IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 10.11.2023

\+ **FAO(OS) (COMM) 29/2022 & CM APPL. 7026/2022**

SKYPOWER SOLAR INDIA PRIVATE LIMITED ..... Appellant

versus

STERLING AND WILSON INTERNATIONAL FZE ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Tishampati Sen, Ms. Riddhi S, Mr. Anurag Anand & Mr. Himanshu Kaushal, Advs.

For the Respondent : Mr. Darpan Wadhwa, Sr. Adv. with Mr. Jaiyesh Bakshi, Mr. Ravi Tyagi, Ms. Manmilan Sidhu, Mr. Sameer Patel, Ms. Sudiksha Saini & Mr. Ankit Tyagi, Advs.

AND

\+ **FAO(OS) (COMM) 30/2022 & CM APPL. 7028/2022**

SKYPOWER HOLDINGS LLC AND ORS ..... Appellants

Versus

STERLING AND WILSON INTERNATIONAL FZE ..... Respondent

Advocates who appeared in this case:

For the Appellants : Mr. Tishampati Sen, Ms. Riddhi S, Mr. Anurag Anand & Mr. Himanshu Kaushal, Advs.

For the Respondent : Mr. Darpan Wadhwa, Sr. Adv. with Mr. Jaiyesh Bakshi, Mr. Ravi Tyagi, Ms. Manmilan Sidhu, Mr. Sameer Patel, Ms. Sudiksha Saini & Mr. Ankit Tyagi, Advs.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. The appellants have filed the present intra-court appeals under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') read with Section 13 of the Commercial Courts Act, 2015 impugning a common judgment dated 22.06.2020 (hereafter '**the impugned judgment'**) delivered by the learned Single Judge in petitions filed by the respondent (hereafter '**S&W'**) under Section 9 of the A&C Act, being ***Sterling and Wilson International FZE v. Sunshakti Solar Power Projects Private Limited & Ors.*** [O.M.P (I) (COMM.) 460/2018] and ***Sterling and Wilson International FZE v. Skypower Solar India Private Limited & Ors.*** [O.M.P (I) (COMM.) 461/2018].

2. The appellants in the present appeals belong to a Group of Companies (hereafter '**the Skypower Group**'). The appellant in

FAO(OS) (COMM) 29/2022 was arrayed as respondent no.1, and the appellants in FAO(OS) (COMM)No. 30/2022 were arrayed as respondent nos. 2 to 6 in OMP (I) (COMM) 461/2018.

3. Appellant no.1 in FAO (OS) (COMM.) 30/2022, Skypower Holdings LLC (hereafter also referred to as '**SHL**'), is the parent company of Skypower Solar India Private Limited (hereafter also referred to as '**SIPL**'), which is the appellant in FAO(OS) 29/2022. SIPL is a company incorporated under the Companies Act, 1956, having its registered office at 16A/20, W.E.A. Main Ajmal Khan Road, Karol Bagh, New Delhi-110005.

4. Skypower Southeast Asia Holdings 2 Ltd., appellant no. 3 in FAO(OS)(COMM)No.30/2022 (hereafter also referred to as '**Holdings 2 Ltd.**'), is a company incorporated under the laws of Mauritius and is a wholly owned subsidiary of Skypower Global Cooperatief U.A (hereafter also referred to as '**SGC**'). SGC is a company incorporated under the laws of Netherlands and was arrayed as original respondent no.3 in OMP (I) (COMM) 461/2018. Holdings 2 Ltd. also holds 0.81% of the paid-up share capital in SIPL, in addition to holding the entire shareholding of Skypower Southeast Asia Holdings 4 Ltd. (hereafter also referred to as '**Holdings 4 Ltd.**').

5. Holdings 4 Ltd. (original respondent no.5), is a company registered in Mauritius. It holds the entire shareholding of Skypower Southeast Asia IV Investments Ltd. (hereafter also referred to '**IV**

Investments Ltd.'), arrayed as original respondent no.6 and having 99.19% holding in SIPL.

6. Skypower Global Canada (hereafter '**Skypower Canada**') and CIM Group (hereafter '**CIM**') were arrayed as respondent nos.7 and 8 respectively in O.M.P (I) (COMM.) 461/2018 but are not parties to the present appeals.

7. The appellants, Skypower Canada, and CIM Group are hereafter also referred to as '**the Skypower Entities**'.

8. S&W had filed a petition under Section 9 of the A&C Act and was the petitioner in the original petition OMP(I)(COMM) 461/2018.

9. S&W is an affiliate of Sterling and Wilson Private Limited (hereafter '**SWPL**'), which is an Indian entity incorporated under the Companies Act, 2013.

10. It is submitted by the parties in the present appeals that disputes in respect of Sunshakti Solar Power Projects Private Limited, which were subject matter of O.M.P (I) (COMM.) 460/2018, have been settled. The present appeals are confined to the interim measures of protection granted in OMP(I)(COMM) 461/2018, by the impugned judgement.

11. By way of the impugned judgment, the learned Single Judge had, *inter alia,* directed the appellants [original respondent nos.1 to 6 in O.M.P (I) (COMM.) 461/2018] to furnish a bank guarantee to secure a

sum equal to 50% of the total of USD 34,133,214 within a period of four weeks, from the date of the impugned judgment to the satisfaction of the Registrar of this Court.

FACTUAL CONTEXT

12. S&W is a company incorporated under the laws of United Arab Emirates, having its registered office at P.O Box No.54811, Dubai, United Arab Emirates and is a part of the Shapoorji Pallonji Group. S&W is, *inter alia*, engaged in the business of supply of solar modules, PV (Photovalatic) Inverters, and trackers that are needed for commissioning solar power projects. It is stated that S&W has a commercial presence in the trade of MEP (mechanical, electrical and plumbing) and solar materials in Qatar and Saudi Arabia.

