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

***%*** ***Reserved on: 13.03.2020***
***Pronounced on: 22.06.2020***

\+ O.M.P.(I) (COMM.) 460/2018 and I.A. Nos. 9313/2019, 9356/2019

STERLING AND WILSON INTERNATIONAL FZE ..... Petitioner

Through: Mr. Sandeep Sethi and Mr. Darpan Wadhwa, Sr. Advocates with Ms. Farida Dholakawala, Mr. Sameer Patel, Mr. Shubhanshu Gupta, Mr. Kabir Chilwar, Ms. Sanjana Bakshi and Mr. Hitesh Singhvi, Advocates.

Versus

SUNSHAKTI SOLAR POWER PROJECTS PRIVATE LIMITED & ORS. ..... Respondents

Through: Mr. A.S. Chandiok, Sr. Advocate with Mr. Ritesh Kumar, Mr. Tishampati Sen, Ms. Riddhi Sancheti, Ms. Abhisree Saujanya, Ms. Tejasvi Chaudhary, Mr. Mayur Shetty and Ms. Aarti Kumar, Advocates for R-1.
Mr. Sharan Jagtiani, Advocate for R-2 to 8.

\+ O.M.P.(I) (COMM.) 461/2018 and I.A. Nos. 9314/2019, 9358/2019

STERLING AND WILSON INTERNATIONAL FZE ..... Petitioner

Through: Mr. Sandeep Sethi and Mr. Darpan Wadhwa, Sr. Advocates with Ms. Farida Dholakawala, Mr. Sameer Patel, Mr. Shubhanshu Gupta, Mr. Kabir Chilwar, Ms. Sanjana Bakshi and Mr. Hitesh Singhvi, Advocates.

Versus

SKYPOWER SOLAR INDIA PRIVATE LIMITED & ORS. ..... Respondents

Through: Mr. Dayan Krishnan, Sr. Advocate with Mr. Ritesh Kumar, Mr. Tishampati Sen, Ms. Riddhi Sancheti, Ms. Abhisree Saujanya, Ms. Tejasvi Chaudhary, Mr. Mayur Shetty and Ms. Aarti Kumar, Advocates for R-1.
Mr. Sharan Jagtiani, Advocate for R-2 to 8.

**CORAM:**
**HON'BLE MS. JUSTICE JYOTI SINGH**

## **J U D G E M E N T**

1. Both these petitions have been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') seeking interim reliefs. Prayers sought in OMP (I) (COMM) 460/2018 are as under:-

> *"(a) Direct the Respondents to furnish security to a tune of USD 34,723,013 being the Offshore Supply Price, by way of an unconditional and irrevocable bank guarantee in favour of the Petitioner pending the completion of arbitration proceedings and making of the Award; or*
>
> *(b) In the alternative, direct the Respondents to furnish security by depositing a sum of USD 34,723,013 being the Offshore Supply Price, before this Hon'ble Court pending the completion of arbitration proceedings and making of the A ward; and*
>
> *(c) Grant an order of temporary injunction restraining the Respondents, their respective directors, servants, officers and/or agents from in any manner directly and/or indirectly, voluntarily and/or involuntarily, transferring, conveying, alienating, dealing with, creating third party rights and/or otherwise encumbering the Project, including the land, plants, equipment and machinery and other articles at the site where the Project is situated pending the hearing and final disposal of the Petition and during the arbitration completion of arbitration proceedings and making of the Award; and*
>
> *(d) Grant an order of temporary injunction restraining Respondent nos.2, 7 and 8 from transferring, disposing off, creating a charge and/ or encumbering, in any manner, their shares and other securities held by them directly and/ or indirectly in Respondent nos.1,3,4,5 and 6 pending the hearing and final disposal of the Petition and during the*

*arbitration completion of arbitration proceedings and making of the Award; and*

*(e) Grant an order of temporary injunction restraining Respondent no.4, from transferring, disposing off, creating a charge and/ or encumbering, in any manner, its shares and other securities held by it in Respondent nos. 1 and 5 pending the hearing and final disposal the Petition and during the arbitration completion of arbitration proceedings and making of the Award; and*

*(f) Grant an order of temporary injunction restraining Respondent nos.3 ,5 and 6 from transferring, disposing off, creating a charge and/or encumbering, in any manner, the shares and other securities held by them in Respondent nos. 4, 6 and 1, respectively, pending the hearing and final disposal of the Petition and during the arbitration completion of arbitration proceedings and making of the Award; and*

*(g) Grant ex-parte ad interim relief in terms of the above; and*

*(h) Award the cost of this Petition to the Petitioner; and*

*(i) Pass such further and other reliefs as the nature and circumstances of the case may require in the interest of justice and equity."*

2. With minor differences in the facts and dates of the documents, the two petitions involve common issues and questions of law and are being decided by a common judgment. Minor differences in the facts of the two cases will be detailed in the later part of the judgment. However, for the sake of convenience, facts and documents in OMP (I) (COMM) 460/2018 are being referred to.

3. Facts, as averred, on behalf of the Petitioner in OMP (I) (COMM) 460/2018 are that Petitioner is a Company incorporated under laws of

United Arab Emirates carrying on business of supply of Solar Modules, PV Invertors and Trackers, required for commissioning of Solar Power Projects. Petitioner is a part of the renowned Shapoorji Pallonji Group and has played a defining role in trading Mechanical, Electrical and Plumbing ('MEP') and solar materials. Petitioner has engaged itself in procurement activities in respect of MEP projects in Qatar and Saudi Arabia and other Solar Power Projects.

4. Respondent No. 1 is the owner of a 50 MW capacity Solar Power project at Kamareddy Village, Telangana. Respondent No. 2 is the Parent Company of Respondent Nos. 1, 3, 4, 5 and 6. Respondent No. 3 is a Company incorporated under the laws of Netherlands and was required to create the Offshore Security in respect of its entire shareholding in Respondent No. 4, in favour of the Petitioner, to secure the dues owed by Respondent No. 1 to the Petitioner, under the Offshore Supply Agreement (hereinafter referred to as OSA), dated 19.05.2017, entered into between the Petitioner and Respondent No. 1.

5. Respondent No. 4 is wholly owned subsidiary of Respondent No. 3 and holds 0.22% of the paid-up share capital of Respondent No. 1, in addition to holding the entire shareholding of Respondent No. 5. Respondent No. 5 has its office at Mauritius and is a wholly owned subsidiary of Respondent No. 4. Respondent No. 5 in turn holds the entire shareholding of Respondent No. 6 which in turn holds 99.78% of the paid-up share capital of Respondent No. 1.

6. Respondent No. 7 is the ultimate Parent Company of Respondent Nos. 1 to 6 having its office in Canada. Respondent No. 7 has the actual control over the other Respondents in so far as all major decisions are concerned.

7. It is the case of the Petitioner that Respondent No. 1 pursuant to a Tender floated by Northern Power Distribution Company of Telangana Ltd. (State Discom) was selected as the successful bidder to set up the project and sell power from the project to the State Discom. A Power Purchase Agreement ('PPA') was entered into between Respondent No. 1 and State Discom on 10.02.2016 in terms of which the power had to be sold in terms of and for consideration provided in the PPA.

8. On 19.05.2017, Petitioner entered into an OSA with Respondent No. 1, for Offshore Supplies, which were to be used for setting up the project, including supply of solar modules, PV invertors and trackers. According to the Petitioner it had completed the offshore supplies, which were utilized by Respondent No. 1 for commissioning the project. It is averred that as per the said Agreement, Petitioner was entitled to receive a sum of USD 34,723,013 as Offshore Supply Price (OSP) and the modalities for payment of 90% of the OSP under Clause 12.2.1 of the OSA were as under:-

> *12.2.1 <u>Commercial Operations Date Payment</u>*
>
> *"Upon achievement of the Commercial Operations Date, the Supplier shall issue an invoice to the Owner for an amount equal to 90% of the Supply Price, aggregating USD 31,250,712 (United State Dollars Thirty One Million Two Hundred Fifty Thousand Seven Hundred Twelve)*

*("Commercial Operations Date Payment"). Within 14 (fourteen) Days from the date of receipt of such invoice, the Owner shall, without any set off, recovery or adjustment of any costs or expenses or liability, pay to the Supplier, the aggregate amount specified in such invoice. For the avoidance of doubt, any unfulfilled obligations that are not affecting the achievement of commercial operation of the Facility shall prevent the Owner from issuing any requisite certificates or documents for facilitating achievement of Commercial Operation Date."*

9. As per Clause 12.2.1 of the OSA, upon achievement of the Commercial Operations Date (COD), Petitioner was required to issue an invoice to Respondent No. 1, for an amount equal to 90% of the Offshore Supply Price (OSP). Further, under the said Clause, within 14 days from the date of receipt of such invoice, Respondent No.1 was required, without any set off, recovery or adjustment of any costs or expenses or liability, to pay to the Petitioner, the aggregate amount specified in the invoice.

10. It is averred by the Petitioner that no advance against the Offshore Supplies was given by Respondent No. 1. The scheme of the contract was unique, in that the Petitioner had to make all investments (USD 34,723,013) for making supplies under the OSA and payment of 90% of the OSP was to be made only upon achievement of the COD. In order to secure the payment of OSP, Respondent No. 1 had agreed to create adequate security in the form of a pledge in favour of Petitioner, of the 100% shares directly held by Respondent No. 3, in Respondent No. 4, which in turn directly and indirectly held 100% shares in Respondent No.

1 (Offshore Security). This reciprocal arrangement formed the basis of the contract, since in the absence of security no business entity, according to the Petitioner, would run the risk of investing such a huge amount.

11. Terms governing the creation of Offshore Security were stipulated in Clause 3.5 of the OSA read with Schedule V, which are as under:-

> *"**3.5 Security***
>
> *3.5.1 The Owner shall create Offshore Security in favour of the Supplier in the manner as set out in Schedule V.*
>
> *3.5.2 For the avoidance of doubt:*
>
> *(a) the costs/expenses to be incurred for creation of valid and enforceable Offshore Security shall be to the Owner's account;*
>
> *(b) the Offshore Security shall be created and enforced in accordance with the terms of the Security Documents; and*
>
> *(c) the Offshore Security shall be released in accordance with the terms of the Security Documents.*
>
> *3.5.3 In the event of non-payment of the Supply Price by the Owner in the manner set out in Clause 12, subject to the terms of the Security Documents, the Supplier shall have the right to enforce the Offshore Security."*
>
> ***Schedule V to the Offshore Supply Agreement***
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> *"The Owner shall ensure that the following security ("Offshore Security") in relation to the Facility is created in favour of the Supplier upon execution of the necessary agreements ("Security Documents"):*
>
> *Pledge over certain percentage of shares (or class of shares) of an Affiliate (a company incorporated under the laws of Mauritius) of the Owner, as mutually agreed between the*

*Parties, subject to, and in compliance with the terms of the PPA."*

12. It is further averred in the petition that the creation of the Offshore Security was a critical requirement and a pre-condition to the Offshore Supplies. Petitioner, however, in good faith and in the interest of the Project, completed its obligations, but the OSP remained unsecured.

13. Petitioner entered into a Side Letter on liquidated damages on 19.05.2017 with Respondent No.1 and its affiliate SWPL as well as an Indemnity Letter dated 19.05.2017. On 02.11.2017, COD was achieved in respect of the project entitling the petitioner to payment of 90% of the Offshore Supply Price i.e. USD 31,250,711.70. Respondent No.1 received the invoices from the Petitioner with respect to the said payment on 05.03.2018. Respondent No.1, however, failed to make the said payment.

14. It is the case of the Petitioner that despite the project achieving the COD and the Petitioner's prompt performance, entitling it to 90% of the OSP, Respondent No. 1 is in breach and has in fact defrauded the Petitioner by withholding the payment. Petitioner is thus in an unenviable situation, where it has parted with huge sums of money to its vendors for supplying the Offshore Supplies and is left without any security.

15. Petitioner avers that several reminders were sent by the Petitioner to Respondent No. 1 to fulfil its obligations, the details of which have been set out in a tabular form in the petition.

