



**IN THE HIGH COURT OF ANDHRA PRADESH
AT AMARAVATI
(Special Original Jurisdiction)**

[3524]

WEDNESDAY, THE SEVENTH DAY OF JANUARY
TWO THOUSAND AND TWENTY SIX

PRESENT

THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI

THE HONOURABLE SRI JUSTICE MAHESWARA RAO KUNCHEAM

INTERNATIONAL COMMERCIAL ARBITRATION APPEAL NO: 2/2025

Between:

1. ZION SHIPPING LTD., HAVING ITS REGISTERED OFFICE AT 25TH FLOOR, WORKINGTON TOWER, 78, BONHAM STRAND, SHEUNG WAN, HONG KONG EMAIL ADDRESS SHIDDINA@OCEANICDATH.COM. REPRESENTED BY ITS AUTHORISED SIGNATORY MR MADALA SIINIVAS.

...PETITIONER

AND

1. SARALA FOODS PVT LTD, HAVING ITS REGISTERED OFFICE AT D.NO 1-361 (OLD D.NO. 1-215/A) UPPALANKA, YANAM ROAD, KARAPA MANDAL, EAST GODAVARI, KAKINADA RURAL, ANDHRA PRADESH, INDIA, 533016 EMAIL ADDRESS MD.SARALAFOODS@QMAIL.COM MD@SARALAFOODS.COM RAIASEKHAR.MANQIDUDI@NORAOASHIDDINA.COM

2. M/S SRI SEETARAMANJANEYA SORTEX, HAVING ITS OFFICE AT D. NO. 1-215/A, YANAM ROAD, UPPALANKA KARAPA MANDAL, KAKINADA -533016. EMAIL ADDRESS RAIASEKHAR.MANAIDUDI@NORAOASHIDDINA.COM

3. M/S AMIT CHAWAL UDHYOG, HAVING ITS OFFICE AT SINODHA ROAD, TILDA NEORA, RAIPUR, CHATTISGARH 493114 EMAIL ADDRESS- RAIASEKHAR.MANQIDUDI@NORQOASHIDDINQ.COM

4. KAKINADA SEAPORTS LTD, HAVING ITS REGISTERED OFFICE AT 8-2-418, MEENAKSHI HOUSE, 3RD FLOOR, ROAD NO. 7, BANJARA HILLS, HYDERABAD- 500 034, TELANGANA, INDIA EMAIL ADDRESS MAILKKD@KAKINADASEAPORTS.IN PORT PREMISES AT 2ND

FLOOR, PORT ADMINISTRATIVE BUILDING BEACH ROAD,
KAKINADA - 533007.

...RESPONDENT(S):

pleased to set aside the Final Order dated 13.10.2025 passed by the Ld. Single Judge of this Honble High Court in ICOMAOA. No. 5 of 2024 and consequently direct the Respondents to fnairitain the security amount of USD 296,326.74 already deposited with this Honble Court until the disposal of the arbitration proceedings between the Appellant and Respondents and pass

Counsel for the Petitioner:

1.SAI SANJAY SURANENI

Counsel for the Respondent(S):

1.

The Court made the following:

THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI

THE HONOURABLE SRI JUSTICE MAHESWARA RAO KUNCHEAM

I.C.O.M.A.A. No.2 of 2025

JUDGMENT: *(per Hon'ble Sri Justice Maheswara Rao Kuncheam)*

The present appeal is filed under Section 37 of the Arbitration and Conciliation Act, 1996, by the appellant Zion Shipping Ltd., being aggrieved by the Order dated 13.10.2025 passed by the learned Single Judge of this Court in ICOMAOA No.5 of 2024.

2. The backdrop of the case is that initially, the appellant Company, by invoking Section 9 of the Arbitration & Conciliation Act (in short 'Act'), filed ICOMAOA No.5 of 2024, before the learned Single Judge, seeking the following main relief:-

“.....pleaded to a Ex parte order maintenance of the status quo attachment preservation interim custody or sale of 1600 MT of rice loaded/ being loaded on to the vessel MV BULK MANARA at the anchorage of 4th Respondents port pending the issuance of arbitration award b Ex parte direct Respondents to furnish security in favor of the Petitioner for the sum of USD 296,326.74 along with interest pending the issuance of arbitration awards and pass.....”

