.3,04,37,228/- for the period 12.2.2009 to 23.5.2011 i.e. Rs. 1,24,73,426.20/-
As on 16.4.2011, the total amount due to the petitioner comes to Rs. 12,98,11,297.53/-.*
- iii) Interest on Rs. 12.98 Cr. from 16.4.2011 till date, which comes to Rs.25.11. Cr. approx.”.*

10. This claim of interest is on an assumption that Canara Bank would be entitled to interest at the rate of 18% p.a. The majority Award, which was the subject matter of O.M.P.(COMM.) 373/2016, awarded interest to the parties at the rate of 8.5% p.a. Mr. Pradeep Dewan, Senior Counsel for Canara Bank, has relied on an interim order to contend that it imposed interest at the rate of 9.10% p.a. on Canara bank as a condition for restitution of released amount. Nevertheless, his supposition does not reasonably establish that the amount in dispute would be 38 crores, even if the afore-noted rate of interest is taken into consideration. As of now, the Court can only assume the rate of interest in the Award to be the guide for

securing the amount in question. Applying that, the interest claim would be less than half of what is claimed as the amount in dispute. In these circumstances, the Court finds that the bank guarantee of Rs. 15 crores would adequately protect Canara Bank's interest, and secure the amount in dispute, pending arbitration that would ensue shortly.

11. Accordingly, the present petition is allowed with the direction that the bank guarantee for Rs. 15 crores which has been furnished before Court in O.M.P.(I.)(COMM.) 318/2018 shall be kept alive for a period of eight weeks from today.

12. It must be added that the relief under Section 9 of the Act is available to till the arbitral tribunal is constituted, to enable a party to obtain the relief under Section 17 of the Act. The arbitral tribunal has not been not constituted as yet. Canara Bank, instead of proceeding for the appointment of the Tribunal, is exercising other remedies. No doubt Canara Bank can avail of such remedies under law, but at the same time, the orders under Section 9 cannot continue everlastingly. There is merit in the submission of Helm that they are being saddled with costs of maintaining and renewing the bank guarantee, from 2018 onwards. Since there is no stay of the Judgment dated 21st December 2021, there can be no legal impediment in appointment of an arbitral tribunal. Yet, there appears to be a deadlock on appointment, owing to reasons which are not relevant to be gone into in the present proceedings. Nonetheless, if any of parties is not consenting to arbitration or the arbitral institution is not constituting the tribunal, remedy is provided under the Act. Thus, it is directed that if Canara bank does not proceed to

take recourse to appoint the arbitral tribunal by filing appropriate application before court, within eight weeks from the date of uploading of this order, the interim protection given herein shall lapse automatically. If the steps are undertaken, the protection granted today shall be extended till such time such arbitral tribunal decides Canara Bank's application under Section 17 of the Act, if so filed. The arbitral tribunal shall then proceed to decide the same by extending, revoking or modifying the directions as it deems fit, on its independent consideration of the facts of the case, uninfluenced by any of the observations made hereinabove. If no application under Section 17 is filed by Canara Bank within two weeks of the appointment of the arbitral tribunal, the interim protection shall lapse.

13. With the above directions, the present petition is disposed of, along with pending applications.

SANJEEV NARULA, J

APRIL 6, 2022

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(Corrected and released on 18th April, 2022)