

GUJARAT HIGH COURT

Hon'ble Judges:M.R.Shah and K.J.Thaker JJ.

Essar Oil Limited Versus United India Insurance Company Limited

FIRST APPEAL No. 2861 of 2014 ; *J.Date :- NOVEMBER 20, 2014

- [ARBITRATION AND CONCILIATION ACT, 1996](#) Section - [9](#), [9\(ii\)](#), [9\(ii\)\(b\)](#), [9\(ii\)\(d\)](#), [9\(ii\)\(e\)](#), [34](#), [36](#), [37](#)
- [CODE OF CIVIL PROCEDURE, 1908](#) Order - [38R.5](#), [39R.1](#), [39R.2](#)

Arbitration and Conciliation Act, 1996 - S. 9, 9(ii), 9(ii)(b), 9(ii)(d), S. 9(ii)(e), 34, 36, 37 - Code of Civil Procedure, 1908 - Or. 38 R. 5, Or. 39 R. 1, 2 - learned Additional District Judge directed appellant to furnish the Bank Guarantee within 3 months - appellant filed present appeal u/S. 37 of the Arbitration Act, 1996 - held, Court may pass any order as provided u/S. 9(i) to S. 9(ii)(e) either pre-award or post-award - considering the order that may be passed u/S. 9(ii) more particularly S. 9(ii)(b); S. 9(ii)(d) and S. 9(ii)(e) are akin to Order 38 Rule 5 of CPC and under Order 39 Rules 1 and 2 of the CPC - object and purpose of the powers conferred upon the Court to pass any order u/S. 9 of the Arbitration Act seems to be to protect the interest of the parties and so as to see that either arbitration proceedings do not become infructuous or to see that if ultimately the award is passed and executed u/S. 36 of the Arbitration Act - party in whose favour the award is declared, is able to enjoy the fruit of the litigation/arbitral award - while exercising the powers u/S. 9 of the Arbitration Act by Court and while passing the orders u/S. 9(ii) of the Act i.e. order to interim measure, the Court is required to be guided by the principles of grant of such or a similar reliefs under the CPC and while passing such orders the Court is required to bear in mind the celebrated principles while passing such orders under the CPC - while passing the order of interim measure and furnishing the security and/or passing any order of interim measure u/S. 9(ii) of the, Court is certainly required to be guided by the provisions of the CPC particularly Order 38 Rule 5 of the CPC etc. - at this stage as such the arbitration proceedings in Arbitration Act are substituted of the civil proceedings before the Civil Court - impugned order quashed and set aside - appeal allowed.

Imp.Para: [[6](#)] [[7](#)]

Cases Referred To :

