IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: June 09, 2020

\+ **OMP(I) (COMM) 120/2020**

GOODWILL NON-WOVEN(P) LIMITED ..... Petitioner
Through: Mr. Parag P. Tripathi, Sr. Adv. with Mr. Sriniwas Ramaswamy & Mr. Shikhar Khare, Advs.

versus

XCOAL ENERGY & RESOURCES LLC ..... Respondent
Through: Mr. Monish Panda, Adv. with Mr. Sumit Rai & Mr. Kshitiz Arya, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996, with the following prayers-:

i. Direct the Respondent to furnish adequate security in the form of a bank guarantee issued by a nationalized bank in India or such other security that shall cover the entire sum in dispute between the parties;

ii. Alternatively, direct the Respondent to deposit with this Hon'ble Court a sum of USD 1,182,735 which is equivalent to the amount paid by the Petitioner herein to the Respondent as consideration under the Contract dated 10.03.2020.

iii. Direct the amount so deposited by the Respondent be kept in an interest-bearing fixed deposit until the conclusion of the arbitration proceedings.

iv. Pass such other further order(s) in favour of the Petitioner as this Hon'ble Court may deem fit and proper in the facts of the present case.

2. The Petitioner, Goodwill Non-Wovens (P) Limited is a private limited company incorporated under the provisions of the Companies Act, 1956 having its registered office at 54, Todermal Road, Bengali Market, New Delhi 110001. The petitioner was incorporated in the year 2008 for the purpose of undertaking the business of buying, selling, exporting, importing, manufacturing, various commodities. The present petition is instituted, filed, verified and signed by the Director of the petitioner Company, Mr. Ashok Jain, on the basis of a Board Resolution date 15 May, 2020.

3. The respondent, XCoal Energy & Resources LLC., is a privately-owned global coal marketing and logistics company headquartered in Latrobe, Pennsylvania.

4. The parties entered into a Contract dated March 10, 2020 ('Contract', for shot) for sale and delivery of 13,500MT of Consol BEFH US High CV Thermal Coal ('Coal', for short) at the designated port. As per Clause 12 of the Contract, petitioner was to make requisite payment to the respondent and in turn the respondent was to make the delivery of the Coal to the petitioner upon receipt of such payment.

5. It is the case of the petitioner and admitted by the respondent that in terms of Clause 12 of the Contract, the petitioner established an irrevocable Letter of Credit bearing number 027LC01200720007 drawn on HDFC Bank, New Delhi ('Letter of Credit', for short) for the entirety of the cargo value.

Against the said Letter of Credit, full payment amounting to a sum of USD 1,182,735 was remitted to the respondent's designated bank account held with Wells Fargo Bank, N.A., New York International Branch on April 21, 2020. Pursuant to the establishment of the aforesaid Letter of Credit, the respondent shipped to the petitioner 13,500MT of Coal on board the vessel MV Berge Toubkal from Console Marine Terminal, Baltimore, Maryland on March 22, 2020. The Commercial Invoice dated March 27, 2020 issued by the respondent ('Commercial Invoice', for short) *inter alia* records that the payment under the aforesaid Letter of Credit was due at sight. The payment under the said Letter of Credit was subsequently realized by respondent on April 21, 2020.

6. It is the case of the petitioner that it even received a 12-Day Pre-Arrival Notice dated April 22, 2020 ('Pre-Arrival Notice', for short) issued by the vessel agent of respondent. Vide the said Pre-Arrival Notice, the petitioner was informed that the vessel was due to arrive at the designated port on May 04, 2020, where the Coal would be discharged in accordance with the Contract. And in repose to the said Notice, the petitioner vide email dated April 23, 2020 wrote to respondent stating *inter alia* that it had performed its respective obligations including making the full payment under the Contract on April 21, 2020 and requested respondent to ensure immediate unloading and delivery of the Coal, which was due to arrive on May 04, 2020.

7. It is the case of the petitioner, on May 04, 2020, it received a copy of a marked e-mail sent by the respondent to M/s Kalyani

(India) Private Ltd. ('M/s. Kalyani', for short), calling upon M/s. Kalyani to fulfill its contractual obligations with respondent. It is the averred that the petitioner has no privity of contract with M/s. Kalyani, and the performance of its Contract with the respondent is independent of any contract entered into by the respondent with M/s. Kalyani or any third party for that matter.

8. It is averred that the petitioner, immediately, on May 05, 2020, in response to the above-mentioned e-mail, sent an e-mail to the respondent stating that it had performed all its obligations under the Contract and in view thereof, respondent must discharge the Coal.

9. It is the case of the petitioner, even after pointing out that it had complied with all the contractual obligation, respondent failed to discharge the Coal and the respondent vide a telephonic conversation on May 08, 2020, informed the petitioner that the shipped quantity of Coal shall not be discharged at the designated port until such time certain third parties (viz. M/s. Kalyani) all of whom have purportedly entered into separate agreements with the respondent perform their respective contracts with the respondent, which is in violation of the stipulations of the Contract.

10. It is the case of the petitioner that, subsequent to stand contrary to the Contract taken by the respondent, it addressed a legal notice dated May 09, 2020 ('Notice of Default', for short) asking respondent to rectify the breach to the Contract committed within 5 days in terms of Clause 21, failing which it was stated that the Contract shall be deemed to be terminated and that the legal proceedings shall be initiated against the respondent. Since

there was no response to the Notice of Default by the respondent, the petitioner terminated the Contract vide Letter of Termination dated May 19, 2020 ('Letter of Termination'). Respondent, however responded to the Letter of Termination, denying the grounds for termination, directing petitioner take discharge of Coal failing which the same shall be discharged by the respondent itself on the basis of the Contract, at the expense of the petitioner.