3. At the time of admission, the learned Single Judge on 23.04.2024 passed the *ex parte* conditional order of attachment of stock in trade of 1600 MTs of rice, subject to furnishing of security of USD 29,296,326.74 within 24 hours. The 1st respondent Company complied with the said

conditional order dated 23.04.2024, by depositing the security amount on 24.04.2024 before the Registrar (Judicial) of this Court.

4. However, the 1st respondent Company filed ICOMAA No.3 of 2024 against the interim order dated 23.04.2024, passed in ICOMAOA No.5 of 2024 before the Division Bench of this Court. After hearing both sides, the Hon'ble Division Bench pleased to direct the 1st respondent to submit its objections /explanation before the learned Single Judge by stating their case. Further, it is observed that in such an event, the learned Single Judge shall pass appropriate orders, in accordance with law.

5. Consequently, the 1st respondent Company filed I.A.No.1 of 2025 under Order XXXIX Rule 4 C.P.C., to vacate the *ex parte* interim order dated 23.04.2024 of the learned Single Judge of this Court. The learned Single Judge, after hearing the arguments on both sides elaborately in ICOMAOA No.5 of 2024 pleased to pass the orders dated 13.10.2025, whereby and whereunder vacating the interim orders dated 23.04.2024 made in I.A.No.1 of 2024 and, as a result, dismissed the application filed by the appellant Company and also directed the Registry to return the security amount deposited by the 1st respondent. Assailing the said order dated 13.10.2025 made in ICOMAOA No.5 of 2024, the instant appeal emanated under Section 37 of the Act before us.

BRIEF CASE OF THE APPELLANT:

6. The appellant, Zion Shipping Ltd., is a company incorporated under the laws of Hong Kong, engaged in the commercial activity of owning and chartering ocean-going vessels for maritime transportation. Respondent Nos.1 to 3 are entities involved in the export of agricultural commodities, primarily rice, etc., and are stated to have availed the services forming the subject matter of the present dispute. Respondent No.4 is the operator of the Kakinada Port and has been impleaded only as a formal party, without any independent relief against it.

7. The appellant and respondent Nos. 1 to 3 entered into a fixture note/charterparty agreement dated 12.03.2021, under which the appellant, as owner of the vessel MV HAN THAR, chartered the said vessel to respondent Nos. 1 to 3 for the carriage of 9,000 MT of rice from Kakinada (port of loading) to Ho Chi Minh City, Vietnam (port of discharge). The fixture note stipulated, inter alia, the quantity of cargo, ports of loading and discharge, freight payable, laytime, and other contractual covenants. It further provided for payment of demurrage at the rate of USD 7,500 per day for any delay at the loading or discharging ports and contained an arbitration clause providing for resolution of disputes by arbitration in Singapore. Pursuant to the said agreement, the appellant

duly carried the cargo, and upon arrival at the port of discharge, tendered the Notice of Readiness on 21.05.2025.

8. As per the terms of the Fixture Note dated 12.03.2021, the discharge of the cargo was required to be completed within 3 days and 16 hours, i.e., on or before 26.05.2021, but contrary to the contractual stipulation, the discharge commenced on 29.05.2021 and was finally completed only on 12.06.2021, resulting in total discharge period of 20 days and 19 hours. After deducting the contractually permitted laytime, the delay occurred was 17 days and 2 hours. Consequently, the appellant, in accordance with Clause 7 of the fixture note, issued Statement of Facts dated 23.06.2021 and raised an invoice for USD 128,409.74 towards demurrage, which, under the contract, was required to be paid within 15 days of submission of the supporting documents, i.e., on or before 07.07.2021. However, the respondents 1 to 3 failed and neglected to honour the contractual obligation and made no payment towards the demurrage claimed.

