$~ (original)

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

Reserved on : 11th November, 2020
Pronounced on: 20th January, 2022

\+ O.M.P.(I) (COMM.) 308/2020 and I.As. 8634/2020, 8635/2020

HINDUSTAN CLEANENERGY LTD. ..... Petitioner

Through: Dr. Abhishek Manu Singhvi, Sr. Advocate with Mr. Vijay Aggarwal, Ms. Barkha Rastogi, Mr. Shailesh Pandey and Mr. Deepanshu Choithani, Advs.

versus

MAIF INVESTMENTS INDIA 2 PTE LTD. & ORS.

..... Respondents

Through: Mr. Rajiv Nayar, Sr. Advocate with Mr. Jafar Alam, Ms. Shivani Khandekar, Mr. Pranav Jain, Mr. Sidhanth Kumar and Mr. Samykya Mukku, Advs.

Reserved on : 12th October, 2021
Pronounced on: 20th January, 2022

\+ O.M.P.(I) (COMM.) 211/2021

HINDUSTAN CLEANENERGY LTD. ..... Petitioner

Through: Dr. Abhishek Manu Singhvi and Mr. Maninder Singh, Sr. Advs. Mr. Rishi Agrawala, Mr. Sanjeev Kapoor, Mr. Vaibhav Mishra, Mr. Nikhil Rohatgi, Ms. Saman Ahsan, Ms. Niyati Kohli, Mr. Madhav Khosla, Ms. Swastika Chakravarti, Advs.

versus

MAIF INVESTMENTS INDIA 2 PTE LTD & ORS.

..... Respondents

Through: Mr. Harish Salve and Mr. Rajiv Nayar, Sr. Advs. with Mr. Jafar Alam, Ms. Shivani Khandekar, Mr. Ishan Bisht, Mr. Gokul Holani, Advs.

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

J U D G M E N T

% 20.01.2022

(Video-Conferencing)

1. These petitions, preferred under Section 9 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act") arise out of the same set of agreements. They are, therefore, being disposed of by a common judgement though, as the disputes in the petitions are distinct, they would be dealt with separately.

OMP (I) (COMM) 308/2020

2. Given the nature of the dispute in this petition, it would be appropriate, at the outset, to introduce the *dramatis personae*.

3. The petitioner provides clean energy solutions and, *inter alia*, sets up and implements Solar Power Projects. Kindle Engineering and Construction Pvt Ltd, Responsive SUTIP Ltd and Ujjawala Power Pvt Ltd, Respondents 3, 4 and 5, are three of 18 Special Purpose Vehicles (SPVs), set up by the petitioner for executing 18 Solar Power Projects. Respondents 1 and 2, by agreement with the petitioner, purchased the Solar Power Projects. Respondent 6 is a Debenture Trustee, which

holds in trust the Kindle Pledge constituting the Kindle restricted shares of Respondent 3, for the benefit of Respondent 1.

4. Respondents 1 and 2 are Investment Management Firms incorporated in Singapore. They have no official presence in India, though they are registered as a Foreign Portfolio Investor and a Foreign Venture Capital Investor, with the Securities and Exchange Board of India (SEBI) under the SEBI (Foreign Portfolio Investor) Regulations, 2014 and the SEBI (Foreign Venture Capital Investors) Regulations, 2000 respectively.

A prefatory note

5. This Court is seized with a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"). The peripheries of jurisdiction of Section 9 Court are logistically circumscribed, the parameters of such circumscription being authoritatively delineated by the recent decision of a Division Bench of this Court in ***DLF Ltd. v. Leighton India Contractors Pvt. Ltd.***[1] The Court is completely proscribed, while exercising Section 9 jurisdiction, in entering into detailed analysis of contractual clauses, which is a territory exclusively reserved for the Arbitral Tribunal. The limited extent to which the clauses of the agreements between the parties are of relevance to a Section 9 Court is for the Court to ascertain whether a case for granting interim protection, so as to prevent frustration of the arbitral proceedings or the rendition of an award, if it comes to be rendered in favour of the applicant.

[1] **2021 SCC OnLine Del 3772**

6. The manner, detail and extent to which arguments were addressed in the present case and the exhaustive submissions advanced with respect to the intricacies of the contractual covenants, in my view, far exceeded the legitimate limits of discussion in a Section 9 proceeding.

The issue in précis

7. The controversy, in substance, is simple. The Framework Agreement dated 26th January, 2017, forming, as it were, the parent contract in the present case, required the petitioner to obtain marketable title in respect of certain lands of Respondents 4 and 5, from the Government of Gujarat. Failure, on the part of the petitioner, to obtain such marketable title within the stipulated period entitled Respondents 1 and 2, under the Framework Agreement, to redemption of the Optionally Cumulative Convertible Debentures (OCCDs) of Respondent 5 and transfer of the shares of Respondent 3, of a total value of ₹ 95 crores, for ₹ 1. The petitioner contends that marketable title has been obtained in respect of 88% of the disputed lands and that the application in respect of remaining 12% is presently pending with the Government of Gujarat. The time for obtaining marketable title, as originally fixed in the Framework Agreement, was extended by Respondents 1 and 2 on multiple occasions, the last extension having been granted till 25th September, 2020. Purportedly owing to the intervention of the COVID-2019 pandemic, the applications submitted by the petitioner to the Government of Gujarat for obtaining marketable title in respect of the remaining 12% of the disputed lands

continue to remain pending. That the petitioner has, in fact, applied for regularization and grant of marketable title even in respect of said 12% remaining disputed land is not in doubt. The petitioner, therefore, contends that it has done everything within its power to fulfil its obligations under the contract and could not be treated as having committed any contractual default.

8. Respondents 1 and 2, on the other hand, contend that the Framework Agreement, and other agreements executed between the parties in terms of the Framework Agreement, are sacrosanct. That the petitioner has failed to obtain marketable title in respect of the entire disputed lands of RSL and UPPL within the originally stipulated period as extended by Respondents 1 and 2, they point out, is not in dispute. The contractual sequitur, according to them must inexorably follow. Respondents 1 and 2 claim, as a consequence of the default of the petitioner in obtaining marketable title for the entire disputed lands, to have become entitled, by operation of Clause 3.9 of the Framework Agreement, to invoke the pledged Kindle shares, (alternatively referred to as the "Kindle Pledge") and to redemption of the OCCDs of UPPL for ₹ 1. This being a contractual dispensation, Respondents 1 and 2 submit that Section 9 cannot be so invoked as to deny them their legitimate rights to the benefits available under the contract.

9. This, then, is the substance of the disputes.

10. The petitioner seeks that, pending resolution of the disputes between the parties by arbitration, the respondents ought to be

restrained from invoking the Kindle Pledge or to redemption and transfer of the OCCDs for ₹ 1, by invoking Clause 3.9 of the Framework Agreement.

11. This Court is required to consider whether a case for grant of such relief exists or not.

Facts in greater detail

12. For the sake of convenience, Respondents 3, 4 and 5 would be referred to "Kindle", "RSL" and "UPPL" respectively.

Agreements between the parties

13. As many as 10 agreements were executed among the parties.

14. Framework Agreement:

14.1 The parent agreement, as already noted, was a Framework Agreement dated 26th January, 2017. The petitioner was referred to as the "lead seller" therein. Respondents 1 and 2 were identified, in the agreement, as "Purchaser 1" and "Purchaser 2" respectively.

14.2 Clause 3 of the Framework Agreement set out the manner in which the transactions, envisaged by the agreement, were to be implemented. Clause 3.1 noted that the petitioner had capitalized various SPVs, including Kindle, RSL and UPPL, through which the petitioner was developing and maintaining Solar Power Projects.

Capitalization of these SPVs has been effected by the petitioner by, *inter alia*, subscribing to equity shares, preference shares and OCCDs. OCCDs, which were acquired by the Purchasers (i.e. Respondents 1 and 2) in accordance with Clause 3.9 and in terms of the UPPL Security Purchase Agreement (UPPL SPA) from the petitioner were defined in the Framework Agreement as "Tranche 3 OCCDs". Clause 3.1(k) provided for transfer/redemption of the Tranche 3 OCCDs by/to the Purchasers, i.e. Respondents 1 and 2, in accordance with Clause 3.9.

14.3 Clause 3.9 dealt with "Acquisition and/or redemption of Tranche 3 OCCDs". Sub-clause (a) thereunder dealt with RSL and sub-clause (b) dealt with UPPL.

14.4 Sub-clauses (a) and (b) of Clause 3.9 were amended successively by the 3rd, 4th 5th and 6th amendments to the Framework Agreement, executed on 19th March, 2018, 8th August, 2018, 31st January, 2019 and 25th June, 2020 respectively.

14.5 Amendments in respect of RSL – Clause 3.9(a):

14.5.1 In respect of RSL, Clause 3.9(a)(i)(B)(I) and (II), of the Framework Agreement, as amended by the 5th Amendment Agreement dated 31st January, 2019, provided thus:

> "(i) The Parties agree that the Lead Seller shall, at its cost, complete the following actions in relation to RSL, to the reasonable satisfaction of the Purchasers:
>
> *****

B) the Lead Seller shall on or before 30 September 2019:

I. on behalf of RSL obtain all necessary permissions pertaining to all land parcels owned and/or used by RSL, except the land parcels bearing survey number 404/I/paiki26, 404/I/p21/1 and 404/87, for the usage of land for operating the solar power projects and for change in land use for non-agricultural purpose;

II. ensure that RSL shall have clear and marketable title to all land owned and/or used by RSL, except the land parcels, bearing survey number 404/I/paiki26, 404/I/p21/1 and 404/87, (save and except encumbrances created in favour of lenders to the SPVs) as evidenced duly stamped and registered sale deeds and RSL shall have been recorded in the revenue records and the mutation entries in that regard have been suitably made reflecting RSL as the owner of such land;"

14.5.2 The 6th Amendment Agreement dated 25th June, 2020 to the Framework Agreement added sub-clause (C) to Clause 3.9(a)(i) in the Framework Agreement, after Clause 3.9(a)(i)(B). Sub-clause (4)(y) of the said newly added Clause 3.9(a)(i)(C) clarified that the petitioner would be obligated to ensure allotment of the RSL disputed land to RSL in a timely manner and that failure in that regard, whether on account of the petitioner or any other third party, would be regarded as failure, on the part of the petitioner, to fulfil its obligations under Clause 3.9(a) and would be treated as occurrence of an "RSL land failure event".

14.5.3 Clause 3.9(a)(iv) provided for the consequence of completion, by the petitioner, of its obligations in relation to RSL as envisaged by Clause 3.9(a)(i) and read thus:

> "(iv) If all the obligations set out in Clause 3.9(a)(i) above are completed in relation to RSL, to the reasonable satisfaction of the Purchasers within the timelines set the out therein, the Lead Seller shall intimate in writing to the Purchasers regarding completion of such obligations under Clause 3.9(a)(i) and shall have the right to require the Purchasers to release the Kindle Pledge as soon as reasonably practicable and in no event later than 3 (Three) Business Days from the date on which the Lead Seller intimates the Purchasers under this Clause 3.9(a)(i);"

14.5.4 Clause 3.9(a)(vi) provided, *per contra*, for consequences in the event of failure, by the petitioner, to fulfil its obligations in respect of RSL under Clause 3.9(a)(i). The said Clause, along with sub-clauses (A), (C), (D) and (E) (of which the last was amended by the 4th amendment dated 8th August, 2018), read thus:

> "In the event, that the Lead Seller fails to fulfil its obligations in relation to RSL in accordance with Clause 3.9(a)(i) above ("RSL Land Failure Event") then:
>
> > (A) all rights of the Lead Seller under Clause 3.9(a) shall fall away forthwith (including the representation rights under Clause 3.9(a)(iii) and the right to have the Kindle Pledge released under Clause 3.9(a)(iv));
> >
> > *****
> >
> > (C) Kindle shall be entitled to repay, all of the loans (including accrued interest) granted by the Lead Seller to Kindle (if any) for an aggregate consideration of INR I (Indian Rupee One), promptly and in any event within 15 (Fifteen) Business Days of the occurrence of the RSL Land Failure Event and no further obligations or payments shall be due or payable in this regard. It is hereby clarified that the Lead Seller shall not be liable

for any tax liabilities or consequences as a result of such repayment of loans (including accrued interest);

(D) the RSL Land Failure Event shall constitute as an 'event of default' under the NCD Documents entered into by RSL with Purchaser I shall be entitled to accelerate the repayment of all amounts under the NCOD Documents entered into by RSL with Purchaser I as well as invoke the Kindle Pledge and transfer all or any of the Kindle Restricted Shares to any Person to seek redemption of the Subscription NCDs issued by RSL. Notwithstanding anything provided in the Agreement, the Lead Seller and / or its Affiliates shall not be liable in any manner whatsoever for any costs, loss or liability suffered by RSL and/ or the Purchasers which results from the arrangement contemplated in this Clause 3.9(a)(vi)(D) including pursuant to the invocation of pledge or imposition of any liability, penalty, cost on RSL due to such 'event of default'; and

*****

(E) Save and except the rights and obligations of the Lead Seller under Clauses 8, 9 and 10B of this Agreement and any Transaction Documents entered pursuant to Clauses 8, 9 and 10B (which rights and obligations shall continue to be available to the Lead Seller in accordance with the terms therewith), all other rights and obligations of the Lead Seller in relation to the Kindle Restricted Shares (in the capacity as a Shareholder or debenture holder (pursuant to the relevant Capital Reduction Scheme), as the case may be) under the Kindle SHA and this Agreement shall fall away forthwith without requirement of any further act, deed or thing, however, the Lead Seller shall exercise all of its voting rights in relation to the Kindle Restricted Shares in a manner as instructed in writing by the Purchasers provided such instructions do not result in contravention of any Applicable Law. It is clarified that the Purchasers shall not give directions to the Lead Seller to exercise the voting rights in relation to Kindle Restricted Shares which is contrary to the procurement obligations of the Purchasers under Clause 8, Clause 9 and Clause 10B.