1. Adhunik Steels V. Orissa Manganese & Mineral, AIR 2007 SC 256
2. Arvind Construction V. Kalinga Mining Corp, 2007 6 SCC 793
3. Brand Value Communications Ltd. V. Eskay Video Private Limited, AIR 2010 Cal 166
4. [Chunilal Kapoorchanji Shah V. Yuvraj Industries Limited, 2009 3 GLH 434 : 2010 \(1\) RAJ 659 : 2010 \(1\) ArbLR 138 : 2009 JX\(Guj\) 595 : 2009 GLHEL HC 221711](#)
5. Country Development & Management Services Pvt. Ltd. V. Brookside Resorts Pvt. Ltd., 2006 4 AD (Delhi) 38
6. Cref Finance Ltd. V. Puri Construction Ltd., 2000 87 DLT 449
7. Delta Construction Systems Limited Hyderabad V. Narmada Cement Company Limited Mumbai, 2002 2 BOMLR 225
8. Delta Construction Systems Ltd., Hyderabad V. Narmada Cement Company Ltd., Mumbai, 2002 2 ArbLR 47
9. Firm Ashok Traders And Anr. V. Gurumukh Das Saluja And Ors., 2004 3 SCC 155
10. Geep Batteries (India) Pvt. Ltd. V. Gillette India Ltd., 2005 120 DLT 387
11. Goel Associates V. Jivan Bima Rashtriya Avas Samiti, 2004 3 ArbLR 289
12. [Gujarat Bottling Co. Ltd. V. Coca Cola & Ors., 1995 5 SCC 545 : 1995 \(2\) GLH 594 : 1996 \(2\) GCD 41 : 1995 \(4\) Scale 635 : JT 1995 \(6\) 3](#)
13. [Gujarat Bottling Co. V. Coca Cola & Co., AIR 1995 SC 2372 : 1995 \(2\) GLH 594 : 1996 \(2\) GCD 41 : 1995 \(5\) SCC 545 : 1995 \(4\) Scale 635](#)
14. Icici Securities V. O.P. Roongta, 2010 Supp BCR 405
15. Iti Ltd. V. Siemens Public Communications Network Ltd., 2002 3 SCR 1122
16. M:s. Global Co. V. M:s. National Fertilisers Ltd., AIR 1998 De 397
17. M:s. Global Company V. M:s. National Fertilizers Ltd., AIR 1998 Del 397
18. Mala Kumar Engineers Pvt. Ltd. (Mke) V. B. Seenaiiah & Co. (Projects) Ltd.], 2005 117 DLT 183
19. Mala Kumar Engineers V. B. Seenaiiah, 2005 1 Arb LR 264
20. Modi Rubber Limited V. Guardian International Corp, 2007 141 DLT 822
21. Mohd. Mehtab Khan And Ors. V. Khushnuma Ibrahim, 2013 9 SCC 221
22. National Aluminium V. Pressteel & Fabrications, 2004 1 SCC 540
23. National Highways Authority Of India (Nhai) V. China Coal Construction Group Co.], AIR 2006 Del 134
24. National Building Construction Corporation Ltd. (Nbcc) V. Ircon International Ltd., 1998 1 AD (Delhi) 513

25. National Highways Authority Of India (Nhai) V. China Coal Construction Group Co., 2006 127 DLT 766
26. National Shipping Company Of Saudi Arabia V. Sentrans Industries Limited, AIR 2004 Bom 136
27. Nepa Limited V. Manoj Kumar Agrawal, AIR 1999 MP 57
28. Newage Fincorp (India) Ltd. V. Asia Corp Securities Limited, 2000 4 MH LJ 134
29. Premraj Mundra V. Md. Maneck Gazi, AIR 1951 Cal 156
30. [Rajasthan Cylinder And Container Ltd. V. Essar Steel Ltd., AIR 2009 Guj 116 : 2009 AIR Guj 116 : 2008 JX\(Guj\) 740 : 2008 GLHEL_HC 220894](#)
31. Raman Tech V. Solanki Traders, 2008 2 SCC 302
32. Reliance Infocomm Ltd. V. Bharat Sanchar Nigam Ltd., 2004 115 DLT 219
33. Rite Approach Group Ltd. V. M:s Rosoboronextport, 2004 111 DLT 816
34. S. Raminder Singh V. Nct Of Delhi, 2003 66 DRJ 239
35. Sail V. Amci Pty Ltd. & Anr., 2011 3 ARB LR 502
36. Sanrachna (India) Inc. V. Ab Hotels Ltd., 2006 128 DLT 694
37. Saraswat Coop. Bank V. Chandrakant Maganlal Shah, AIR 2002 Bom 203
38. Sea Transport Contractors Ltd. V. Indian Farmers Fertilizers Co Operative Ltd., 2006 91 DRJ 83
39. Shaw V. Him Neel Breweries Ltd., 2006 133 DLT 153
40. Shin Satellite Public Co. V. Jain Studios, 2008 2 ArbLR 242
41. Sudarshan Finance Ltd. V. Npec, AIR 1999 SC 565
42. Sudershan Rao And Ors. V. Evershine Builders Private Limited Mumbai, 2013 2 ARBLR 52
43. Techno Construction V. Kunj Vihar Co- Operative Group Housing Society, 2005 118 DLT 591
44. Veda Research Laboratories Ltd. V. Survi Projects, 2009 164 DLT 388
45. Wander Ltd. V. Antox India (P) Ltd., 1990 Supp SCC 727

Cited in :

1. (Referred To) :- [Torq Commodities Llc Vs. Nava Investment Pte Ltd, 2019 JX\(Guj\) 132 : 2019 AIJEL HC 240230](#)

Equivalent Citation(s):

2015 (3) GLH 28 : 2014 JX(Guj) 909

JUDGMENT :-

M.R.Shah, J.

