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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 3rd September, 2020
Pronounced on: 7th June, 2021

\+ O.M.P.(I) (COMM.) 243/2020

THAR CAMPS PVT. LTD. ..... Petitioner
Through: Mr. Dayan Krishnan, Sr. Advocate with Mr. Shivam Sharma, Ms. Ritika Goyal and Ms. Aakashi Lodha, Advs..

versus

M/S. INDUS RIVER CRUISES PVT. LTD. & ORS. ..... Defendants
Through: Ms. Manmeet Arora, Ms. Fareha Ahmad Khan, Ms. Samapika Biswal and Ms. Shagun Chopra, Advs. for Respondent Nos. 1 and 3
Mr. Shivek Trehan, Adv. for Respondent No. 2
Mr. Ashish Dholakia and Mr. Pranay Mohan Govil, Advs. for Respondent Nos. 4 and 5

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G E M E N T

% (video conferencing)

1. Three vessels, which stand berthed off the coast of Kolkata, constitute the subject matter of controversy in this petition, preferred by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"). They are the RV Katha Pandaw, RV

Kalaw Pandaw and the RV Kindat Pandaw and would be referred to, in this judgement, as "Katha", "Kalaw" and "Kindat", respectively.

A Fasciculus

2. Admittedly, Katha is owned by Respondent 4 M/s Pandaw Cruises Ltd, Myanmar ("PCL Myanmar", hereinafter), whereas Kalaw and Kindat are owned by Respondent 5 M/s Indus Cruises Pte Ltd, Perth ("Indus Perth", hereinafter), and all the three vessels were leased to Respondent 1 M/s Indus River Cruises Pvt Ltd, New Delhi under Bareboat Charter Agreements executed between Respondent 1 and PCL Myanmar in respect of Katha and between Respondent 1 and Indus Perth in respect of Kalaw and Kindat. The petitioner is a stranger to the said Bareboat Charter Agreements.

3. Respondent 1 entered into a Vessel Operation and Management Agreement ("VOMA", in short), whereunder the petitioner was contracted for operating and managing the aforesaid three vessels. Admittedly, the VOMA was executed exclusively between the petitioner and Respondent 1. None of the other respondents were parties to the VOMA. The petitioner claims that Respondent 1 owes over ₹ 36 crores to it under the VOMA. This, according to the petitioner, has resulted in a dispute, amenable to arbitration in accordance with the arbitration clause contained in the VOMA. The petitioner seeks, by the present petition, securing of the amount allegedly due from Respondent 1 to the petitioner, to the extent of ₹ 4,13,25,726/– and ₹ 18 crores, while stating that it was willing to agitate its entitlement to the remaining amount of ₹ 15 crores

separately in arbitral proceedings, and did not seek securing of the said amount. The petitioner pleads that the three vessels are subject matter of the dispute, and that, as Respondent 1 is presently in impecunious circumstances and the remaining respondents are situated outside the boundaries of India, the only way to secure the dues of Respondent 1 to the petitioner would be by restraining removal of the vessels from Indian waters. Ergo, this petition seeks interlocutory directions to the said effect, pending arbitral proceedings.

4. Respondents 2 to 5 express undisguised chagrin. Respondent 2 claims to be a complete stranger to the entire dispute and that it has been unnecessarily dragged into the controversy. Respondents 4 and 5 claim to be independent corporate entities, who are also strangers to the VOMA and, consequently, to the arbitral proceedings which the petitioner seeks to initiate. They claim that Respondent 1 has defaulted in its obligations under the Bareboat Charter Agreements, *vide* which the vessels were leased to Respondent 1. These defaults, submit Respondents 4 and 5, have entitled them to repossess the vessels. The petitioner, according to them, has no locus whatsoever to interfere with such right of repossession. This stand is also supported by the other respondents, including Respondent 1. The "subject matter of the dispute", submit the respondents in one voice, are not the vessels, but the dues allegedly owed to the petitioner under the VOMA. By wrongly categorising the vessels as the subject matter of the dispute, the respondent submitted that the petitioner is illegally misusing the Section 9 jurisdiction of this Court to proceed against

property of third parties, who are complete strangers to the petitioner and to the VOMA. This, submit the respondents, is totally impermissible.

5. The petitioner, *per contra*, seeks to interlink the respondents, by submitting that all the respondents are but corporate *avatars* of Respondent 3, Mr Paul Strachan ("Paul", hereinafter). All that one has to do, submits the petitioner, is to lift the corporate veil, and the interconnect between the respondents would become painfully apparent. Developing on this premise, the petitioner submits that the prayer that the amounts claimed by it be either deposited by Respondent 1 or secured by restraining removal of the vessels from the Indian territorial waters, is maintainable under Section 9 and is justified on merits. Needless to say, the respondents disclaim all allegations of any interconnection between them, though some commonality of directors and shareholders is admitted. The allegation of overarching superintendence, of Paul, over all the other respondents is also, obviously, denied.

6. This, then, is a fasciculus of the controversy.

The facts, in greater detail

7. The petitioner is engaged in the business of managing and operating hotels, resorts, wedding venues, destination management services, and other associated activities, under the name 'Thar Camps'.

Relevant Agreements

8. The petitioner refers to a Memorandum of Understanding ("MoU") dated 25th April, 2018, an agreement dated 20th August, 2018 and the VOMA, dated 30th September, 2019. According to the petitioner, the VOMA is a sequel to, and a consequence of, the Agreement dated 20th August, 2018. The respondents, *per contra*, deny this assertion, emphasising that the Agreement dated 20th August, 2018 and the VOMA dated 30th September, 2019, were distinct and different agreements, of which the former never fructified.

9. The MoU dated 25th April, 2018: The VOMA dated 30th September, 2019 was actually a creature of this MoU, which was executed on 25th April, 2018, between Paul and Capt Sandeep Shekhawat. Clause 1 of the preambular recitals in the MoU delineated its background, by introducing Paul as engaged in the business of owning and maintaining ships and carrying out passenger river cruise business in various countries. The Clause further identified the objective of the MoU as the desire, of Paul, to expand his passenger cruising business to India, by sending ships for handling and management by the petitioner, a Company owned by Capt Shekhawat. The MoU was executed to place, on record, the terms and conditions of the said business, as well as its *modus operandi*/methodology. Proceeding to the clauses of the MoU itself, Clause I provided for formation of a company in India, to operate under the name "Trans Indus River Cruises P Ltd" ("TIRPL", in short), with the object of

carrying on the passenger cruising business on Indian rivers and the business of tour operators for sightseeing in India. The Clause further provided that Capt. Shekhawat and Mrs Rosario Flotats Molinas, the wife of Paul, would be the Directors of TIRPL, holding, initially, 99% and 1% respectively of its paid-up Share Capital. Clause II provided, however, for transfer, by Mrs Molinas, to Capt. Shekhawat, of 10%, 10% and 9% of the equity in TIRPL, on the completion of the first, second and third year of formation of the Company so that, by the end of the third year, Capt. Shekhawat would hold 30% of the paid-up share capital. Clause IV required Paul to send, in the first phase, two ships, on lease basis, under a Lease Agreement to be executed by the company owning the vessels in favour of TIRPL. The lease agreement was to be for 12 years, and 5% of the total turnover of TIRPL was payable as lease rental. Clause V provided that the governmental costs of bringing the ships into India in saleworthy and marketable condition and of making them capable of sailing in Indian rivers for passenger cruise would be borne by Paul, to be either paid directly to the Government or through TIRPL on reimbursement basis. Clause VI required TIRPL to outsource the operation, management and administration of the ship to the petitioner, for which purpose the Clause contemplated execution of an agreement between the petitioner and TIRPL, coterminous with the tenure of the lease. Day-to-day repairs and maintenance were required to be borne by the petitioner and major repairs, annual overhauling and annual maintenance expenses by TIRPL. Other terms relating to operation and management of the vessels were to be contained in the formal VOMA to be executed separately. Clause XI, therefore, envisaged execution

of a lease agreement between the Company owning the vessel (in the present case, Respondents 4 and 5) and TIRPL, and the VOMA between TIRPL and the petitioner, for providing operational and management services in relation to the vessel.

10. Agreement dated 20th August, 2018:

10.1 This Agreement was executed between Pandaw Cruises Ltd, British Virgin Islands (Respondent 2 herein and referred to, hereinafter, as "PCL BVI") and the petitioner. PCL BVI claims that this Agreement has nothing to do with the controversy in issue or with the MoU or the VOMA, and that, in fact, this Agreement never fructified. PCL BVI also contends that it has unnecessarily been dragged into the present controversy by the petitioner on the basis of this Agreement, which has no bearing thereon.

10.2 A bare reading of the Agreement reveals that this is, indeed, the position. The three vessels covered by the Agreement dated 20th August, 2018, were Katha, RV Indochina Pandaw and RV Orient Pandaw, of which the latter two vessels are not subject matter of the VOMA and do not concern the controversy presently in issue. The Agreement envisaged the engagement of the petitioner, by PCL BVI for management and operation of the three vessels forming subject matter thereof, for the entire term. Clause 8 of the Agreement fixed the terms thereof as 5 years, to take effect from the first day of operation of each vessel, renewable for a further period of 5 years. As there is no material on record to link this Agreement dated 20th August, 2018 either with the MoU dated 25th April, 2018 or the

VOMA dated 30th September, 2019, I do not deem it necessary to make further reference thereto. The contention, of the petitioner, that this Agreement, dated 20th August, 2018, was a prequel to the VOMA is, therefore, rejected.

11. The VOMA dated 30th September, 2019

11.1 On 30th September, 2019, the VOMA was executed between the petitioner and Respondent 1, IRCPL. The agreement recited that IRCPL, which was engaged in the business of river cruising in India, through an agreement with PCL BVI (which is not on record), was "in need of an independent agency to undertake the task of hospitality management and operations of the cruising vessels", and that the petitioner was "desirous of undertaking the task of hospitality management and operating the river cruising vessels of IRCPL in India". Under the VOMA, IRCPL having taken, on lease, the vessels Katha, Kalaw and Kindat, from their respective owners (Respondents 4 and 5) under Bareboat Charter Agreements for 10 years, engaged the petitioner to manage and operate the said vessels for a term of 5 years, commencing 30th September, 2019 which was deemed, under the VOMA, to be the effective date of the agreement.

11.2 Clause 4 of the VOMA set out the reciprocal responsibilities and duties of the petitioner and Respondent 1 IRCPL thereunder. Clause 6 fixed the compensation payable to the petitioner under the VOMA, which comprised annual fixed costs of ₹ 21,75,000/– for all 3 ships, fixed management fees of ₹ 43,50,000/– per ship on annual basis and fixed annual operational expenses of ₹ 82,65,000/– for

Katha and ₹ 1,06,26,470/– each for Kalaw and Kindat. Sub-clause (a) in Clause 6(A) clarified that the fixed expenses and fees were applicable for up to 28 passengers in Katha and up to 36 passengers each in Kalaw and Kindat. The subclause further clarified that there would be up to a maximum of 210 sailing dates in each Financial year starting 8th September, 2019 for Kindat. These amounts were fixed for 5 years, adjustable for inflation with mutual consent. The various elements which were included in these Fixed Costs and Expenses were enumerated in sub-clause (c), and the elements which were excluded were enumerated in sub-clause (d). Clause 9 provided for a lock in period of 5 years, during which, save and except on the ground of *force majeure*, both parties were prohibited from terminating the VOMA. Termination, after the lock in period, was permissible only with 6 months written notice to the opposite party. Subclause (ii) of Clause 9 provided, further, that, if problems or issues, highlighted by IRCPL were not remedied by the petitioner within 6 months, IRCPL could terminate the VOMA by 3 months' written notice. Clause 10 guaranteed exclusivity to the petitioner in the matter of management and operation of the vessels in the Indian subcontinent. Clause 11 provided that, in the event of a breach, by either party, of the VOMA, the aggrieved party would have the right to issue a notice to the party guilty of breach, to rectify the breach and, on failure of the guilty party to do so within 90 days, to terminate the Agreement by 90 days' written notice. Clause 21 provided for resolution of any dispute or difference arising between the parties in connection with the VOMA by mutual negotiation and, failing that, by arbitration, the venue of which was contractually fixed as New Delhi.

Correspondence between the parties

12. The petitioner alleges that, as payments, against services provided by the petitioner under the VOMA, were not being made in time, the petitioner wrote to IRCPL. This started a slew of communications, which necessarily need to be set out, seriatim and chronologically, thus:

(i) On 17th April, 2020, IRCPL wrote to Paul, calling on Paul to release at least US $ 10,000, so that the petitioner would be paid and its employees would not suffer.

(ii) On 17th June, 2020, IRCPL addressed an email to all its vendors, including the petitioner. The email acknowledged the claims and use of the vendors, and stated, further, that IRCPL was attempting to recover its dues "from Pandaw office", which was expressing difficulties, and was seeking time. The intervention of the COVID-2019 pandemic, and the restrictions necessitated as a consequence thereof, it was further averred in the said communication, had resulted in exacerbation of the situation. Even so, IRCPL stated that it was trying its best to protect the claims and dues of its vendors, and assured that, with some delays, the claims and dues would be cleared. The vendors were, therefore, requested to bear with IRCPL in the matter.

(iii) On 25th June, 2020, IRCPL addressed an email to Strachan (with a copy marked to the petitioner), enclosing, therewith, a duly reconciled statement of outstanding dues of the petitioner. The total amount of ₹ 4,24,90,675/– was stated, in the statement of outstanding dues enclosed with the said communication, to be due from IRCPL to the petitioner, from which, after deducting TDS of ₹ 11,64,949/–, paid and posted and ₹ 13,46,097/–, yet to be paid, the final dues of IRCPL were worked out as ₹ 3,99,79,629/–. This figure was, however, made subject, as per the note appended below the worksheet, to verification of invoices and other details.