9. The appellant, through its authorised agent, issued several reminders to respondent Nos.1 to 3 calling upon them to honour the contractual obligation; however, no meaningful or constructive response was forthcoming. Significantly, the respondents at no point disputed or denied their liability towards the demurrage claim. As the default persisted,

the appellant issued legal notice dated 06.08.2021 to respondent Nos.1 to 3, which also evoked no reply. Thereafter, on 18.04.2024, the appellant raised an updated invoice for USD 128,409.74, together with interest at 24% per annum from July 2021, and additionally sought arbitration and legal costs quantified at USD 80,000, thereby enhancing the cumulative claim to USD 296,326.74 and the same yielded no result. In those circumstances, the appellant approached this Court by filing an application under Section 9 (1) of the Act, seeking an order of attachment before judgment in respect of 1600 MT of rice, valued at USD 200 per MT, belonging to the 1st respondent and scheduled to be loaded on the vessel MV BULK MANARA, presently anchored at the port operated by respondent No.4.

10. This Court *vide* an *ex parte* interim order dated 23.04.2024 in ICOMAOA No.5 of 2024 directed respondent Nos.1 to 3 to furnish security for the amount of USD 2,96,326.74 within 24 hours from the time of receipt of notice and further directed to attach the cargo of rice of 1600 metric tonnes being loaded on to the vessel MV BULK MANARA in the 4th respondent Port and if the security is furnished as directed, the order of attachment shall be raised, otherwise in default the attachment shall continue until further orders. Subsequently, arbitration proceedings were initiated by the appellant for recovery of the claim amount, and the same

are pending final adjudication due to the matter is being heard before this Court. Finally, ICOMAOA No.5 of 2024 was dismissed vide orders dated 13.10.2025 by the learned Single Judge of this Court on merits.

BRIEF CASE OF THE RESPONDENTS:

11. Conversely, the respondents 1 to 3 claim that the appellant has no title or interest at the relevant point of time i.e., at the time of attachment under order dated 23.04.2024, subject cargo was being exported to Sharjah, UAE on the vessel, 'BULK MANARA' by respondent No.1 under a FOB (free on board) contract dated 25.03.2024, where the very title of the cargo attached had already passed on to the buyer upon the cargo being loaded on board the vessel.

12. It is the case of the 1st respondent that they were constrained to deposit USD 196,480.00 before the Registry of this Court and that they have deposited the alleged exaggerated amount claimed by the appellant.

OBSERVATIONS OF THE LEARNED SINGLE JUDGE:

13. The learned Single Judge, after perusing the record and considering the submissions of both sides, framed the following questions:

“1) whether applicant has a strong/good prima facie case,

2) whether balance of convenience is in favour of granting interim relief,

3) whether applicant has approached the court with reasonable expedition, and

4) whether the respondents is attempting to remove or dispose of its assets with intention of defeating the decree that may be passed.”

14. The learned Single Judge, after appreciating all the facts and circumstances coupled with legal dictums, passed the order vacating the *ex parte* interim orders dated 23.04.2024 and dismissed the petition filed under Section 9 of the Act (ICOMAOA No.5 of 2024) on merits vide orders dated 13.10.2025. For the sake of convenience, the relevant finding of the learned Single Judge extracted hereunder:

“.....**30**.....This Court is not impressed with the general and vague statements made. This is for the reason that first of all petitioner has not given any specific details or particulars of the assets which respondent is proposing to sell. Strong possibility of diminution of assets is required to be shown. This Court is conscious that all above do not require applicant to demonstrate with actual proof. Having said that still some amount of material is required to be placed in support. Secondly, the cargo of rice, which is sought to be attached, is merely stock in trade and the same does not constitute to be a substantive asset.

Against the above dismissal order, the instant appeal was emanated before this Court under Section 37 of the Act.

15. Heard Sri O.Manohar Reddy, learned Senior Counsel representing the learned counsel for the appellant and Sri Manoj Khatri, learned

counsel for respondent Nos.1 to 3. Perused the entire material available on record.

SUBMISSIONS OF THE APPELLANT'S COUNSEL:

16. The learned Senior Counsel for the appellant contended that the balance of convenience is to be gauged with reference to whether, , in the absence of security, the appellant would be able to effectively enforce any award against the respondents, and that it should not be linked to considerations of expediency. With regard to the expediency, he submits that the appellants have approached this Hon'ble Court when it located the assets belonging to the respondents.

17. He further submits that the appellants did approach the court within reasonable expediency, given that the limitation period in Singapore where the arbitration seat is located.

