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

Reserved on: July 03, 2020
Decided on: July 07, 2020

\+ **FAO(OS)(COMM) 65/2020**

ASHWANI MINDA AND
M/S JAY USHIN LIMITED ..... Appellants

Through: Mr. Ratan Kumar Singh, Adv. with Mr.Gracious Timothy Dunna, Adv.

versus

M/S U-SHIN LIMITED AND
M/S MINEBEA MITSUMI INC. ..... Respondents

Through: Mr. K.V. Viswanathan, Sr. Adv. with Ms. Saman Ahsan, Mr. Nihar Thakkar, Mr. Raj Panchmatia, Mr. Sanjeev Kapoor, Mr. Abhishek Dadoo & Mr. Peshwan Jehangir, Advs.

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CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE PRATEEK JALAN

JUDGMENT

PRATEEK JALAN, J.

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "the Act"] is directed against a judgment dated 12.05.2020 rendered by a learned Single Judge of this

Court in O.M.P. (I) (Comm.) No. 90/2020. By the impugned judgment, the learned Single Judge dismissed the petition of the appellants herein under Section 9 of the Act, holding that the petition was not maintainable.

Facts

2. The appellants in the present appeal (who were the petitioners before the learned Single Judge) are Mr. Ashwani Minda [hereinafter referred to as "AM"] and a company of which he is the Managing Director, viz. Jay Ushin Limited [hereinafter referred to as "JUL"]. Two companies incorporated in Japan have been impleaded as respondents in the petition as well as in this appeal. Respondent No. 1, U-Shin Limited [hereinafter referred to as "USL"] was previously known as Yuhshin Company Limited. Respondent No. 2 is a company by the name of Minebea Mitsumi Inc. [hereinafter referred to as "MMI"].

3. The basic agreement to which the present disputes relate is a Joint Venture Agreement dated 30.05.1986 [hereinafter referred to as "the JVA"], to which USL and a partnership firm by the name of M/s Jay Industries were party. The partnership firm was represented by Mr. J.P. Minda [hereinafter referred to as "JPM"], who is the father of AM. The parties to the JVA agreed to establish a joint venture company for the primary purpose stated in clause 2.1 thereof, viz. manufacture and sale of automobile locks, steering locks and key ignition switches, door latches and combination switches for all categories of automobiles. JUL is the joint venture company created pursuant to the JVA.

4. The details of the arrangement between the parties were set out in the JVA including the organisation of equity capital (clause 2.4), the option of USL to increase its shareholding to 40% (clause 3.2), the composition of the Board of Directors (clause 5.1), technical know-how to be supplied by USL (clause 6.1) etc. For the purposes of the present dispute, the most relevant clauses of the JVA are the following:

> *"4-1 Neither YUHSHIN nor JAY shall sell the shares of New Co to any third parties unless it will first offer the other party to purchase such shares at the price to be offered to a third party. Should the party offered refuse to purchase the shares at such proposed price, the offering party may sell such shares to such third party not below the offered price."*
>
> *xxxx xxxx xxxx*
>
> *"7-1 The benefits and obligations under this Agreement shall not be directly or indirectly assigned or transferred by any of the parties hereto without a prior consent in writing of the other; provided that nothing herein contained shall be construed as restricting the right of either hereto to transfer or assign the benefits and obligations hereunder to any parent company or any company with which either party hereto has amalgamated or merged or the subsidiaries of such amalgamated or merged companies. Parent company or subsidiary company in this paragraph respectively shall mean a company which owns, controls or is owned or controlled the majority voting stocks of or by the either party hereof."*
>
> *xxxx xxxx xxxx*
>
> *"9-5 In case of failure to reach a settlement, such disputes, controversies or differences shall be submitted to the arbitration under the Commercial Rules of the India Commercial Arbitration Association to be held in India if initiated by YUHSHIN, or under the Rules of the Japan*

Commercial Arbitration Association to be held in Japan if initiated by JAY."

xxxx xxxx xxxx

"9-7 a) The formation, validity, construction and performance of this Agreement shall be governed by the laws of India.

xxxx xxxx xxxx"

5. The case of the appellants is that the interest of the partnership firm in the JVA was transferred to JPM and AM by virtue of a Memorandum of Family Settlement dated 14.02.1988, with the consent of USL. The appellants contend that through a series of further family settlements, the interest was first acquired by JPM (vide family settlement dated 21.02.2013), and thereafter by AM (vide family settlement dated 12.05.2019). AM has been the Managing Director of JUL since 1988.

6. JUL went public in 1989 and 43.7% of its shareholding is at present held by parties other than AM and USL. AM and USL in turn hold 30.3% and 26% of the shareholding respectively.

