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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
K.V. VISWANATHAN; J., ALOK ARADHE; J.
CIVIL APPEAL NO. 5819 OF 2025; 11 August, 2026
National Projects Construction Corporation Ltd. *versus* **Ishvakoo (India) Pvt. Ltd.**

Arbitration and Conciliation Act, 1996 – Section 9, Section 9(1)(ii)(e), Section 34 and Section 36 – Maintainability of Section 9 Petition at Post-Award Stage by an Unsuccessful Party / Award Debtor – Threshold and Guiding Principles for Grant of Interim Relief – Securing Amount in Dispute / Deposit of Monies – Rare and Compelling Cases - A petition under Section 9 of the Arbitration and Conciliation Act, 1996 at the post-award stage by an unsuccessful party (award debtor) is maintainable in law - the threshold for granting interim relief to an unsuccessful party is significantly higher - The Supreme Court may grant interim measures in rare and compelling cases to balance equities, prevent irreparable prejudice, and preserve the efficacy of the challenge proceedings under Section 34 - The exercise of power under the "just and convenient" residuary clause under Section 9(1)(ii)(e) must be guided by settled principles namely, existence of a strong prima facie case, balance of convenience, irreparable injury, and reasonable expedition and must promote the efficacy of arbitration without being rigidly bound by the strict procedural technicalities of Order XXXVIII Rule 5 or Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 - In the present case, bank guarantees furnished against mobilisation advance were encashed by the appellant prior to the pronouncement of the arbitral award - The Arbitrator dismissed the respondent's claims in toto without the appellant having filed any counter-claim or the Arbitrator recording any finding regarding non-utilisation of the mobilisation advance - Sustaining the High Court's direction directing the appellant to deposit Rs. 3.5 crores in the Registry to be placed in an interest-bearing Fixed Deposit pending adjudication of the Section 34 petition, the Supreme Court held that permitting the appellant to retain the encashed funds in the absence of an executable award or counter-claim in its favour would result in unjust enrichment and defeat earlier interim undertakings - The case presented rare and compelling circumstances warranting interim deposit to prevent irreparable prejudice and preserve the subject matter of the dispute. *[Relied on Home Care Retail Marts Pvt. Ltd. v. Haresh N. Sanghavi, 2026 SCC OnLine SC 670; Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited, (2022) 20 SCC 178; Paras 18–27].*

For Appellant(s): Mr. Rajat Arora, AOR Ms. Mariya Shahab, Adv.

For Respondent(s): Mr. Ajay Bansal, Adv. Ms. Veena Bansal, Adv Mr. Gaurav Yadav, Adv. Mr. Sourav Jindal, Adv. Mr. Aditya Gupta, Adv. Ms. Pooja, Adv. Mr. Kuldip Singh, AOR

J U D G M E N T

K. V. Viswanathan, J.

1) The present appeal calls in question the correctness of the order dated 21.05.2019 passed by a Division Bench of the High Court of Delhi at New Delhi in FAO(OS)(COMM) No. 113/2019. By the said order, the Division Bench dismissed the appeal filed by the appellant and confirmed the order of the learned Single Judge dated 05.04.2019 in OMP(I)(COMM.) No. 57/2019 filed under Section 9 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'the 1996 Act').

2) The respondent filed OMP (I)(COMM.) No. 57/2019 before the High Court seeking the following reliefs: -

"(a) Allow the present application and further direct the Respondent to immediately refund the amount of Rs.3,50,00,000/- to the Petitioner (in terms of order dated 20.09.2018) being the amount appropriated by it by wrongfully encashing the Bank Guarantees in question, along with interest at the rate of 18% per annum from 14.09.2017 till the amount is refunded, and

(b) Award costs of the proceedings in favour of the Petitioner and against the Respondents, and/or ... "

BRIEF FACTS: -

3) On 16.08.2002, the appellant and the respondent entered into a Memorandum of Understanding (MoU) for the work of Bus Terminus at Taj Mahal Bus Stand, UPST Bus Stand, Idgah Bus Stand and development of Taj Trapezium Zone (TTZ) Heritage Corridor for Agra, Government of Uttar Pradesh. In December 2002, the respondent was provided Rs. 3.5 crores as Mobilisation Advance against the bank guarantees furnished by it.