13. SIPL is the owner of a 50MW capacity solar power plant and attendant facilities at Village Chhirbel, Khandwa District, Madhya Pradesh (hereafter '**the Project**').

14. S&W, *inter alia,* claims that it is entitled to receive the supply price of USD 30,719,892.60. S&W claims that it had supplied solar module PV inverters and other equipment (**Offshore Supplies**) to SIPL for commissioning the Project in terms of the Offshore Supply Agreement dated 19.05.2017 (hereafter '**the OSA**'). In terms of the OSA, S&W was entitled to 90% of the price of the Offshore Supplies (Supply Price), amounting to USD 30,719,892.60 on achievement of the Commercial Operation Date (COD) of the Project. The COD was

achieved on 05.09.2017 and accordingly, S&W had raised an invoice for 90% of the Supply Price. The said invoice was received by SIPL on 16.11.2017. S&W claims that SIPL has acted in breach of the OSA and had not paid the invoiced amount within a period of fourteen days of the receipt of the invoice, as agreed. According to S&W, SIPL's obligation to pay the Supply Price was independent of any other contractual arrangement between SIPL (or its affiliated entities) with SWPL or any of its group entities.

15. S&W further alleges that SIPL in collusion with other Skypower Entities had breached its obligation of ensuring that an adequate security (**Offshore Security**) is created in the form of pledge of 100% shares directly held by SGC (original respondent no.3) and Holdings 4 Ltd. (original respondent no.4), which directly or indirectly hold 100% of the paid-up capital of SIPL.

16. The appellants dispute the aforesaid claims. According to the appellants, the OSA is not independent of the other agreements and the documents executed between some of the Skypower Entities and SWPL.

17. It is stated that the concerned state instrumentalities of Madhya Pradesh had invited bids for setting up of solar power plants. Some of the Skypower Entities had participated in the bids and were successful. Accordingly, they were permitted to set up 57.5MWP (50.0 MW AC) Photovoltaic Solar Plant with tracker technologies at Chirwel, Madhya Pradesh. The MP Power Management Company Limited (hereafter

'**State Discom**') and SIPL along with two other affiliated companies entered into a Power Purchase Agreement dated 18.09.2015.

18. The Project included units and auxiliaries such as water supply, treatment or storage facilities, bays for transmission system in the switchyard, dedicated transmission line up to the delivery point, buildings, structures, equipment, plant and machinery and other facilities for generation and supply of power in terms of the Power Purchase Agreement. SIPL claims that at the material time, SWPL and S&W represented to the concerned Skypower Entities that they had the experience, expertise, capability and know-how for implementing the Project.

19. The appellants claim that the concerned Skypower Entities entered into a Memorandum of Understanding (**MOU**) and Heads of Terms (**HOT**) dated 18.04.2016 with SWPL and an Amended HOT dated 19.12.2016 in respect of the design, supply, construction, development and commissioning of the Project. In terms of the Amended HOT, it was agreed that the Offshore Supplies for the project would be undertaken by an Offshore affiliate of SWPL. According to the appellants, it was agreed that separate contracts would be entered into for the Offshore Supplies and other supplies but SWPL would undertake the entire responsibility for the same. The appellants contend that it was always understood that works in relation to the Project would be undertaken by SWPL and S&W as a single point entity. It claims that reading of all the agreements indicates that the Project was awarded to

the Sterling and Wilson Group (SWPL and S&W) on a turn key basis. The Amended HOT also stipulate the same. The appellants claim that on 19.05.2017, the several contractual documents including the OSA were entered into for executing the Project. These also included six contractual documents between SIPL and SWPL (Development Agreement, Service Contract, Civil Works Contract, Onshore Supply Agreement, Operation and Management Agreement, Wrap Agreement). The OSA was signed only by SIPL and S&W. Although, other entities were not signatories to the Offshore Supply Agreements, S&W had executed a Side Letter on Liquidated Damages, indemnity and composite costs, which were linked to other contractual documents.

20. According to the appellants, although separate documents were executed for Onshore Contracts and Offshore Supplies, it was always understood and agreed between the parties that these separate contractual agreements were a part of a single consolidated contract, which would be executed by SWPL and its affiliate entities.

21. The appellants claim that SWPL and its affiliates had breached the terms of the agreements. Although the appellants do not deny receipt of the Offshore Supplies, they dispute their obligation to pay for the same on account of claims in respect of performance of other agreements, which were allegedly breached.

22. Since the invoices submitted by S&W had not been paid, S&W sent a letter dated 21.05.2018 to SIPL communicating that it had

invoked the dispute resolution mechanism under Clause 23.1.2 of the OSA.

23. SIPL responded by a letter dated 19.06.2018 declining to make the payment on the ground that SWPL had not complied with its material obligations under the Onshore EPC (Engineering, Procurement and Construction) Contracts including the Wrap Agreement. It claimed that as per the Side Letter on Liquidated Damages executed by S&W, it was not liable to pay the invoiced amount as claimed.

24. Thereafter, discussions were held, *inter alia,* between SIPL and S&W. However, the disputes remained unresolved. On 28.07.2018, S&W sent an e-mail to SIPL accepting the addition of a dispute resolution provision, that is, arbitration according to the Singapore International Arbitration Centre Rules (hereafter '**the SIAC Rules**') to be included in the OSA.

25. Subsequently, on 18.09.2018, SIPL sent an e-mail to S&W claiming that it had scheduled diligence activities for the Project. S&W replied on 24.08.2018 stating that no sale will be permitted by it till it is paid its legitimate dues.

26. On 03.10.2018 SIPL responded to S&W's e-mails, requesting for details pertaining to the indemnity claims in respect of the Project and the OSA. Further, on 2.11.2018, S&W sent a letter to SIPL refuting the objections put forth by it in its letter dated 27.07.2018. It is S&W's case that the provisions of the Indemnity Letter are in respect of the payment

of taxes and the letter is not relevant to the obligation to pay the Offshore Supply Price.

