

APHC010193672024



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

[3506]

MONDAY, THE THIRTEENTH DAY OF OCTOBER
TWO THOUSAND AND TWENTY FIVE

PRESENT

THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN

INTERNATIONAL COMMERCIAL ARBITRATION ORIGINAL APPLICATION

NO: 5/2024

Between:

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

...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 RAJASEKHAR.MANGIPUDI@NORGOASHIPPING.COM

2. M/S SRI SEETARAMANJANEYASORTEX, HAVING ITS OFFICE AT D. NO. 1-215/A, YANAM ROAD, UPPALANKAKARAPA MANDAL, KAKINADA -533016. EMAIL ADDRESS RAIASEKHAR.MANGIPUDI@NORGOASHIPPING.COM

3. M/S AMIT CHAWAL UDHYOG, HAVING ITS OFFICE AT SINODHA ROAD, TILDA NEORA, RAIPUR, CHATTISGARH 493114. EMAIL ADDRESS RAIASEKHAR.MANGIPUDI@NORGOASHIPPING.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 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 4 th 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. c. Pass a

IA NO: 1 OF 2024

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to permit Mr. Madala Srinivas to represent the petitioner vide resolution dated 22.04.2024 and to pass

IA NO: 1 OF 2025

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to Vacate ex-parte interim order dated 23.04.2024 directing attachment of cargo and furnishing of security; For costs of the application, Pass

IA NO: 2 OF 2025

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to a. Direct the Registry of the Hon'ble Court to forthwith return of the security amount of USD 296,326.74 deposited by Respondent No.1 b. For costs of the application; c. Pass

Counsel for the Petitioner:

1.SAI SANJAY SURANENI

Counsel for the Respondent(S):

1.MOGULURU ISWARYA

The Court made the following:

THE HONOURABLE SRI JUSTICE CHALLA GUNARANJAN
INTERNATIONAL COMMERCIAL ARBITRATION ORIGINAL
APPLICATION NO: 5/2024

ORDER:

Present application is filed under Section 9 of Arbitration and Conciliation Act, 1996, seeking following relief:

- “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 Respondent's port, pending the issuance of arbitration award;
 - b. *Ex parte* direct Respondents to furnish security in favour of the Petitioner for the sum of USD 296,326.74 along with interest pending the issuance of arbitration awards; and
 - c. Pass any other order as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case, and in the interests of justice, equity and good conscience.”
2. (a) Initially, this Court, on 23.04.2024, has passed conditional order of attachment (herein after, for short 'attachment') of stock in trade of 1600 MTs of rice. However, subject to furnishing of security for USD 296,326.74 within

twenty-four hours on receipt of notice, the said order under attachment stood raised.

(b) Consequently, 1st respondent has provided security in terms of aforesaid order dated 26.04.2024, enabling to release the order of attachment of Cargo. However, the said order of attachment came to be assailed in I.COM.A.OA. No.3 of 2024. The appellate court has disposed of the said appeal vide orders dated 18.02.2025, granting liberty to 1st respondent/appellant to submit objections/explanation before the learned Single Judge as to why it need not furnish security for the amounts so ordered and seek withdrawal of attachment, and on such recourse being adopted, the said application was observed to be disposed in accordance with law. The 1st respondent, therefore, preferred I.A. No.1 of 2025 under Order 39 Rule 4 of CPC seeking to vacate the *ex parte* interim order dated 23.04.2024 ordering attachment of Cargo and I.A. No.2 of 2025 seeking direction to the Registry to return the security amount as deposited respectively.

