

**RIGOURS OF ATTACHMENT PRIOR TO JUDGMENT NOT STRICTLY APPLICABLE TO §9 OF THE ARBITRATION AND CONCILIATION ACT 1996: *ESSAR HOUSE PVT LTD v ARCELOR MITTAL NIPPON STEEL INDIA LTD***<sup>[1]</sup>

24 November 2022



The Supreme Court has held that the procedural rigours of Order 38 Rule 5 (attachment prior to judgment) of the Code of Civil Procedure 1908 are not strictly applicable while deciding a pre-arbitration §9 Petition to secure the amount in dispute.

***Facts***

Essar Steel entered into an agreement with Essar Services for the latter to provide support services to the former. Under the agreement, Essar Steel was supposed to pay a security deposit of ₹73 Crores, out of which an amount of ₹47.41 Crores was paid.

A different transaction was entered into by Essar Steel with Essar House to lease certain portions of a property owned by the latter. An interest free security deposit of ₹25.80 Crores was paid to Essar House. Subsequently, Essar Steel was admitted into CIRP and during the pendency of the insolvency process, another agreement was entered into with Essar Homes for the lease of office space. This agreement required a security deposit of c. ₹35.52 Crores, which was paid after adjusting the previously available security deposit.

Arcelor Mittal Nippon Steel was the successful resolution applicant and took over Essar Steel in 2019. Following the takeover, Arcelor settled its accounts with Essar Services by making payments and sought for a refund of the security deposit of ₹47.41 Crores. As far as Essar Homes' is concerned, a vacation notice was received by Arcelor which was complied with. In turn, Arcelor demanded the refund of the c. ₹47.71 Crores security deposit.

In both situations, the response from the Essar companies were that the respective deposits had been adjusted through a series of transactions to discharge Essar Steel's liabilities.

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<sup>1</sup> Decision of 14 September 2022 passed by the Supreme Court.

Arcelor filed two petitions under §9 of the Arbitration and Conciliation Act seeking the deposit of the respective security amounts with the Prothonotary of the Bombay High Court. In both cases, the Single Judge allowed the petitions and directed the respective Essar entities to either deposit the amount or provide a bank guarantee. Both appeals to the Division Bench were dismissed, which resulted in leave petitions being filed before the Supreme Court.

### **Supreme Court of India**

The primary contention was that while directing a deposit prior to an adjudication on the merits of the case, here through arbitration, the Court must strictly follow the principles of Order 38 Rule 5 of the CPC. The Court must satisfy itself that there is a *“bona fide and strong claim and that Essar House and/or Essar Services was about to remove or dispose of whole or part of its property with intent to obstruct or delay execution”*.

The Supreme Court dismissed the appeals by holding that:

1. While ordinarily the basic principles of procedure in the CPC should not be ignored when exercising powers under §9, the technicalities of the CPC would not come in the way of *“securing the ends of justice”*;
2. The powers of interim relief under §9 are wider than under the CPC, which is also evident from the language of the provision;
3. For the purposes of granting relief under §9 (pre, during or post arbitration, but before enforcement), all the Court is required to see is *“whether the applicant has a good prima facie case, whether the balance of convenience is in favour of interim relief...and whether the applicant has approached the court with reasonable expedition”*;
4. The *“mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC”* would not bar granting of relief if a *“strong prima facie case is made out and balance of convenience is in favour of interim relief being granted”*.
5. 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 §9”* and *“a strong possibility of diminution of assets would suffice”*.

### **Conclusion**

The Supreme Court has held that under the Arbitration Act, the requirements of Order 38 Rule 5 of the CPC for securing the amount in dispute prior to the commencement of arbitration are not strictly applicable.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

For further information on this topic please contact Tuli & Co

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