27. It is submitted that on 10.11.2018, a representative of a potential buyer of SIPL's affiliate project addressed an e-mail to S&W. The said buyer, *inter alia*, sought details of S&W's outstanding claims against SIPL stating that the same were sought for undertaking due diligence of the said Project.

28. S&W claims that after the lapse of 12 months from receiving the invoices, on 5.12.2018, SIPL asked S&W to rescind and withdraw the same on the ground that the invoices were not in accordance with the provisions of the OSA and the Onshore EPC Contracts on account of alleged deficiencies in the Project.

29. On 12.12.2018, S&W refuted the claims raised by SIPL in its letter dated 05.12.2018, and reiterated its claim for payment of 90% of the Offshore Supply Price.

30. In view of the aforesaid dispute, S&W commenced arbitration against original respondent nos.1 to 8 on 16.03.2019, to be conducted by SIAC.

31. Thereafter, S&W filed a petition under Section 9 of the A&C Act being OMP (1) COMM. 461/2018 titled ***Sterling & Wilson International FZE v. Skypower Solar India Private Limited and Others,*** (arraying the appellants in the present appeals as respondent

nos.1, 2, 3, 4, 5 and 6) and seeking an interim injunction in order to secure its claim, while the arbitral proceedings were pending.

32. By an order dated 18.12.2018, a learned Single Judge of this Court granted temporary injunction to S&W against the appellants (original respondent nos.1 to 6) in terms of prayer (c) of the said petition. In terms of the said prayer the appellants and its directors, officers, servants, agents were restrained from creating third party rights and/or otherwise encumbering the Project. The appellants, Skypower Canada and CIM, were also directed to disclose the extent of shareholdings of each of their companies. The order was subsequently modified on 11.01.2019 to read as under:

> "I.A. No. 303/2018 (for modification of the order dated 18.12.2018)
>
> 1. This application is allowed and the expression 'Respondent no. 1' written in the third line of paragraph 3 of the order dated 18.12.2018 will be read as 'Respondent no.4'.
>
> 2. Also, the figure of 'USD 31,250,711.70' written in paragraph 1 of the order be read as 'USD 34,723,013', without in any manner observing the merits of the cases of the respective parties.
>
> 3. I.A. stands disposed of."

33. Thereafter, by an order dated 21.01.2019, the learned Single Judge recorded that the entire shareholding of Holdings 2 Ltd. is held by SGC and directed that there will be no further transfer of the said shareholdings.

34. On 22.06.2020, the learned Single Judge passed the impugned judgment, partly allowing the prayer or for interim relief and directed the original respondents (appellants, Skypower Canada and CIM) to furnish a Bank Guarantee for 50% of the claim against the Offshore Supply Price. The learned Single Judge also restrained SGC, Holdings 4 Ltd. and IV Investment Ltd. from transferring, disposing off, creating a charge and/or encumbering, in any manner their shares and other securities held by them in SIPL, SGC and Holdings 4 Ltd.

35. Aggrieved, the appellants have filed the present appeals.

REASONING AND CONCLUSION

36. At the outset it is necessary to note that the question whether the court has the jurisdiction to order interim measures for protection under Section 9 of the A&C Act in aid of the arbitral proceedings conducted overseas, was not agitated before this Court. The appellants concede that the learned Single Judge has rightly held that this Court has the jurisdiction to issue interim orders in aid of arbitration being conducted overseas under the aegis of the SIAC and according to its Rules.

37. The memoranda of appeals mention several grounds, other than the impugned order falls foul of the principles under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (hereafter '**the CPC**'), for assailing the impugned order. But, as noted above, the same were not pressed. It is relevant to note that one of the questions raised before the learned Single Judge was whether the court could issue any orders of

interim measures of protection, under Section 9 of the A&C Act against the appellants in FAO(OS)(COMM) 30/2022, as they were not signatories to the Arbitration Agreement. The learned Single Judge referred to various principles including the Group of Companies Doctrine as accepted by the Supreme Court in ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. & Ors.***[1], ***Mahanagar Telephone Nigam Limited v. Canara Bank & Ors.***[2] and ***Ameet Lalchand Shah & Ors. v. Rishabh Enterprises & Anr.***[3] and expressed a *prima facie* view that in the given facts, even though the said appellants were not signatories to the arbitration agreement, they could be compelled to arbitrate. The said issue – which was stoutly contested before the learned Single Judge – was not pressed in these appeals. However, it is necessary to record that although, Mr Dayan Krishnan had not pressed the said issue before us, he reserved the rights of the appellants to raise the same before the learned Arbitral Tribunal.

38. The controversy in the present appeals is in a narrow compass. Mr Dayan Krishnan and Mr Nayar, learned senior counsels, who advanced submissions on behalf of the appellants, confined these appeals to assailing the direction issued for submission of a bank guarantee equivalent to 50% of the amounts claimed by S&W. Further, they circumscribed the challenge by founding the same on a singular

[1] (2013) 1 SCC 641
[2] 2019 SCC OnLine SC 995
[3] (2018) 15 SCC 678

ground that the said direction is contrary to the principles under Order XXXVIII Rule 5 of the CPC.

39. In view of the above, the only question to be addressed by this Court is whether the impugned directions to furnish a Bank Guarantee equivalent to 50% of the amount claimed by the respondent, can be faulted on the ground that the conditions for issuing such a direction as stipulated under Order XXXVIII Rule 5 of the CPC, are not satisfied.

40. The appellants contend that the direction to furnish a Bank Guarantee to secure S&W's claims amounts to attachment before decree and no such direction can be issued without satisfying the conditions for issuing such an order under Order XXXVIII Rule 5 of the CPC. Mr. Wadhwa, the learned senior counsel appearing for S&W countered the aforesaid contention and urged that the findings of the learned Single Judge clearly warrant issuance of such directions.