16. The facts to the extent they are different in OMP(I)(COMM.) 461/2018 are that on 18.09.2015, Respondent No.1 and MP Power Management Company Limited (State Discom) entered into a Power Purchase Agreement (PPA) in terms of which Respondent No.1 agreed to sell power from 50 MW capacity solar power project at village Chhirbel, Khandwa District, MP, to the State Discom. Petitioner entered into OSA with Respondent No.1 on 19.05.2017 for supplying solar modules, PV Inverters and Trackers (Offshore Supplies). Petitioner was entitled to receive a total sum of USD 34,133,214 (Offshore Supply Price). Petitioner entered into a Side Letter on liquidated damages on 19.05.2017 with Respondent No.1 and its affiliate SWPL as well as an Indemnity Letter dated 19.05.2017. On 05.09.2017, COD was achieved in respect of the project entitling the petitioner to payment of 90% of the Offshore Supply Price i.e. USD 30,719,892.60. Respondent No.1 received the invoices from the Petitioner with respect to the said payment on 16.11.2017. Respondent No.1, however, failed to make the said payment. The prayers sought in the present petition are the same as in OMP(I)(COMM) 460/2018, except for the difference in amount in prayers (a) and (b).

17. Vide order dated 18.12.2018, this Court granted interim relief in terms of prayer (c) of the petition. Relevant part of the order reads as under:-

> *"5. In view of the arguments urged on behalf of the Petitioner, till further orders unless varied by the Court, the Petitioner is entitled to interim order in terms of prayer (c) of this petition, and which reads as under:-*

*"(c) Grant an order of temporary injunction restraining the Respondents, their respective directors, servants, officers and/or agents from in any manner directly and/or indirectly, voluntarily and/or involuntarily, transferring, conveying, alienating, dealing with, creating third party rights and/or otherwise encumbering the Project, including the land, plants, equipment and machinery and other articles at the site where the Project is situated pending the hearing and final disposal of the present Petition.""*

18. The order was subsequently modified on 11.01.2019 to read as under:-

*"I.A. No. 303/2018 (for modification of the order dated 18.12.2018)*

*1. This application is allowed and the expression 'Respondent no. 1' written in the third line of paragraph 3 of the order dated 18.12.2018 will be read as 'Respondent no. 4'.*

*2. Also, the figure of 'USD 31,250,711.70' written in paragraph 1 of the order be read as 'USD 34,723,013', without in any manner observing the merits of the cases of the respective parties.*

*3. I.A. stands disposed of.*"

19. On 21.01.2019, statement of Counsel for Respondent No. 3 was recorded, that without prejudice to its rights, Respondent No. 3 will not further transfer the shareholding of Respondent No. 4 which is owned by Respondent No. 3. Court directed that Respondent Nos. 3 & 4 will be

bound by their statements made in Court. Relevant part of the order reads as under:-

> *"1. All the eight respondents are served and appear through counsel. As per the pleadings of the petitioner, the entire shareholding of Respondent no.4 company is held by the respondent no.3 company. This position stands today and the same is not disputed on behalf of the respondents. Counsel for the respondent no.3 states that respondent no.3, without prejudice to its rights, will not further transfer the shareholding of respondent no.4 which is owned by the respondent no.3 company. The respondents no.3 and 4 will be bound by the statement made today in Court."*

20. Learned Senior Counsels for the Petitioner Mr. Sandeep Sethi and Mr. Darpan Wadhwa, contend that in terms of the OSA, the obligation of the Petitioner was only limited to providing Offshore Supplies in respect of the project which was fulfilled by the Petitioner. Reliance is placed on Recital (B) as well as Clause 1.1, Clause 5 and Clause 24.8 of the OSA. It is submitted that there were only two preconditions for receiving the OSP under the OSA (a) achieving the Commercial Operations Date and (b) sending the invoice to Respondent No.1. The COD was achieved in both cases and the invoices were also received by Respondent No.1 and thus there was no reason for Respondent No.1 to withhold the payments, due to the Petitioner. It is further argued that the payment was to be made without any set off, recovery or adjustment of any costs or expenses or liability.

21. It is next contended that Respondent No.1 is dishonestly pleading that the payment to the Petitioner is dependent on the fulfilment of the

obligations by Petitioner's Indian Affiliate, Sterling and Wilson Pvt. Ltd. (SWPL), under the Onshore and other related contracts between the Indian Affiliate and Respondent No.1. No clause under the OSA requires the petitioner to fulfill any obligations under these contracts. Respondent No.1's resistance of its obligation to pay under the OSA is based on an erroneous interpretation of the Wrap Agreement dated 19.05.2017. Petitioner is not a party to the Wrap Agreement and only its Indian Affiliate, SWPL is a party. Other Project Contracts include the Supply Agreement, the E&C Contract, Civil Works Contract and the Development Contract and do not include the OSA. Under Clause 3.2 relied upon by Respondent No.1, the responsibility to deliver the project on a turnkey basis as well as for delays and non-performance is on the 'Contractor', defined therein, which is SWPL and not the Petitioner.

22. It is further contended that the other defence of Respondent No.1 is based on the Side Letter on liquidated damages, to which the Petitioner is a party. It is argued that Respondent No.1 has made no claim for liquidated damages in any proceedings so far and even assuming that the liability is to be discharged jointly by the Petitioner and the Contractor, in relation to the Projects in the other contracts, this cannot be a ground to deny the payment to the Petitioner. In any case, the Side Letter cannot be interpreted to entitle Respondent No.1 to claim a set off, especially when Respondent No.1 has failed to provide the Offshore Security under the OSA, which would have forthwith allowed the Petitioner to encash the invoice amount, on the failure of Respondent No.1 to pay.

23. It is next argued by learned Senior Counsels that creation of the Offshore Security in favour of the Petitioner and provision of supplies under the OSA, were reciprocal obligations. Clause 3.5 of the OSA read with Schedule V clearly provided for an Agreement to create the Offshore Security, the execution of which was delayed by the Respondents in collusion with each other. In any case, a formal execution of an Agreement was only a formality as all terms had been agreed between the parties. It is submitted that on account of this, the Petitioner is totally insecure having made all supplies under the OSA. It is denied that the securities created in favour of SWPL secure the Petitioner under the OSA as alleged by Respondent No. 1. Respondent No.1 has relied on certain security documents to plead that they cover the Offshore Supplies under the OSA, but this is incorrect as Petitioner is not a party to the said documents and thus has no right to enforce the same and recover its monies. In so far as the unattested Deed of Hypothecation dated 19.12.2016 is concerned, it clearly shows that the same has been entered into between SWPL and Respondent No.1, to which the Petitioner is not a party. Recital 'D' states that the Deed has been entered into for securing the Onshore EPC Price and the dues payable by Respondent No.1 to SWPL. Clause 2.1 provides that the charge under the Deed secures the obligations of Respondent No.1 and this is further substantiated by Clause 4.4. In fact, Respondent No.1 is overlooking Clause 18.2, which expressly states that the charge and security under the Deed, does not constitute security for the payment of OSP. It is further submitted that the Project itself can even otherwise not secure the Petitioner as any sale of the project asset would lead to a further litigation

between the State Discoms and Respondent No.1 and would stall the realisation of monies by the Petitioner. Financial condition of Respondent No.1 is precarious, as evident from its Financial Statement for the year ending 31.03.2018, with the Registrar of Companies. Respondent No.1 has no assets, other than the project assets, which are encumbered in favour of SWPL and, in any case, this asset continues to depreciate. In the circumstances, the only way in which the Petitioner can be secured is by directing Respondent No.1 to either deposit the amount payable to the Petitioner under the OSA in this Court or secure the same by furnishing unconditional Bank Guarantees.

24. Learned Senior Counsels place reliance on the judgements in the case of ***National Aluminium Co. Ltd. v. Gerald Metals SA, (2004) 9 SCC 307, Vedanta Aluminium Ltd. v. Shenzhen Shandong Nuclear Power Construction and anr. SLP (Civil) No. 49/2013*** and ***Ajay Singh v. Kal Airways Private Limited, (2018) 209 Com Cas 154,*** to argue that the Courts have been granting an order of pre-deposit under Section 9 of the Act.

25. In respect of the interim directions sought against Respondent Nos. 2 to 8, Learned Senior Counsels argue that the only resistance on behalf of Respondent Nos. 2 to 8, is that they are not parties to the Arbitration Agreement. It is argued that the settled law is that under Section 9 of the Act, powers of the Court are not limited to passing interim directions only against a party to an Arbitration Agreement. Wherever necessary, directions can be passed even against a non-party and a non-signatory to

an Arbitration Agreement. It is argued that in the present case, the Respondents are closely knit and connected as Group Companies, which is evident from their Corporate Structure and shareholding pattern, as known to the Petitioner. In fact, Respondent no. 1 is only a Special Purpose Vehicle incorporated for the purposes of the Project. It is Respondent No.7 who is the ultimate Parent Company of Respondent No.1 and manages the day to day affairs of Respondent Nos. 1 to 6. It is pertinent that the Offshore Security agreed to be created was a pledge of 100% shares of Respondent No.4 held by Respondent No.3. It is argued that Petitioner apprehends that Respondents would cause a change in the shareholding at the higher level of its Subsidiaries/Affiliates abroad. They may dispose of the shareholdings in Respondent No.1 indirectly and change the Management and control in Respondent No.1. Thus, directions need to be issued to restrain them from creating third party rights in the shareholdings in respect of the Project as well as changing their shareholding pattern.

26. Respondent No. 1 filed an interim reply, without prejudice to its contention that this Court lacks the jurisdiction to entertain the disputes between the parties, as the Arbitration Clause in the EPC contracts provides for a Singapore seated Arbitration. An objection, that there was a substantial delay in approaching the Court by the Petitioner, is taken in the reply, along with allegations of suppression of material facts.

27. On merits, the stand of Respondent No. 1 is that under the Side Letter for liquidated damages, to which the Petitioner is a signatory,

consequences on the SP Entities, for not providing the Offshore Security are mentioned i.e. in the event the State Discom calls upon the entities to replenish the Bank Guarantee under the PPA or submit an additional Bank Guarantee, the SP entities would have to do the needful, instead of the Petitioner. Failure to provide Offshore Security would not constitute a breach of the OSA, as it only exempts Sterling from having to replenish the BG. Under Clause 4.5 (d) of the Wrap Agreement, on the State Discom calling upon Respondent No.1, to replenish or submit additional Bank Guarantee, Sterling was required to do the needful. Thus, the consequences of the SP entities being in default were only that Sterling would be exempt from replenishing or submitting additional Bank Guarantee. This according to Respondent No.1 disentitles the Petitioner to any relief. Further stand of Respondent No.1 in the reply is that it is incorrect for the Petitioner to give an impression as if the disputes between the Petitioner and Respondent No.1 are not connected to other contracts entered into between SWPL and Respondent No. 1. The disputes between the parties are inter-woven with each other with respect to all the contracts entered into between them. Even the EPC contracts are interconnected. Most importantly, the OSA contains consolidation clause 23.2.1, which provides for consolidation of disputes, in view of the fact that each such EPC contract is inter-connected.

28. It is stated that, while according to the Petitioner, cause of action to file the present petition arose on 30.11.2017, on which date allegedly Respondent No. 1, in collusion with Respondent Nos. 2 to 8, failed to make payment of 90% of the OSP, but the fact is that vide letter dated

19.06.2018, Respondent No. 1 had intimated to the Petitioner that no amount was payable by it. Still, the Petitioner took no steps to seek interim relief till 13.12.2018. No explanation has been furnished by the Petitioner for the inordinate delay in approaching the Court and on this ground alone, Petitioner is disentitled to seek any interim relief.

29. Learned Senior Counsels for Respondent No. 1 Mr. A. S. Chandhiok and Mr. Dayan Krishnan, reiterating the above points pleaded in the reply, further submit that the Petitioner has failed in establishing that it has a *prima facie* case and there is default in payment by Respondent No. 1, under Clause 12.2.1 of the OSA. Petitioner has also failed in establishing that Respondent No. 1 is attempting to remove or dispose of its assets, with the intention of defeating the Award that may be passed in the Arbitration Proceedings and thus, the essential ingredients of relief under Order XXXVIII Rule 5 CPC are not satisfied. Learned Senior Counsels submit that performance of the obligations under the EPC contracts were not mutually exclusive and independent, but were conjoint and interrelated. The Wrap Agreement identifies SWPL's single point responsibility for performance of the work under the 'Project Contract'. It is argued that the Petitioner's stand that Clause 12.2.1 of the OSA mandates payment of supply price, irrespective of performance by SWPL of the Onshore Contracts, is an incorrect reading of the Clause and ignores the joint liability of the Petitioner and SWPL under the Side Letter on liquidated damages.