3. Petitioner herein filed counter on I.A. No.1 of 2025 on 22.04.2025 and an additional counter on 29.08.2025.

4. Brief facts germane for disposal of present petition and also other applications are as under:

(a) Petitioner is Hong Kong based company engaged in business of owning and chartering out vessels. Respondents 1 to 3 are companies incorporated under the provisions of Indian Laws engaged in the business of sale and export of agricultural commodities. 4th respondent operates and manages Port, which is within the territorial jurisdiction of this Court. Petitioner and respondents 1 to 3 entered into fixture note/charterer party agreement dated 12.03.2021, under which petitioner chartered vessel 'MV HAN THAR' for carriage of Cargo of 9000 MTs of rice. The fixture note provided for the quantity of cargo to be carried, port of loading, port of discharge, freight payable and laytime, besides other covenants. It also provided for demurrages at the rate of USD 7500 per day for delay if any caused at the loading port or discharging port. Further, fixture note also provides for dispute resolution mechanism by way of arbitration to be settled at Singapore, in case of any disputes arising under the contract.

(b) Petitioner stated to have executed the contract by carrying the cargo from port of loading at Kakinada to port of discharge at

Ho Chi Minh City, Viet Nam. Before reaching port of discharge, notice of readiness was tendered on 21.05.2021, however, discharge commenced only on 29.05.2021 and got completed on 12.06.2021. The total time for discharge taken was 20 days 19 hours, of which only 3 days 16 hours were allowed as per the contract i.e., lay time, therefore, the balance of 17 days 2 hours incurred since was attributable to 1st respondent, statement of facts was issued on 23.06.2021, indicating that 1st respondent had to incur demurrage of USD 1,28,409.74. Petitioner also issued invoice dated 23.06.2021 claiming aforesaid amount and called upon to pay the same within 15 days.

(c) As respondents 1 to 3 failed and neglected to pay the same, petitioner, through its agent, addressed several reminders through the agents of respondents 1 to 3, which were never replied to, either denying or disputing the liability of demurrage. Thereafter, legal notice came to be issued on 06.08.2021 even for which there was no reply denying or disputing the demurrage. The respondents, therefore, were required to pay USD 1,28,409.74 along with interest @24% per annum from July, 2021 and also costs to the tune of USD 80,000, cumulatively USD 296,326.74. The updated invoice dated 18.04.2024 was raised

by petitioner for aforesaid amount. The respondents neither taken any steps to pay aforesaid amount of demurrage nor denied or disputed the same, since 1st respondent was in the process of loading approximately 16,000 MTs of rice on to the Vessel MV Bulk Manara, at 4th respondent port, present application has been filed for attachment and sale of the said cargo or else to furnish security for sum as claimed in aforesaid invoice in favour of petitioner.

(d) Subsequent to filing of present petition and passing of order of attachment, petitioner has issued notice of arbitration on 03.05.2024. The respondents have replied to the same and now the dispute is being contested by respective parties before learned arbitrator who stated to have heard the final arguments of respective parties and is awaiting for passing of final award.

5. Heard Sri Sanjay Suraneni, learned counsel for appellant and Sri Manoj Khatri, learned counsel, appearing on behalf of Ms.Moguluru Iswarya, learned counsel for respondents.

6. Learned counsel for applicant raised following contentions:

(i) that fixture note clearly provide for demurrages on account of delay in unloading of cargo at port of discharge, beyond the

permitted lay time, since such delay has been clearly indicated in statement of facts dated 23.06.2021 followed by invoice for USD 1,28,409.74, which never was denied or disputed, there is a strong prima facie case in favour of petitioner to recover the said amounts.

(ii) that even broker of respondents 1 to 3 in their e-mail communications have categorically admitted to the liability of demurrage, in absence of any denial or dispute to the said amounts, there exists clear debt to be discharged by respondents. Under Section 74 of Indian Contract Act, the plaintiff is required only to prove damages in general sense as contract made between parties estimating damages is itself in evidence of damages, therefore, as amount claimed is towards demurrage as agreed between parties, no other evidence is required to show that the demand made was unreasonable or no legal injury caused to the respondents, meaning thereby no specific loss need to be shown. Only in order to secure the said debt and in the event of final award being passed, and ensure respondents do not avoid payments under the award, clearly balance of convenience lies in its favour for seeking interim attachment. The defense set up by respondents in the present

application, in particular contesting notice of readiness dated 21.05.2021 to be invalid and not in consonance with clauses 16 and 21 of fixture note and besides issuance of invoices dated 23.06.2021 only on 2nd respondent, therefore, there is no valid claim qua 1st respondent and non-service of second notice dated 18.04.2024 are only an after thought to defeat the undenied liability.