7. The dispute between the parties arises out of a transaction for mutual business integration between USL and MMI, which was announced on 07.11.2018. As a result of the said transaction, USL became a subsidiary of MMI on 10.04.2019 and delisted from the Tokyo Stock Exchange on 05.08.2019. Following these transactions, by a communication dated 16.12.2019, MMI contended that it was required to make an open offer to the public to purchase the shares of JUL. According to MMI, it was obliged to do so under the applicable provisions of the Securities and Exchange Board of India (Substantial

Acquisition of Shares and Takeovers) Regulations, 2011 [hereinafter referred to as 'Takeover Code'].

8. The contention of the appellants is that the proposed public offer in fact constitutes a breach of the provisions of the JVA, particularly clauses 4.1 and 7.1 thereof. They have therefore invoked arbitration proceedings under clauses 9.4 and 9.5 of the JVA. As the arbitration is at the instance of the appellants, who claim to be the successors of M/s Jay Industries, the proceedings are admittedly to be held in Japan under the Rules of Japan Commercial Arbitration Association [hereinafter referred to as "JCAA"]. In the request for arbitration, the appellants have also made reference to a License and Technical Assistance Agreement [hereinafter referred to as "LTAA"] dated 17.02.2014 to which JUL and USL are party.

9. By a communication dated 13.03.2020, the appellants applied before the JCAA for an emergency measure of protection under Articles 75 to 79 of the JCAA Rules. Both the respondents in this appeal were impleaded therein and the following reliefs were sought:

> *"82. Claimants seeks the following interim reliefs against Respondents (including persons claiming through or under the Respondents):*
>
> *a. to restrain Respondents from pursuing any actions or steps with respect, and in relation, to the open offer to purchase shares, in excess of its existing 26% voting share capital in Claimant No. 2, as per the India's Takeover Code;*
>
> *b. in the alternative, to restrain Respondents from exercising their rights as shareholders, in respect of shares purchased via open offer which are in excess of its existing*

26% voting share capital in Claimant No. 2, until the conclusion of the present dispute;

c. in the alternative, to grant an interim mandatory injunction to transfer the shares acquired via open offer, which are in excess of its existing 26% voting share capital in Claimant No. 2, to Claimant No. 1 at the prevailing market rate (in Aug. 2019) when it ought to have made the preemptive offer to Claimant No. 1 to comply with JVA and LTAA, and until such time restrain Respondents from exercising their rights as shareholders, in respect of shares purchased via open offer which are in excess of its existing 26% voting share capital in Claimant No. 2, from the date of said purchase to the date of said transfer.

d. an order directing the Respondents to pay the costs incurred (and to be incurred) by the Claimants in pursuing this Application for emergency measures.

e. an order of any other interim measure that the Emergency Arbitrator deems fit, in the interest of justice, fairness, and good conscience."

10. By an order dated 02.04.2020, the emergency arbitrator rejected the request, holding against the appellants both on the question of jurisdiction and merits. The emergency arbitrator *inter alia* held that he did not have jurisdiction in respect of claims under the LTAA, that JUL (being the joint venture company) could not assert claims under the JVA and that MMI is not a proper party to the proceedings. On merits, the emergency arbitrator held that the transaction between USL and MMI did not constitute an acquisition or transfer or assignment of shares of JUL, which continue to be held by USL. As far as the public offer is concerned, the emergency arbitrator held that the breach of JVA conditions, if any, would be manifest only after the public offer

fructifies, and in the event the respondents seek to assert any rights contrary to the JVA as a result thereof.

11. During the pendency of the emergency arbitration proceedings, the appellants submitted 'a request for arbitration' dated 23.03.2020 to the JCAA. The final reliefs enumerated in the request for arbitration are as follows:

> *"20. As final reliefs, Claimants seek the following against Respondents (including persons claiming through or under the Respondents):*
>
> *a. An award of declaration that Respondents breached clauses 4.1 and 7.1 of JVA and clauses 1.1 and 26.1 of LTAA.*
>
> *b. An award of damages in respect of Respondents' breach of clauses 4.1 and 7.1 of JVA and clauses 1.1 and 26.1 of LTAA: for Respondent No. 1's failing to take prior written consent from Claimant No. 1 before intending and actioning a "change of control" and transfer to Respondent No. 2 (through a mutually planned acquisition of Respondent No. 1 by Respondent No. 2) the rights, benefits, and interest in Claimant No. 2; and Respondent No. 1's failure to present a preemptive offer to Claimant No. 1 to purchase the shares of Claimant No. 2, the JV, as per JVA, since the takeover of Respondent No. 1, in effect, breaches the JVA such that the proprietary interest in the shares of Claimant No. 2 have been transferred by Respondent No. 1 to Respondent No. 2. Claimants reserve the right to quantify the damages (with interest) later in the course of the arbitration.*
>
> *c. An award of mandatory injunction against Respondents to transfer to Claimant No. 1 such percentage of its 26% voting share capital in*