11. It is further the case of the petitioner that the vessel agent of the respondent, communicated to the petitioner vide an e-mail dated May 22, 2020, intimating that petitioner's Coal was ready for discharge at Kandla Port and the requisite documents were submitted for filing of Import General Manifest ('IGM', for short) and the petitioner reverted to this communication vide an e-mail, on the same day, stating that the Contract stood terminated on May 19, 2020 and the petitioner does not have any responsibility with request to the cargo/Coal.

12. It is the case of the petitioner that owing to termination of the Contract on respondent's default, petitioner is entitled to refund of the monies remitted under the Contract along with damages in arbitration proceedings to be invoked by the Petitioner in due course. Petitioner, thus claims in the wake of the COVID-19 pandemic and the procedural timelines regarding invocation of arbitration and constitution of the arbitral tribunal under the rules of arbitration of the International Chamber of Commerce ('ICC') and also due to reasonable apprehension that the respondent may make attempts to obstruct the satisfaction of the decree which may be awarded to the petitioner in the arbitration proceedings, seeks

an interim relief against the respondent to secure the amount in dispute. It is also the case of the petitioner that since the petitioner had fulfilled its contractual obligations, petitioner has in its favour a *prima facie* case, balance of convenience and irreparable harm and injury will be caused if an interim-relief is not granted in its favour.

13. On the preliminary objection taken by the respondent on the maintainability of the petition as per Section 2(2) of the Act, it was submitted by Mr. Parag P. Tripathi, learned senior counsel appearing on behalf of the petitioner that even though as per the dispute resolution clause (Clause 21), validity, construction and performance of the Contract shall be determined in accordance with laws of State of New York, USA and provides that all disputes shall be referred to a tribunal of 3 arbitrators pursuant to the rules of ICC, respondent has failed to establish non-applicability of Section 2(2) as there was nothing in the Contract, which excluded the applicability of Part-I of the Act.

14. It was submitted by Mr. Tripathi that, in fact relevant Rules of the ICC, which have been agreed by the parties to govern the arbitration proceedings, do not prevent either party from approaching the Court for grant of interim measures in terms of Articles 28.2 and 29.7 of the ICC Rules, which reads as under :

> "*28.2 : Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for*

such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof"

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29.7. The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat."

15. In support of his submission that there is no bar either in law or in Contract to the invocation of jurisdiction of this Court, he has placed reliance on a co-ordinate bench judgment of this Court in ***Raffles Design International India Private Limited v.***

Educomp Professional Education Limited & Ors., 234 (2016) DLT 349; a matter under the Act as amended by The Arbitration and Conciliation (Amendment) Act, 2015, ('Amended Act', for short) involving identical facts where the contract contemplated the governing law as Singapore law and arbitration under the SIAC Rules, the Court held that it would not be improper for parties to approach a court for interim-relief as the same is not incompatible with the SIAC Rules.

16. It was also submitted by Mr. Tripathi that the plea of the respondent on *forum non conveniens*, does not stand proved as the respondent has failed to show any material or judicial authority in this regard. In support, he has relied upon ***Modi Entertainment Network v WSG Cricket Pte Ltd., (2003) 4 SCC 341.***

17. Further, he submitted that the petitioner has a *prima facie* case by relying upon documents such as Letter of Credit which was realized in respondent's bank account on April 21, 2020, the Commercial Invoice which reflects the said realization, Clause 12 of the Contract which states that the buyer is relieved from its payment responsibility once fully clean letter of credit is received at seller's counter, Pre-Arrival Notice, Notice of Readiness dated May 05, 2020 by respondent's vessel agent ('Notice of Readiness' for short), Notice of Default, Letter of Termination and the various communications indicating that petitioner's obligations stands discharged. Moreover, Mr. Tripathi submitted that the prices of coal have depreciated to around USD 67.09 per MT, which has caused great loss/prejudice to the petitioner and the same is evident from a comparison of the Bill of Entries filed by

the respondent itself in respect of one shipment for which IGM was filed on May 05, 2020 and another shipment which was refused by M/s. Kalyani and for which IGM was filed on May 28, 2020.

18. On the respondent's plea of it being a foreign company with no assets and that the ingredients of Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 ('CPC', for short) were not satisfied, Mr. Tripathi submitted that it is wholly misplaced in view of a coordinate bench judgment of this Court in ***Steel Authority of India Limited v. AMCI Pty. Limited & Anr., MANU/DE/3413/2011,*** a petition filed under Section 9 with regard to an arbitration proceedings under ICC Rules, directed the respondent therein, a foreign company, to deposit a sum of USD 152.85 Million by relying upon a Division Bench judgment of the Hon'ble Bombay High Court in ***National Shipping Company of Saudi Arabia v. Sentrans Industries Limited, (2004) 106(2) BomLR 695,*** and further went on to hold that the powers conferred on a Court under Section 9 are wider than a civil court and is not fettered by the text of the Order XXXVIII.