> Further, upon the occurrence of a RSL Land Failure Event, the shareholding of the Purchasers in Kindle shall be deemed to be 100% (One hundred percent), for the purposes of Clause 8.2(j), Clause 9.11(e), Clause 10B.1 and Clause 10B.3."

14.6 Amendments in the case of UPPL – Clause 3.9(b):

14.6.1 As in the case of RSL, Clause 3.9(b)(i) of the Framework Agreement, relating to UPPL, was also subjected to repeated amendments. Of these, the only amendments of consequence are the 5th and 6th amendments dated 31st January, 2019 and 25th June, 2020 respectively.

14.6.2 As in the case of Clause 3.9(a) which dealt with RSL, its sub clauses (I) and (II) of Clause 3.9(b)(i)(B), as amended by the 5th amendment, required the Purchaser to, on or before 30th September, 2019,

> "I. on behalf of UPPL obtain all necessary permissions pertaining to all land parcels owned and/ or used by UPPL, except the land parcels bearing survey number 404/ l/p25, for the usage of land for operating the solar power projects and for change in land use for non agricultural purpose;
>
> II. ensure that UPPL shall have clear and marketable title to all land owned and/or used by UPPL, except the land parcels bearing survey number 404/I/p25, (save and except encumbrances created in favour of lenders to the SPVs) as evidenced by duly stamped and registered sale deeds and UPPL shall have been recorded in the revenue records and the mutation entries in that regard have been suitably made reflecting UPPL as tile owners of such land ..."

14.6.3 As in the case of Clause 3.9(a) which dealt with RSL, a new sub-clause (C) was added after Clause 3.9(b)(i)(B) dealing with UPPL, by the 6th amendment dated 25th June, 2020, numbered as 3.9(b)(i)(C), which read thus:

> "(1) The Lead Seller has represented to the Purchasers and UPPL that for the purposes of allotment of the UPPL Disputed Land by the revenue department, Government of Gujarat to UPPL, the revenue department may require UPPL to pay an allotment fee towards allotment of UPPL Disputed Land to UPPL. In respect of such allotment of UPPL Disputed Land to UPPL, the Lead Seller shall provide the following documents to the Purchaser and UPPL:
>
> > (x) an in-principle allotment letter, which shall set out all the terms and conditions applicable with respect to allotment of the UPPL Disputed Land to UPPL along with allotment fee required to be paid towards allotment of UPPL Disputed Land to UPPL (UPPL In-Principle Allotment Letter); and
> >
> > (z) a formal allotment letter for allotment of UPPL Disputed Land to UPPL, which shall only include those terms and conditions in respect of such allotment which are substantially similar to the terms and conditions set out UPPL In-Principle Allotment Letter (UPPL Allotment Letter).
>
> (2) The Lead Seller shall provide each of the documents (i.e. the UPPL In-Principle Allotment Letter and the UPPL Allotment Letter) mentioned under Clause 3.9(b)(i)(C)(I) within 1 day from the date of receipt of such documents by the Lead Seller.
>
> (3) Based on the representations made by the Lead Seller under Clause 3.9(b)(i)(C)(I) and subject to the Purchasers being satisfied with and approving the terms and conditions set out under the UPPL In-Principle Letter and the UPPL Demand Letter (including but not limited to the amount of allotment fee required to be paid in relation to the allotment of the UPPL Disputed Land to UPPL), UPPL and/or the Purchasers may elect, at their sole discretion, to pay the

allotment fee as set out under the UPPL In-Principle Allotment Letter and as approved by the Purchasers (UPPL Allotment Fee) to the relevant revenue department, for the purposes of allotment of the UPPL Disputed Land to UPPL, in the manner and within such timelines as determined by them…."

14.6.4 Sub clause (4)(y) of the newly added Clause 3.9(b)(i)(C), reads thus:

"(4) Notwithstanding anything to the contrary set out under the Transaction Documents, it is clarified that

*****

(y) the obligation to ensure allotment of the UPPL Disputed Land to UPPL and ensure that all payments and/or amounts due in this regard are made in a timely manner, is solely to the account of the Lead Seller and any failure to complete such allotments or make such payments in respect of the UPPL Disputed Land, whether such failure arises as a result of actions of Lead Seller or any other third parties, shall be regarded as the Lead Seller having failed to fulfil its obligations under this Clause 3.9(b), and accordingly, an UPPL Land Failure Event having occurred."

14.6.5 Clause 3.9(b)(iv) provided that in the event of performance, by the petitioner, of its obligations qua the UPPL land under Clause 3.9(b)(i) a "UPPL successful event" would be deemed to have occurred, in which case the petitioner would transfer the UPPL Tranche-3 OCCDs, to the Purchasers, i.e. Respondents 1 and 2, for a consideration of ₹ 27.67 crores.

14.6.6 Sub clause (vii) of Clause 3.9(b) provided, on the other hand, that if the Purchaser failed to fulfil its obligations *qua* UPPL

land in accordance with Clause 3.9(b)(i), a "UPPL land failure event" would have occurred, in which case:

> "(A) all rights of the Lead Seller under this Clause 3.9(b)(i) shall fall away forthwith (including the representation rights under Clause 3.9(b)(iii));
>
> (B) the Purchasers shall be entitled to purchase and the Lead Seller shall be required to transfer, or UPPL shall be entitled to redeem, all of the Tranche 3 OCDs issued by UPPL, for a consideration of INR I (Indian Rupee One), promptly and in any event within 15 (Fifteen) Business Days of the occurrence of the UPPL Land Failure Event. The Lead Seller shall transfer the Tranche 3 OCDs issued by UPPL to the Purchasers under this Clause 3.9(b)(vii)(B), free and clear from any claim, charge, lien or Encumbrance (save and except encumbrances created in favour of the lenders of the SPVs), and with all rights attached thereto ..."

14.7 Clauses 10.5 and 10.6, on the one hand, and Clause 10.20 of the Framework Agreement, on the other hand, provided for further consequences in the event of occurrence of an RSL land failure event.

14.7.1 Clause 10.6 allowed the Purchasers, i.e. Respondents 1 and 2 to, in the event of occurrence of an RSL land failure event, exercise the "Kindle Call Option", in relation to the Kindle restricted shares, for ₹ 1/-. Subject to Clause 10.6, however, Clause 10.5 allowed (a) the petitioner the option to sell all the Kindle restricted shares to the respondents and (b) the respondents the right to require the petitioner to sell all the Kindle restricted shares to them. Clauses 10.5 and 10.6 of the Framework Agreement read thus:

> "10.5 Subject to Clause 10.6:
>
> (a) the Lead Seller shall have the right (but not the obligation), to sell all (but not part) of the Kindle

Restricted Shares, to the Purchasers ("Kindle Put Option"); and

(b) the Purchasers shall have the right (but not the obligation), to require the Lead Seller to sell all (but not part) of the Kindle Restricted Shares, to the Purchasers, ("Kindle Call Option").

10.6 If a RSL Land Failure Event occurs, then the Purchasers shall have the right (but not the obligation) to exercise the Kindle Call Option in relation to the Kindle Restricted Shares, for a consideration equal to INR I (Indian Rupee One), upon expiry of the lock-in restrictions in relation to Kindle. The terms and conditions governing the relationship of the Purchasers and Lead Seller as Kindle's shareholders inter se as well as with Kindle, including without limitation, in relation to the management of Kindle and the terms pertaining to the Kindle Put Option and the Kindle Call Option (including the terms set out in this Clause 10.6), shall be set out in the Kindle SHA."

14.7.2 Clause 10.20, which applies in the event of an RSL land failure event, envisages creation of a pledge over the Kindle restricted shares held by the petitioner, to secure the subscription non-convertible debentures (subscription NCDs) issued by RSL. "Subscription NCDs" is defined, in the Framework Agreement, as meaning "the aggregate unsecured non-convertible debentures proposed to be issued by the relevant SPVs, in accordance with Schedule 3 and the terms and conditions set out in the NCD Documents".

15. Pledge Agreement dated 19th March, 2018:

15.1 Clause 10.20 of the Framework Agreement relates us to a Pledge Agreement dated 19th March, 2018, executed among the

petitioner, Kindle and the debenture trustee. In this agreement, the petitioner is identified as the "pledgor", Kindle as the "subject company" and Respondent 1 as the "subscriber".

15.2 Recital (C) in the Pledge Agreement envisages creation of an "exclusive first ranking pledge", over the "Pledged Assets" in favour of Respondent 6, i.e. Debenture Trustee, for the benefit of the "finance parties", as security for the "secured obligations". The "finance parties" are defined in the Pledge Agreement, as denoting, collectively, Respondents 1 and 6. The exclusive first ranking pledge created by the Pledge Agreement is, therefore, to enure, even as per the Pledge Agreement, to the benefit of Respondent 1 and is intended to secure the "secured obligation". "Secured obligations" is defined in the Pledge Agreement, as meaning "all present and future obligations and liabilities ... of the pledgor to any finance party under any debenture document". "Debenture documents" include, by definition, the "Pledge Agreement and the Debenture Trust Deed".

15.3 Occurrence of an RSL land failure event, within the meaning of Clause 3.9(a)(vi) of the Framework Agreement is defined, in the Pledge Agreement, as an "event of default". Clause 10 of the Pledge Agreement deals with circumstances in which the security under the Pledge Agreement becomes enforceable. Clause 10.1 provides that "if the Debenture Trustee notifies the Issuer (RSL), the Pledgor (the petitioner) and the Subject Company (Kindle) of the occurrence of an Event of Default in accordance with Clause 10.2(a) and sends a notice to the Pledgor stating that it intends to enforce this Security, this

Security becomes immediately enforceable when the period of 1 (one) day set out in that notice expires".

15.4 In such a circumstance, Clause 11.1 of the Pledge Agreement provides for "transfer or sale of the pledged shares", which reads thus:

> "**11.1 Transfer or sale of the Pledged Shares**
>
> (a) Upon the Debenture Trustee notifying the Issuer, the Pledgor and the Subject Company of the occurrence of an Event of Default under Clause 10.1, the Debenture Trustee (acting for the benefit of the Debenture Holders) shall be permitted to transfer/ sell the Pledged Assets only on and after the Lock-in Expiry Date but no later than 45 (Forty-five) days from the Lock-in Expiry Date or such longer period as may be extended upon occurrence of any of the Sale Restriction Events (defined below) in italics (Transfer Period Restriction). It is clarified that the period during which the Sale Restriction Event exists and the time taken by a Finance Party to remove the Sale Restriction Events will not be included within the Transfer Period Restriction.
>
> Sale Restriction Event means any or all of the following events occurring prior to expiry of 45 (Forty-five) days from the Lock-in Expiry Date, which prevent the Debenture Trustee from transferring / selling the Pledged Assets: (a) any restriction under Applicable Law and / or any regulatory approval which may be required in this regard; (b) any order, judgment, etc., (by whatever name called) passed by a Governmental Entity in this regard…"

15.5 Clause 12.1 of the Pledge Agreement provides for utilization of all amounts received by the Debenture Trustee (Respondent 6), pursuant to the enforcement of the security in terms of Clause 11.1, by the Debenture Trustee, firstly towards its own reimbursement and

defraying of expenses, costs and remuneration and, thereafter, essentially in favour of Respondent 1.

16. Share Holders Agreement dated 15th July, 2017: Clause 16 of the Shareholders Agreement dated 15th July, 2017, executed amongst the petitioner, Respondent 2 and Kindle provides that on occurrence of an RSL Land Failure Event, all voting rights of the petitioner, in relation to the Kindle restricted shares, held by the petitioner (as the "existing shareholder") would fall away and would vest in Respondent 2.

17. Debenture Trust Deed dated 19th March, 2018: On the same date as the Pledge Agreement, a Debenture Trust Deed was also executed between RSL and Respondent 6, the debenture trustee, appointing Respondent 6 as the debenture trustee to deal with the Kindle Pledge i.e. the Kindle restricted shares.

18. It is in the backdrop of these agreements and these covenants that the present dispute arises.

19. Admittedly, prior to execution of the 5th amendment to the Framework Agreement on 31st January, 2019, marketable title had been secured in favour of RSL and UPPL, from the Government of Gujarat, in respect of all but 34 acres of the disputed RSL land and UPPL land, undisputedly constituting 88% of the total disputed land forming subject matter of Clause 3.9 of the Framework Agreement. The 5th amendment to the Framework Agreement was, therefore, executed in respect of the remaining 34 acres, constituting 12% of the

total land covered by Clause 3.9 of the Framework Agreement, in respect of which regularisation and obtaining of marketable title still remains.

20. Further communications between the parties:

20.1 It is averred, in the petition, and not disputed by the respondent that by a communication dated 17th January, 2019, extension of time was granted to the petitioner, for fulfilment of its obligation under Clause 3.9 of the Framework Agreement, till 30th September, 2019.