41. Mr Wadhwa, referred to the decision of the Supreme Court in ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited***[4] and submitted that the powers of a court under Section 9 of the A&C Act are wider than the powers under the provisions of the CPC. He further emphasized that the Supreme Court had approved the view of this Court in ***Ajay Singh & Ors. v. Kal Airways Private Limited & Ors.***[5] as well as the Bombay High Court in ***Jagdish Ahuja & Anr. v.***

[4] 2022 SCC OnLine SC 1219
[5] 2017 SCC OnLine Del 8934

Cupino Limited[6] and ***Valentine Maritime Ltd. v. Kreuz Subsea Pte Limited & Anr.***[7]. He also relied on the observations of the Supreme Court to the effect that if a strong *prima facie* case is made out and the balance of convenience is in favour of the petitioner, the court would not withhold relief on a mere technicality of absence of averments. In addition, he referred to the decision of the learned Single Judge of this Court in ***Huawei Technologies Co. Ltd. v. Sterlite Technologies Limited.***[8].

42. Before proceeding further, it would be relevant to refer to the findings of the learned Single Judge on which the impugned directions rest. The learned Single Judge had considered Clause 12.2.1 of the OSA and noted that in terms of the said agreement, S&W was entitled to 90% of the Offshore Supply Price on achieving of the COD. It was further entitled to the remaining 10% of the Offshore Supply Price on Final Acceptance. The Court noted that the commercial operations had commenced, and admittedly, the said milestones were achieved. This was also reflected by the certificates issued by the State Discom. Thus, the Court concluded that, *prima facie,* S&W would be entitled to 90% of the Offshore Supply Price. The Court noted that the OSA expressly recorded that it was a complete agreement. And, S&W was not in breach of its obligations in respect of the Offshore supplies.

[6] 2020 SCC OnLine Bom 849
[7] 2021 SCC OnLine Bom 75
[8] 2016 SCC OnLine Del 604

43. In view of the above, the learned Single Judge accepted that S&W had established a *prima facie* case in its favour. In view of the undisputed facts, the learned Single Judge returned findings on a *prima facie* basis, to the following effect:

(i) that S&W's obligations under the OSA were limited to the Offshore supplies;

(ii) that S&W had fulfilled its obligations;

(iii) that the cover of Offshore Security cover was not provided to S&W;

(iv) that the Offshore Supply Price payable to S&W was required be secured by the shareholding of Holdings 2 Ltd. (respondent no.4), which was held by SGC (respondent no.3). Holdings 4 Ltd. was a holding company for SIPL (respondent no.1) and the security in respect of the shares of Holdings 4 Ltd. would effectively secure S&W by an indirect control of the shareholding of SIPL, despite S&W completing its supplies which were used in setting up a project and for achieving the COD, no amount was paid to S&W; and

(v) that the OSA between S&W and SIPL was independently executed.

44. The learned Single Judge found that the balance of convenience was in favour of S&W. The Offshore Supply Price payable to S&W was required to be secured by the shareholding of Holdings 2 Ltd.

(respondent no.4), which was held by SGC (respondent no.3). Holdings 2 Ltd. was the holding company of SIPL and securing the shares of Holdings 2 Ltd. would effectively secure the indirect control of the shareholding of SIPL. However, contrary to the agreement between the parties, the said security was not created. The learned Single Judge found that S&W was unsecured in respect of the Offshore Supplies and was not protected by the hypothecation deed or the equitable mortgage documents.

45. The learned Single Judge additionally observed that the interim directions were required to be issued against the non-signatories [appellant nos. 1 to 5 in FAO(OS)(COMM) 30/2022 as well as Skypower Canada and CIM Group, which were arrayed as respondent nos. 7 & 8 in OMP(I) (COMM) 461/2018 but are not parties to the present appeals]. The learned Single Judge reasoned that the change in the shareholding pattern of SIPL would have a material bearing on the arbitration proceedings and the execution of the arbitral award that may be rendered on culmination of the arbitral proceedings.

46. In view of the above, the learned Single Judge interdicted respondent no.3 (SGC), respondent no.5 (Holdings 4 Ltd.) and respondent no.6 (IV Investments Ltd.) from transferring, disposing of, creating a charge and/or encumbering in any manner the shares and securities held by them in respondent nos.1, 4 and 6 (SIPL, Holdings 2 Ltd. and IV Investments Ltd.). As noticed at the outset, the appellants have not pressed their challenge to the said directions.

47. There is no finding (*prima facie* or otherwise) by the learned Single Judge that, if S&W prevails in the arbitral proceedings, it would be unable to enforce the arbitral award in its favour if the amounts as claimed are not secured. There is no allegation that appellant nos. 2 to 6 are alienating their assets and are acting in a manner that would frustrate the enforcement of an arbitral award that may be delivered in favour of S&W.

48. Mr Darpan Wadhwa, learned senior counsel appearing for S&W contended that powers to pass interim measures of protection under Section 9 of the A&C Act are wide and not constrained by the provisions of the CPC. He submitted that the learned Single Judge had clearly made observations to the effect that S&W was unsecured; it had established a *prima facie* case; and the balance of convenience was in its favour. He submitted that in view of the aforesaid *prima facie* findings, it was not necessary for S&W to establish that the appellants were acting in a manner that would frustrate the arbitral award that may be in its favour.

