IN THE HIGH COURT OF DELHI AT NEW DELHI

Pronounced on: 19th July, 2022

\+ O.M.P. (I) (COMM.) 433/2020, & I.As. 131/2021, 757-58/2021, 5762/2021, 7056-57/2021, 9045-46/2021 and 9068-69/2021

SHANGHAI ELECTRIC GROUP CO LTD ..... Petitioner

Through: Mr. Rajiv Nayar and Mr. Dayan Krishnan, Senior Advocates with Mr. Ashish Bhan, Mr. Ketan Gaur and Mr. Aayush Mitruka, Advocates.

versus

RELIANCE INFRASTRUCTURE LTD ..... Respondent

Through: Mr. Harish Salve and Mr. Sandeep Sethi, Senior Advocates with Mr. Sanjeev Kapoor, Mr. Mahesh Agarwal, Mr. Gaurav Juneja, Mr. Aditya Ganju, Mr. Pranjit Bhattacharya, Mr. Akshit Mago, Ms. Shruti Garg, Mr. Arjit Oswal and Ms. Monika Vyas, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.:

1. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 [*hereinafter, "**the Act**"*] seeks interim measures for securing the amount in dispute in arbitration payable in terms of a Guarantee Letter dated 26th June, 2008 issued by the Respondent as well as injunctive reliefs restraining the Respondent from selling, transferring or otherwise disposing of and/ or creating any encumbrances on its assets during the pendency of the arbitration proceedings.

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PARTIES TO THE DISPUTE

2. The Petitioner – SEGCL Electric Group Co. Ltd. [*hereinafter*, *"**SEGCL**"*] is a company incorporated and having its registered office in the People's Republic of China, and is *inter alia*, engaged in the business of supplying equipment and services relating to the design, engineering, manufacturing, installation of the main body of turbines and generators and the supervision of erection and commissioning of boilers, turbines and generators, including associated accessories and spare parts.

3. The Respondent – Reliance Infrastructure Limited [*hereinafter*, *"**RELIANCE**"*] is a company incorporated having its registered office in India, and is *inter alia*, engaged in the business of operating and carrying out engineering, procurement and construction services for various power projects, including thermal power plants.

FACTS

4. SEGCL entered into an 'Equipment Supply and Service Contract' dated 26th June, 2008 [*hereinafter*, *"**Contract**"*] with a subsidiary of RELIANCE *viz.* Reliance Infra Projects (UK) Limited [*hereinafter*, *"**Reliance UK**"*] – under which, SEGCL was engaged as the contractor to, *inter alia*, supply equipment, erect the main body of the turbines and generators, and provide supervision services to Reliance UK in relation to erection and commissioning of six units of boilers, turbines and generators, including associated accessories and spare parts, for construction of the coal-fired super critical thermal ultra-mega power project at Sasan, Madhya Pradesh, India

[*hereinafter*, ***"Sasan UMPP"***].

5. Under the Contract, Reliance UK was obliged to, inter alia, pay SEGCL a lump sum contract price of US$ 1,311,000,000 (approx. INR 9,641 crores), which comprised the equipment supply price of USS 1,286,000,000 (approx. INR 9,457 crores) and the services price of US$ 25,000,000 (approx. INR 184 crores).

6. With a view to secure performance of obligations of Reliance UK, RELIANCE issued a Guarantee Letter dated 26th June, 2008, guaranteeing Reliance UK's due performance of all, including payment, obligations under the Contract [*hereinafter*, ***"Guarantee Letter"***].

7. In compliance with the terms of the Contract, SEGCL submitted the Contract Performance Guarantee and Advance Bank Guarantee to RELIANCE and received the first 5% of the contract price on 24th July, 2008.

8. On 30th March, 2015, Sasan UMPP was commissioned and the last consignment of spare parts was delivered on 23rd November, 2017.

9. As of August, 2019, SEGCL was owed an amount of US$ 135,320,728.42 (approx. INR 995 Crores) under the Contract, for which, a notice of dispute dated 23rd August, 2019 was issued to RELIANCE seeking *inter alia* compliance of its obligations under the Guarantee Letter and curing of Reliance UK's breach of obligations by making good the payments of sums owed by Reliance UK to SEGCL, within 60 days of the notice.

10. Owing to non-compliance of the afore-noted notice of dispute, SEGCL invoked arbitration against RELIANCE *vide* notice dated 13th December, 2019. The arbitration proceedings seated in Singapore and administered by Singapore International Arbitration Centre ("SIAC")[1] and United Nations Commission on International Trade Law ("UNCITRAL") Rules have since commenced.

11. It is SEGCL's case that ever since it commenced arbitration, RELIANCE has been in the process of hurriedly dissipating its assets, which, it believes, is to deprive it of the fruits of arbitral award likely to be passed in its favour. In this regard, some of the key indicative instances include, *inter alia,* RELIANCE (i) having entered into a binding agreement on 28th November, 2020 for sale of its entire 74% equity stake in its subsidiary *viz.* M/s. Parbati Koldam Transmission Company Limited; (ii) is in process of selling its 51% stake each in BSES Rajdhani Power Ltd. and BSES Yamuna Power Ltd. – which are some of its key revenue generating assets; (iii) is in advanced stages of completing the sale of its Delhi-Agra toll road to Singapore-based Cube Highways and Infrastructure for INR 3,600 crore; (iv) has made several public statements declaring its clear intention of selling other assets; and (v) RELIANCE's statutory auditors have repeatedly raised serious concerns regarding its fast deteriorating financial health and ability to continue as a "going concern".

[1] Registered as SIAC Arbitration No. 448 of 2019.

CONTENTIONS ADVANCED

I. ON BEHALF OF SEGCL

12. Mr. Rajeev Nayar and Mr. Dayan Krishnan, Senior Counsel for SEGCL, have advanced the following legal submissions controverting the objections raised by RELIANCE on maintainability:

A. Reliance's allegation that Section 9 has been impliedly excluded is false and misconceived.

13. The proviso to Section 2(2) of the Act is explicit. In that, Section 9 is made applicable to all foreign-seated arbitration; however, parties are at liberty to exclude the applicability of Section 9, should they so choose. It is settled position of law that this exclusion cannot be implied, and parties must expressly exclude Section 9 in writing. In the Guarantee Letter, there is nothing to even remotely indicate that the parties have excluded the scope under Section 9.

14. To this extent, reliance is placed on the judgments in ***Big Charter Private Limited v. Ezen Aviation Pty. Ltd. & Ors.***,[2] ***Raffles Design International India Pvt. Ltd. & Anr. v. Educomp Professional Education Ltd.& Ors.***[3] and ***Heligo Charters Private Limited v. Aircon Feibars FZE***.[4]

[2] (2020) SCC OnLine Del 1713 [*See* paragraphs no. 65-71].
[3] (2016) 234 DLT 349] [See Paras 91-103].
[4] (2018) SCC OnLine Bom 1388. [*See* paragraphs no. 16-17].

15. In any event, the present arbitration is governed by UNCITRAL Rules, which under Article 26(9), permits parties to approach a court of competent jurisdiction (other than the seat court) for interim reliefs. It is therefore, contended that this Court has jurisdiction and is competent to grant interim reliefs.

B. Reliance's allegation that SEGCL has other efficacious remedies is misconceived.

16. Section 9 of the Act is explicit and can be invoked at three stages: firstly, before arbitral proceedings; secondly, during arbitral proceedings; or thirdly, at any time after making of the arbitral award, but before its enforcement. The present case falls under the second category as mentioned above.