20.2 On 30th October, 2019, four communications were addressed, of which two were by the respondents to the petitioner and two were by the petitioner to the respondents. By their communications dated 30th October, 2019, the respondents notified the petitioner that a "RSL Land Failure Event" and a "UPPL Land Failure Event", constituting "Events of Default", within the meaning of the Framework Agreement as well as the Pledge Agreement, had occurred, entitling the respondents to enforce the securities in the form of the UPPL OCCDs and the Kindle Pledge. The notices intimated the petitioner that, if the RSL Land Failure Event and the UPPL Land Failure Event were not remedied/rectified before 29th February, 2020, the OCCDs would be redeemed and the pledged securities would be invoked, i.e. (i) the debenture trustee (Respondent 6) would be entitled, on behalf of Respondent 1, to enforce the security as per the Pledge Agreement, including by way of transfer and sale of the pledged assets and (ii) UPPL would further be entitled to redeem the Tranche 3 OCCDs for ₹ 1/- in accordance with the Framework Agreement. The

communications, by the respondents to the petitioners, dated 30th October, 2019 read thus:

"

30 October 2019

To,

Hindustan Cleanenergy Limited
616A, (16A, Sixth Floor),
Devika Tower, Nehru Place,
New Delhi-110019
Attn: Mr. Ravi Trehan

Kindle Engineering and Construction Private Limited
906-907, Indraprasth Corporate,
Opp. Venus Atlantis 100 ft. Road,
Prahladnagar, Ahmedabad,
Gujarat – 380015
Attn: Mr. Bharat Rathi

Responsive SUTIP Limited
906-907, Indraprasth Corporate,
Opp. Venus Atlantis 100 ft. Road,
Prahladnagar, Ahmedabad,
Gujarat – 380015
Attn: Mr. Bharat Rathi

Sub: Occurrence of an 'Event of Default' under the Share Pledge Agreement dated 19 March 2018 and notice of invocation of Security under the pledge agreement

Dear Sir,

1. This notice (Notice) is in reference to:

(a) the framework agreement dated 26 January 2017 (Framework Agreement) executed inter alia between Hindustan Cleanenergy Limited (the Pledgor), MAIF Investments India 2 Pte Ltd (MAIF 2) and MAIF Investments India Pte Ltd (MAIF), as amended from time to time;

(b) the debenture trust deed dated 19 March 2018 (Debenture Trust Deed) executed between Responsive SUTIP

Limited (and Vistra ITCL (India) Limited (Debenture Trustee), as amended from time to time;

(c) letter agreement dated 19 March 2018 executed between MAIF 2, RSL and the Pledgor; and

(d) share pledge agreement dated 19 March 2018 (Pledge Agreement) executed between the Debenture Trustee, the Pledgor and Kindle Engineering and Construction Private Limited (Kindle), as amended from time to time.

(e) shareholders' agreement dated 15 July 2017 (Kindle SHA) executed between the Pledgor, MAIF and Kindle, as amended from time to time.

2. Capitalized terms used but not defined in this letter have the meaning ascribed to them in the Pledge Agreement and the Debenture Trust Deed, as the case maybe.

3. As informed to us by the Debenture Holder, pursuant to Clause 3.9 of the Framework Agreement, the Pledgor has an obligation to rectify certain identified land-related non-compliances in relation to RSL on or prior to 30 September 2019, in accordance with the Framework Agreement. Failure to complete such rectification actions in respect of RSL in accordance with the Framework Agreement is regarded as an 'RSL Land Failure Event' for the purposes of the Debenture Trust Deed and the Pledge Agreement.

4. Occurrence of an 'RSL Land Failure Event' constitutes an 'Event of Default' under the Pledge Agreement. Upon occurrence of an 'Event of Default' under the Pledge Agreement, the Debenture Trustee has the right to invoke and enforce the Security in accordance with the terms of the Pledge Agreement and the Debenture Trust Deed.

5. As informed to us by the Debenture Holder, please note that the timelines under the Framework Agreement for completion of such rectification actions has expired. Accordingly, this is to notify you that an RSL Land Failure Event has occurred and consequently, an Event of Default has occurred under the Pledge Agreement. Pursuant to the occurrence of an Event of Default under the Pledge Agreement, we would like to notify you that the Debenture Trustee

(on behalf of the Debenture Holders) hereby invokes the Security created pursuant to the Pledge Agreement.

6. The Debenture Trustee (on behalf of the Debenture Holders) intends to enforce the Security any time on and after 29 February 2020 (Enforcement Date), including by way of transfer and sale of the Pledged Assets, in the manner as determined by the Debenture Trustee in accordance with the terms of the Pledge Agreement, if the land-related non-compliances in relation to RSL have not been rectified (to the satisfaction of MAIF 2) and the RSL Land Failure Event and Event of Default under the Pledge Agreement has not been cured (to the satisfaction of MAIF 2), in each case prior to the Enforcement Date (i.e. latest by 28 February 2020).

7. The Pledgor specifically acknowledges that, if the actions identified under Paragraph 6 are not completed prior to the Enforcement Date, the Debenture Trustee shall be fully and completely entitled to deal with the Security / Pledged Assets in a manner solely determined by the Debenture Trustee in accordance with the terms of the Pledge Agreement, including having the right to transfer and sell the Pledged Assets. The Pledgor further agrees that the notice period provided under this Notice, from the date of this Notice till the Enforcement Date is reasonable notice of any enforcement action in respect of the Security, including for the purposes of section 176 of the Indian Contract Act, 1872.

8. MAIF 2 specifically acknowledges that, if prior to the Enforcement Date, the land-related non-compliances in relation to RSL are rectified in accordance with the Framework Agreement (other than timelines mentioned in the Framework Agreement), to the satisfaction of MAIF 2, then MAIF 2 shall notify in writing to the Pledgor confirming satisfactory rectification of such land related non-compliances in accordance with the terms of the Framework Agreement (other than timelines mentioned in the Framework Agreement) provided that the obligation of MAIF 2 to notify the Pledgor pursuant to this Paragraph shall only arise if the land-related non-compliances in relation to RSL have been rectified by the Pledgor in accordance with the Framework Agreement (other than timelines mentioned in the Framework Agreement) to the satisfaction of MAIF 2, in its sole discretion.

9. The Debenture Trustee (on behalf and on the instruction of the Debenture Holders) specifically acknowledges that, if prior to the Enforcement Date, (a) the land-related non-compliances in relation

to RSL are rectified in accordance with the Framework Agreement (other than timelines mentioned in the Framework Agreement), to the satisfaction of MAIF 2, and (b) MAIF 2 has notified in writing to the Pledgor confirming satisfactory rectification of such land-related non-compliances in accordance with the terms of the Framework Agreement (other than timelines mentioned in the Framework Agreement) (Satisfaction Notice), then from the date of issuance of the Satisfaction Notice (i) the Event of Default under the Pledge Agreement shall be deemed to have been cured, (ii) the Debenture Trustee (on behalf of the Debenture Holders) shall not enforce the Security and the Pledge invoked under Paragraph 5 shall stand revoked, (iii) the Pledge Agreement shall stand terminated; and (iv) the Pledgor shall not be restricted to transfer the Pledged Assets.

10. It is hereby agreed that from the date of issuance of the Satisfaction Notice by MAIF 2 in accordance with Paragraph 8, the RSL Land Failure Event shall be deemed to have not occurred and the obligations of the Pledgor under Clause 3.9 (a) of the Framework Agreement shall be deemed to have been completed within the agreed timelines.

11. Notwithstanding anything to the contrary set out under this Notice, we reserve all of our rights and remedies as available to us under the Framework Agreement, the Pledge Agreement or any other transaction document and applicable law, including but not limited to, the right to enforce the Security pursuant to the Pledge Agreement.

12. Nothing in this notice shall: (a) prejudice any of the rights or remedies available to us in respect of such matters and shall not act as any express or implied, permanent or temporary waiver of any such rights or remedies that may be available to us under applicable law, the Framework Agreement, the Pledge Agreement or any other transaction document, and the correspondence exchanged between the parties, equity, or otherwise, whether now or in future, each of which are hereby expressly reserved; (b) prevent us from identifying or relying on any or all such matters in future; and (c) constitute (or be construed as) an acceptance or approval of any acts or omissions not identified here.

Request the Pledgor to accept, agree and acknowledge the terms of this Notice by providing a signed acknowledgment in the format set out under Annexure 1 below, which will constitute complete admission and acceptance of the terms of this Notice by the Pledgor.

Regards,
On behalf of **Vistra ITCL (India) Limited** ”

“ 30 October 2019

To,

Hindustan Cleanenergy Limited
616A, (16A, Sixth Floor),
Devika Tower, Nehru Place,
New Delhi-110019
Attn: Mr. Ravi Trehan

Sub: Occurrence of an UPPL Land Failure Event under the Framework Agreement dated 26 January 2017 and notice for redemption of the Tranche 3 OCDs

Dear Sir,

1. This notice (**Notice**) is in reference to the framework agreement dated 26 January 2017 (**Framework Agreement**) executed inter alia between Hindustan Cleanenergy Limited (**the Lead Seller**), MAIF Investments India 2 Pte Ltd (**MAIF 2)** and MAIF Investments India Pte Ltd (**MAIF**), as amended from time to time.

2. Capitalized terms used but not defined in this letter have the meaning ascribed to them in the Framework Agreement.

3. As you are aware, pursuant to Clause 3.9 of the Framework Agreement, the Lead Seller has an obligation to rectify certain identified land-related non-compliances in relation to UPPL on or prior to 30 September 2019, in accordance with the Framework Agreement. Failure to complete such rectification actions in respect of UPPL in accordance with the Framework Agreement is regarded as an ‘UPPL Land Failure Event’ for the purposes of the Framework Agreement.

4. Upon occurrence of an ‘UPPL Land Failure Event’ under the Framework Agreement, UPPL has the right to redeem all of the Tranche 3 OCDs issued by UPPL for a consideration of INR 1 (Indian Rupee One).

5. Please note that the timelines under the Framework Agreement for completion of such rectification actions has expired. Accordingly, this is to notify you that an UPPL Land Failure Event has occurred.

6. Pursuant to the occurrence of an UPPL Land Failure Event under the Framework Agreement, we would like to notify you that UPPL intends to redeem all the Tranche 3 OCDs for a consideration of INR 1 (Indian Rupee One) anytime on and after 29 February 2020 (Redemption Date), in the manner as determined by UPPL in accordance with the Framework Agreement, if the land-related non-compliances have not been rectified (to the satisfaction of MAIF and MAIF 2) and the UPPL Land Failure Event under the Framework Agreement has not been cured (to the satisfaction of MAIF and MAIF 2), in each case prior to the Redemption Date (i.e. latest by 28 February 2020).

7. The Lead Seller acknowledges that, if the actions identified under Paragraph 6 are not completed prior to the Redemption Date, UPPL shall be entitled to redeem all the Tranche 3 OCDs for a consideration of INR 1 (Indian Rupee One), anytime on and after the Redemption Date, without the requirement for any further notice to the Lead Seller.

8. UPPL and the Purchasers specifically acknowledge that, if prior to the Redemption Date the land related non-compliances in relation to UPPL are rectified by the Lead Seller, in accordance with the Framework Agreement (other than timelines mentioned in the Framework Agreement), to the satisfaction of MAIF and MAIF 2, then MAIF and MAIF 2 shall notify in writing to the Lead Seller confirming satisfactory rectification of such land-related non-compliances in relation to UPPL in accordance with the terms of the Framework Agreement (other than timelines mentioned in the Framework Agreement) provided that the obligation of MAIF and MAIF 2 to notify the Lead Seller pursuant to this Paragraph shall only arise if the land-related non compliances in relation to UPPL have been rectified by the Lead Seller in accordance with the Framework Agreement (other than timelines mentioned in the Framework Agreement) to the satisfaction of MAIF and MAIF 2, in its sole discretion.

9. UPPL and the Purchasers specifically acknowledge that, if prior to the Redemption Date:

(a) the land-related non-compliances in relation to UPPL are rectified by the Lead Seller, in accordance with the Framework Agreement (other than timelines mentioned in the Framework Agreement), to the satisfaction of MAIF and MAIF 2; and

(b) MAIF and MAIF 2 have notified in writing to the Lead Seller confirming satisfactory rectification of such land-related non-compliances in accordance with the terms of the Framework Agreement (other than timelines mentioned in the Framework Agreement) (Satisfaction Notice),

then from the date of issuance of the Satisfaction Notice (i) UPPL Land Failure Event shall be deemed to have been cured; and (ii) UPPL shall either redeem or any of the Purchasers shall purchase, all of the Tranche 3 OCDs for the UPPL Tranche 3 OCDs Consideration, which is payable upon UPPL Successful Event in accordance with the terms of the Framework Agreement.

10. It is hereby agreed that from the date of issuance of the Satisfaction Notice by MAIF and MAIF 2, the UPPL Successful Event shall be deemed to have occurred and the obligations of the Lead Seller under Clause 3.9 of the Framework Agreement shall be deemed to have been completed within the agreed timelines.

11. Notwithstanding anything to the contrary set out under this Notice, we reserve all of our rights and remedies as available to us under the Framework Agreement or any other transaction document and applicable law.

12. Nothing in this notice shall: (a) prejudice any of the rights or remedies available to us in respect of such matters and shall not act as any express or implied, permanent or temporary waiver of any such rights or remedies that may be available to us under applicable law, the Framework Agreement or any other transaction document, and the correspondence exchanged between the parties, equity, or otherwise, whether now or in future, each of which are hereby expressly reserved; (b) prevent us from identifying or relying on any or all such matters in future; and (c) constitute (or be construed as) an acceptance or approval of any acts or omissions not identified here.

Request the Lead Seller to accept, agree and acknowledge the terms of this Notice by providing a signed acknowledgment in the format

set out under Annexure 1 below, which will constitute complete admission and acceptance of the terms of this Notice by the Lead Seller.

Regards,

On behalf of Ujjawal Power Private Limited"

20.3 Eschewing reference to intervening correspondence, on 9th June, 2020, the petitioner wrote to the respondents, seeking further extension of time to comply with its obligations under Clause 3.9 of the Framework Agreement, citing the hardships that had occurred consequent to the COVID-2019 pandemic and drawing the attention of the respondents to the fact that marketable title remained to be obtained only in respect of 12% of the land covered by Clause 3.9. The respondents, *vide* their reply dated 25th June, 2020, agreed "based on the representations set out under the Extension Letter", to extend the cure period for rectification of the RSL Land Failure Event and the UPPL Land Failure Event until 25th September, 2020. These communications read thus:

Letter dated 9th June, 2020 from petitioner to respondents:

"Date: June 9, 2020

To,

1. **MAIF Investments India Pte Ltd.**
   9 Straits View, #21-07 Marina One West Tower,
   Singapore 018937

2. **MAIF Investments India 2 Pte Ltd.**
   9 Straits View, #21-07 Marina One West Tower,
   Singapore 018937

Dear Sir,

Subject: Update on conditions subsequent to be satisfied by Hindustan Cleanenergy Limited.