(iv) Paul responded, *vide* email dated 27th June, 2020 addressed to IRCPL (with a copy marked to the petitioner), requesting for copies of the outstanding invoices of the petitioner and stating, further, that the respondents were requesting the petitioner for a credit of US $ 150,000 as compensation for alleged mistakes on the petitioner's part, and were willing to settle all legitimate claims of the petitioner less the said amount, subject to the petitioner handing over the three vessels to a representative of the owners at Kolkata. I am constrained to use the word "the respondents", apropos the communications addressed by Paul as, while addressing the communications in his capacity as "Founder, Pandaw Group", the communications do not claim to be addressed on behalf of any one or more of the respondents.

(v) The petitioner replied, on 28th June, 2020, to IRCPL (with a copy marked to Paul), expressing its agreement "to 50% deduction of the claim amount of US $ 146,000 (i.e. to a reduction of US $ 73,500), as telephonically requested by Paul, over a period of 4 years, "@ US $ 18,375 per year". Further, stated the petitioner in the said communication, the petitioner had been manning and managing the ships with its group, for which fee of approximately US $ 3700, along with applicable GST thereon, per ship, per month was due and payable to the petitioner.

(vi) Paul Strachan, thereupon, wrote, on 2nd July, 2020, to the petitioner, thus:

> "Dear Captain Shekhawat and Mr Pal
>
> > I have now received a statement from Indus so we can quantify the amount of your claim on us.
> >
> > You will be aware that Pandaw is now on the brink of collapse and completely run out of funds; loans from my family trust have now been exhausted and there is no prospect of further funding.
> >
> > This is not just because of Coronavirus but because the losses we experienced in India last season exhausted all our reserves.
> >
> > The company is now in effect in receivership and the administrator has been able to secure a bank loan based on securitising our ships. The rescue package will be insufficient to meet the demands of all our creditors until cash flows again in 2021 and we have good bookings confirmed for then.

I am therefore authorised to release to Thar Camps the sum of USD 250,000 to be paid to you in full and final settlement for all debts outstanding and we will make no further claim on you for losses and client compensations we paid out and you will make no further claim on us.

There are though conditions attached to the settlement:

1) the receiver has appointed a surveyor who will visit the ships and make a report on condition and any loan will be subject to their good condition

2) receipt of ship inventories

3) hand over of vessels to an appointed representative who will store and secure them until operations resume

4) cancellation of existing service contract

we have been instructed to place this fund on escrow via our lawyers who will prepare the settlement letter for both parties to sign

please also note that for 2021 cruises we would most heartily welcome the tender from Thar Camps for services

thank you for your past partnerships and we are so sorry that we are faced with this situation

Sincerely,

Paul Strachan
Founder, Pandaw Group
www.pandaw.com"

(vii) The meeting took place on 14th July, 2020, between the petitioner and IRCPL, with a mediator acting as an intermediary, in which the petitioner clearly expressed its inability to agree to the terms of "settlement" proposed by Paul. The petitioner quantified the dues of IRCPL, to which, as amounting, by then, to US $ 4.63 lakhs. The petitioner also declined to accept the proposal, of Paul, to cancel the VOMA. In the event of any termination by IRCPL, of the VOMA, the petitioner quantified the damages payable by IRCPL as US $ 4 million. The petitioner also refused to part with possession of the vessels, till all its dues were paid.

(viii) On 15th July, 2020, Paul addressed an email to a solicitors firm, requesting the firm to prepare a simple agreement of settlement, between the petitioner and IRCPL, whereunder IRCPL would settle the claims of the petitioner for US $ 350,000 (which converts to ₹ 2.56 crores, approximately), with US $ 250,000 to be paid initially, and the remaining US $ 100,000 to be paid in two tranches in January and June 2021 respectively. The proposed settlement agreement envisaged, thereupon, the petitioner not making any further demands on IRCPL "or any Pandaw Group Company", termination of the VOMA, return of the three vessels to the owners' appointed agent and inventorization of the owners' property on board.

(ix) *Vide* identical communications dated 10th August, 2020, Respondents 4 and 5 (PCL Myanmar and ICPL Perth) issued notice to IRCPL, proposing repossession, by them, of the vessels leased to IRCPL on account of non-payment of charter fees, under the Bareboat Charter Agreements by IRCPL from February 2019. On the same day, Paul, in his capacity as Founder, Pandaw Group, wrote to IRCPL, informing IRCPL that, as the petitioner was resisting the proposed Settlement Agreement, they were concerned for the safety of the ships, which they wish to place in the hands of a trusted agent, for which purpose it was necessary for the owners of the ships to repossess them. Accordingly, IRCPL was requested to inform the petitioner that the Pandaw Group had initiated that process. This email was forwarded to the petitioner, by IRCPL (through its Chartered Accountant) on 13th August, 2020.

(x) On the same day, i.e. 13th August, 2020, the petitioner proposed revised terms to settle the dispute. The proposal was, however, rejected by Paul *vide* return email dated 14th August, 2020.

The case of the petitioner

13. While things stood thus, the petitioner, alleging that efforts were being made by the respondents to forcibly take possession of the ships, filed the present petition before this Court, under Section 9 of the 1996 Act.

14. I have heard, at length, Mr. Dayan Krishnan, learned Senior Counsel, for the petitioner.

15. Mr. Krishnan alleges that the respondents are all interrelated undertakings, under the control and stewardship of Paul. It is further alleged, in the petition, that the Default Notices dated 10th August, 2020, addressed by PCL Myanmar and ICPL Perth (Respondents 4 and 5) to IRCPL, alleging breach of obligations under the Bareboat Charter Agreements as a ground to justify repossession of the vessels, were a mere farce. Mr. Krishnan also alleges that IRCPL is flush with funds, and there is no reason why it should not pay the hire charges to PCL Myanmar and ICPL Perth. If IRCPL is demurring from doing so, it is only, according to the petitioner, so as to make out a ground for PCL Myanmar and IRCL Perth to repossess the vessels.

16. Regarding the dues of the respondents to the petitioner, para 44 of the petition asserts thus:

> "That the Respondent No. 1 as well as Respondent No. 3 have admitted their liability in the tune of Rs. 4,13,25,726/-. Further, under the contract which contains a lock in period of 5 years, if the Respondents terminate the contract they will be liable to pay all fixed charges and management fee as per the agreement between the parties for the remainder of the lock-in period which will amount to about 18 Crores plus an additional amount of about Rs. 15 Crores towards loss of revenue from other services like food, beverage etc. So far the agreement has not been terminated and the Respondent No. 1 will have to continue to pay as per the terms of payment as provided in the Agreement. The ships are presently non-operational and an amount of Rs. 6.5 Lakhs per month for 3 ships/vessels (basic expense as per established guidelines) is being incurred by the Petitioner since April 2020. Hence, for

the period from April-August 2020 an amount is Rs. 32.5 Lakhs is also payable by the Respondents."

17. Though the petitioner does not clearly set out the basis for the claim, of the petitioner, of ₹ 18 crores, against the respondents, Mr. Krishnan relates the claim to Clause 6(A) of the VOMA. Clause 6(A), with its sub- clauses (a) and (b), reads thus:

"**6. COMPENSATION FOR SERVICES**

A. Fixed Expenses & Fees:

The Party of the First Part guarantees the following payments without limitation(s) to the Party of the Second Part as under

Sr. No	Heads	Katha Pandaw	Kalaw Pandaw	Kindat Pandaw	Remarks
1	Fixed Costs (Shored Based items)	INR 21,75,000 Annual (Equivalent to USD 30,000)			On Per Location Basis for 3 ships i.e. for Kolkata for these 3 ships
2	Fixed Operational Expenses	INR 82,65,000 Annual (Equivalent to USD 1,14,000)	INR 1,06,26,470 Annual (Equivalent to USD 146,572)	INR 1,06,26,470 Annual (Equivalent to USD 146,572)	Estimated on Per Ship Basis
3	Management Fees (Fixed)	INR 43,50,000 PER SHIP on Annual Basis (Equivalent to USD 60,000 per Ship)			

a. The above Fixed Expenses and Fees are applicable for up-to 28-pax in Katha Pandaw, and up to 36-pax each in Kalaw Pandaw and Kindat Pandaw. The sailing days would be up-to maximum 210-days in each Financial Year starting from 08.09.2019 for Kindat Pandaw. The above Fixed Expenses & Fees as mentioned in Para-6(A) above are fixed for 5-years. However, based on the initiation and

other parameters that affects costs, both parties shall mutually decide for an appropriate increase over the previous year's Fixed Expenses & Fees. This shall be done for each year over the previous year's Fixed Expenses & Fees. This shall be done for each year over the previous year and shall be applicable for the entire duration/terms of the agreement.

b. TDS and the GST, as applicable and are extra."

To justify the claim for ₹ 18 crores, Mr. Krishnan seeks to read Clause 6(A) along with Clause 9 of the VOMA, which provided for the lock in period and termination, and read thus:

"**9. <u>LOCK-IN PERIOD & TERMINATION</u>**

i. Lock-in period of this agreement shall be five years on either side. During this period, 'No Party' can terminate except in case of Force Majeure. This is applicable from the First day of commercial sailing of each ship &/or the date of registration of the First each vessel, whichever is later.

ii. Termination after Lock-In period can be done by the Party of the Second Part only by giving 6-months written Notice to the Party of the First Part. Similarly, if any problems &/or issues that have been highlighted by the Party of the First Part is not remedied by the Party of the Second Part within 6-months then the Party of the First Part can terminate the said agreement by giving 3-months notice in writing. The Party of the First Part to provide a standard mechanism by which services will be judged by the guests."

Mr. Krishnan also points out that no communication was issued, by the respondents, invoking the *force majeure* clause (Clause 14), which read as under:

"**14. <u>FORCE MAJEURE CLAUSE</u>**

> If by reason of war or civil war (whether declared or not), all other hostilities (including, but not limited to technical failures, terrorism, terrorist attack, sabotage, vandalism, riot, insurrection, revolution or other civil commotion), explosion, bombing, labour disputes, strikes, lockout, elections, festivals, social unrest, inability to obtain labour or materials, fire, flood, storm, earthquake, hurricanes, tidal conditions, baan waves, tornado, drought or other acts or elements, accident, government restrictions or appropriation or other causes, whether like or unlike the foregoing, beyond the reasonable control of a Party hereto (herein called events of "Force Majeure"), such Party is unable to perform in whole or in part its obligations under this Agreement, then in such an event (s) such Party shall be relieved of those obligations to the extent it is so unable to perform and such inability to perform so caused shall not make such Party liable to the other."

In the same context, Mr. Krishnan points out that, in his email dated 2nd July, 2020 *supra*, Paul, while asserting that Pandaw was on the brink of collapse, admitted that this was not just because of the COVID pandemic, but because of the losses experienced in India in the earlier season, which had exhausted its reserves. The *force majeure* clause, as contained in the VOMA cannot, therefore, submits Mr. Krishnan, come to the rescue of the respondents.

18. Mr. Krishnan also refers to the communications dated 27th June, 2020[1] from Paul to IRCPL, 2nd July, 2020[2] from Paul to the petitioner, the Minutes of Meeting dated 14th July, 2020[3] the communication from Paul to his lawyers on 15th July, 2020[4] and the Draft Settlement

[1] Refer para 10(iv) *supra*
[2] Refer para 10(vi) *supra*
[3] Refer para 10(vii) *supra*
[4] Refer para 10(viii) *supra*

Agreement as drafted by Paul and forwarded to the petitioner *vide* email dated 22nd July, 2020, as attempts to coerce the petitioner into cancelling the VOMA. He points out that no settlement was ever executed between the petitioner and any of the respondents. An insidious attempt was, thereafter, made by Paul to repossess the ships by having Default Notices issued by PCL Myanmar and IRCL Perth to IRCPL, alleging default in payment of charter fees since January/February 2019. That this was an oblique effort on Paul's part was manifest, submits Mr. Krishnan, by the communication, dated 10th August, 2020[5], from Paul to IRCPL, in which Paul frankly admitted that he was attempting to repossess the ships as the petitioner was resisting the proposed Settlement Agreement. By thus repossessing the ships and removing them from Indian territorial waters, Mr. Krishnan submits that the respondents are clearly seeking to defeat the petitioner's rights under the VOMA. In these circumstances, according to Mr. Krishnan, a clear case exists, to direct the respondents either to furnish security for ₹ 18 crores or to injunct them against repossessing the vessels. A holistic view of the directorial interlink among the respondents, Mr. Krishnan submits, would clearly reveal that they are all entities working under the stewardship of Paul and in collusion with each other, to defeat the petitioner's rights. A concerted effort is, according to Mr. Krishnan, being made to remove the only asset of the Pandaw Group in India, i.e. the aforesaid three vessels, in which context he again invites attention to the email dated 10th August, 2020[5] from Paul to IRCPL. All decisions, regarding all companies of the Pandaw Group, submits

[5] Refer para 10(ix) *supra*

Mr. Krishnan, were being taken by Paul and all communications in that regard were also being issued by Paul, as Founder of the Pandaw Group. As such, he submits that the attempts at repossession of the vessels, purportedly on account of non-payment of charter fees by IRCPL, was a complete farce. Mr. Krishnan also draws attention to the fact that the MoU dated 25th April, 2018[6] , which was a precursor to the VOMA, was executed between the petitioner and Paul. In view of the admission, by Paul, in the email dated 2nd July, 2020[2] to the petitioner, that the Pandaw Group was in financially straitened circumstances, Mr. Krishnan submits that, in order to prevent the arbitral proceedings from being frustrated at their inception, securitisation of the arbitral corpus, by restraining the respondents from repossessing the ships or removing them from Indian territorial waters, was essential.