17. As regards the objection under Section 9(3) is concerned, it will not be efficacious for SEGCL to obtain interim protection from the Arbitral Tribunal, and as such, an order passed by it would not be directly enforceable by Indian Courts. Unlike Section 17, there is no corresponding provision under the Act for enforcement of interim orders passed by a foreign tribunal. The Act only contemplates enforcement of foreign awards (and not foreign interim orders).

18. SEGCL can also not approach the seat court (in this case, Singapore) as there is no provision for execution of an interim order passed by a foreign court under the Code of Civil Procedure, 1908 – which only contemplates execution of foreign decrees under Section 13 read with Section 44A.

19. Therefore, there is a presumption in law that making an application for interim reliefs either before a foreign court or tribunal will be inefficacious when seeking reliefs against an Indian party having the bulk of its assets only in India. Rather, approaching the Court exercising natural jurisdiction over the assets of the Indian party would be the only "efficacious remedy". In this regard, a reference has been made to the 246th Law Commission Report,[5] ***Big Charter Private Limited v. Ezen Aviation Pty. Ltd. & Ors.***[6] and ***Benara Bearings and Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd.***[7]

20. Any meaningful provisional reliefs such as attachment of the RELIANCE'S assets and properties, including bank accounts and direction to third-parties could only be granted by a competent Court in India (such as this Court) and not by the Arbitral Tribunal or the foreign court.

21. In any event, RELIANCE's reliance upon the then provisions of Section 9(3) is misplaced. Section 9(3) refers to only Section 17, which is inapplicable to a foreign-seated arbitration such as the present one.

22. During the oral arguments on 19th January, 2021, it was insinuated by RELIANCE that SEGCL had filed an application seeking similar interim measures from the Arbitral Tribunal and had failed. This is factually incorrect. SEGCL never made any injunction application to the Arbitral Tribunal, and rather, it had previously sought a relief at paragraph 206(e) of the Statement

[5] Law Commission of India, 'Amendments to the Arbitration and Conciliation Act 1996', Report No. 246, paragraph no. 41, Chapter II, (August 2014).
[6] (2020) SCC Online Del 1713 [*See* paragraph no. 60].
[7] (2017) SCC Online Del 7226 [*See* paragraphs no. 25-26].

of Claim, which was withdrawn *vide* communication dated 22nd December, 2020 in view of the protective measures being sought by SEGCL from this Court.

C. Respondent's allegation that the Delhi High Court is not a "Court" under Section 9 is incorrect.

23. In so far as foreign-seated arbitrations are concerned, an application under Section 9 of the Act can be filed wherever RELIANCE has assets or money to satisfy the contemplated foreign award. In this regard, reliance is placed upon the judgments in ***Trammo DMCC v. Nagarjuna Fertilizers and Chemicals Ltd.***[8]

24. Admittedly, RELIANCE has assets located within the territorial jurisdiction of this Court. RELIANCE also has stakes in several other companies whose registered offices are in Delhi. These include: (i) 100% shareholding in Delhi Airport Metro Express Private Limited; (ii) 51% shareholding in BSES Yamuna Power Limited; (iii) 51% shareholding in BSES Rajdhani Power Limited; and (iv) 3.06% shareholding in Indian Highways Management Company Limited.

25. It is a settled position that shares constitute assets, and the situs of such assets are at the place where the registered office of the concerned company is located. Reliance is placed on the judgment of this Court in ***Motorola Inc. v. Modi Wellvest***.[9]

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[8] (2017) SCC Online Bom 8676 [*See* paragraph no. 19].
[9] (2004) SCC Online Del 1094 [*See* paragraphs no. 18].

D. Reliance's allegation that the instant petition is not maintainable since the Guarantee Letter is Unstamped and Unregistered is Ill-Conceived.

26. It must be noted that RELIANCE has not taken this defence in its reply to the petition under Section 9, and the only reference to the same is found in the reply to I.A. No. 131/2021, wherein RELIANCE has only made a bald statement at paragraph 19(x) and not explained how or why the Guarantee Letter is to be registered and/ or stamped under the relevant statutes. RELIANCE has also not provided the amount of stamp duty, if so applicable, and therefore, it seems non-serious in pursuing this defence, as it lacks any merit.

27. In any case, non-stamping or non-registration of the Guarantee Letter (assuming applicable) would not come in the way of this Court in exercising jurisdiction under Section 9. In this regard, reliance is placed on the judgments in ***Gautam Landscapes Pvt. Ltd. v. Shailesh S. Shah***,[10] ***Saifee Developers Pvt. Ltd. v. Sanklesha Constructions and Others***,[11] ***Mittal Electronics v. Sujata Home Appliances (P) Ltd. and Ors.***[12]

28. Further, this objection can, at best, be a matter for concern for a domestic arbitration or in a suit instituted in India. Such bar would not be applicable for a foreign-seated arbitration. RELIANCE is fully aware of this and that is why it has not taken this defence/ objection in the arbitration.

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[10] 2019 3 SCC Online Bom 563 [*See* paragraph no. 74].
[11] (2019) SCC Online Bom 13047 [*See* paragraphs no. 10-11].
[12] (2022) SCC Online Del 409 [*See* paragraph no. 42].

II. ON BEHALF OF RELIANCE

29. On the other hand, Mr. Harish Salve and Mr. Sandeep Sethi, Senior Counsel for RELIANCE, have advanced the following submissions on maintainability/ jurisdiction:

A. Objections on Jurisdiction

30. The Guarantee Letter does not provide jurisdiction to this Court. Further, no cause of action has arisen within the jurisdiction of this Court in as much as: (i) both the Contract and the Guarantee Letter, even as per SEGCL, were executed in China; (ii) the power project is based out of Sasan, Madhya Pradesh; (iii) Payments/ Letter of Credit were issued in China; and (iv) the registered office of RELIANCE is in Mumbai, to the extent of which, reliance has been placed on the judgements in ***Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.***[13] and ***Aarka Sports Management v Kalsi Buildcon Pvt Ltd.***[14]

31. The jurisdiction of this Court has been invoked on the basis of RELIANCE's shareholding in certain subsidiaries based out of New Delhi. It is argued that the shareholding in such subsidiaries or the transaction(s) in relation thereto, do not form part of 'subject matter of the arbitration' under Section 9, and therefore, are irrelevant.

[13] (2017) 7 SCC 678 [*See* paragraphs no. 19-20].
[14] (2020) SCC Online Del 2077[*See* paragraphs no. 10, 28 to 30].

32. The reliefs sought in the present Petition are primarily focused on securing the alleged sum in dispute. Such relief may be sought (and was in fact, sought by SEGCL) before the Arbitral Tribunal.

33. The case substantiated by SEGCL that the jurisdiction of a Court under Section 9 can be made out on the basis of location of assets is beyond the provisions of the Act. In rare circumstances, the location of assets have been considered in cases where an award has already been passed and the intent under Section 9 is to secure the enforcement of the award. In the instant case, neither has any award been passed nor has the question of enforcement arisen. The petition is clearly not maintainable before this Court for securing a contingent award that may not be enforced by this Court.

34. Further, the proviso to Section 2(2) has no application, if otherwise, the Court has no jurisdiction in terms of Section 2(e). In the present case, this Court would not be a court having jurisdiction in terms of Section 2(e) read with proviso to Section 2(2).

B. Objections on maintainability

35. The Guarantee Letter is *non est* and the arbitration clause is unenforceable since it is not duly stamped.

35.1. As per Section 3 read with Entry 5 and 37 of Schedule I of the Indian Stamp Act, 1899, a letter of guarantee is chargeable with stamp duty. It is settled law that an unstamped document, even executed outside India (as is the case with the Guarantee Letter in the present matter),

cannot be used as evidence in terms of Section 35 of the Indian Stamp Act.