18. The learned counsel asserts that the ***Raman Tech*** case was rendered in the context of Order 38 Rule 5 provisions and has no applicability here. And that the learned Single Judge has erred in relying on the judgment of Hon'ble Supreme Court in ***Sanghi Enterprises*** to apply Order 38 Rule 5 principles in the context of S.9 application of the Act given that the judgment does not consider the binding precedent of the ***Essar House*** Case.

19. He further submits that the respondents are regular defaulters and the appellant has doubts about the financial health of the respondents. The learned counsel submits that the appellant is apprehending the possibility that the respondents would try to defeat the award.

SUBMISSIONS OF THE LEARNED COUNSEL FOR RESPONDENT Nos.1 to 3:-

20. Learned counsel for respondents Nos.1 to 3 contended that the order of the learned single Judge should be sustained.

21. It is the contention of the respondents' counsel that the very scope and parameters of Section 37 of the Act are very narrow, and the appellant has not been able to demonstrate their case to contradict the reasoned orders passed by the learned Single Judge.

22. The learned counsel submits that the fundamental basis of the petition seeking attachment of the subject cargo is flawed as respondent No.1 has no title or interest in the attached cargo at the time of attachment under Order dated 23rd April 2024 as the subject cargo was being exported to UAE under FOB (Free on Board) contract, wherein, once the goods cross the ship's rail the seller neither has title nor possession nor any insurable interest as the buyer becomes the owner of goods and bears all risks associated with them.

23. The learned counsel for the respondents also contends that the appellant has grossly failed to show that respondent No.1 was in the process of alienating of its assets with an intent to defeat the alleged claim of the Appellant which is prime requirement under Order 38 Rule 5 of the Civil Procedure Code which is akin to Section 9 of the Arbitration and Conciliation Act, 1996. He further contends that respondent No.1 is in the regular course of business and was in no way in process of alienating/disposing of its assets with an intent to defeat the alleged claim of the Appellant.

24. He argues that the vessel M.V Han Thar was supposed to reach the discharge port i.e., Ho Chi Minh City, Vietnam, on or about 21st May 2021, but the vessel reached Vung Tau on 21st May 2021 and the appellant tendered Notice of Readiness, hence, the appellant's claim of alleged demurrage is not maintainable and is invalid. He further submits that even otherwise, the appellant's claim is in the nature of damages, which warrants adjudication, and without the same, no security can be granted.

25. The learned counsel for the respondents also contends that the appellant cannot seek attachment under Section 9 of the Act, due to his inexplicable delay for three years from 23.06.2021 (date of first invoice) to 18.04.2024 (date of second invoice), with a time lapse of three years, without initiating the process as mentioned in the fixture note.

26. The learned counsel for the respondents further submits that there is no contractual agreement between the parties, no specified clause in the Fixture Note regarding 24% interest rate per annum, imposing legal costs of USD 80,000 and an additional amount. In the absence of such clause and without any rational basis, shows the arbitral inflation of the appellant.

ANALYSIS OF THE COURT:

27. In the light of the above rival submissions of the respective counsel, the following moot point falls for our consideration:-

Whether the orders dated 13.10.2025 of the
learned Single Judge call for interference or not?

SCOPE OF SECTION 37 OF THE ACT:

28. Before venturing into the adjudication of the instant case, it is apt to note the scope of Section 37 of the Act, which was invoked by the appellant before us.

29. Scope of Appellate Court Powers under Section 37(1)(b) of the Act, as amended by Act No.3 of 2016 (w.e.f. 23-10-2015), the following Clause (a) to (c) have been substituted in Sub-Section (1) to Section 37 of the Act:-

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

30. It is trite to note that the legislative intent underlying the 2015 Amendment to the Act is to minimise judicial intervention in arbitral proceedings. A conjoint reading of the non-obstante clause in Section 37 with clauses (1)(a) and (b) of Section 37 demonstrates that the legislature intended to confine the appellate remedy exclusively to orders: (a) refusing to refer parties to arbitration under Section 8, and (b) granting or refusing to grant any interim measure under Section 9. The statutory scheme precludes recourse to any other court or invocation of any other law as an alternative, thereby bypassing all extraneous remedies.

31. The Court, under Section 37 of the Act, is guided by principles analogous to those under the CPC, but is not strictly bound by its technicalities. The appellate power to scrutinize the impugned orders under Section 9 under Clause (b) supra, shall be guided by the objective to ensure the preservation of the subject-matter of arbitration and ensuring that the arbitration process remains meaningful and should be extended to scrutinize as to whether the impugned order passed under Section 9 of the Act is within the consonance and object of the Act.