19. He also relied on ***Adhunik Steel Ltd. v. Orissa Manganese and Minerals Ltd., (2007) 7 SCC 125,*** to contend that reliefs under Section 9 are to be guided by well-established principles of grant of injunction such as prima facie case, balance of convenience, etc. However, the power under Section 9 is not limited or curtailed to the letter and language of Order XXXVIII or XXXIX of CPC but is to be exercised to safeguard the interests of the party.

20. Mr. Manish Panda, learned counsel appearing on behalf of the respondent, as taken a preliminary objection as to the maintainability of the present petition under Section 9. He submitted that the arbitration under the Contract is an International Commercial Arbitration, seated in New York and applicable law is the laws of the State of New York and the respondent against whom reliefs have been claimed is a limited partnership registered in USA, which does not have any assets in India as Section 2(2) of the Act makes it amply clear that this Court will have jurisdiction to pass any order in a petition filed under Section 9 of the Act in an International Commercial Arbitration, where the place of arbitration is outside India, only if the arbitral award made or to be made, in such arbitration is enforceable and recognized under the provisions of Part – II of this Act. In other words, it is his submission that the jurisdiction vested on an Indian Court under the proviso to Section 2 (2) of the Act is an asset based jurisdiction, only when the asset of the counter party against which an order is being sought is based in India, an Indian Court can exercise its jurisdiction under the proviso to Section 2 (2). The language is clear and unambiguous that before exercising its jurisdiction under the proviso to Section 2 (2), the Court needs to first determine whether if an award was made in the arbitration, could such an award be enforced against the respondent.

21. He further submitted that law applicable to the present contract is the law of State of New York. The seat of arbitration is in New York. The curial law as well as the law applicable to the arbitration agreement is that of New York. It is thus clear that the

intention of parties was to subject themselves to the jurisdiction of courts in New York alone – except to the extent it is essential to enforce an Award or protect such subsequent enforcement and assuming that an Award is passed against the respondent, the petitioner would have no way of getting the Award executed against the respondent in India, owing to non-availability of assets, under Part-II of the Act.

22. Mr. Panda relied upon paragraphs 41, 42 and 43 of the 246th Law Commission Report, to draw the attention of this Court to the rationale behind the insertion of proviso to Section 2(2) of Act by The Arbitration and Conciliation (Amendment) Act, 2015. He submitted that though the decision in ***Bharat Aluminum and Co. vs. Kaiser Aluminium and Co., (2012) 9 SCC 552***, was a step in the right direction aimed to reduce the judicial intervention in foreign seated arbitration, by excluding the applicability of Part-I, there were few areas which were problematic, the primary one being, cases where the assets of a party are located in India and since there is likelihood that such parties will dissipate its assets in the near future, the other party will lack an efficacious remedy. According to him, it was to give a leeway for an effective remedy that Law Commission recommended the insertion of the proviso to Section 2(2) as a pre-enforcement measure to the foreign party to seek a protective order from an Indian Court against a party whose assets are in India, so that enforcement of award against the Indian party who has assets in India does not become unenforceable for the reason that the assets which are in India have been dissipated by the Indian party during the course of arbitral proceedings in the

foreign seated arbitration.

23. He further submitted that by no stretch of imagination, it can be said that the power vested under the proviso to Section 2(2) of the Act was meant for proceeding against a party in a foreign seated arbitration where such party (i.e. the respondent) is neither amenable to court's personal jurisdiction nor has any assets in India. For this reason, the proviso requires the Court before exercising its jurisdiction under Section 9 to question whether an Award if passed in an International Commercial Arbitration, could be enforced against the party in India. If such foreign award could not be enforced by an Indian Court for the simple reason that no assets of the respondent i.e. the foreign party, is within the jurisdiction of the Indian Court, then the Indian court does not have jurisdiction under proviso to Section 2(2) to entertain an application under Section 9 of the Act. Any other interpretation would make the intention of the amendment to the Act made in 2015 completely nugatory.

24. Mr. Panda has relied upon ***Garware Wall Ropes Ltd. vs Coastal Marine Constructions and Engg. Ltd., (2019) 9 SCC 209*** and ***Mayavati Trading Pvt. Ltd. vs Pradyut Deb Burman, (2019) 8 SCC 714***, to contend that the Apex Court relied upon the 246th Law Commission recommendations to interpret the true intent and purport of the amendment introduced by the The Arbitration and Conciliation (Amendment) Act, 2015 with regard to Section 11 of the Act. He has also relied upon ***Mithilesh Kumar and Ors. vs. Prem BehariKhare, AIR 1989 SC 1247,*** to submit that Law Commission Reports can be referred to as external aids of

construction especially where a particular enactment or amendment is the result of recommendation of the Law Commission of India.

25. He stated that reliance placed by the petitioner on ***Raffles Design International India Pvt. Ltd. & Anr. (supra)*** is misconceived, as in the said case, the party against whom relief was sought was Indian party and the Award (obtained from the Emergency Arbitrator) being enforceable in India, is clearly distinguishable in facts as compared to the present case. He contested the reliance placed by the petitioner on ***Steel Authority of India Limited (supra),*** by stating that the said judgment was prior in time to the 2015 Amendment and had India as the seat of Arbitration, and therefore clearly distinguishable.

26. Mr. Panda, without prejudice to his stand also stated that the petitioner has failed to show/prove that any cause of action or part any material part thereof has been suffered in New Delhi, to substantiate this Court has jurisdiction and that the ports Kandla/Tuna being in Gujarat, it would be High Court of Gujarat that would have jurisdiction.

