

Notavailable Vs. Not Available

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SooperKanoon Citation : sooperkanoon.com/964288

Court : Chennai

Decided On : Apr-25-2013

Judge : Vinod K.Sharma

Appellant : Notavailable

Respondent : Not Available

Judgement :

Application Nos.5315 and 5316 of 2013 VINOD K.SHARMA, J.

These applications, under Section 9 of the Arbitration and Conciliation Act, 1996 have been filed for interim direction to the respondent to forthwith release all payments against invoices raised by the applicant from commencement of commercial operations since 25th July 2010 to 30th October 2012, and to continue to make payments on the stipulated due date in the BWPA against the invoices raised in future by the applicant.

2. Paragraph 25(iii) of the affidavit reads as under:- "As up to October 2012, the Respondent owes the Applicant a sum of Rs.522,505,799.06 towards water charges as summarized below:-

| S.No | Invoice No. | Date of the Invoice | Invoiced Amount | Amount Paid | Shortfall in Paymen |
|------|-------------|---------------------|-----------------|-------------|---------------------|
|------|-------------|---------------------|-----------------|-------------|---------------------|

| | | | | |
|------|------------|---------------|--------------|-------------|
| 001. | 05/08/2010 | 16,616,311.00 | 7,461,009.25 | 9,155,301.7 |
|------|------------|---------------|--------------|-------------|

| | | | | |
|------|------------|---------------|---------------|-------------|
| 002. | 04/09/2010 | 73,594,173.65 | 67,570,136.82 | 6,024,036.5 |
|------|------------|---------------|---------------|-------------|

003. 06/10/2010 85,241,412.00 71,950,707.69 13,290,705.2

004. 02/11/2010 91,998,000.00 82,718,161.74 9,279,838.2

005. 02/12/2010 91,998,000.00 66,454,755.30 25,543,244.7

006. 04/01/2011 91,998,000.00 53,153,684.46 38,844,315.5

007. 02/02/2011 91,998,000.00 72,958,093.92 19,039,906.0

008. 03/03/2011 91,998,000.00 79,352,874.90 12,645,125.1

009. 05/04/2011 91,998,000.00 68,951,581.02 23,046,418.9

010. 04/05/2011 91,998,000.00 75,287,483.28 16,710,516.7

011. 06/06/2011 91,998,000.00 73,039,052.16 18,958,947.8

012. 05/07/2011 91,998,000.00 69,081,290.20 22,916,701.8

013. (1st to 25th Jul/2011) 05/08/2011 71,224,258.00 67,096,178.11 4,128,079.89

013(25th to 31st Jul'2011) 05/08/2011 20,400,277.00 19,771,899.17 628,377.8

014. 05/09/2011 90,344,083.33 72,862,180.14 17,481,903.1

015. 04/10/2011 90,344,083.33 80,181,277.40 10,162,805.9

016. 04/11/2011 90,344,083.33 67,978,502.06 22,365,581.2

017. 02/12/2011 90,344,083.33 47,873,329.73 42,470,753.6

018. 06/01/2012 90,344,083.33 32,315,175.17 58,028,908.1

019. 02/02/2012 90,344,083.33 75,078,643.57 15,265,439.7

020. 05/03/2012 90,344,083.33 85,006,554.89 5,337,528.4

021. 09/04/2012 90,344,083.33 71,884,980.23 18,459,103.1

022. 05/05/2012 90,344,083.33 80,017,754.61 10,326,328.7

023. 01/06/2012 90,344,083.33 81,047,677.16 8,936,406.1

024. 04/07/2012 90,344,083.33 77,048,144.59 13,295,938.7

025. (1st to 25th Jul'2012. 03/08/2012 69,943,806.00 52,023,934.96
17,919,871.04 025 (25th to 31st Jul'2012) 03/08/2012 20,032,890.00
12,659,611.81 7,373,278.1

026. 05/09/2012 88,717,083.33 56,478,182.42 32,238,900.9

027. 05/10/2012 88,717,083.33 66,445,547.73 22,271,535.60 Total
2,356,254,211.55 1,833,748,412.49 522,505,799.06 3. The plaintiff company set
up a plant for water desalination for the 24x7 supply of drinking water to the city of
Chennai. The Project was established as a Public Private Partnership (PPP)
between the respondent and the applicant with the support of the Government of
Tamil Nadu. The applicant company was incorporated as a Special Purpose
Vehicle (SPV) exclusively to Design, Build, Own, Operate and Transfer (DBOOT)
the Project.