Claimant No. 2 so as to prevent the breach JVA and LTAA, given the intention of Respondents (acting in concert) to give an open offer to the public, as per India's Takeover Code, to purchase the shares of Claimant No.2, at the prevailing market rate (in Aug. 2019) when it ought to have made the preemptive offer to Claimant No. 1 to comply with JVA and LTAA; and until such time restrain Respondents from exercising their rights as shareholders, in respect of shares purchased via open offer which are in excess of its existing 26% voting share capital in Claimant No. 2, from the date of said purchase to the date of said transfer.

d. *In the alternative to "c," an award of mandatory injunction against Respondents to transfer to Claimant No. 1 the shares acquired via open offer, which are in excess of its existing 26% voting share capital in Claimant No. 2, to comply with JVA and LTAA, at the prevailing market rate (in Aug. 2019) when it ought to have made the preemptive offer to Claimant No. 1 to comply with JVA and LTAA; and until such time restrain Respondents from exercising their rights as shareholders, in respect of shares purchased via open offer which are in excess of its existing 26% voting share capital in Claimant No. 2, from the date of said purchase to the date of said transfer.*

e. *In the alternative to "c" and "d," and without prejudice any of the above reliefs, an award of damages. Claimants reserve the right to quantify the damages (with interest) later in the course of the arbitration.*

f. *By Article 80.2 of JCAA Rules, an award ordering the Respondents to pay the Claimants its legal and other costs (with interest) of this arbitration.*

> g. *Such further or other relief as the tribunal deems appropriate in the interest of justice and good conscience."*

12. In the request for arbitration, the appellants also sought various interim reliefs, substantially similar to the reliefs sought in the application before the emergency arbitrator.

13. It is undisputed that the arbitral tribunal has since been constituted under the aegis of the JCAA on 13.05.2020.

14. Prior to the constitution of the arbitral tribunal, the appellants moved the petition under Section 9 of the Act [OMP (I) (COMM.) No. 90/2020] before the learned Single Judge. In the petition, the reliefs sought were similar to those enumerated as interim measures before the arbitral tribunal.

15. The learned Single Judge dismissed the petition on the grounds of maintainability, finding that the petition could not be maintained after dismissal of the appellants' request for emergency measures before the JCAA. The learned Single Judge accepted the argument of the appellants that Section 9 of the Act is also applicable to foreign seated arbitrations, consequent upon the amendment of Section 2(2) of the Act by the Arbitration and Conciliation (Amendment) Act, 2015 [hereinafter referred to as "the 2015 Amendment"]. However, it was held that the application of Part I of the Act was impliedly excluded in the facts and circumstances of the present case.

16. Aggrieved by the aforesaid judgment of the learned Single Judge dated 12.05.2020, the appellants have preferred this appeal.

Relevant Provisions of the Act and JCAA Rules

17. Before adverting to the submissions of the parties, the relevant provisions of the Act are set out below:

> *"**2. Definitions –***
>
> *xxxx xxxx xxxx*
>
> *(2) This Part shall apply where the place of arbitration is in India:*
>
> *[Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.]*
>
> *xxxx xxxx xxxx*
>
> ***9. Interim measures, etc., by Court**.—[(1)] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—*
>
> > *(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*
> >
> > *(ii) for an interim measure of protection in respect of any of the following matters, namely:—*
> >
> > > *(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*
> > >
> > > *(b) securing the amount in dispute in the arbitration;*
> > >
> > > *(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and*

authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

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

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

xxxx xxxx xxxx

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]

xxxx xxxx xxxx

17.***Interim measures ordered by arbitral tribunal****.—(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal—*

xxxx xxxx xxxx

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

(Emphasis supplied.)

It may be noted that the proviso to Section 2(2) of the Act, and Section 9(3) were both inserted by the 2015 Amendment, pursuant to the 246th Report of the Law Commission (submitted in August 2014) [hereinafter referred to as "the LC Report"]. Through the same Amendment, Section 17 was also replaced by a new provision, which included the addition of Section 17(3).

18. It would also be convenient at this stage to set out the relevant provisions of the JCAA Rules, which are as follows:

> *"**Article 71 Interim Measures***
>
> *1 A party may apply in writing to the arbitral tribunal for the grant of interim measures against the other Party ("**Interim Measures**"). Interim Measures are, for example, orders to:*
>
> *(1) maintain or restore the status quo;*
>
> *(2) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings themselves;*
>
> *(3) provide a means of preserving assets out of which a subsequent arbitral award may be satisfied; or*
>
> *(4) preserve evidence that may be relevant and material to the resolution of the dispute.*
>
> *2 The Party requesting Interim Measures under Article 71.1(1), (2) and (3) shall satisfy the arbitral tribunal that:*
>
> *(1) harm not adequately reparable by an arbitral award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the Party against whom the*

measure is directed if the measure is granted; and

(2) there is a reasonable possibility that the requesting Party will succeed on the merits of the claim.