19. In support of his submissions, Mr. Krishnan places reliance on the judgements of this Court in ***Sterling & Wilson International FZE v. Sunshakti Solar Power Projects Pvt Ltd***[7], ***Value Advisory Services v. Z.T.E. Corporation***[8], ***Dorling Kindersley v. Sanguine Technical Publishers***[9] and ***V.L.S. Finance Ltd v. B.M.S. IT Institute Pvt Ltd***[10] and of the High Court of Bombay in ***Girish Mulchand Mehta v. Mahesh S. Mehta***[11]**.**

Submissions of Respondent Nos. 1 and 3 (IRCPL)

[6] Refer para 7 *supra*
[7] **MANU/DE/1303/2020**
[8] **2009 SCC OnLine Del 1961**
[9] **2013 SCC OnLine Del 2319**
[10] **2015 SCC OnLine Del 9292**
[11] **2009 SCC OnLine Bom 1986**

20. Respondents 1 and 3, i.e. IRCPL and Paul, were represented by Ms. Manmeet Arora. Ms Arora submits that the entire basis of the prayer in the petition is misconceived, as the petitioner was a mere contractor, who had no lien over the vessels whose repossession it is seeking to obstruct. In effect, she submits, the petitioner is seeking an order of attachment before judgement, which can be granted only in accordance with the discipline of Order XXXVIII Rule 5 of the CPC, the conditions governing which are not satisfied in the present case.

21. Ms Arora denies the allegation that IRCPL admitted, in its email dated 25th June, 2020, any liability, towards the petitioner, of ₹ 4,13,25,726/-. She submits that the email merely forwarded the "Statement of Thar Camps", prepared by the petitioner, to Paul, and was in the nature of an internal communication, which cannot be construed as any kind of admission to the petitioner. She also points out that IRCPL had informed Paul, in the same email, that the petitioner had been called upon to submit documents supporting its claim and proof of the expenses incurred by it. Even the amount of ₹ 3,99,79,629/–, she points out, was subject to proof and verification. As such, she points out that there is no acknowledgement of any debt by IRCPL to the petitioner. She highlights the fact that, even as per the statement prepared by the petitioner, much of the payment, purported to have been made by the petitioner, was in cash – particularly the amount of ₹ 1,00,43,042/–, out of the total amount of ₹ 3,99,79,629/–. In view thereof, she submits that the request, of IRCPL to the petitioner, to provide invoices or other documents

evidencing payments having been made by the petitioner as claimed, was perfectly justified. Ms Arora also points out that Paul, in his reply dated 27th June, 2020[12], demanded copies of all outstanding invoices, with the statement and also raised the counter claim of US $ 150,000, which is equivalent to ₹ 10,988,100/–, against the petitioner. This counter claim, she submits, was partially admitted by the petitioner, to the extent of 50%, in its email dated 28th June, 2020[13]. She submits, relying on the judgement of a coordinate Single Judge of this Court in ***Lanco Infratech Ltd v. Hindustan Construction Co Ltd***[14], that the act of seeking details or the submission of the claims of the petitioner could not be treated as an admission of liability on the part of Paul or of the respondents. Even for the amount of ₹ 4,13,25,726/-, therefore, according to Ms Arora, there is no factual basis.

22. The claim for ₹ 18 crores, Ms Arora would emphatically submit, is completely bereft of any foundation, not only on the documents filed by the petitioner but even in its pleadings. No details regarding the manner in which the petitioner had worked out the claim were forthcoming. The submission of Mr. Krishnan that, on determination of the VOMA within the lock in period, IRCPL became liable to pay, to the petitioner, the fixed charges and Management Fees for the remaining lock in period, she submits, is not borne out either by the VOMA or by the pleadings. The VOMA, she points out, does not provide for any consequence of its termination prior to the

[12] Refer para 10(iv) *supra*
[13] Refer para 10(v) *supra*
[14] **2016 (234) DLT 175**

expiration of the lock-in period, nor does it provide for any damages as a genuine pre-estimate of the losses suffered, were the VOMA to be so terminated. The expression "compensation for services", as employed in Clause 6 of the VOMA, according to Ms Arora, refers to the Fixed Expenses identified in the VOMA and cannot include losses that the petitioner was likely to suffer consequent on determination thereof. The claim of ₹ 15 crores, canvassed by the petitioner, submits Ms. Arora, is clearly in the nature of damages, for which purpose she relies on para 44 of the petition[15]. In any event, she submits, in exercise of its jurisdiction under Section 9 of the 1996 Act, this Court should refrain from expressing any opinion regarding the interpretation of Clauses 6 or 9 of the VOMA, as that would adversely affect the arbitral proceedings. Ms Arora places reliance on the judgements of the Supreme Court in ***U.O.I. v. Raman Iron Foundry***[16], the Division Bench of this Court in ***Tower Vision India Pvt Ltd v. Procall Pvt Ltd***[17] and of a learned Single Judge of this Court in ***Intertoll ICS Cecons O & M Co. Pvt Ltd v. N.H.A.I.***[18], contending, *inter alia*, on the basis thereof, that a claim for unliquidated damages cannot be secured under Section 9 of the 1996 Act, as it does not give rise to a debt till it is adjudicated. She further submits, on the anvil of the decisions in ***Lanco Infratech***[14] and of a learned Single Judge in ***B.M.W. India Pvt Ltd v. Libra Automotives Pvt Ltd***[19], that speculative damages cannot be secured under Section 9 of the 1996 Act. She seeks to draw a distinction, in this context, between the expressions "subject matter of dispute" and "amount in

[15] Reproduced in para 14 *supra*
[16] (1974) 2 SCC 231
[17] 2014 (183) Comp Cas 364
[18] ILR (2013) II Del 1018
[19] 2019 (261) DLT 579

dispute". She submits that, in fact, the provision which has been invoked by the petitioner is clause (b), and not clause (a), of Section 9(1)(ii). Section 9(1)(ii)(a), according to Ms Arora is *ex facie* inapplicable as the vessels are not subject matter of the arbitration agreement nor subject matter of the dispute. Reiterating the submission that attachment before judgement can be directed only if, in the first instance, it is established that IRCPL is about to dispose of the whole or part of the property forming subject matter of the arbitral dispute and, secondly, that such disposal is with intent to obstruct or executing a decree to be passed against it, Ms Arora submits that the prayers in the petition are misconceived.

23. Ms Arora submits, further, that the petitioner does not disclose any material on the basis of which any amount, in excess of ₹ 4,13,25,726/–, could be claimed by the petitioner. Nor does it contain any averment to the effect that IRCPL was taking any steps to alienate or dispose of its property, so as to frustrate any award or decree which, at a later point of time, may be passed against IRCPL or in favour of the petitioner. There was, in fact, no question of any restraint against the vessels on the ground that IRCPL was seeking to remove or divert its assets to defeat any possible arbitral award, for the simple reason that the vessels were not the assets of IRCPL. The three vessels, she emphasises once again, do not belong to the petitioner, and the petitioner cannot invoke Section 9 of the 1996 Act to restrain the repossessing thereof. In effect, she submits, the petitioner is using the said vessels, which are owned by third parties (PCL Myanmar and ICPL Perth) to coerce IRCPL into accepting

harsher settlement terms than those proposed by Paul. A petition for a restraint against the vessels, by a party who has no lien over them, she submits, is *ex facie* not maintainable in the first instance. For the proposition that interim protection to one party cannot be granted, under Section 9 of the 1996, at the cost of imposing onerous conditions on the other, Ms Arora relies on the judgement of this Court in ***Natrip Implementation Society v. IVRCL Ltd***[20]. Again citing ***B.M.W.***[19], Ms Arora submits that Order XXXVIII Rule 5 cannot be used to convert an unsecured debt into a secured debt.

24. Ms Arora criticises the petitioner in not responding to the overtures of the respondents, to settle the dispute, and submits that the petitioner was clearly unreasonable in these circumstances.

25. Ms Arora also disputes the submission of Mr. Dayan Krishnan that all the respondents were interlinked or operating under the control and supervision of Paul. She has provided what, according to her, is the correct position of the directorship of the various respondents, in the following tabular form.

Party	As per the Petitioner	Factual Position
Respondent No. 1 *Indus River Cruises Pvt. Ltd*	*Directors*: Praveen Kumar Rastogi Sonia Ved Antoni Strachan Flotats John Martin Mackenzie *Shareholding:* John Mackenzie : 1% Antoni Strachan Flotats:99%.	*Directors*: Praveen Kumar Rastogi Sonia Ved Antoni Strachan Flotats John Martin Mackenzie *Shareholding*: John Makenzie : 1% Antoni Strachan Flotats:99%

[20] **2016 SCC OnLine Del 5023**

Respondent No. 2: *M/s Pandaw Cruises Ltd., BVI*	*Director*: John Martin Mackenzie	John Martin Mackenzie is not a Director in Respondent No. 2 *Director*: Westlaw Limited *(Under Section 110 of the BVI Business Companies Act, 2004)*
Respondent No. 4 *Pandaw Cruises Ltd. Myanmar*		No shareholding or Directorship of Antoni Strachan or John Martin Mackenize[sic] *Directors*: U Lin Lin Htun U Than Zaw
Respondent No. 5: *Indus Cruises Pte. Ltd.*	*Shareholding*: Antoni Strachan Flotats *Directors*: Antoni Strachan Flotats Paul Strachan John Martin Mackenzie	John Martin Mackenzie is not a Director in Respondent No. 5 *Directors*: Antoni Strachan Flotats Paul Strachan

Ms Arora points out that Respondents 4 and 5, i.e. PCL Myanmar and IRCL Perth were not claiming any right, title or position in the vessels from the petitioner or from IRCPL, and were not parties to the VOMA either. They had an independent right against IRCPL, emanating from the Bareboat Charter Agreements, to repossess the vessels on failure, of IRCPL, to comply with the covenants of the said Agreements. This right, submits Mr. Arora, could not be prejudiced by the petitioner. Inasmuch as IRCPL had defaulted under the Bareboat Charter Agreements, Ms Arora submits that the Default Notices dated 10th August, 2020, had been rightly issued by PCL Myanmar and IRCL Perth. She reiterates that IRCPL, PCL BVI, PCL Myanmar and IRCL Perth, i.e. Respondents 1, 2, 4 and 5 were independent

companies incorporated in India, the British Virgin Islands, Myanmar and the UK, respectively. The mere fact that one Director may have been common between one or more of the Companies, or certain commonality of shareholders might have existed (between IRCPL and IRCL Perth) does not, in the submission of Ms. Arora, result in IRCPL Perth being bound by the dues owed by IRCPL to any third party. Paul, she submits, was merely a Senior Cruise Advisor in IRCPL and has, therefore, been wrongly implicated in these proceedings. There is no privity of contract between the petitioner and Paul.

26. Without prejudice to these submissions, Ms Arora submits that her clients are willing to deposit, with this Court, ₹ 3,45,66,679/–, to secure the petitioner's claim.

27. Post reserving of judgement, further written submissions were filed by IRCPL and Paul, through Ms Arora. Adverting to Clause 6A of the VOMA, it is submitted that the expenses, covered by the said Clause are such as would be incurred by the petitioner on operating and managing the vessels during the cruise, for consumables, toiletries, linen for rooms and kitchen, expenses towards staff food, fittings light bulbs, fans and geysers. These expenses, therefore, would be incurred only if the cruises operate. They are in the nature of reimbursements and cannot, therefore, submit the respondents, include losses which the petitioner is likely to suffer owing to termination of the VOMA during the lock in period. The expenses envisaged by Rule 6A have, it is submitted, not been incurred by the

petitioner since 14th March, 2020, which was the last cruise run by IRCPL. The written submissions also reiterate the contention that Paul was merely a Senior Cruise Advisor for IRCPL, authorised to approve invoices and verify expenditure claims.

28. Apropos the contention of the petitioner, advanced by learned Senior Counsel during arguments, that ***Raman Iron Foundry***[16] had been overruled by the Supreme Court in ***H.M. Kamaluddin Ansari v. U.O.I.***[21] , as held in ***Gangotri Enterprises Ltd v U.O.I.***[22] and ***State of Gujarat v. Amber Builders***[23], it was submitted that paras 9 and 31 of ***H.M. Kamaluddin Ansari***[21] clearly demonstrated that ***Raman Iron Foundry***[16] had not been overturned on the aspect of nature of damages, which continued to remain good law. ***Gangotri Enterprises***[16], it is submitted, was the judgement of a two-Judge Bench of the Supreme Court, which erroneously relied on ***Raman Iron Foundry***[16] without being made aware of ***H.M. Kamaluddin Ansari***[21]. Though ***Amber Builders***[17] declared ***Gangotri Enterprises***[16] to be *per incuriam*, having been decided in ignorance of the law laid down in ***Kamaluddin Ansari***[21], the written submissions contend that this decision was only on the issue of interpretation of the terms of the General Conditions of Contract (GCC) and not on the legal position that a claim for liquidated damages does not give rise to a debt until the liability is adjudicated.

Submissions of PCL BVI (Respondent 2)

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[21] (1983) 4 SCC 417
[22] (2016) 11 SCC 720
[23] (2020) 3 SCC 540

29. Mr. Shivek Trehan, learned Counsel representing PCL BVI, submitted that his client was unnecessarily dragged into the controversy. He submits that his client had nothing to do either with the VOMA or with any of the three vessels, regarding which relief was sought by the petitioner. The petitioner, he submits, had unjustifiably sought to rely on the abortive agreement dated 20th August, 2018, executed between the petitioner and PCL BVI, in order to drag his client into the controversy. That agreement, he submits, was in no way a precursor or forerunner to the VOMA, subsequently executed on 30th September, 2019. He points out that the vessels forming subject matter of the agreement dated 20th August, 2018 were different from those which form the subject matter of the VOMA. In fact, he submitted, the agreement dated 20th August, 2018 never fructified. There is no question, points out Mr. Trehan, of the VOMA having been a successor or a follow-up to the agreement dated 20th August, 2018, as the latter agreement had a life of 5 years, which is yet to expire. In fact, submits Mr. Trehan, the agreement dated 20th August, 2018 was not an interim arrangement, but was a final agreement which, unfortunately, could not take off. He points out that the VOMA makes no reference to the agreement dated 20th August, 2018, or to any interim arrangement having been made before the VOMA came to be executed. Operations under the agreement dated 20th August, 2018, he submits, never commenced. The agreement dated 20th August, 2018 and the VOMA dated 30th September, 2019 were not, therefore, either contemporaneous or interconnected. As such, there being no valid Arbitration Agreement between the

petitioner and PCL BVI, he submits that PCL BVI had wrongly been impleaded in the present case. The submission, of Mr. Krishnan, that Mr. John Mackenzie was a Director in PCL BVI, he points out, is incorrect; in any event, he submits that the "Group of Companies" doctrine cannot be invoked merely because one Director, in more than one Company happens to be common. He refers, in this context, to the judgement of the Supreme Court in ***Chloro Controls India (P) Ltd v. Severn Trent Water Purification***[24].