4) Disputes arose between the parties. The arbitration clause was invoked by the respondent and an Arbitrator came to be appointed to adjudicate the disputes.

5) At that stage, a Section 9 application came to be filed in OMP No. 363/2003 before the High Court, by the respondent. The prayer made in the application was to restrain the appellant from invoking Bank Guarantee Nos. 109/2002 to 124/2002 for a total sum of Rs. 3,50,00,000/- issued by the Canara Bank. The said Section 9 application was disposed of on 15.12.2005, in the following terms: -

“OMP No. 363/2003

Present petition is filed under Section 9 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') seeking restraint against the respondent from invoking bank guarantees No.109 to 124/2002 for a total sum of Rs. 3 crores 50 lacs issued by Canara Bank, H-Block, Connaught Circus, New Delhi in favour of the respondent. The arbitration proceedings are underway. On 16th September, 2003 order was passed recording the undertaking of the petitioner to renew these bank guarantees and directing the respondent not to press for encashment of these bank guarantees during the extended period of the bank guarantees. This order was extended from time to time and on 19th August 2004, it was directed that the bank guarantees shall be kept alive by the petitioner till the disposal of this petition. Since the counsel for the petitioner thereafter on 7th July 2005 gave an undertaking that the bank guarantees shall be kept alive till the arbitrator gives the award, the learned counsel for the respondent sought time to have the instructions in the matter.

Mr. Taneja, learned senior counsel appearing for the respondent, states on instructions that the respondent shall not invoke these bank guarantees provided the bank guarantees are kept alive till the arbitrator gives the award and further till the award becomes enforceable as a decree under Section 36 of the Act. However, it is subject to the condition that if after adjudication by the arbitrator it is found that the respondent has to recover the amount from the petitioner, the respondent will be entitled to recover such amount by invoking the bank guarantees. This suggestion is acceptable to learned counsel for the petitioner. The Managing Director of the petitioner is present and statement by the learned counsel for the petitioner is made on instructions from his client.

The petition is accordingly disposed of recording undertaking of the petitioner to the effect that the bank guarantees shall be kept alive till the matter is adjudicated upon by the arbitrator and even thereafter if petition under Section 34 of the Arbitration Act is filed till the disposal of the said petition. It is also made clear that on the award becoming executable if under the said award the respondent has to recover the amount, the respondent shall be entitled to encash the bank guarantees.

IA also stands disposed of".

(Emphasis supplied)

6) It will be noticed that in the order it is clearly recorded that the appellant undertook not to invoke the bank guarantees, provided the bank guarantees were kept alive. It is further recorded that if after adjudication by the Arbitrator, it is found that the appellant [referred to as Respondent in the said Order] had to recover the amount from the Respondent [referred to as the Petitioner in the said Order], the appellant shall be entitled to recover the amount by invoking the bank guarantees.

7) The Arbitrator proceeded with the arbitration and rendered an Award on 05.12.2017. In the meantime, it transpires from the record that since the respondent herein was unable to keep the bank guarantees alive, the appellant herein invoked the bank guarantees, in and about September, 2017.

8) Before the Award was pronounced and after the encashment of bank guarantees, the respondent moved a petition under Section 9 of the 1996 Act before the High Court. That petition was disposed of on 01.11.2017 by holding that since the respondent failed to keep the bank guarantees alive after September, 2017, there was no fault in the conduct of the appellant, and no further orders were required to be made.

9) Before the arbitrator, the respondent herein was the claimant and the appellant herein was the respondent. Admittedly, no counter-claim was filed by the appellant. The arbitrator framed several issues, of which, Issue Nos. 3 and 4 are relevant for our purpose, which read as under: -

"3. Whether the Claimant is entitled to discharge of bank Guarantees? OPC

4. Whether the Claimant is entitled to Bank Charges of Rs. 77,27,225/- for keeping the Bank Guarantees? OPC"

10) In the Award, the arbitrator dismissed the claims of the respondent. Dealing with Issue Nos. 3 and 4, the arbitrator recorded as under: -

"<u>Issues No. 3 and 4</u>

Issues No. 3 and 4 are whether the Claimant is entitled to discharge of the Bank Guarantee and also whether the Claimant is entitled to the sum of Rs. 77,27,225/- towards the bank charges for keeping the Bank Guarantee alive.