(iii) that even with regard to notice of readiness dated 21.05.2021, since the respondents never raised any objection and rather acted on the same at the discharge port, they impliedly waived the right to dispute notice of readiness. Even otherwise as per sea port regulations of Ho Chi Minh City, in particular Articles 2 and 6 Vung Tau falls under Ho Chi Minh City port, therefore, for all purposes, notice of readiness constitutes to be valid and issued at port of discharge.

7. In support of aforesaid submissions, learned counsel for petitioner placed reliance on the following judgments:

(i) Judgment of the Hon'ble Apex Court in **Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited**¹

¹ 2022 SCC OnLine SC 1219

(ii) Order of this Court in **Tuf Metallurgical Private Limited and others v. Bst(hk) Limited**²

(iii) Order of Division Bench of this Court in **Tuf Metallurgical Private Limited v. Bst(hk) and others**³

(iv) Order of High Court of Madras in **Value Shipping Limited v. Owners and parties interested in the Vessel MV Nadhenu Purna**⁴

8. (a) Per contra, learned counsel for respondents contended that since it is an admitted position that claim is for demurrages which are in the nature of liquidated damages, even as admitted by petitioner, until and unless such liquidated damages proved, established and adjudicated, there exists no debt. The liability first has to be fixed and thereafter, the damages have to be assessed, which are preconditions for assuming existence of debt. Further, it is contended that as per clauses 5, 16 and 21 of fixture note, the performing owners/petitioner has to first issue 7/5/3/2/1 day notice of expected time of arrival of Vessel at discharging port followed by

² Order dated 12.09.2024 in I.A. No.2 of 2024 in ICOMAOA. No.14 of 2024

³ 2025 SCC OnLine AP 13

⁴ Order dated 08.02.2024 in Application Nos.138 and 479 of 2024 in C.S.(Comm.Div.) No.4 of 2024

notice of readiness upon vessel's arrival at outer anchorage of discharging port, therefore, unless aforesaid prior notices are issued strictly in terms of clauses 21 and 16, lay time shall not commence for arriving demurrage. Inasmuch as in the present case, no such notice was issued under clause 21, and even notice of readiness dated 21.05.2021 issued under clause 16 was not upon arrival at Ho Chi Minh City port, rather it was at Vung Tau, the same do not constitute to be a valid notice of readiness. Besides, even statement of facts was not signed by shipper, first invoice dated 23.06.2021, was never issued to 1st respondent, whose cargo is now under attachment and admittedly, second invoice dated 18.04.2024 was never served on any of the respondents, all these contentious issues required to be examined with reference to the terms of contract and also evidence to determine the liability *per se*. Unless the liability is determined with reference to above issues, mere existence of clause of liquidated damages in contract does not ipso facto confirm the existence of debt.

(b) He further contended that in order to maintain attachment, the principles enunciated under Order 38 Rule 5 of CPC are mandatorily required to be established. When showing prima

facie case, that one is attempting to remove or dispose of the assets and for securing doubtful claims and conversion of any secured debt into secured, the aforesaid provision cannot be invoked. Since petitioner has been silent from July, 2021 till moving of present application in 2024, even without invoking the dispute resolution clause under the contract, seeking of attachment of 1st respondent cargo by present application would be only to arm-twist the respondents' furtherance to reach settlement on disputed claim. The cargo that is sought to be attached is stock in trade, and nothing has been pleaded or shown in the application that the respondents are selling all their assets in last three years or sold certain assets in last three years, except for making a bald statement which would not suffice to seek relief under Order 38 Rule 5 of CPC.