1 Feeling aggrieved and dissatisfied with the impugned order passed by the learned Additional District Judge, Vadodara in Civil Miscellaneous Application No.467/2013 by which in exercise of powers under section 9 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as "Arbitration Act"], the learned Additional District Judge, Vadodara has directed the appellant herein - original respondent to furnish the Bank Guarantee for an amount of Rs.79,61,76,998.58 ps., within 3 months of the said order, the appellant has preferred the present appeal under section 37 of the Arbitration Act.

2 Facts leading to the present First Appeal in nut shell are as under:

[2.1] That in August 1996, the respondent United India Insurance Co. Ltd. issued an insurance policy to the appellant in respect of the appellant's refinery which was under construction at Wadinar, Jamnagar. It appears that the said insurance policy, inter alia, covered (1) the material damage [under section I of the insurance policy] i.e. damage to the appellant's properties, machinery, equipment etc. and (2) advance loss of profit i.e. loss of future profits caused on account of delay in commissioning the refinery. That in the year 1998, a massive cyclone hit the coast of Gujarat and caused severe damage to the appellant's property, machineries, equipments etc. at the refinery site. Therefore, the appellant made claims under the insurance policy i.e. material damage claimed and advance loss of profit claimed. A dispute arose between the parties and therefore, the dispute was referred to the Arbitral Tribunal in view of the Arbitration Agreement dated 05.01.2008. The arbitration primarily related to two insurances against the appellant herein - original refinery being (a) the claim of Rs.391.70 Crores (approximately) towards material damaged at the refinery on account of the cyclone, (b) the claim of Rs.3306.28 Crores (approximately) towards the Advance Loss of Profits which the appellants suffered on account of the reason of delay in commissioning the refinery. That the Arbitral Tribunal passed an interim award dated 24.02.2012. Thereafter, on 25.04.2012, the Arbitral Tribunal passed the corrected interim award under which the learned Tribunal rejected the appellant's claims and allowed the respondent's counter claim and directed the appellants to pay Rs.6,74,04,740/ to the respondent, however without interest.

That being aggrieved and dissatisfied with the award declared by the Arbitral Tribunal, the appellant has filed Civil Misc. Application No.295/2012 before the learned District Court, Vadodara under section 34 of the Arbitration Act, which is pending.

It appears that thereafter on 02.07.2012, the respondent filed an application before the learned Arbitral Tribunal seeking costs to the tune of Rs.29 Crores. It appears that subsequently the respondent filed an extended schedule of costs, claiming costs to the tune of Rs.94.5 Crores.

That on 21.06.2013, the learned Arbitral Tribunal passed the correct final award awarding the cost to the tune of Rs.69,40,90,433.20 to the respondent.

[2.2] Feeling aggrieved and dissatisfied with the aforesaid corrected final award awarding the cost to the tune of Rs. 69,40,90,433.20, the appellant herein has filed Civil Misc. Application No.444/2013 before the learned District Court, Vadodara under section 34 of the Arbitration Act, which is also pending.

That during the pendency of the aforesaid proceedings before the learned District Court, Vadodara, on 23.08.2013, the respondent filed the Civil Misc. Application No.467/2013 under section 9 of the Arbitration Act, seeking an order directing the appellant to deposit an amount of Rs.79,61,76,998.58 as awarded by the corrected interim award and corrected final award and interest thereon solely on the ground that the Arbitral Tribunal's awards are in favour of the respondent and the appellant was making huge losses and was having huge debts including a huge tax liability of Rs.6169 Crores (approximately) and therefore, to secure the amount and so as to ensure that the Arbitral awards should be enforced, it was requested to pass an appropriate order directing the appellant to deposit an amount of Rs. 79,61,76,998.58 as interim measure. That the said application was opposed by the appellant by filing its reply. The appellant filed further affidavit on 13.03.2014, inter alia, placing on record the fact that, in financial year 2012 13, its gross turn over as Rs.96797 Crores (approximately) and it made a cash profit of about Rs.126 Crores and that, in 9 months ended on 31.12.2013, its gross turn over was Rs.79498 Crores (approximately) and the respondent made a cash profit of about Rs.126 Crores. It was also pointed out that it was servicing all its debts and paying all its taxes and had not made a single default, and that it had already paid a substantial part of its sales tax liability which was paid in installments. It was submitted that it was not the allegation on behalf of the respondent that the appellant was disposing of or removing any properties or assets with intent to obstruct or delay execution of the award.