30. It is further argued by Learned Senior Counsels for Respondent No. 1 that the scope of work was artificially split under the Onshore and

Offshore contracts, at the request of the Sterling Wilson Group, only for Tax purposes. Notwithstanding the split, the EPC contracts were intended to govern the commissioning of Solar Power Projects by services to be provided, both by the Petitioner and/or SWPL. The dispute, therefore, if any, ought to be treated as a composite one. It is argued that the Petitioner, Respondent No. 1 and SWPL were involved in a single commercial project and were responsible, jointly, for their respective obligations. Learned Senior Counsels rely on the judgment of the Supreme Court in the case of ***Ameet Lalchand Shah and Others vs. Rishabh Enterprises and Another, [(2018) 15 SCC 678]*** wherein it was held that, where several parties are involved in a single commercial project executed through several Agreements, all the parties can be covered by an Arbitration Clause in the main Agreement, even if certain parties are not signatories to the Arbitration Agreement contained in the main Agreement. In the present case, it is argued that both Offshore and Onshore Supply Agreements contain Arbitration Clauses. Disputes pertain to a single commercial transaction executed through series of interconnected agreements and no dispute can be considered in isolation.

31. In order to show the composite nature of the Onshore and Offshore Contracts, Learned Senior Counsels submit that the first Agreement between the Respondent No.1 and SWPL was the MOU and Heads of Terms (HOT) dated 18.04.2016, which clearly provided in Clauses 6 and 7 that 'Contractor' was responsible on a turnkey basis, for engineering, procurement and construction of Solar Plant, including supplies. MOU and the HOT were amended on 19.12.2016 and Clause 11 thereof

provided that the parties agreed that the Offshore Supplies shall be from Offshore Affiliate of the Contractor. The Employer and the Offshore supplier shall enter into separate contract to record the terms and the conditions for delivery of the supplies to the project site. The 'Contractor' undertook to take the responsibility for ensuring the delivery of the completed project. Clause 11 is as under:-

> *"11. The Parties agree that the supply of solar PV modules, trackers, and inverters ("**Offshore Supplies**") shall be from an offshore affiliate of the Contractor ("**Offshore Supplier**"). The Employer and the Offshore Supplier shall enter into a separate contract to record the terms and conditions for the delivery of Offshore Supplies to the project site. The Contractor agrees and undertakes to be the entity responsible for ensuring the delivery of the completed Project to the Employer in accordance with the detailed terms of the Project Agreements."*

32. It is argued that on the same date i.e. 19.12.2016, Hypothecation Deed was executed between Respondent No.1 and SWPL, securing EPC Price, which included both Offshore and Onshore Supply Price. On 19.05.2017, a joint Indemnity was executed between SWPL and Petitioner in favour of Respondent No.1 and simultaneously, SWPL, Petitioner and Respondent No.1 entered into Side Letter on liquidated damages, for laying down Terms governing the payments in case of delay in performance of the work for the project.

33. It is further argued that a Wrap Agreement was also contemporaneously executed between Respondent No.1 and SWPL,

wherein SWPL undertook Single Point Responsibility under Clause 4.1 even with respect to the OSA. Clause 4.1 is as under:-

> ***"4.1 Single Point Responsibility***
>
> *In consideration of the Owner agreeing to enter into the relevant Project Contracts and notwithstanding any provisions in any of the Project Contracts, the Contractor irrevocably undertakes the following:*
>
> *(a) due and punctual performance of all obligations and responsibilities of the parties (other than the Owner) under each of the Project Contracts, and overall timely completion of the Project, pursuant to and in accordance with the relevant Project Contracts;*
>
> *(b) the obligations of the Contractor hereunder shall not be affected by the award, performance, non performance or delay of any works under the Other Contracts;*
>
> *(c) if such parties to the other Project Contracts and/or the Other Contracts (other than the Owner) fail to perform any of their respective obligations under any of the other Project Contracts and/or the Other Contracts, then the Contractor shall perform or ensure the performance of the same and be liable for payment of all sums of money, losses, damage, costs, charges and expenses that may become due and payable to the Owner in consequence of any default in performance of, or compliance with, any or all the other Project Contracts;*
>
> *(d) the Whole Works shall meet the Warranties, the Guaranteed Performance Ratios and conditions of the Environment, Health and Safety Manual;*

*(e) notwithstanding any delays, non performance or default under the Other Contracts, the Facility shall achieve Commercial Operations Date on or prior to the Scheduled Commercial Operations Date;*

*(f) for the sake of clarity, except as specifically permitted under the other Project Contracts, no further extension beyond the Scheduled Commercial Operation Date shall be allowed by the Owner including for any delays, non performance and/or default under the Other Contracts;*

*(g) it shall have sole and overall responsibility for all necessary integration, ensuring that the Guaranteed Performance Ratios and other guaranteed parameters are met, interface and coordination in respect of the independent supplies, works and services to be performed under the separate Project Contracts to ensure that the Facility and the Whole Works are in every respect as contemplated by the Project Contracts and in accordance with Applicable Laws, Applicable Permits, IFC Guidelines, Good Engineering Practices and Prudent Utility Practices;*

*(h) it shall have the sole and overall responsibility to indemnify the Owner for any liability which may accrue upon the Owner on account of any act or deed which may invalidate any or all the Project Contracts (including any part thereof);*

*(i) it shall bear any additional tax liability or obligations which may arise or be levied on account of (i) execution of the Project Contracts*

*(including on account of the Project Contracts being considered as a single comprehensive works contract); and (ii) non-performance of any of the obligations in-relation to the Project under the respective Project Contracts;*

*(j) it shall have the responsibility of fulfilling all the technical requirements and parameters as per the PPA or any other documents, as may be requested by the Owner; and*

*(k) it shall also be required to coordinate with the Lender's Independent Engineer, appointed pursuant to the Financing Documents entered into by the Owner.*"

34. The intention of the parties is further evident from the fact that a consolidated Dispute Resolution Mechanism was envisaged, which reflects the composite nature of the contracts. Clause 23.2.1 of the OSA is as under:-

*"23.2.1 Where, in the Owner's absolute discretion, it is beneficial to the Project for any dispute between the Owner and Supplier under this Agreement, which has been referred to arbitration, to be resolved in the same arbitration proceedings as a related dispute between the Owner and the consultants and/or sub-contractors or any other party or parties engaged upon the Project ("Related Dispute") the Supplier hereby agrees that, at the Owner's sole option, the dispute between the Owner and the Supplier under this Agreement shall be referred to the arbitrators appointed or to be appointed in respect of the Related Dispute and be determined at the same time as such Related Dispute, provided that this option may not be exercised by the Owner*

*once a tribunal has been constituted in the dispute under this Agreement. If this clause operates to exclude the Supplier's right to choose its own arbitrator, the Supplier irrevocably and unconditionally waives any right to do so.*"

35. Attention of the Court is also drawn to certain Clauses of the Supply Agreement between SWPL and Respondent No. 1 to substantiate the said argument, which are as under:

*"(E) The Supplier acknowledges that the Owner has entered into or will enter into contracts with Other Contractors and/or parties for other components of development of the Facility and that the Owner will have Related Works performed. The Supplier further acknowledges that it is of paramount importance that the Supplies or the part specified thereof are fully and completely coordinated with the Related Works in view of their concurrent and sequential nature."*

*"'"**Other Contractors**" means the other contractors engaged by the Owner for carrying out Related Works and other allied infrastructure facilities required for the Project."*

*"'"**Related Works**" means the works and/or supplies other than Supplies performed, or to be performed by the Other Contractors in connection with the Project either prior to, concurrently or subsequently with the Supplies."*

36. Placing reliance on these clauses, as well as on Clauses 5.3.3, 1.8.1 and 1.8.2, it is submitted that Petitioner was at best acting as an Agent to

its Indian Affiliate and cannot claim superior rights than its principal and is not entitled for the payments for the supplies, till the issue of breach by the Indian Entity is decided. Learned Senior Counsels also submit that vide email dated 25.10.2017, which is on record, Respondent No.1 had categorically informed that consent for obtaining COD from Discom, was subject to the condition that no invoice would be sent or claimed for the projects, until the required capacity of the project, is commissioned. Indian entity of the Petitioner has committed various breaches in the other contracts which have been detailed in the reply to the petition, and one of the major one is that it has failed to achieve the required 57.5 MWDC of the Solar Power.

37. It is next contended by the Learned Senior Counsels that the apprehension of the Petitioner that Respondent No. 1 would take steps to defeat the Award, which may be passed in favour of the Petitioner, is completely baseless. Various Securities have been created in favour of SWPL, in the form of Hypothecation of moveables and other intangibles, in relation to the Solar Power Plants; Equitable Mortgage in relation to the land underlying the Facility and pledge of the shares of the SP entities and the Petitioner is secured.

38. It is next contended that the Petitioner is seeking Specific Performance of an Agreement to create Offshore Security, which is incomplete or inchoate and the said relief cannot be granted in the present petition. Petitioner has setup a case that in order to secure the payment of OSP, Respondent No.1 had agreed to create security in the form of a pledge in favour of the Petitioner of the 100% shares, directly held by

Respondent No.3 in Respondent No.4, which in turn holds 100% shares in Respondent No.1. Petitioner also pleads that the obligation to create the Offshore security emanates from Clause 3.5 read with Schedule V of the OSA. Petitioner has thus sought injunction on transfer or creation of third party rights in the Respondents' shareholdings inter-se. It is argued that Schedule V contemplates creation of a pledge over an unascertained percentage of shares, of an unidentified Company, which should be affiliated with Respondent No.1. The correspondence between the parties prior to execution of the OSA demonstrates that Petitioner and Respondent No.1 were unable to arrive at mutually agreed terms for creating the aforesaid security, despite exchange of several drafts. Besides this, the Side Letter on liquidated damages provides the consequences of non-execution of Share Pledge Agreement which is that SWPL will not be called upon to replenish its BG, and hence, the parties contemplated the possibility that a mutually agreed form of Share Pledge Agreement, may not be arrived at. It is further argued that an interim relief in aid of specific performance cannot be granted once the Agreement itself is not capable of being performed and the Court cannot rewrite an Agreement between the parties. Reliance is placed on the judgment in ***Nahar Singh vs. Harnak Singh, [(1996) 6 SCC 699],*** for the proposition that unless the property in question with respect to which relief of specific performance is sought, is identifiable, no decree can be granted.

39. On the issue of grant of interim reliefs sought in Prayers (a) and (b) are concerned, it is argued that Petitioner has not been able to establish a

prima facie case and has not satisfied the Court that Respondent No. 1 is about to dispose of/alienate its assets to defeat an Award that may be passed in favour of the Petitioner. Until the twin conditions are satisfied no relief of deposit or furnishing Bank Guarantees can be granted as that amounts to Attachment before Judgement. Reliance is placed on the judgment in case of ***Raman Tech. & Process Engg. Co. and Anr. vs. Solanki Traders, [(2008) 2 SCC 302]*** wherein it was held that power under Order XXXVIII Rule 5 CPC being an extra ordinary power, must be carefully and sparingly exercised.

40. Separate arguments have been advanced on behalf of Respondent Nos. 2 to 8. The first and foremost objection of the said Respondents is that no relief can be claimed against Respondent Nos. 2 to 8 in the present proceedings. It is submitted that the interim relief sought against the said Respondents is in aid of final relief of performance of Clause 3.5 read with Schedule V of the OSA. It is argued that Clause 3.5 is not capable of specific performance in as much as the Agreement sought to be enforced is incomplete and inchoate.

41. Without prejudice to the above, it is argued that the answering Respondents have no involvement in commissioning of the Facility, either under the Onshore or Offshore contracts and there is no privity of Contract between them and the Petitioner. Respondent Nos. 2 to 8 are not parties to any of the Agreements executed between Petitioner, Respondent No. 1 and SWPL for works under the EPC Contracts. Respondent Nos. 2 to 8 are distinct Juristic Entities and hence they cannot

be subjected to any Arbitration Proceedings and no final relief can be passed against them even during Arbitration.

42. It is next contended that in a case involving execution of multiple Agreements with several parties, for execution of a single commercial project, Supreme Court has held in ***Ameet Lalchand (supra)*** that the parties who had executed separate agreements, and are integrally connected with the Agreement, containing the Arbitration Clause, may be joined as parties to the Arbitration Proceedings, notwithstanding their being non-signatories to the Agreement. The facts of the present case are completely different, as the Petitioner has no jural relationship with Respondent Nos. 2 to 8. It is argued that the Petitioner has itself in para 19 of the petition clearly averred that to secure the payment of OSP, Respondent No. 1 had agreed to ensure creation of a pledge in favour of the Petitioner of the 100% shares directly held by Respondent No. 3 in Respondent No. 4, which holds 100% shares in Respondent No.1. The pleadings, therefore, evidence that even the Petitioner understands that Respondents Nos. 2 to 8 are not required to be joined in the present petition.