Background

1. This is with reference to the framework agreement dated 26 January 2017 **(Framework Agreement)** executed *inter alia* between Hindustan Cleanenergy Limited **(Company),** MAIF Investments India 2 Pte Ltd **(MAIF 2)** and MAIF Investments India Pte Ltd **(MAIF),** as amended from time to time.

2. Pursuant to Clause 3.9 of the Framework Agreement, the Company had an obligation to rectify certain identified land-related non-compliances in relation to Responsive SUTIP Limited **(RSL)** and Ujjawala Power Private Limited **(UPPL).** The compliances included regularization of the entire project land of approximately 278 acres. The Parties had agreed to a timeline of February 29, 2020 for satisfaction of the said land-related non-compliances by the Company.

3. The Company has successfully got the mutation done and NA certificate in name of the RSL and/or UPPL, as the case may be, with respect to approximately 88% of the land.

4. The pending compliance is with respect to allotment of 34 acres of land in the name of RSL and/or UPPL, as applicable, which will also be granted once the land is allotted by the State Government of Gujarat.

Status

5. With respect to the remaining 34 acres of Government land it may be noted that:

   (i) the application for allotment of the said 34 acres of Government Land was filed by us;

   (ii) We understand the post scrutiny of our application, the file was sent to the Revenue Department, Government of Gujarat. Further,

in terms of the process followed by Government of Gujarat, the file was forwarded to the higher authority for approval.

Reasons for Delay

6. From the abovementioned, it can be categorically seen that there are no steps to be taken by us at this stage and the delay is being caused solely on account of functioning of various administrative offices of Government of Gujarat, over which we have no control. Further, we wish to highlight that operations of various administrative offices of Government of Gujarat was disrupted, from time to time, on account of various force majeure events (including the disruptions since January 2020 on account of COVID - 19). Due, to this force majeure event Government offices have been partially/ fully closed for last several weeks. Further, several Government officials concerned with this matter are expected to be changed/ retire during this force majeure period and thus, we require additional efforts including re-discussing the entire matter again with new Government officials. Thus, we expect some additional time period (of 90 days from the date of extension by MAIF and MAIF 2) will be required to regularize the remaining 34 acres land, the details of which are provided hereinbelow.

Proposed Timeline

Steps	**Expected Time Line**
State Level Pricing Committee (SLPC) to approve the rates and file to be sent to Additional Chief Secretary (ACS Revenue)	30 June 2020
File from ACS to Revenue Minister for approval	20 July 2020
Revenue Minister to forward file to Cabinet	5 August 2020
Issuance of formal allotment letter for allotting	5 September

the land to the SPVs (post approval from the Cabinet)	2020

Yours sincerely,
Sd/-
For **Hindustan Cleanenergy Limited**"

Reply dated 25th June, 2020 from respondents to petitioner:

"25th June 2020
To,
Hindustan Cleanenergy Limited
616A, 916A, Sixth Floor),
Devika Tower, Nehru Place,
New Delhi-110019
Atten.:Mr.Ravi Trehan

Sub: Continued occurrence of an UPPL Land Failure Event and RSL Land Failure Event under the Framework Agreement dated 26 January 2017

Dear Sir,

1. The notice (**Notice)** is in reference to the framework agreement dated 26 January, 2017 **(Framework Agreement)** executed inter alia between Hindustan Cleanenergy Limited (the **Lead Seller**), MAIF Investment India Pte Ltd. and MAIF Investments India 2 Pte Ltd. as amended from time to time. Capitalized terms used but not defined in this letter have the meaning ascribed to them in the Framework Agreement.

2. As stated in our previous notices dated 30 October 2019 and 20 March 2020, the timelines under the Framework Agreement for completion of rectification of certain identified land-related non-compliances in relation to RSL and UPPL, along with the cure periods offered by the Purchasers in this regard, have expired on 28 February 2020. Accordingly, on and from 29 February 2020, an RSL Land Failure Event and an

UPPL Land Failure Event has occurred and is on-going as of the date of this Notice. As of the date of this Notice, the Purchasers are free to exercise any and all rights or remedies, at any time, available to them under the Framework Agreement and any other Transaction Document.

3. We note from your letter dated 9 June 2020 **(Extension Letter**) that the Lead Seller has requested for an extension of time until 5 September 2020 to rectify all the land-related non-compliances in relation to RSL and UPPL as identified under the Framework Agreement, to the satisfaction of the Purchasers. Based on the representations set out under the Extension Letter, we agree to extend the cure period for rectification of the RSL Land Failure Event and an UPPL Land Failure Event until 25 September 2020.

4. Nothing in this notice shall: (a) prejudice any of the rights or remedies available to us in respect of such matters and shall not act as any express or implied, permanent or temporary waiver of any such rights or remedies that may be available to us under applicable law, the Framework Agreement or any other Transaction Document, and the correspondence exchanged between the parties, equity, or otherwise, whether now or in future, each of which are hereby expressly reserved; (b) prevent us from identifying or relying on any or all such matters in future, and (c) constitute (or be construed as) an acceptance or approval of any acts or omissions not identified here. We expressly reserve all of our rights and remedies as available to us under the Framework Agreement or any other Transaction Document and Applicable Law.

Sincerely,
On behalf of **MAIF Investments India 2 Pte Ltd**
Name: Verena Lim & Chrostopher Low
Designation: Authorised Signatories

Copy to:
Hindustan Powerprojects Private Limited
616A, (16A, Sixth Floor), Devika Tower, Nehru Place, New Delhi-110019

Attn: Mr. Ashok Ganesan"

21. As it transpires, the COVID-2019 pandemic continues largely unabated and, till date, requisite clearance and marketable title, in respect of the remaining 34 acres constituting 12% of the land covered by Clause 3.9 of the Framework Agreement, has not been obtained from the Government of Gujarat.

22. It is in these circumstances that the petitioner moved this Court by means of the present petition. The prayer clause in the petition reads thus:

> "In light of the above facts and circumstances, it is respectfully prayed that this Hon'ble Court may be pleased to:
>
> a) Restrain Respondent No.1 and Respondent No. 6, from giving effect to any invocation of the Kindle Pledge, and restrain Respondent No.3 from registering the transfer of 26% equity stake of the Petitioner in the Respondent No.3 company, till such time that the disputes are finally resolved by the parties through arbitration;
>
> b) Restrain Respondent No.1, Respondent No.2 and Respondent No.5 from redeeming the Tranche 3 OCDs, till such time that the disputes are finally resolved by the parties through arbitration;
>
> c) Restrain the Respondents from taking any other coercive action against the Petitioner, or any action prejudicial to the interests of the Petitioner, in terms of Clause 3.9 of the Framework Agreement dated January 26, 2017, or otherwise, till such time that the disputes are finally resolved by the parties through arbitration;
>
> d) In case, the invocation of pledge has been given effect to and the 26% equity shares have already been transferred, then direct the Respondents to deposit the Share Certificate before the Registry of this Hon'ble

> Court and further restrain the Respondents from creating any third party rights or exercising any further rights / actions in respect of the said shares, till such time that the disputes are finally resolved by the parties through arbitration and· if the shares are held in DEMAT, direct the depository to freeze the shares and hold the same for Registry of this Hon'ble Court until the final resolution of the disputes by the parties through arbitration;
>
> e) Pass any other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

23. As it transpires, after reserving of judgment in OMP (I) (COMM) 308/2020, the petitioner has invoked arbitration in respect of the present "Land Regularization Disputes" *vide* notice dated 29th June, 2020. It appears, thereafter, that on an application by the respondent dated 13th July, 2017, the Singapore International Arbitration Centre (SIAC) Court has passed an order dated 16th September, 2021, consolidating the arbitral proceedings forming subject matter of consideration in the present two petitions. Dr. Singhvi, learned Senior Counsel for the petitioner submits, on instructions, that the petitioner intends to challenge the aforesaid decision of the SIAC Court. That, however, is not an aspect with which I am concerned.

24. Furthermore, as on 26th October, 2021, the Arbitral Tribunal also stands constituted.

Rival submissions

25. Submissions of petitioner:

25.1 Dr. Singhvi and Mr. Rohatgi, arguing for the petitioner, citing a somewhat picturesque vernacular idiom, submit (per Mr Rohatgi) that the elephant has passed through the eye of the needle and only the tail remains. 88% of the approval and clearance has, it is pointed out, been obtained from the Government of Gujarat in respect of the disputed RSL and UPPL lands, and clearance remains to be obtained only in respect of the remaining 12%. Even in respect of the said 12%, it is pointed out that the petitioner had done everything within its control, and that the ball now lay in the court of the Gujarat Government which, apparently, owing to the restrictions imposed consequent on the intervening COVID pandemic, has not been able, till date, to accord the necessary approval. Once the petitioner had done everything within its power to comply with Clause 3.9 of the Framework Agreement, it is submitted, with great emphasis, that it would be a travesty of justice if the respondents were permitted, in purported exercise of their rights under Clause 3.9, to invoke the Kindle Pledge, redeem the UPPL OCCDs and appropriate, to themselves, securities aggregating to a value of almost ₹ 95 crores, for ₹ 1/-. It is pointed out that the letter, dated 25th June, 2020, whereby the respondents had granted extension of time to the petitioner till 25th September, 2020 impliedly acknowledged the intervention of the COVID pandemic as the reason for the failure, on the part of the petitioner in securing approval *qua* the remaining 34 acres of disputed

land. That situation, point out Dr. Singhvi and Mr. Rohatgi continues till date.

25.2 In any event, it is submitted that the petitioner cannot be blamed for the failure to obtain the requisite approval, or, therefore, for having caused an "event of default", within the meaning of either the Framework Agreement or the Pledge Agreement.

25.3 Learned Senior Counsel for the petitioner have also contended that Clause 3.9 of the Framework Agreement is a penal clause, and that the right of the respondents, envisaged by the said clause, to invoke the pledged securities, of a value of around ₹ 95 crores, for ₹ 1/-, is in the nature of liquidated damages. Relying, for the purpose, on Sections 73[2] and 74[3] of the Indian Contract Act, 1872, ("the Contract Act") the petitioners contend that these rights cannot be enforced in

---

[2] **73. Compensation for loss or damage caused by breach of contract.—**When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

[3] **74. Compensation for breach of contract where penalty stipulated for**.— 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, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or 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 or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

the absence of actual proof of loss. The petitioner submits that the respondents have not suffered any actual loss as, on the approved land, their solar plants are functioning and they are earning profits. In such circumstances, allowing the respondents to forfeit securities of ₹ 95 crores for ₹ 1 would, in the submission of learned Senior Counsel, be completely disproportionate. Clause 3.9, it is submitted, is required to be reasonably interpreted.

25.4 Learned Senior Counsel have also sought to contend that time, in the present case, cannot be treated as of essence of the contract. It is pointed out that there is no clause, in the Framework Agreement, providing that time is of the essence and that, in such circumstances, the burden is on the respondents to prove otherwise, for which purpose learned Senior Counsel place reliance on ***Govind Prasad Chaturvedi v. Hari Dutt Shastri***[4]. The transaction envisaged by Clause 3.9 being in relation to immoveable property, learned Senior Counsel contend that there is a presumption, in law, that time is not of essence of the contract. Reliance has also been placed for this purpose, on Section 3(26)[5] of the General Clauses Act, 1897. Reliance has also been placed on Section 55[6] of the Contract Act, to contend that, by

---

[4] **(1977) 2 SCC 539**

[5] "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

[6] **55. Effect of failure to perform at fixed time, in contract in which time is essential. –** When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential. – If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon. – If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

allowing the petitioner to continue discharging its obligations under the contract on two occasions, even after expiry of the extension of time as granted by them, the respondents had lost their right to contend that time was of essence of the contract. This consequence also resulted from the grant of a "cure period", to the petitioner by the letter dated 25th June, 2020, though no such cure period was provided in the Framework Agreement.

25.5 Learned Senior Counsel for the petitioner have also placed reliance on Clause 15.2 of the Framework Agreement, which reads as under:

> "15.2 If, for any reason whatsoever, any term contained in this Agreement cannot be performed or fulfilled, the Parties agree to meet and explore alternative solutions depending upon the new circumstances, but keeping in view the spirit and core objectives of this Agreement."

In view of Clause 15.2, learned Senior Counsel contend that, before "exploring alternative solutions", consequent on the COVID-2019 pandemic and the restrictions that have come into place as a consequence thereof, the respondents could not seek to invoke the pledged securities under Clause 3.9 of the Framework Agreement.

25.6 If the respondents were to be allowed to enforce the pledged securities as they proposed to do, it is submitted that the petitioners would suffer irreparable loss. The very act of enforcement of the pledged securities for ₹ 95 crores for a token ₹ 1/-, it is submitted, amounts, *ipso facto,* to irreparable loss, for which the petitioners place reliance on the judgment of the Supreme Court in ***UOI v. Raman Iron***

Foundry[7] and ***Gangotri Enterprises v UOI***[8]. The consequence of allowing the pledged securities to be invoked, it is submitted, would be that the petitioners would lose their rights to seek specific performance before the Arbitral Tribunal, as well as all controlling and voting rights in Respondent 3. It is further submitted that the petitioner would also lose its right to pursue the matter with the Government of Gujarat for regularisation of the disputed lands.

25.7 Learned Senior Counsel further contend that Respondents 1 and 2 have no fixed assets in the country and have only a combined cash balance of ₹ 7.5 crores and that they are in the process of being wound up. In such circumstances, if pledged securities worth ₹ 95 crores are permitted to be appropriated by Respondents 1 and 2 for ₹ 1/-, learned Senior Counsel for the petitioners submit that, even if they were to succeed in arbitration, it would become next to impossible to recover the said amounts.