(c) In support of above said submissions, he placed reliance on the following judgments:

(i) Judgment of the Hon'ble Apex Court in **Sanghi Industries Limited v. Ravin Cables Limited and another**⁵

⁵ 2022 SCC OnLine SC 1329

(ii) Judgment of Hon'ble Apex Court in **Union of India v. Raman Iron Foundry and others**⁶

(iii) Judgment of High Court of Delhi in **Skypower Solar India Private Limited and others v. Sterling and Wilson International Fze**⁷

(iv) Judgment of Hon'ble Apex Court in **Sterling and Wilson International Fze v. Skypower Solar India Private Limited and others**⁸

(v) Judgment of Hon'ble Apex Court in **Raman Tech. and Process Engg. Co. and ors. V. Solanki Traders**⁹

(vi) Judgment of High Court of Bombay in **Ultratech Cement Ltd. V. Sunfield Resources Pty. Ltd.**¹⁰

(vii) Judgment of High Court of Delhi in **Belvedere Resources DMCC v. OCL Iron and Steel Ltd and Ors**¹¹

9. Perused the record and considered submissions of both counsels.

⁶ (1974) 2 SCC 231

⁷ 2023 SCC OnLine Del 7240

⁸ Order dated 08.04.2024 in Special Leave to Appeal Nos.6437 and 6438 of 2024

⁹ (2008) 2 SCC 302

¹⁰ 2016 SCC OnLine Bom 10023

¹¹ 2025 SCC OnLine Del 4652

10. There is no dispute between the parties in entering into fixture note/contract for carriage of Cargo. The contract is dated 12.03.2021, which is executed between petitioner as performing owner and 1st respondent as charterer and respondents 2 and 3 as group members. As per the said contract, minimum of 9000 MTs and maximum of 9500 MTs of rice was required to be shipped through Cargo from loading port of Kakinada to discharging port of Ho Chi Minh City, Viet Nam. The freight agreed was USD 34.00 per MT on FIOS Terms. Clause 7 provided for demurrage @ USD 7500 per day of pro data and dispatch rate @ USD 3500 per day of pro data. Clause 10 envisaged that demurrage and dispatch at loading port to be settled along with freight rates and likewise, demurrage and dispatch at discharge port within 15 days after completion of discharging and submission of documents. Clause 16 contemplates issuance of notice of readiness at discharging port, the master or agent upon Vessel's arrival at outer anchorage of discharging port required to issue such notice and the lay time shall commence from 12 hours after issuance of such notice. Clause 21 also specified that owners/master to issue advance notice of expected time of arrival of vessel at loading and

discharging port. It is also not in dispute that the cargo was loaded at Kakinada Port, the designated loading port, the same was discharged at Ho Chi Minh City Port, Viet Nam. Entire dispute now revolves around the delay caused at discharging port.

11. It is the case of petitioner that notice of readiness was issued on 21.05.2021. As per clause 16, upon issuance of such notice, lay time shall commence from 12 hours thereafter. It is stated that the discharge only commenced on 29.05.2021 and was completed on 12.06.2021, therefore, after excluding the allowed time for discharge, it exceeded 17 days 2 hours attracting demurrage charges. Statement of facts was issued on 23.06.2021 to 1st respondent, though unsigned by shipper, along with invoice for demurrages for USD 1,28,409.74. There was some correspondence between the brokers of both petitioner and respondents, but not directly between parties herein, which is also presently in dispute. Petitioner did not take any steps to claim aforesaid amounts. It is stated to have issued second invoice on 18.04.2024 updating along with interest @24% per annum from July, 2021 onwards. Therefore, fact remains that after July, 2021, till issuance of second invoice, which has been

admitted to by the petitioner that there was no proof of communicating the same to respondents and eventually filing of present O.A. on 23.04.2024, no effective steps ever came to be initiated for recovery, though clause 20(2) of the contract provided to resolve the disputes through arbitration to be settled at Singapore.