32. The Constitutional Courts, upon an extensive survey of judicial precedents, have elucidated the contours of appellate jurisdiction under

Section 37 of the Act, consistently holding that the said jurisdiction is narrow and circumscribed. However, upon a clear examination, it is evident that the ratio of the decisions is confined to the scope of appellate intervention in matters arising post-adjudication under Section 34 of the Act, i.e., after the statutory remedy of setting aside an arbitral award has either been invoked or exhausted. The scope of characterising the jurisdiction under Section 37 of the Act as limited, related to revisional or supervisory powers, or precluding re-appreciation of evidence cannot be mechanically extended to appeals falling under clauses (a) and (b) of sub-section (1) of Section 37 of the Act, particularly in the context of the post-2015 amendment regime, which materially altered the statutory framework governing interim measures and appellate scrutiny.

33. In the case of ***Punjab State Civil Supplies Corporation Limited and Another Vs. Sanam Rice Mills and Others***¹, the Apex Court reiterated the principle of minimal judicial interference in arbitration proceedings, as held under:

“....**14.** It is equally well settled that the appellate power under Section 37 of the Act is not akin to the normal appellate jurisdiction vested in the civil courts for the reason that the scope of interference of the courts with arbitral proceedings or award is very limited, confined to the ambit of Section 34 of the Act only and even that power cannot be exercised in a casual and a cavalier manner.....”

¹ 2024 SCC OnLine SC 2632

34. To proceed further, it is relevant to consider the statutory provision of Section 9 of the Act, which deals with the interim measures as under:-

“.....9. Interim measures, etc., by Court.—1 [(1)]A party may, before or during 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 a court— (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely:— (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 subjectmatter 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.....”

35. The analogous provision to Section 9 of the Act enunciated in the Civil Procedure Code, 1908, is Order 38 Rule 5 of the Civil Procedure Code, which deals with “attachment before judgment” in ordinary civil suits. It allows the court to attach the defendant’s property only if there is material to show that the defendant is about to remove or dispose of property with the intention to obstruct or delay execution of a future decree. In this context Order 38 Rule 5 of C.P.C is extracted hereunder:-

“.....5. Where defendant may be called upon to furnish security for production of property. (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the

defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void....”

36. In the case of ***Raman Tech. & Process Engg. Co. v. Solanki Traders***², the Hon’ble Supreme Court has held as under:

“.....4. The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realisation of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The scheme of Order 38 and the use of the words “to obstruct or delay the execution of any decree that may be passed against him” in Rule 5 make it clear that before exercising the power the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against

² (2008) 2 SCC 302

the defendant. This would mean that the court should be satisfied that the plaintiff has a *prima facie* case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a *prima facie* case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well settled that merely having a just or valid claim or a *prima facie* case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a *prima facie* case.

5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment....”

37. The ***Raman Tech*** case has established that the interim relief (asset attachment as security) can only be granted when the party proves that there is a *prima facie* case, and also demonstrates that the respondents are trying to sell/encumber/consume the stock with the intent to defeat the decree that may be passed.

38. In this context, it is also relevant to note the dictum of the Apex Court in ***Essar House*** case, for the sake of comprehensive view, it is apt to extract the relevant para Nos.47, 48 & 49 in the above dictum:-

“.....**47.** Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is whether the applicant for interim measure has a good prima facie case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.....”

“.....**48.** If a strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5CPC....”

“.....**49.** Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending arbitral award is not imperative for grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice. To assess the balance of convenience, the Court is required to examine and weigh the consequences of refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail....”

39. The Hon’ble Supreme Court explained the broader scope of the provisions under Section 9 of the Act, wherein, it held that all that a court was required to see whether the applicant for interim measures had a good *prima facie* case, whether the balance of convenience was in favour of the grant of the prayed interim reliefs, and whether the applicant approached the Court with reasonable expedition. If these conditions were met, a court exercising power under Section 9 of the Act ought not

to withhold the relief on mere technicalities such as the absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 CPC. And also held that an actual attempt to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending arbitral award is not imperative for the grant of relief under Section 9 of the Act, rather a strong possibility of diminution of assets would suffice.