Both the sides filed their respective written submissions. After considering the rival submissions, by impugned order the learned District Court, Vadodara - learned Additional District Judge, Vadodara has partly allowed the said Civil Misc. Application No.467/2013 and in exercise of powers under section 9 of the Arbitration Act, has directed the appellant to furnish a Bank Guarantee of Rs.79,61,76,998.58 within a period of 3 months.

[2.3] Feeling aggrieved and dissatisfied with the impugned order passed by the learned District Court, Vadodara by which in exercise of powers

under section 9 of the Arbitration Act, the appellant is directed to furnish a Bank Guarantee for an amount of Rs.79,61,76,998.58 ps., the appellant herein - original respondent has preferred the present First Appeal under section 37 of the Arbitration Act.

3 Shri Mihir Thakore, learned Senior Advocate has appeared on behalf of the appellant herein - original respondent and Shri Kamal Trivedi, learned Senior Advocate has appeared on behalf with Shri Ajay Mehta, learned advocate appearing on behalf of the respondent herein - original applicant - United India Insurance Co. Ltd.

[3.1] Shri Mihir Thakore, learned Counsel has vehemently submitted that as such the corrected interim order as well as corrected final award are challenged under section 34 of the Arbitration Act and are, therefore, not enforceable in view of section 36 of the Arbitration Act. In support of his above submissions, he has relied upon the decision of the Hon'ble Supreme Court in the case of National Aluminium V. Pressteel & Fabrications reported in (2004)1 SCC 540. It is submitted that in view of the above, no inter-locutory order sought by the respondent could have been granted. It is submitted that inter-locutory relief sought by the respondent seeking deposit of the amounts awarded by the corrected interim order and corrected final award amounts to execution of the awards, which is not permissible in law. It is submitted that what cannot be done directly in view of section 36 of the Arbitration Act cannot be done indirectly under section 9 of the Arbitration Act.

[3.2] It is further submitted by Shri Mihir Thakore, learned Counsel appearing on behalf of the appellant that the principles of grant of interim relief under Code of Civil Procedure, 1908 [hereinafter referred to as "CPC"] would apply even when the Court is exercising jurisdiction under section 9 of the Arbitration Act. It is submitted that this is because the Arbitration Act is negated as a means for adjudication on disputes which would otherwise have to be adjudicated by the trial Court in a suit. It is submitted that arbitration is, therefore, a substitute to a suit and the powers of passing interim orders by the Court in a suit are also given to the Court under section 9 of the Arbitration Act. It is submitted that therefore the Court is required to follow the principles which govern the grant of any interim relief. It is submitted that the fact that arbitration is being promoted as a means for quick disposal of civil litigation or that the object of Arbitration Act could be to promote the efficacy of arbitration does not have any bearing on the principles to be followed by the Court while granting the orders under section 9 of the Arbitration Act and cannot mean that the Court is not required to adhere to settled principles for grant of an interim order. It is submitted that the grant of such a relief is necessarily required to be based on accepted principles and not in an unguided manner. In support of his above

submission, Shri Thakore, learned Counsel appearing on behalf of the appellant has relied upon the following decisions of the Hon'ble Supreme Court and other High Courts.