35.2. The Guarantee Letter is liable to be impounded by this Court under Section 33 of the Indian Stamp Act. Further, the arbitration clause contained in the Guarantee Letter is also *non-est*, unenforceable and any interim order(s), if passed based on such unstamped document, has to be vacated. Reliance is placed on the judgements in ***Malaysian Airlines Systems-I v. Stic Travels (P) Ltd.***,[15] ***Avantha Holding Limited v. Osian's Connoisseurs of ART (P) Ltd. and Ors.***,[16] ***Garware Wall Ropes v Coastal Marine***,[17] ***Dharmaratnakara Rai Bahadur v. Bhaskar Raju & Bros.***,[18] and ***Vidya Drolia & Ors. v. Durga Trading Corp.***[19]

36. The applicability of Section 9 of the Act has been excluded. Having agreed to foreign-seated institutional arbitration (under UNCITRAL Rules, as amended in 2013) and arguing for the applicability of English law on the Guarantee Letter, SEGCL has excluded the applicability of Section 9. Reliance is placed on the judgement of the High Court of Delhi in ***Ashwani Minda v. U-Shin Ltd.***[20] for this purpose.

37. The Petition is not maintainable under Section 9(3), since SEGCL has efficacious remedy before the Arbitral Tribunal.

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[15] 2000 SCC Online SC 68 [*See* paragraphs no. 4 and 9].
[16] 2012 SCC Online Del 2044 [*See* paragraphs no. 17-18].
[17] (2019) 9 SCC 209 [*See* paragraph no. 22].
[18] (2020) 4 SCC 612 [*See* paragraph no. 18].
[19] 2020 SCC Online SC 1018 [*See* paragraph no. 131].
[20] 2020 SCC Online Del 721 [*See* paragraphs no. 52-53].

37.1. Section 9(3) provides that *"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."* Therefore, since the Arbitral Tribunal has already been constituted in the present matter (since February, 2019), this Court should not entertain the present petition. Reliance is placed on ***Ashwani Minda*** *(Supra)*[21] to this extent.

37.2. Rule 26 of the UNCITRAL Rules provide for an efficacious remedy to seek interim measures, including for preserving assets out of which a subsequent award may be satisfied. SEGCL has never before disputed the efficacy of the same. On the contrary, in its Statement of Claim, SEGCL had already sought a relief to secure itself of the amount in dispute by requiring RELIANCE to furnish and maintain an irrevocable Letter of Credit for the sum of US$ 257 million approx. (INR 1895 crores approx.), thereby admitting that an efficacious remedy exists before the Arbitral Tribunal. The said relief was not pressed for by SEGCL for more than 10 months before the Arbitral Tribunal.

37.3. The present petition has been filed to avoid payment of revised costs of arbitration. Based on the relief sought by SEGCL before the Arbitral Tribunal (*i.e.*, to secure the sums in dispute by way of an irrevocable Letter of Credit worth US$ 257 million approx.), the SIAC revised the cost of arbitration (from SGD 1,550,985.54 to SGD 2,379,141.60.). To avoid suspension of arbitration on 22nd December,

[21] 2020 SCC Online Del 721 [*See* paragraphs no. 36-37].

2020, due to non-payment of such revised cost, SEGCL filed the present Petition and immediately withdrew the said relief for securing the amount in dispute as claimed before the Arbitral Tribunal.

C. Additional objections to maintainability of claims/ petition

38. ***The Guarantee Letter is invalid and unenforceable as per Foreign Exchange laws of India.***

38.1. The Guarantee Letter is also invalid and unenforceable, as per Regulation 3 of the Foreign Exchange Management (Guarantees) Regulations, 2000, which provides that no Indian company may give/ stand as guarantee for a person residing outside India, without the permission of the Reserve Bank of India ("RBI"). Admittedly, no such permission has been obtained from the RBI.

39. ***The Guarantee Letter and arbitration clause contained therein is not executed by RELIANCE and is unknown to it.***

39.1. RELIANCE has a serious objection to the very existence/ validity/ execution of the Guarantee Letter on its behalf.

39.2. The person who has signed the Guarantee Letter was not authorised/ empowered to execute any such guarantee on RELIANCE's behalf. SEGCL admittedly did not verify whether the authority of such person is binding on RELIANCE (a public limited company) with implications of about USD 1.3 billion dollars. No such guarantee letter was placed before the Board of RELIANCE and as such, it is unaware of its alleged execution. In fact, it is the SEGCL's own case that the alleged

signatory had signed the Guarantee Letter not at the office of RELIANCE but curiously, at its own office in Shanghai, China.

39.3. The Guarantee Letter (including the arbitration agreement) has not been countersigned/ acknowledged by SEGCL. In fact, even when disputes arose as early as in 2013-2014, the existence of such Guarantee Letter was not even mentioned by SEGCL until its invocation in 2019 (*i.e.*, after 11 years from its purported execution and about 6 years since disputes arose).

40. ***SEGCL's claims are barred under Indian Limitation Act, 1963.***

40.1. The claims of SEGCL are hopelessly time-barred. It is an admitted position that SEGCL's claims arose as early as in 2013. In any event, it is also admitted that the project was completed around March, 2015 and the disputes have been pending since October, 2015.

40.2. Notably, the Guarantee Letter is not dependent on a demand being made against RELIANCE in case of breach by the principal debtor. Instead, the cause of action to invoke the Guarantee Letter would arise on first occasion of breach by the principal debtor (*i.e.*, alleged to be in 2013 or 2015 in the present case). The invocation of the Guarantee Letter in August, 2019, is thus, much beyond the period of limitation.

ANALYSIS

41. The Court has heard the counsel for both parties extensively. For the sake of convenience, the contentions are being dealt with under separate headings:

I. INTERIM ORDERS IN FORCE

42. At the first instance, when the petition was listed for the first time on 24th December, 2020, RELIANCE was granted time to file an affidavit on the objections raised by them on the ground of maintainability. Subsequently, with the change of roster, the matter was listed before another bench.

43. A controversy arose regarding the oral assurance given by the counsel *qua* interim protection, when, on 15th January, 2021, counsel for SEGCL submitted that an oral assurance had been given by Mr. J.J. Bhatt, Senior Counsel on behalf of RELIANCE on 24th December, 2020 that it would not dispose of three immovable assets mentioned in the petition. It was alleged that in violation of such assurance, two of the assets had been disposed of by RELIANCE – one in December, 2020 itself and the other on 8th January, 2021. This stance was controverted by Mr. Mukul Rohatgi, Senior Counsel appearing on behalf of RELIANCE, who stated that no such oral assurance was given. In light of the divergent stand taken by the parties, the matter was placed for clarification before the Bench which had passed the order dated 24th December, 2020. Accordingly, the following order came to be passed:

> *"1. The present petition has been listed before this Court pursuant to an order passed by the Roster Bench on 15.01.2021, as it appears that the parties were at divergence in respect of the assurance given on behalf of the respondent to this Court on 24.12.2020.*
> *2. Learned senior counsel for the respondent reiterates that the respondent had assured this Court on 24.12.2020 that till the next date, the respondent will not create any further third party rights in its assets valued at Rs.995 Crores, which assets will be available for appropriate orders being passed by this Court in case the need so arises.*

> *3. In view of the aforesaid submission of the learned senior counsel for the respondent, no further orders are called for.*
> *4. List the matter before the Roster Bench on the date already fixed, i.e., 27.01.2021."*

44. Thereafter, while hearing arguments on maintainability, the Roster Bench *vide* order dated 19th January, 2021, directed the following:

> "*List for arguments on maintainability of this petition on 27th January, 2021 at 02:15 PM. Till then the Respondent shall maintain status quo regarding its shareholding in BSES Yamuna Ltd. and BSES Rajdhani Ltd."*

45. On 27th January, 2021, the Roster Bench directed RELIANCE to file its list of assets and details *qua* encumbrance, litigation and complete details of charge or hypothecation etc., and the interim order was continued. With the above interim measure in place, parties advanced submissions on the questions of jurisdiction, maintainability as well as on merits, which are dealt with hereinafter.