30. As such, Mr. Trehan prays that his client PCL BVI be deleted from the array of parties in the present case.

Submissions of PCL Myanmar (Respondent 4) and IRCPL Perth (Respondent 5)

31. Respondents 4 and 5 – who, from paras 30 to 38 herein, would be referred to, collectively, as "the Respondents", for the sake of convenience – voice their collective chagrin through Mr. Ashish Dholakia, learned Counsel at the petitioner seeking, by a side wind as it were, to interfere with their right to claim repossession of their vessels, consequent to breach, by IRCPL, of the Bareboat Charter Agreements. Mr. Dholakia points out that the respondents are not parties to the VOMA, and the petitioner is not a party to the Bareboat Charter Agreements, whereunder they have a right to repossess the vessels. No arbitration agreement exists, he would contend, between his clients and the petitioner. In this context, Mr. Dholakia relies on

[24] **(2013) 1 SCC 641**

Clause 16 of the Bareboat Charter Agreements, titled "Non-Lien", which reads as under:

> "**16. Non-Lien**
>
> The Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by their agents, which might have priority over the title and interest of the Owners in the Vessel. The Charterers further agree to fasten to the Vessel in a conspicuous place and to keep so fastened during the charter period a notice reading as follows:
>
> 'This Vessel is the property of (name of Owners). It is under the Charter to (name of Charterers) and by the terms of the Charter Party neither the Charterers nor the Master have any right, power or authority to create, incur or permit to be imposed on the Vessel any lien whatsoever."

Additionally, Mr. Dholakia points out that Clause 29 of the Bareboat Charter Agreements entitled the respondents to repossess the vessels in the event of default, on the part of IRCPL, in paying Charter Charges. Highlighting the obligations of the petitioner, as set out in the VOMA, Mr. Dholakia submits that the petitioner was essentially providing housekeeping services on the vessels. He expresses his surprise at such a provider of housekeeping services obstructing repossession, by the owners of the vessels, as permitted by the Bareboat Charter Agreements. In such circumstances, the respondents would seek to contend that Section 9 of the 1996 Act would not authorise the passing of an order to their detriment. They rely, for the purpose, on the judgement of this Court in ***P.E.C. Ltd v. Kandla Energy & Chemicals Ltd***[25]. They emphasise the contractual position

[25] **2016 SCC OnLine Del 5969**

that the VOMA was an agreement for managing and operating vessels, executed between the petitioner and IRCPL, who did not own the vessels. The respondents questioned the very permissibility of attaching their assets as security to secure the use of IRCPL to the petitioner. They liken the situation to pledging a hotel to secure the dues owed by the owner of a restaurant, managed in space taken from the hotel on rent, to the caterer. They echo the contention of IRCPL that the petitioner has no lien over the vessels.

32. Piercing of the corporate veil, submit the respondents, is an extremely involved exercise, which would require trial or arbitration. According to the respondents, this Court, exercising its jurisdiction under Section 9 of the 1996 Act, cannot, on the basis of a summary "piercing of the corporate veil" exercise, attach the properties of the respondents to secure the date of IRCPL. They rely, for the purpose, on the judgement of the Supreme Court in ***Sunil B. Naik v. Geowave Commander***[26].

33. The vessels, of which the petitioner seeks attachment for security, point out the respondents, are neither subject matter of the arbitration agreement nor subject matter of the dispute. Relying on ***Intertoll***[18], the respondent submit that, under Section 9 of the 1996 Act, it is only the "amount in dispute" which could be secured. To drive home, still further, their contention that the vessels could not be arrested for securing the dispute in the arbitration, the respondents

[26] **(2018) 5 SCC 505**

also rely on the judgement of the High Court of Bombay in ***J.S. Oceanliner LLC v. MV Golden Progress***[27]**.**

34. The respondents also echo the submission of IRCPL that the attempt, of the petitioner, to "interconnect" Respondents 1, 2, 4 and 5 as Companies being managed by Paul is thoroughly misguided. Relying on the well-known judgement of the Supreme Court in ***Bacha F. Guzdar v. C.I.T.***[28] as well as on ***Indowind Energy Ltd v. Wescare (India) Ltd***[29], it is contended that independent and separately incorporated entities have their own distinct commercial status, distinct from their shareholders or directors. The respondents contend that they had no concern, whatsoever, with the VOMA, or operation and management of the vessels owned by them.

35. The respondents contend that they cannot be held liable for the amounts owed to the petitioner by IRCPL merely on the basis of the emails addressed by Paul. Said emails, the respondents submit, were not addressed by Paul in his capacity as Director of IRCL Perth; nor were they referring to the financial troubles being faced by the respondents. The reference to financial constraints appeared to refer, rather, to PCL BVI.

36. The principle of piercing of the corporate veil, submit the respondents, has no application to the present case. Apart from the fact that the principle has to be applied in rare and restricted cases, the

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[27] **2007 SCC OnLine Bom 69**
[28] **(1955) 1 SCR 816**
[29] **(2010) 5 SCC 306**

respondents would emphasise that it applies only where a corporate entity was found to be a camouflage or a sham, created by the actual persons exercising control, to further their fraudulent or dishonest design. The petitioner, it is pointed out , had never sought to contend that the VOMA, though purporting to have been executed with IRCPL, was actually executed between the petitioner and the respondents, or that IRCPL was merely a façade, created to defraud the creditors of the respondents. No case for piercing of any corporate veil, least of all at an interim stage, therefore, it is submitted, has been made out.

37. In any event, submits Mr. Dholakia, the subject matter of the VOMA was the management and operation of the vessels by providing hospitality services thereon, and not the vessels themselves. He has relied on the following recitals, towards the commencement of the VOMA, to emphasise the position that the petitioner was merely a service provider:

> "And whereas IRCPL, for the purposes of Hospitality Management and operations of its cruising vessels, is in need of an independent agency to undertake the task of hospitality management and operations of the cruising vessels.
>
> And whereas TCPL is engaged in the business of managing and operating hotels, resorts, wedding venues, destination management services operating under the brand name 'Thar Camps' and has enormous experience of hospitality management and has inherent strength in sales, marketing and distribution in hospitality is desirous of undertaking the task of hospitality management & operating the river cruising vessels of IRCPL in India."

As a mere service provider, the petitioner, submits Mr. Dholakia, was not conferred with any right in the vessels *per se*. The petitioner was

engaged, vide Clause 2 of the VOMA, "for managing and operating the 'Property' for a Term Period of 5 years from the effective date of the agreement". As against this, the claim of the petitioner was a mere monetary claim. Mr. Dholakia emphasises that clauses (a) and (b) of Section 9(1)(i) empowered the Court to secure the "amount in dispute" and to grant interim protection for preservation or custody of the "subject matter of arbitration". The vessels, he reiterates, neither constitute the amount in dispute nor the subject matter of arbitration. The amount in dispute, further, does not represent any debt owed to the petitioner by the respondents.

38. The respondents have also highlighted the discrepancy between the value of the vessels and the claim of the petitioner. The vessels, it is submitted, are worth over ₹ 45 crores, which is much higher than the damages claimed by the petitioner. Depriving the respondents of their right to use the vessels, merely to secure a much lower claim of the petitioner is, therefore, submit the respondents, extremely unfair. Even otherwise, it is contended that injunction, restraining a party from using its assets is a most unusual step and is ordinarily never granted.

39. The respondents have also attempted to distinguish the judgements cited by the petitioner. *Inter alia*, Mr. Dholakia has submitted that the said decisions deal with cases in which the assets, of which securitisation was sought, belonged to one of the parties to the arbitration agreement, but were in the possession of a third party,

unlike the present case in which the vessels belonged to a third party, who was a stranger to the arbitration agreement.

Analysis

40. I proceed, now, to examine the rival contentions, on merits.

41. Liability of PCL BVI (Respondents 2): I am entirely in agreement with the submission of Mr. Trehan, learned Counsel for PCL BVI, that his client is an unnecessary party in this litigation. It appears that the only basis for including PCL BVI in the dispute is the agreement dated 20th August, 2018, which was executed between the petitioner and PCL BVI. On a reading of the said agreement, *vis-à-vis* the MoU dated 25th April, 2018 and the VOMA dated 30th September, 2019, I find myself in agreement with Mr. Trehan that there is nothing to indicate that the agreement dated 20th August, 2018 was in any way a precursor to the VOMA dated 30th September, 2019. Of the three vessels forming subject matter of the VOMA, only one finds place in the agreement dated 20th August, 2018. I also find substance in the contention of Mr. Trehan that the agreement dated 20th August, 2018 had a life of 5 years, which is yet to expire. There is nothing, in the agreement dated 20th August, 2018, stated to indicate that it was in the nature of any "interim" arrangement. Nor is there any reference in the VOMA dated 30th September, 2019, to any earlier interim arrangement, or even to the agreement dated 20th August, 2018. The agreement dated 20th August, 2018, therefore, does not seem to be relevant to the controversy in issue. Per corollary, Respondent 2 PCL

BVI is also not required to be joined as a party in these proceedings. The submission of Mr. Trehan that PCL BVI requires to be deleted from the array of parties is, therefore, meritorious, and is accordingly accepted.

42. Having thus consigned PCL BVI to the sidelines, I proceed to address the remaining issues which arise for consideration.

43. Applicability of Section 9(1)(ii)(a)

43.1 Section 9(1)(ii), with its sub- clauses (a), (b) and (e) reads thus:

> "**9. Interim measures, etc. by Court. –**
>
> (1) A party may, before or during the 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 –
>
> *****
>
> (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;
>
> *****
>
> (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 order as it has for the purpose of, and in relation to, in the proceedings before it."

43.2 Mr. Dayan Krishnan sought to contend that the vessels were "subject matter of the arbitration agreement". Ms Arora and Mr. Dholakia, *per contra*, contended that the VOMA was purely a housekeeping contract, and that the vessels, the operation and management of which was entrusted to the petitioner, could not be regarded, by any stretch of imagination, as "subject matter" of the VOMA.

43.3 In ***Intertoll***[18], Dr. S. Muralidhar, J. (as the Hon'ble Chief Justice then was) ventured to contradistinguish the expressions "subject matter of the arbitration agreement" (though, in the decision, it is referred to as "subject matter of the dispute"; a distinction which would not make any great difference) with the expression "amount of the dispute" thus (in para-19 of the report):

> "However, for examining the question as to what could constitute the 'subject-matter of the dispute' in the context of Section 17 of the Act, it would be useful to draw a comparison with Section 9 of the Act. A reading of the various sub-clauses of Section 9 makes it apparent that *a distinction has been drawn between the words 'subject-matter of the dispute' [used in Section 9(ii)(a) and (c)] and 'amount in dispute' [used in Section 9(ii)(b)].* It is arguable that where the legislature in the same provision uses the words 'subject-matter of the dispute' in two sub-clauses and uses the words 'amount in dispute' in another sub-clause it intends to draw a distinction between the two. *When Section 9(ii)(a) use the words 'subject matter of the dispute', they refer to 'goods' in respect of which there could be an order of 'preservation' or 'interim custody'. The same words in Section 9(ii)(c) refer to 'any property or thing' in respect of which there could be an*

order of 'detention, preservation or inspection of.' Where the claim is of a monetary nature Section 9(ii)(b) talks of 'securing the amount in dispute in the arbitration.' By the same analogy the words 'subject-matter of the dispute' in Section 17 should be understood as referring to a tangible 'subject matter of dispute' different from an 'amount in dispute'."

(Emphasis supplied)

It is important to distinguish between the subject matter of the dispute and the corpus of the dispute. The expression "subject matter" has come in for interpretation by several judicial authorities, albeit in other contexts. P. Ramatha Aiyar, in his classic Advanced Law Lexicon defines "subject matter" involved in the litigation as "the right which one party claims as against the other and demands the judgement of the Court upon it". In the context of Order XXXIII of the CPC, the High Court of Lahore in ***Shadi Ram v. Amin Chand***[30] and the High Court of Himachal Pradesh in ***Nirmala v. Hari Singh***[31], defined "subject matter" as equivalent to the phrase "cause of action in the suit". Similarly, the High Court of Kerala, in ***Subha Jayan v. Meenakshy Kumaran***[32] ruled that the expression "subject matter", as contained in Order XXXIII Rule 1(4) of the CPC "can be (interpreted) having regard to the substantive right of the parties and to do justice between the parties". The High Court of Patna, even while holding that "no hard and fast rule can be laid down as to the meaning of the expression 'subject matter' of the suits under Order XXXIII Rule 3" of the CPC, held, in ***Ramjanam v. Bindeshwari***[33] that the question has to be answered with reference to the "frame of the suit, the reliefs

[30] **AIR 1930 Lah 937**
[31] **AIR 2001 HP 1**
[32] **AIR 2004 Ker 39**
[33] **AIR 1951 Pat 299**

claimed and the matters [arising] for decision in the case on the pleadings of the parties." Perhaps most significant, in the context of the present controversy, are the decisions of the High Court of Kerala in ***Kalu Parvathi v. G. Krishnan Nair***[34] and of the High Court of Patna in ***Kaloot Sao v. Munni Sao***[35], which clarify that the expression "subject matter" cannot be understood as the property involved in the suit, but has to be understood with respect to the relief claimed in the suit and the cause of action on which the suit is based.