43. Learned Counsel for the Respondents argues that the present petition has been filed on the basis of an Arbitration Agreement contained in Clause 23 of the OSA, entered into between the Petitioner and Respondent No. 1. Respondent Nos. 2 to 8 arrayed as parties herein are not parties or signatories to the OSA and nor are they parties or signatories to any other related document, Agreement, Instrument or letter executed between the Indian Affiliate of the Petitioner and

Respondent No. 1. The case of the Petitioner proceeds on the basis that Corporate veil of the Respondents must be pierced and all the Respondents should be treated as a single Economic Unit. Even assuming that the answering Respondents are a single Unit, this argument as a basis to extend Arbitration Agreements and interim relief to non-signatories has been rejected in a number of judgements. Mere assertion that parties are Group entities is not enough to give directions against the answering Respondents.

44. It is further submitted that the requirements of an Arbitration Agreement are set out in Section 7 of the Act. In the case of ***Indowind Energy Limited vs. Wescare (India) Limited And Another, [(2010) 5 SCC 306],*** Supreme Court held that an Arbitration Agreement between a third-party Company and a Parent Company, would not establish an Agreement with the Subsidiary Company, despite the Subsidiary being a named Nominee under the Agreement. The underlying principle is that each Company is a separate legal entity in the context of Section 7 of the Act, which requires the Arbitration Agreement to be in writing. It is contended that it is the existence of an Arbitration Agreement that would confer jurisdiction to grant interim relief under Section 9 of the Act, as held by the Constitution Bench of the Supreme Court in ***SBP & Co. vs. Patel Engineering Ltd. & Anr. [(2005) 8 SCC 618]***. In the case of ***K.K. Modi Investments and Financial Services Pvt. Ltd. vs. Apollo International Inc., [(2009) SCC OnLine 1595]***, the applicant had sought relief under Section 9 of the Act against non-signatory affiliates of the parties to an Arbitration Agreement, contained in a Shareholder's Agreement. Court rejected the contention on account of there being no

Arbitration Agreement under Section 7 of the Act and on the principle that each Company, including Holding and Subsidiary, has to be treated as a separate legal entity. Learned counsel submits that the Supreme Court in ***Chloro Controls India (P) Ltd. vs. Severn Trent Water Purification Inc. and Others, [(2013) 1 SCC 641],*** has recognized a narrow exception to the Rule enunciated therein regarding non-signatories to an Arbitration Agreement. In the said case, the facts were that there was a composite transaction between various Group Entities and not all the Affiliates or Group Entities were parties to the Arbitration Agreement, contained in the Mother Agreement, but, were parties to other transaction documents which had their own Dispute Settlement Mechanisms. Petitioner in the present case has not made out any case to bring the petition within the narrow exception. Petitioner has not shown that there was a mutual intention to bind the non-signatories Affiliates or that there existed a composite transaction between the Petitioner on one hand and the signatory and non-signatory Affiliates on the other. As per the Petitioner's own case, Respondents' Group Structure was disclosed by Respondent No. 1 to the Petitioner vide e-mail dated 01.12.2016, along with a chart. Despite this, only Respondent No. 1 is a party to all the transactions, Agreements and documents dated 19.05.2017, as also the MOU and Heads of Terms, executed between them. A mere assertion that parties are Group entities would not be enough to further the case of the Petitioner. In the case of ***Reckitt Benckiser (India) Private Limited vs. Reynders Label Printing India Private Limited, (Civil) no. 65 of 2016,*** Supreme Court referred to the judgment in ***Chloro Controls (supra)*** but refused to accept the plea to bind a non-signatory affiliate

merely on the premise of it being a related entity or a single economic unit. In ***Goldstar Metal Solutions Pvt. Ltd. vs. Shri Dattaram Ganianan Kavtankar and Ors., [(2013) SCC OnLine Bom 448]***, Bombay High Court rejected the submission of extending the Arbitration Agreement by applying the doctrine of 'piercing the veil' of one alleged signatory, to bind a Group Company that was under common Management and control, emphasizing that both Companies were distinct entities and Arbitration Clause could not bind a sister Company. It is further argued that apart from the law of Arbitration, even under the Company Law, Supreme Court in various decisions such as ***Vodafone International Holdings BV vs. Union of India & Anr. [(2012) 6 SCC 613]*** and ***Balwant Rai Saluia &. Anr. etc. vs. Air India Ltd. & Ors., [(2014) 9 SCC 407],*** has recognized the fundamental principle that Companies including Holding and Subsidiary, are separate Juristic Entities.

45. It is next contended that from a plain language of the OSA, in particular, Schedule V, it is evident that Schedule V was at best an Agreement to agree. Correspondence exchanged between Petitioner and Respondent No. 1 shows that there were differences on several issues, which were being negotiated upon, when the OSA was executed. When the Agreement was executed on 19.05.2017, the Offshore Security was yet to be agreed upon. It is clear that the parties were never *ad-idem* on the terms and conditions for creation of an Offshore Security in the form of a Share Pledge Agreement. It is also clear from a reading of Clause 3.5 of the OSA, that the Agreement to create security is not capable of specific performance, being inchoate and incomplete. It is next contented by learned counsel that Respondent No. 7 and Respondent No. 8 in fact

do not even exist. There is no Company by the name of Sky Power Global, Canada and even the Petitioner's shareholding chart does not disclose any Entity by this name. Respondent No. 8 is described as CIM Group. A Group is not a Juristic Entity known to law.

46. It is further argued that the Petitioner overlooks the fact that Respondent Nos. 2 to 8 have been joined not merely as parties against whom relief is sought in Section 9 of the Act, but on the premise that they are parties to the Arbitration Agreement itself. Though it is correct that under Section 9 of the Act, relief can be claimed against a third party or a non-party to the Arbitration Agreement, where such third-party claims in some way through or under the party to the Agreement. In the present case, Respondent Nos. 2 to 6 are neither the Parent nor the indirect Holding companies of Respondent No. 1 and nor are they Subsidiaries of Respondent No. 1.

47. Learned Senior Counsels for the Petitioner, arguing in rejoinder, contend that none of the Agreements sought to be relied upon by Respondent No. 1, including the OSA, fasten any liability on the Petitioner to fulfil the obligations of the Petitioner's affiliate SWPL under the Contracts entered into by SWPL, with Respondent No. 1. Learned Senior Counsels on behalf of Respondent No. 1 have erroneously relied on Clause 5.3.3 of the Supply Agreement, to contend that the Petitioner had undertaken to fulfill its Indian Affiliate's Obligations. Clause 5.3.3 only provides an obligation on the part of the Petitioner to co-ordinate with Respondent No. 1 and the Contractors for performing the Petitioner's obligation under the OSA. It does not require the Petitioner to

perform SWPL's obligation in respect of the Project. To reiterate, the Petitioner's obligation is only limited to providing the offshore supplies, which it has fulfilled and is an undisputed fact. Respondent No.1's reliance on Clauses 1.8.1 and 1.8.2 of the Supply Agreement is also misplaced. Again, these clauses do not require the Petitioner to perform SWPL's obligations in respect of the project.

48. It is further argued that Petitioner is not a party to the Wrap Agreement and thus cannot be saddled with any obligations under the same. It is SWPL which had to fulfil its obligations under the said Agreement with Respondent No. 1 and no liability is fastened on the Petitioner. Respondent No. 1 has itself admitted in its reply that it is SWPL and not the Petitioner, who was to undertake the work, under the project. Under Clause 3.7 of the Wrap Agreement, SWPL has undertaken the overall responsibility of completing the project.

49. It is next contended that Respondent No. 1 has erroneously placed reliance on the Side Letter on liquidated damages, entered into between Petitioner, SWPL and Respondent No. 1, for wrongfully withholding payments due to the Petitioner. Purpose of entering into the Side Letter on liquidated damages is clear from recital (C), which is to set out certain terms governing payment of liquidated damages, imposed by the State Discom. Admittedly, Respondent No. 1 has made no claim for LD against the Petitioner in any proceeding so far. Consequently, there can be no adjudication of the Liquidated Damages which the Petitioner or SWPL is liable to pay, even on a mere assumption that such liability is to be discharged jointly by the two entities. This is further fortified by Clause

(i) of the Side Letter on liquidated damages which provides that the two entities have jointly agreed to perform their respective scope of works under each of the contracts to which they are a party. Provisions of Side Letter in any case do not override the obligation of Respondent No. 1, to make payment to the Petitioner, within 14 days of receipt of the invoice without any set off etc. Even otherwise by virtue of Clause (5) of the Side Letter, no set off can be claimed by Respondent No. 1, on account of LD, as no Offshore Security has been created in favour of the Petitioner.

50. It is further contended that even the reliance on Indemnity Letter is misplaced. The letter had been issued only to set out provisions pertaining to the Petitioner's and SWPL's obligation to indemnify Respondent No. 1, in respect of taxes.

51. Learned Senior Counsels, placing reliance on the judgment of this Court in ***Huawei Technologies Company Limited v. Sterlite Technologies Limited, (2016) 1 High Court Cases (Del) 624,*** submit that the facts of the said case are similar to the present case and the Court has directed the Respondent therein to furnish Bank Guarantee as security, in respect of the amounts due and payable to the Petitioner. Learned Senior Counsels have laboured hard to draw out a comparison between the facts of the present case and those in the case of ***Huawei Technologies (supra)*** and argue that the present case is squarely covered by the said judgment.

52. Responding to the contentions of the Respondents, regarding the obligations of the Indian entity of the Petitioner, learned senior counsels for the Petitioner reiterate that Petitioner is bound only by the terms of the OSA, it has entered into and not by any other Agreement. Respondent

No. 1 has not been able to show that the OSA contains any provision, whereby the terms of the contracts entered into between SWPL with Respondent No. 1 have been incorporated into the OSA. Admittedly, Petitioner is not a party to any of those Agreements. Only two pre-conditions are prescribed in the OSA for making 90% payment to the Petitioner and which are the achievement of COD, which has been achieved and issuance of invoices by the Petitioner, which have been issued.

53. Learned Senior Counsels next contend that it is not open to Respondent No. 1 to plead that the Offshore Supply Payments under the OSA are secure. The Offshore Security, which was required to be created in favour of the Petitioner, has not been created. The security documents relied upon are those created in favour of SWPL and the Petitioner has no right to enforce the same or recover monies in respect thereto. Reliance on the unattested Deed of Hypothecation by Respondent No. 1 entered into between SWPL and Respondent No. 1 is misconceived. Perusal of the Deed would reveal that Petitioner is not a party to the Deed and cannot enforce it. Recital (D) expressly states that it is only to secure the onshore EPC price and the dues payable by Respondent No. 1 to SWPL. Pursuant to the execution of the Sale Deed, Respondent No. 1 has filed a form CHG-1 with the ROC in favour of SWPL and in respect of the dues payable to SWPL. It is falsely stated by Respondent No. 1 that a mortgage has been created in favour of the Petitioner and thus SWPL should have been made a party to the present proceedings, applying the principles under Order 34 Rule 1 CPC. It is submitted that no such mortgage has been created and the Petitioner's dues are unsecured.

Learned Senior Counsels, contend that Petitioner's claim will be frustrated in case no interim relief is granted and the Award will be a mere paper Award. Respondent No. 1 has filed its Financial Statement for the year ending 31.03.2018, with the ROC, which indicates that its financial condition is precarious.