25.8 For all these reasons, Dr. Singhvi and Mr. Rohatgi submit that the interests of justice, as well as the prevailing considerations covering exercise of jurisdiction under Section 9 of the 1996 Act, a case for interdicting the respondents, as sought in the prayers contained in the present petition, is eminently made out.

26. Submissions of respondents

26.1 Responding to the submissions of Dr. Singhvi and Mr. Rohatgi, Mr. Salve and Mr. Nayar contend that the argument, of learned Senior

[7] **AIR 1974 SC 1265**
[8] **(2016) 11 SCC 720**

Counsel for the petitioner, that 88% of approval, as required in the contract between the petitioner and the respondents, has been obtained, and that all that remains to be obtained is 12%, is completely misleading. They submit that, in fact, the 5th amendment to the Framework Agreement, which constitutes an independent contract by itself, covers the entire remaining 34 acres, and that no approval has been obtained of any part of the land covered by the 5th amendment. It cannot, therefore, be said, in the submission of learned Senior Counsel for the respondents, that the petitioner has substantially complied with its obligations *vis-à-vis* the respondents.

26.2 Learned Senior Counsel for the respondents submit that in its letter dated 30th October, 2019, by which the petitioner had sought extension of time, the petitioner had clearly acknowledged the right of the respondents to invoke the pledged securities. Having done so, learned Senior Counsel submit that the petitioners are estopped from invoking Section 9 of the 1996 Act seeking an interdiction against the respondents from doing so. This, it is submitted, would amount to a prayer for injuncting the respondents from exercising their lawful contractual rights, which no Section 9 Court can do.

26.3 Learned Senior Counsel for the respondents dispute the contention that Clause 3.9 of the Framework Agreement is in the nature of a penal clause, or that it envisages recovery of liquidated damages. According to learned Senior Counsel for the respondents, the Framework Agreement is not a contract for transfer or disposal of land and land is merely incidental to the contract. They submit that the contractual relationship between the petitioner and the respondents

was essentially for acquisition of the solar power projects by transfer *inter alia* of the Kindle shares and the UPPL OCCDs. Transfer of the shares and redemption of the OCCDs, they submit, is inevitable under the Framework Agreement. The obtaining of a marketable title in respect of the disputed RSL and UPPL lands, they submit, merely affects the consideration at which the Kindle pledge could be invoked or the UPPL OCCDs redeemed. In case marketable title was obtained within the period envisaged by the contract or as extended by the respondents, the price to be paid by the respondents would be ₹ 95 crores; else, it would be ₹ 1/-. Learned Senior Counsel for the respondents submit that the petitioner has already been paid ₹ 1260 crores by the respondents and that the issue of compliance with Clause 3.9 of the Framework Agreement was relevant only to decide whether the petitioner would be entitled to additional payment of ₹ 95 crores or of ₹ 1/-. The claim of the petitioner, is, therefore, submit learned Senior Counsel for the respondents, fundamentally monetary in nature. The contract is not a contract for transfer of lands, but is a purely commercial contract for acquisition and management of the solar power projects for monetary consideration.

26.4 Learned Senior Counsel for the respondents submit that Clause 3.9 was inserted in the Framework Agreement only to protect the respondents' legitimate business interests, as, in the absence of marketable title, the value of the disputed RSL and UPPL lands would be considerably reduced. The respondents having a pervading interest in the said land, Clause 3.9 provided for their being recompensed in the event of failure, on the part of the petitioner, to obtain a

marketable title for the lands within the stipulated period. ₹ 95 crores, therefore, merely constituted an incentive, by way of additional payment to which the petitioner would be entitled, if the petitioner were to obtain a marketable title within the stipulated period. It did not cast any obligation on the petitioner to do so. If the petitioner were to default in that regard, it would not be in breach of any contractual obligation; all that would result would be that the petitioner would be entitled only to ₹ 1 as a consideration against the Kindle shares and the UPPL OCCDs, instead of ₹ 95 crores.

26.5 What, essentially, the petitioners were seeking, by way of the present petition, therefore, it is submitted, was a stay of operation of Clause 3.9 of the Framework Agreement, which was not permissible under Section 9 of the 1996 Act, especially as the petitioners had admitted the respondents' entitlement to invoke the pledged securities, in its letter dated 30th October, 2019 *supra*. The prayers of the petitioner in the petition, it is submitted, are in the teeth of Clause 3.9, as well as the covenants of the Pledge Agreement, the share purchase agreement and the debenture trust deed.

26.6 Clause 3.9 of the Framework Agreement, submit learned Senior Counsel, is not in the nature of a penal clause or a clause imposing liquidated damages. The invocation, by the petitioner, of Sections 73 and 74 of the Contract Act is also, therefore, submit learned Senior Counsel for the respondents, fundamentally misconceived. Having obtained ₹ 1260 crores under the Framework Agreement, learned Senior Counsel for the respondent submit that the petitioner can hardly balk at application of Clause 3.9 thereof.

26.7 In any event, submit learned Senior Counsel, the issue of whether Clause 3.9 is penal, or not, is essentially a matter of trial, and it would not be advisable for the Court to take a view in that regard at a Section 9 stage.

26.8 Learned Senior Counsel for the respondents also dispute the petitioner's submission that time is not of the essence of the contract. They refer to various paragraphs of the petition, to contend that the petitioner had itself accepted that time was essence of the contract in the present case. In any event, submit learned Senior Counsel, time is presumed to be of the essence of the contract in all commercial contracts. Learned Senior Counsel reiterate their contention that the present contract is not one for transacting in land, but is a purely commercial contract by which the respondents had purchased 18 solar power projects and provided consideration by purchasing of the Kindle shares and the UPPL OCCDs. The land is merely incidental to the transaction. The Framework Agreement does not envisage sale or purchase of land. They reiterate that Clause 3.9 merely provided for payment of additional consideration to the petitioner were it in a position to obtain the requisite approvals from the Government of Gujarat, for the disputed land within the stipulated period. They have referred me to Clauses 3.7, 3.9, 10.18 of Framework Agreement, Clauses 2.2, 3.1 of UPPL SPA, Clause 16 of Shareholders Agreement, Clauses 9.3, 10.1 and 10.2 of Pledge Agreement to contend that time was of the essence of the contract. In any event, they submit, relying on ***Citadel Fine Pharmaceuticals v. Ramaniyam Real Estate Pvt.***

Ltd.[9] and ***Narinder Kumar Malik v. Surinder Kumar Malik***[10], that it was not mandatory that a specific recital to the effect that time was of essence of the contract, was required to be contained in the agreement. ***Citadel Fine Pharmaceuticals***[9], they submit, also holds that the absence of any clause providing for *force majeure* or extension of time itself indicates that time was of the essence of the contract.

26.9 Learned Senior Counsel have also sought to contend that the Shareholders Agreement constituted an independent contract with respect to the Kindle pledge and that the petitioner could not, by invoking Section 9, seek an interdiction against the respondents exercising their rights under the said contract.

26.10 Learned Senior Counsel for the respondents also dispute the contention of Dr. Singhvi and Mr. Rohatgi that, were interlocutory relief as sought in this petition not to be granted, the petitioner would suffer irreparable loss. It is submitted that the claim of the petitioner being monetary in nature, the petitioner could always advance the claim in arbitration. Even if the respondents were to invoke the pledged securities for ₹ 1, it would be open to the learned Arbitral Tribunal, were it to find to the invocation to be not in accordance with law, to award ₹ 95 crores to the petitioner. No case, therefore, for pleading irreparable loss, according to learned Senior Counsel for the respondents, exists. The petitioner has, it is submitted, conveniently glossed over the fact that it had actually earned ₹ 1260 crores from the

[9] **(2011) 9 SCC 147**
[10] **(2009) 8 SCC 743**

respondents, and was fighting only for a differential of ₹ 95 crores, to which even as per the petitioner itself, it was not entitled.

26.11 Responding to the submission of learned Senior Counsel for the petitioner that Respondents 1 and 2 had no assets save ₹ 7.5 crores cash bank balance, learned Senior Counsel for the respondents submit that the respondents were part of the Macquaire Group, which was one of the world's leading financial institution and assets management companies and that therefore, the petitioner had no reason to have any apprehension that, were they to succeed in arbitration, they would not reap the benefits of the award. Even on this ground, therefore, it is submitted that no case, to secure the petitioners at this stage exists.

26.12 Mr Salve and Mr Nayar pray, therefore, that the petition be dismissed.

Discussion and analysis

Scope and ambit of Section 9

27. Before proceeding to examine the issue, it is necessary to revisit the principles relating to Section 9 of the 1996 Act and grant of interim protection thereunder. While doing so, I refrain from adverting to grant of relief under Section 9(1)(ii)(b), which is governed by its own set of principles, and has not been invoked in the present case.

28. As it stands today, Sections 9 and 17 of the 1996 Act are, for all intents and purposes, identical. The very same relief which the Section 9 Court can grant, can be granted by the learned Arbitral Tribunal under Section 17. Section 17 was equalized with Section 9 by Section 10 of the Arbitration and Conciliation (Amendment) Act, 2015. Prior to its amendment, Section 17 read thus:

> "**17. Interim measures ordered by arbitral tribunal.** –
>
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.
>
> (2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub- section (1)."

29. After amendment, however, Section 17 is co-equal with Section 9. For ready reference, Sections 9 and 17 of the 1996 Act may be reproduced thus:

> "**9. Interim measures, etc. by Court –** A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court:-
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:-
>
> (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

*****

17**. Interim measures ordered by arbitral tribunal**

(1) A party may, 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 the arbitral tribunal—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the
arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or
experiment to be tried, which may be necessary or expedient for the purpose of obtaining full
information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.]"

30. It has been noted by the Supreme Court, in paras 67 and 68 of the report in ***Arcelor Mittal Nippon Steel v. Essar Bulk Terminal Ltd***[11], thus:

> "67. To discourage the filing of applications for interim measures in Courts under Section 9(1) of the Arbitration Act, Section 17 has also been amended to clothe the Arbitral Tribunal with the same powers to grant interim measures, as the Court under Section 9(1). The 2015 Amendment also introduces a deeming fiction, whereby an order passed by the Arbitral Tribunal under Section 17 is deemed to be an order of Court for all purposes and is enforceable as an order of Court.
>
> 68. With the law as it stands today, the Arbitral Tribunal has the same power to grant interim relief as the Court and the remedy under Section 17 is as efficacious as the remedy under Section 9(1). There is, therefore, no reason why the Court should continue to take up applications for interim relief, once the Arbitral Tribunal is constituted and is in seisin of the dispute between the parties, unless there is some impediment in approaching the Arbitral Tribunal, or the interim relief sought cannot expeditiously be obtained from the Arbitral Tribunal."

31. Section 9, therefore, is not a pre-arbitral Section 17. It is not intended to provide a choice to a litigant, as to whether to approach the Court under Section 9 or to the Arbitral Tribunal under Section 17. Quintessentially, the appropriate remedy, for seeking interlocutory protection, in the event of a default in adherence to the terms of the contract by one or the other party, amenable to resolution by arbitration, is Section 17. Section 9 is merely intended to provide interim protection to the parties, where it is necessary for the Court to grant such protection in order that the arbitral proceedings are not

[11] **2021 SCC OnLine SC 718**

frustrated, or the award that may come to be rendered therein being reduced to a paper decree.

32. Section 9 may be invoked at a pre-arbitral stage, during the arbitration proceedings, or after the arbitral proceedings have ended but before the arbitral award is enforced. The considerations that govern exercise of Section 9 jurisdiction at these stages are distinct and different. For the present, I would concern myself only with the governing considerations for exercise of Section 9 jurisdiction at a pre-arbitral stage, as that is what we are concerned with.

33. Section 9 has come in for consideration by the Supreme Court, as well as by various High Courts of this country, including this Court, on various occasions. In its pre-amended *avatar*, Section 9 has been interpreted by the Supreme Court in, *inter alia*, ***Adhunik Steels Ltd v. Orissa Manganese and Minerals (P) Ltd***[12]***, Arvind Constructions Co. (P) Ltd v. Kalinga Mining Corporation***[13] and ***Firm Ashok Traders. v. Gurmukh Das Saluja.***[14]. In its present incarnation, the most recent authoritative pronouncement of the Supreme Court, which considers its earlier decisions, is ***Arcelor Mittal***[11]**.**

34. Insofar as the Division Benches of this Court are concerned, one need refer only to the recent decision in ***DLF***[1], which also considers the principles enunciated by the earlier Division Bench

---

[12] **(2007) 7 SCC 125**
[13] **(2007) 6 SCC 798**
[14] **(2004) 3 SCC 155**

decision in ***NHAI v. Bhubaneswar Expressway Pvt Ltd***[15]. I have also had an occasion to speak on the ambit of Section 9, and its application at the pre-arbitral stage, in ***Avantha Holdings Ltd v. Vistra ITCL India Ltd***[16]***, Big Charter Pvt Ltd v. Ezen Aviation Pty. Ltd.***[17], ***CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corporation of India Ltd***[18], ***Mumbai International Airport Ltd v. Airports Authority of India***[19] *and* ***Pearl Hospitality & Events Pvt Ltd vs. Oyo Hotels And Homes Pvt. Ltd.***[20] Of these, ***Avantha Holdings***[16] has, in part, been approved by the Supreme Court in ***Arcelor Mittal***[11], and the appeal against ***CRSC Design***[18] stands dismissed by the Division Bench of this Court, as reported in ***CRSC Research and Design Institute Group Co. Ltd v. Dedicated Freight Corridor Corporation of India Limited*** [21].

35. The three principles governing considerations for grant of interim relief under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (" the CPC"), viz. the existence of a prima *facie case* in favour of the applicant, balance of convenience being in favour of the applicant and the likelihood of irreparable loss or prejudice to the applicant were relief not to be granted, apply equally to Sections 9 and 17 of the 1996 Act.