3 <u>The arbitral tribunal may order Interim Measures under Article 71.1(4) to the extent it considers appropriate after taking into account the standards under Article 71.2.</u>

4 The arbitral tribunal, before granting Interim Measures, shall give each Party a reasonable opportunity to comment.

5 Articles 66.2, 67, and 68 shall apply mutatis mutandis to the Interim Measures.

6 <u>The Parties shall be bound by, and carry out, the Interim Measures ordered by the arbitral tribunal.</u>

xxxx xxxx xxxx

Article 75 Application for Emergency Measures

*1 <u>Before the arbitral tribunal is constituted, or when any arbitrator has ceased to perform his or her duties, a Party may apply in writing to the JCAA for Interim Measures by an emergency arbitrator (“**Emergency Measures**”).</u>*

xxxx xxxx xxxx

7 If the JCAA has received no Request for Arbitration before or at the time of receiving the application for Emergency Measures, the applicant shall submit the Request for Arbitration within ten days from the date of the application.

xxxx xxxx xxxx

Article 77 Mandate of Emergency Arbitrator

1 The emergency arbitrator may order, modify, suspend or terminate Emergency Measures in accordance with Articles 71 through 74.

2 The emergency arbitrator shall make a procedural schedule for Emergency Measures immediately after his or her appointment.

3 The emergency arbitrator, if he or she considers a hearing necessary in order to make a determination on the Emergency Measures, may hold such hearing for one day only.

4 The emergency arbitrator shall make reasonable efforts to decide on the Emergency Measures within two weeks from his or her appointment.

5 The Parties shall be bound by, and carry out, the Emergency Measures ordered by the emergency arbitrator. The Emergency Measures shall be deemed to be Interim Measures granted by the arbitral tribunal when it is constituted or when a substitute arbitrator is confirmed or appointed by the JCAA. The Emergency Measures shall remain in effect until the arbitral tribunal modifies, suspends or terminates such Emergency Measures under Article 78.2.

6 The Emergency Measures shall no longer be effective, if:

(1) the arbitral tribunal is not constituted or a substitute arbitrator is not confirmed or appointed by the JCAA within three months from the grant of the Emergency Measures;

(2) the arbitral proceedings are terminated under Article 61.1; or

(3) the JCAA receives no request for arbitration within ten days from the date of the application, where the JCAA has not received

such request at the time of or before receiving the application for Emergency Measures.

7 The mandate of the emergency arbitrator shall be terminated:

(1) in the case that the JCAA receives no request for arbitration within ten days from the date of the application, where the JCAA has not received such request at the time of or before receiving the application for Emergency Measures;

(2) on the constitution of the Arbitral Tribunal; or

(3) on the confirmation or appointment of the substitute arbitrator by the JCAA.

The JCAA may extend the mandate, if it considers it necessary.

8 The emergency arbitrator shall not be appointed as an arbitrator for the same dispute, unless otherwise agreed in writing by the Parties.

Article 78 Approval, Modification, Suspension and Termination by Arbitral Tribunal

1 <u>No determination on Emergency Measures shall be binding on the arbitral tribunal.</u>

2 <u>The arbitral tribunal may approve, modify, suspend or terminate the Emergency Measures in whole or in part."</u>

(Emphasis supplied.)

Submissions on maintainability

19. Mr. Ratan K. Singh, learned counsel for the appellants, submitted that the impugned judgment overlooks the purpose behind the proviso to Section 2(2) of the Act. Mr. Singh drew our attention to paragraph

41 of the LC Report, wherein the Law Commission observed that a party to a foreign-seated arbitration seeking interim measures in respect of properties or assets in India is unlikely to have any efficacious and enforceable remedy, other than recourse to the Indian courts. Mr. Singh further submitted that reliance upon Section 9(3) of the Act in the impugned judgment is erroneous, as the aforesaid provision refers expressly to Section 17 of the Act, which is applicable only to arbitrations seated in India.

20. According to Mr. Singh, therefore, the only question to be determined in the present case concerns the scope of Section 2(2) of the Act, and more particularly, whether the parties have agreed to opt out of the applicability of the Part I of the Act. On this aspect, he assailed the finding of the learned Single Judge that the facts of the present case revealed such an agreement. According to Mr. Singh, the analysis in the impugned judgment requires a positive agreement between the parties to apply Part I of the Act, whereas the statutory mandate in Section 2(2) is the converse, i.e. that Part I would be applicable in the absence of an agreement to the contrary. He further submitted that Article 15 of the Japanese Arbitration Act, 2003 permits parties to seek interim orders from competent courts, and relied upon the judgment of the Division Bench of Bombay High Court in *Heligo Charters Private Limited* vs. *Aircon Feibars FZE* (2018) 5 AIR Bom R 317 : 2018 SCC OnLine Bom 1388 to argue that the agreement referred to in Section 2(2) must be express, and cannot be implied from surrounding facts and circumstances.