40. In a subsequent decision of ***Sanghi Industries Ltd. v. Ravin Cables Ltd.***, the Hon'ble Supreme Court observed as follows:-

“4. ... 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 preconditions under Order 38 Rule 5 CPC are satisfied 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 Arbitration Act, 1996.

5. ... However, unless and until the conditions mentioned in Order 38 Rule 5 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.”

In the above case, the Hon'ble Supreme Court emphasised the principles enunciated under Order 38 Rule 5 CPC in granting interim measures under Section 9 of the Arbitration Conciliation Act

41. At this juncture, it is relevant to point out that the decisions in both ***Essar House*** and ***Sanghi Industries*** cases were rendered by Benches

comprising an equal coram and the judgment in ***Sanghi Industries*** case was delivered a month after the pronouncement of the judgment in the ***Essar House*** Case.

42. In ***Sky Power Solar Pvt. Ltd. Vs. Sterling and Wilson International³***, the Division Bench of the Delhi High Court in respect of paras 48 and 49 of the judgment in ***Essar House Private Limited Vs Arcellor Mittal Nippon Steel India Ltd.*** held that:

“.....72. The aforesaid observations cannot be read in isolation. Although the Supreme Court had held that an applicant is required to establish a good prima facie case as well as the balance of convenience in his favour, for the grant of interim relief. However, the said observations cannot be read to mean that other underlying principles for the grant of interim orders as contemplated under Order 38 Rule 5 CPC are required to be ignored or disregarded. In a subsequent para, the Supreme Court had observed that a mere technicality of the absence of averments incorporating the grounds for attachment before the judgment under Order 38 Rule 5 CPC should not withhold relief. However, these observations read in the context of the decision, clearly indicate that the same cannot be read to mean that the underlying principles for the grant of interim relief as contemplated under Order 38 Rule 5 CPC can be disregarded. It is material to note that in *Essar House (P) Ltd.* case, the Supreme Court was considering an appeal against an order of the commercial court of the Bombay High Court. In its order, the Bombay High Court had held that Section 9 of the A&C Act does not preclude a court to pass an equitable order for securing the claim of the applicant in a case where "once having rendered prima facie finding that the applicant would have good chances of succeeding in the arbitration and if the claim made by the applicant is not secured, he would not be able to enjoy fruits of the arbitral award on its execution". Thus, the underlying principle that the interim orders for securing a claimant in an arbitral

³ 2023 SCC OnLine Del 702

proceeding can be made only in cases where the court is prima facie satisfied that but for securing the claimant, it would be unable to reap the benefits of a favourable award, was satisfied in that case.....”

Further, cited the decision of the ***Sanghi Industries***, mentioning that it was delivered after the judgment of ***Essar House***.

43. In the backdrop of above statutory provisions coupled with the narrow scope conferred to the appellate court’s jurisdiction and well settled legal principles, we will now proceed to examine the orders of the learned Single Judge.

PRIMA FACIE CASE:

44. Undisputedly, Section 9 of the Act provisions relates to interim measure of protection. As such, in order to adjudicate the said relief, it is just and essential to determine a strong prima-facie case which is indispensable and inextricable.

45. Undisputedly, the Notice of Readiness was issued at Vung Tau port, by the appellant, but not at Ho Chi Minh as stipulated in the contract. This change affects the commencement of the laytime and the applicability of demurrages. However, the Respondents have not objected to the issuance of the Notice of Readiness at Vung Tau port, at the earliest opportunity.

46. The Fixture note dated 12.03.2021 prescribed a fixed rate of demurrage under clause 7. The appellant issued of statement of facts and an invoice in the year 2021 demanding the settlement of freight and demurrage within 15 days as stipulated in clause 10 of the fixture note. And the Respondents did not deny the claim until the arbitration notice. On the basis of the material record, an arguable claim for demurrage was raised by the appellant.

47. It is pertinent to note that the demurrage here is liquidated damages and liability is being contested before the arbitrator. As no pecuniary obligation arises until adjudication is complete, the claim is a mere right to sue for damages, which cannot by itself justify securing the amount through attachment because Order XXXVIII Rule 5 of the CPC cannot be used to convert an unsecured claim for damages into a secured debt.