49. We have carefully examined the impugned judgment. Whilst, the learned Single Judge has found that S&W has established a *prima facie* case and that the balance of convenience is also in its favour, there is no finding to the effect that appellant nos. 2 to 6 are alienating their assets or would do so and frustrate S&W's recourse to enforce the arbitral award if it prevails in the arbitral proceedings. There is no finding that absent an order for securing the amounts in dispute, S&W would be

unable to enforce the Arbitral Award that may be made in its favour. The learned Single Judge had accepted that any change in the shareholding pattern of original respondents no.2 to 8 would have a bearing on the arbitration proceedings as well as the execution of the Arbitral Award. The observations to the said effect are contained in paragraph 74 of the impugned judgment, which reads as under:

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

50. In view of the above, the learned Single Judge had issued directions interdicting original respondent nos. 3, 5 and 6 (SGC, Holdings 4 Ltd. and IV Investments Ltd.) from transferring, disposing of, creating a charge and/or encumbering their shares or any securities by original respondent nos.1, 4 and 6 (SIPL, Holdings 2 Ltd. and IV Investments Ltd.) in any manner. As noted above, there are no findings to the effect that if the original respondent nos. 2 to 8 do not secure S&W by furnishing a Bank Guarantee, the enforcement of an Arbitral Award in favour of S&W would be frustrated. However, the learned Single Judge had observed that if S&W succeeded in securing an award

in its favour, realization of its dues from the Project "*may be a long drawn battle and may also involve complications due to interest of the State Discoms in the same.*"

51. Paragraph 85 of the impugned judgement is relevant and is set out below:

> "85. Prima facie, it appears that the Hypothecation Deed does not secure the Offshore Supply Price. Learned Senior Counsels for the Petitioner are also right in their contention that the project has liabilities towards the State Discoms under the various PPAs and is also encumbered with SWPL. In case the Petitioner succeeds in getting an Award in its favour, realization of its dues from the Project may be a long drawn battle and may also involve complications due to the interest of the State Discoms in the same. This Court cannot lose sight of the undisputed fact that the project has utilized the Offshore Supplies made by the Petitioner and is functional and generating revenue for the Respondents. The dues of the Petitioner under the OSA need to be secured and preserved as a step in aid of Arbitration, which is the purpose and intent of the Legislature in enacting Section 9 of the Act."

52. It is material to note that there is no cavil that the direction issued by the learned Single Judge for furnishing the Bank Guarantee is in the nature of an order under Order XXXVIII Rule 5 of CPC.

53. The question as to the conditions required to be satisfied for issuance of orders in the nature of attachment before decree, for securing the claims made by a party, under Section 9 of the A&C Act, has been the subject matter of several decisions.

54. Before discussing the same, it would be relevant to refer to Section 9(1) of the A&C Act. The same is reproduced below:

> "**Interim measures, etc. by Court**.—(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court:—
>
> *(i)* for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
>
> *(ii)* (*ii*) for an interim measure of protection in respect of any of the following matters, namely:—
>
> (*a*) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
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> (*b*) securing the amount in dispute in the arbitration;
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> (*c*) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
>
> (*d*) interim injunction or the appointment of a receiver;
>
> (*e*) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

55. The last limb of Section 9(1) of the A&C Act, expressly provides that the courts would have the same powers for making orders as it has for the purpose of, and in relation to, any proceedings before it. Thus, the powers to be exercised under Section 9 of the A&C Act are expressly qualified to be limited to those that are available to a court in respect of any proceedings before it. To put it conversely Section 9 of the A&C Act does not confer any additional powers, which are otherwise not available in relation to proceedings before courts.

56. In ***Firm Ashok Traders & Anr. v. Gurmukh Das Saluja & Ors.***[9], the Supreme Court had referred to Section 9 of the A&C Act and had observed as under:

> "13. …The reliefs which the Court may allow to a party under clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the Arbitral Tribunal..."

57. In ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.***[10], the Supreme Court had observed 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

[9] (2004) 3 SCC 155
[10] (2007) 7 SCC 125

> 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 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."

58. In ***Natrip Implementation Society v. IVRCL Limited***[11], a Single Judge of this Court (one of us, Vibhu Bakhru, J.) had in the context of the powers to secure an amount claimed prior to the passing of the arbitral award observed as under:

> "17. It is also clear from the opening sentence of section 9(1)(ii) of the Act that the measures that can be ordered are "interim measures of protection". It, plainly, follows that the principles that would be applicable for grant of orders under section 9(1)(ii) of the Act would be the principles

[11] 2016 SCC OnLine Del 5023

that may be applicable to grant of such orders as are applicable to proceedings before the Court. An order for securing the amount claimed prior to an arbitral award is essentially in the nature of attachment before judgement and thus, the principles as applicable for grant of such orders in proceedings before the Court - that is, as applicable under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (hereafter 'the CPC') - would be equally applicable for grant of relief under Sections 9(1)(ii)(b) or 17(1)(ii)(b) of the Act (as amended by Act 3 of 2016) prior to the publishing of the arbitral award. In *Rite Approach Group Ltd. v. Rosoboronexport*: 111 (2004) DLT 816, *Global Company v. M/s National Fertilizers Ltd.*: AIR 1998 Delhi 397 and *Gatx India Pvt Ltd.* (*supra*), this Court held that it would take guidance from the principles given in Order XXXVIII Rule 5 of the CPC for grant of orders under Section 9 of the Act.

18. It is also well settled that the granting of orders under section 9 of the Act are discretionary in nature and equitable considerations would apply for grant of such orders. Thus, orders as prayed under section 9(1) of the Act would be granted only if it is necessary and equitable.

xxxx xxxx xxxx

20. In order for the court to exercise its powers under Order XXXVIII Rule 5 of the CPC, it is necessary that twin conditions be satisfied. First, that the plaintiff establishes a reasonably strong prima facie case for succeeding in the suit; and second, that the court is prima facie satisfied that the defendant is acting in a manner so as to defeat the realisation of the decree that ultimately may be passed. The object of Sections 9(1)(ii)(b) and 17(1)(ii)(b) of the Act is similar to the object of order XXXVIII Rule 5 of the CPC. The Arbitral Tribunal while exercising powers under Section 17(1)(ii)(b) of the Act or the Court while exercising power under Section 9(1)(ii)(b) of the Act must be satisfied that it is necessary to pass order to secure the amount in dispute. Such orders cannot be passed mechanically. Further, the object of the order would

be to prevent the party against whom the claim has been made from dispersing its assets or from acting in a manner to so as to frustrate the award that may be passed."