36. That does not, however, mean that the scope of examination by the Section 9 Court is identical to that of the learned Arbitral Tribunal

---

[15] **2021 SCC OnLine Del 2421**
[16] **272 (2020) DLT 664**
[17] **2020 SCC OnLine Del 1713**
[18] **274 (2020) DLT 89**
[19] **MANU/DE/2148/2020**
[20] **276 (2021) DLT 566**
[21] **2020 SCC OnLine Del 1526**

under Section 17. There is a perceptible difference between the two, primarily with respect to the aspect of existence of a *prima facie* case. This difference must necessarily exist, for the simple reason, already noted hereinbefore, that a Section 9 proceeding is *not* a pre-arbitral Section 17 proceeding. It is merely a precursor to the arbitral proceedings and the exercise of jurisdiction by the learned Arbitral Tribunal. If the Section 9 Court were to undertake the same exercise which, after the learned Arbitral Tribunal is in place, would be undertaken by the learned Arbitral Tribunal, it is bound to frustrate the arbitral proceedings, as any findings returned by the Section 9 Court, even *prima facie*, would affect the arbitral proceedings. While it is true that, while disposing of a Section 9 petition, the Court does normally enter into a disclaimer that the findings in the order are merely *prima facie* and interlocutory in nature, intended to dispose of the Section 9 application, such a disclaimer is, in its practical application, more a caveat of form than of substance. Observations and findings of the Section 9 Court are, invariably, treated by the Arbitral Tribunal with due deference, and that does colour, to a greater or lesser degree, the subjectivity of the exercise of jurisdiction by it.

37. While the learned Arbitral Tribunal, examining the existence of a *prima facie* case in exercising its jurisdiction under Section 17, is expected and, indeed, obligated, to enter into the intricacies of the matter and the rival contentions of the parties before it *vis-à-vis* the contractual stipulations and other relevant factors, such an approach is neither expected from, nor available to, the Section 9 Court. The

aspect of existence of *prima facie* case has to be examined by the Section 9 Court with respect to the issue of whether a dispute, worthy of consideration by the learned Arbitral Tribunal does, or does not exist. If the case set up by the Section 9 applicant is found to be completely ephemeral or moonshine, the primary consideration of a *prima facie* case is not met, and the Section 9 Court may decline from examining the matter further. If, however, the Section 9 applicant has made out a case worthy of consideration by the learned Arbitral Tribunal, the Court has to then examine whether the Section 9 applicant is required to be protected, so that the arbitral proceedings are not frustrated or any award rendered in the arbitral proceedings does not become unenforceable. This is essentially an act in aid of the integrity of the arbitral process, the fostering of which is the entire *raison d'être* of the 1996 Act. While examining whether such interim protection is required to be granted, however, the Court is not expected to analyse the issue with a fine toothcomb, but is required to restrict its consideration to a *prima facie* level. Where the possibility of a danger of the arbitral proceedings being frustrated is real, the Section 9 Court is obligated, in an appropriate case, to grant interim protection.

38. Where such interim protection is granted at a pre-arbitral stage, it is open to the Court either to grant the interim protection till the conclusion of the arbitral proceedings, or on a temporary basis, subject to the orders to be passed by the Arbitral Tribunal. In my considered opinion, ordinarily, the latter course would be more appropriate. The reason is obvious. If the Court were to grant interim

protection under Section 9, to continue till the arbitral proceedings conclude, the Court divests the Arbitral Tribunal of the jurisdiction to examine the aspect of interim protection and, thereby, practically renders Section 17 otiose. Ordinarily, therefore, where Section 9 is invoked at a pre-arbitral stage, grant of interim protection must reserve jurisdiction with the learned Arbitral Tribunal to decide whether the protection granted by the Court should or should not continue, as well as the extent thereof. It is only thus that the sanctity of the jurisdiction of the learned Arbitral Tribunal, conferred by Section 17, can be maintained.

39. A brief reference to the decisions cited hereinbefore may now be made.

40. ***Arcelor Mittal***[11]

40.1 ***Arcelor Mittal***[11], as already noted, observed, in paras 67 and 68 of the report, that the very amendment of Section 17 of the 1996 Act was intended to discourage litigants from approaching the Court under Section 9. With the Arbitral Tribunal having been invested with the authority to grant, to the parties before it under Section 17, the very same relief which the Court could grant under Section 9, a prevailing consideration which would operate with the Section 9 Court would be whether the relief sought from it could not, equally efficaciously, be sought from the Arbitral Tribunal. If the Arbitral Tribunal is already in place, the standard to be established by the Section 9 applicant would be higher. Even where the Arbitral Tribunal is yet to be

constituted, the Section 9 applicant would have to establish, to the Court, that the relief sought by him is so emergent as could not await the setting up of the Arbitral Tribunal and the invocation of its jurisdiction under Section 17.

40.2 Paras 27 to 30 and 34 of the judgment of the Division Bench of this Court in ***Energo Engineering Projects Limited*** **v.** ***TRF Ltd***[22]**,** authored by Indira Banerjee, J. as she then was, which have been approved by the Supreme Court in para 82 of the report in ***Arcelor Mittal***[11], are of considerable significance in this regard, and read thus:

> "27. A harmonious reading of Section 9(1) with Section 9(3) of the 1996 Act, as amended by the 2015 Amendment Act, makes it amply clear that, even after the amendment of the 1996 Act by incorporation of Section 9(3), the Court is not denuded of power to grant interim relief, once an Arbitral Tribunal is constituted.
>
> 28. When there is an application for interim relief under Section 9, the Court is required to examine if the applicant has an efficacious remedy under Section 17 of getting immediate interim relief from the Arbitral Tribunal. Once the court finds that circumstances exist, which may not render the remedy provided under Section 17 of the 1996 Act efficacious, the Court has the discretion to entertain an application for interim relief. Even if an Arbitral Tribunal is non functional for a brief period of time, an application for urgent interim relief has to be entertained by the Court under Section 9 of the 1996 Act.
>
> 29. It is a well settled proposition that if the facts and circumstances of a case warrant exercise of discretion to act in a particular manner, discretion should be so exercised. An application for interim relief under Section 9 of the 1996 Act, must be entertained and examined on merits, once the Court finds that circumstances exist, which may not render the remedy provided under Section 17 of the said Act efficacious.

[22] **2016 SCC OnLine Del 6560**

> 30. In our view, the Learned Single Bench patently erred in holding "there is no impediment or situation where the remedy under Section 17 of the Act is not efficacious". The Learned Single Bench failed to appreciate that the pendency of a Special Leave Petition in which the constitution of the Arbitral Tribunal was under challenge, was in itself, a circumstance which rendered the remedy of the parties under Section 17 uncertain and not efficacious.
>
> *****
>
> 34. An application for interim relief should ordinarily be decided by the Arbitral Tribunal, once an arbitral tribunal is constituted. However, if circumstances which may not render the remedy under Section 17 of the 1996 act efficacious, the Court has to consider the prayer for interim relief on merits, and pass such order, as the Court may deem appropriate."

40.3 The principles enunciated in the afore-extracted passages from ***Energo Engineering Projects***[22], which stand approved in ***Arcelor Mittal***[11], are important, especially as they underscore the obligation of the Section 9 Court to grant relief in an appropriate case. The Court has held, in unequivocal terms, that, where circumstances exist, which may render the remedy available under Section 17 inefficacious, the Section 9 Court is bound to exercise its discretion in favour of the applicant. The ground on which the Division Bench interfered with the decision of the learned Single Judge in ***Energo Engineering Projects***[22] is even more significant. The learned Single Judge had, in the judgment which was carried in appeal, declined to grant interim relief under Section 9 on the ground that the Arbitral Tribunal already stood constituted. The Division Bench held that this approach was erroneous, as the learned Single Judge had failed to notice the fact that the constitution of the Arbitral Tribunal was under challenge before

the Supreme Court in a Special Leave Petition. In that view of the matter, the Division Bench held that the possibility of grant of relief to the Section 9 applicant, under Section 17, was uncertain and could not be regarded as efficacious. That being so, the Division Bench held that the learned Single Judge could not have rejected the prayer for relief under Section 9 merely on the ground that the remedy under Section 17 before the Arbitral Tribunal was available. Thus, held the Division Bench, though an application for interim relief, ordinarily, was required to be decided by the Arbitral Tribunal once it was constituted, however, if circumstances existed which rendered the remedy under Section 17 before the constituted Arbitral Tribunal inefficacious, the Section 9 Court will be bound to consider the prayer for interim relief on merits and pass appropriate orders.

40.4 For reasons which would become presently apparent, these observations, in ***Energo Engineering Projects***[22], as approved by the Supreme Court in ***Arcelor Mittal***[11], have particular significance in the facts of the case.

40.5 Paras 83 and 84 of the report in ***Arcelor Mittal***[11] clarified that the proscription, contained in Section 9(3), on "entertainment" of a Section 9 application once an Arbitral Tribunal was constituted, did not apply where the Section 9 application was moved prior to constitution of the Arbitral Tribunal. That aspect, however, is not of much significance, as no objection on that count has been raised in the present case.

40.6 Para 87 of the report in ***Arcelor Mittal***[11] approves, expressly, the following observations of this Court, in para 45 of the report in ***Avantha Holdings***[16]:

> "The Court, while exercising its power under Section 9 of the 1996 Act, has to be acutely conscious of the power, vested in the arbitrator/arbitral tribunal, by Section 17 of the same Act. A reading of Section 9, and Section 17, of the 1996 Act, reveals that they are identically worded. The" interim measures", which can be ordered by the arbitral tribunal, under Section 17, are the very same as those which can be ordered by the Court under Section 9. It is for this reason that sub-section (3) of Section 9 proscribes grant of interim measures, by the Court, consequent on constitution of the arbitral tribunal, save and except where the Court finds that circumstances exist, which may not render the remedy, under Section 17, to be efficacious."

40.7 Paras 99 and 100 of the report in ***Arcelor Mittal***[11] hold that, once an application under Section 9 has been finally heard before the Arbitral Tribunal was constituted, or where the judgment on the Section 9 application was reserved before such constitution, there could be no question of relegating the party to the remedy under Section 17. Even where the Arbitral Tribunal stood constituted prior to hearing of the Section 9 application, one of the circumstances in which relief could be granted under Section 9, as envisaged by the Supreme Court in para 100 of the report in ***Arcelor Mittal***[11], is where the arbitrators are situated at different locations, distant from each other, resulting in the possibility of their convening and examining the request for interim relief under Section 17 being rendered moot.

41. Having held as above, para 107 of the report of ***Arcelor Mittal***[11] concludes thus:

"**107.** It is reiterated that Section 9(1) enables the parties to an arbitration agreement to approach the appropriate Court for interim measures before the commencement of arbitral proceedings, during arbitral proceedings or at any time after the making of an arbitral award but before it is enforced and in accordance with Section 36 of the Arbitration Act. The bar of Section 9(3) operates where the application under Section 9(1) had not been entertained till the constitution of the Arbitral Tribunal. Of course it hardly need be mentioned that even if an application under Section 9 had been entertained before the constitution of the Tribunal, the Court always has the discretion to direct the parties to approach the Arbitral Tribunal, if necessary by passing a limited order of interim protection, particularly when there has been a long time gap between hearings and the application has for all practical purposes, to be heard afresh, or the hearing has just commenced and is likely to consume a lot of time. In this case, the High Court has rightly directed the Commercial Court to proceed to complete the adjudication."

42. ***Arcelor Mittal***[11], therefore, holds that

(i) the amendment of Section 17 of the 1996 Act, whereby the powers of the Arbitral Tribunal have been equated with those of the Court under Section 9, was specially intended to discourage parties from approaching the Court under Section 9, where an equally efficacious remedy under Section 17 was available,

(ii) ordinarily, where the Arbitral Tribunal stood constituted, there was no reason why a Court should grant a relief under Section 9,

(iii) this was, however, subject to the caveat that, where there was an impediment in approaching the Arbitral Tribunal under Section 17 or where interim protection could not be obtained expeditiously from the Arbitral Tribunal, the Section 9 Court

would be obligated to exercise jurisdiction and examine the issue,

(iv) the coming into place of the Arbitral Tribunal did not, *per se*, denude the Section 9 Court of its jurisdiction; in an appropriate case, the Section 9 Court could exercise jurisdiction even where orders were reserved by the Arbitral Tribunal,

(v) the Section 9 Court was essentially required to examine, and weigh in the balance, the efficacy of the remedy available under Section 9 *vis-a-vis* the urgency as expressed by the Section 9 applicant,

(vi) where the remedy available under Section 17, despite the Arbitral Tribunal being *in seisin* of the disputes between the parties, was inefficacious, such as a situation in which the constitution of the Arbitral Tribunal was the subject matter of challenge before a Court of law, or where the members of the Arbitral Tribunal were not in a position to meet and confer, the Section 17 remedy was rendered uncertain and inefficacious, the Section 9 Court would have to examine the prayers of the applicant before it on merits, and

(vii) the Section 9 Court was, nonetheless, required to bear in mind the fact that the reliefs which could be granted by it, to the Section 9 applicant, could also be granted by the Arbitral Tribunal under Section 17.

Exercise of jurisdiction under Section 9 has to, therefore, be duly informed of the necessity of maintaining an intricate balance among these competing factors. The prevailing consideration, at the end of

the day, appears to be that of rendition of substantial justice, counterbalanced with the necessity of maintaining the sanctity and integrity of the arbitral process.