1. Adhunik Steels V. Orissa Manganese & Mineral AIR 2007 SC 2563 (Para 10 18)

2. Arvind Construction V. Kalinga Mining Corp (2007)6 SCC 793 (Paras 9, 10, 15)

3. Goel Associates V. Jivan Bima Rashtriya Avas Samiti 2004(3) Arb LR 289 (Del) [Para 2]

4. Mala Kumar Engineers V. B. Seenaiiah 2005(1) Arb LR 264 (Del) [Para 21 22]

5. Shin Satellite Public Co. V. Jain Studios 2008(2) Arb LR 242 (Del) [Para 34 36]

6. ICICI Securities V. O.P. Roongta 2010(Supp) BCR 405 (Bom)

7. Brand Value Communications Ltd. V. Eskay Video Private Limited AIR 2010 Cal 166 [3.3] It is further submitted by Shri Mihir Thakore, learned Counsel appearing on behalf of the appellant that as such the prayer of the respondent seeking the deposit of the awarded amount is under section 9(ii)(b) of the Arbitration Act i.e. for "securing the amount in dispute in the arbitration". It is submitted that therefore the said prayer seeking a relief which is provided only under Order 38 Rule 5 of the CPC and is not a prayer seeking injunction under Order 39 Rule 1 thereof. It is submitted that the principles governing grant of relief under Order 38 Rule 5 of the CPC would therefore be applicable to the present case. It is submitted that a relief under Order 38 Rule 5 can only be granted if 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 this Court...". It is submitted that the aforesaid requirement is sine qua non for grant of such a relief and no such relief can be granted if the said requirement is not fulfilled. In support of his above submissions, he has relied upon the following decisions. 1. Raman Tech V. Solanki Traders (2008)2 SCC 302 (Para 5 6) 2. Rajasthan Cylinder and Container Ltd. V. Essar Steel Ltd. AIR 2009 Guj 116 (Para 7) 3. Premraj Mundra V. Md. Maneck Gazi AIR 1951 Cal 156 (Para 10 11) 4. Saraswat Coop. Bank V. Chandrakant Maganlal Shah AIR 2002 Bom 203 (Para 24)

[3.4] It is further submitted that in the present case the respondent's case is entirely based on the losses incurred by the appellant and debts of the appellant in the last few years. It is submitted that it is not the case of the respondent at all that the appellant has closed down or not functioning or is disposing of his properties etc. It is submitted that even otherwise the respondent was required to aver and prove that the appellant "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 this Court...". It is submitted that such averments and proof thereof were absolutely essential requirements of Order 38 Rule 5 of the CPC failing which no relief could have been granted. It is submitted that in the present case, there was no averment or allegation whatsoever that the appellant has disposed of any property or is about to dispose of any property with intent to obstruct or delay the execution of the award. It is submitted that only ground on which the respondent sought such a drastic relief was that the appellant is suffering from financial difficulties, a factor which is wholly irrelevant especially in light of the principles governing grant of such relief and in light of the fact that the purpose and object of grant of such relief is not to convert an unsecured debt into a secured debt. It is submitted that therefore, the respondent having failed to aver and prove that the appellant had disposed of any property or is about to dispose of any property with intent to obstruct or delay the execution of the award, the application was required to be rejected.

[3.5] It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the appellant that the contention of the respondent that since this is a case where award has already been passed, the principles governing grant of relief under Order 38 Rule 5 of the CPC would not apply and only the principles governing grant of relief under Order 39 Rule 1 of the CPC would apply is not tenable. It is submitted that what is sought is a relief securing an amount and not a temporary injunction and hence, Order 39 Rule 1 has absolutely no applicability. It is submitted that Order 37 Rule 1 is also a provision for certain interim measures and hence, it cannot be said that while Order 38 Rule 5 does not apply, Order 31 Rule 1 applies. It is submitted that even assuming without admitting that the relief sought is under Order 39 Rule 1, the said provision also contemplates similar averments and proof before any relief and injunction can be granted and therefore also, the respondent has not made out any case for passing of such a drastic order. It is submitted that as such in view of section 36 of the Arbitration Act, the award has not become enforceable decree and therefore, the case cannot be treated as one where there is an executable decree to which the provisions of attachment post, that is, attachment in execution can be applied. It is submitted that therefore, the contention on behalf of the

respondent that this has to be treated at par with judgment post decree cannot be accepted more particularly in view of section 36 of the Arbitration Act and pending section 36 proceedings, the award is not enforceable. It is submitted that infact the Bombay High Court in the case of ICICI Securities (Supra) has applied the principles of Order 38 Rule 5 of the CPC in context of an application under section 9 of the Arbitration Act after filing of section 34 application. It is submitted that any other interpretation would be ex facie contrary to the law that mandates that the award remains unenforceable during the pendency of the Section 34 applications.