II. JURISDICTIONAL OBJECTIONS

46. RELIANCE opposes the present petition on jurisdictional grounds, which have been noted above and are being analysed first before dealing with the merits of the contentions:

A. Whether the applicability of Section 9 has been excluded.

47. RELIANCE has argued that the having agreed to a foreign-seated institutional arbitration (under the UNCITRAL Rules, as amended in 2013)

and agreeing for the applicability of English law on the Guarantee Letter, SEGCL has agreed to exclude applicability of Section 9 of the Act.

48. In order to adjudicate on the above objection, it would first be apposite to take note of the proviso to Section 2(2), which reads as follows:

> *"(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."*
>
> [Emphasis Supplied]

49. The proviso to Section 2(2) was introduced on recommendation of the Law Commission of India in its 246th Report, in terms whereof, provisions of Section 9 (amongst other provisions enumerated therein) were made applicable to international commercial arbitrations. The language of amendment to Section 2(2) makes it evident that Section 9 is applicable to international commercial arbitrations, even if the seat is outside of India. The proviso to Section 2(2) also gives liberty to parties to exclude the applicability of Section 9, which is obvious and explicit from the expression used – *"subject to an agreement to the contrary."* Thus, in order to render Section 9 inapplicable, a party has to demonstrate that there is an agreement to the contrary, thereby explicitly excluding application of proviso to Section 2(2). However, it must also be noticed that the phrase – "an agreement to the contrary" – has to be given due weightage, and such "contrary agreement" cannot be assumed or interpreted on the mere assertion of a party. The provision mandates that the exclusion must be explicitly demonstrated. In

other words, the same should clearly be borne out from the language of the agreement between the parties as exclusion of Section 9 is contrary to the dispensation provided in the proviso. The necessary corollary is that unless an agreement to the contrary is convincingly founded, the provision would become applicable.

50. That said, the Court is conscious that the above provision does not specify that an agreement must be "express", and it merely requires an "agreement to the contrary". Nevertheless, in the opinion of the Court, even if a provision is silent to this extent, exclusion cannot be assumed on a mere allegation. When a party raises the plea of exclusion of a provision of law, the same must not be construed lightly. It must be called upon to prove the same. In the instant case, the objection *qua* exclusion of Section 9 is premised purely on the basis of the submission that parties have chosen a foreign-seated institutional arbitration under UNCITRAL Rules. This, in the opinion of the Court, certainly cannot amount to "an agreement to the contrary", so as to exclude the applicability of Section 9. Such an interpretation would be contrary to the intent of the proviso to Section 2(2) – which was introduced only to render Section 9 applicable to foreign-seated institutional arbitrations.

51. On this issue, RELIANCE has placed reliance in the judgment of this Court in ***Ashwani Minda and Anr. v. U-Shin Limited and Anr***,[22] the relied upon potion whereof, read as under:

> *"52. In view of the Amendment to* ***Section 2(2), it is clear that Section 9 of the Act, with which the present Petition is concerned, is applicable even to***

[22] 2020 SCC Online Del 1648 [*See* paragraphs no. 52 and 53].

> ***International Commercial Arbitration held outside India, provided its applicability has not been excluded by the parties by an Agreement to the contrary****. In the case of Raffle (supra), Court has in para 72 held that it is not necessary that the parties exclude the applicability of Section 9 by an express Agreement and the exclusion can be even inferred and implied.*
> *53.* ***Legislative intent of making certain provisions of Part I of the Act applicable to International Commercial Arbitration held outside India, subject to an agreement to the contrary,*** *is clearly in keeping with the ethos and annals of 'party autonomy' which is the foundation of the pyramid of Arbitration. Therefore, if the parties, by an agreement, expressly or impliedly exclude the applicability of Sections 9 or 27 or 37 in Part I of the Act, then the said provisions cannot be invoked by either party to the Agreement."*
>
> [Emphasis Supplied]

52. However, in the Court's opinion, the reliance placed upon the judgment in ***Ashwani Minda*** *(Supra)* is misplaced. The observations made in paragraphs no. 52 and 53 of the judgment are being read and interpreted out of context. In fact, in the paragraphs of the same judgment, which have been relied upon by RELIANCE, the Court has observed that Section 9 is applicable even to foreign-seated arbitrations and applicability may be excluded by parties only by way of "an agreement to the contrary".

53. Further, it must also be noted that unlike the JCAA Rules which were in dispute in ***Ashwani Minda*** *(Supra)*, Article 26(9) of the UNCITRAL Rules pertaining to 'Interim Reliefs' permits parties to approach a Court of competent jurisdiction (other than the seat court) for interim reliefs. The said clause reads as follows:

> *"A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."*

54. In ***Ashwani Minda*** *(Supra)*, relying upon the judgment in ***Raffles Design*** *(Supra)*, the Court therein also observed that it is not necessary that parties exclude the application of Section 9 by an "express agreement", and the same can also be inferred and implied; however, such an observation would also not help RELIANCE's case, as it seeks to exclude the applicability of Section 9 primarily on the ground that parties have chosen foreign-seated institutional arbitration. This plea does not *ipso facto* exclude applicability of Section 9.

55. Further, this Court in ***Big Charter Private Limited*** *(Supra)* analysed the scope and ambit of Section 2(2) and its proviso thereto by referring to recommendations of the Law Commission of India and opined that an agreement to exclude the application of the proviso to Section 2(2) would, in fact, have to be an express agreement. It was further held that the expression – *"subject to an agreement to the contrary"*, would require parties to specifically spell out that Section 9 would not apply. A mere condition in a contract that parties submitted to the jurisdiction of a foreign court would be insufficient to operate as "an agreement to the contrary", to exclude the applicability of Section 9. The relevant portions of the judgment in ***Big Charter Private Limited*** *(Supra)*, reads as follows:

> *"65. There is yet another way of looking at the issue. What is required, by the proviso to Section 2(2) of the 1996 Act, in order to render the proviso inapplicable in a particular case, is an "agreement to the contrary". **The agreement, which would exclude the application of the proviso to Section2(2) would, therefore, have to be contrary to the dispensation provided in the proviso, i.e., it would have to be contrary to the applicability, to the proceedings, of Section 9 of the 1996 Act** applicable even in the case of foreign seated arbitrations; **any "agreement to the contrary" would, therefore, have to expressly stipulate that Section 9 would not apply in that***

particular case, *Absent such a specific stipulation, the beneficial dispensation, contained in the proviso, cannot stand excluded.*

xx ... xxx ... xx

71. Extrapolating this reasoning to Clause 22.1 in the present case, read with the requirement of an "agreement to the contrary", for the proviso to Section 2(2) to be rendered inapplicable, the mere conferment of exclusive jurisdiction, on courts at Singapore, by Clause 22.1, would not suffice as an "agreement to the contrary", within the meaning of the proviso to Section 2(2). ***The agreement would be required to have a specific stipulation that the parties had agreed to exclude the applicability of Section 9 of the 1996 Act to the contract between them, and to disputes arising thereunder.*** *Absent such a specific stipulation,* ***the mere recital, in Clause 22.1, that the parties had agreed to submit themselves to the jurisdiction of Singapore courts, would not suffice as an "agreement to the contrary",*** *within the meaning of the proviso to Section 2(2) of the 1996 Act."*

[Emphasis Supplied]

56. To conclude, the mere conferment by parties to arbitration governed by UNCITRAL Rules would not amount to ouster/ exclusion of the applicability of Section 9. Therefore, RELIANCE's objection that the applicability of Section 9 stands excluded by choosing foreign-seated institutional arbitration, cannot be countenanced and is hereby rejected.