43. *DLF*[1]

43.1 The Division Bench judgement of this Court in ***DLF***[1] is an important decision, essentially because it underscores the necessity of the Section 9 Court refraining from entering, in detail, into an examination of the merits of the rival stands of the parties before it, or into an intricate assessment and analysis of the covenants of the contract between them. Any such exercise by the Section 9 Court would invite, in its inevitable wake, findings on merits. Such findings, even if *prima facie*, are, as the Division Bench unexceptionally holds, bound to affect the subjective jurisdiction of the Arbitral Tribunal while adjudicating on the *lis*. Paras 48 to 50 of the report in ***DLF Ltd.*** are enlightening in this context, and read thus:

> "48. There is another aspect that needs to be discussed. While passing interim orders, relief that would amount to grant of a final relief must be eschewed. Also, while it is true that what would be the nature of an interim measure of protection that would appear to the court to be "just and convenient" would certainly vary from case to case. But, while deciding on the relief, the court ought not to venture into determination of liabilities and the interpretation of clauses. This Bench in ***Bhubaneswar Expressway***[15] has held as below:
>
> > "44. If the Courts, in exercise of powers under Section 9, start enforcing the terms of the contract, it would do extreme disservice to the very concept of arbitration, where the parties choose to have their disputes adjudicated, instead of by the Courts, by

> Arbitrators of their choice. In the present case, the appellant NHAI has disputed its liability for termination payment on diverse grounds, as can be understood from the narrative hereinabove of the arguments of the senior counsel for NHAI. ***If this Court, while exercising jurisdiction under Section 9, were to adjudicate whether there is any legal merit in the said grounds or not, this Court would be adjudicating the disputes, which the parties have agreed to be adjudicated by arbitration and in fact there would be nothing left for the Arbitral Tribunal to decide,*** as far as the claim of BEPL for the termination payment directed to be made is concerned. In fact, after reading the impugned judgment, we have also wondered what remains for the Arbitral Tribunal to decide, as far as the claim of BEPL for termination payment on a demurer, believing the breach to be on the part of BEPL, is concerned. ***It is a hard reality that once there is judicial order on the merits of the dispute and which judicial order is not granting any interim measure but granting the final relief claimed in the arbitration proceeding, the Arbitral Tribunal would hesitate from deciding contrary to the findings returned by the Court on interpretation of terms of the Concession Agreement*** and of admission, and to which Court, an application under Section 34 of the Act would lie against the award of the Arbitral Tribunal."
>
> (Emphasis added)

49. In the instant case, both sides have extensively referred to communications between them, pertaining to extension of time to complete the project, the issuance of C.C., the defaults found in the work and the Clauses of the C.A., detailing the mutual rights and obligations. Clearly, therefore, these are matters that cannot be considered by the court in an application under Section 9. But the learned Single Judge has clearly dealt with the question of illegality and had laid the fault at the door of DLF. This it did on the basis of an assessment of the facts and the Clauses of the C.A. and concluded that while DLF could have encashed the RBGs, it was not proper to have encashed the PBGs and therefore, found it "just and proper" to direct DLF to furnish FDRs of the value of Rs. 143,87,22,708/-. The court has, thus,

accepted the stand of Leighton, preferring it over the stand of DLF.

50. In ***CRSC Research and Design Institute***[21], we had occasion to make the following observations:

> "15. We are unable to agree with the contention of the senior counsel for the appellant that this Court, when approached for the interim measure of interference with unequivocal, absolute and unconditional BGs, is required to interpret the contract and/or form a prima facie opinion whether the beneficiary of the BGs has wrongfully invoked the BGs. **Such exercise, in our view, is to be done in a substantive proceeding to be initiated by the appellant for recovery of the monies of the BGs, if averred to have been wrongly taken by the respondent No. 1 by encashment of BGs.** If any interim relief is also claimed in the said substantive proceedings, the need for taking a prima facie view, will arise therein; however not while dealing with an application for the interim measure of restraining invocation/encashment of BGs……"
>
> (Emphasis added)

44. In ***Big Charter***[17], I have observed that Section 9 is in the nature of an emergency clause and have sought to emphasize the use of the word "protection" in Section 9, as counter-distinguished from the words used in Order XXXIX of the CPC.

45. In ***Avantha Holdings***[16], this Court has taken a stock of the decisions of the Supreme Court in ***Adhunik Steels***[12], ***Arvind Constructions***[13] and ***Firm Ashok Traders***[14], though these decisions were rendered at the time when Section 17 was in its pre-amended form. Among other things, these decisions of the Supreme Court hold that (i) the demonstration of irreparable or, perhaps, substantial, harm,

were interim protection not granted, is necessary for relief to be granted under Section 9, (ii) the interim relief granted under Section 9 may, to some extent, overlap with the final relief sought in the arbitral proceedings[23] and (iii) grant of interim relief under Section 9 of the 1996 Act would also be subject to the restrictions governing Section 9 of the Specific Relief Act, 1963. This Court has also relied on the following observations of the Division Bench of the High Court of Madras in ***V. Sekar v. Akash Housing***[24], as authored by Banumathi, J (as she then was), expounding on the scope of Section 9(1)(ii)(e) of Section 9, which is in the nature of a residual clause, empowering the Court to grant such interim protection as may be "just and convenient":

> "The purpose of Section 9 is to provide an interim measure of protection to the parties to prevent the ends of justice from being defeated. Section 9(2)(e) vests the Court with the power to grant such interim measures of protection as may be just and convenient. The jurisdiction under the "just and convenient" clause is quite wide in amplitude, but must be exercised with restraint. Interim measures are to be granted by the Court so as to protect the rights in adjudication before the arbitral tribunal from being frustrated. It does not allow the Court the discretion to exercise unrestrained powers and frustrate the very object of arbitration."

46. In my decision in ***CRSC Design***[18] (which was affirmed in appeal by the Division Bench[21]), I have attempted to delineate the following three criteria, cumulative satisfaction of which is necessary, before interim protection can be granted under Section 9:

---

[23] In my opinion, the observation in para 48 of the judgment of the Division Bench in ***DLF*** that "while passing interim orders (under Section 9), relief that would amount to grant of a final relief must be eschewed" must be read subject to this observation, which finds place in the judgment of the Supreme Court in ***Adhunik Steels***.

[24] **AIR 2011 Mad 110:(2011) 3 Arb LR 327 (DB)**

(a) the existence of an arbitration clause, and manifest intent, of the Section 9 petitioner, to invoke the said clause, and initiate arbitral proceedings,

(b) the existence of a *prima facie* case, balance of convenience and irreparable loss, justifying such grant of interim relief to the applicant, and

(c) the existence of emergent necessity, so that, if interim protection is not granted by the Court, even before arbitral proceedings are initiated and the chance to approach the arbitral tribunal under Section 17 manifests itself, there is a possibility of the arbitral proceedings being frustrated or rendered futile.

47. The scope and ambit of Section 9 and its application at a pre-arbitral stage, in my view, stands sufficiently clarified by the aforesaid decisions. The prayer of the petitioner in the present case has to be examined in the backdrop of these principles.

Consideration

48. From the rival submissions of learned Senior Counsel, the following issues arise.

49. The petitioner contends that Respondents 1 and 2 could not be permitted to invoke Clause 3.9 of the Framework Agreement on the ground that an "event of default" had occurred, as the petitioner had failed to obtain approval and perfection of title in respect of the entire disputed RSL land and UPPL land covered by the said Clause.

According to the petitioner, it has done everything within its power to comply with the mandate of Clause 3.9. There is, therefore, according to the petitioner, not merely substantial, but complete compliance, by it, of its obligation under Clause 3.9. The petitioner has no control over the processing of its application, by the Government of Gujarat, for perfection of title in respect of the remaining 34 acres of land. In such circumstances, according to the petitioner, no "event of default" can be attributed to it.

50. Respondents 1 and 2, for their part, do not dispute, on facts, this submission of the petitioner. Their contention is that, once the petitioner has, willy nilly, consented to Clause 3.9 of the Framework Agreement and appended its signature to the contract containing the said covenant, it is bound by the terms thereof. The reason for failure, on the part of the petitioner, to obtain perfect title, in respect of the entire land covered by Clause 3.9 of the Framework Agreement is, according to the respondent, irrelevant. Mr. Harish Salve, in fact, sought to submit that commercial contracts are "red in tooth and claw". There is, according to the respondent, no scope for any equity or sympathy while construing the covenants of commercial contracts which have to stand as they are.

51. The petitioner, on the other hand, contends that a commercial contract is required, at the least, to be reasonably construed, keeping the realities of the situation in mind. Allowing the respondents to invoke securities worth ₹ 95 crores for ₹ 1/-, in a situation in which the petitioner has done everything it could, and cannot be attributed

fault on any score is, according to the petitioners, a completely unreasonable way of construing Clause 3.9.

52. The petitioners have further sought to submit that Clause 3.9 is a penal clause which results, in effect, in levying liquidated damages of ₹ 95 crores on the petitioner. Operation and effectuation of such a penal clause, submits the petitioner, has to abide by Sections 73 and 74 of the Contract Act. These provisions require adducing of evidence by the respondents of actual proof of loss. A mere allegation of failure, on the part of the petitioner, to strictly comply with Clause 3.9, in respect of a mere 12 % of the land covered thereby, even while compliance of the remaining 88% had been ensured, submits the petitioner, cannot justify the redemption of securities worth ₹ 95 crores for ₹ 1/-. That the imperfection in title, in respect of the remaining 34 acres of land, has resulted in actual loss to Respondents 1 and 2 has, according to the petitioner, to be proved, before Clause 3.9 could legitimately be invoked.

53. In fact, submits the petitioner, Respondents 1 and 2 have not suffered any actual loss, as solar power plants are functioning on the land which stands regularised and the respondents are earning considerable profits therefrom.

54. Respondents 1 and 2 contend, *per contra,* that Clause 3.9 is not a penal clause and does not provide for liquidated damages. In fact, submit Respondents 1 and 2, the interpretation placed by the petitioner on Clause 3.9 is completely misconceived.

55. According to Respondents 1 and 2, Clause 3.9 merely incentivises the petitioner by providing an additional consideration of ₹ 95 crores in the event the petitioner succeeds in obtaining perfected title in respect of RSL and UPPL lands covered by Clause 3.9 of the Framework Agreement. To buttress this submission, the respondents have emphasized the fact that the petitioner has already been paid ₹ 1260 crores by Respondents 1 and 2. According to the said respondents, Clause 3.9 merely provides for an additional payment of ₹ 95 crores, to which the petitioner would become entitled if it were in a position to obtain perfected title in respect of the entire RSL and UPPL lands covered by Clause 3.9. If it cannot, the respondents contend that the petitioner must content itself with the ₹ 1260 crores which it had already been paid and forego ₹ 95 crores (obviously less ₹ 1/-). The submission of the petitioner that Clause 3.9 is in the nature of a clause for liquidated damages, or is penal in nature is, therefore, stoutly opposed by the respondents who, consequently, also submit that Sections 73 and 74 of the Contract Act have no part to play, whatsoever, in the present case.

56. Yet another aspect on which the petitioner and the respondents join issue is whether time is of essence of the contract. The petitioner contends that there is no clause in the Framework Agreement which specifies that time is of the essence of the contract. In such a situation, the onus is on the respondents, according to the petitioner, to prove that time is of the essence. The petitioner submits that Clause 3.9, being in the nature of a transaction related to an immovable property, there is a presumption, in law, that time is not of the essence of such

transaction, for which purpose the petitioner has also placed reliance on Section 3(26) of the General Clauses Act. The periodic extensions of time, granted to the petitioner by Respondents 1 and 2 have also been cited as a factor which indicates that time is not of the essence of the contract in the present case. As against this, the respondents contend that the contract is not one for transacting in immovable property, but is a purely commercial contract, whereby the respondents have paid valuable consideration to the petitioner, against the acquisition of the SPVs. The contract, therefore, is purely commercial in nature, and, in such cases, it is contended by the respondents, that the presumption is that time is of the essence of the contract, rather than otherwise. Extensions of time were also granted, it is submitted, reserving the rights of the respondents and, therefore, grant of such extension could not lead to any presumption that time was not of the essence of the contract.

57. The petitioner has also sought to place reliance on Clause 15.2 of the Framework Agreement, which ordains that if, for any reason, any term of the Framework Agreement cannot be performed or fulfilled, the parties would meet and explore alternative solutions depending on the new circumstances. The COVID-19 pandemic, which is also the reason why approval has yet to be granted by the Government of Gujarat for the disputed 34 acres of RSL land and UPPL land is, submits the petitioner, indisputably a "new circumstance". Before invoking Clause 3.9 of the Framework Agreement against the petitioner, therefore, the petitioner submits that the respondents were duty bound to sit down with the petitioner and

"explore alternative solutions". This clause, submits the petitioner, is akin to and, in fact, wider than, a *force majeure* clause. As against this, the respondents, while not particularly affording any pointed response to Clause 15.2, have contented themselves with the submission that the clause was not intended to cater to such a situation and could not result in divesting the respondents' rights which emanate from Clause 3.9 of the Framework Agreement.

58. These, and the other submissions of learned Senior Counsel for the petitioner and the respondents, throw up seminal issues which arise for consideration. They require an intricate examination of the facts of the case, the covenants of the various contractual documents executed between and among the parties, and other involved issues, including the applicability of other statutes, including Sections 55, 73 and 74 of the Contract Act. This Bench, which, over the past year and a half, has come across several arbitral awards in matters involving commercial contracts, is acutely conscious of the fact that divergent views are taken by arbitral tribunals on similar issues, as issues such as these arise in case after case. If this court were to enter into the thicket of these submissions, and return findings, even, *prima facie*, on the merits thereof, one way or the other, it is bound to influence the arbitral proceedings and would also be in the teeth of note of caution expressed by the Division Bench of this Court in ***Bhubaneswar Expressways***[15] and ***DLF***[1].