4. The plant under the project was set up at Minjuris built on 60 acre site in
Kattupalli, about 35 kms north of Chennai with a capacity of 100 thousand cu.m.
per day (100 million litres per day or 100 MLD). The plant is at present supplying
potable water in bulk to the respondent for distribution in the Chennai Metropolitan
Area.

5. The Chennai Metropolitan Water Supply and Sewerage Board (CMWSSB) was
established exclusively to attend the growing needs of planned development and
appropriate regulation of water supply and sewerage services in the Chennai
Metropolitan Area with particular reference to the protection of public health, and
for all matters connected therein or incidental thereto.

6. The project is a "dedicated" facility for supply of bulk water solely to the
respondent, who is by design the sole off-taker of water supplied by the Project.
This project was set up under the sponsorship of respondent to bridge the
increasing gap between the demand and supply of safe drinking water in the
Chennai Metropolitan Area. The commercial operation of the Plant commenced on

July 25, 2010. The aggregate capital expenditure for the project was Rs.552.45crore,which was financed by borrowings from banks and financial institutions to the tune of Rs.300 crore from domestic lenders and Euro 14.01 million from foreign lenders and an equity investment of Rs.172.98 crore.

7. One of the conditions agreed to between the parties was that the company shall not grant to any third party or allow any third party to obtain any entitlement to the Product Water supplied by the Facility during the Term of this Agreement.

8. Though the applicant has referred to other conditions, the clauses which are necessary for the case are reproduced hereunder:- "12.These charges are payable against the invoices raised by the Applicant at the end of each calendar month by the 5th day of the succeeding month, stating with the supporting calculations the Water Capacity Charges, Water Variable Charges and the total amount payable for the month. The invoiced amount is due and payable within 30 days from the date of the invoice. If payment is not made in full by the due date, a delayed payment charge is payable by the Respondent for each day from the date of issuance of the invoice to the date of actual payment at the Delay Rate (SBI prime lending rate plus 3.0%). Relevant BWPA Sections 10.2.1 and 10.2.2 (i) provide as follows in this behalf:- "10.2.1 Billing and Payment At the end of each Calendar Month, by the 5(fifth) day of the succeeding month (or, if such day is not a Business Day, the immediately succeeding Business Day), the Company shall prepare and submit to CMWSSB, an invoice (the "Invoice"), in duplicate stating with supporting calculations: A. In Relation to the Water Capacity Charges- (i) Available Capacity for the Facility for that Month. (ii)Deemed availability for that Month due to any breach by CMWSSB, Force Majeure Event, Period of Non-supply (iii)Adjustment, if any, for reduced Available Capacity (iv)Arrears, if any (v) Sub-total amount payable for the Month for Water Capacity Charges. B. In Relation to the Water Variable Charges- (i) The volume of Product Water supplied to CMWSSB in accordance with meter readings at the Water Dispatch Point for that Month. (ii) The Water Variable Charges based on the volume supplied during that month and the Price of Product Water for that Month. (iii) Penalty charges, if any payable for failure in supply of Product Water or meeting the Performance Standards. (iv) Adjustments, if any, for rebate in Water Variable Charges or any

other adjustment, as the case may be. (vi) Arrears, if any (vi) Sub-total amount payable for the Month for Water Variable Charges. "10.2.2. Due Date Rebate and Penalty etc. i) Invoices are payable within 30 (thirty) days from the date of the invoice ("the Due Date") iv) If the payment in full, of the Invoice, is not made by CMWSSB into the Operating Account on or before the close of business on the Due Date, a delayed payment charge on the unpaid amount due, for each day from the date of issuance of Invoice till date of actual payment thereof, will be payable at the Delay Rate with quarterly rests." B. Project Depends Exclusively on Guaranteed Off Take by Respondent and Timely Payment 13. In view of the sole off-taker structure of the Project (which is an inherent feature of the PPP model) the tariff payment by Respondent (the sole off-taker) is the "life-blood" of the Project. Payments by Respondent are the sole and exclusive source of revenue for the Project, and is intended to fund all cost including fixed and variable operating cost, debt service (Principal repayment and interest), depreciation, chemicals, consumables and electricity charges, and the funding of reserves (such as for debt service). In the absence of full and timely payment by Respondent of the monthly tariff, the Project will run out of cash in a matter of months if not weeks.

