

A SANGHI INDUSTRIES LIMITED

v.

RAVIN CABLES LTD., AND ANR.

(Civil Appeal No. 6908 of 2022)

SEPTEMBER 30, 2022

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[M. R. SHAH AND KRISHNA MURARI, JJ.]

Arbitration and Conciliation Act, 1996 – s.9 – Code of Civil Procedure, 1908 – Or.XXXVIII, r.5 – Application u/s.9 – Power of Commercial Court – Appellant invoked performance bank guarantees issued by respondent no.1 – Thereafter, it invoked arbitration – Respondent No.1 filed application u/s.9 before Commercial Court regarding the bank guarantees, pending which the bank realized the payments under the bank guarantees invoked by the appellant – Commercial Court passed order u/s.9(ii)(e) to secure the amount in dispute and directed the appellant to deposit the amount of bank guarantees – Order confirmed by High Court – Held: Bank guarantees were already invoked and the amounts thereunder were already paid by the bank much prior to the Commercial Court passed the order u/s.9 – Unless and until the pre-conditions u/Or.XXXVIII, r.5, CPC were satisfied and unless there were specific allegations with cogent material and prima-facie the Court was satisfied that the appellant was likely to defeat the decree/award that may be passed by the arbitrator by disposing of the properties and/or in any other manner, the Commercial Court could not have passed such an order in exercise of powers u/s.9 – Order passed by the Commercial Court in an application u/s.9 is mainly by way of interim measure – In a given case if all the conditions of Or.XXXVIII, r.5, CPC are satisfied and the Commercial Court is satisfied as aforesaid, it may pass an appropriate order including the restrain order and/or any other appropriate order to secure the interest of the parties – Further, in the present case even otherwise there are serious disputes on the amount claimed by the parties – Impugned order passed by the High Court and the order of the Commercial Court, set aside – Commercial Courts Act, 2015.

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6908 of 2022.

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From the Judgment and Order dated 11.02.2022 of the High Court of Gujarat at Ahmedabad in R/First Appeal No. 3253 of 2021. A

Vivek Chib, Sr. Adv., Anirudh Wadhwa, Shaishir Divatia, Vipul Kumar, Abhishek Kumar, Bikram Dwivedi, Shivendra Singh, Advs. for the Appellant.

K. V. Viswanathan, Sr. Adv., Ms. Malvika Kapila, Arvind Raj, Ms. Tanwangi Shukla, Krishan Kumar, Atul Sheopuri, Nitin Pal, Kartik Sarsoonia, Swikiritimala Dubey, Swati Jindal Garg, Advs. for the Respondents. B

The Judgment of the Court was delivered by

M. R. SHAH, J. C

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 11.02.2022 passed by the High Court of Gujarat at Ahmedabad in Regular First Appeal No. 3253 of 2021, by which, the High Court has dismissed the said appeal confirming the order passed by the Commercial Court in an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act, 1996), by which the Commercial Court directed the appellant herein – original opponent/respondent No. 1 to deposit the amount of performance bank guarantees pertaining to purchase order Nos. 01, 02 and 03 invoked by it, the original opponent/respondent No. 1 has preferred the present appeal. D E

2. We have heard Shri Vivek Chib, learned Senior Advocate appearing on behalf of the appellant and Shri K.V. Viswanathan, learned Senior Advocate appearing on behalf of respondent No. 1 herein – the main contesting party.

3. At the outset it is required to be noted that in the present case the dispute is with respect to three purchase orders, namely, purchase order Nos. 01, 02 and 03. It appears that the appellant served a notice upon respondent No. 1 vide notice dated 11.06.2021 claiming a loss of INR 29.31 crores (approximately) owing to the defective quality of the cables supplied. The said notice was replied by respondent No. 1 vide reply dated 19.06.2021. That thereafter, respondent No. 1 served a legal notice dated 13.07.2021 on the appellant claiming for outstanding payment of INR 1.30 crores (approximately). That the appellant vide communication/letter dated 21.07.2021 invoked the bank guarantees issued by respondent No. 1 herein, which according to respondent No. 1 F G H