59. In ***Nimbus Communication Ltd. v. Board of Control for Cricket in India & Anr.***[12] the Bombay High Court held as under:—

"22. The judgment of the Supreme Court in *Adhunik Steels* has noted the earlier decision in *Arvind Constructions* which holds that since section 9 is a power which is conferred under a special statute, but which is exercisable by an ordinary Court without laying down a special condition for the exercise of the power or a special procedure, the general rules of procedure of the Court would apply. Consequently, where an injunction is sought under section 9 the power of the Court to grant that injunction cannot be exercised independent of the principles which have been laid down to govern the grant of interim injunctions particularly in the context of the Specific Relief Act, 1963. The Court, consequently would be obligated to consider as to whether there exists a prima facie case, the balance of convenience and irreparable injury in deciding whether it would be just and convenient to grant an order of injunction. Section 9, specifically provides in sub-clause (d) of clause (ii) for the grant of an interim injunction or the appointment of a receiver. As regards sub-clause (b) of clause (ii) the interim measure of protection is to secure the amount in dispute in the arbitration. The underlying object of Order 38 Rule 5 is to confer upon the Court an enabling power to require a defendant to provide security of an extent and value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should be furnished is, however, preconditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be

[12] 2012 SCC OnLine Bom 287

passed against him. In view of the decisions of the Supreme Court both in *Arvind Constructions* and *Adhunik Steels*, it would not be possible to subscribe to the position that the power to grant an interim measure of protection under section 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure 1908 or that the exercise of that power is untrammelled by the Code. The basic principle which emerges from both the judgments of the Supreme Court is that though the Arbitration and Conciliation Act, 1996 is a special statute, section 9 does not either attach a special condition for the exercise of the power nor does it embody a special form of procedure for the exercise of the power by the Court. The second aspect of the provision which has been noted by the Supreme Court is the concluding part of section 9 under which it has been specified that the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. This has been interpreted in both the judgments to mean that the normal rules that govern the Court in the grant of an interlocutory order are not jettisoned by the provision. The judgment of the Division Bench of this Court in *National Shipping Company* (supra) notes that though the power by section 9(ii)(b) is wide, it has to be governed by the paramount consideration that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award. The Division Bench noted that the power being of a drastic nature, a direction to secure the amount claimed in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought was regarded as being a material consideration. However, the view of the Division Bench of this Court that the exercise of power under section 9(ii)(b) is not controlled by the provisions of the Code of Civil Procedure 1908 cannot stand in view of the decision of the Supreme Court in *Adhunik Steels*".

(Emphasis added)

60. In ***Ajay Singh & Ors. v. Kal Airways Private Limited***[5], the Co-ordinate Bench of this Court had observed as under:

> "27. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines – therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles…"
>
> (Emphasis added)

61. In ***National Highway Authority of India v. Punjab National Bank & Ors.***[13], a Division Bench of this Court considered the petition of the respondent bank for disbursement of payment, which it claimed was due to it notwithstanding the arbitrable disputes. In that case the concession agreement expressly provided the obligation to make certain payment on termination of the concession agreement. This Court was of the view that notwithstanding the controversy and disputes regarding termination of the agreement in question, undisputedly, such demands would be payable. Accordingly, this Court directed deposit of the said amount in a petition filed under Section 9 of the A&C Act. In regard to

[13] 2017 SCC OnLine Del 11312

the exercise of powers under Section 9 of the A&C Act, this Court observed as under:

> "37. On the question of exercise of power under Section 9 of the A&C Act, we have already referred to Clauses 37.3.1 of the Concessionaire Agreement which is an express and mandatory provision when said agreement is terminated on account of concessionaire fault. We have also referred to Clauses 3.2 and 4.2 of the tripartite Escrow Agreement which refers to termination payment. To accept the plea of NHAI that section 9 of the A&C Act cannot be invoked, would negate and obliterate the aforesaid Clauses and their effect. In the aforesaid circumstances the ratio of decision of the Division Bench of this Court in *Value Source Mercantile Limited v. Span Mechnotronix Limited*: (2014) 143 DRJ 505, is apposite, if not definite and conclusive. Referring to Section 9 of the A&C Act, this decision emphasized that the said provision uses the expression 'interim measure of protection' as distinct from the expression 'temporary injunction' used in Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908. Interim injunction is one of the measures or orders prescribed in Clause (d) to Section 9(ii) of the A&C Act, albeit a party to the arbitration agreement is entitled to apply for an seek 'interim measure of protection'. Clause (e) to Section 9(ii) is a residuary power of the court to issue or direct other "interim measures of protection". Thus, the court has the power to issue or direct other interim measurers of protection as may appear to the court to be just and convenient. Section 9 encompass the power of making orders as the Civil Court has for the purpose of, and in relation to any proceedings before it. This decision refers to Rule 10 of Order XXXIX of the aforesaid Code which empowers the Court to direct to deposit payment of the admitted amount. Therefore the court exercising power under Section 9 of the A&C Act has the same power as that of a civil court during pendency of the suit."

62. As noted at the outset, there is no dispute that the directions issued by the learned Single Judge to furnish the Bank Guarantee to partly secure the claims of S&W are in the nature of an order under Order XXXVIII Rule 5 of the CPC. Order XXXVIII Rule 5 of the CPC, is set out below:

> "5. Where defendant may be called upon to furnish security for production of property.— (1) Where at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—
>
> (a) is about to dispose of the whole or any part of his property, or
>
> (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.
>
> (2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.
>
> (3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.
>
> (4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."