27. Mr. Panda further stated that the petitioner has appropriate and effective alternate remedies of appointing an Emergency Arbitrator under the ICC Rules of Arbitration whereby an Emergency Arbitrator will be appointed within 2 days of an application and an Order will be made within 15 days of application being forwarded to the Emergency Arbitrator or the petitioner can invoke the jurisdiction of New York Courts, as the seat of Arbitration is New York. He, while conceding that

availability of such measure does not bar jurisdiction of courts, vehemently contested that it goes on to show that the petitioner intentionally chose to come to this court even though the relief is exclusively claimed against a US party in a US seated arbitration only because it knows that attending to such action will be not be convenient for the respondent. He went on to submit that, such interim relief if granted by the Emergency Arbitrator under Article 29 of the ICC Rules, will be easily enforceable as seat of arbitration is New York, USA and the respondent, carrying out business in the US and has its assets there. Therefore, this Court ought not to interfere in the present matter due to being a *forum non conveniens* –even if the primary objection as to jurisdiction is not accepted.

28. Mr. Panda stated that there is no *prima facie* case on merits as well because, the Contract being a CIF contract, stood concluded the moment the goods were loaded on the ship and the payment was received by the respondent by placing reliance on documents relied upon by the petitioner itself makes good this fact. The Contract being an executed contract, there was no scope for the petitioner to terminate the Contract vide the Letter of Termination, in terms of Clause 14. Moreover, he contended that the petitioner has claimed the termination of the Contract on breach of material obligations, failed miserably to point in terms of the Contract, the obligation which the respondent is in breach of and in terms of Clause 13 (a) to (q), the respondent has not failed in any obligations. The ground of termination as stated in the Letter of Termination is the delay in discharging of the cargo and

Clause 13 of the Contract does not stipulate any time period for discharging the cargo/Coal at the discharging port and even assuming that discharge of cargo was a material obligation and there was a delay in discharge, nothing suggests that respondent is responsible for the same.

29. Mr. Panda also stated that the petitioner's allegation that that respondent did not allow discharging of the cargo at Tuna, is a bald allegation completely belying the CIF terms and the contractual scheme for discharge obligations. Arrangement for discharge in all CIF contracts is upon the Buyer and there is nothing in the present Contract that deviates from the same. The same has been contended by the respondent in their reply dated May 22, 2020 and May 26, 2020 that the petitioner never nominated their agent for taking discharge, neither did they intimate to the shipping line the discharge berth for the purpose of discharging at the discharge port which is required under clause 13(b) of the Contract. In fact, Mr. Panda submitted that from the communications dated May 05, 2020, May 06, 2020 and May 07, 2020, it is evident that the petitioner showed an inclination to receive the cargo at Kandla port but provided no details of any arrangements and in fact has unilaterally rejected the notice of readiness that was issued by the vessel on May 06, 2020.

30. It was submitted by Mr. Panda that the termination of the Contract, was bad in terms of Clause 21, which stipulates designating a date of termination in the written notice seeking termination after the expiry of the initial cure period as per Clause 21(c), which was not the procedure followed in the present case.

31. He also submitted that it is settled now that the party claiming relief under Section 9(1)(ii)(b) of the Act should a) establish a *prima facie* case, and b) demonstrate by putting on record adequate material leading to a definite conclusion that the other party is likely to render the entire arbitration proceedings infructuous by frittering away the properties or funds either before or during the pendency of arbitration proceedings and has also failed to demonstrate how the principles of Order XXXVIII Rule 5 of CPC is satisfied for issuance of a direction under Section 9(1)(ii)(b) to the respondent. In support, he has relied upon the Bombay High Court judgment in ***Nimbus Communication Ltd. vs. Board of Control for Cricket in India and Another., 2012 SCC OnLine Bom 287,*** which relied upon the Apex Court judgment ***Adhunik Steels Ltd. (supra),*** wherein it is held that has held that the underlying principles of Order XXXVIII Rule 5, and the provisions of Specific Relief Act, 1963 ('Specific Relief Act', for short) are applicable in deciding whether relief ought to be granted to a party which has approached under Section 9 of the Act.

32. Mr. Panda contended that the plea of the petitioner in terms of the Bombay High Court judgment in ***National Shipping Company Of Saudi Arabia (supra)***, to submit that the principles of Order XXXVIII Rule 5 are not relevant while adjudicating an application under Section 9(1)(ii)(b) of the Act, no longer holds field as the said decision stands impliedly overruled by the Supreme Court judgment in ***Adhunik Steel Ltd. (Supra)*** and in ***Arvind Constructions vs Kalinga Mining Corporation; (2007) 6***

SCC 798. This aspect has been noted by the Hon'ble Bombay High Court in ***Nimbus Communications (Supra)*** as well. In other words, it is submission that it is an established principle, powers under Section 9 are not wider that powers available to court to order such reliefs under CPC. He also stated that the said judgments and principles were followed in judgments of this Court in ***BMW India Pvt. Ltd. and Ors. Vs. Libra Automotives Pvt. Ltd. and Ors., 261(2019) DLT 579*** and ***Tata Advance Systems Ltd. Vs. M/s Telexcell Information Systems Ltd., ARB.A.(COMM.) 29/2019 & I.A. 14057/2019.*** He further stated that petitioner has failed to establish/satisfy this Court that the respondent is attempting to remove or dispose of its assets with the intention of defeating the decree that may be passed, which is the requisite laid down by the Apex Court in ***Raman Tech & Process Engg. Co. and Anr. vs Solanki Traders, (2008) 2 SCC 302,*** before the courts grant relief under Order XXXVIII Rule 5.