14. Because of the structural dependency between the Project's operation on the one hand and timely and full payment of invoices by Respondent on the other, the timely payment in full of the invoices is a fundamental principle for managing the "sole off-taker risk" in such projects. The BWPA manages this risk by providing multiple safeguards to ensure full and timely payment by Respondent of the monthly invoices raised by Applicant, as given below: (i) First, the Respondent is given a fixed time (30 days) to object to an invoice. If no objection is raised within the stipulated period, the invoice is "considered correct and complete and conclusive between the Parties." See BWPA Section 10.3(i) reproduced below: "10.3(i) If a Party does not question or dispute an Invoice within thirty (30) days of receiving it, the Invoice shall be considered correct and complete and conclusive between the Parties except in the case where that Party could not reasonably have identified any error or omission in the Invoice, taking into account the information then available to it during the above thirty (30) day period." (ii) Second, if the Respondent disputes an invoice, it is required to issue a prescribed "Invoice

Dispute Notice" within the aforesaid 30 day period setting out the specific item in dispute and an estimate of what such item ought to be. See BWPA Section 10.3(ii) reproduced below: "10.3(ii) If either Party disputes any item or part of an item set out in any Invoice then that Party shall serve a notice (an "Invoice Dispute Notice") on the other Party setting out the item or part of an item set out in such Invoice which is in dispute together with its estimate of what such item or part of an item should be." (iii) Third, and perhaps most crucially, Respondent is required to pay the full amount of the invoices (or the three month moving average), regardless of any dispute. See BWPA Section 10.3 (iii) reproduced below: "10.3 (iii) In the event that CMWSSB disputes all or any portion of the Invoice, it shall nevertheless pay the minimum of the moving average of the preceding three months (excluding any shutdown month) or the full amount of the disputed charges when due, provided the Invoice has been prepared in accordance with the provisions of Sections 10.1 and 10.2. The payment of the disputed charges will not in any way prejudice the rights of the Company under Section 10.3".

15. As can be seen from the above, the BWPA goes to great lengths to fine-tune the payment risk and to safeguard and protect the revenue stream of the Project, even from bonafide disputes that may arise. This protection is at the heart of making the PPP arrangement "bankable", because it reassures the Project investors (on both the equity and debt side) that even if there is a dispute, then pending its resolution, payments will be forth coming in full so that the Project continues to operation and does not shutdown. In the absence of such a protection, a sole off-taker, such as Respondent, could willy-nilly shut down the Project by raising a dispute of some sort. It is precisely to curb such abuse by a single off-taker, such as Respondent, that the Invoice is required to be paid in full pending settlement of any dispute. C. Payment by Respondent is Mandatory Regardless of Any Dispute 16. Notwithstanding the Respondent raising a dispute on all or any portion of the invoiced amount, it is still under an obligation to pay the minimum of the moving average of the preceding three (3) months or the full amount of disputed charges on the invoices. This is an unconditional obligation; it does not depend on any other condition being satisfied by the Applicant (or anyone else). As can be seen hereinabove from the quoted language of the contract, the BWPA clauses are non obstante (absolute and unqualified) and apply

under all circumstances. 17. Owing to its failure to make full payment of the invoices, Respondent is in breach of its contractual obligations under the BWPA, specifically Sections 10.2.2(i) and 10.3(iii) quoted above in regard to the payment of invoices raised by the Applicant. The Applicant has been timely raising the invoices on the Respondent in accordance with the BWPA since the operation commenced on July 25, 2010. Owing to its wrongful non-payment, Respondent CMWSSB owes the Applicant a sum in excess of Rs.52.2 crore towards water supplied by Applicant. Despite numerous and repeated reminders from the Applicant Company, the Respondent has not paid the Applicant's dues against the invoices raised on the Respondent. Nor did the Respondent issue any Invoice Dispute Notice to the Applicant Company in terms of Section 10.3 of the BWPA.