54. In so far as Respondent Nos. 2 to 8 are concerned, Learned Senior Counsels for the Petitioner submit that there is enough material on record to show that the Respondents, by their conduct and correspondence with respect to the OSA, had a significant role to play and have in fact benefited from the same. It is argued that Respondent No. 7 was actively involved in every negotiation, while executing the Offshore Security. Attention is drawn on letters dated 25.06.2018, 27.07.2018, and e-mails dated 03.06.2017. 08.07.2017, 19.07.2017 and 09.08.2017, in this regard. All letters addressed on behalf of Respondent No. 1 to the Petitioner are on the Letter Head of Respondent No. 7. Respondent No. 7 represented interests of all other Respondents, besides Respondent No. 1. Respondent No. 3 agreed to create security in respect of its shareholding in Respondent No. 4, in favour of the Petitioner as required under the OSA. Respondent No. 5 agreed to create security in respect of shareholding in Respondent No. 6 in favour of the Petitioner, though subsequently Respondent No. 3 agreed to do the same. Respondent Nos. 3 and 4 were both named parties in the draft of the Offshore Share Pledge Agreement circulated by the Respondent's counsel after the meeting on 27.03.2017 and 28.03.2017. In the structure note circulated on behalf of the Respondents on 27.01.2017, it was clearly indicated that Offshore Security would consist of pledge of shares held by Respondent No. 5 in

Respondent No. 6, in favour of the Petitioner. Even before this Court, Respondent Nos. 2 to 8 along with their reply filed *vakalatnama*, which has been stamped by Respondent No. 1, which shows their close connection. Respondent No. 1 does not have any employee and its financial statement is completed by Respondent No. 7. Mr. Ramandeep Singh has signed the OSA on behalf of Respondent No. 1 and it is obvious that the employees are interchanged. Mr. Kerry Adler who played a substantial role in negotiations of the OSA, is a common Director in Respondent Nos. 1, 4, 5, 6 and 7. The BG in respect of the project has been furnished at the instance of Respondent No. 6. This was required to be furnished to secure the obligations under the PPA. Respondent No. 6 is not a party to the PPA and it is Respondent No. 1 who has executed the PPA as a Special Purpose Vehicle of Respondent No. 6. Respondents have not filed any affidavit disclosing their inter-se shareholding before this Court only with the view to insulate Respondent Nos. 2 to 8 from any recovery action. Respondent Nos. 1 to 8, therefore, form a part of a Group of Companies, who are inextricably linked together to execute the project. Learned senior counsels rely on the judgement in the case of ***Arcelormittal India Private Limited v. Satish Kumar Gupta and Others, [(2019) 2 SCC 1]***, wherein principles were laid down to apply the doctrine of 'lifting the corporate veil'. It is submitted that the doctrine has been applied by Courts to prevent impropriety as in the present case, where the Petitioner having completed its obligations, has not been paid his dues and the Respondents are using their Group structure to play fraud on the Petitioner.

55. Learned Senior Counsels further submit that it is not open to Respondent Nos. 2 to 8 to contend that no relief under Section 9 of the Act can be passed against a non-signatory. Reliance on the judgment in case of ***Indowind (supra)*** is misconceived. The said judgement was in proceedings Section 11(6) of the Act and does not deal with the issue of the reliefs that can be granted under Section 9 of the Act against third parties. Similarly, reliance on the judgment of ***Reckitt Benckiser (India) (supra)*** is also misplaced as in the said case, Supreme Court had refused to refer the non-signatory party to Arbitration, since the party seeking initiation of Arbitration against the non-signatory party, failed to establish that the employee of the signatory party, against whom Arbitration was to be initiated was also an authorized signatory of the non-signatory party. Lastly, it is argued by the learned senior counsels that despite the parties being *ad-idem* with respect to each of the terms and a final draft of the offshore Share Pledge Agreement being circulated by the Petitioner on 12.08.2017, Respondents deliberately failed to create the offshore security with a dishonest intention of keeping the offshore supply price, unsecured.

56. Responding to the objection on the jurisdiction of this Court to entertain the petition, Learned Senior Counsels submit that it is wrong to contend that since the seat of Arbitration is Singapore, this Court would have no jurisdiction. This argument is in the teeth of Clause 23.1.7 of the OSA, which provides that Section 9 of the Act is applicable to the disputes under the OSA. Respondents are also overlooking Proviso to Section 2(2) of the Act, which itself provides that Section 9 of the Act is applicable to International Commercial Arbitration, even if the place of

Arbitration is outside India. The fact that parties have agreed to Singapore as the seat of Arbitration under SIAC Rules, will not oust the jurisdiction of this Court under Section 9 of this Act. Reliance is placed on the judgments in the case ***Raffles Design International India Private Limited v. EduComp Professional Education Limited and Ors., O.M.P. (I) (Comm) 23/2015*** and ***Heligo Charters Private Limited v. Aircorn Feibars FZE, Commercial Arbitration Petition (L) No. 208 of 2017***.

57. I have heard Learned Senior Counsels for the Petitioner as well as Learned Senior Counsels for Respondent No.1 and Learned Counsel for Respondent Nos. 2 to 8.

58. Pursuant to Tenders floated by respective State Discoms, as mentioned above, Respondent No.1 was selected as a successful bidder. PPAs were entered into between the State Discoms and Respondent No.1 under which Respondent No.1 agreed to sell power to the State Discom, in accordance with the terms and conditions of the PPAs. SWPL representing that it had experience, expertise and know-how to supply, design, manufacture and procure, entered into Memorandum of Understanding and Heads of Terms (HOT) for the EPC contracts with Respondent No.1. The HOTs were subsequently amended. The HOT and the Amended HOT, encapsulated the Terms and Conditions governing the documents to be executed in relation to the various contracts. Insofar as supply of Solar PV Modules, Trackers and Inverters (Offshore supplies) were concerned, the same were to be supplied by the Offshore Affiliate of SWPL, i.e. the Petitioner herein. Petitioner and

Respondent No.1 entered into Offshore Supply Agreements (OSAs) thereafter.

59. In a nutshell, it is a case of the Petitioner that under Clause 12.2.1 of the OSA, Petitioner's obligation was only limited to providing the Offshore Supplies in respect of the project and admittedly, the Petitioner fulfilled the said obligations. Under the terms of Agreement, Petitioner thus became entitled to 90% of the Offshore Supplies Price, upon achievement of the COD and within 14 days from the date of receipt of the invoice by Respondent No.1 and 10% upon achievement of Final Acceptance Date. COD was admittedly achieved by the Petitioner, which is reflected in the certificates issued by the State Discoms. Despite the payment being due to the Petitioner, Respondent No. 1 in collusion with Respondent Nos. 2 to 8 failed to make the payment on or before the due date.

60. On the other hand, the defence of Respondent No.1 is that the Petitioner's Indian affiliate, SWPL failed to comply with the various obligations under the onshore EPC contracts and by operation of the Wrap Agreement, Respondent No.1 is not liable to make any payment, till SWPL fulfills its obligations. It is also the contention of Respondent No.1 that Petitioner's affiliate SWPL and the Petitioner are jointly and severally liable under the Side Letter on liquidated damages and the Indemnity Letter. The stand is that under the various Agreements it was the entire and single point responsibility of Sterling Group to complete the project. The separation of the Offshore Supplies, to be supplied by the Offshore Affiliate of Sterling, was an internal arrangement between

the two. Onshore Project and the Offshore Supplies were interlinked and interrelated and actually encompassed a Single Contract. It was also contended that the Project had not achieved the COD on account of various deficiencies in respect of the project.

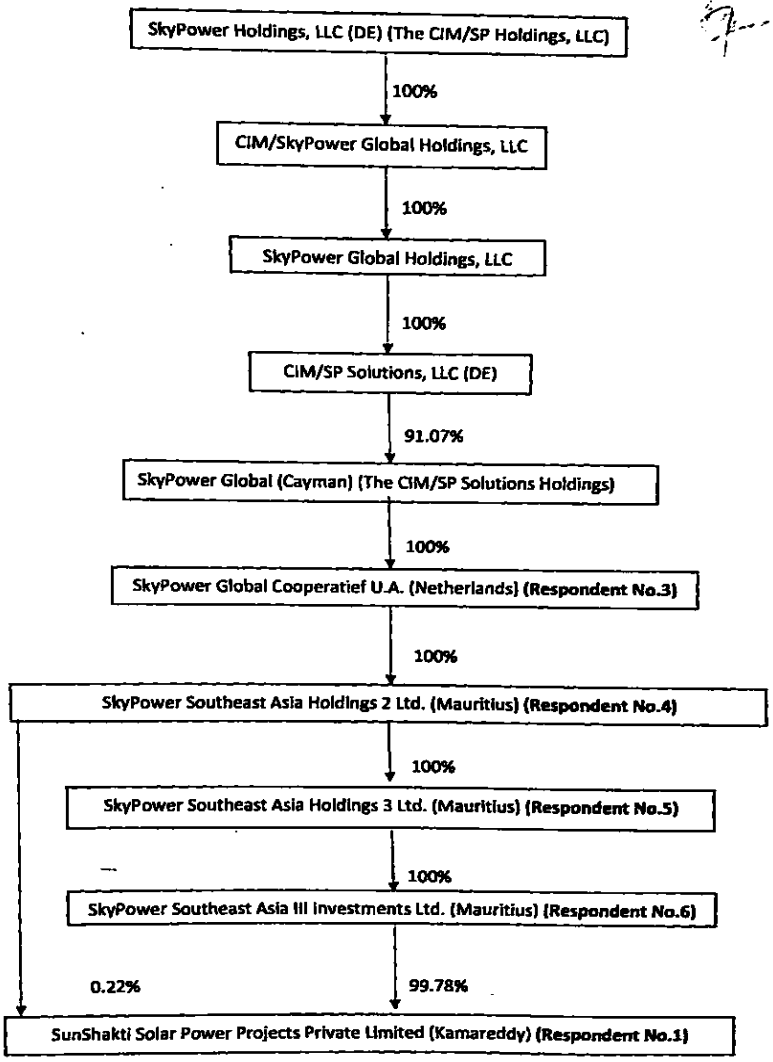
61. Insofar as Respondent Nos. 2 to 8 are concerned, the stand is that they are neither parties nor signatories to the OSA or to any other document, Agreements, Instrument or letter executed between SWPL and Respondent No.1. Petitioner has impleaded Respondent Nos. 2 to 8 as parties to the present petition, on an incorrect premise that they are directly or indirectly Parent companies of Respondent No.1 and thereby Group Companies, forming a single economic unit and all the Respondents have colluded with each other to defraud the Petitioner.

62. Before deciding the case on merits, objection to the jurisdiction of this Court, to decide the present petitions, needs to be decided. The objection of the Respondents is that the Seat of Arbitration is Singapore in an International Commercial Arbitration and hence this Court lacks the territorial jurisdiction to entertain the petitions. In my view, this objection is without any merit. Section 2(2) of the Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016), and a Proviso was inserted therein. By way of this Amendment, Section 9 has been made applicable to International Commercial Arbitration, even in a foreign seated Arbitration, unless the parties agree to the contrary. In the case of ***Raffles (supra)***, this Court has dealt with the said Amendment in great detail and the issue is no longer *res integra*. Moreover, as rightly contended by the Petitioner, the parties have specifically incorporated

Clause 23.1.7 in the OSA, which makes Section 9 applicable to the disputes arising under the OSA. This contention of the Respondents is thus rejected.

63. Two-fold issues arise for consideration by the Court in the present petition. The first issue that arises is whether any directions can be issued by the Court under Section 9 of the Act, against Respondent Nos. 2 to 8 and the second is the relief to which the Petitioner is entitled, keeping in view the principles governing the exercise of power of a Court, under Section 9 of the Act.

64. In order to answer the first question, it is necessary to examine the Corporate structure of the Respondents. Petitioner has categorically averred in the petition that Respondent No.2 is the parent company of Respondent Nos.1, 3, 4, 5 and 6. Respondent No.4 is wholly owned subsidiary of Respondent No.3 and in addition to holding the entire shareholding of Respondent No.5, holds 0.22% of the paid-up share capital of Respondent No.1. Respondent No.5 is wholly owned subsidiary of Respondent No.4 and also holds the entire shareholding of Respondent No.6. Respondent No.6 in turn holds 99.78% of the paid-up share capital of Respondent No.1 and is a wholly owned subsidiary of Respondent No.5. Respondent No.7 is the ultimate Parent Company of Respondent Nos. 1 to 6 and has the actual management and control over them. Respondent No.8 is a Real Estate and Infrastructure Investment Firm who indirectly holds shares in Respondent Nos. 1 to 7. Petitioner has filed a chart showing the Corporate structure as under:-




65. Respondent No. 1 has also placed on record a chart showing the Organization structure, while no document has been filed by Respondent Nos. 2 to 8. In fact, despite the order of this Court dated 18.12.2018 directing the Respondents to disclose the shareholding in a sealed envelope, no such disclosure was made by the Respondents. Prima facie it appears to the Court that the effort was to insulate the information concerning the shareholdings inter-se.