230. Without adverting to the submissions made by the Parties, the Tribunal finds that the High Court of Delhi, vide Order dated 15.12.2005, passed in O.M.P. No. 363/2003 had disposed of the Petition in the following terms:

"The Petition is accordingly disposed of with the undertaking of the petitioner to the effect that the bank guarantees shall be kept alive till the matter is adjudicated by the arbitrator and even thereafter if petition under section 34 of the arbitration act is filed till the disposal of the said petition. It is also made clear that on the award becoming executable if under the said award the respondent has to recover the amount, the respondent shall be entitled to encash the bank guarantees. IA also stands disposed of".

231. Therefore, it can be seen that by its own undertaking, the Claimant was bound to keep the BG alive in terms of the above order.

232. In any event, due to the fraudulent and collusive conduct of the Claimant, the Respondent cannot be fastened with any liability and as such the Tribunal is not inclined to grant any relief in this regard. Respondent is accordingly, not, liable to pay any bank charges."

11) The respondent herein filed a Section 34 application. An order came to be made on 20.09.2018 while permitting the parties to complete pleadings, to the effect that the appellant ought to return the amount, equivalent to the bank guarantees to the respondent, within three weeks. Thereafter, on 30.10.2018, a further order came to be made in the Section 34 application. While reiterating that the appellant herein ought to bring back the money, equivalent to the amount of bank guarantees, the learned Single Judge, in the Order of 30.10.2018, after overruling the objection of the appellant, directed the appellant to remit the amount to the respondent within 10 days, failing which, the concerned officer of the appellant was directed to be present in Court.

12) These orders of the learned Single Judge (dated 20.09.2018 and 30.10.2018), were carried in appeal before the Division Bench in FAO (OS)(COMM) 271/2018, whereby a consent order dated 29.11.2018 was passed, which reads as under: -

"The challenge in this appeal is to the orders dated 20.09.2018 and 30.10.2018.

After some hearing in the matter, it is agreed that without prejudice to the rights and contentions of the parties which have been raised by them in petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, the impugned orders may be set aside and the questions raised may be left open to be decided along with objections filed under Section 34 of the Arbitration and Conciliation Act, 1996, by the respondent.

This order will not come in the way of the respondent, in case the respondent chooses to file a fresh petition under Section 9 of the Arbitration and Conciliation Act, 1996.

Legal objections of the appellant herein are kept open.

The present appeal is accordingly disposed of, in the above terms.

All pending applications also stand disposed of."

13) Pursuant thereto, O.M.P.(I)(COMM) No. 57/2019 came to be filed (pending the Section 34 application) by the respondent herein praying for return of the amount equivalent to the bank guarantees. This petition under Section 9 came to be disposed of on 05.04.2019 by the learned Single Judge. The learned Single Judge, while allowing the Section 9 application, recorded the following crucial findings: -

"11.3 Before I proceed further, I must note that during the course of the arguments, Mr. Nandrajog submitted that the bank guarantees had been issued against mobilization advance which was not utilized. This submission was made before me on 30.10.2018 as well. I had, in that proceeding, put a pointed question to the learned counsel for the respondent as to whether there was any finding in the award that the petitioner had failed to utilize the mobilization advance. I had received a candid answer, on that date, from Mr. Rajat Arora, the Advocate instructing Mr. Nandrajog, that there was no such finding.

11.4 Upon a perusal of the award, I noticed that there is no such finding recorded by the Arbitral Tribunal. Therefore, this query again was put by me at the hearing held today, lest I missed something. While Mr. Nandrajog was not able to show anything which would answer this query, he did refer to paragraphs 158 to 160 of the Award.

11.5 I have examined the observations made by the learned Arbitrator in those paragraphs. None of the observations, however prejudicial they may be, indicate that the petitioner had contended that the bank guarantees furnished by the petitioner against mobilization advance was not utilized by the petitioner. The observations made in the paragraphs referred to by Mr. Nandrajog do not answer the query that I posed to the learned Senior Counsel.