18. To put things in perspective, non-payment by Respondent has swollen to an aggregate sum that equals 25.44% of the paid-up capital and reserves of the Applicant as per the audited financial statement of the Applicant for the period ending June 30, 2012. This has made the Project virtually insolvent and will soon result in the Applicant being unable to meet even the day to day cost of operating and maintaining the plant, leave alone other fixed costs such as debt service. The Applicant is therefore, literally on life support at this time.

19. From a financial point of view, because of Respondent's continuing non-payment, the Applicant has suffered a loss in excess of Rs.61 crore for the period ending 30 June 2012, as per its audited financial statement. As a result, the net worth of the Applicant has been completely eroded from Rs.172.98 crores at the time of commencing commercial operation in July 2010 to Rs.72.78 crores as of June 30, 2012.

20. In addition, from a credit worthiness point of view, the Project is on the verge of defaulting to the banks and financial institutions that have provided debt funding for setting up the plant. The total outstanding debt as on 30 June 2012 is roughly Rs.233 crore to domestic lenders and Euro 10.54million to foreign lenders. In addition, the Applicant has borrowed over Rs.132 crore by way of unsecured loans from its sponsor, IVRCL Limited, on which the cumulative accrued and unpaid interest is in excess of Rs.30.7 crore. The Project requires a minimum of

Rs.7.09crores per month to sustain just the variable cost of its operation. D. Disputes are subject to Arbitration; which Applicant has formally requested, but Respondent has disregarded 21. The BWPA incorporates an Arbitration Agreement between the parties for adjudication of disputes by a sole arbitrator in accordance with the Arbitration and Conciliation Act, 1996. BWPA Section 17.3 embodying the Arbitration Agreement between the parties is reproduced below: "17.3 Arbitration i. The Dispute shall be submitted to arbitration at the request of either Party upon written notice to that effect to the other Party (a "Notice of Reference") and be finally determined in accordance with the provisions of the UNCITRAL, Rules of International Arbitration ("Rules") subject to the arbitration and Conciliation Act, 1996 and any statutory modification thereto from time to time. ii. The place of arbitration shall be Chennai in the State of Tamil Nadu, India and the arbitration will be governed by the provisions of Indian Laws and the Arbitration and Conciliation Act, 1996; iii. The decision of the arbitration(s) shall be final and binding on the Parties. iv. The arbitration(s) shall reasonably decide the proportion in which arbitration fees and costs are to be shared by the Parties. v. The arbitration(s) may, with the consent of the Parties, extend the time taken to make and publish the award. Notwithstanding the existence of any disputes referred to arbitration, the Parties shall continue to perform their respective obligations under this Agreement and the parties shall not withhold, for any reason whatsoever including pendency of arbitration proceeding, payment of any amount which has become due under this Agreement." 22. Prior to taking recourse to arbitration, the parties are required to attempt in good faith to amicably resolve their disputes in accordance with the conciliation procedure prescribed in Sections 17.1 and 17.2 of the BWPA. Accordingly, the Applicant has without prejudice to its right to avail of arbitration referred the dispute of unpaid invoices to the said Dispute Resolution Panel. The said conciliation proceedings have yielded a verdict entirely in favour of the Applicant. Based on its extended deliberations over several months, the Dispute Resolution Panel on 3 November 2012 directed Respondent to make payment of Applicant's invoices within one month. There is no indication that Respondent will comply.