33. Mr. Panda also placed reliance on the following judgments of this Court in ***C.V. Rao vs. Strategic Port Investments KPC Ltd., 218 (2015) DLT 200***, ***OlexFocas Pty. Ltd. & Anr vs. Skodaexport Co. Ltd. & Anr., 1999 SCCOnLine Del 899, Parsoli Motors Works Pvt. Ltd. vs BMW India Pvt. Ltd***., ***247 (2018) DLT 52***, ***Huawei Technologies Company Ltd. vs. Sterlite Technologies Ltd., 2016 SCC OnLine Del 604, and BMW India Pvt. Ltd.(supra);*** to contend that the discretion of the Court to grant interim relief under Section 9 of the Act has to be exercised sparingly and in appropriate cases and the Courts should be extremely cautious in granting interim relief and that the Court's

discretion ought to be exercised in exceptional cases. According to him, the petitioner has failed to establish that the present case is worthy enough for this Court to exercise its discretion.

34. Mr. Panda contended that in view of the law laid down by the Supreme Court in ***Raman Tech (supra),*** wherein it was held the purpose of Order XXXVIII Rule 5 of CPC is not to convert an unsecured debt into a secured debt and any attempt by a party to utilize the provisions of Order XXXVIII Rule 5 as leverage for coercing the other party to settle the suit/claim should be discouraged; and the petitioner's entire case seeking the refund on the termination of the Contract is a money claim and the claim of the petitioner is in the nature of an unsecured debt, and *vide* this present petition no leverage should be granted to the petitioner, as the intention of the petitioner is to force the defendant into an out of court settlement or forcefully make the respondent reduce the rate of Coal to USD 67.50 per MT from USD 87.50 per MT.

35. Mr. Panada also contended that the petitioner is guilty of concealing and suppressing material facts, as the stand taken by the petitioner that it has no relation/connection with M/s. Kalyani is wrong in as much as the entire negotiations and discussions regarding the opening of LCs and circulation of signed contract was being done by the representatives of the petitioner by keeping the officials of M/s. Kalyani in the loop and with regard to the ongoing contract negotiations over e-mails between the petitioner and respondent, M/s. Kalyani was negotiating on behalf of Goodwill and four other buyers, who had formed a consortium for the purpose of negotiating and purchasing coal from the

respondent under separate purchase Contracts. The entire negotiations were being carried out basis discussions with M/s. Kalyani. M/s. Kalyani was marked in these contract negotiations by the petitioner. He also stated that the four other parties of M/s Kalyani and petitioner consortium had even illegally terminated their respective contracts by not opening LC's, M/s. Kalyani on behalf of all parties was seeking to re-negotiate with the respondent. Mr. Panda also stated that the petition has been filed with ulterior motives, as there is no law, assuming the termination by petitioner to be valid, that provides that on termination of a contract, the transaction has to be reversed and the price claimed as refund becomes due and payable, requiring the same to be put up as security immediately.

36. Having heard the learned counsel for the parties and considered the record, at the outset I may state that during the course of his submissions, Mr. Tripathi had stated that the petitioner is ready to lift the coal at the rate of USD 69.09 per MT subject to the respondent furnishing security for the balance amount. This submission was not aggregable to Mr Panda, on instructions. The matter was accordingly heard on merits. Two issues arise for consideration in this case; firstly, whether the petition under Section 9 of the Act is maintainable and secondly, whether the petitioner has made out a case for grant of the reliefs as prayed for in this petition.

37. As the aforesaid issues arose for consideration, on the basis of the objections taken by Mr. Panda, the respondent's counsel, it is necessary to note his submissions in that regard.

38. On maintainability of the petition, the submission of Mr. Panda is that, as the arbitration under the Contract is an International Commercial Arbitration seated in New York, with applicable law being laws of the State of New York and the respondent against whom the reliefs are sought being registered in USA, which does not have any assets in India, this Court cannot exercise its jurisdiction. In other words, he stated that the jurisdiction vested in an Indian Court under proviso to Section 2(2) of the Act is an asset based jurisdiction, only when the asset(s) of the counter party against which, the order is sought to be enforced are situated in India, then can an Indian Court exercise its jurisdiction.

39. On the second issue, he stated that the discretion of the Court to grant interim relief under Section 9 of the Act has to be exercised sparingly and in appropriate cases where there is adequate material on record leading to definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous by frittering away the properties or funds either before or during the pendency of the arbitration proceedings.

40. On the first issue, Mr. Tripathi, learned Sr. Counsel appearing for the petitioner has stated that there is nothing in the Contract, which excludes the applicability of Part-I of the Act. He also relies upon the ICC Rules more specifically Articles 28.2 and 29.7 (as produced in paragraph 14 above) to contend that the parties have agreed to govern themselves with the said Rules, which entitle a party to approach a judicial authority i.e. the Court for grant of interim measures.

41. To decide first issue, it is necessary to reproduce Section 2(2) and the proviso thereto and Section 9 of the Act of 1996.

> *"(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.]*
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> *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.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(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."