- A were by way of performance bank guarantees. That thereafter, the appellant invoked the arbitration on 22.07.2021. Immediately on the next day i.e., 23.07.2021, respondent No. 1 herein filed two applications/petitions under Section 9 of the Arbitration Act, 1996, being application No. 438/2021 before the Commercial Court at Ahmedabad and another application No. 88/2021 before the Commercial Court at Bhuj. Application
- B No. 88/2021 under Section 9 of the Arbitration Act, 1996 filed by respondent No. 1 herein was regarding three bank guarantees, which is the subject matter of present case. At this stage, it is required to be noted that by the time any further order could be passed the bank realized the payments under the bank guarantees invoked by the appellant. That
- C the Commercial Court passed an order dated 13.10.2021 under Section 9(ii)(e) of the Arbitration Act, 1996 to secure the amount in dispute and directed the appellant herein to deposit the amount of respective performance bank guarantees, which as such has already been invoked and for which the payments were already made by the bank. The order
- D passed by the Commercial Court under Section 9 of the Arbitration Act, 1996, directing the appellant to deposit in the court the amount of respective bank guarantees pertaining to purchase order Nos. 01, 02 and 03 was the subject matter of appeal before the High Court under Section 13 of the Commercial Courts Act, 2015. By the impugned judgment and order, the High Court has dismissed the said appeal which
- E has given rise to the present appeal.

4. Having heard learned counsel appearing on behalf of the respective parties and in the facts and circumstances of the case, more particularly, when the bank guarantees were already invoked and the amounts under the respective bank guarantees were already paid by the bank much prior to the Commercial Court passed the order under Section
- F 9 of the Arbitration Act, 1996 and looking to the tenor of the order passed by the Commercial Court, it appears that the Commercial Court had passed the order under Section 9(ii)(e) of the Arbitration Act, 1996 to secure the amount in dispute, we are of the opinion that unless and until the pre-conditions under Order XXXVIII Rule 5 of the CPC are satisfied
- G and unless there are specific allegations with cogent material and unless prima-facie the Court is satisfied that the appellant is likely to defeat the decree/award that may be passed by the arbitrator by disposing of the properties and/or in any other manner, the Commercial Court could not have passed such an order in exercise of powers under Section 9 of the
- H Arbitration Act, 1996. At this stage, it is required to be noted that even

otherwise there are very serious disputes on the amount claimed by the rival parties, which are to be adjudicated upon in the proceedings before the arbitral tribunal. A

4.1 The order(s) which may be passed by the Commercial Court in an application under Section 9 of the Arbitration Act, 1996 is basically and mainly by way of interim measure. It may be true that in a given case if all the conditions of Order XXXVIII Rule 5 of the CPC are satisfied and the Commercial Court is satisfied on the conduct of opposite/opponent party that the opponent party is trying to sell its properties to defeat the award that may be passed and/or any other conduct on the part of the opposite/opponent party which may tantamount to any attempt on the part of the opponent/opposite party to defeat the award that may be passed in the arbitral proceedings, the Commercial Court may pass an appropriate order including the restrain order and/or any other appropriate order to secure the interest of the parties. However, unless and until the conditions mentioned in Order XXXVIII Rule 5 of the CPC are satisfied such an order could not have been passed by the Commercial Court which has been passed by the Commercial Court in the present case, which has been affirmed by the High Court. B C D

5. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the High Court and that of the order dated 13.10.2021 passed by the Commercial Court in an application under Section 9(ii)(e) of the Arbitration Act, 1996 directing appellant to deposit the amount of performance bank guarantees pertaining to purchase order Nos. 01, 02 and 03 already invoked by the appellant herein, are hereby quashed and set aside. E

However, at the same time to protect the interest of the parties, we direct that the appellant herein shall furnish an undertaking backed by the Resolution of the appellant's company before the Commercial Court that in case any award is passed by the learned Arbitrator in arbitration proceedings, the same shall be paid/honoured by the appellant subject to the challenge before the higher forum. Such undertaking backed by the Resolution of the appellant's company shall be filed before the Commercial Court within a period of four weeks from today, with this the present appeal is allowed. No costs. F G