43.4 In the backdrop of the above legal position, it is plain that any decision, as to the real "subject matter of the arbitration agreement", would have to abide by the covenants of the arbitration agreement itself, i.e., in the present case, the VOMA, which contains the arbitration clause between the petitioner and IRCPL. The preambular covenants in the VOMA read thus:

> "Whereas IRCPL is engaged in the business of river cruising in India having extensive sales marketing & distribution network of its products & services through an agreement with an International tour operator M/s Pandaw Cruises Ltd, BVI.
>
> And whereas IRCPL, *for the purposes of Hospitality Management and operations of its cruising vessels, is in need of an independent agency to undertake the task of hospitality management & operations of the cruising vessels*.
>
> And whereas TCPL is engaged in the business of managing and operating hotels, resorts, wedding venues, destination management services operating under the brand name 'Thar Camps' and has enormous experience of hospitality management and has inherent strength in sales, marketing and distribution in hospitality *is desirous of undertaking the task of hospitality management & operating the river cruising*

[34] **1969 Ker LJ 599**
[35] **AIR 1977 Pat 90**

> *vessels of IRCPL in India*. Now this agreement is executed to record the terms & conditions, rate & scope of work & obligation of respective parties to which both the parties above have agreed & witness, records, governs & binds the contractual relationship between the parties…"
>
> (Emphasis supplied)

The VOMA proceeds, even while referring to the three vessels Katha, Kalaw and Kindat as the "property", to recite thus:

> "The above three vessels are hereinafter referred to as "Property" with respect to which this agreement *for the operations & management* being executed with Party of the Second part who *will undertake the task of operations and management of the above vessels* as per the terms & conditions settled hereinafter narrated."
>
> (Emphasis supplied)

Clause 2 of the VOMA, titled "Engagement" declares that IRCPL, by the VOMA, was engaging and appointing the petitioner as contract for managing and operating the "property" for 5 years, in accordance with the scope of work delineated thereafter. The "scope of work" stipulated in the VOMA required the petitioner to "provide for all staff and services required for the marine and hospitality, all day-to-day expenses like housekeeping, food and beverage, and other operational and management expenses towards marine and hospitality services…" The VOMA proceeded, thereafter, to provide the specifications regarding the "marine and hospitality services", to be provided by the petitioner.

43.5 Clearly, therefore, the VOMA was a contract for providing services, as contradistinguished with a contract involving transfer of title or possession in goods. The petitioner was required to provide

"marine and hospitality services", by way of "operation and maintenance" of the three vessels. The claim of the petitioner, against IRCPL, is also relating to alleged short payment of the amount payable to the petitioner, under the VOMA, for providing such services. The cause of action, propelling the litigation, is the providing of services by the petitioner, and the alleged default, on the part of IRCPL, in making payments therefor.

43.6 Clause 21 of the VOMA, which is the arbitration clause therein, provides that, "in the event of any dispute or difference between the parties arising out of or in connection with this Agreement or *with regard to performance of any obligations* by either party", an initial attempt at mutual reconciliation would be undertaken, failing which "all disputes arising in connection with the Agreement, which have not been amicably settled, shall be referred to arbitration…" These words, too, underscore the position that the subject matter of the arbitration would be the services to be provided by the petitioner and the recompense, for providing of such services, to be paid by IRCPL.

43.7 Applying the understanding of the expression "subject matter", as contained in the decisions cited hereinbefore, I am inclined to agree with learned Counsel for the respondents that the "subject matter of the arbitration", in the present case, were not the vessels on which the petitioner was to provide services, but were, rather, the services provided by the petitioner on such vessels.

43.8 I agree with Ms Arora, therefore, that the prayer of the petitioner, in the present petition, is relatable not to clause (a) of Section 9(1)(ii), but to clause (b) thereof. The *prima facie* sustainability of the petitioner's claims has, therefore, to be examined in the light of Section 9(1)(ii)(b).

44. Applicability of Section 9(1)(ii)(b) – Re. Claim for ₹ 18 crores

44.1 Section 9(1)(ii)(b) of the 1996 Act empowers the Court to secure the "amount in dispute" in the arbitral proceedings. According to Mr Dayan Krishnan, the "amount in dispute" would amount to a total of ₹ 18 crores, ₹ 15 crores and ₹ 4,13,25,726/- of which, for the purposes of the present petition, the petitioner is not pressing for securing of the amount of ₹ 15 crores. Learned Counsel for the respondents, *per contra*, contend that there is no amount due to the petitioner and that, at worst, Respondent 1 could be directed to deposit ₹ 3,45,66,679/- the amount offered by Ms Arora on instructions. As the petitioner is not pressing, for the purposes of this petition, the prayer for securing the amount of ₹ 15 crores, I am required to consider the case of the petitioner only qua the claims for ₹ 18 crores and ₹ 4,13,25,726/–.

44.2 Mr. Krishnan premises the claim, of the petitioner, for ₹ 18 crores on Clause 6(A) read with Clause 9 of the VOMA. Clause 9 provides for a Lock-In period of 5 years. During this period of 5 years, subclause (i) of Clause 9 prohibits either party from terminating the VOMA except in the case of force majeure. Sub-

clause (ii) is irrelevant, as it deals with termination after the lock in period.

44.3 On the consequence of contravention of Clause 9 (i), however, the VOMA is conspicuously silent. There is no provision in the VOMA which contemplates the petitioner being entitled, on premature termination of the VOMA by IRCPL, to be paid the balance consideration for the unexpired lock in period. The Court cannot be wiser than the contracting parties. Nor can the Court, by judicial calisthenics, read into commercial contracts covenants which are not contained therein.

44.4 ***Tower Vision***[17], rendered by a Division Bench of this Court and authored by A.K. Sikri, J. (as he then was) rendered in the context of Section 433(e) of the Companies Act, 1956, which permits the Court to wind up a company which is unable to pay its debts, is relevant in this regard. The matter came up before a Division Bench consequent to reference by the Company Judge of this Court, who expressed doubts regarding an earlier decision, rendered by a learned Single Judge. The precise issue delineated for determination by the Division Bench was the following:

> "Whether in a contract for rendering of service/use of site, a stipulation to pay an amount for the 'lock-in' period is an admitted debt within the meaning of Section 433(e) of the Companies Act, 1956 of whether the same is in the nature of damages?"

It is important to note that, in ***Tower Vision***[17], the contract provided for payment of an amount in the event of termination of the contract

before expiry of the lock in period. Clauses 11.3 and 11.4, with their various sub-clauses, so provided, in the contract forming subject matter of consideration in ***Tower Vision***[17], the former dealing with "Anchor Sites" and the latter with "Shared Sites". The clauses were similar in terms and, for the sake of reference, Clause 11.3 with its sub-clauses 11.3.1 and 11.3.2 may be reproduced thus:

> "**11.3 Anchor [Sites]:** With [respect] to Anchor Sites, a Lock In period of 10 (ten) years shall apply, however, the Operator shall be liable for payment of the IP Fees with respect to any specific Anchor Site as follows:
>
> > 11.3.1 If the termination takes place during the initial 2 (two) years as of Commencement Date, then the Operator will pay 100% of the IP Fees for the balance of the initial 2 year period and 50% of the IP Fees for the remaining 8 years.
> >
> > 11.3.2 If the termination takes place after the initial 2 (two) years as of the commencement date then the Operator will pay 50% of the IP fees for the remaining of the 10 years Lock In period."

44.5 Procall, the respondent before the High Court, allegedly breached the aforesaid lock in commitment. Tower Vision ("TV", in short) contended that Procall became liable to make payment in accordance with Clauses 11.3 and 11.4 of the contract. Notices under Sections 433 and 434 of the Companies Act were, therefore, served by TV on Procall, calling on Procall to pay the said amounts. Procall refused, whereupon TV sued for winding up of Procall, under Section 433(e).

44.6 This Court initially distilled the extant legal position thus (in paras 16 to 23 of the report):

"16. Consequences for breach of the contract are provided in Chapter VI of the Contract Act which contains three sections, namely, Section 73 to Section 75. As per Section 73 of the Contract Act, *the party who suffers by the breach of contract is entitled to receive from the defaulting party, compensation for any loss or damage caused to him by such breach, which naturally arose in usual course of things from such breach, or which the two parties knew when they make the contract to be likely the result of the breach of contract.* This provision makes it clear that such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The underlying principle enshrined in this Section is that *a mere breach of contract by a defaulting party would not entitle other side to claim damages unless the said party has in fact suffered damages because of such breach. Loss or damage which is actually suffered as a result of breach has to be proved and the plaintiff is to be compensated to the extent of actual loss or damage suffered.* When there is a breach of contract, the party who commits the breach *does not eo instanti i.e. at the instant incur any pecuniary obligation*, *nor does the party complaining of the breach becomes 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. No pecuniary liability thus arises till the Court has determined that the party complaining of the breach is entitled to damages. The Court in the first place must decide that the defendant is liable and then it should proceed to assess what the liability is. But, till that determination, there is no liability at all upon the defendant.* Courts will give damages for breach of contract *only by way of compensation for loss suffered* and not by way of punishment. The rule applicable for determining the amount of damages for the breach of contract to perform a specified work is that *the damages are to be 'assessed at the pecuniary amount of difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed and not the sum which it would cost to perform the contract, though in particular cases the result of either mode of calculation may be the same. The measure of compensation depends upon the circumstances of the case. The complained loss or claimed damage must be fairly attributed to the breach as a natural result or consequence of the same. The loss must be a real loss or actual damage and not merely a*

probable or a possible one. When it is not possible to calculate accurately or in a reasonable manner, the actual amount of loss incurred or when the plaintiff has not been able to prove the actual loss suffered, he will be, all the same, entitled to recover nominal damages for breach of contract. Where nominal damages only are to be awarded, the extent of the same should be estimated with reference to the facts and circumstances involved. The general principle to be borne in mind is that the injured party may be put in the same position as that he would have been if he had not sustained the wrong.

17. In ***Murlidhar Chiranjilal* v. *Harishchandra Dwarkadas*, AIR 1962 SC 366**, the Supreme Court highlighted two principles which follow from the reading of Section 73 of the Contract Act. The first principle on which damages in cases of breach of contract are calculated is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damages which is due to his neglect to take such steps.

18. Thus, while on one hand, damages as a result of breach are to be proved to claim the same from the person who has broken the contract and actual loss suffered can be claimed, on the other hand, Section 74 of the Act entitles a party to claim reasonable compensation from the party who has broken the contract *which compensation can be pre-determined compensation stipulated at the time of entering into the contract itself. Thus, this section provides for pre-estimate of the damage or loss which a party is likely to suffer if the other party breaks the contract entered into between the two of them.* If the sum named in the contract is found to be reasonable compensation, the party is entitled to receive that sum from the party who has broken the contract. Interpreting this provision, the Courts have held that such liquidated damages must be the result of a "genuine pre-estimate of damages". If they are penal in nature, then a penal stipulation cannot be enforced, that is, it should not be a sum fixed *in terrarium* or *interrarium*.[sic] This action, therefore, merely dispenses with proof of "actual loss or damage".

However, it does not justify the award of compensation when in consequence of breach, no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

19. The Supreme Court in the case of ***Union of India v. Raman Iron Foundry, AIR 1974 SC 1265***, expounded this very principle in the following words:

> "9. 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 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 becomes 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 L.J.Q.B. 234*** "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 K.B. 499***, 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 45 Cal. Weekly Notes, 519***, ***S. Malkha Singh v. N.K. Gopala Krishna Mudaliar 1956 A.I.R. Pun. 174*** and ***Iron & Hardware (India) Co. v. Firm Shamlal & Bros. 1954 A.I.R. Bom. 423***. Chagla, C.J. in the last mentioned case, stated the law in these terms:

> "*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 amount 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.

20. In that case, *Clause 18 of the contract entered into between the parties provide[sic] that whenever any claim for the payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor. The purchaser/Union of India, invoking this clause, wanted to recover and adjust liquidated damages in terms of clause 14 of the contract. As is seen from the aforesaid extracted portion, the Court held that a claim for 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 authority. When there is such a clause, the only right which the plaintiff has is the right to go to Court and recover damages.*

21. The Supreme Court also explained that damages are the compensation which a Court of Law gives to a party for the injury which he has sustained and *the plaintiff 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 fiat of the Court. Therefore, it has to be decided by the Court, in the first instance, that the defendant is liable and then it proceeds to assess what liability is. Till that determination, there is no liability at all upon the defendant*. The Court further went to the extent of holding that there would not be any debt payable unless the Court determines the liability. In this process, the Court also explained the concept of 'debt' in the following manner:

> *"6.* The first thing that strikes one on looking at Clause 18 is its heading which reads: "Recovery of Sums Due". It is true that a heading cannot control the interpretation of a clause if its meaning is otherwise plain and unambiguous, but it can certainly be referred to as indicating the general drift of the clauses and affording a key to a better understanding of its meaning. The heading of Clause 18 clearly suggests

that this clause is intended to deal with the subject of recovery of sum due. Now a sum would be due to the purchaser when there is an existing obligation to pay it in praesenti. It would be profitable in this connection to refer to the concept of a 'debt', for a sum due is the same thing as a debt due. The classical definition of 'debt' is to be found in ***Webb v. Stenton [1883] 11 Q.B.D. 518*** where Lindley, L.J., said:"… a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation". *There must be debitum in praesenti; solvendum may be in praesenti or in future-that is immaterial. There must be an existing obligation to pay a sum of money now or in future. The following passage from the judgment of the Supreme Court of California in* ***People* v. *Arguello [1869] 37 Calif. 524*** *which was approved by this Court in* ***Kesoram Industries* v. *Commissioner of Wealth Tax: [1966] 59 ITR 767 (SC)*** *clearly brings out the essential characteristics of a debt:*

> *Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is debt due."*

22. The Supreme Court in the matter of ***ONGC Ltd. v. Saw Pipes Ltd., AIR 2003 SC 2629***, in para 65 has discussed provisions of Section 73 and 74 of the Indian Contract Act and held as under:

> "*Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it*. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia [relevant for the present case] provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive

from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach…"

23. In the matter of ***Keshoram Industries & Cotton Mills Ltd. v. Commissioner of Wealth Tax (Central), Calcutta, 1966 (2) SCR 688***, the Supreme Court considered the meaning of expression "debt owed". What does the word 'debt' mean was also considered with reference to various English decisions and held as under:

" "a debt is a sum of money which is now payable or will become payable in further by reason of a present obligation: debitum in presenti, solvendum in future."