12. It is equally not in dispute that after issuance of notice of readiness and discharging of the cargo, issuance of statement of facts along with first invoice, neither the respondents raised any dispute nor denied the liability. In this background, the relief claimed in the present application needs to be examined. Since the application is filed under Section 9 of Arbitration and Conciliation Act, seeking attachment of cargo belonging to 1st respondent, this Court is required to examine whether such relief could be granted under Section 9(ii)(e) of the Arbitration and Conciliation Act, 1996, keeping in view the principles enunciated or preconditions attracting Order 38 Rule 5 of CPC.

13. It is apt to refer few judgments relied on by both parties, which dealt with scope of Section 9 of Arbitration and Conciliation Act and also Order 38 Rule 5 of CPC, which reads as under:

Section 9 of Arbitration and Conciliation Act, 1996:**Interim measures, etc. by Court.—**

(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 a 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 subject-matter 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.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.”

Order 38 Rule 5 of CPC: 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.

14. In **Raman Tech's case**, the Hon'ble Apex Court, while considering the object and scope of Order 38 Rule 5 of CPC, observed 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 under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against 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.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, *prima facie*, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment. (See *Premraj Mundra v. Md. Manech Gazi* [AIR 1951 Cal 156] for a clear summary of the principles.)

15. Considering scope of Section 9 of Arbitration and Conciliation Act and applying the conditions of Order 38 Rule 5 of

CPC for the purpose of granting interim relief to secure the amount in dispute, the Hon'ble Apex Court in **Essar House case**, held as follows:

“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.”

16. Later, in **Sanghi Industries case**, the Hon’ble Apex Court once again reiterated the parameters for considering grant of interim relief for securing the amounts in dispute. Paragraph No.5 of the said judgment reads as under:

“**5.** 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.”

17. Even Division Bench of this Court in **TUF Metallurgical’s case**, after referring to aforesaid judgments of Hon’ble Apex Court in **Sanghi Industries case** and **Essar House case**, observed as follows:

“28. The power of attachment under Order 38 Rule 5 CPC was explained in Raman Tech. & Process Engg. Co. v. Solanki Traders wherein it was held as a drastic and extraordinary power and that it should be used sparingly and strictly in accordance with the rule.

29. The power of civil court to pass interlocutory orders under Orders 38, 39 and 40 CPC are provided in abridged form in Sections 9 and 17 of the Act, but the principles for grant of interim order remain constant.

30. Considering the drastic and extraordinary power of attachment, it would be quite odd to say that such a power can be exercised de hors the pleadings just because the language of Section 9 of the Arbitration Act enables the civil Court to pass orders which are “just and convenient”.”

18. The conspectus view of aforesaid judgments go to show that while considering the application under Section 9 for the purpose of securing the amount in dispute, the Court is required to see the following aspects: 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.

19. Keeping in view aforesaid tests, this Court proceeds to examine facts of present case.

Prima Facie Case:

20. The fixture note clearly provided for port of loading and port of discharge to be Kakinada and Ho Chi Minh City, Viet Nam respectively. The notice of readiness contemplated under clause 16 was supposed to have been issued upon Vessel's arrival at outer anchorage of discharging port. Discharging port has been clearly specified under clause 5 to be Ho Chi Min City, Viet Nam. It is claimed that notice of readiness was issued while Vessel was anchored at Vung Tau. Later, Vessel proceeded to Ho Chi Minh

City Port, Viet Nam and discharged the cargo. There is a serious dispute between the parties as to whether notice of readiness issued in the present case constitutes a valid notice of readiness inasmuch as the same ought to have been issued upon Vessel arriving outer anchorage of Ho Chi Minh City. This has now culminated into a demand for demurrage charge of USD 1,28,409.74 and interest @24% per annum along with costs of USD 80,000, cumulatively USD 296,326.74.