66. Ordinarily, Arbitration is a Dispute Resolution Mechanism between parties to the Arbitration Agreement and the Contract, which incorporates the said Agreement. However, there are instances and exceptions where the Arbitration Agreement binds a non-party or a non-signatory, as well. One of the classic examples of this exception is where the Agreement is entered into between one party and another Company, where the latter is one of the Companies in a Group of Companies. In such a case, the Agreement would bind the non-signatory Affiliate or the Sister or the Parent concern, if there was an intention of the parties to bind the signatory and the non-signatory. Also, in a case where there are a number of Agreements and composite transactions, intrinsically linked with each other and it is found that these multiple agreements cannot be performed without the performance of the others, the Doctrine of non-signatory to the Arbitration Agreements, in some of these Contracts would apply and bind the non-signatory, even though it may not be party to the Arbitration Agreement. This issue has been examined by the Supreme Court in the case of ***Chloro Control (supra)*** and relevant paras read as under:-

> *"70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (sic underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming*

*"through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (2nd Edn.) by Sir Michael J. Mustill:*

*"1. The claimant was in reality always a party to the contract, although not named in it.*

*2. The claimant has succeeded by operation of law to the rights of the named party.*

*3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.*

*4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."*

*71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]*

*72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very*

*significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.*

*73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.*

*74. In a case like the present one, where origin and end of all is with the mother or the principal agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfilment of the principal or the mother agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the court would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically interlinked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. The intention of the parties to*

*refer all the disputes between all the parties to the Arbitral Tribunal is one of the determinative factors."*

67. In the said case observing that joinder of non-signatory parties to Arbitration is not unknown to arbitration jurisprudence, Supreme Court evolved two legal principles to bind a non-signatory to an Arbitration Agreement and which are as under:-

*"103. Various legal bases may be applied to bind a non-signatory to an arbitration agreement:*

*103.1. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.*

*103.2. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law."*

68. Interestingly, the Court also dealt with a fact situation where the Corporate Structure of the Companies demonstrated a legal relationship which was not only an inter-legal relationship, but also intra-legal between the parties to the lis. The Court found in the facts of the case, it was dealing with, that the parties had contractual relationships, which arose out of various contracts that spelt out the terms, obligations and roles of the respective parties, which they were expected to perform for attaining the successful completion of the mother agreement therein, which was the Joint Venture Agreement. Court found that the joint

venture project, was capable of being achieved only on fulfillment of various ancillary agreements. After thorough examination of the interlinked agreements, the Court found that all the other agreements as well as the mother agreement were a part of composite transaction to facilitate the implementation of the principal Agreement. May be all parties to the lis were not signatory to all the Agreements, but none of the Companies was a stranger to these transactions and the parties had intentionally executed, intended and implemented the composite transactions. In such a situation, binding the non-signatories to the composite agreements, the Court had referred all the parties to arbitration, despite some of them not being signatories to some Agreements. The question which begs an answer is whether Respondent Nos. 2 to 8 are strangers to the OSA and/or what is their Corporate Structure and role viz-a-viz the parties to the lis.

69. In the present case, examining the Corporate structure of Respondents, as referred to above, as well as their role in execution of the OSA, it is clear that Respondent No.3 had agreed to create Offshore Security in respect of its shareholding in Respondent No.4, in favour of the Petitioner as required under the OSA. Respondent No.7 actively involved itself, as averred by Petitioner, in every aspect of the negotiations in relation to the creation of Offshore Security. Most of the correspondence between Respondent No.1 and the Petitioner are on the letter heads of Respondent No.7. Mr. Kerry Adler, who has played a substantial role in the negotiations of the terms of the OSA, is a common Director in Respondent Nos. 1, 4, 5, 6 and 7. Respondent No.1 has executed the PPA, as a Special Purpose Vehicle of Respondent No.6 and

yet after the project was undertaken to be executed by Respondent No.1, the Performance Bank Guarantee given by Respondent No.6 was not replaced by Respondent No.1. The conduct of the Respondents and the interlinked transactions entered into between them as well as their share holding pattern and corporate structure does indicate that Respondent Nos. 2 to 8 form part of the same Group of Companies, with Respondent No.1 as a Special Purpose Vehicle, incorporated for executing the project for which the OSA was entered into. The present case is clearly covered by judgement in the case of ***Mahanagar Telephone Nigam Ltd. vs. Canara Bank and Others, 2019 SCC Online SC 995,*** where the Supreme Court held that Group of Companies Doctrine is invoked in cases where there is a tight Group Structure, with strong organizational and financial links, so as to constitute a single economic reality, as also where the funds of one company are used to financially support or restructure other members of the Group.

70. In ***MTNL (supra)***, Supreme Court reiterated the principles laid down in the case of ***Chloro Controls (supra)***. Circumstances, in which the Group of Companies doctrine could be invoked to bind the non-signatory affiliate of a parent company or inclusion of a third party to an arbitration, were broadly brought out such as, where there is a direct relationship between the party which is signatory to the Arbitration Agreement, direct commonality of the subject matter or composite nature of transactions between the parties. Relevant paras of the judgment are as under:-

> *"10.3. A non-signatory can be bound by an arbitration agreement on the basis of the "Group of Companies"*

*doctrine, where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non-signatory parties. Courts and tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract.*

*10.4. The doctrine of 'Group of Companies' had its origins in the 1970's from French arbitration practice. The 'Group of Companies' doctrine indicates the implied consent to an agreement to arbitrate, in the context of modern multi-party business transactions. It was first propounded in the case of Dow Chemical v. Isover-Saint-Gobain,9 where the arbitral tribunal held that:*

> *"... the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise".*

*The 'Group of Companies' doctrine has been invoked by courts and tribunals in arbitrations, where an arbitration agreement is entered into by one of the companies in the group; and the non-signatory affiliate, or sister, or parent concern, is held to be bound by the arbitration agreement, if the facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group. The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial*

*contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts. The circumstances in which the 'Group of Companies' Doctrine could be invoked to bind the non-signatory affiliate of a parent company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject matter; the composite nature of the transaction between the parties. A 'composite transaction' refers to a transaction which is inter-linked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.*

*10.5. The Group of Companies Doctrine has also been invoked in cases where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or re-structure other members of the group.*"

71. Learned Senior Counsels for the Petitioner have rightly relied on the Doctrine of piercing the Corporate veil. Relevant paras of the judgment explaining the doctrine in the case of ***Arcelormittal (supra)*** are as under:-

> ***"****33. The doctrine of piercing the corporate veil is as well settled as the Salomon [Salomon v. A. Salomon & Co. Ltd., 1897 AC 22 (HL)] principle itself. In LIC v. Escorts Ltd. [LIC v. Escorts Ltd., (1986) 1 SCC 264], this Court held: (SCC pp. 334-36, para 90):*
>
> *"xxx xxx xxx*

*In Palmer's Company Law (23rd Edn.), the present position in England is stated and the occasions when the corporate veil may be lifted have been enumerated and classified into fourteen categories. Similarly in Gower's Company Law (4th Edn.), a chapter is devoted to "lifting the veil" and the various occasions when that may be done are discussed. In TELCO Ltd. [TELCO Ltd. v. State of Bihar, (1964) 6 SCR 885 : AIR 1965 SC 40] the company wanted the corporate veil to be lifted so as to sustain the maintainability of the petition, filed by the company under Article 32 of the Constitution, by treating it as one filed by the shareholders of the company. The request of the company was turned down on the ground that it was not possible to treat the company as a citizen for the purposes of Article 19. In CIT v. Sri Meenakshi Mills Ltd. [CIT v. Sri Meenakshi Mills Ltd., (1967) 1 SCR 934 : AIR 1967 SC 819] the corporate veil was lifted and evasion of income tax prevented by paying regard to the economic realities behind the legal facade. In Workmen v. Associated Rubber Industry Ltd. [Workmen v. Associated Rubber Industry Ltd., (1985) 4 SCC 114 : 1985 SCC (L&S) 957] resort was had to the principle of lifting the veil to prevent devices to avoid welfare legislation. It was emphasised that regard must be had to substance and not the form of a transaction. Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object*

*sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected, etc."*

*xxx* *xxx* *xxx*

*71. In recent times, the law has been crystallised around the six principles formulated by Munby, J. in Ben Hashem v. Ali Shayif [Ben Hashem v. Ali Shayif, 2008 EWHC 2380 (Fam) : (2009) 1 FLR 115]. The six principles, as found at paras 159-64 of the case are as follows:*

*(i) Ownership and control of a company were not enough to justify piercing the corporate veil;*

*(ii) The court cannot pierce the corporate veil, even in the absence of third-party interests in the company, merely because it is thought to be necessary in the interests of justice;*

*(iii) The corporate veil can be pierced only if there is some impropriety;*

*(iv) The impropriety in question must be linked to the use of the company structure to avoid or conceal liability;*

*(v) To justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and*

*(vi) The company may be a "façade" even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.*

*xxxx* *xxxx* *xxxx*

*36. Similarly in DDA v. Skipper Construction Company (P) Ltd. [DDA v. Skipper Construction Company (P) Ltd., (1996) 4 SCC 622], this Court held: (SCC pp. 637-39, paras 24-28)*

*"xxxx xxxx xxxx*

> *26. The law as stated by Palmer and Gower has been approved by this Court in TELCO Ltd. v. State of Bihar [TELCO Ltd. v. State of Bihar, (1964) 6 SCR 885 : AIR 1965 SC 40] . The following passage from the decision is apposite: (AIR p. 47, para 27)*
>
> *'27. ... Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But, it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Broadly stated, where fraud is intended to be prevented, or trading with an enemy is sought to be defeated, the veil of a corporation is lifted by judicial decisions and the shareholders are held to be the persons who actually work for the corporation.'*

*27. In D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council [D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council, (1976) 1 WLR 852 (2) : (1976) 3 All ER 462 (CA)] the Court of Appeal dealt with a group of companies. Lord Denning quoted with approval the statement in Gower's Company Law that*

> *'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'.*

*The learned Master of Rolls observed that 'this group is virtually the same as a partnership in which all the three companies are partners'. He called it a case of "three in one" — and, alternatively, as "one in three".*

*28. The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent this Court from treating all of them as one entity belonging to and controlled by Tejwant Singh and family if it is found that these corporate bodies are merely cloaks behind which lurks Tejwant Singh and/or members of his family and that the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud people."*

*(emphasis supplied)*

*37. It is thus clear that, where a statute itself lifts the corporate veil, or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the law, the court will disregard the corporate veil. Further, this principle is applied even to group companies, so that one is able to look at the economic entity of the group as a whole."*

72. Powers of the Court under Section 9 of the Act to issue interim directions are not confined only to a party to an Arbitration Agreement. Depending on the facts and circumstances of the case, appropriate orders

can be passed against a third party and this issue is no longer *res integra*. In ***Girish Mulchand Mehta and Ors. v. Mahesh S. Mehta and Ors., [2010 (1) BomCR 31]***, Court brought out the nature of reliefs that can be given under Section 9 as well as held that orders can be passed against third parties. Relevant paras are as under:-

> "9. *The purport of Section 9 has been expounded by the Apex Court in the case of Firm Ashok Traders and Anr. v. GurmukhdasSaluja and Ors. reported in MANU/SC/0026/2004 : AIR 2004 SC 1433. It considered the scheme of Section 9 of the Act. It has held that application under Section 9 is not a suit although such application results in initiation of civil proceedings. It went on to observe that the right conferred by Section 9 is on a party to an Arbitration Agreement. That Section 9 has relevance to the locus standi as an applicant. A person not party to an arbitration agreement cannot enter the Court for protection under Section 9 of the Act. In other words, the party to an Arbitration Agreement can invoke this jurisdiction for securing relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9. The Apex Court further held that Section 9 has nothing to do with the relief which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The Court is competent to grant reliefs to a party under Clauses (i) and (ii) of Section 9 which flow from the power vesting in Court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the Arbitral Tribunal. It is thus clear that the relief sought in such application is neither in a suit nor a right arising from a contract. The Court under Section 9 only formulates interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being*

*frustrated. Suffice it to observe that this decision is of no avail to answer the controversy on hand as to whether remedy under Section 9 can be pursued against a person who is not party to an arbitration agreement or arbitration proceedings.*