12. Therefore, the question before me is: whether without a claim, can the respondent, by any stretch of imagination, hope to keep the money with it. Mr. Nandrajog points out that Issue No.3 was related to discharge of bank guarantee while Issue No.4 was related to the petitioner's claim for bank charges. According to the learned Senior Counsel, both the issues were decided by the learned Arbitrator against the petitioner.

12.1 I tend to disagree with Mr. Nandrajog that Issue No. 3 was, at all, decided by the learned Arbitrator. A careful perusal of Paragraphs 229 to 232 of the award dated 5.12.2017 would show that the learned Arbitrator did not decide Issue No. 3 which pertained to discharge of bank guarantees. The learned Arbitrator after quoting the order dated 15.12.2005 passed by this Court, had only stated the following:

"231. Therefore, it can be seen that by its own undertaking, the Claimant was bound to keep the bank guarantee alive in terms of the above order. 232. In any event, due to the fraudulent and collusive conduct of the Claimant, the Respondent cannot be fastened with any liability and as such, the Tribunal is not inclined to grant any relief in this regard. The respondent is accordingly, not liable to pay any bank charges."

(emphasis is mine)

12.2 What is plainly evident, when one reads the award, is that, the learned Arbitrator was unaware of the fact that the bank guarantees had already been encashed. As a result, the learned Arbitrator held the view that the bank guarantees continued to remain in operation on account of an undertaking to that effect, given by the petitioner, by which it was bound. In this regard, the obvious reference of the Arbitral Tribunal was to the order dated 15.12.2005 passed by this Court. More importantly, this observation was made in the context of Issue No. 4, which required the Arbitral Tribunal to determine as to who would bear the financial burden of keeping the bank guarantees alive.

12.3 The Arbitral Tribunal, clearly, failed to deal with the direction contained in order dated 15.12.2015 which required the petitioner to keep the bank guarantees alive only to enable the respondent to encash the bank guarantees against an executable award, if any, passed in its favour. In view of the fact that there was no counterclaim lodged by the respondent, the Arbitral Tribunal, in my view, had to decide, in the changed circumstances, whether or not the condition put in place by this Court via order dated 15.12.2015 would continue to operate. The Arbitral Tribunal, clearly, did not decide this aspect of the matter and, thus, Issue No. 3 remain unaddressed.

12.4 The Arbitral Tribunal, though, for whatever it is worth, did decide Issue No. 4 which related to "liability", purportedly borne by the petitioner on account of bank charges for keeping the bank guarantees alive.

13. Therefore, I am confronted with two undeniable facts. First, no counterclaims were filed. Second, however irrelevant it may be, there is no finding that the bank guarantees were encashed on account of non-utilization of mobilisation advance.

14. Given this position, in my view, if I were to permit the respondent to continue to hold on the money, it would not only result in the respondent unjustly enriching itself but would also be contrary to the purpose and object with which order dated 15.12.2005 was passed by this Court when arbitration had not commenced. Thus, the argument that the respondent is good for its money, given the facts obtaining in this case, is untenable and hence is rejected."

15.2 Thus, in view of the fact that I have still not adjudicated upon the Section 34 petition, equities, to my mind, would be balanced if an appropriate direction is issued to the respondent to deposit the money in Court, which is also the alternative relief that Mr. Verma has prayed for. This direction appears to be wholesome as deposit of money in Court will enable accrual of interest which will ultimately benefit the party which succeeds in the main matter."

"17. Thus, for the foregoing reasons, I am inclined, for the moment, insofar as this petition is concerned, to direct the respondent to deposit the monies, which, I am told, is an amount equivalent to a sum of Rs.3.5 Crores with the registry of this Court. The said amount will be deposited within two weeks from today. Upon such amount being deposited with the Registry of this Court, the same shall be invested in an interest-bearing fixed deposit, maintained with a nationalized bank."

It is this Order, which the Division Bench, vide the impugned order has upheld.

14) We have heard Mr. Rajat Arora, learned counsel for the appellant and Mr. Ajay Bansal, learned counsel for the respondent.