63. The principle for granting orders under Order XXXVIII Rule 5 of the CPC are now well settled. In ***Raman Tech. & Process Engineering Co. & Anr. v. Solanki Traders***[14], the Supreme Court had observed that the power under Order XXXVIII Rule 5 are drastic and extraordinary powers and are required to be used sparingly and in accordance with the rule. The Supreme Court also observed that the purpose of Order XXXVIII Rule 5 was not to convert an unsecured debt as a secured one. The object of Order XXXVIII Rule 5 was to prevent any defendant from defeating the realization of a decree that may ultimately be passed in favour of the plaintiff. The relevant extract of the said decision is set out below:

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

[14] (2008) 2 SCC 302

> interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.
>
> 5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for out-of court settlements, under threat of attachment."

64. The powers of a court under Section 9 of the A&C Act to direct interim measures are wide and in the given cases, the court can direct furnishing of a security to secure the claims of the applicant pending the conclusion of the arbitral proceedings. Further, orders under Section 9 of the A&C Act can be passed before, during or after the arbitral proceedings. However, it is equally well settled that the powers available to a court for making orders under Section 9 of the A&C Act are the same as that the court has, for the purpose of, or in relation to, any proceedings before it. Thus, the powers under Section 9 of the

A&C Act cannot be exercised in disregard of the provisions of the CPC or their underlying principles.

65. In ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited***[4], the Supreme Court had approved the view of this Court in ***Ajay Singh & Ors. v. Kal Airways Private Limited***[5] that Section 9 of the A&C Act grants wide powers to the courts in fashioning an appropriate interim order. However, it is material to note that in ***Ajay Singh & Ors. v. Kal Airways Private Limited***[5], this Court had also stressed that the exercise of such power should be "*principled, premised on some known guidelines.*" The reference to Orders *38* and 39 of the CPC was in the aforesaid context. However, the Court was not bound by the text of those provisions but had to follow the underlying principles. The decision of the Bombay High Court in ***Jagdish Ahuja & Anr. v. Cupino Limited***[6] is not materially different. The reading of the said decision indicates that the Court had followed its earlier decision in ***Nimbus Communications Limited v. Board of Control for Cricket in India & Anr.***[12] and emphasized that the Court while exercising the powers under Section 9 of the A&C Act has the discretion to grant a wide range of interim measures of protection. However, the Court was required to be guided by the principles which the civil courts ordinarily employ for considering interim relief, particularly, under Order XXXIX Rule 1 and 2 and Order XXXVIII Rule 5 of the CPC. However, the Court reiterated the view that, in exercise of powers under Section 9 of the A&C Act, the Court is "*not unduly bound by their texts*". This is, essentially, the same view as

expressed by this Court in ***Ajay Singh & Ors. v. Kal Airways Private Limited***[5]**.**

66. In ***Valentine Maritime Ltd. v. Kreuz Subsea Pte Limited. & Anr.***[7] – a decision relied upon by S&W that was also referred to by the Supreme Court in ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited***[4] – the Bombay High Court had reiterated the aforesaid principles. Contrary to the contentions advanced by Mr Wadhwa, the High Court in the said case had, after referring to the decisions in ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.***[10] and ***Nimbus Communications Ltd. v. Board of Control for Cricket in India & Anr.***[12], held that the decision of the Division Bench of the Court in ***National Shipping Companies of Saudi Arabia v. Sentrans Industries Limited***[15] to the effect that exercise of powers under Section 9 (ii)(b) of the A&C Act was not controlled by the CPC, was not sustainable. Paragraph 95 of the said decision is set out below:

> "95. Insofar as judgment of this Court delivered by the Division Bench of this court in case of *Nimbus Communications Limited v. Board of Control for Cricket in India* (supra) relied upon by the learned senior counsel for the VML is concerned, this Court adverted to the judgment of Hon'ble Supreme Court in case of *Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.*, (2007) 7 SCC 125 and held that in view of the decision of the Supreme Court in case of *Adhunik Steels Ltd.*, (supra) the view of the Division Bench in case of *National Shipping Company of Saudi Arabia* (supra) <u>that the exercise of power under section 9(ii)(b) is not controlled by the provisions of the Code of Civil</u>

[15] 2004 SCC OnLine Bom 25

> Procedure, 1908 cannot stand. This court in the said judgment of *Nimbus Communications Limited* (supra) held that the exercise of the power under section 9 of the Arbitration Act cannot be totally independent of the basic principles governing grant of interim injunction by the civil Court, at the same time, the Court when it decides the petition under section 9, must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution."
>
> (Emphasis Added)

67. It is also relevant to refer to decision of the learned Single Judge of this Court in ***Tahal Consulting Engineers India Pvt. Ltd. v. Promax Power Ltd.***[16]

68. In the said case, this Court had referred to the earlier decisions and had held as under:

> "39. Turning then to the powers of the Arbitral Tribunal to pass an order of attachment before the Award is rendered or framing directions for securitising the claim that may be laid before it, the Court notes that it is now well settled that while the Arbitral Tribunal may not be strictly bound by the principles which inform Order XXXVIII Rule 5 of the Code, it could adopt principles analogous to those comprised in that provision. Courts have repeatedly held that while the power to attach before Award may not have been specifically set out in Sections 9 and 17 of the Act, such an order could be made if circumstances so warrant. Indubitably, while the Arbitral Tribunal or for that matter the Court under Section 9 may not be strictly bound by the rigidity of the discretion vested upon a court by the Code, at the same time when it does choose to exercise that

[16] 2023 SCC OnLine Del 2069

> power it must do so guided by the principles accepted as relevant and germane for that power being wielded."

69. We concur with the aforesaid view. The law in regard to issuing orders in the nature of securing the claims made by a party are now well settled. Whilst the court is not unduly bound by the texts or Order XXXVIII Rule 1 and 2 or Order XXXVIII Rule (5) or any other provisions of CPC, the substantial principles for grant of such interim measures cannot be disregarded. These principles must be duly satisfied for the court to issue any interim measures of protection under Section 9 of the A&C Act.