*xxx* *xxx* *xxx*

*11. In the present case, the relief which is sought by the Respondent No. 1 and as granted by the Learned Single Judge is ascribable to the situations specified in Sub clauses(d) and (e) of Section 9(ii). Sub-clause (d) envisages interim injunction or the appointment of Receiver. Obviously, the interim measures can be for management, protection, preservation and improvement of the property which is the subject matter of the Arbitration Agreement. In addition to appointment of a Receiver, it is open to the Court to provide such interim measures of protection as may appear to it, to be just and convenient. Besides, appointing the Court Receiver, it would be open to the Court to order removal of any person from the possession or custody of the property or commit the same to the possession, custody or management of the Receiver. It is also open to the Court to confer upon the Receiver all such powers for realization, management, protection, preservation and improvement of the property, collection of the rents and profits thereof or such other powers as the Court thinks fit. Such order, however, has to be passed on the satisfaction of the Court that it is just and convenient to do so. The language of Sub-clause (e) reinforces the position that besides appointment of a Receiver, it is open to the Court to order such other interim measures of protection as may appear to the Court to be just and convenient. Section 9 makes it amply clear that the Court shall have the same power for making orders as it is for the purpose of, and in relation to, any proceedings before it. In other words, the Court while considering the request for formulating interim measures should be guided by equitable consideration on case to case basis with a view to ensure that the award passed by the Arbitral Tribunal is capable of enforcement.*

*12. The next question is whether order of formulating the interim measures can be passed by the Court in exercise of powers under Section 9 of the Act only against a party to an Arbitration Agreement or Arbitration Proceedings. As is noticed earlier, the jurisdiction under Section 9 can be invoked only by a party to the Arbitration Agreement. Section 9, however, does not limit the jurisdiction of the Court to pass order of interim measures only against party to an Arbitration Agreement or Arbitration Proceedings; whereas the Court is free to exercise same power for making appropriate order against the party to the Petition under Section 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the Arbitration Agreement or Arbitration Proceedings does not affect the jurisdiction of the Court under Section 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the Arbitration Agreement."*

73. In ***Gatx India Pvt. Ltd v. Arshiya Rail Infrastructure Limited, 2015 VAD (Delhi) 190]***, Court held as under:-

"66. *While the section explicitly provides that only a party to the arbitration agreement can apply to the court for interim measures, it does not say against whom any such relief can be claimed. Unlike section 17 which specifically allows for measures to be directed only against parties to arbitration, there is nothing in section 9 which expressly restricts a court from passing orders against non-signatories to arbitration agreement. Pertinently, there has been a divergence of opinion in this Court on the aspect of maintainability of a petition under section 9 of the Act against a third party. On one hand, there are cases where the learned single judges of this court have endorsed the view that section 9 of the Act is applicable only inter se/between the parties to the arbitration agreement. [see: National highways Authority of India vs .China Coal Construction Group Corp,*

*MANU/DE/0488/2006: AIR 2006 Delhi 134; Mikuni Corporation vs. UCAL Fuel Systems Ltd, MANU/DE/0130/2008 : (2008) 1 ALR503 (Del); Smt. KantaVashist vs. Shri Ashwani Khurana, MANU/DE/0380/2008;National agriculture Co-operative Marketing federation of India Ltd vs. Earthtech enterprises ltd., OMP no. 558/2007 decided on 23.04.2009]. On the other hand, the court in several cases has recognised the existence of power of the court to issue interim orders with respect to third parties under section 9 of the Act. [see: CREF vs. Puri Construction Ltd., MANU/DE/0580/2000: (2000) 3 ALR 331 (Del); Arun Kapur vs. Vikram Kapur, MANU/DE/1266/2001: AIR 2002 Del 420; Goyal Mg Gases (p) Ltd. vs. Air Liquide Deutschland GmbH, OMP no. 361 /2004 decided on 31.01.2005, Sri Krishan v. Anand, OMP no. 597/2008 decided on 18.08.2009].*

*67. In Value Advisory Services v. ZTE Corporation and Ors, OMP no. 65/2008 decided on 15.07.2009, learned single judge after considering numerous conflicting judgments of single-judge benches of the High Court, inter-alia, concluded that:*

> *"13. A conspectus of the judgments aforesaid on Section 9 would show that the court in each case has made the observation with regard to maintainability/applicability of Section 9 qua third parties depending upon facts of each case and depending upon feasibility of the order sought/required therein.* ***In my view, no general principle of maintainability/applicability or non-maintainability/non-applicability can be laid down. It will have to be determined by the court in the facts of each case whether for the purpose of interim measure of protection, preservation, sale of any goods, securing the amount in dispute, an order affecting a third party can be made or not.***

*14.In my view, if as a general rule it is laid down that in exercise of power under Section 9, no direction can be issued to parties not parties to agreement containing an arbitration clause or not parties to arbitration proceedings, the same will hamper the efficacy of the said provision. Under Clause (i) thereof, the guardian to be appointed may not be such a party; similarly the goods under Clause (ii) (a) may be or may be required to be in custody of or delivered to or sold to such third parties - further orders against such third parties may also be required in connection with such sale; under Clause (ii)(b) the amount to be secured may be in the form of money payable or property in hands of such third party - the scope cannot / ought not to be restricted to securing possible with orders against parties to arbitration only. Similar examples can be given with respect to other clauses also."*

*68. In the aforesaid case, the court was dealing with a petition under section 9 of the Act for direction to respondent no. 3 owing certain money to respondent no. 1&2, to deposit the same in the court in order to secure the monetary claim that the petitioner had against respondent nos. 1&2 therein. The learned single judge held that, notwithstanding the fact that respondent no. 3 was not a party to the arbitration agreement between the petitioner & the other two respondents, and was not concerned with the dispute between them, it was within the ambit of Court's power under section9 to issue such a direction to respondent no. 3. Observing that section 9 provides that "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", and referring to provisions under CPC, such as sections 47, 60 and Order 21 Rules 46 and 46A-F, Order 38 Rules 6-11A of CPC, learned single judge reasoned that the practice of*

*issuing interim orders including pre-decretal ones against third parties was well-accepted under the C.P.C., and therefore, it would be illogical not to extend the same powers to the Court under section 9 of the Act. On the question of possibility of the third party contesting such an application, or setting up a defense thereto, calling for an adjudication on trial, the Court, inter- alia, observed that "The court, in such cases in its discretion can on a prima facie view of the matter, either refuse to exercise powers under Section 9 or pass other appropriate order to protect the interest of all parties concerned." However, in the facts of that case, the court refused to order respondent no. 3 to deposit the monies in Court.*

*69. The observations made in Value Advisory Services (supra) with respect to power of the court under section 9 being analogous to power of a civil court to pass an order qua a third party for attachment of property/deposit of money in court, at a pre-decretal stage, were made in the context of an interim relief in nature of a garnishee order. The observations were made with respect to power of the court to order attachment of property/monies of a defendant, which may be in possession of third party-in trust, for or on behalf of the defendant.*

*70. I find myself in respectful agreement with the learned single judge that no hard and fast rule can be laid down as to issuance of interim orders qua third parties, and the same depends on the facts of each case. I may point out that subsequently, the court taking note of the said observation made in Value Advisory Services (supra), in the specific facts of the respective cases, refused to exercise its power under section 9against a non-signatory to arbitration agreement in Ajay Makhija v. Dollarmine Exports Pvt. Lt. &Ors, MANU/DE/1906/2009, whereas, it passed interim orders with respect to a third party in Dorling Kindersley (India) Pvt. Ltd. vs. Sanguine Technical Publishers &Ors., MANU/DE/1853/2013 : 2013 (3) ARB LR 52 (Del).*

*71.Undoubtedly, section 9 provides that the court shall have the same powers for making interim orders under section 9 as a civil court has for the purpose of, and in relation to, any proceedings before it, and the powers of a civil court in this regard are very wide. The civil courts as and when required, and deemed appropriate in the facts and circumstances of a particular case have been making interim orders in respect of third parties, such as: interim injunction restraining third party- banks from honouring bank guarantees; attaching defendant's monies/property in hands of third party trustee, debtor, agent etc; restraining third party-subsequent transferee/person claiming rights in suit property from disposing of the same, and the like. As a corollary, the power of the court to issue interim orders under section 9 cannot be confined only to the parties to arbitration agreement. However, a significant parameter inherent in section 9, for exercise of this power against a non-signatory to arbitration agreement, is that the purpose of section 9 is to aid arbitration between the parties thereto, and the interim orders there under have to be with regard to subject matter of arbitration/in connection with the arbitral proceedings. In this context, it is relevant to draw a distinction between orders granting interim relief against a party to the arbitration agreement which incidentally affects a third party, on one hand, and orders granting relief directed against a third party, on the other. While the former is ordinarily acceptable as being within the scope of section 9, the power with respect to the latter should be exercised sparingly. For instance, an order appointing a third party as a receiver or guardian of a minor/person of unsound mind is not an order against the third party, or detrimental to its rights as such. Rather, it is a relief granted to the petitioner in support of the arbitral proceedings and affects the party to the arbitration agreement. Similarly, when a subsequent transferee, or a person claiming title under a party to arbitration is ordered to maintain status quo, or not to dispose of property which is subject matter of arbitration, it is again ancillary to arbitral proceedings in as much, as, it*

*is for protection of the subject matter of arbitration that the order is passed. ...*"

74. It is clear that under Section 9, the Court has the power to issue interim directions to non-parties to Arbitration Agreement. Keeping in view the judgements referred to above, in my opinion, Petitioner is right in its contention that if the shareholding pattern of Respondents changes by transferring shares, there is likelihood of changes in the management, overall control and the decision making power. This would have a significant bearing on the Arbitration Proceedings as well as the ultimate execution of the Award. Thus, interim directions are required to be issued against Respondent Nos. 2 to 8. The judgments relied upon by Respondents are distinguishable on the facts of this case and thus of no avail to them.

75. The next issue that the Court has to address is on the interim relief sought by the Petitioner in the light of the scope of its power under Section 9 of the Act.

76. The principal contention of the Petitioner is that in terms of the OSA, the obligation of the Petitioner was only limited to providing the Offshore Supplies in respect of the Project and that the Petitioner has fulfilled the same. Relevant provisions of the OSA are as under :-

*"**Recital B***
*"The Owner has approached the Supplier for supply of the Solar Modules, PV Inverters and Trackers for the consideration and on the terms and conditions set out herein and under the Project Documents (as defined below)."*

***Clause 1.1 -Definition of Supplies***

*“"Supplies" shall mean the Solar Modules, PV Inverters, Trackers along with any associated auxiliaries, all Mandatory Spares, tools and tackles, which are to be supplied by the Supplier under this Agreement in accordance with the terms hereunder and the Specifications, including the Preliminary Supplies and the supplies mentioned in Schedule III of this Agreement.”*

***Clause 5 - Supplier's Obligation***

*"5.1.1 The Owner has engaged the Supplier to provide the Supplies under this Agreement relying upon the representations, assurances and warranties made by the Supplier, including the representation that the Supplier has the experience, skill and resources to provide the Supplies and to design, manufacture and complete in all respects the Supplies in a manner fit for the intended purpose, and deliver the same to the Owner in accordance with this Agreement, and the Supplier acknowledges such reliance by the Owner and confirms its acceptance for such engagement.” (emphasis supplied)*

***24.8- Entire Agreement***

*“This Agreement constitutes the entire agreement and contains all of the understandings and agreements of whatsoever kind and nature existing between the Parties, and supersedes, all prior written or oral agreements, commitments, representations, communications and understandings between the Parties.”*

***12.2 Payment Milestone***

*12.2.1 Commercial Operations Date Payment*

*Upon achievement of the Commercial Operations Date, the Supplier shall issue an invoice to the Owner for an amount equal to 90% of the Supply Price, aggregating USD 31,250,712 (United State Dollars Thirty One Million Two Hundred Fifty Thousand Seven Hundred Twelve) ("Commercial Operations Date Payment"). Within 14*

*(fourteen) Days from the date of receipt of such invoice, the Owner shall, without any set off, recovery or adjustment of any costs or expenses or liability, pay to the Supplier, the aggregate amount specified in such invoice. For the avoidance of doubt, any unfulfilled obligations that are not affecting the achievement of commercial operation of the Facility shall prevent the Owner from issuing any requisite certificates or documents for facilitating achievement of Commercial Operation Date."*

77. Prima facie, a perusal of the above-mentioned clauses of the OSA does support the contention of the Petitioner that the obligation of the Petitioner was limited to providing the Offshore Supplies, in respect of the Project. Clause 12.2.1 provides that, upon achievement of the COD, supplier shall issue an invoice to the owner for an amount equal to 90% of the supply price, aggregating to USD 31,250,712. Within 14 days from the date of receipt of such invoice, the owner shall pay to the supplier, the aggregate amount specified in such invoice, without any set off, recovery or adjustment of any costs or expenses or liability. It is undisputed between the parties that the Petitioner had achieved the COD in respect of the Offshore Supplies. Petitioner is not in breach of its obligations under the OSA and has fulfilled both the pre-conditions for release of 90% of the OSP. Clause 24.8 is relevant in this context, as it provides that the OSA constitutes the entire Agreement, reflecting all understandings between the parties. Petitioner has repeatedly stated that the Project is fully functional and Respondent no.1 is unjustly enriching itself by utilizing the offshore supplies and at the same time, causing loss to the Petitioner, by not paying the due amounts as well as keeping the Petitioner unsecured, in respect of the OSP.