42. It is a conceded position that vide The Arbitration and Conciliation (Amendment) Act, 2015 effective from October 23, 2015, the proviso was added to Section 2(2) of the Act. The effect of the proviso is that it makes applicable Sections 9, 27, 37(1)(a) and 37(3) of the Act to foreign seated arbitration. I may state here, it is not the case of Mr. Panda that there is any stipulation in the Contract between the parties, which restricts the applicability of Section 9 of the Act. In fact, Mr. Tripathi is justified in relying upon Articles 28.2 and 29.7 (as produced in paragraph 14 above), which are part of the ICC Rules and which bind the parties.

43. Having said that, the aforesaid proviso to Section 2(2) of the Act was dealt with by this Court in the judgment of ***Raffles Design International India Pvt. Ltd (supra),*** wherein it is held that the proviso makes Sections 9, 27, 37(1)(a) and 37(3) of the Act applicable to foreign seated arbitration. The Supreme Court also in a later judgment in the case of ***BCCI vs. Kochi Cricket Pvt. Ltd. 2018, (6) SCC 287,*** has also held on similar lines.

44. The effect of the submission made by Mr. Panda is that a petition under Section 9 of the Act cannot be maintained against a foreign party having no assets in India. This submission of Mr. Panda is by relying upon the 246th report of the Law Commission and on the words '*enforceable and recognized under the provision of Part-II'* in proviso to Section 2(2) of the Act.

45. Insofar as the said words are concerned, the same are to mean a contracting State to the conventions, on the basis of reciprocity shall recognize and enforce the awards made in the territory of another contracting State. There is no dispute that an Arbitral award made in USA is enforceable in India under Part-II of the Act.

46. Insofar as the submission made by Mr. Panda relying on the 246th report of the Law Commission is concerned, the said report was considered by this Court in ***Raffles Design International India Pvt. Ltd (supra).*** In the said case, this court also considered the Consultation Paper prepared by the Government of India justifying the incorporation of the proviso clause to Section 2(2) of the Act. The same are reproduced as under:-

"87. The Consultation Paper placed by the Government of India in public domain also highlighted the need for amending Section 2 of the Act to enable the parties to approach the Courts in India for interim relief under Section 9 of the Act in the following words:-

(xvii) It may be stated that it is the broad principle in International Commercial arbitration that a law of the country where it is held, namely, the Seat or forum or laws arbitri of the arbitration, governs the arbitration. However, if all the provisions of Part I are not made applicable to International Commercial arbitration where the seat of arbitration is not in India, some practical problems are arising. There may be cases where the properties and assets of a party to arbitration may be in India. Section 9 of the Act which falls in Part I provide for interim measures by the Court. As per Section 9, a party may, apply to a court for certain interim measures of protection including for preservation, interim custody or sale of goods, securing the amount in disputes, detention, preservation or inspection of any property, interim injunction etc. If provision of Section 9 is not made applicable to International Commercial arbitration where seat of arbitration is not in India, a party may be out of remedy if the assets and property are in India. In cases of international arbitration where the seat of arbitration is outside India, a serious controversy has arisen in the Indian Courts. These are cases where interim measures

could not be granted by Indian courts under Section 9 to an Indian national before commencement of arbitration (or after the award) against property of a foreign party. By the time the Indian party takes steps to move the courts in the country in which the seat of arbitration is located, the property may have been removed or transferred.

88. The Law Commission of India in its 246th Report also proposed amendments to Section 2 (2) of the Act (as quoted herein before) as it felt that the same were necessary. The reasons for such amendments were explained, as under:-

(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.

XXXX XXXX XXXX"

47. From the above, it is seen that the thought process, which weighed for incorporating proviso to Section 2(2) of the Act is the difficulty faced by both the Indian and the foreign party in seeking orders/interim measures in India in a foreign seated arbitration. So, it follows that proviso to Section 2(2) was incorporated to facilitate the parties to move the Court in India, even though the arbitration is seated outside India.

48. The submission of Mr. Panda that enforceability is related to assets in India, looks appealing on a first blush, but on a deeper consideration, needs to be rejected for the following reasons: -

(i) Section 9, starts with the words '*A party'*, which denotes, any party can file an application under the said Section.

(ii) Section 9 is for order/ interim measure, in either case not an Award required to be enforced against any asset in India. In other words, for the purpose of passing an order/interim measure, the availability of asset in India is irrelevant.

(iii) The order/interim measure under Section 9 includes (a) the appointment of a guardian for a minor for which the availability of asset in India is inconsequential; (b) an interim measure for preservation, interim custody or sale of any goods, which are subject matter of the arbitration agreement for example dispute between a foreign party and an Indian party with regard to an agreement for sale of textiles to an Indian party this Court would be within its right, to pass an order for its preservation, interim custody or its sale and with a direction to secure the proceeds received thereof, such an order does not presuppose existence of asset(s) of a foreign party in India; (c) securing the amount in dispute in arbitration like directing the foreign party to furnish a bank guarantee in favour of the Indian party; directing the foreign party to deposit the claim amount in this Court, such orders also does not does not presuppose existence of asset(s) of a foreign party in India.

49. Thus, it is clear that, passing of orders/granting interim-measures under Section 9 does not presuppose existence of

asset(s) in India. The bank guarantee, which is furnished/amount deposited pursuant to an order passed by a Court in India under Section 9 (as stated at "C" above) can be invoked/withdrawn by an Indian party in the eventuality, it succeeds in a foreign seated arbitration in satisfaction of the Award, even though the foreign entity may not have any assets in India.