23. In the face of foot dragging by Respondent, the Applicant prior to the conciliation, served upon Respondent a Notice of Reference to Arbitration on 11th

May 2012 as provided for in the Arbitration Agreement on account of Respondent's failure to pay the invoices in full and its continued failure to cure the breach of its obligations under the BWPA. However, to the frustration and disappointment of the Applicant, as on date the Respondent has not appointed an arbitrator from the panel suggested in the said Notice of Reference to Arbitration, and accordingly the arbitration is yet to commence. Due to the urgency of the situation and due to the ongoing drain on the Applicant's financial resources it is compelled to approach this Hon'ble court for interim measures of protection." 9. The case set up by the applicant is that, in violation of the agreed terms between the parties, the respondent has failed to release the payment due against the invoices raised by the applicant.

10. The learned Senior Counsel for the applicant vehemently contended that it is agreed between the parties that the applicant has to raise invoices with the supporting calculations for release of payment with respect to the Water Capacity Charges and Water Variable Charges. It was also agreed that payment due under the invoices would be paid within 30 days of the date of invoices.

11. According to the learned Senior Counsel for the applicant, this condition of payment was mandatory. Payments by respondent are the sole and exclusive source of revenue for the Project as the whole of the water has to be supplied only to the respondent and not to any third party. It was thus contended, for this reason that a special provision was made in the agreement, notwithstanding any dispute on any of the invoices, it was mandatory obligation to pay the minimum of the average of the preceding three months (excluding any shutdown month) or the full amount of the disputed charges of the invoices.

12. This condition has overriding effect of all the terms and conditions as agreed between the parties.

13. It is also one of the condition that if a party does not dispute an invoice within thirty days, it was to be taken as correct and conclusive between the parties. If any party was to dispute all or any portion of the Invoice, minimum of the moving average of the preceding three months (excluding any shutdown month) was to be paid. The action of the respondent in not agreeing to arbitration and not making

payment, therefore, was violation of the agreement entered into between the parties, which makes out a prima facie case in favour of the applicant.

14. It is also contended by the learned Senior Counsel for the applicant that balance of convenience is also in favour of the applicant. It was further contended though one of the condition for grant of interim injunction is that there should be irreparable loss and injury, and that it cannot be compensated in terms of money, but in this case, it is a special contract under which the applicant has no other source of income to run the project, which is dedicated exclusively to the respondent for supply of water to the residents of Chennai Metropolitan Area. Therefore, the applicant will be put to irreparable loss and injury if a direction is not issued.

15. The learned Senior Counsel also contended that the applicant is willing to furnish a bank guarantee or other security for the amount to be disbursed to them in terms of the agreement for the alleged disputed amount.

16. The application is opposed by the respondent by filing counter affidavit. A preliminary objection is raised that the relief claimed by the applicant in this application is not competent under Section 9 of the Arbitration and Conciliation Act, as the relief is in the nature of asking for final relief, is not permissible under Section 9 of the Arbitration and Conciliation Act.

17. The stand of the respondent is that under Clause 17(2) of the Bulk Water Purchase Agreement dated 13.09.2005, it is condition precedent for the applicant to submit any dispute, difference, or controversy for mediation before a Dispute Resolution Panel, and the applicant can seek reference of the dispute to arbitration and only after failure of the mediation process, that matter can be referred to arbitration. The stand of the respondent is that though the applicant submitted itself before the Dispute Resolution Board, but was for different set of issue and not the one covered under this application. However, it is not disputed that payment as agreed in conciliation proceeding has also not been granted to the applicant.

18. The averments made in the affidavit are denied by taking a stand that the respondent is not withholding any funds due to the applicant, under the Bulk Water Purchase Agreement. The stand of the respondent is that no payment is due to the applicant as on date. The claim raised by the applicant based on calculations not covered under the provisions of BWPA.

19. It is also the stand in the counter that the applicant can claim for the water capacity charges in full, only if the available capacity in any month is more than or equal to 95% of the contracted capacity, and in the event of the available capacity in any month being less than 95% of the contracted capacity, then the water capacity charges payable by the respondent to the applicant were to be reduced proportionately.

20. That under Clause 8.7(b) of the agreement, the available capacity shall be used for determining the water capacity charges payable by the respondent to the applicant and in the event that the available capacity in any given month is less than the contracted capacity, the water capacity charges payable by respondent to the applicant for that month shall be reduced proportionately as detailed in paragraph 25 of the affidavit of the applicant.