B. Whether the present petition is not maintainable under Section 9(3).

57. Before delving into this issue, it would be apposite to take note of Section 9(3) of the Act, which reads as follows:

*"**Section 9. Interim measures by Court –***
[...]
(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"

58. RELIANCE'S contentions all throughout have been that since the Arbitral Tribunal has already been constituted, the Court ought not to entertain the present petition, and that Rule 26 of the UNCITRAL Rules provides for an "efficacious remedy" to seek interim measures, including for preserving assets out of which a subsequent award may be satisfied. In support of this objection, substantial reliance has been placed on the judgment of the Division Bench of this Court in ***Ashwani Minda v. U-Shin Limited***,[23] the relevant portion whereof is extracted hereinbelow:

> *"36. […] We therefore hold that,* ***although an application under Section 9 is maintainable in connection with a foreign-seated arbitration, an application thereunder would not lie after the constitution of the arbitral tribunal, unless the applicant demonstrates that it does not have an efficacious remedy before the tribunal****. (We are not required in the facts of the present case to decide whether the availability of a remedy before an emergency arbitrator, or the seat court, would also dissuade the Indian court from granting relief under Section 9.)*
>
> *37. In considering the aforesaid question, the Court would certainly have regard to* ***the question as to whether the remedy before the arbitral tribunal would be efficacious or not.*** *This caveat is incorporated in Section 9(3) also, and would* ***turn upon the facts and circumstances of each case, including the amplitude of the power conferred upon the arbitral tribunal.*** *In making this assessment, the manner in which the applicant has framed the relief sought cannot be determinative;* ***the more appropriate test is whether the tribunal is sufficiently empowered to grant effective interim measures of protection.*** *It may well be that, in the circumstances mentioned in paragraph 41 of the LC Report, the Court would come to the conclusion that the application ought to be entertained However, this does not obviate the necessity for a determination of the question."*
>
> [Emphasis Supplied]

59. On the other hand, SEGCL has argued that it will not be efficacious for it to obtain interim protection from the Arbitral Tribunal, as such an order, even if granted, is not directly enforceable by the Courts in India. Unlike

[23] 2020 SCC OnLine Del 721.

Section 17(2), there is no corresponding provision under the Act for enforcement of interim orders passed by a foreign tribunal. The Act only contemplates enforcement of foreign awards and not foreign interim orders passed by the Arbitral Tribunal.

60. Since RELIANCE has heavily relied upon ***Ashwani Minda*** *(Supra)*, in order to determine whether the said judgment is applicable to the facts of the case, it would be imperative to take note of certain pertinent observations made in the said judgement. In the afore-noted case, the Division Bench took note of the contentions raised by the Appellant therein *qua* applicability of Section 9(3) to foreign-seated arbitrations. The Division Bench was conscious of the fact that Section 9(3), on its own, expressly related to Indian-seated arbitrations as evidenced by the reference to Section 17; yet, it was held that the principle enshrined under the said provision would be equally applicable when interim measures are sought in Indian Courts in connection with foreign-seated arbitrations. This view was taken with due consideration of the Law Commission's recommendations which provide the rationale for insertion of Section 9(3) into the Act – suggesting that the amendment had been introduced to reduce the Court's role in relation to the grant of interim measures, pending the constitution of the Arbitral Tribunal. The relevant portions of the said judgment are as under:

> *"34. Although Section 9(3) of the Act is, on its terms, expressly relatable to India–seated arbitrations, as evidenced by the reference to Section 17 of the Act, we are of the view that the principle thereof is equally applicable when interim measures are sought in the Indian courts in connection with a foreign-seated arbitration. Resolution of disputes by a tribunal of the parties' choice, and reduced interference by courts, are amongst the central features of arbitration. Section 9(3) of the Act reflects that understanding and*

manifests a legislative preference that the grant of interim measures ought to be considered by the arbitral tribunal, once constituted, rather than by the courts. It is only when the remedy before the tribunal lacks efficacy, that a party can seek interim measures from the court under Section 9. In the LC Report also, the following justification is provided for the insertion of Section 9(3) into the Act:

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

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

> *"41. While the decision in BALCO is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.*
>
> *(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the*

interim relief obtained by it.

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

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

61. The Division Bench also took note of the contentions urged by the Appellant therein *qua* the principle of minimal court interference in relation to Indian-seated arbitrations not being applicable to foreign-seated arbitrations, and rejected the same. It was held that reference in Section 9(3) to Section 17 alone cannot be dispositive of the question whether the same principle can be made applicable to foreign-seated arbitrations. The relevant observations on this aspect are as follows:

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

[Emphasis Supplied]

It was therefore, held that the absence of specific reference to foreign-seated arbitrations in Section 9(3) was not to be construed as widening of the scope under Section 9 to include cases wherein the Arbitral Tribunal had been constituted and is capable of granting efficacious relief.

62. It must also be noted that the injunction/ reliefs sought in ***Ashwani Minda*** *(Supra)* were by an India party against Japanese corporations, where the Court did not have natural/ personal jurisdiction against Japanese corporations; whereas, in contrast, in the present case, an injunction has been sought by SEGCL (a Chinese corporation), against RELIANCE (an Indian party), whose assets are stated to be located in India.

63. In view of the above-noted observations, the proposition advanced by SEGCL that RELIANCE cannot rely upon the provisions of Section 9(3), is misplaced. Equally misconceived is SEGCL's proposition that since Section 9(3) refers only to Section 17, it is inapplicable to foreign-seated arbitrations.

64. In ***Ashwani Minda*** *(Supra)*, the Division Bench also dealt with the question as to whether an application can lie, after constitution of an arbitral tribunal. The holding is as follows:

> *"……We therefore hold that, although an application under Section 9 is maintainable in connection with a foreign-seated arbitration, an application thereunder would not lie after the constitution of the arbitral tribunal, unless the applicant demonstrates that it does not have an efficacious remedy before the tribunal. (We are not required in the facts of the present case to decide whether the availability of a remedy before an emergency arbitrator, or the seat court, would also dissuade the Indian court from granting relief*

under Section 9."

Indeed, the jurisdiction of this Court is not automatically ousted on the constitution of the Arbitral Tribunal. This is the language of the statute. In such an event, however, the Court is required to examine whether the applicant demonstrates that it does not have an "efficacious remedy" before the Tribunal.

65. This brings us to the decisive question as to whether the remedy sought before the Arbitral Tribunal for interim measures would be "efficacious" or not. On this issue, SEGCL's grievance, as noted above, is that it is not efficacious for it to obtain interim protection from the Arbitral Tribunal, since the order passed by the Tribunal is not directly enforceable by the Courts in India in absence of any provision corresponding to Section 17(2). SEGCL has also urged that it cannot approach the seat court in Singapore, as there is no provision for execution of an interim order passed by a foreign court under the Code of Civil Procedure, 1908.