78. Coming to the defence taken by Respondent No.1, there is no doubt that the project involved both the Onshore as well as the Offshore Agreements. While the obligations of the Petitioner were restricted to the OSA, the obligations of its Indian Entity were under the Onshore contracts. Respondent No.1 has taken a categorical position that the Indian Entity of the Petitioner allegedly did not fulfill its obligations under the other Contracts and a number of alleged breaches on its part have been spelt out in the reply. An issue has also been raised that the two contracts were composite and interlinked and the OSA for Offshore Supplies, was only an internal arrangement of the Sterling Group. The single point responsibility for execution of the entire project was on the Sterling Group and therefore, till such time that the Indian entity does not fulfil its obligations, Petitioner is not entitled to the payment for its Offshore Supplies. Respondent No. 1 may have a valid defence during the arbitration, that the contracts are composite and interlinked or that SWPL has a Single Point Responsibility and is allegedly guilty of breaches. However, at this stage, it is not for this Court to enter into adjudication of these issues. All issues relating to the composite nature of the contracts, the alleged breaches by the parties, liabilities under the various Agreements/Side Letter/Indemnity Letter would be in the domain of the Arbitral Tribunal. At this stage, the Court is only required to see if the subject matter of the Arbitration needs to be preserved as a step in aid of Arbitration and whether the Petitioner has made out a prima facie case for grant of interim relief.

79. It is a settled law that while exercising power under Section 9 of the Act while the Court is not bound by the textual provisions of the CPC

but provisions of Order XXXIX Rule 1 and 2 CPC and Order XXXVIII Rule 5 CPC have to be kept in mind as guiding principles. In ***Raman Tech (supra)***, the Supreme Court has laid down that before passing an order in the nature of Attachment before Judgment, the Court must be satisfied that the Petitioner has a *prima facie* case and also that the Respondent is in the process of removing its assets from the jurisdiction of the Court to defeat the ultimate relief that may be granted in favour of the Petitioner. Court also held that the order under Order XXXVIII Rule 5 CPC is a drastic order and must be carefully passed and in exceptional circumstances. Relevant part of the judgment reads as under:-

> *"4. The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words 'to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of*

*attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case."*

80. To the same effect is the decision of the Bombay High Court in ***Nimbus Communications Limited vs. Board of Control for Cricket in India and Ors., 2012 SCC OnLine Bom 287*** where the Bombay High Court relied upon the judgment of the Supreme Court in ***Adhunik Steels Limited vs. Orissa Manganese and Minerals (P) Ltd,. (2007) 7 SCC 125.*** Relevant para of judgment in ***Adhunik Steels (supra)*** is as under:-

*"10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction…."*

81. Relevant part of the judgment in ***Nimbus (supra)*** is as under:-

*"22…… The Court, consequently would be obligated to consider as to whether there exists a prima facie case, the balance of convenience and irreparable injury in deciding whether it would be just and convenient to grant an order of injunction. Section 9, specifically provides in sub-clause (d)*

*of clause (ii) for the grant of an interim injunction or the appointment of a receiver. As regards sub-clause (b) of clause (ii) the interim measure of protection is to secure the amount in dispute in the arbitration. The underlying object of Order 38 Rule 5 is to confer upon the Court an enabling power to require a defendant to provide security of an extent and value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should be furnished is, however, pre-conditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be passed against him. In view of the decisions of the Supreme Court both in Arvind Constructions and Adhunik Steels, it would not be possible to subscribe to the position that the power to grant an interim measure of protection under Section 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure 1908 or that the exercise of that power is untrammeled by the Code. The basic principle which emerges from both the judgments of the Supreme Court is that though the Arbitration and Conciliation Act 1996 is a special statute, Section 9 does not either attach a special condition for the exercise of the power nor does it embody a special form of procedure for the exercise of the power by the Court. The second aspect of the provision which has been noted by the Supreme Court is the concluding part of Section 9 under which it has been specified that 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. This has been interpreted in both the judgments to mean that the normal rules that govern the Court in the grant of an interlocutory order are not jettisoned by the provision. The judgment of the Division Bench of this Court in National Shipping Company (supra) notes that though the power by Section 9(ii)(b) is wide, it has to be governed by the paramount consideration that a party which has a claim adjudicated in its favour ultimately*

*by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award. The Division Bench noted that the power being of a drastic nature, a direction to secure the amount claimed in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought was regarded as being a material consideration. However, the view of the Division Bench of this Court that the exercise of power under Section 9(ii)(b) is not controlled by the provisions of the Code of Civil Procedure 1908 cannot stand in view of the decision of the Supreme Court in Adhunik Steels.*

*xxx* *xxx* *xxx*

*24. A close reading of the judgment of the Supreme Court in Adhunik Steels would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under Section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A*

*balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b).”*

82. Reading of the judgments shows that while exercising power under Section 9, the Court has to be mindful of the trinity principles under Order XXXIX Rule 1 & 2 CPC and the underlying principles of Order XXXVIII Rule 5 CPC. Examining the present case on the touch stone of these principles in my view, the Petitioner has established a prima facie case in its favour. The factors which persuade this Court to hold so, are the undisputed facts that (a) obligations of the Petitioner under the OSA were limited to Offshore Supplies (b) Petitioner fulfilled the obligations (c) no Offshore Security cover was given to the Petitioner (d) despite complete supplies having been made and achieving the COD under the OSA, no monies have come to the Petitioner and (e) OSA for Offshore Supplies was independently executed between the Petitioner and Respondent No. 1.

83. The Balance of Convenience which is an equity doctrine also in my view lies in favour of the Petitioner. Having made the supplies, the payments due to the Petitioner are at present unsecured. Learned Senior Counsels for Respondent No. 1 have articulated that the Offshore Price is secure on account of the Hypothecation Deeds, Equitable Mortgage documents etc. Reliance is placed on the definition of ‘EPC Contract

Price' and 'Offshore EPC Price' to contend that the Hypothecation covers the Offshore Price. Relevant Clauses are as under:-

> *(a) 'EPC Contract price' meant aggregate of the Onshore EPC Price and the Offshore EPC price.*
>
> *(b) 'Offshore EPC Price' means the contract price of a sum of USD 34,151,470/- payable to Sterling and Wilson international FZE by the company in relation to the offshore component of the works in accordance with the terms of the MoU and the EPC Contract, which shall be subject to such adjustments as may be permitted in terms of the MOU or the EPC Contract.."."*

84. Petitioner on the other hand has drawn the attention of the Court to Clause 18.2 of the Hypothecation Deed to argue that the provisions of the Clause clearly stipulate that the hypothecated properties by the Deed do not constitute security for payment of the Offshore EPC Price. Relevant Clause 18.2 is as under:-

> *"18.2 It is hereby expressly clarified that the charge and security created over the Hypothecated Properties by this Deed does not constitute security for the payment of the Offshore EPC Price.*"

85. Prima facie, it appears that the Hypothecation Deed does not secure the Offshore Supply Price. Learned Senior Counsels for the Petitioner are also right in their contention that the project has liabilities towards the State Discoms under the various PPAs and is also encumbered with SWPL. In case the Petitioner succeeds in getting an Award in its favour, realization of its dues from the Project may be a long drawn battle and

may also involve complications due to the interest of the State Discoms in the same. This Court cannot lose sight of the undisputed fact that the project has utilized the Offshore Supplies made by the Petitioner and is functional and generating revenue for the Respondents. The dues of the Petitioner under the OSA need to be secured and preserved as a step in aid of Arbitration, which is the purpose and intent of the Legislature in enacting Section 9 of the Act.

86. Learned Senior Counsels for the Petitioner have rightly placed reliance on the judgment of the Division Bench of this Court in ***Ajay Singh & Ors. (Supra)***. Propounding the scope of Power under Section 9 of the Act in the light of the principles under Order XXXVIII Rule 5 CPC Court held as under:-

> "24. *The first question which the court addresses is the one adverted to by the appellant, that principles underlying Order 38, Rule 5 CPC have to be kept in mind,while making an interim order, in a given case, directing security by one party. Indian Telephone Industries v Siemens Public Communication MANU/SC/0502/2002 : 2002 (5) SCC 510 is an authority of the Supreme Court, which tells the courts that though there is no textual basis in the Arbitration Act, linking it with provisions of the CPC, nevertheless, the principles underlying exercise of power by courts-in the CPC are to be kept in mind, while making orders under Section 9. In Arvind Constructions v Kalinga Mining Corporation MANU/SC/7697/2007 : 2007 (6) SCC 798, the Court held as follows:*
>
> > *"The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application under Section 9 of the Act shall*

*have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order XVIII Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver."*

25. *Interestingly, in a previous decision, Firm Ashok Traders & Anr v Gurumukh Das Saluja & Ors*

*MANU/SC/0026/2004 : (2004) SCC 155, the Supreme Court observed that:*

> *"13...The Relief sought for in an application under Section 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated..... "*

*26. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles. In this regard, the observations of Lord Hoffman in Films Rover International Ltd. v. Cannon Film Sales Ltd. MANU/UKCH/0014/1986 : (1986) 3 All ER 772 are fitting:*

> *"But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by*

*definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."*

*27. It was observed later, in the same judgment that:*

*"The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the Court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction."*

87. The facts of the present case are indeed close to the facts in the case of ***Huawei Technologies (Supra).*** The Court noted that the goods had been supplied by the Petitioner to the Respondent in terms of the Supply Contract and were being used and enjoyed by the ultimate consignee. Despite this money was not paid to the Petitioner and thus the Court directed the Respondent to furnish a Bank Guarantee to secure the amount due to the Petitioner. Relevant para of the judgment is as under:-

> *"30. In the present case, admittedly, the goods have been supplied by the petitioner to the respondent in terms of the supply contract and respondent has further supplied the same to MTNL. The said goods are being used and enjoyed by the MTNL. The respondent after supplying the goods to MTNL has collected substantial payment and has not paid to the petitioner for supply of the goods and the payment has been retained by the respondent.*
>
> *No doubt, the claim(s) and counterclaim(s) of the parties would be adjudicated in arbitral proceedings. However, there is no reason why the petitioner's claim be not secured by requiring the respondent to furnish appropriate security, especially in the light of the contractual framework and particularly when the dues are admitted and the party has received the amount due from the employer."*

88. In view of the above, the following directions are passed by this Court:

(a) Directions issued by this Court in para 5 of the interim order dated 18.12.2018 are confirmed. These directions would be read along with the modified order on 11.01.2019;

(b) On 21.01.2019 Court had recorded the undertaking of Respondent No. 3 that it will not transfer the shareholdings of Respondent No. 4 owned by Respondent No.3 and had directed that Respondent Nos. 3 & 4 will be bound by their statements. The said order is confirmed;

(c) The amounts claimed by the Petitioner in the two petitions are USD 34,723,013 and USD 34,133,214 respectively. Respondents are directed to furnish a Bank Guarantee to secure a sum equal to 50% of the total of the two amounts mentioned above, within a period of four weeks from today, to the satisfaction of the Registrar General of this Court;

(d) Respondent Nos. 3, 5 and 6 are restrained from transferring, disposing off, creating a charge and/or encumbering, in any manner, their shares and other securities held by them in Respondent Nos. 1, 4 & 6.

89. This order would however operate till the Arbitral Tribunal vacates or modifies the same at the instance of either party to the arbitration proceedings. It is made clear that the Court has not expressed any opinion on the merits of the case and the Tribunal is free to decide the matter on merits, including vacation, variation or continuation of the order passed by this Court. The narration of facts above is only for the purpose of deciding these petitions under Section 9 of the Act.

90. With the above observations, the petitions are partly allowed. All pending applications stand disposed of.

**CCP(O) No. 34/2019 in O.M.P.(I) (COMM.) 460/2018 & CCP(O) No. 35/2019 in O.M.P.(I) (COMM.) 461/2018**

91. These petitions were filed alleging contempt of orders dated 18.12.2018 and 30.05.2019.

92. In view of the final disposal of the petitions, as above, no further orders are required to be passed in these contempt petitions. They are accordingly disposed of.

**JYOTI SINGH, J**

**JUNE 22nd , 2020**
**yo**