21. It is the positive stand of the respondent that the applicant had illogically raised invoices for full water capacity charges. The calculations made by the applicant was contrary to the norms prescribed under the contract as well as the admitted ground reality. The respondent made payments which were proportionate to the actual available capacity as contemplated in the agreement. Therefore, there is no breach of any contractual obligation on the part of the respondent. 22 It is submitted that there is no amount due to the applicant as the total amount has been paid in full. The other averments made in the affidavit have also been controverted. In sum and substance, the defence raised is that the applicant is not maintainable under Section 9 of the Arbitration and Conciliation Act and that the bills raised by the applicant are not as per the terms of the agreement. 23 From the pleadings referred to above, it is clear that it is mandatory on the part of the respondent to pay the minimum of the moving average of the preceding 3 months or the full amount disputed charges of invoice. This stipulation is not subject to any

other condition being satisfied by the applicant. 24 It also shows that keeping in view of the nature of contract, the balance of convenience is also in favour of the applicant and the applicant is likely to suffer irreparable loss if injunction is not granted. 25 The contention of the learned counsel for the respondent that application under section 9 is not competent, as it amounts to final relief cannot be accepted, in the peculiar facts and circumstances of this case. As per the terms of the contract which are binding on the parties, it is mandatory to pay the bill irrespective of the dispute if any. 26 The contention of the learned counsel for the respondent that order under section 9 of the Arbitration and Conciliation Act cannot be passed, as the applicant cannot invoke the arbitration clause without first resorting to conciliation also cannot be accepted, as the applicant had invoked the conciliation proceedings regarding non payment of dues which was decided in favour of the applicant, but respondent refused to honour the said commitment. 27 Para 29 of the affidavit reads as under: "29 The interim measures sought to be granted by the Court pending commencement of the arbitration are required to prevent the arbitration proceedings from being frustrated due to the Project suffering a total financial collapse rendering applicant insolvent. The interim measure of protection sought is just and convenient because the applicant has made out a prima facie case, the balance of convenience is overwhelmingly in the applicant's favour and the applicant will suffer irreparable injury if the interim measure is not granted, as explained below. (i) It is submitted that the applicant has a prima facie good case on merits and for the relief prayed for. Although the existence of a dispute is not relevant to respondent's obligation to make payment of the invoices, it should be noted that the dispute resulting from respondent's non-payment has been decided in favour of applicant under the conciliation process provided in the BWPA. The respondent's Panel constituted by applicant and respondent in accordance with BWPA Section 17.2. After conciliation proceedings extending over several months, the Dispute Resolution Panel issued its recommendation on 3.11.2012 directing the respondent to make payment of the applicant's invoices within one month. (ii) Furthermore, the balance of convenience is overwhelmingly in favour of the applicant. If the relief as prayed for is not granted, it would be fatal to the very existence of the applicant. Without infusion of the payments due from respondent, the applicant will in short order be wound up

by its creditors resulting in the Project going into liquidation. Not only will this result in huge monetary loss to the applicant and the banks and financial institutions and equity investors, it will mean untold hardship for the people of Chennai who have already been suffering from chronic water shortages. Secondly, there is a compelling public interest in ensuring that the Project continues to operate. A shut down of the Project will drastically reduce the availability of safe drinking water and adversely affect sanitation and public health in the Chennai Metropolitan Area. In addition closure of the Project will result in the irrevocable loss of the going concern value of the Project; in that, the Project is far more valuable as an operating water supply facility than what is salvageable from a liquidation of its plant and machinery. (iii) On the otherhand the loss (if any) to respondent is atmost notional. Respondent is required in any case by the BWPA to make full payment of the invoice even if there is a bonafide dispute. The protective measures sought will require respondent to do no more than what respondent is already obligated to do under the BWPA; there is no additional burden or risk placed upon it. Therefore, there is no inconvenience to the respondent. It is simply being required to duly fulfill its contractual obligations. Moreover, the blatant disregard by respondent of its contractual obligations and the high-handedness of its contempt of its contempt for the sanctity of the BWPA contract should not be left unchallenged. From the perspective of promoting the just and timely application of the rule of law, the respondent should be compelled to honour its contractual obligations even if (or because) it is an arm of Government." 28 In the counter filed by the respondent, this fact has not been specifically denied, as in paragraph 4 and 13 of the counter affidavit reads as under: "4 Over and above the same, Clause 17(2) of the Bulk Water Purchase Agreement, dated 13.9.2005 (hereinafter called the BWPA) makes it condition precedent for the applicant to submit the any dispute, difference or controversy of whatever nature howsoever rising under, out of or in relation with the BWPA for mediation before a Dispute Resolution Panel. Under the agreement, the applicant can seek to refer the dispute to arbitration only after the failure of the mediation process. Though the applicant had submitted itself before the Dispute Resolution Board, it was for a different set of issues and the present dispute has not been submitted before the Dispute Resolution Board thus far. While so, the present application under Section