21. The demand was first notified by way of statement of facts and first invoice even dated 23.06.2021 followed by demand notice dated 06.08.2021. This was later followed by second invoice dated 18.04.2024. Yet again, there is a dispute regarding raising of first invoice on 1st respondent, shipper not signing statement of facts, and non-communication of second invoice. Neither the respondents have ever denied or disputed the claim until reply was issued to notice of arbitration. There is no dispute that the contract has provided for demurrage @ USD 7,500 per day. The petitioner also admitted that the claim is in the nature of liquidated damages. It is admitted that notice of readiness was issued after anchoring at Vung Tau but not Ho Chi Minh City and that there was no objection raised at relevant point of time

regarding notice of readiness. Therefore, it is ultimately for arbitrator to decide whether notice of readiness dated 21.05.2021 is valid and binds the parties and whether the respondents have waived their right to contest the same, having not objected to do at the earliest point of time. Since the claim is in the nature of liquidated damages, it is the contention of counsel for respondents that unless the same is determined and damages are assessed, there cannot be any debt in existence, and the same translates to an actionable claim seeking to secure by present application.

22. It is also his submission that provisions of Order 38 Rule 5 of CPC cannot be leveraged for converting an unsecured debt into a secured debt, therefore, not only applicant to demonstrate strong prima facie case but also is required to establish that the claim is bona fide and valid. He has heavily relied on following observations of Hon'ble Apex Court in **Raman Iron Foundry case**, which reads as under:

“**11.** Having discussed the proper interpretation of clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other

contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract *in terrorem* is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for

unliquidated damages. Now the law is well settled that a claim for unliquidated 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 authority. When there is a breach of contract, the party who commits the breach does not *eo instanti* 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 which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we find it stated by Wightman, J., in *Jones v. Thompson* [(1858) 27 LJ QB 234 : 120 ER 430] “Exparte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed”. It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in *O'Driscoll v. Manchester Insurance Committee* [(1915) 3 KB 499 : 113 LT 683] Swinfen Eady, L.J., said in reference to cases where the claim was for unliquidated damages: “...in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given”. The same view has also

been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, *Jabed Sheikh v. Taher Mallik* [AIR 1941 Cal 639 : 197 IC 606 : 45 Cal WN 519] , *S. Milkha Singh v. N.K. Gopala Krishna Mudaliar* [AIR 1956 Punj 174] and *Iron and Hardware (India) Co. v. Firm Shamlal and Bros* [AIR 1954 Bom 423, 425-26 : ILR 1954 Bom 739 : 56 Bom LR 473] . Chagla, C.J. in the last mentioned case, stated the law in these terms: (at pp. 425-26)

“In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which

already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.”

This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of clause 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under clause 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.”

23. On the other hand, learned counsel for the petitioner, while relying on the judgment of High Court of Bombay in **Ultratech**

Cement Case, contended that all the demurrage claimed under contract is towards liquidated damages, rate of which is fixed, therefore, the moment Vessel is detained beyond time provided under the contract, the same constitutes breach on the part of charterer for which specified liability has already been agreed upon and nothing more is required to be proven and demonstrated for further adjudication. Meaning thereby, it is contended that the amount agreed under the contract is fixed and once liability is not denied nor disputed, the same would amount to actionable claim.

24. In the facts of present case, the claim made is undisputedly to be liquidated damages. The parties have agreed for a specific rate to assess the damages. However, before embarking on the amount of damages, the liability *per se* has to be determined. The said exercise of determining liability is now seized up before the arbitrator. Unless the liability is determined, it cannot be said that petitioner has an actionable claim. Petitioner though having raised demand claiming demurrage charges in July, 2021 itself, has kept quiet till 2024 without initiating any legal steps. Even respondents merely denied the statement of facts to be unsigned by one of the parties, and first invoice was never communicated

