CLASIS LAW

An unsuccessful party cannot possibly apply for interim relief in aid of what it lost before the arbitral tribunal

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***Oil and Natural Gas Corporation Limited; Versus Consortium of Sime Darby Engineering Sdn
and Ans. [Comm. Arbitration Petition (L) No. 471 of 2018] Bombay High Court***

Brief Facts:-

The Arbitral Tribunal had passed an impugned award and held that the Oil and Natural Gas
Corporation Limited **(Petitioner)** is entitled to a total amount of USD 15,665,064.80, whilst the
Consortium of Sime Darby Engineering Sdn and Ans (**Respondents'**) claims awarded by the
arbitral tribunal add up to USD 20,792,980.20. The net amount of USD 5,127,915.40 (INR
333724734.00) in full and final settlement of the rival claims arising from the contract has been
awarded to the Respondents. The Petitioner challenged the said award under Section 34 of the
Arbitration and Conciliation Act, 1996 ("**the Act**"). The Respondents have not challenged the
award, though the time to challenge the award is still subsisting.

In the above circumstances, ***the Petitioner also sought relief under Section 9 of the Act, from
this Court to protect the Petitioner's interest by directing the Respondents to extend the
performance bank guarantee, which was due to expire on 30 April 2018 and keep the same
alive till the hearing and final disposal of the Petitioner's challenge under Section 34, i.e.
Arbitration Petition (L) No.327 of 2018.***

It is pertinent to note that, when the arbitration petition challenging the impugned award, i.e.
Arbitration Petition (L) No.327 of 2018, was filed, an application was also moved for a prayer
seeking direction against the Respondents to extend the bank guarantee before the arbitration
court. The Single Judge and Division Bench of High Court of Bombay held that since the claim of
the Petitioner was partly rejected and the award was against the Petitioner, a prayer seeking
direction against the Respondents to extend the bank guarantee could not be granted by the
Court and *ad-interim* relief was rejected.

The Petitioner inter alia made the following submissions:-

- The Petitioner submitted that the relief was refused by the Division Bench in the appeal
  on an express footing that the original application before the learned Single Judge could
  not be treated as an application under Section 9 of the Act. It was submitted that the
  Division Bench treated the application as an application under Section 36(2) of the Act.
  However, the Petitioner, in the present case had come up with a specific application
  under Section 9 of the Act for the relief denied to it by the Division Bench under Section
  36(2) of the Act.

- The Petitioner further submitted that the Petitioner is not the losing party and the
  Petitioner's counter claims have in fact been allowed by the arbitral tribunal.

- Further, the Petitioner relied on the judgment of the full bench of Bombay High Court in
  the case of ***R.S. Jiwani vs. Ircon International Ltd.2010(1) Mh.L.J 547*** and submitted
  that the doctrine of severability can be applied to the various parts of the impugned
  award, since these parts which deals with the claims of the Petitioner and the
  Respondent separately are severable.

The Hon'ble Court made the following observations and held as follows:-

- The Court held that the Respondents, who may alone enforce the award and the Petitioner is the judgment debtor before the Court and as a judgment debtor, under the law stated by this Court in _**Dirk India Private Limited vs. Maharashtra State Electricity Generation Company Limited**_ **2013 (7) Bom C. R. 493** cannot possibly apply for interim relief in aid of what it lost before the arbitral tribunal. The Court further observed that the Petitioner as an unsuccessful party in that case can come to the Court under Section 36 of the Act to restrain enforcement of the award passed by the arbitral tribunal against it. It is impermissible for an unsuccessful party to apply for interim relief under Section 9 requiring the successful party to do something to protect his own claims.

- The court further held that the full bench decision of this court on severability in the case of _**Ircon International Ltd.**_ was in a different context. The severability principle cannot be extended in a manner so as to convert an award in favour one party (by the process of netting of claims and counterclaims) into an award in favour of the other party (by arriving at different figures of claims and counterclaims and netting them accordingly differently). That would be making of an altogether new award which is not permissible to a court hearing a challenge to the award.

In light of above observations, the Hon'ble Court rejected the application as there were no merits.

Conclusion:-

In cases where there are claims and counterclaims by the parties, and the arbitrator awards a net amount payable by one party to the other after adjustment of accounts, the award is one composite award, which awards the successful party's claim on the basis of such netting. The unsuccessful party in that case can apply to the Court under Section 36 of the Act to restrain enforcement of the award passed by the arbitral tribunal against it. It is not allowed for such unsuccessful party to apply for interim relief under Section 9 of the Act requiring the successful party to do something to protect his own claims.

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