CONTENTIONS OF THE APPELLANT: -

15) Learned counsel for the appellant submits that under Section 9, a Court cannot grant relief which amounts to a final adjudication of rights that are pending consideration at the Section 34 stage. It is submitted that post award, Section 9 power is exercised only to protect the fruits of the Award in aid of its enforcement. It is submitted that a claimant whose claim has been dismissed in *toto* holds no Award, has no adjudicated "amount in dispute" surviving in its favour, and has no fruits of its own to protect. Learned counsel submitted that the respondent herein is seeking a mandatory direction to claw back monies already realised lawfully under the bank guarantees. It is submitted that the legality of encashment stands concluded by the order dated 01.11.2017. Learned counsel submits that the High Court has undertaken a merits review of the Award at the interlocutory stage, which was illegal. Learned counsel, after referring to the Award, submitted that the arbitrator had declined the claim for discharge of bank guarantees and had refused expressly the relief on account of the respondent's own undertaking and its fraudulent and collusive conduct. Learned counsel submitted that the relief granted to the respondent is not encompassed within the framework of Section 9(1)(ii)(e). Learned counsel submitted that the absence of a counter claim did not make any difference to the dispute. The dismissal of Claim No. 1 itself removed the substrata in the case of the respondent to seek the bank guarantee amounts back. It was submitted that the principles of Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908, were not satisfied.

CONTENTIONS OF THE RESPONDENT: -

16) Learned counsel for the respondent contended that no counter claims were filed by the appellant and further there is no finding in the Award as to the non-utilization of mobilization advance. Learned counsel contended that Issue Nos. 3 before the arbitrator remained unaddressed. Learned counsel submitted that the finding on collusion against the respondent is subject matter of challenge in the Section 34 proceedings. Learned counsel reiterated the finding of the learned Single Judge that permitting the appellant to retain the amount would only result in unjustly enriching the appellant. Learned counsel submitted that Section 9 of the 1996 Act confers wide powers to pass orders of the nature passed by the Single Judge and the Division Bench.

QUESTION FOR CONSIDERATION: -

17) In the above background, the question for consideration is whether the courts below were justified in directing the appellant to deposit a sum of Rs. 3.5 crores in the Registry of the High Court, pending disposal of the Section 34 application filed by the respondent, challenging the Award of the arbitrator?

ANALYSIS AND DISCUSSION: -

18) This is a case where the Award Debtor has, post the Award, invoked the jurisdiction under Section 9. Insofar as the maintainability of a Section 9 application by the Award Debtor is concerned, the issue is no longer *res integra*. Recently, in ***Home Care Retail Marts Pvt. Ltd.*** vs. ***Haresh N. Sanghavi,*** 2026 SCC Online SC 670, this Court, speaking through Manmohan, J., held as under: -

"2. The substantial question of law that arises for consideration in the present batch of appeals is whether a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') at the post-award stage, by a party that has lost in the arbitral proceedings and has no enforceable award in its favour, is maintainable in law?

43. Sections 34 as well as 36 provide remedies against an award or a stay thereof, whereas Section 9 ensures protection of the subject matter or the amount in dispute. An unsuccessful party cannot secure protection of its claim under Section 34 or Section 36. **To deny interim relief under Section 9 would leave such a party remediless. In fact, if the Court declines to entertain an application of a losing party for interim relief, there would be no forum available for protection of the subject matter, even where the award under challenge is stayed and potentially liable to be set aside. Moreover, the ultimate outcome may alter the rights of parties and, therefore, distinction between a '*winning*' and a '*losing*' party cannot govern access to the remedy under Section 9 of the Act.**

49. Even applying the test of purposive interpretation, 'a party' must mean any party to the arbitration agreement. This Court can envisage situations where a party that has lost in arbitration may nonetheless require interim protection. For instance, where an arbitral award has been rendered without proper notice to a party, or where a party is able to prima facie demonstrate that the award has been induced or tainted by fraud or corruption. In such situations, the Court may not only stay the award but also grant interim measures under Section 9 of the Act to balance the equities. **Similarly, in certain cases, an unsuccessful party may have obtained interim protection during the arbitral proceedings, such as an order restraining invocation of a bank guarantee. Upon the rendering of the arbitral award, such interim protection ordinarily stands vacated. However, the unsuccessful party may challenge the award under Section 34 of the Act and obtain a stay on the enforcement of the arbitral award under Section 36(3) of the Act. In such circumstances, immediate removal of interim protection, for example, in relation to a bank guarantee, may result in irreversible prejudice to the unsuccessful party whose challenge to the arbitral award is pending adjudication.**

52. Consequently, in rare and compelling cases, it may be necessary to permit the unsuccessful party to invoke Section 9 of the Act to seek continuation of the existing interim protection. This assumes greater significance, as noted earlier, in light of the decision in Gayatri Balasamy (supra) which recognises the Court's power under Section 34 of the Act to modify an arbitral award, including the power to sever 'the "invalid" portion from the "valid" portion of the award'.