21. Relying upon the judgment of the Supreme Court in *Transcore* vs. *Union of India*, (2008) 1 SCC 125 and the Division Bench decision of the Calcutta High Court in *Mussammat Gulab Koer* vs. *Badshah Bahadur (minor)* (1908-09) 13 CWN 1197 : 1909 SCC OnLine Cal 143, Mr. Singh further argued that the "doctrine of election" has been erroneously applied in the impugned judgment. He submitted that the remedies before the JCAA and the Indian courts are not inconsistent remedies, between which the suitor is bound to make an election. Mr. Singh further submitted that the judgment of a learned Single Judge of this Court in *Raffles Design Int'l India Pvt. Ltd.* vs. *Educomp Professional Education Ltd. & Ors.*, (2016) 234 DLT 349 permits an independent adjudication in a petition under Section 9 of the Act, notwithstanding the result of a determination by an emergency arbitrator. He contended that the judgment in *Raffles Design* (supra) has been erroneously distinguished in the impugned judgment.

22. Mr. Singh submitted that in the facts of the present case, where the interim relief sought by the appellants concerns a public offer to be made in India in the exercise of local regulations, any order passed by the arbitral tribunal would be unenforceable and the appellants would be left without any efficacious remedy.

23. Mr. K.V. Viswanathan, learned Senior Counsel for the respondents, submitted at the outset that the arbitral tribunal having been constituted in terms of the agreement between the parties, the Court ought to be circumspect in exercising powers under Section 9 of the Act. He referred to the provisions of the JCAA Rules (set out above) to argue that the arbitral tribunal is sufficiently empowered to grant

interim measures of protection in favour of the appellants, if so persuaded, notwithstanding the contrary order of the emergency arbitrator. Mr. Viswanathan submitted that the principles of Section 9(3) of the Act would be equally applicable to a foreign-seated arbitration. He argued that the efficacy of a remedy available before the arbitral tribunal (within the meaning of Section 9(3) of the Act) should be adjudicated on the basis of the width of power available to the tribunal, and not solely by reference to the relief sought by the applicant.

24. In the facts of the present case, Mr. Viswanathan submitted that the contention now taken by the appellants regarding the efficacy of the remedy before the arbitral tribunal is tantamount to an attempt to approbate and reprobate, as they had unsuccessfully invoked the procedure under the JCAA Rules to approach the emergency arbitrator. He referred to the Supreme Court's decision in *Nagubai Ammal & Others* vs. *B.Shama Rao & Others* AIR 1956 SC 593 (paragraph 21) in this connection. The grant of an interim measure by the Court in such circumstances, would, according to Mr. Viswanathan, be in derogation of the arbitral proceedings rather than in aid thereof. In any event, Mr. Visawanathan was instructed to make the following statement on behalf of the respondents during the course of hearing, which has been reiterated in the written submissions filed by them on 03.07.2020:

> *"The Respondents undertake to comply with any interim order(s) that may be passed by the arbitral tribunal which has been constituted under the JCAA Rules in the arbitration proceedings pending between the parties. This would be without prejudice to any right/ remedy available to the Respondents under the applicable law/ rules against such interim order(s)."*

25. Mr. Viswanathan further pointed out that the appellants' pleadings, in the petition under Section 9 of the Act, make it clear that they approached this Court virtually as an appellate forum against the order of the emergency arbitrator.

Submissions on merits

26. Although the impugned judgment of the learned Single Judge is confined to the question of maintainability, we also heard both sides briefly on the merits of the disputes between them.

27. Mr. Singh argued that the proposed public offer by MMI would result in acquisition of a majority shareholding in JUL by MMI, entirely contrary to the structure envisaged in the JVA. He referred particularly to clauses 4.1 and 7.1 of the JVA which, according to him, incorporate negative covenants, enforceable by orders of injunction in terms of the judgment of the Supreme Court in *Gujarat Bottling Co. Ltd. & Others* vs. *Coca Cola Co. & Others* (1995) 5 SCC 545. Relying upon the judgment of the Supreme Court in *State of Rajasthan and Others* vs. *Gotan Lime Stone Khanij Udyog Private Limited and Anr.* (2016) 4 SCC 469, Mr. Singh contended that the transaction between USL and MMI in fact constitutes an attempt to do indirectly what USL could not do directly.

28. Mr. Viswanathan, on the contrary, reiterated the findings of the emergency arbitrator to the effect that there has been no transfer of shares of JUL as a consequence of the transaction between USL and MMI. He submitted that the said transaction was in fact welcomed by AM on behalf of JUL vide communication dated 17.04.2019.