50. That apart, this Court cannot refuse to entertain a petition under Section 9 of the Act on the ground, the foreign party does not have any assets in India, as in a given case it may so happen that the Indian party may not be successful in the arbitration proceedings for it to have an Award in its favour, so as to execute against a foreign party in India. Thus, it must be held that the present petition under Section 9 of the Act, for the reliefs claimed, is maintainable and the plea of Mr. Panda is rejected

51. On issue No.2, it was the submission of Mr. Tripathi that the petitioner has a prima-facie case, by referring to Letter of Credit, which was released in respondent's bank account on April 21, 2020, Pre-Arrival Notice, Notice of Readiness, Notice of Default, Letter of Termination and various communications indicating the petitioner's obligations stand discharged. Moreover, it is the case of Mr. Tripathi that the price of coal has depreciated to around USD 67.05 per MT as against the contractual value of USD 87.09 per MT.

52. Further, on the plea of Mr. Panda that for grant of the relief prayed, it is relevant that the ingredients of Order XXXVIII Rule 5 of CPC have to be satisfied, Mr. Tripathi had relied upon the judgment of this Court in ***Steel Authority of India Limited***

(supra) wherein the Court directed a foreign company to deposit a sum of USD 152.85 million by relying on the judgment of the Bombay High Court in ***National Shipping Company of Saudi Arabia (supra).***

53. Mr. Panda contested the submissions of Mr. Tripathi by stating that the contract being CIF contract, stood concluded, the moment the goods were loaded on the ship and payment received by the respondent; the Contract being an executed contract, there was no scope for the petitioner to terminate the Contract; the petitioner has claimed the termination of the Contract on breach of material obligations but has miserably failed to point out in terms of the Contract, the obligations which the respondent is in breach of; the ground of termination as stated in the Letter of Termination, is delay in discharge of the cargo and Clause 13 of the Contract does not stipulate any time period for discharging the cargo / coal at the discharge port and even assuming that the discharge of cargo was a material obligation and there was a delay in discharge, nothing suggests that the respondent is responsible for the same; the petitioner showed inclination to receive cargo at Kandla Port, provided no details of any arrangements and in fact has unilaterally rejected the notice of readiness that was issued by the vessel agent on May 06, 2020; the petitioner has failed to establish / satisfy this Court that the respondent is attempting to remove or dispose of the assets with the intention of defeating the decree that may be passed in its favour. He also relied upon the judgments in ***Arvind Constructions (supra), Nimbus Communication Ltd. (supra), BMW India Pvt. Ltd. and Ors.***

(supra), Tata Advance Systems Ltd. (supra), Raman Tech. & Process Engineering Co. & Anr. (supra), C.V. Rao (supra), Olex Focas Pvt. Ltd. (supra), Parsoli Motor Words Pvt. Ltd. (supra), Huawei Technologies Company Ltd. (supra), to contend that the powers to grant reliefs under Section 9 of the Act are not wider than the powers available to the Court to order such relief under CPC. Further, the petitioner has to establish / satisfy the Court that the respondent is attempting to remove or dispose of the assets with the intention of defeating the decree that may be passed and the discretion of the Court to grant interim relief under Section 9 of the Act has to be exercised sparingly and in appropriate cases and the Court should be extremely cautious in granting interim relief and it should be based on materials on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous.

54. Suffice would it be to state that what should govern the grant of relief under Section 9 of the Act, which is in the nature of interim relief pending arbitration proceedings, has been considered by a Coordinate Bench of this Court in its recent opinion in the case of ***BMW India Pvt. Ltd. and Ors. (supra),*** wherein the Court has referred to most of the judgments relied upon by the Counsels for the parties as referred above and in paras 25 to 29 held as under:-

> *"25. Before further delving into these disputed and contested claims, it is first necessary to analyze the objection raised by the Respondent on the issue of maintainability of the Petitions having regard to the nature of relief sought. Respondents*

contend that in order to succeed in the present petitions, Petitioner No. 1 has to satisfy the threshold prescribed under Order 38 Rule 5 of the Code of Civil Procedure 1908. Mr. Dayan Krishnan on the contrary relies upon the judgment of the Division Bench of this Court in Ajay Singh v. Kal Airways Pvt. Ltd., FAO (OS) (Comm) 61/2016 decided on 3rd July 2017 and Huawei Technologies Company Ltd. Vs. Sterlite Technologies Ltd., (2016) SCC Online Del 604, to submit that Petitioners have a prima facie case in their favour and the court need not stringently enforce the principles regarding grant of injunction in the present case. This court in Kal Airways (supra), has examined the question regarding the applicability of the principles underlying Order 38 Rule 5 CPC while making an interim order. The Court after considering several judgments on this issue, has observed as under:-

> *"25. Interestingly, in a previous decision, Firm Ashok Traders & Anr v Gurumukh Das Saluja & Ors (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. (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 FAO(OS)(COMM) 61/16 & connected cases Page 21 of 25 '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.""

26. Similarly, in the case of Huawei Technologies Company Ltd. Vs. Sterlite Technologies Ltd., (2016) SCC Online Del 604, this Court held as under:-

"As far as finding arrived by the Division Bench in C.V. Rao case [2014 SCC OnLine Del 4441 : (2015) 218 DLT 200] is concerned, this Court totally agrees that the said relief can only be granted in the exceptional cases when there is adequate material on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceeding infructuous if the award is passed against them.