to 1st respondent and so also second invoice, which stand is taken only after issuance of notice of arbitration. This Court, therefore, is of the opinion that the liquidated damages so claimed now by petitioner unless are determined qua liability, there cannot be any actionable claim in favour of petitioner. Even the judgment in **Ultratech Cement case**, while explaining the concept of demurrage ultimately concluded that in a given case the parties may commercially understand a demurrage clause as a fixed charge and accordingly consider and discharge their obligation albeit the underlying legal position explained therein and that the same would certainly depend on facts and circumstances of each of the case. Therefore, in the present case, the contention of petitioner has to be tested from perspective of the covenants under the contract which exercise definitely would be clearly outside the scope of present application rather it be left to the arbitrator. Further the petitioner has also taken a plea that since the respondents have not raised any objection regarding issuance of notice of readiness for the purpose of unloading the cargo and based on the same, indeed cargo came to be discharged, the doctrine of waiver would kick in for the respondents to raise any dispute at this point of time and

in support has relied on **Glencore Grain Ltd v Flacker Shipping Ltd; The Happy Day**¹². The said judgment was rendered in appeal arising out of an interim final arbitration award. Such plea is required to be considered based on pleadings and evidence on record which can only be appreciated in the arbitration proceedings. Without rendering any specific finding on the foundational facts, no conclusion can be arrived. Having said that petitioner has since raised the demand at very first instance itself, basing on notice of readiness, which was not disputed by respondents, it has sufficiently demonstrated prima facie case.

Balance of convenience:

25. Petitioner having issued first notice on 23.06.2021 has waited to issue second updated invoice dated 18.04.2024, which included interest @24% and even thereafter, has not initiated any immediate steps for recovering the said amount. Learned counsel for petitioner also stated that there is no proof to show that second invoice was ever issued to the 2nd respondent. There is also serious dispute regarding issuance of both invoices to 1st respondent. The record shows that both these invoices have been raised on 2nd respondent. Learned counsel for petitioner,

¹² [2002] 2 ALL ER (Comm) 896

however, maintained that first invoice was duly emailed to MD of 1st respondent, therefore, they were very much aware of the same. In the absence of proper invoice being issued on 1st respondent whether there subsists any liability *per se*, de horse the other issues raised also need to be examined during arbitral proceedings. The petition is silent about what steps have been initiated from July, 2021 till institution of present petition for initiating legal steps. Therefore, this absolute silence for such a long period makes this Court to conclude that balance of convenience clearly does not lie in favour of petitioner. As rightly pointed out by learned counsel for respondents, emphasizing from the observation of Hon'ble Apex Court in **Essar House case**, the Court has to see whether the applicant had approached with reasonable expedition.

26. Though learned counsel for petitioner tried to persuade this Court by referring to the order of coordinate bench passed in **Tuf Metallurgical Case**, which was confirmed in Division Bench, as in that particular case, the petitioner therein had immediately asserted legal remedies and approached the court seeking interim measure, so there is a significant factual variation.

Therefore, the analogy and observations in those cases would not apply here.

27. Once a strong prima facie case is made out and balance of convenience is demonstrated, normally court exercising power under Section 9 of Arbitration Act should not withhold relief of granting order of attachment. However, in order to grant such order of attachment, it is essential that the party applying should make out a clear case underlying principles for grant of interim order as contemplated under Order 38 Rule 5 of CPC.

28. Learned counsel for petitioner, while addressing the said aspect, had laid much emphasis on judgment of Hon'ble Apex Court in **Essar House case** to contend that the Court is not required to look into technicalities of absence of averments in the pleadings or grounds raised for attachment before judgment. Even otherwise, it is his submission that petitioner has specifically pleaded in Paragraphs 28 and 29 that 1st respondent may proceed to sale, encumber the rice being sought to be attached, and further that flitter away its assets in order to frustrate any award that would be passed in favour of petitioner. These averments in his submission are sufficient to satisfy the

requirements of attachment. He has also contended that though in the counter, the 1st respondent denied aforesaid aspect and stated that to be hale and healthy, to which effect it has annexed balance sheet as annexure, no such copy has been filed along with, which itself demonstrates that it is clearly hiding to disclose the details of its assets to evaluate its financial status.