According to Mr. Viswanathan, MMI is legally mandated to make a public offer under the Takeover Code as a statutory consequence of the transaction. He submitted that this cannot be by-passed at this stage, so as to render the respondents liable to the consequences of a regulatory breach. He further argued that interim relief of the nature sought by the appellants would in fact prejudice the rights of the public shareholders of JUL to tender their shares in the public offer.

29. Mr. Viswanathan also argued that the arbitration proceedings as constituted are misconceived for misjoinder of parties, which point has *inter alia* been raised before the arbitral tribunal as a jurisdictional objection. He submitted that MMI is not a signatory to the JVA and therefore not bound by its provisions. With regard to entitlement of AM, he submitted that the Family Settlement document dated 12.05.2019, upon which AM relies, grants him rights in JUL only after the lifetime of JPM. As JPM is still alive, Mr. Viswanathan contends that no rights have vested in AM thereunder.

30. Mr. Singh, in rejoinder, argued that the appellants' communication dated 17.04.2019 cannot constitute acquiescence or waiver in any respect, as the integration of the business of USL and MMI had already been concluded before that date. He cited the judgments of the Madras High Court in *Kunhammed* vs. *Narayanan Mussad* ILR 1889 (12) Mad 320 and of the Oudh Chief Commissioner's Court in *Ram Avadh Pande* vs. *Ghisa Pande* AIR 1941 Oudh 611 to submit that the concepts of acquiescence and waiver are not applicable in the facts and circumstances of the present case. He also referred to clause 9 of the JVA in this connection.

31. With regard to the locus of AM in the arbitration proceedings, Mr. Singh submitted that the Family Settlement Deed dated 12.05.2019, to which JPM and AM are party, is not a testamentary disposition but a settlement deed by virtue of which rights vest in AM *in praesenti*. Mr. Singh cited the judgment of the Supreme Court in *P.K. Mohan Ram* vs. *B.N. Ananthachary and Others.* (2010) 4 SCC 161 in support of this contention.

Analysis

32. In the light of the facts and submissions recorded above, the primary question which requires consideration is whether the appellants ought to be permitted to proceed with their request for interim measures of protection under Section 9 of the Act, after having failed in obtaining similar relief from the emergency arbitrator under the JCAA Rules, and even after the constitution of the arbitral tribunal.

33. Although Section 9(3) of the Act is, on its terms, expressly relatable to India-seated arbitrations, as evidenced by the reference to Section 17 of the Act, we are of the view that the principle thereof is equally applicable when interim measures are sought in the Indian courts in connection with a foreign-seated arbitration. Resolution of disputes by a tribunal of the parties' choice, and reduced interference by courts, are amongst the central features of arbitration. Section 9(3) of the Act reflects that understanding, and manifests a legislative preference that the grant of interim measures ought to be considered by the arbitral tribunal, once constituted, rather than by the courts. It is only when the remedy before the tribunal lacks efficacy, that a party can seek

interim measures from the court under Section 9. In the LC Report also, the following justification is provided for the insertion of Section 9(3) into the Act:

> *"[NOTE: This amendment seeks to reduce the role of the Court in relation to grant of interim measures once the Arbitral Tribunal has been constituted. After all, once the Tribunal is seized of the matter it is most appropriate for the Tribunal to hear all interim applications. This also appears to be the spirit of the UNCITRAL Model Law as amended in 2006.*
>
> *Accordingly, section 17 has been amended to provide the Arbitral Tribunal the same powers as a Court would have under section 9.]"*
>
> (Emphasis supplied.)

34. Mr. Singh submitted on behalf of the appellants that the aforesaid principle is not applicable to foreign-seated arbitrations, as interim measures granted by India-seated tribunals alone are automatically enforceable in India under Section 17(2) of the Act. It is for this reason, according to Mr. Singh, that Section 9(3) refers only to the availability of a remedy under Section 17, and not to remedies that may be available before a foreign-seated arbitral tribunal. Mr. Singh pointed to this very difference as the rationale for the insertion of the proviso to Section 2(2) of the Act, as contained in paragraph 41 of the LC Report, wherein the Law Commission referred to the decision of the Supreme Court in *Bharat Aluminium and Co.* vs. *Kaiser Aluminium and Co.*, (2012) 9 SCC 552, and observed as follows:-

> *"41. While the decision in BALCO is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.*

(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it.

That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

(ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre- BALCO."