48. It is well settled legal principle that a claim for un-liquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory forum. When there is a breach of contract, the party who commits the breach does not *eo instanti* (at that very instant) incur any pecuniary obligation, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right that the party aggrieved by the breach of the contract is the right to sue for damages, which is not an

actionable claim, and this position is made amply clear by the amendment (34 of 2019) w.e.f. 31-10-2019 in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred, as stated in the Transfer of Property Act, 1882 as follows:

6. What may be transferred. — Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

(e) A mere right to sue cannot be transferred.

The above provision strengthens the present case that the appellant has the only right to sue, but it cannot impose interest, as it is not a debt.

49. In fact, the aggrieved party's sole entitlement is to approach a Judicial Forum to seek recovery of damages. Damages constitute compensation awarded by the competent judicial fora for the injury or loss sustained by the party. Importantly, such compensation does not arise from any pre-existing pecuniary obligation on the part of the party committing the breach rather, it flows from the orders of the Judicial Forum upon adjudication.

50. Consequently, no pecuniary liability crystallizes until the Competent Forum determines that the party complaining of the breach is entitled to damages. At the stage of assessment, the said forum is not merely quantifying a liability that already exists; rather, it first establishes liability and then proceeds to determine the extent of damages. Until such

determination is made, the alleged debtor incurs no enforceable obligation, and no actionable pecuniary liability arises against him.

51. In the backdrop of above facts and circumstances in our considered view, the appellant has not been able to establish a strong *prima facie* case. The claim is predicated on disputed demurrage allegedly arising from liquidated damages and the very liability is yet to be determined. The validity of the Notice of Readiness dated 21.05.2021 and its issuance at Vung Tau instead of the contractually agreed discharge port at Ho Chi Minh City, the alleged waiver by the respondents, the unsigned Statement of Facts, and the disputed issuance and service of invoices are all contentious issues requiring adjudication. In the absence of a determination on liability, the claim does not crystallize into an enforceable or actionable debt. Hence, the *prima facie* case may be arguable, but it does not operate conclusively as a strong *prima facie* case in favour of the appellant.

BALANCE OF CONVENIENCE:

52. As held in ***Essar's*** case, to assess the balance of convenience, the Court is required to weigh the consequences of refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail.

53. It is pertinent to note the admitted fact in the lis is that, in terms of ex-parte interim orders dated 23.04.2024 passed by the learned Single Judge, the 1st respondent immediately complied with the said conditional orders within 24 hours by depositing the required amount before the Registry of this court on 24.04.2024 itself, which crystal clears the bonafide conduct of the 1st respondent Company. Hence, mere allegation of the appellant Company that the 1st respondent company would fritter away its assets with a view to frustrate the award in the event of his succeeding the arbitral proceedings has no significance.

54. In fact, a quantity of 1,600 MT of rice constitutes routine business stock and not a special or earmarked asset. Restraining the company from dealing with its normal stock would disrupt its core export operations. On the other hand, the appellant issued the Notice of Readiness (NOR) in May 2021, and on issuance of the invoice on 23.06.2021, the appellant did not take any action and waited till 18.04.2024 to issue the second invoice, which included interest @ 24% for the initial demurrage claim. It is pertinent to note that the appellant has not explained the complete inaction on the part of the respondents for a period of 3 years, until 2024.

55. The appellant only approached the Court after 3 years of delay with a claim that was yet to be adjudicated, whereas maintaining the rice in a frozen state was likely to cause substantial commercial detriment to the

1st respondent. In fact, this absolute unexplained silence for such a long period leads us to conclude that the balance of convenience clearly does not lie in favour of the appellant and emphasises that the appellant had not approached the court with reasonable expedition.

56. Thus, the comparative hardship to the 1st respondent Company was far greater, coupled with the fact that the claim amount is yet to be adjudicated before the learned arbitrator and the appellant did not satisfy the two essential pre-requisites to grant interim measure under Section 9 of the Act. Therefore, the balance of convenience does not lie in favour of the appellant.

OTHER FACTORS:

57. As rightly concluded by the learned Single Judge that the appellant had failed to act with reasonable expedition and observed that where a party remains silent and elects to assert its rights only at the juncture when attachable cargo becomes available, the extraordinary power of attachment cannot be invoked as a matter of course. Such a delay cannot be brushed aside as a mere procedural lapse, rather, it goes to the root of the appellant's bona fides and negates any real necessity for exceptional interim protection under Section 9 of the Act.