Paragraphs 28 and 29 read as under:

“28. Exparte Grounds: Petition seeks *exparte, ad interim* reliefs from this Hon’ble Court. If notice of this petition is given by petitioner to 1st respondent, 1st respondent may proceed to take away, sell, encumber and/or consume the rice, frustrating the purpose of the present petition.

29. Petitioner has a *prima facie* good case that 1st respondent is liable to it. Petitioner is also likely to succeed and obtain award against 1st Respondent. If security is not ordered, it is likely that petitioner will not be able to realize the fruits of any award that is may obtain in the arbitrations. There is a real risk that 1st respondent will fritter away its assets with a view to frustrate any award that petitioner may obtain.”

29. On the other hand, learned counsel for 1st respondent by relying on **Skypower case**, appeal against which came to be dismissed by Hon’ble Apex Court vide order dated 08.04.2024,

contended that unless and until the pre conditions under Order 38 Rule 5 of CPC are satisfied and there are specific allegations with cogent material to show respondents are likely to defeat the decree/award that may be passed by arbitrator by disposing of properties, the relief of attachment cannot be granted to petitioner. Except for making a vague and bald statement in Paragraphs referred to above, no cogent material has been placed on record to even remotely suggest 1st respondent is disposing of its properties to frustrate the award. By referring to aforesaid judgments, he also submitted that the observations of Hon'ble Apex Court in **Essar House case** to the effect that while considering the application for interim measures one need not go into the technicality of absence of averments satisfying ingredients of Order 38 Rule 5 of CPC would not be absolute, the principles underlying Order 38 Rule 5 CPC necessarily have to be considered and the same was the opinion expressed by the High Court of Delhi in **Skypower case**. Therefore, clearly in the present case, petitioner failed to meet the same and is disentitled to the interim relief.

30. There is no quarrel with respect to one satisfying the underlying principles for grant of interim orders as contemplated

under Order 38 Rule 5 CPC for the purpose of ordering attachment before judgment while considering application under Section 9 of Arbitration Act. Even Division Bench of this Court in **Tuf Metallurgical case** has considered aforesaid aspect and reiterated that pleadings before court would be very much relevant for the purpose of granting relief under Section 9, testing the same from the parameters of Order 38 Rule 5 CPC. On plain reading of the pleadings made in the present case, it is clear that mere general statements are made that 1st respondent may proceed to sale, encumber the rice cargo proposed under attachment and further that 1st respondent would fritter away its assets to frustrate any award that petitioner may obtain. 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 1st 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. Lastly, petitioner has moved the present petition nearly after three years, therefore, as observed by Hon'ble Apex Court, if the applicant has not applied for relief with reasonable expedition, the relief of order of attachment should not be granted in a routine and mechanical way merely for asking. Had the petitioner been diligent and serious about asserting the claim, nothing prevented or stopped it from initiating appropriate legal proceedings at the earliest point of time rather than choosing to wait for such a long period. This conduct even raises serious doubts about the bonafides of petitioner in making eleventh hour attempt of securing attachment even without initiating any legal steps for recovery. The power under Order 38 Rule 5 CPC is held to be drastic and extraordinary and should not be exercised mechanically or merely for the asking. Therefore, in the considered opinion of this Court, the parameters circumscribed under Order 38 Rule 5 are not clearly made out for petitioner to be granted the relief as claimed in the present application.

31. In view of the same, the interim order dated 23.04.2024 stands vacated and the application accordingly dismissed.

Registry is forthwith directed to return the security amount of USD 296,326.74 deposited by 1st respondent. No costs.

As a sequel, interlocutory applications pending consideration, if any, shall stand closed.

CHALLA GUNARANJAN, J

13.10.2025
SS