[3.6] It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the appellant that even otherwise the powers of grant of interim relief have to be read as being identical in a proceeding before Court and in a proceeding before Arbitrator since arbitration is only an alternative forum to civil proceedings. It is submitted that when the Court functions in proceedings before it, it has inherent powers. However, such powers are not available to the Court exercising power under section 9 of the Arbitration Act. It is submitted that in fact the Arbitration Act contemplates minimal interference by the Court. It is submitted that in view of the aforesaid, the judgments relied upon by the respondent in the cases of Delta Construction Systems Limited Hyderabad V. Narmada Cement Company Limited Mumbai reported in (2002)2 BOMLR 225 (Para 11) and National Shipping Company of Saudi Arabia V. Sentrans Industries Limited reported in AIR 2004 Bom 136 (Para 10), which are rendered prior to decision of the Hon'ble Supreme Court in the case of Adhunik Steel (Supra) have to be read in light of the ratio of the said judgment of the Hon'ble Supreme Court.

[3.7] It is further submitted by Shri Thakore, learned Counsel that even otherwise the powers of Court cannot vary pre award and post award for the following reasons.

(a) In view of section 36 of the Arbitration Act, the award is of no relevance till the application under section 34 is disposed of. The intent of the legislature was to treat the position as if decree is not passed. Therefore, Order XXI of the CPC is not applicable.

(b) This is further confirmed by the language of section 9 of the Arbitration Act.

(c) If a contrary view is taken, the law laid down in (2004)1 SCC 540 will be made otiose.

(d) Both the stages have to be treated as similar to the pendency of a suit and the power of the Court to grant interim relief has to be treated as identical in both stages.

[3.8] It is further submitted that assuming without admitting that different principles have to be applied pre award and post award, the criteria for grant of any interim relief has never been contemplated to be invalid to pay or to secure the payment for the plaintiff. It is submitted that the criterion for grant of interim relief has always been the conduct of the defendant. It is submitted that in fact section 51 of the CPC also makes it clear that even in execution, a person cannot be arrested for inability to pay. It is submitted that therefore the criterion that award is passed is irrelevant. It is submitted that had the appellant conducted itself in a manner so as to defeat the execution or to defraud the respondent only then would grant of such interim relief be justified.

[3.9] It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the appellant that the respondent's case is entirely based on the losses incurred by the appellant and the debts of the appellant in the last few years. It is submitted that it is not the case of the respondent that the appellant has closed down or not functioning or is disposing of its properties etc. It is further submitted that the fact that appellant was making losses and had debts was completely irrelevant for deciding the application. In any case, the appellant is a very large company which is a running concern employing thousands of persons. It is further submitted that it has very much turned the corner and has come out of a Corporate Debt Restructuring package. In FY 2012-13, its gross turnover was Rs.96,797 Crores and its cash profits were Rs.116 Crores. It is further submitted that in that year the throughput in the refinery increased from 13.50 MMT to 19.77 MMT. Likewise, in the nine months ended on 31.12.2013, the gross turnover of the appellant was approximately Rs.79,498 Crores and the appellant made a cash profit of about Rs.126 Crores. In this period also, the throughput in the refinery was as high as 15.88 MMT. It is further submitted that it has not defaulted in a single payment as and when it falls due, be it a debt or a tax. At the time of filing the said further affidavit dated 13.03.2014 before the trial Court, the appellant had already paid an amount of about Rs.4,232 Crores out of the total sales tax liability of about Rs.6,169 Crores. It is further submitted that as on date, it has made further payment towards its sales liability payable in instalments and only an amount of Rs.650.96 Crores remains outstanding. It is further submitted that even for the huge sales tax liability of Rs.6169 Crores, the Hon'ble Supreme Court did not impose any condition of giving any security on the appellant. Moreover, in FY 2013-14, the appellant has also made substantial revenue from operations and has made profit of Rs.129.09 Crores and its reserves have also become positive and are to the tune of Rs.964.51 Crores. It is