The said decisions also accept the legal position that a liability depending upon a contingency is not a debt in presenti or in future till the contingency happened. But if there is a debt the fact that the amount is to be ascertained does not make it any the less a debt if the liability is certain and what remains is only the quantification of the amount."

(Emphasis supplied)

44.7 The Court went on to rely on the following propositions of law, emerging from earlier decisions of the Supreme Court and various

High Courts, as enumerated by the High Court of Karnataka in ***Greenhills Exports (P) Ltd v. Coffee Board***[36] and cited by the High Court of Bombay in ***E-City Media Pvt Ltd v. Sadhrta Retail Ltd***[37]:

> "(i) A "Debt" is a sum of money which is now payable or will become payable in future by reason of a present obligation. The existing obligation to pay a sum of money is the sine qua non of a debt.
>
> "Damages" is money claimed by, or ordered to be paid to; a person as compensation for loss or injury. It merely remains a claim till adjudication by a court and becomes a "debt" when a court awards it.
>
> (ii) In regard to a claim for damages (whether liquidated or unliquidated), there is no "existing obligation" to pay any amount. No pecuniary liability in regard to a claim for damages, arises till a court adjudicates upon the claim for damages and holds that the defendant has committed breach and has incurred a liability to compensate the plaintiff for the loss and then assesses the quantum of such liability. An alleged default or breach gives rise only to a right to sue for damages and not to claim any "debt". A claim for damages becomes a "debt due", not when the loss is quantified by the party complaining of breach, but when a competent court holds on enquiry, that the person against whom the claim for damages is made, has committed breach and incurred a pecuniary liability towards the party complaining of breach and assesses the quantum of loss and awards damages. Damages are payable on account of a fiat of the court and not on account of quantification by the person alleging breach.
>
> (iii) When the contract does not stipulate the quantum of damages, the court will assess and award compensation in accordance with the principles laid down in Section 73. Where the contract stipulates the quantum of damages or amounts to be recovered as damages, then the party complaining of breach can recover reasonable compensation, the stipulated amount being merely the outside limit.
>
> (iv)…

[36] **(2001) 106 Comp Cas 391 (Kar)**
[37] **(2010) 153 Comp Cas 326 (Bom)**

> (v) Even if the loss is ascertainable and the amount claimed as damages has been calculated and ascertained in the manner stipulated in the contract, by the party claiming damages, that will not convert a claim for damages into a claim for an ascertained sum due. Liability to pay damages arises only when a party is found to have committed breach. Ascertainment of the amount awardable as damages is only consequential."

44.8 That this decision may have been rendered in the context of Section 433(e) of the Companies Act makes no difference, at all, to its applicability. It examined, in detail, the legal position regarding the entitlement of a party to a contract in the case of unlawful termination, by the opposite party, specifically in the context of premature termination during the lock in period. In the process, the Division Bench has imbibed, in its decision, the essence of authoritative pronouncements of the Supreme Court, including ***Murlidhar Chiranjilal v. Harishchandra Dwarkadas***[38], ***Raman Iron Foundry***[16], ***O.N.G.C. v. Saw Pipes***[39] and ***Keshoram Industries v. C.W.T.***[40]**.** It has distinguished between Sections 73 and 74 of the Contract Act, even while observing that, with the passage of time and evolution of judicial thought, this distinction stands largely effaced. In the present case, Section 74 does not arise for consideration at all, as there is no provision in the VOMA, providing for any liquidated damages being payable, in the event of termination of the VOMA during the lock in period. Nor, for that matter, is there any provision envisaging payment of any particular amount, in such eventuality. No provision

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[38] **AIR 1962 SC 366**
[39] **AIR 2003 SCC 2629**
[40] **1966 (2) SCR 688**

for any kind of liquidated damages, therefore, finds place in the VOMA, relatable to termination during the lock in period.

44.9 Resultantly, it must be held that the submission, of Mr. Dayan Krishnan, that the petitioner would be entitled to be paid, consequent on termination of the VOMA by the respondents during the lock in period, payments which would otherwise have been due to the petitioner, under Clause 6(A), were the VOMA to have continued to subsist, must be held to be devoid of substance.

44.10 Ms Arora also sought to submit that, if Clause 6(A) of the VOMA were properly read, liability to make payments, as envisaged therein, would arise only if the vessels were functional, as they related to facilities provided during the functioning of the vessels, such as food, toiletries, consumables and linen. By its very nature, therefore, she would submit, Clause 6(A) cannot apply where the vessels were non-functional, and no cruises took place. *Prima facie*, this submission, too, has weight. It is extremely doubtful, in my *prima facie* view, as to whether the "premature" determination of the VOMA, before expiry of the lock in period, could mulct IRCPL with the liability to make payments, in accordance with Clause 6(A) of the VOMA, even for periods when the vessels remained non-operational.

44.11 Having said that, it cannot be gainsaid that the petitioner may, in the event of it succeeding in establishing that the VOMA was being prematurely terminated, be entitled to some form of compensation or recompense. That, however, would depend on the petitioner

succeeding in proving loss, and the damages sustained by or as a consequence thereof. Clearly, these are matters of trial – or, in the present case, arbitration.

44.12 The VOMA is, as yet, not terminated. The claim of the petitioner, in para 44 of the petitioner, is predicated on a possible termination of the VOMA during the lock in period. What the petitioner has averred, in para 44, is that, "if the respondents terminate the contract they will be liable to pay all fixed charges and management fee as per the agreement between the parties for the remainder of the lock in period which will amount to about ₹ 18 crores plus an additional amount of about ₹ 15 crores towards loss of revenue from other services like food, beverage etc." The supposed liability of ₹ 18 crores, or ₹ 15 crores, therefore, would arise only in the event of termination of the VOMA during the lock in period. *The petition does not contain any prayer, for a restraint against the respondents from terminating the VOMA during the lock in period.* It may be doubtful, therefore, whether the prayer for securing the claim of ₹ 18 crores, or ₹ 15 crores, can at all be maintained at this point, when the VOMA is yet to be terminated. The submission of Ms. Arora that Section 9 of the 1996 Act cannot be used to secure any speculative claim for damages, in my view, merits acceptance.

44.13 ***Intertoll***[18] is instructive on this count as well. In para 20 of the report, this Court, speaking through Dr S. Muralidhar, J. (as he then was) has cautioned even against directing furnishing of bank guarantees to secure claims which are merely speculative in nature.

Paras 20, 21 and 23 to 25 of the report may, in this context, be reproduced thus:

> "**20.** Notwithstanding the above legal position, considering that the reliefs sought by the Appellant in its claim and by NHAI in its counter claims are monetary in nature, even if the language of the words 'subject matter of the dispute' in Section 17 are taken to include monetary claims, the provision of 'security' in relation to such subject matter can perhaps be in the form of providing a bank guarantee. *However, a direction of that nature at an interlocutory stage would indeed be an extraordinary one and has to necessarily be preceded by a determination of the possible extent of the claim that is likely to be awarded. In other words, the power of the Tribunal under Section 17 of the Act, even if assumed to be as wide as that of the Court under Section 9 of the Act, cannot extend to directing the provision of security in the form of a bank guarantee in relation to a speculative claim for damages*.
>
> **21.** In ***Shin Satellite Public Co. Ltd.* v. *Jain Studios Ltd.***[41] it was held that the expression "amount in dispute" in Section 9(ii)(b) had different connotation and that *it should not be used to enable a person "to recover the sums on account of damages in advance" even if the liabilities are in dispute.* It was further observed that "it is probable that the Court alone and not the Arbitrator, has power to make such an order" for providing a bank guarantee. Consequently, even if in the impugned orders the Tribunal has observed that language of Section 17 is wide, it would extend to requiring a party to furnish security for a claim that is yet to be adjudicated. *The expression 'any interim measure of protection' cannot obviously be stretched to include providing security for the entire possible sum of damages that could be awarded even at a stage when there is no reason or determination of what that amount might be.*
>
> *****
>
> **23.** Likewise, in ***Iron & Hardware (India) Co. v. Firm Shamlal & Bros., AIR 1954 Bom 423***, Chief Justice Chagla of the Bombay High Court explained as under:

[41] **153 (2008) DLT 604**

"*Before it could be said of a claim that it, is a debt, the Court must be satisfied that there is a pecuniary liability upon the person against whom the claim is made, and the question is whether in law a person who commits a breach of contract becomes pecuniarily liable to the other, party to the contract. 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*."

(Emphasis added)

24. The above legal position was reiterated by the Punjab & Haryana High Court in ***S. Milkha Singh v. N.K. Gopala Krishna Mudaliar, AIR 1956 Punjab 174***. In ***Union of India v. Raman Iron Foundry, (1974) 2 SCC 231***, the Supreme Court cited all the above decisions with approval and held:

"11…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 becomes 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 provies that a mere right to sue for damages cannot be transferred…"

25. The decision in **Raman Iron Foundry** was overruled in ***H.M. Kamaluddin Ansari & Co. v. Union of India, (1983) 4 SCC 417*** on another point "that the clause in the contract applied to a claim itself and not only to an amount due". However, *on the nature of the claim for damages the decision in* ***Raman Iron Foundry*** *has not been overruled and is good law.*"

(Emphasis supplied)

44.14 In any event, as I am unable to discern any *prima facie* entitlement, of the petitioner, in the event of termination of the VOMA during the lock in period, to payment, in accordance with Clause 6(A) thereof for the remaining "unexpired" lock in period, no case for securing any claim, of the petitioner, for ₹ 18 crores can, in my view, exist.

45. ***Raman Iron Foundry***[16] *vis-a-vis* ***Kamaluddin Ansari***[21] *vis-a-vis* ***Gangotri Enterprises***[22] *vis-a-vis* ***Amber Builders***[23]

45.1 According to Mr. Dayan Krishnan, ***Raman Iron Foundry***[16] was overruled in ***Kamaluddin Ansari***[21] and is, therefore, no longer good law. Ms Arora and Mr. Dholakia, however, submitted that, even after ***Kamaluddin Ansari***[21], ***Raman Iron Foundry***[16] was followed by the Supreme Court in ***Gangotri Enterprises***[22] and, therefore, continues to apply. Mr. Krishnan attempts to meet the submission by pointing out that ***Gangotri Enterprises***[22] did not notice ***Kamaluddin Ansari***[21] and that, therefore, in following ***Raman Iron Foundry***[16], it was effectively a decision rendered *per incuriam*. Besides, he submits, no dispute remained after the decision, rendered last year by the Supreme Court in ***Amber Builders***[23]. To quote, verbatim, Mr. Krishnan, "***Raman Iron Foundry***[16] cannot survive beyond ***Amber Builders***[23].

45.2 ***Gangotri Enterprises***[22], I am inclined to agree, cannot be pressed into service as a response to the submission that ***Raman Iron Foundry***[16] stood overruled in ***Kamaluddin Ansari***[21], as ***Gangotri Enterprises***[22] was rendered by a bench of two Hon'ble Judges of the Supreme Court, and did not notice the earlier decision, by three

Hon'ble judges, in ***Kamaluddin Ansari***[21]. The issue of whether ***Raman Iron Foundry***[16] was, or was not, overruled by ***Kamaluddin Ansari***[21], therefore, passed *sub silentio* in ***Gangotri Enterprises***[22].

45.3 A learned Single Bench of Dr S. Muralidhar, J. (as the Hon'ble Chief Justice then was), however, held thus, in para-24 and 25 of the report in ***Intertoll***[18]:

> "**24.** … In ***Union of India* v. *Raman Iron Foundry*, *(1974) 2 SCC 231***, the Supreme Court cited all the above decisions with approval and held:
>
> > "11…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 becomes 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 provies that a mere right to sue for damages cannot be transferred…"
>
> **25.** The decision in ***Raman Iron Foundry*** was overruled in ***H.M. Kamaluddin Ansari & Co.* v. *Union of India*, *(1983) 4 SCC 417*** *on another point "that the clause in the contract applied to a claim itself and not only to an amount due". However, on the nature of the claim for damages the decision in* ***Raman Iron Foundry*** *has not been overruled and is good law*."
>
> (Emphasis supplied)

45.4 This position was reiterated by Muralidhar, J. (as the Hon'ble Chief Justice then was) in ***Lanco Infratech***[14].

45.5 Does ***Amber Builders***[23] alter this position? Mr Krishnan argues that it does. Ms Arora and Mr Dholakia argue that it does not.

45.6 I am inclined to the latter view.

45.7 The reason why Mr. Krishnan's submission cannot be accepted is apparent even from the opening para of ***Amber Builders***[23], which identifies the issue before the Court in that case thus:

> "The main question which arises for decision in these appeals is whether the Gujarat Public Works Contract Disputes Arbitration Tribunal (hereinafter referred to as "the Tribunal") constituted under Section 3 of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 (hereinafter referred to as "the Gujarat Act") has jurisdiction to make interim orders in terms of Section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the A&C Act")."

The Supreme Court was, thus, concerned, in ***Amber Builders***[23], with the power of the Gujarat Public Works Contract Disputes Arbitration Tribunal ("the Tribunal", in short) to pass an interim order under Section 17 of the 1996 Act. In that case, Amber Builders ("Amber", in short) was awarded a contract for strengthening a section of the National Highway on 31st July, 2007. Amber claimed to have completed the contract at work on 30th April, 2008. Premised on this date, Amber claimed that it was required to remove defects only for three years therefrom, which period ended on 30th April, 2011. Amber, therefore, requested the State of Gujarat to release the security amounts deposited by it. The State responded *vide* letter dated 11th November, 2014, claiming an amount of ₹ 1,09,00,092/– from Amber on the ground that the road repair work carried out by Amber was not in accordance with the contract. The State also threatened to withhold

the security deposit as well as payments due to Amber against the bills raised by it in other contracts. Amber challenged the notice before the High Court, under Article 226 of the Constitution of India, on the ground that the State could withhold the amount payable to it under other contracts, till the liability of Amber, under the said contracts, was duly adjudicated by a forum of competent jurisdiction. The High Court accepted the case set up by Amber, and held that, without quantification or crystallisation of the amount claimed to be recoverable from Amber under other contracts, the State could not unilaterally recover the said amounts from the ongoing contract by withholding payments. The State appealed to the Supreme Court, contesting the jurisdiction of the High Court to pass such an order. Before the Supreme Court, the State contended that the remedy, for Amber, was before the Tribunal, and not before the High Court in writ jurisdiction.