59. Needless to say, the grant of interim relief under Section 9 of the Act will continue to be guided by wellestablished principles, namely, the existence of a prima facie case, balance of convenience, and likelihood of irreparable harm or injury. This Court, in Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited, (2022) 20 SCC 178, has held as under: "47. Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. **All that the Court is required to see is, whether the applicant for interim measure has a good prima facie case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition."**

60. Undoubtedly, the threshold for grant of interim relief will be higher in the case of an unsuccessful party in arbitration seeking such relief. In rare and compelling cases, permitting the unsuccessful party to invoke Section 9 of the Act would prevent irreparable prejudice and preserve the efficacy of the challenge proceedings. However, the rights of such a party cannot be curtailed merely on the apprehension of possible misuse of a statutory provision."

[Emphasis supplied]

19) This Court, while holding the application to be maintainable, has sounded a note of caution that the threshold for grant of interim relief will be higher in case the application is moved by an Award Debtor and that a court may, in rare and compelling cases, permit the unsuccessful party to invoke Section 9 to prevent irreparable prejudice and to preserve the efficacy of the challenge under Section 34.

20) This Court, also reiterated the holding in ***Essar House Private Limited*** vs. ***Arcellor Mittal Nippon Steel India Limited.***, (2022) 20 SCC 178 emphasizing the principle that the existence of a *prima facie* case and balance of convenience have to be seen along with the aspect whether party has approached the Court with reasonable expedition or not.

21) In ***Essar House (supra),*** this Court laid down the guiding principles while interpreting Section 9 especially Clause (ii) (e) which enabled the Court to pass such other interim measure of protection as may appear to the Court to be just and convenient.

22) This Court held that while couching a relief under the "just and convenient" clause, the discretion has to be exercised judiciously and not arbitrarily and that such an exercise of power must promote the efficacy of arbitration as a form of dispute resolution.

23) In ***Essar House (supra),*** this Court held as under: -

41. As argued by Mr Kaul, besides the specific power of securing the amount in dispute, the courts have been empowered to pass any interim measure of protection, keeping in view the purpose of the proceedings before it. **The said provision confers a residuary power on the Court to pass such other interim measures of protection as may appear to be just and convenient.**

44**. In *Jagdish Ahuja* v. *Cupino Ltd.* [2020 SCC OnLine Bom 849], the Bombay High Court correctly summarised the law in para 6 extracted hereinbelow:**

"*6*. As far as Section 9 of the Act is concerned, it cannot be said that this Court, while considering a relief thereunder, is strictly bound by the provisions of Order 38 Rule 5. **As held by our Courts, the scope of Section 9 of the Act is very broad; the court has a discretion to grant thereunder a wide range of interim measures of protection "as may appear to the court to be just and convenient", though such discretion has to be exercised judiciously and not arbitrarily. The court is, no doubt, guided by the principles which civil courts ordinarily employ for considering interim relief, particularly, Order 39 Rules 1 and 2 and Order 38 Rule 5; the court, however, is not unduly bound by their texts.** As this Court held in *Nimbus Communications Ltd.* v. *BCCI* [2012 SCC OnLine Bom 287] (per D.Y. Chandrachud, J.), as the learned Judge then was), **the court, whilst exercising power under Section 9, 'must have due regard to the underlying purpose of the conferment of the power under the court which is to promote the efficacy of arbitration as a form of dispute resolution'. The learned Judge further observed as follows :**

'*24*. … Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure, 1908, the rigours of every procedural provision in the Code of Civil Procedure, 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case.' "

47. Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. **All that the Court is required to see is, whether the applicant for interim measure has a good prima facie case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.**

49. Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending arbitral award is not imperative for grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice. **To**

assess the balance of convenience, the Court is required to examine and weigh the consequences of refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail.