further submitted that since the FCCBs of Rs.1224.65 Crores issued by the appellant have been converted into equity during FY 2013 14, no interest liability remains in that regard and the said debt is converted into equity thus reducing the total debt. It is further submitted that such a company cannot be subjected to drastic orders of deposit or furnishing security. Therefore also, the appellant has made payment of further amount towards its sales tax liability which is now reduced to only about 650 Crores and the appellant's financial position has improved as can be seen from its balance sheet for FY 2013 14 and its quarterly financial result for the quarter ended June 2014 and also on account of infusion of equity of Rs.840 Crores (approximately) by the promoters in June 2014. It is further submitted that in light of the appellant's pleadings and documents which were before the trial Court when it passed the impugned order, the trial Court has committed a gross error in relying solely on the respondent's pleadings/arguments/documents in regard to the appellant's financial position. It is further submitted that moreover the subsequent facts have shown further improvement in the appellant's financial position and are also required to be considered before subjecting the appellant to such drastic orders.

[3.10]It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the appellant that the following factual aspects with regard to the balance-sheet are also required to be considered.

a. The FCCBs were converted into shares on a premium. This means that the said debt was converted into equity thus reducing the debts of the company to that extent as also the interest liability thereon. Moreover, the conversion was on a premium, which naturally resulted in increasing the reserves of the company.

b. The "Reserves and Surplus" shown on page 44 of the appeal show that in the year ending 31st March, 2013, the reserves were in negative Rs.275.44 Crores whereas in the year ended 31 st March, 2014 on account of the combined effect of the Capital Reserve, Securities Premium Account, Debenture Redemption Reserve, Net Profit for the year, etc. the balance as per the last Balance Sheet (which was showing a loss of Rs.5345.26 Crores) was wiped out and this resulted in creation of a positive reserve of Rs.964.51 Crores.

c. The financial results for the quarter ended 30 th June, 2014 (page 75 of the appeal) show that for the quarter ended 31 st March, 2014, the company made a profit of Rs.1011 Crores and for the quarter ended 30th June 2014, the company made a profit of Rs.684 Crores. The Note 5 on page 77 shows that the company also received Rs.839 Crores from a holding company as advance towards Global Depository Shares which

means that this is equity infusion and has nothing to do with the profits made by the company during the fiscal year.

[3.11]It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the appellant that even otherwise the learned Judge has materially erred in passing the impugned order and directing the appellant to furnish the Bank Guarantee of Rs.79,61,76,998.58 ps. in exercise of powers under section 9 of the Arbitration Act solely on the allegation that the appellant is running into loss and/or is having the debts and/or huge tax, sales tax liability of Rs.6169 Crores. It is submitted that the Civil Misc. Application No.295/2012 challenging the corrected interim award was filed in June 2012, and the Civil Misc. Application No.444/2013 challenging the corrected final award was filed in June 2013. It is further submitted that the present application was filed on 23.08.2013. Therefore, for all this while, the respondent did not consider it necessary to seek such a relief. In all this while, the appellant has not disposed of any property with intent to obstruct or delay the execution of the award. Therefore, there is no real apprehension in the respondent's mind in this regard and the Civil Misc. Application No.467/2013 is nothing but a pressure tactic and/or a devious means of enforcing an unenforceable award. It is further submitted that there was absolutely no justification for grant of such drastic relief. It is submitted that even during the pendency of the arbitration proceedings no such application for interim measure was submitted and no such apprehension was ever made. It is further submitted that the Hon'ble Supreme Court has not imposed any requirement of creation of security in favour of the Government in respect of the sales tax liability of Rs.6169 Crores. It is submitted that the said amount has been substantially paid as per the requirements granted and apart from that, the company has not defaulted in any tax payment as and when due or in servicing of loans. It is submitted that therefore also, the present is a case of so called lack of confidence, which cannot be a ground for directing such drastic interim measures.