35. We are unable to accept Mr. Singh's contention. The primary purpose of Part I of the Act (which inter alia includes Section 2, 9 and 17) is to govern India-seated arbitrations. The reference in Section 9(3) to Section 17 alone, cannot therefore be dispositive of the question as to whether the same principle applies where the arbitration is seated outside India. In our view, the absence of a specific reference to foreign-seated arbitrations in Section 9(3) ought not to be construed as a widening of the Section 9 power, to cover cases where the arbitral tribunal has been constituted, and is capable of granting efficacious relief. Such an interpretation would not just extend the scope of Section 9, but would amount to the provision being available in the Indian courts in connection with foreign-seated arbitrations, but not in connection with India-seated arbitrations. We therefore hold that, although an application under Section 9 is maintainable in connection with a foreign-seated arbitration, an application thereunder would not lie after the constitution of the arbitral tribunal, unless the applicant demonstrates that it does not have an efficacious remedy before the tribunal. (We are not required in the facts of the present case to decide whether the availability of a remedy before an emergency arbitrator, or the seat court, would also dissuade the Indian court from granting relief under Section 9.)

36. In considering the aforesaid question, the Court would certainly have regard to the question as to whether the remedy before the arbitral tribunal would be efficacious or not. This caveat is incorporated in Section 9(3) also, and would turn upon the facts and circumstances of each case, including the amplitude of the power conferred upon the

arbitral tribunal. In making this assessment, the manner in which the applicant has framed the relief sought cannot be determinative; the more appropriate test is whether the tribunal is sufficiently empowered to grant effective interim measures of protection. It may well be that, in the circumstances mentioned in paragraph 41 of the LC Report, the Court would come to the conclusion that the application ought to be entertained. However, this does not obviate the necessity for a determination of the question.

37. Turning to the facts of the present case, it is undisputed that the arbitral tribunal has in fact been constituted. Articles 71 and 78 of the JCAA Rules, enumerated above, make it clear that the tribunal has ample power to grant interim measures of protection, notwithstanding the findings of the emergency arbitrator. Mr. Singh contended that the measures sought by the appellants concern acts to be done in India, and even if the arbitral tribunal grants an order in favour of the appellants, the same would not be enforceable. It was also argued that any interim measure of protection is not enforceable under the JCAA Rules or under Japanese law. Mr. Viswanathan, on the other hand contended that Article 24(2) of the Japanese Arbitration Act, 2003 empowers the tribunal to direct either party to provide security in connection with any interim measure, and such an order, if granted, would enure in aid of enforcement. We do not attempt to render any finding on Japanese law on the materials before us. Suffice it to say that, in the present case, the respondents are both Japanese corporations, and the interim reliefs enumerated in the Request for Arbitration dated 23.03.2020 are in the form of injunctions against them. The voluntary statement made by

them, as recorded in paragraph 24 above, also satisfies us that in the event the tribunal grants an interim measure in favour of the appellants (subject to any remedies that the respondents may have in law), the remedy would not be inefficacious. Additionally, we note that the appellants did in fact approach the emergency arbitrator under the JCAA Rules. It can be presumed therefrom that the appellants did not have any reservation about the efficacy of that remedy. The contrary contention now raised therefore appears to be an afterthought, induced by the lack of success in the emergency arbitration proceedings. Mr. Viswanathan is right in suggesting that this amounts to an attempt by the appellants to approbate and reprobate, which cannot be permitted. Reference in this connection may be made to the Supreme Court's decision in *Nagubai Ammal* (supra) (paragraph 21).

38. In fact, in the petition filed by the appellants before the learned Single Judge under Section 9 of the Act, they have stated that the petition is necessitated by the fact that the arbitral tribunal had not yet been constituted, and not because the remedy before it would be inefficacious. The final paragraph of the list of dates attached to the Section 9 petition, which is repeated in paragraph 52 of the petition (at pages 483 and 506 of the appeal paperbook, respectively) reads as follows:

> *"52. <u>Since the constitution of the main tribunal is due for near a month's time</u>, the present Application is being filed by the Applicants seeking urgent interim measures of protection under Section 9 of the 1996 Act...."*

(Emphasis supplied.)

Similarly, in paragraph 70 of the petition (at page 512 of the appeal paperbook), it has been averred as follows:

> *"70. The Hon'ble High Court is not barred from entertaining this Application as the main arbitral tribunal has not been formed under the selected institution (JCAA), which is the only consideration to be made under Section 9 of the Arbitration and Conciliation Act 1996. The concluded Emergency Arbitration ("EA") proceedings do not weigh in against the Applicants in pursuing this Application under Section 9."*
>
> (Emphasis supplied.)

Paragraph 2 of the appellants' written submissions before the learned Single Judge (at page 894 of the appeal paperbook) are to similar effect. The appellants have not approached this Court because the arbitral tribunal would not be able to render effective orders in their favour, but because the tribunal had not then been constituted. Mr. Singh's arguments regarding the applicability of the principle of Section 9(3) to foreign-seated arbitrations, and the efficacy of the remedy available to the appellants before the arbitral tribunal, are thus wholly in excess of the pleadings of the appellants before the learned Single Judge. The arbitral tribunal having since been constituted, the contention raised in the petition no longer survives.