59. Suffice it to state that both sides have raised issues which require serious consideration. Without an in-depth examination of the

contractual covenants, the communications between the parties and all legal provisions which apply, is not possible for this court to advance findings even, *prima facie,* regarding (i) whether Clause 3.9 of the Framework Agreement is in the nature of a penal clause envisaging liquidated damages, or otherwise, in the nature of a clause merely envisaging additional consideration payable to the petitioner over and above ₹ 1260 crores already paid to it, (ii) whether Sections 73 and 74 of the Contract Act are, or are not, applicable, (iii) whether there has, or has not, been complete or substantial compliance, by the petitioner, with Clause 3.9 of the Framework Agreement, (iv) whether given the extent to which the petitioner has complied with the said clause, and the admitted fact that the failure, on the petitioner's part, to obtain perfection of title in respect of the entire land covered by Clause 3.9 of the Framework Agreement, owing to circumstances beyond its control, the respondents would be justified in invoking the pledged securities of ₹ 95 crores for ₹ 1, (v) whether time is of the essence of the contract, and the result of this finding and (vii) whether Clause 15.2 of the Framework Agreement can be cited by the petitioner in its defence. Quite clearly, these are issues which require in-depth examination, before any finding could be returned thereon.

60. The core issue, around which the entire controversy revolves, is the nature of Clause 3.9 of the Framework Agreement. One contends that it is in the nature of a penal clause envisaging liquidated damages and subject, therefore, to the discipline of Sections 73 and 74 of the Contract Act; the other contends that it is merely a clause providing for additional consideration to which the petitioner would be entitled

in the event of the petitioner securing *perfecture* of title in respect of the RSL and UPPL lands. Analysis and interpretation of Clause 3.9 is therefore, fundamental to resolution of the dispute. That, proclaims the Division Bench in ***Bhubaneswar Expressways***[15] and ***DLF***[1], the Section 9 court cannot do.

61. These are, nonetheless, issues of pith and significance, none of which can be stated, at this point, to be merely chimerical or insubstantial in nature. They do make out, in my considered opinion, a case worthy of consideration by the arbitral tribunal.

62. What remains to be considered is, therefore, whether a case for protecting the petitioner, till these issues are considered by the arbitral tribunal exists, or not.

63. At the time when judgement was reserved in this matter, the arbitral tribunal had not been constituted. Thereafter, the respondents submitted that the arbitral tribunal stands constituted. Learned Senior Counsel for the petitioners, have, however, submitted that the decision of the arbitral tribunal to consolidate the disputes with respect to the present petition and in OMP(I)(COMM) 211/2021, is being challenged by the petitioner before the appropriate judicial forum in Singapore. That they have a right to do so, is not disputed by learned Senior Counsel for the respondents. When the arbitral tribunal would enter on reference, therefore, is anybody's guess.

64. Analogizing the situation to that which existed in ***Energo Engineering Projects***[22]**,** it is not possible for this court to satisfy itself, at least on the materials placed on record before it by both sides, that there is a reasonable expectation of the arbitral tribunal, constituted under the aegis of the Singapore International Arbitration Centre (SIAC), grappling with the rival contentions of the petitioner and the respondents at any proximate point of time.

65. That, however, is secondary. Learned Senior Counsel for the petitioner have pointed out that Respondents 1 and 2 have, in their accounts, a consolidated cash balance of ₹ 7.5 crores and have no other assets. It is also contended that these are entities created for the purposes of entering into the contracts forming subject matter of the present dispute, and would not be in a position to honour the arbitral award, if it is finally passed in favour of the petitioner.

66. Learned Senior Counsel for the respondents have not disputed this position. All that they contend is that Respondents 1 and 2 are part of the Macquarie group, which is one of the world's leading financial institutions and asset management companies. It is not the contention of the respondents that the Macquarie group has, by any written, contractual, or other instrument, agreed to meet the liabilities of Respondents 1 and 2, should any arbitral award come to be passed against them and in favour of the petitioner. The Macquarie group, moreover, is not a party to any of the contracts between the petitioner and the respondents in the present case. To what extent the liabilities of Respondents 1 and 2, should the arbitral award be passed in favour

of the petitioner, be secured by the Macquarie group is, therefore, entirely a matter of conjecture. The Macquarie group has not, in the present proceedings, placed any undertaking or affidavit on record, which could satisfy this court that, if Respondents 1 and 2 were to invoke the pledged securities of ₹ 95 crores for ₹ 1/-, and this invocation were ultimately to be set aside by the arbitral tribunal, resulting in the petitioner being entitled at least to ₹ 95 crores, that amount would be paid by it. Nor have the respondents advanced any additional security, to secure the said amount.

67. Undisputedly, Respondents 1 and 2 are registered in Singapore and have no official presence in India, except for their registrations as Foreign Portfolio Investor and Foreign Venture Capital Investor with the SEBI, respectively. Incidentally, in the pleadings in OMP (I) (Comm) 211/2021, there is a specific averment, in the petition, that Respondents 1 and 2 are likely to dissipate their assets. Learned Senior Counsel for the respondents have not, in terms, denied this submission, with Mr. Salve submitting, in response, that any such dissipation is likely to take considerable time.

68. In view thereof, pending and subject to any orders that the learned arbitral tribunal may choose to pass in that regard, I deem it appropriate to partly allow the prayers in this petition by restraining the respondents from taking any coercive or other action against the petitioner in terms of Clause 3.9 of the Framework Agreement read with the Pledge Agreement, Security Purchase Agreement, Shareholders' Agreement, RSL Debenture Trust Deed, or on account

of failure of the petitioners to fulfil their obligations under the said Clause.

69. Though learned Senior Counsel for the petitioner had prayed for interim orders to continue during the pendency of the arbitral proceedings and till they conclude, I am not inclined to accede. The authority and jurisdiction of the Arbitral Tribunal to decide the interim arrangement, to remain in place during the pendency of proceedings before it, has to be respected. The above directions are, therefore, expressly made subject to further orders that the learned Arbitral Tribunal may choose to pass.

OMP (I) (Comm) 211/2021

70. This petition was first heard on the issue of grant of interim relief pending final disposal. Consequent, thereupon, by judgement dated 16th August, 2021[25], I had granted *ad interim* protection to the petitioner. At that stage, the Arbitral Tribunal, to arbitrate on the disputes between the parties, had not yet been fully constituted. By the time the matter was heard finally, however, the Arbitral Tribunal was in place, and it continues to be so. In the circumstances, Mr. Harish Salve, learned Senior Counsel for Respondents 1 and 2 suggested that, instead of entering into the niceties of the disputes between the parties, the matter could be referred for decision by the Arbitral Tribunal, and the *ad interim* order passed by this Court on 16th August, 2021 could be allowed to remain in place for 90 days after the decision of the learned Arbitral Tribunal.

[25] Subsequently reported in **MANU/DE/1703/2021**

71. Though Dr. Singhvi, learned Senior Counsel for the petitioner, opposed the suggestion, and prayed for grant of interim relief to continue till the conclusion of the arbitral proceedings, I am not inclined to accede to the submission, as it would impinge on the autonomy of the learned Arbitral Tribunal to decide on the interim arrangement which should continue during the pendency of the arbitral proceedings. The suggestion of Mr. Salve, in my view, is eminently reasonable and wholesome, and merits acceptance.

72. In that view of the matter, a brief recital of facts would suffice, as the intricacies of the controversy already stand adumbrated, in detail, in my judgement dated 16th August, 2021[25].

73. The dispute, in this petition, relates to Clause 8 of the Framework Agreement, which pertains to litigations in which the petitioner and Respondents 1 and 2 were embroiled, at the time of its execution.

74. Clause 8 was titled "Management of the Identified Litigations". Of the three litigations, in which the petitioner and Respondents 1 and 2 were involved at the time of execution of the Framework Agreement, the present dispute relates to the "SESI Litigations" and the "Kindle Litigation". "Identified Litigation Securities", in the form of equity shares and OCCDs issued by Respondents 3 to 11 to the petitioner were provided as security, against the failure, on the part of the petitioner, to ensure the occurrence of "Judgement Satisfaction

Events" ("JSE") and a "Payment Satisfaction Events" ("PSE"). The value of the Identified Litigation Securities was ₹ 304 crores.

75. A JSE, in respect of any Identified Litigation, was deemed to have occurred in the event of (i) procurement, by the petitioner, of a final and non-appealable judgement in relation thereto, or (ii) default, on the part of the opposite party in such Identified Litigation, to file an appeal against the judgement within the prescribed limitation period or (iii) settlement of the Identified Litigation between the concerned SP and the opposite party, by the petitioner. A PSE was deemed to have occurred, in respect of any Identified Litigation, where (i) the JSE, in relation to such Identified Litigation, had occurred within 3 years of the Final Completion Date (FCD) and (ii) the SPV(s) had received an amount, based on the JSE in relation to such Identified Litigation, within 4 years of the FCD. Failure, on the part of the petitioner, to ensure the occurrence of the JSE and PSE, in relation to any of the Identified Litigations, entitled Respondents 1 and 2 to obtain the Identified Litigation Securities of the SPV, in relation to which the JSE has not occurred, for ₹ 1/-.

76. On 5th August, 2020, the SPVs (except Kindle) wrote to the petitioner, on their behalf as well as on behalf of Respondents 1 and 2, that, as 3 years had expired from the relevant FCDs in respect of the Identified Litigations, without a JSE having occurred, the SPVs had redeemed the Identified Litigation Securities for ₹ 1/–, which was paid to the petitioner. Kindle separately wrote to the petitioner, proposing, for the same reason, to acquire the Kindle Litigation Securities for ₹ 1/–, and to remit the said amount to the account of the

petitioner. The petitioner was, therefore, directed to transfer the Kindle Litigation Securities to the Demat account of Respondent 2.

77. The petitioner, in the circumstances, filed the present petition, under Section 9 of the 1996 Act, before this Court, seeking interlocutory reliefs.

78. As already noted, by a detailed *ad interim* order dated 16th August, 2021, I had restrained the respondents from alienating, disposing or creating any third-party interest in favour of the Identified Litigation Securities, acquired/redeemed by them, pending further orders of this Court. Further, Respondents 1 and 2 were restrained from transferring their interest in Respondents 3 to 11 pending further orders in the present proceedings.

79. When the matter was taken up for final hearing, Mr. Harish Salve, learned Senior Counsel for Respondents 1 and 2 submitted that as, during the interregnum, the Arbitral Tribunal was in place, interim relief could be sought from the learned Arbitral Tribunal as well, and thus, it would be appropriate that the present dispute be referred to the learned Arbitral Tribunal and that the *ad interim* directions passed by this Court be permitted to remain in place for a period of 90 days following the decision of the learned Arbitral Tribunal.

80. Dr. Singhvi, appearing for the petitioner, opposed the request. Arguments were advanced, in an attempt to convince me that the interests of justice would merit continuance of the existing *ad interim* arrangement till conclusion of the arbitral proceedings, and that

allowing the learned Arbitral Tribunal to rule on the petitioner's petitions would be likely to result in prejudice to the petitioner.

81. I am not convinced. As I have already observed, the learned Arbitral Tribunal is, under the 1996 Act, conferred autonomy and entire jurisdiction over the proceedings before it, and the manner in which they are to proceed. The role of the Court, under the 1996 Act, is only to ensure that the arbitral proceedings are allowed to be initiated and continued without interruption, till their conclusion. Interference, by the Court, with the arbitral proceedings, even after they conclude, is limited to cases of patent illegality, or where the conscience of the Court is shocked. It is difficult, in fact, to conceive of a situation in which the interests of justice would justify passing of orders, under Section 9, to remain in effect till the conclusion of the arbitral proceedings though, theoretically, it is certainly permissible.

82. In view thereof, I am inclined to agree to the suggestion made by Mr. Salve, albeit with a slight modification. As the arbitral proceedings are taking place in Singapore, under the aegis of the SIAC, I deem it appropriate, instead of referring the present petitions to the learned Arbitral Tribunal, to make the interim orders already passed absolute, subject, however, to the learned Arbitral Tribunal being conferred the authority to modify, vary or vacate the orders, on application being made by any of the parties before it. As Mr. Salve suggested, the order passed by the learned Arbitral Tribunal would take effect 90 days after its passing. Needless to say, the right of any party, aggrieved by the decision of the learned Arbitral Tribunal, to challenge the same, in accordance with law, shall stand reserved.

Conclusion

83. These petitions, therefore, stands disposed of in the following terms:

(i) The respondents are restrained from taking any coercive or other action against the petitioner in terms of Clause 3.9 of the Framework Agreement read with the Pledge Agreement, Securities Purchase Agreement, Shareholders' Agreement, RSL Debenture Trust Deed, or on account of failure of the petitioners to fulfil their obligations under the said Clause.

(ii) The respondents are restrained from alienating, disposing or creating any third-party interest in favour of the Identified Litigation Securities, acquired/redeemed by them. Further, Respondents 1 and 2 are restrained from transferring their interest in Respondents 3 to 11.

(iii) It shall be open to the parties to apply to the learned Arbitral Tribunal for confirmation, modification or vacation of the protection granted by this order, and any such application, if made, shall be decided on its own merits.

(iv) Any order/orders passed by the learned Arbitral Tribunal, on the application, if so made, shall take effect 90 days after it has passed. The right of any party, aggrieved by the decision of the learned Arbitral Tribunal, to assail the same, in accordance

with law, stands reserved. The interim protection granted by this judgement, in these petitions, shall remain in place only till that date.

(v) Needless to say, subject to the above, the parties are at liberty to approach the learned Arbitral Tribunal, for any interlocutory or other orders, at any stage of the proceedings, as they may deem appropriate, in accordance with law.

84. All observations and findings, in this judgement, are intended only for disposal of the present proceedings, under Section 9 of the 1996 Act. They do not represent an expression of opinion by this Court, either final or interim, regarding the merits of the disputes between the parties. They are not, therefore, to influence the opinion of the learned Arbitral Tribunal in dealing with the dispute, or with any application/applications which may be preferred, before it, by the parties.

85. There shall be no orders as to costs.

C. HARI SHANKAR, J

JANUARY 20, 2022
kr/*r.bariaria*/**SS**