66. SEGCL has also laboured that there is a presumption in law that making an application for interim reliefs before a foreign tribunal or court would be inefficacious when seeking reliefs against an Indian party having bulk of its assets in India. On this proposition, reliance has been placed on the observations made by this Court in ***Big Charter Private Limited*** *(Supra)*, wherein it was held as:

> *"60. There is a qualitative, an unmistakable, difference, between the jurisdiction exercised by a Court under Section 9, and the jurisdiction exercised by the Court under other provisions of the 1996 Act, such as*

*Signature Section 11, 34 and 36. Section 9 is available at the pre-arbitration stage, before any arbitral proceedings, and could be subject to supervision by any judicial forum, have commenced. The purpose in including, specifically, Section 9, in the proviso to Section 2(2), has to be appreciated in the backdrop of the recommendations of the 246th Law Commission, and the observations guiding the said recommendations. It is at this point that the difficulty, or impossibility, of the petitioner obtaining pre-arbitral interim relief from Singapore, becomes relevant. As has been correctly pointed out by Mr. Gautam Narayan, para 41(i) of the recommendations of the Law Commission indicate, unmistakably, that the decision to exclude, generally from the ambit of Section 2(2), applications seeking pre- arbitral interim reliefs, for securing the assets constituting subject matter of the arbitration, was that, where the assets were located in India and there is a likelihood of dissipation thereof, the party, seeking a restraint thereagainst, would "lack an efficacious remedy if the seat of the arbitration is abroad". **As has been observed by the Law Commission, in such a situation, the party seeking pre-arbitral interim injunction, would have to obtain an interim order from the foreign Court, or the arbitral tribunal situated abroad, and, thereafter, to file a civil suit to enforce the right created by such interim order which, otherwise, would not be directly enforceable by way of an execution petition, as it would not qualify as a "judgement" or "decree", for the purposes of Section 13 and 44A of the CPC. Similarly, disobedience, by the party against whom an injunction may, if at all, be obtained from a foreign Court, would also require the applicant seeking injunction to initiate contempt proceedings in the foreign Court and thereafter, enforce the judgement of the foreign Court under Section 13 and 44A of the CPC. These reliefs, as the Law Commission has observed, are likely to be more chimerical than substantial.**"*

[Emphasis Supplied]

In ***Big Charter Private Limited*** *(Supra)*, the Court was dealing with a pre-arbitration petition, *i.e.*, whereunder the Arbitral Tribunal had not been constituted. Nonetheless, the observations extracted above are relevant and the Court has highlighted the inadequate and tedious execution mechanism of an interim order of a foreign court or arbitral tribunal situated abroad. This suggests that SEGCL's remedy before the Arbitral Tribunal would not be efficacious.

67. In the instant case, it is an undisputed fact that the Arbitral Tribunal has already been constituted and UNCITRAL Rules apply to the arbitral proceedings. Rule 26 of the UNCITRAL Rules itself provides for a remedy to seek interim measures, including the preserving of assets out of which a subsequent award may be satisfied. The said Rule reads as under:

> *"Article 26*
>
> *1. The arbitral tribunal may, at the request of a party, grant interim measures.*
>
> *2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:*
>
> *(a) Maintain or restore the status quo pending determination of the dispute;*
>
> *(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;*
>
> *(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or*
>
> *(d) Preserve evidence that may be relevant and material to the resolution of the dispute.*
>
> *3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:*
>
> *(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*
>
> *(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.*
>
> *4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.*
>
> *5. The arbitral tribunal may modify, suspend or terminate an interim measure*

it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."

68. At this juncture, it must also be noted that RELIANCE has also contended that SEGCL had earlier filed an application before the Arbitral Tribunal seeking similar interim measures, but failed to pursue the same only to save costs. SEGCL, on the other hand, controverts RELIANCE'S contention, stating it to be factually incorrect and that SEGCL never made an interim application before the Tribunal. Rather, it had previously sought a relief at paragraph 206(e) of its Statement of Claim – which was also withdrawn subsequently on 22nd December, 2020, in view of the protective measures being sought before this Court. SEGCL's email to the Tribunal to that effect reads as under:

"Dear Sirs

The Claimant has serious cause for concern that the Respondent has taken and continues to take steps to dispose of and/or create encumbrances on its assets situated in India so as to render any award issued in ARB 448 ineffective. In the circumstances, the Claimant is constrained to file an application under Section 9 of the Indian Arbitration and Conciliation Act,

1996 before the Honourable High Court of Delhi, India, seeking urgent interim measures against the Respondent to secure the amount in damages sought by the Claimant in ARB 448 in the sum of US$135,320,728.42, and for injunctive reliefs to restrain the Respondent from selling, transferring or otherwise disposing of and/or creating encumbrances on its assets during the pendency of ARB 448. The application was filed by the Claimant on 18 December 2020. A copy of this application was served on the Respondent earlier today on 22 December 2020.

Due to the urgency of the situation, and given that the Respondent is an Indian corporation with the bulk of its assets located in India, the Claimant was of the view that urgent relief was required from the Indian Courts so as to immediately injunct the Respondent from disposing of and/or creating encumbrances on its assets. A hearing of the Claimant's application is likely to take place on 24 December 2020. The Claimant is of the view that the Indian Court application ought not to affect the timelines and proceedings in ARB 448. Nonetheless, we will keep the Tribunal updated on matters pertaining to the Claimant's Indian Court application, insofar as they are relevant to ARB 448.

In light of the protective measures now being sought before the Indian Courts, the Claimant is of the view that the relief it previously sought at paragraph 206(e) of the Statement of Claim dated 23 April 2020 filed in ARB 448 ("SOC") is no longer necessary. *The Claimant therefore wishes to immediately withdraw the relief sought at paragraph 206(e) of the SOC, with no orders as to costs. That relief is reproduced below for ease of reference:*

> *"(e) an order that the Respondent immediately furnishes and maintains an irrevocable automatic Revolving Sight Letter of Credit in favour of the Claimant for the sum of US$257,200,000 issued by a bank acceptable to the Claimant and based on the terms set out at Appendix 5 to the Contract, valid until three months after the issuance of the Final Completion Certificates for each of the two Streams of the Sasan UMPP to the Claimant, given Reliance's UK's failure to do the same, or until all sums found by the tribunal to be due and payable by the Respondent to the Claimant under the Guarantee Letter have been fully paid to the Claimant, whichever is later …"*

*Also attached is a draft of the Claimant's Statement of Claim (Amendment No. 1) ("**Claimant's Amended SOC**"), with the Claimant's proposed amendments to the SOC marked-up in strikethrough and underline in red font. We look forward to the Tribunal's acknowledgment of the Claimant's Amended SOC. The Claimant would also be happy to address any queries the Tribunal may have.*

We thank the Tribunal for its kind attention to this matter.

Regards
May Jean

May Jean Lim
Director, Dispute Resolution"

[Emphasis Supplied]

69. Although, SEGCL has contended that the relief at paragraph 206(e) was not an interim relief, and rather, a final one – for specific performance of Clause 2(i)(A) of Appendix-V of the underlying Contract; however, it still bears out that SEGCL disputed the efficaciousness of the Arbitral Tribunal to grant interim measures. SEGCL did not pursue its remedy before the Tribunal in respect of the relief sought in the present petition. Thus, the crucial question remains – whether the remedy for interim relief before the Arbitral Tribunal is inefficacious.