45.8 The Supreme Court accepted the contention advanced by the State, and held that the proper remedy for Amber was before the Tribunal, which had the jurisdiction to decide whether the State was entitled to recover any amount from Amber, as also to pass an interim orders in that regard.

45.9 Before the Supreme Court, Amber cited ***Gangotri Enterprises***[22]. To appreciate what the Supreme Court held, *apropos* this contention, it would be necessary to reproduce paras 19 and 20 of the report in ***Amber Builders***[23], thus:

> "**19.** Shri Sukhwani, learned counsel appearing for the respondents has placed reliance on a judgment of this Court

in ***Gangotri Enterprises Ltd. v. Union of India, (2016) 11 SCC 720 : (2016) 4 SCC (Civ) 480*** to submit that till the demand of the Government is crystallised or adjudicated upon, the Government cannot withhold the money of the contractor. Since this case has been specifically relied upon we are duty-bound to go into the correctness of the view laid down in ***Gangotri Enterprises***. The judgment in ***Gangotri Enterprises*** is primarily based on the judgment of a two-Judge Bench of this Court in ***Union of India v. Raman Iron Foundry, (1974) 2 SCC 231.*** In this case, this Court held that the Government had no right to appropriate the amount claimed without getting it first adjudicated. The relevant portion of the judgment reads as follows: (***Raman Iron Foundry case***, SCC pp. 238 & 244, paras 6 & 11)

> "6. … But here the order of interim injunction made by the learned Judge does not, expressly or by necessary implication, carry any direction to the appellant to pay the amounts due to the respondent under other contracts. It is not only in form but also in substance a negative injunction. It has no positive content. What it does is merely to injunct the appellant from recovering, suo motu, the damages claimed by it from out of other amounts due to the respondent. It does not direct that the appellant shall pay such amounts to the respondent. The appellant can still refuse to pay such amounts if it thinks it has a valid defence and if the appellant does so, the only remedy open to the respondent would be to take measures in an appropriate forum for recovery of such amounts where it would be decided whether the appellant is liable to pay such amounts to the respondent or not. No breach of the order of interim injunction as such would be involved in non-payment of such amounts by the appellant to the respondent. The only thing which the appellant is interdicted from doing is to make recovery of its claim for damages by appropriating such amounts in satisfaction of the claim. That is clearly within the power of the court under Section 41(*b*) because the claim for damages forms the subject-matter of the arbitration proceedings and the court can always say that until such claim is adjudicated upon, the appellant shall be restrained from recovering it by appropriating other amounts due to the respondent.

The order of interim injunction made by the learned Judge cannot, therefore, be said to be outside the scope of his power under Section 41(*b*) read with the Second Schedule.

***

11. … 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."

20. The judgment in ***Raman Iron Foundry*** was specifically overruled on the issue in hand by a three-Judge Bench of this Court in ***H.M. Kamaluddin Ansari & Co. v. Union of India, (1983) 4 SCC 417***. In this case there was a general condition which entitled the Government to recover the damages claimed by appropriating any sum which may become due to the contractor under other pending bills. In this case, this Court disagreed with the findings in ***Raman Iron Foundry*** and held as follows: (***H.M. Kamaluddin Ansari case***, SCC pp. 428-29 & 432, paras 21-22 & 31)

"21. … With profound respect we find that the aforesaid observation is incongruous with the proposition of law laid down by this Court just before this observation. We find it difficult to agree with the observation of the court that the impugned order in form and substance being the negative the respondent could refuse to pay such amounts if it thinks it has a valid defence, and if it chooses to do so there would be no breach of the injunction order.

22. It is true that the order of injunction in that case was in negative form. But if an order injuncted a party from withholding the amount due to the other side under pending bills in other contracts, the order necessarily means that the amount must be paid. If the amount is withheld there will be a defiance of the injunction order and that party could be hauled up for infringing the injunction order. It will be a contradiction in terms to say that a party is injuncted from withholding the amount and yet it can withhold

the amount as of right. In any case if the injunction order is one which a party was not bound to comply with, the court would be loath and reluctant to pass such an ineffective injunction order. The court never passes an order for the fun of passing it. It is passed only for the purpose of being carried out. Once this Court came to the conclusion that the court has power under Section 41(*b*) read with Second Schedule to issue interim injunction but such interim injunction can only be for the purpose of and in relation to arbitration proceedings and further that the question whether any amounts were payable by the appellant to the respondent under other contracts, was not the subject-matter of the arbitration proceedings and, therefore, the court obviously could not make any interim order which, though ostensibly in form an order of interim injunction, in substance amount to a direction to the appellant to pay the amounts due to the respondent under other contracts, and such an order would clearly be not for the purpose of and in relation to the arbitration proceedings; the subsequent observation of the court that the order of injunction being negative in form and substance, there was no direction to the respondent to pay the amount due to the appellant under pending bills of other contracts, is manifestly inconsistent with the proposition of law laid down by this Court in the same case.

***

31. We are clearly of the view that an injunction order restraining the respondents from withholding the amount due under other pending bills to the contractor virtually amounts to a direction to pay the amount to the contractor appellant. Such an order was clearly beyond the purview of clause (*b*) of Section 41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its claim for damages. But certainly Clause 18 of the standard contract confers ample power upon the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount."

45.10 The points on which ***Kamaluddin Ansari***[21] overruled ***Raman Iron Foundry***[16] were, therefore, according to ***Amber Builders***[23], the right of the Government to withhold payments, stated to be due from the contractor, against dues of the contractor under other contracts, and the power of the Court to grant an injunction in that regard. The findings in ***Raman Iron Foundry***[16] regarding the nature of liquidated and unliquidated damages, and the liability in that regard crystallising only when adjudicated by a court, continue, however, to remain undisturbed. *Status quo*, regarding the observations made in that context, by Muralidhar, J., in ***Intertoll***[18] and ***Lanco Infratech***[14], therefore, continues to prevail. On all points that concern us, ***Raman Iron Foundry***[16] is still good law.

46. Inasmuch as the claim, of the petitioner against the respondents, for ₹ 18 crores, is not supported, *prima facie*, by the material on record, I cannot, quite obviously, detain vessels, the cumulative value of which is far greater than ₹ 18 crores, in the present proceedings.

47. Consequence of PCL Myanmar and IRCL Perth not being parties to the VOMA, and of the liability of IRCPL under the Bareboat Charter Agreements

47.1 A comparison between the present petition, preferred by the petitioner under Section 9 of the 1996 Act, and the documents filed therewith reveals, surprisingly, that, though the petitioner has filed, with its petition, copies of the Bareboat Charter Agreements executed between Respondents 4 and 5 (PCL Myanmar and IRCL Perth) and

Respondent 1 (IRCPL), the petitioner does not make any reference to these agreements. Besides, the Bareboat Charter Agreements were executed in January, 2019, much before the VOMA. *Prima facie*, therefore, it is difficult, at this interlocutory stage, to hold that the Bareboat Charter Agreements were executed in order to avoid the obligations cast by the VOMA. There is, moreover, no dispute, by the petitioner, to the genuineness of the veracity of the Bareboat Charter Agreements, whereby and whereunder the vessels were leased by PCL Myanmar and IRCL Perth to IRCPL.

47.2 Mr. Dholakia has invited the attention of the Court to the covenants of the Bareboat Charter Agreements, which authorised Respondents 4 and 5 to repossess the vessels, on failure, by Respondent 1, to comply with the covenants of the said Agreements and pay hire charges in accordance therewith. The petitioner does not dispute these covenants, either. Respondents 4 and 5 asserted that, as Respondent 1 had defaulted in making payments under the Bareboat Charter Agreements, they were entitled to repossess the vessels. This assertion is, *prima facie*, borne out by the covenants of the Bareboat Charter Agreements. Clause 16 of the Charter Agreements, which already stands reproduced hereinbefore, proscribes creation of any lien or encumbrance, having priority over the title and interest of the owners in the vessels, i.e. of Respondents 4 and 5. Clause 28 of the Charter Agreements entitled Respondents 4 and 5, as the owners of the vessels, to withdraw the vessels from the service of IRCPL and terminate the Charter with immediate effect, by written notice, in the event of failure, by IRCPL, to pay hire in accordance with the

covenants of the Charter Agreements. The written notices issued, to the said effect, by Respondents 4 and 5 to IRCPL, are on record. There is no *prima facie* material on the basis of which this Court can doubt the credibility of the said communications. Save and except for a bald allegation that they were a farce, in order to remove the vessels from Indian territorial waters, there is precious little, in the petition, to discredit these communications. The only other factual averment, on the basis of which the petitioner seeks to cast doubt on the bonafides of these communications, is the assertion that IRCPL had the requisite funds to pay the hire charges, under the Bareboat Charter Agreements, to Respondents 4 and 5. It is obvious that this assertion cannot advance the case of the petitioner to any extent whatsoever. Why IRCPL did not pay hire charges to Respondents 4 and 5, as required by the Charter Agreements, is anybody's guess. This Court would be seriously trespassing beyond the discernible boundaries of its Section 9 jurisdiction in castigating the plea of Respondents 4 and 5, regarding their rights to repossess the vessels under the Charter Agreements consequent on the default in payment of hire charges by IRCPL, as farcical, without any credible supportive material whatsoever. The financial wherewithal of IRCPL is, in my view, extraneous to the issue.

47.3 The reliance, by Mr. Dholakia, on the judgements of the Supreme Court in ***Sunil B Naik***[26] and the Full Bench of the High Court of Bombay in ***J.S. Oceanliner***[27] is, in the context, apt. It is true that both these decisions were rendered in the context of Admiralty Law, but that can make no difference to their application or

precedential value. An act which Admiralty Law proscribes can hardly be done by the Court exercising jurisdiction under Section 9 of the 1996 Act. Section 9 of the 1996 Act cannot be interpreted in blind defiance to every other existing statute. No *non obstante* clause figures, either, in Section 9. The reach of the arms of the Court exercising Section 9 jurisdiction cannot, howsoever magnanimous be the amplitude of the provision, extend to regions into which the law in force does not permit the Court to forage.

47.4 The very opening para of ***Sunil B Naik***[26] discloses the likeness between the issue in controversy before the Supreme Court in that case and that which arises before this Court in the present. It reads:

> "Leave granted. A maritime claim against the charterer of a ship, who is not the de jure owner of the ship, and the endeavour to recover that amount through a restraint order against the ship owned by a third party has given rise to the present appeal."

One has merely to replace the words "maritime claim", with the words "claim under Section 9 of the 1996 Act", to transmute the issue in ***Sunil B Naik***[26] to that in the present. In that case, a contract for carrying out seismic survey operations was awarded by Oil and Natural Gas Corporation Ltd (ONGC) to Reflect Geophysical Pte Ltd, Singapore ("RG", in short). *Vide* a Bareboat Charter Agreement, RG took on lease the vessel "Geowave Commander", which was sold by Master & Commander AS, Norway ("MCAS", in short), in order to carry out its obligations to ONGC. RG also entered into a charter hire agreement on 30th October, 2012, with Sunil B Naik ("Sunil", in short), the appellant before the Supreme Court, whereunder Sunil

agreed to supply 24 fishing trawlers to assist in the operations to be conducted by RG. Sunil alleged that RG defaulted in making payments against the invoices raised by him. The notice of default, issued by Sunil to RG, proved futile, whereupon Sunil filed an Admiralty suit in the High Court of Bombay which, *vide* interim order dated 15th March, 2013, passed by a learned Single Judge, directed arrest of the vessel. This order was, however, vacated by the learned Single Judge, and the appeal, preferred by Sunil thereagainst, was dismissed by the Division Bench of the High Court. Thus did Sunil reach the Supreme Court.

47.5 Paras 44, 45 and 50 of the report clarifies the legal position, in unequivocal terms, thus:

> "**44.** *The contracts entered into with the appellants by Reflect Geophysical are completely another set of charter hire agreements/contracts. The unpaid amounts under these contracts amount to claims against Reflect Geophysical. Thus, if there was another vessel owned by Reflect Geophysical, the appellants would have been well within their rights to seek detention of that vessel as they have a maritime claim but not in respect of the respondent vessel. The maritime claim is in respect of the vessels which are owned by the appellants and the party liable in personam is Reflect Geophysical. Were the respondent vessel put under the de jure ownership of Reflect Geophysical, the appellants would have been within their rights to seek a detention order against that vessel for recovery of their claims.*
>
> **45.** *In the facts of the present case the owners of the respondent vessel, in fact, also have a claim against Reflect Geophysical for unpaid charter amount.* Thus, unfortunately it is both the owner of the respondent vessel on the one hand and the appellants on the other, who have a maritime claim against Reflect Geophysical, which has gone into liquidation. *The appellants quite conscious of the limitations of any endeavour to recover the amount from Reflect Geophysical,*

have ventured into this litigation to somehow recover the amount from, in effect, the owners of the respondent vessel by detention of the respondent vessel. That may also be the reason why the appellants did not even think it worth their while to implead Reflect Geophysical against whom they have their claim in personam, possibly envisaged as a futile exercise.

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50. As an illustrative example, if we consider the principles of a garnishee order where amounts held by a third party on behalf of a defendant can be injuncted or attached to satisfy the ultimate claim, which may arise against the defendant. *It is not as if somebody else's money is attached in pursuance of a garnishee's order. Similarly for a claim against the owner of the vessel, a vessel may be detained and not that somebody else's vessel would be detained for the said purpose. The crucial test would be of ownership, which in the present case clearly does not vest with Reflect Geophysical and the de facto ownership under their bareboat charter cannot be equated to a de jure owner, which is necessary for an action in personam*."