58. Moreover, as observed in the ***Sky Power*** judgment that the underlying principles for the grant of interim relief as contemplated under Order 38 Rule 5 CPC cannot be disregarded, one of the underlying principles for the grant of interim relief is that the appellant should also establish that the defendant is attempting to remove or dispose of his assets with the intention of defeating the orders that may be passed. However, in the present case, the appellant has not even able to show any real risk of asset diminution. In fact, Paragraphs 28 and 29 in Section 9 petition (ICOMAOA No.5 of 2024) contained only vague or unsupported allegations. Though the appellant is not required to demonstrate such asset dissipation with strict or conclusive proof, it should still establish a reasonable apprehension of dissipation warranting protective relief. By refusing attachment based on such vague, unsubstantiated claims, the learned Single Judge correctly applied the well settled legal principles.

59. In ***Union of India Vs. Raman Iron Foundry***⁴, it is distinguished between an arguable claim for damages and a crystallised debt. Unliquidated damages cannot give rise to debt. Since the demurrage here is a liquidated damage, and the liability is being contested before the arbitrator, no pecuniary obligation arises until adjudication. As such, the claim is a mere right to sue for damages, which cannot by itself justify

⁴ (1974) 2 SCC 231

securing the amount through attachment because Order XXXVIII of CPC cannot be used to convert an un-secured, un-adjudicated damages claim into a secured debt. Hence, the learned Single Judge has correctly held that the petitioner has only the right to sue for damages until the arbitrator determines liability.

60. Based on ***Ultratech Cement Ltd. V. Sunfield Resources Pvt. Ltd.***, the appellant's claim of demurrage is based upon consideration of the facts and the contractual terms mentioned in the fixture note. The court cannot place reliance on precedents concerning the demurrage clause, as those were rendered in the light of specific facts and circumstances and peculiar in nature. Here, the facts have to be checked by the arbitrator and not by us, more particularly, while exercising the powers under Section 37 of the Act. Hence, the court cannot rely on judgments that dealt with the demurrage clause, even though the respondents had waived the right to challenge the demurrage by being silent during the Notice of Readiness, the validity of the waiver and Notice of Readiness involves detailed factual foundational questions that have to be dealt with by the Arbitrator, not by the Court at this interim stage.

61. The appellate jurisdiction is circumscribed by the principle that interference is warranted only where the impugned order suffers from arbitrariness, perversity, or violation of settled legal principles. The

concept of “perversity” strictly limits appellate intervention. The said position was well founded in ***Wander Ltd. v. Antox India (P) Ltd.***⁵, wherein the Hon’ble Supreme Court held that an appellate court cannot re-appreciate the material or take a different view merely because another view is possible. This principle has further been reiterated in the judgment of ***Ramakant Ambala Choksi v. Harish Ambalal Choksi***⁶, wherein the Hon’ble Supreme Court held that in the absence of perversity, the High Court must refrain from interfering with the discretionary Orders. In the present case at hand, we do not find any arbitrariness, perversity, or violation of settled legal principles in the orders under challenge before us.

CONCLUSION:

62. In the aforesaid facts and circumstances, the discretion vested in and exercised by the learned Single Judge while dismissing the petition under Section 9, calls for no interference by us. Moreover, the orders under the appeal cannot be characterised as perverse, arbitrary, or vitiated by any patent illegality and considering the settled position that an appeal under Section 37 of the Act is not in the nature of a first appeal.

⁵ 1990 Supp SCC 727

⁶ (2024) 11 SCC 351

63. For the foregoing conclusion arrived at by this Court, we see no grounds to interfere with the impugned orders. Accordingly, the appeal is dismissed.

There shall be no order as to costs. As a sequel, all pending applications shall stand closed.

RAVI NATH TILHARI, J

MAHESWARA RAO KUNCHEAM, J

GVK

**THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI
AND
THE HONOURABLE SRI JUSTICE MAHESWARA RAO KUNCHEAM**

I.C.O.M.A.A. No.2 of 2025

Dt. 07.01.2026

GVK