70. The principles underlying the object of Order XXXVIII Rule (5) of the CPC are, as noticed earlier, well settled. Such orders are required to be issued in case where the court is satisfied that the party has established a strong *prima facie* case and that the respondents are acting in a manner that would defeat the realization of the decree. These principles must be equally satisfied for securing protective orders under Section 9 of the A&C Act, which are in the nature of orders under Order XXXVIII Rule (5) of the CPC.

71. Mr Wadhwa had strongly relied on paragraphs 48 and 49 of the decision of the Supreme Court in ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited***.[4] The said paragraphs are set out below:

> "48. 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. If a strong *prima facie* case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC."

72. The aforesaid observations cannot be read in isolation. Although the Supreme Court had held that an applicant is required to establish a good *prima facie* case as well as the balance of convenience in his favour, for the grant of interim relief. However, the said observations cannot be read to mean that other underlying principles for the grant of interim orders as contemplated under Order XXXVIII Rule 5 of the CPC are required to be ignored or disregarded. In a subsequent paragraph, the Supreme Court had observed that a mere technicality of the absence of averments incorporating the grounds for attachment before the judgment under Order XXXVIII Rule 5 of the CPC should not withhold relief. However, these observations read in the context of the decision, clearly indicate that the same cannot be read to mean that the underlying principles for the grant of interim relief as contemplated under Order XXXVIII Rule 5 of the CPC can be disregarded. It is

material to note that in ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited***[4], the Supreme Court was considering an appeal against an order of the Commercial Court of the Bombay High Court. In its order, the Bombay High Court had held that Section 9 of the A&C Act does not preclude a Court to pass an equitable order for securing the claim of the applicant in a case where "*once having rendered a prima-facie finding that the applicant would have good chances of succeeding in the arbitration and if the claim made by the applicant is not secured, he would not be able to enjoy fruits of the arbitral award on its execution*." Thus, the underlying principle that the interim orders for securing a claimant in an arbitral proceeding can be made only in cases where the court is *prima facie* satisfied that but for securing the claimant, it would be unable to reap the benefits of a favourable award, was satisfied in that case.

73. In ***Sanghi Industries Limited v. Ravin Cables Ltd. & Anr.***[17] – which was delivered after the decision in ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited***[4]– the Supreme Court considered a case where the appellant was directed to deposit an amount realized by invocation of the performance guarantees. The respondent had filed a petition under Section 9 of the A&C Act seeking to interdict the invocation of the bank guarantees. However, before any order could be passed, the bank guarantees were invoked and the appellant had realised the payments in respect of the said bank guarantees. In the

[17] 2022 SCC OnLine SC 1329

aforesaid context, the learned Commercial Court had passed an order directing the appellant to deposit the amount realized by it by invoking the bank guarantees, in the court. In the appeal preferred against the said order, the Supreme Court held as under:

> "4. Having heard learned counsel appearing on behalf of the respective parties and in the facts and circumstances of the case, more particularly, when the bank guarantees were already invoked and the amounts under the respective bank guarantees were already paid by the bank much prior to the Commercial Court passed the order under Section 9 of the Arbitration Act, 1996 and looking to the tenor of the order passed by the Commercial Court, it appears that the Commercial Court had passed the order under Section 9(ii)(e) of the Arbitration Act, 1996 to secure the amount in dispute, we are of the opinion that unless and until the preconditions under Order XXXVIII Rule 5 of the CPC are satisfied and unless there are specific allegations with cogent material and unless prima facie the Court is satisfied that the appellant is likely to defeat the decree/award that may be passed by the arbitrator by disposing of the properties and/or in any other manner, the Commercial Court could not have passed such an order in exercise of powers under Section 9 of the Arbitration Act, 1996. At this stage, it is required to be noted that even otherwise there are very serious disputes on the amount claimed by the rival parties, which are to be adjudicated upon in the proceedings before the arbitral tribunal.
>
> 4.1 The order(s) which may be passed by the Commercial Court in an application under Section 9 of the Arbitration Act, 1996 is basically and mainly by way of interim measure. It may be true that in a given case if all the conditions of Order XXXVIII Rule 5 of the CPC are satisfied and the Commercial Court is satisfied on the conduct of opposite/opponent party that the opponent party is trying to sell its properties to defeat the award that may

be passed and/or any other conduct on the part of the opposite/opponent party which may tantamount to any attempt on the part of the opponent/opposite party to defeat the award that may be passed in the arbitral proceedings, the Commercial Court may pass an appropriate order including the restrain order and/or any other appropriate order to secure the interest of the parties. However, unless and until the conditions mentioned in Order XXXVIII Rule 5 of the CPC are satisfied such an order could not have been passed by the Commercial Court which has been passed by the Commercial Court in the present case, which has been affirmed by the High Court."

[Emphasis Added]

74. In the present case, there are no observations or findings to the effect that if the orders for furnishing of the bank guarantee are not granted, S&W would be unable to enforce the Arbitral Award against appellant nos. 2 to 6. There is also no material on record to even remotely suggest that appellant nos. 2 to 6 are alienating their assets or acting in a manner that would frustrate the enforcement of the Arbitral Award, if S&W India prevails in the arbitral proceedings. Clearly, an order directing them to furnish a Bank Guarantee, militates against the principles underlying under Order XXXVIII Rule 5 of the CPC.

75. Appellant no.1 (SHL) is a special purpose vehicle in respect of the project. In regard to the said company the respondent is protected to the extent that the impugned order effectively restrains any change in the shareholding of the said company.

76. In view of the above, we allow the present appeals to the limited extent of setting aside the direction to the appellants to provide a bank guarantee to partly secure the claims of the respondent. We clarify that all other interim measures of protection granted in terms of the impugned order continue to be operative.

77. It is also clarified that this would not preclude the respondent from seeking such interim relief as advised in the arbitral proceedings. Needless to state that any application made by the respondent shall be considered uninfluenced by any observations made in this order.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

NOVEMBER 10, 2023
RK/gsr