70. This brings us to another decision of this Court in ***Raffles Design (Supra)***, wherein certain disputes arose between the parties in relation to a Share Purchase Agreement. Petitioner therein invoked the arbitration clause which provided for reference of disputes to the Singapore International Arbitration Centre ("SIAC"). Thereafter, pursuant to Rule 26.2 of the SIAC Rules, Petitioner sought appointment of an emergency Arbitrator. The Emergency Award was granted in favour of Petitioner therein, who then filed an application before the High Court of Republic at Singapore under Section 12 of the International Arbitration Act, 1994 seeking enforcement of the emergency award. Since Respondents therein acted in contravention of the Petitioner's rights despite the emergency award, a petition under Section 9 of

the Arbitration and Conciliation Act, 1996 came to be filed. The Court, while rejecting the contention of the Respondent regarding the applicability of Section 9, observed as under:

> *"97. The contention that the parties have impliedly agreed to exclude Section 9 of the Act, has to be considered in the above backdrop.*
>
> *98. It is seen that the parties had expressly agreed that the arbitration shall be governed by the SIAC Rules. It is relevant to note that Rule 26.3 of the SIAC Rules, expressly provides that:-*
>
> > *"26.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules."*
> >
> > *[Rule 30.3 of SIAC Rules, 2016 is similarly worded to Rule 26.3 quoted above.]*
>
> *99. This is pari materia to Article 9 of the Model Rules. The SIAC Rules must be read as a part of the agreement between the parties and the only conclusion that can be drawn is that the parties had expressly agreed that seeking an interim order from the Courts would not be incompatible with the arbitral proceedings.*
>
> *100. The SIAC Rules are clearly in conformity with the UNCITRAL Model Law and permit the parties to approach the Court for interim relief. As pointed out earlier, UNCITRAL Model Law expressly provides for courts to grant interim orders in aid to proceedings held outside the State. And, the proviso to Section 2 (2) of the Act also enables a party to have recourse to Section 9 of the Act notwithstanding that the seat of arbitration is outside India. Thus, the inescapable conclusion is that since the parties had agreed that the arbitration be conducted as per SIAC Rules, they had impliedly agreed that it would not be incompatible for them to approach the Courts for interim relief. This would also include the Courts other than Singapore. It is relevant to mention that IAA is based on UNCITRAL Model Law and SIAC Rules are also complimentary to IAA/UNCITRAL Model law.*
>
> *101. In the circumstances, the contention that the parties by agreeing that the proper law applicable to arbitration would be the law in Singapore have excluded the applicability of Section 9 of the Act cannot be accepted.*
>
> *102.* ***The only question that now remains to be considered is whether the petitioner can approach this Court for an interim relief considering that it has already approached the Arbitral Tribunal in Singapore and thereafter,***

<u>also obtained a judgment in terms of the interim order from the Singapore High Court.</u>

103. ***<u>It is relevant to mention that Article 17H of the UNCITRAL Model Law contains express provisions for enforcement of interim measures. However the Act does not contain any provision pari materia to Article 17H for enforcement of interim orders granted by an Arbitral Tribunal outside the India. Section 17 of the Act is clearly not applicable in respect of arbitral proceedings held outside India</u>****."*

[Emphasis Supplied]

As can be seen from the extracted portion, although the question *qua* efficaciousness of the Arbitral Tribunal was not specifically raised in the said judgement; nonetheless, the above-noted observations are germane and reflect the opinion of the Court *qua* maintainability of Section 9 petition in relation to enforcement of interim orders.

71. From the above discussion and analysis of the caselaw it emerges that the emergency award/ foreign interim orders cannot be enforced directly. In the present case, the arbitration is based on UNCITRAL Law, which permits parties to approach the Courts for interim relief – which means courts other than those of Singapore. SEGCL cannot approach the seat court (in this case, Singapore), as there is no provision for execution of an interim order passed by a foreign court under the Code of Civil Procedure (which contemplates for execution of foreign decrees under Section 13 read with Section 44A). In fact, any meaningful provisional reliefs such as attachment of RELIANCE's assets and properties, including bank guarantees and directions to third-parties could only be granted by a court of competent jurisdiction in India, and not by the Arbitral Tribunal or a foreign court, since there is no provision corresponding

to Section 17 for enforcement of interim orders.

72. Accordingly, the Court finds merit in the plea of SEGCL that the remedy before the Arbitral Tribunal is inefficacious. Thus, the Court holds that the remedy to invoke Section 9 of the Act is available to SEGCL, notwithstanding the constitution of the Arbitral Tribunal.

C. Whether jurisdiction can be invoked on the basis of location of assets.

73. There is yet another jurisdictional objection with regard to the maintainability of the petition, which needs to be briefly dealt with.

74. SEGCL contends that the jurisdiction of this Court under Section 9 of the Act can be made out on the basis of the location of assets. RELIANCE controverts this on the ground that the same is beyond the provisions of the Act. Even otherwise, it is only in very rare circumstances – where an award has already been passed and the intent under Section 9 is to secure its enforcement – that the location of assets has been considered.

75. In the present case, neither has any arbitral award been passed, nor has the question of enforcement arisen; however, this does not mean that a party cannot invoke jurisdiction under Section 9 on the basis of the location of assets.

76. Further, the legislature has permitted a party holding a foreign award to invoke Section 9 as well as Sections 47 to 49 to enforce a foreign award.

For such enforcement, in terms of the explanation to Section 47, a "Court" is defined as having *'original jurisdiction to decide question(s) forming the subject-matter of an arbitral award, if the same had been the subject-matter of a suit on its original civil jurisdiction'*. The Bombay High Court in ***Trammo DMCC v. Nagarjuna Fertilizers and Chemicals Ltd.***,[24] examined the principle of contextual interpretation under Section 2(1)(e)(ii) to hold that "Court", as defined in the explanation to Section 47, would be the appropriate court when a petitioner is seeking interim relief(s) under Section 9, pending enforcement of a foreign award, the relevant portion of the said judgment reads as under:

> *"19. Now the question remains is 'whether section 2(1)(e)(ii) when it defines "court" to mean the High Court having jurisdiction to decide the question forming the subject matter of the arbitration would create any impediment preventing the petitioner to invoke Section 9 before this Court. In my opinion, a cumulative reading of the amended provisions would not create such a hurdle for the petitioner to invoke the jurisdiction of this Court and maintain this petition. The reason being that Section 2 the definition clause begins with the words "In this Part, unless the context otherwise requires-". The definition of "Court" as contained in Section 2(1)(e)(ii), in the present context would create a incongruity to enforce the provisions Section 9 of the Act as made applicable by the 2015 Amendment Act. This inasmuch as the petitioner would be prevented to seek interim measures in enforcing the money award, when the money is lying within the territorial jurisdiction of the Courts only for the reason that it is not the subject matter of arbitration. This is opposed to the plain and clear intention of the legislature as incorporated by the 2015 Amendment Act as noted above. It cannot be conceived that on the one hand the legislature permits a party holding a foreign award to invoke Section 9 of the Act and further permit invoking of the provisions of Sections 47 to 49 of the Act to enforce the foreign awards, and for that matter to approach the appropriate court having jurisdiction to decide the question forming the subject matter of arbitral award, as if the same had been the subject matter of the suit as the explanation to Section 47 would provide. However, on the other hand at the same time, when it comes to adopting proceedings under* ***Section 9 to secure the sums awarded being the money to secure the award is available within the jurisdiction of the***

[24] 2017 SCC Online Bom 8676.

> ***Court, it would render the Court lacking such jurisdiction by application of Section 2(1)(e)(ii). This is surely not the intention of the legislature. Any interpretation which would defeat the intention of the legislature is required to be avoided. Thus, in my opinion, considering the amended provisions and in the facts of the present case when the petitioner is holding a foreign award and when the money is available within the jurisdiction of this Court as contained in the bank accounts of the respondent at Mumbai, the principles of "contextual interpretation" of Section 2(1)(e)(ii) would be required to be adopted considering the opening words of Section 2(1) "In this Part, unless the context otherwise requires—" and adverting to this principle of interpretation it would be required to be held that the "Court" as defined under the explanation to Section 47, would be the appropriate court when the petitioner is seeking interim reliefs under Section 9 of the Act pending the enforcement of the foreign award."***
>
> [Emphasis Supplied]

Although in ***Trammo DMCC***, the Section 9 application was filed post-award, its ratio would still be applicable even to a petition that has been filed seeking interim reliefs at the pre-award stage.