39. Turning now to the "doctrine of election" invoked in the impugned judgment, Mr. Singh submitted that the said doctrine is applicable only when the remedies sought are inconsistent and both the remedies are efficacious. He cited the judgment of the Supreme Court in *Transcore* (supra) and the Division Bench decision of Calcutta High Court in *Mussammat Gulab* (supra) to this effect.

40. However, this contention also does not appeal to us. The aforesaid judgments, considering the doctrine of election as a facet of estoppel, emphasise the condition that the contentions of the party must be inconsistent. However, we have not been referred to any authority for the proposition that a party which fails in obtaining a remedy before a forum which has jurisdiction to grant it, can then seek the same relief in an alternative forum. A reading of the application under Section 9 of the Act, clearly shows that the appellants regarded the present proceedings as a remedy against the order of the emergency arbitrator. The appellants have submitted that they "are aggrieved by" the said order (list of dates, paragraph 51 and 71 of the application under Section 9 of the Act, at pages 483, 506 and 512 of the appeal paperbook). No such appellate remedy is provided under the Act, and the application itself was therefore misconceived.

41. After the amendment of Section 2(2), a party to a foreign-seated arbitration has the option of seeking interim measures of protection in the Indian courts, or of going to the seat court or the tribunal for interim relief. The question that arises in this case is whether having chosen to invoke the JCAA process and go to the emergency arbitrator, and having failed in its endeavor to obtain interim relief, the party can then seek the self-same relief in Section 9 proceedings. Neither a purposive interpretation nor the legislative history of the 2015 Amendment reveal an intention to permit such a course. The legislative intent was to provide an efficacious alternative means for seeking relief in the Indian courts, where the arbitral tribunal is either not constituted or otherwise unable to grant efficacious relief. Having chosen the tribunal, the seat,

the applicable rules and the forum from which to seek interim measures, the appellants cannot revise that choice at this juncture.

42. The appellants' reliance upon the judgment of a learned Single Judge in *Raffles Design* (supra) is similarly misplaced. The relevant observations in *Raffles Design* (supra) are as follows:

> *"104. In the circumstances, the emergency award passed by the Arbitral Tribunal cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit.*
>
> *105. However, in my view, a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. Needless to state that the question whether the interim orders should be granted under section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal. Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted.*
>
> *106. It is relevant to note that the provisions under Article 171(2) of the Model Law, the court enforcing an interim order passed by an Arbitral Tribunal in prescribed form undertakes a review of the substance of interim measure the Model Law. To that extent, a Court while examining a similar relief under Section 9 of the Act would be unfettered by the findings or the view of the Arbitral Tribunal."*

43. The significant difference between *Raffles Design* (supra) and the present case is that the emergency arbitrator in *Raffles Design* (supra) had granted an interim measure in favour of the petitioner therein, which had also been enforced by the Singapore High Court under

Section 12 of the International Arbitration Act. The Section 9 petition before this Court was filed in view of subsequent events which showed that the respondents were refusing to act in terms of the emergency order. It is in these circumstances that the petition under Section 9 was held to be maintainable and it was also held that the question would be considered by Indian court independently. The observations in paragraph 105 and 106 are in the context of paragraph 104 which would only arise when an emergency order has been made by the arbitrator and not in a situation where the arbitrator has rejected that relief.

44. In view of our findings above, it is not necessary to examine the correctness of the finding of the learned Single Judge in paragraph 54 that the provision of the foreign seat and rules itself evince the intention of the parties to exclude Part I of the Act. The question is expressly left open to be decided in an appropriate case. It is made clear that the impugned judgment will not foreclose the issue, even in the context of the arbitration agreement and arbitral proceedings which form the subject matter of this litigation.

45. Similarly, having held that the petition filed by the appellants under Section 9 of the Act was not maintainable in the facts and circumstances of the case, we do not consider it necessary to adjudicate the merits of the dispute. In our view, it would be more appropriate to leave all questions of jurisdiction and merits for decision by the arbitral tribunal, whether in an application for interim measures or at the final stage of the proceedings.

Conclusion

46. For the reasons aforesaid, the present appeal is disposed of with the following directions:

(a) The judgment of the learned Single Judge, to the effect that the petition filed by the appellants under Section 9 of the Act was not maintainable, is affirmed.

(b) The appellants are at liberty to invoke such other remedies as may be available to them in law, including under the JCAA Rules. We make it clear that we have not expressed any view regarding the contentions raised by the parties before the arbitral tribunal, on jurisdiction or on merits.

(c) The question as to whether the parties have agreed to opt out of the applicability of Section 9 of the Act is left open, and may be agitated by the parties in subsequent proceedings, if necessary. The impugned judgment will not be treated as having decided this issue finally.

47. There will be no order as to costs.

PRATEEK JALAN, J

CHIEF JUSTICE

JULY 07, 2020

'Hkaur'