9 of the Act is pre-mature, as much as the mediation process stipulated in the BWPA has not been exhausted by the applicant till date and the arbitration proceedings can ensue only on the failure of the mediation process under the BWPA. Without prejudice to the preliminary objections raised herein above, the respondent submits the following in reply to the averments raised in the applications under reply. 13 It is respectfully submitted that contrary to the claims of the applicant in paragraphs 28 to 30 of the affidavit under reply, there is no sustainable cause of action to maintain the above applications, much less any prima facie case being made out by the applicant to warrant any interim direction from this Court. As submitted at the outset, the reliefs sought for in the above applications are in the nature of off-setting the arbitration proceedings that ought to have been initiated by the applicant in the event that it felt aggrieved or there was any dispute that should be necessarily arbitrated upon. Without resorting to the well-settled proposition of law to that effect and against all canons of justice, the applicant has attempted to secure an arbitral award through the present applications without submitting itself to arbitration or establishing its claims in a manner known to law. Any amount of financial pressure, which has been primarily cited by the applicant as the basis for the above applications, cannot enable the applicant to seek the reliefs that go beyond the scope of Section 9 of the Act. The respondent being a statutory body, cannot be compelled into making payments without establishing its liability to do so and be put in a position where it has to seek the recovery of the same from the applicant in the event of the arbitral award being passed in its favour eventually. As stated earlier, the BWPA vests the onus to fund the project solely on the applicant. The applicant cannot seek to hold the project to ransom by making untenable claims and seek an equity based relief on that basis. It is respectfully submitted that the balance of subjective convenience cannot be the only arbiter in granting an interim relief, particularly when the amount sought to be released is well over 52 Crores. Whether or not the payments claimed by the applicant are legitimate and payable can only be determined at the end of the arbitration proceedings and seeking any release of payment on the presumption of a favourable award is per se unsustainable. The other contentions raised by the applicant in the paragraphs under reply are repetitions of the paragraphs already replied to and the respondent relies on its reply given in the

foregoing paragraphs to countenance the same." 29 The reading of the counter clearly shows that the factum that it is only on vague denial and not specific denial, nor respondents have placed on record, the decision taken in conciliation and reason for not implementing it. Rather, this is a VINOD K.SHARMA, J.

vaan/svki case where parties have resorted to conciliation proceedings before invoking arbitration. 30 Reliance placed by the learned counsel for the respondent on the judgment of the Hon'ble High Court of Orissa in Neelachakra Constructions vs. State of Orissa and another (CDJ 200.Orissa HC 028.therefore, would have no application to the facts of the present case. 31 The judgment of this Court in O.S.A.No.61 of 2011 decided on 20.10.2011 (M/s.IVRCL Infrastructures & Projects Ltd. vs. M/s.Alandur Municipal Corporation and 3 others) also does not apply to the facts of the present case, as in this case, admittedly parties have gone for conciliation and it is the respondent who have disputed the decision taken in the conciliation proceedings. The applicant therefore has successfully proved prima facie case, balance of convenience and also that it will suffer irreparable loss and injury in case injunction as prayed for is not granted. Consequently, this application is ordered. 25.04.2013 Index: Yes/No Internet:Yes/No svki/vaan Appln Nos.5315 and 5316 o

25. 04.2013

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