24) Earlier, this Court in ***Adhunik Steels Ltd.*** vs. ***Orissa Manganese and Minerals (P) Ltd.,*** (2007) 7 SCC 125, reiterated how the well-known principles governing the grant of an interim injunction followed by courts are not *alien* to Section 9 of the 1996 Act. This Court held as under: -

11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. **The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction.** Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. **On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."**

<u>APPLICATION OF LAW TO THE FACTS</u>: -

25) Did the respondent, in the present case, satisfy the above yardsticks, is the crucial question that arises for consideration.

26) An analysis of the facts and the application of the principles led us to the irresistible conclusion that the respondent, in fact, did fulfil in ample measure, the necessary parameters for obtaining relief under Section 9. We say so for the following reasons: -

(i) ***Firstly***, on 15.12.2005, when OMP No. 363/2003 filed by the respondent was adjudicated, the High Court directed that if after adjudication by the Arbitrator, it was found that the appellant had to recover the amount from the respondent herein, the appellant herein will be entitled to recover such amount by invoking the bank guarantees;

(ii) ***Secondly***, no counter-claim was filed by the appellant before the Arbitrator;

(iii) ***Thirdly***, Issue Nos. 3 and 4 dealt with by the Arbitrator only concerned the bank charges as to whether respondent was entitled to the same. The Arbitrator appears to be oblivious of the fact that prior to the Award, the bank guarantees were invoked since the respondent was unable to keep the bank guarantees alive;

(iv) ***Fourthly***, the Section 34 Court is engaged with the issue whether the Arbitrator has recorded any finding as to whether the respondent failed to use mobilisation advance. Though prima facie findings have been recorded in the current proceedings, to the effect that there is no such finding by the Arbitrator, it will finally be decided only in the Section 34 application;

(v) ***Fifthly***, the order dated 01.11.2017 of the learned Single Judge will not come in the way of the respondent for the reason that the present proceedings arise out of a Section

9 application, post Award. In fact, the learned Single Judge, in the present round, after noticing the order dated 01.11.2017, observed that the Arbitrator had reserved the award on 12.12.2016 and pronounced the Award on 05.12.2017, completely oblivious of the fact of encashment of bank guarantees. Moreover, the question in the present round of litigation is really whether in the light of the contents of the Award, permitting the appellant to retain the money would tantamount to unjustly enriching the appellant? It is in that context that the Order of 01.11.2017 has to be viewed;

(vi) ***Sixthly***, since *prima facie* it is found that there was no counter claim by the appellant and no finding that the mobilisation advance against which the bank guarantees were given was not utilized, the High Court was justified in observing that permitting the appellant to hold on the money pending Section 34 application, would be unjustly enriching the appellant and would also be in teeth of the order of 15.12.2005 passed by the High Court in OMP No. 363/2003;

(vii) ***Seventhly***, applying the dictum laid down in ***Home Care Retail Marts (supra)*** and ***Essar House (supra),*** the case of the respondent does provide a rare and a compelling case where even after applying the higher threshold, the directions, as made by the courts below, were required to prevent irreparable prejudice and preserve the efficacy of the challenge in Section 34;

(viii) ***Eighthly***, the High Court could not be said to have exercised its jurisdiction arbitrarily. It was a judicious exercise, keeping in mind the parameters of a *prima facie* case and balance of convenience and irreparable prejudice. The respondent did move the court with reasonable expedition; and,

(ix) ***Finally,*** a relief, as the one fashioned by the courts below, furthers the efficacy of arbitration as a form of dispute resolution and is in keeping with the purpose and object of interim measures contemplated under Section 9.

CONCLUSION: -

27) For the reasons stated above, we find no merit in the appeal. The appeal is, accordingly, dismissed. We grant 4 (four) weeks' time to the appellant to deposit the amount of Rs. 3.5 crores with the Registry of the High Court of Delhi. On deposit, the Registry of the High Court shall keep the same in a Fixed Deposit (FD), in any Nationalized Bank, on auto-renewal basis, till the disposal of the Section 34 application. Needless to state that the observations made in these proceedings are only for the purpose of deciding the Section 9 petition and the Section 34 application will be decided on its own merits without being influenced by the observations in the orders of the courts below or in the present judgment. No order as to costs.