(Italics and underscoring supplied)

47.6 In ***J.S. Ocean Liner***[27], the very first issue framed by the Full Bench of the High Court of Bombay, as arising for its consideration, was "whether an application under Section 9 of the Arbitration and Conciliation Act, 1996 is maintainable for the arrest of a vessel for obtaining the security of an Award that may be made in the arbitration proceeding". Paras 30 to 34, 37 and 38 of the report speak for themselves:

"**30.** However, the principal Civil Court of original jurisdiction in district that is District Court is not empowered to exercise the admiralty jurisdiction. It cannot make any order for arrest of vessel. For any order under section 9 of the Act of 1996, the Court must have jurisdiction to decide the

questions forming the subject-matter of the arbitration if the same had been the subject-matter of the suit.

31. The pecularity of the admiralty action in rem is that the coastal authorities in respect of any maritime claim can assume jurisdiction by arrest of the ship, irrespective of the nationality of the ship or that of its owners, or place of business or dismissal or residence of its owners or the place where the cause of action arose wholly or in part. In admiralty, the vessel has a juridical personality. Admiralty law confers upon the claimant right in rem to proceed against the ship or cargo as distinguished from a right in personam to proceed against the owner. A ship may be arrested: (i) to acquire jurisdiction; (ii) to obtain security for satisfaction of the claim when decreed or (iii) in execution of the decree.

32. Section 9(ii)(b) of Act of 1996 cannot be construed so as to read into it in rem jurisdiction. This provision does not cover the arrest of the ship or the keeping of a ship under arrest in the exercise to the Court jurisdiction in rem at all. What is provided by section 9(ii)(b) is securing the amount in dispute in the arbitration by way of an interim measure which in our considered view does not include the arrest of vessel.

33. The question as to whether the arbitration Court, while passing the interim orders, can exercise power in admiralty came up for consideration directly before the English Courts while considering section 12 of the English Arbitration Act, 1950. Section 12(6) of the English Arbitration Act, 1950 (since repealed) provided, "The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of……..(f) securing the amount in dispute in the reference; as it has for the purpose of and in relation to an action or matter in the High Court. A look at this provision would show that it is quite similar to section 9(ii)(b) of the Act of 1996.

34. In the case of ***Tuyuti, 1984 (2) Lloyd's Law Reports***, 51, the Court of appeal held that the jurisdiction to issue a warrant of arrest ought not to be described as power of the Court to make an order securing the amount in dispute but as a power to issue a warrant-the warrant being rather an instruction to the admiralty Marshal than an order. Section 12(6)(f) of the Arbitration Act that provided that the High

Court had power to make order in respect of securing the amount in dispute in the reference did not refer to the jurisdiction to issue a warrant of arrest. This is how the matter was considered by Lord Justice Robert Goff:

> "The submission of Mr. Aikens before the Judge, which he repeated before us, was that the power to issue a warrant of arrest under which the Admiralty Marshal is commanded to execute the warrant by arresting the ship constitutes a power of the High Court of making an order securing the amount in dispute within this sub-section. A similar submission was considered on two occasions by Mr. Justice Brandon, first in ***The Golden Trader, [1974] 1 Lloyd's Rep. 378; [1975] Q.B. 348, pp. 384 and 385***, and second in ***The Rena K. (sup)*** itself at pp. 561 and 408. On each occasion the submission was rejected by him.
>
> I turn straight to ***the Rena K.*** where Mr. Justice Brandon had this to say: I was unable to accept the basic argument with regard to section 12(6)(f) put forward for the charterers in ***The Golden Trader, [1974] 1 Lloyd's Rep. 378; [1975] Q.B. 348***, because it appeared to me that, on the true construction of that provision, it did not cover the arresting of a ship, or the keeping of a ship under arrest, in the exercise of the Court's jurisdiction in rem at all. The provision refers to the power of "making orders in respect of securing the amount in dispute." This did not seem to me to be appropriate language to describe the process of arrest in an action rem, because such arrest does not result from the making of any order by the Court, but from the party concerned himself causing a warrant of arrest to be issued under R.S.C., Ord. 75, R. 5, subject to the requirements of that rule. The matters to which I thought the provision related were the Court's powers of securing amounts in dispute in various other ways, for instance by making orders under R.S.C., Ord. 29, RR. 2(3) and 6.
>
> I still think that section 12(6)(f) of the Arbitration Act 1950 does not cover the arresting of a ship under arrest, in the exercise of the Court's jurisdiction in rem. It follows that I am equally unable to accept the

extended argument as to the effect of that provision put forward for the cargo owners in the present case. The point involved in the extension itself, however, is a separate one, and I shall return to it shortly.

This reasoning was followed and applied by the Judge in the present case, and I find myself to be in agreement with him. I must confess that it would not have occurred to me to describe the jurisdiction to issue a warrant of arrest as a power of the Court of making an order securing the amount in dispute. I would describe it as a power to issue a warrant-the warrant being rather an instruction to the Marshal than an order in the sense in which the latter word is usually used in interlocutory orders of the Court, especially having regard to the orders listed in paras (a)-(h) of section 12(6), relating to such matters as security for costs, discovery, and so on. I agree with Lord Brandon that section 12(6)(f) relates to the Court's powers under such rules as O. 29, RR. (2)(3) and (6), and that it does not, on its true construction, refer to the jurisdiction to issue a warrant of arrest. I can see no ground for interfering with the Judge's decision on this point."

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37. It is not infrequent that the persons who are not concerned with the arbitration may be affected by the arrest of the ship. These affected persons like charterer, cargo owners and other persons having a maritime claim, are permitted to intervene in the action in rem; this is permitted by Rule 949 of the Bombay High Court (O.S.) Rules. Such affected persons like charterer, cargo owners and other persons would not be entitled to have their say if the proceedings are dealt with by the High Court under section 9 of the Act of 1996.

38. In what we have discussed above, and upon taking into consideration all relevant aspects, *we have no hesitation in holding that an application under section 9 of the Arbitration and Conciliation Act, 1996 is not maintainable for the arrest of the vessel and that section 9(ii)(b) "securing the amount in dispute in the arbitration" cannot be held to be referable to the arrest of the ship.* The view of the Division Bench in *m.v.*

> *Indurva Valley* to the effect: "The remedy of the appellants is to make an application for interim relief in terms of section 9 of the Arbitration and Conciliation Act, 1996", is not correct view and is accordingly, overruled."
>
> (Emphasis supplied)

47.7 I express my respectful and complete concurrence with the aforequoted enunciation of the law by the Full Bench of the High Court of Bombay.

47.8 It is no doubt true that strangers to an arbitration agreement may not, for that reason alone, remain insulated from orders under Section 9 of the 1996 Act. *At the same time, independent rights, lawfully enuring in favour of third parties who are strangers to the arbitration agreement under consideration before the Court, cannot be injuncted under Section 9. The position may be different if such third parties claim said rights, or title, under or through one of the parties to the arbitration agreement.* The legal position in this regard is pithily encapsulated in para 23 and 24 of the report in ***P.E.C.***[25], authored by Indira Banerjee, J. (as she then was), presiding over a Division Bench of this Court:

> "**23.** The learned Single Bench rightly observed that ordinarily an order under Section 9 of the 1996 Act cannot be passed against persons who are not parties to the arbitration agreement. Orders which affect persons who are not parties to an arbitration agreement, may be issued in certain circumstances, for example, when such persons claim right title or possession from a party to the agreement. However, *in no circumstances can a person who is not a party to the arbitration agreement be restrained from exercising an independent right vis-a-vis one of the parties to the arbitration agreement.*

> **24.** In the instant case, it is not in dispute that the cargo has been lying in the bonded warehouse of Adani Ports. *Adani Ports has an independent right to realise its charges on account of storage of goods in the bonded house from KECL. The appellant cannot, in an application under Section 9 of the 1996 Act restrain Adani Port from exercising such right*."
>
> (Emphasis supplied)

The law as enunciated in these paras applies, *mutatis mutandis*, to the facts on hand. The petitioner does not seek to contend that Respondents 4 and 5 claim their right to title or possession over the vessels from the petitioner or from IRCPL. Nor does the petitioner contend that the Bareboat Charter Agreements, whereby the vessels were released by Respondents 4 and 5 to IRCPL, were sham, or unenforceable at law. Rather, it is admitted, in para 10 of the petition, that the vessels were, in fact, leased by Respondents 4 and 5 to IRCPL. Once (i) the ownership of Respondents 4 and 5, over the vessels, is not disputed, (ii) the fact of a valid lease stands acknowledged by the petitioner, (iii) the lease, under the Charter Agreements, constitutes an independent contractual transaction, *vis-à-vis* the VOMA and (iv) Respondents 4 and 5 neither claim right to title or possession from the petitioner nor from IRCPL, the petitioner cannot, by galvanising this Court under Section 9 of the 1996 Act, seek an order which would prejudice the right to repossession of the vessels, enuring independently to Respondents 4 and 5 under the Charter Agreements, consequent on default, by IRCPL, in paying hire charges thereunder. It is for *this* reason, and not merely because they are strangers to the VOMA, that Respondents 4 and 5 (PCL Myanmar and IRCL Perth) escape any coercive action against their vessels, in the present case.

48. Lifting of the corporate veil:

48.1 Mr. Dayan Krishnan repeatedly urged this Court to "lift" – or, at the least, "pierce" – the corporate veil which, according to him, would reveal that the respondents are all corporate entities operating under the control and supervision of Paul. In view of the findings already returned hereinabove, I am of the opinion that this exercise may conveniently be obviated. The communications between the petitioner, IRCPL and Paul, undoubtedly, do indicate that, when called upon to meet its obligations towards the petitioner, IRCPL was turning to Paul. They also indicate that Paul was, on more than one occasion, acknowledging the position that the entity being represented by him – which may, parenthetically, be called the 'Pandaw Group' – was in debt to the petitioner. A holistic appreciation of these communications, and the consequent appreciation of the extent to which the liability which, otherwise under the VOMA, was of IRCPL, would stand transferred to Paul or the Pandaw Group, however, would be an involved and intricate exercise, to be undertaken during the arbitral proceedings, should it be deemed necessary. Even if, *arguendo*, lifting of the corporate veil would, as Mr. Krishnan would seek to submit, discloses that Paul was the moving spirit behind Respondents 2, 4 and 5, the extent to which IRCPL could be treated as a corporate entity managed and controlled by Paul, may be debatable.

48.2 The corporate veil, moreover, is not as flimsy, or even transparent, as Mr. Dayan Krishnan would seek to make out. The law

does accord considerable sanctity to corporate entities, independently incorporated under the Companies Act. The corporate veil may be said to have been successfully lifted, or pierced, only when the companies behind the veil are shown to be dummy entities owned, managed and controlled by any independent person, incorporated only to create a corporate smokescreen, and intended to veil the activities of the controlling person. To repeat, this is an extremely intricate exercise. It is not easily undertaken, or easily accomplished. The material on record may not, therefore, be sufficient for this Court to undertake this endeavour, while exercising its summary jurisdiction under Section 9, and come to any kind of definitive conclusion that the corporate respondents are merely entities created by Paul in order to avoid his responsibilities in law. At the very least, this Court would also have to arrive at a conclusion that the credibility of the VOMA is also in doubt. The material on record does not justify, in my opinion, such a conclusion, at this incipient stage.

48.3 Nor, for that matter, I may note, is there any such plea, in the present petition filed by the petitioner.

48.4 In any event, this aspect of the matter loses its importance, insofar as the present petition under Section 9 is concerned. I have already held that (i) the subject matter of the VOMA was, parenthetically, the services to be provided by the petitioner on board the vessels, and not the vessels themselves, (ii) there was no material to justify, even *prima facie*, securing of the claim, of the petitioner against the respondent, for ₹ 18 crores and (iii) no order, detailing

order restraining the vessels, could be passed in the present proceedings, as they were owned by Respondents 4 and 5 who, under the Charter Agreements with Respondent 1 IRCPL, had an independent right to repossess them. It is not possible, therefore, for this Court, in the present proceedings, either to restrain the respondents from taking possession of the vessels and doing with them as they pleased, or to secure any amount in excess of ₹ 3,45,66,679/–, which IRCPL has offered to deposit with this Court.

48.5 I also refrain, in the circumstances, from embarking on any detailed discussion of Order XXXVIII Rule 5 of the CPC, and its applicability to the present proceedings. Suffice it to state, in this context, that the mere possibility of frustration of arbitral proceedings, or any award which may be passed therein, cannot justify grant of interim protection under Section 9 of the 1996 Act. The Court has, in the first instance, to be satisfied, *prima facie*, of the entitlement, of the petitioner, to the amount claimed, and of the permissibility, in law, of securing of the said amount in the manner sought by the petitioner. It is only if these twin considerations are met, satisfactorily, by the petitioner, that any order for security, or for interim protection in any other manner, can be passed. The threshold of these considerations, unfortunately for the petitioner, remains inviolate in the present case. No *prima facie* case exists, for the claim, of the petitioner against IRCPL, of ₹ 18 crores. Neither can, in law, the Court proceed to detain the vessels, independently owned by Respondents 4 and 5, thereby transgressing on the rights enuring to them under the Charter Agreements.

Conclusion

49. As a result, Respondent 1 IRCPL is directed to deposit, with the Registry of this Court, an amount of ₹ 3,45,66,679/- within 4 weeks from the date of communication of this judgement to learned Counsel for IRCPL, by way of a Demand Draft. The money, as and when deposited, shall be retained in interest bearing fixed deposit, and shall abide by the outcome of the arbitral proceedings.

50. The petition is allowed to the aforesaid limited extent. The prayers for detailing or attaching the vessels, as well as other prayers in the petition, stand rejected.

51. There shall be no order as to costs.

C. HARI SHANKAR, J.

JUNE 7, 2021