77. Thus, in light of the original jurisdiction exercisable by the Court, the location of assets to satisfy the resultant foreign award, can indeed come into play when taking recourse to proceedings under Section 9.

78. Applying this principle, the Court does not find any ground to dismiss the present petition on the ground of lack of jurisdiction, pending adjudication of arbitral proceedings.

III. MERITS

79. Having decided the jurisdictional objections, the pertinent question to be addressed is whether SEGCL is entitled to an order as prayed for. SEGCL

has invoked the jurisdiction of this Court on the basis of RELIANCE'S shareholding in certain subsidiaries based within the jurisdiction of this Court. SEGCL had entered into the Contract with Reliance UK for equipment supply and services, which, as noted above, is a subsidiary of RELIANCE herein. Under the said Contract, Reliance UK was obliged to, *inter alia*, pay SEGCL a lump-sum contract price of USD 1,311,000,000 (Approx. INR 9641 crores), which comprises of an equipment supply price of USD 1,286,000,000 (Approx. INR 9457 crores) and services price of USD 25,000,000 (Approx. INR 184 crores).

80. In order to secure the performance of obligations of Reliance UK, RELIANCE issued a Guarantee Letter – which has been relied upon by SEGCL. The Contract between SEGCL and Reliance UK was subsequently amended on 20th March, 2012, and thereafter, on 31st July, 2014. SEGCL apprehends that if no urgent interim relief is granted, RELIANCE would continue to dispose of its assets in order to delay execution of the award, which it believes is likely to be passed in its favour, and thereby, it shall be unable to recover its rightful dues. In support of its contentions with regard to uncertainty and doubt on RELIANCE'S ability to continue as a "going concern", SEGCL has placed reliance on the observations made by RELIANCE'S statutory auditors over a period of time – which have been set-out in detail in the petition. It has also been pointed out that the auditors have raised specific concerns in relation to various corporate guarantees issued by RELIANCE. Further, it is argued that RELIANCE's critical financial condition becomes evident from its yearly statements of debt securities, defaults in servicing, term loans etc.

81. In a nutshell, SEGCL is claiming relief(s) directing RELIANCE to furnish a security by securing the amount in dispute i.e., the subject matter of arbitration.

82. RELIANCE has disputed the validity/ execution of the Guarantee Letter and arbitration clause, and has also raised several allegations to the effect that Guarantee Letter relied upon by SEGCL is invalid and unenforceable under the Foreign Exchange Management (Guarantees) Regulations, 2000. Additionally, it has been argued that SEGCL's claims are barred under limitation.

83. RELIANCE has also contended that Reliance UK has already paid to SEGCL about 90% of the amount due under the Contract – totalling to about USD 1.18 Billion (Rs. 8640 Crores Approx.). There were deficiencies in the services of SEGCL – which led to severe losses/ additional costs of about USD 415 Million (Rs. 3060 Crores Approx.) being incurred by Reliance UK/ Sasan UMPP, for which, SEGCL is liable to compensate it.

84. There are intricate questions of fact in respect of the legality, validity and authenticity of the Guarantee Letter – which is being relied upon by SEGCL to contend that RELIANCE undertook to secure the obligations of Reliance UK under the Contract. Thus, given that the liability of Reliance UK and RELIANCE under the Guarantee Letter is highly disputed and contested, and further, since RELIANCE has raised counter-claims, the Court cannot consider the claim of SEGCL to be 'admitted' or only 'superficially denied'. The claims of SEGCL are presently being adjudicated and liability is yet to

be ascertained, and thus, in view of contentious issues raised by RELIANCE, at this stage, no *prima facie* case is made out for proceeding against the assets of RELIANCE or grant such other interim injunctive relief to secure SEGCL's claim, pending the decision of the Arbitral Tribunal.

85. As regards the apprehensions expressed by SEGCL *qua* the financial status and wherewithal of RELIANCE, again, the Court finds the same to be a highly contentious issue. The nature of relief claimed by SEGCL (*viz.* an order for securing the amount claimed prior to the passing of an arbitral award), has been held to be analogous with the nature of relief provided under Order XXXVII Rule 5 of the Code of Civil Procedure (i.e., attachment before judgment). There is no material on record to conclude that any sale of assets is being done with the intent to deny the fruits of the award that SEGCL is pursuing. To obtain the reliefs sought, SEGCL must *inter alia* establish a *prima facie* case or crystallisation of debt due, validated with cogent material, to substantiate the apprehension that RELIANCE is attempting to remove or dispose of the assets *"with the intention of defeating the decree/ award that may be passed*." [25]

86. That said, RELIANCE'S financial condition alone cannot be reason to justify a relief of attachment before judgment.[26] Not every disposal of assets would justify the grant of interim measures under Section 9. In its reply,

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[25] ***BMW India Private Limited v. Libra Automotives Private Limited***, 2019 SCC OnLine Del 9079. *See* paragraphs no. 29 – 34; and
Beigh Construction Company Private Limited v. Varaha Infra Limited, 2021 SCC OnLine Del 3439. *See* paragraphs no. 15 – 17.
[26] ***Raman Tech and Process Engg. Co. v. Solanki Traders***, (2008) 2 SCC 302. *See* paragraph no. 8.

RELIANCE provided an explanation of every transaction carried out to "reduce debt", and not to "defeat any award", the sale proceeds whereof, are statedly being used to pay off the lenders.

87. There is another reason for declining the relief. Court had listed the matter for clarifications on 13th July, 2022, wherein it had inquired from the parties the status of arbitral proceedings. To this, Mr. Sandeep Sethi, Senior Counsel for RELIANCE, stated that submissions were filed 21st December, 2021 and oral arguments stood completed on 21st January, 2022. Further, on 3rd May, 2022 the parties were intimated by the Arbitral Tribunal that it was at the final deliberation stage, which was progressing well. Parties were also asked to exchange submissions *qua* interest and costs, which stood complete as of 10th June, 2022. As it stands, only the award of the Arbitral Tribunal is awaited.

88. All throughout the pendency of the proceedings, nothing has been shown to have transpired, which would compel the Court to grant the relief of restraint upon the dissipation of RELIANCE's assets. Although Mr. Ketan Gaur, counsel for SEGCL, has submitted that RELIANCE has disposed of 100% of its shareholding in 'Utility Infrastructure & Works Pvt. Ltd.'; however, Mr. Sethi clarifies that the said company was not part of the restraining order. He further submits that RELIANCE still has its stakes in BSES Yamuna Power Ltd. and BSES Rajdhani Power Ltd, which alone account for more than the arbitral claim amount, thereby reassuring the Court and SEGCL that it was in no way trying to fraudulently defeat/ frustrate the award. Further, *prima facie*, no clandestine alienation of assets (*i.e.*, shareholding in companies) can be

apprehended, considering the fact that sale of shares is normally under transparent transactions – which are well regulated and are in public domain. Moreover, SEGCL has not shown any cogent material to buttress its allegation as well.

89. For the foregoing reasons, no *prima facie* case, balance of convenience and irretrievable harm or injury has been demonstrated in favour of SEGCL. The Court is thus, not inclined to grant the reliefs prayed for.

90. Dismissed. It is however clarified, that the views expressed hereinabove on the merits of the case are only tentative, for the purpose of deciding the present petition, and shall not influence the Arbitral Tribunal. To that extent, all rights and contentions of the parties are left open.

SANJEEV NARULA, J

JULY 19, 2022
Sapna