I agree that the discretion should be exercised in those exceptional cases when there is adequate material on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous or there is an admitted liability."

27. A careful analysis of the judgment in Ajay Singh (supra), reveals that in the said case, the Division Bench has held that Section 9 of the Act grants wide powers to the Court in fashioning an appropriate interim order. It has also been held that Court should not find itself unduly bound by the text of those provisions and should rather follow the underlying principles.

Essentially, the Division Bench has held that the discretion should be exercised appropriately while granting an interim order and such discretion must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection. Even in Huawei Technologies (supra), the Court has recognized that all the requisite conditions of Order 38 Rule 5, CPC are required to be satisfied for considering the prayer of securing the amount and the Court

should exercise its discretion very carefully. It was also held that where it appears that there are exceptional circumstances, it has ample power to secure the amount, if it is just and convenient. However, the aforenoted judgments do not seem to suggest that while exercising power under Section 9 the necessary conditions and ingredients under Order 38 Rule 5 CPC, are not required to be insisted upon. The judgments relied upon by the Petitioner only stress that the power should be principled and premised on some known guidelines and hence the analogy of Order 38 and 39, CPC is certainly applicable. At this stage, the judgments relied upon by the learned counsel for the Respondents also need to be mentioned. Respondents have relied upon C.V. Rao & Ors v. Strategic Port Investment, (2015) 218 DLT 200, Lanco Infratech Ltd. v. HCC Ltd. (2016) 234 DLT 175, Intertoll ICS Cecons O&M v. NHAI, ILR (2013) II Delhi 1018, Raman Tech v. Solanki Traders, 2008 (2) SCC 302 and Kopastin Holding Ltd. v. Uday Bahadur & Ors, MANU/DE/2867/2018.

28. Besides the aforenoted judgments, there are several other judgments that deal with this issue. In Nimbus Communication Ltd. v. Board of Control for Cricket in India, 2012 SCC OnLine Bom 287, the Bombay High Court held as under:-

"The judgment of the Supreme Court in Adhunik Steels has noted the earlier decision in Arvind Constructions which holds that since section 9 is a power which is conferred under a special statute, but which is exercisable by an ordinary Court without laying down a special condition for the exercise of the

power or a special procedure, the general rules of procedure of the Court would apply. Consequently, where an injunction is sought under section 9 the power of the Court to grant that injunction cannot be exercised independent of the principles which have been laid down to govern the grant of interim injunctions particularly in the context of the Specific Relief Act, 1963. 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, preconditioned 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 untrammelled 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" (emphasis supplied)

29. All the above noted judgments listed above invariably echo the same principles. The imperative that emerges is that the court should not ignore the principles or the well known guidelines, but at the same time it should be unduly bound by the text. There is thus no perceptible difference in the views expressed by the Division Bench as sought to be highlighted by Mr. Krishnan. An order for securing the amount claimed prior to an arbitral award is certainly comparable to the nature of relief provided for under Order 38 Rule 5, CPC. Keeping the well-known principles in mind, I am of the view that it is necessary that Petitioner No. 1 satisfies the Court that (a) Petitioners have a reasonably strong prima facie case for succeeding in the arbitration proceedings and (b) that the Respondent is acting in a manner so as to defeat the realization of the future award that may ultimately be passed. Such orders cannot be passed mechanically as the exercise of power in the nature of Order 38 Rule 5, CPC is a drastic and extraordinary power.

There is no doubt in my mind that the underlying basis of Order 38 Rule 5, CPC has to be borne in mind while deciding an application under Section 9 (ii) (b) of the Act.

55. Noting the aforesaid conclusion, with which I concur, it is clear that for grant of the relief as prayed for by the petitioner, the petitioner has to show that; (a) it has a *prima facie* case and balance of convenience in its favour and shall succeed in the arbitration proceedings and (b) that the respondent is acting in a manner as to defeat the realization of the future award that may ultimately be passed. It follows that orders, as sought by the petitioner cannot be passed mechanically on its asking, as the exercise of power under Order XXXVIII Rule 5 CPC, is drastic and extraordinary.

56. As regards *prima facie* case, noting the respective stand of the parties, there exists disputed facts which cannot be decided in this petition. It has to be decided by the Arbitral Tribunal. Further, I have seen the averments in the petition. The plea in support of the reliefs primarily is that in view of COVID-19, the petitioner is unable to meet the timelines for invoking the Arbitration and there is an apprehension that the respondent may make attempts to obstruct the satisfaction of the decree, which may be awarded in favor of the petitioner in the arbitration proceedings. Suffice would it be to state, the plea of COVID-19 for not invoking the arbitration has no bearing on the merits of the case. I find the allegations in the petition are bald, without any supporting evidence, surely will not satisfy the tests laid down by various judgments, as noted above for grant of interim relief and moreover it must be held that it is not an exceptional case where there is adequate material on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings

infructuous by frittering away the properties or funds either before or during the pendency of the arbitration proceedings. Accordingly, this Court refuses to exercise its discretion in favour of the petitioner. I do not see any merit in the petition. The same is dismissed. No costs.

V. KAMESWAR RAO, J

JUNE 09, 2020*/ak*