[3.12]It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the appellant that the allegation of the respondent that the current balance sheet of the appellant shows a "rosy picture" where there is none or that the figures of profit, revenue, turnover, reserves cannot be believed, is neither correct nor relevant. It is submitted that as stated earlier, such a relief cannot be granted on the ground that there are losses or huge debts which may make it difficult / impossible to enforce the award, but is to be granted on the ground that the appellant with intent to obstruct or delay the execution of award (a) is about to dispose of the whole or any part of its property, or (b) is about to remove the whole or any part of its property from the local limits of the jurisdiction

of the Court. It is therefore submitted that this basis for foundation is admittedly not made out in the present case.

[3.13] Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of Steel Authorities of India (Supra) is concerned, it is submitted that in the said decision, the decision of the Hon'ble Supreme Court in the case of Adhunik Steel (Supra) has not been considered at all.

Making above submissions and relying upon above decisions, it is requested to allow the present appeal and quash and set aside the impugned judgment and award.

4 Present appeal is opposed by Shri Kamal Trivedi, learned Senior Advocate appearing on behalf of the United India Insurance Co. Ltd. Shri Trivedi, learned Counsel appearing on behalf of the respondent - original applicant [hereinafter referred to as "original applicant"] has vehemently submitted that considering the financial position of the appellant and as the appellant was running in huge losses and is indebted heavily, in the facts and circumstances of the case, the learned Judge has not committed any error in passing the impugned order directing the appellant to furnish the Bank Guarantee for an amount of Rs.79,61,76,998.58 ps. in exercise of powers under section 9 of the Arbitration Act. It is submitted that the impugned order passed by the learned District Court is absolutely just and proper and in consonance with the provisions of section 9 of the Arbitration Act more particularly to protect the interest of original applicant in whose favour there is a well reasoned award.

[4.1] It is further submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that the impugned order passed by the learned District Court is a detailed and reasoned award wherein the learned Court had, after examining the details placed on record by both the parties and the pleadings on record, has concluded that the financial condition of the appellant was such that the original applicant would be unlikely to recover the amounts awarded to it in the arbitration proceedings and has passed an order securing the awarded amount.

[4.2] It is further submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that the powers under section 9 of the Arbitration Act can be exercised even after the award has been pronounced and a challenge thereto is pending under section 34 of the Arbitration Act. In support of his above submissions, he has relied upon the decision of this Court in the case of Chunilal Kapoorchanji Shah V. Yuvraj Industries Limited reported in 2009(3) GLH 434. It is submitted that in the aforesaid decision this Court has held that so far as section 9 of the Arbitration Act is concerned, the scope is very wide and the order for interim measure can be ordered by the Court before or during the

arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with section 34 of the Arbitration Act and even an interim order can also be passed under section 9 of the Arbitration Act. It is submitted that there cannot be any doubt that a petition under section 9 of the Arbitration Act can be filed in a post award situation.

[4.3] It is further submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that as such the original applicant filed section 9 application for seeking deposit of the awarded amount so as to secure the amounts awarded in arbitration. It is submitted that the appellant's argument that the amounts awarded in arbitration are not "amount in dispute" cannot be accepted when the appellant still dispute those amounts by itself challenges to the award since the costs incurred in the arbitration were also disputed and contentious and therefore, the same is amounted to "amount in dispute". It is submitted that in a post award situation, once award has been pronounced, the rights of the party are crystallized. The party in whose favour the orders have been passed can ofcourse approach the Court under section 9(ii)(b) of the Arbitration Act to secure the awarded amounts, so as to ensure that it is not reduced to paper decrees. It is submitted that such a situation would arise when the party in whose favour the award has been passed is unable to executed the award because of the pendency of section 34 petitions filed by the other party, but the party apprehends that by the time section 34 petition is decided by the Court, there would be nothing left to seek execution of. It is submitted that the Court cannot be held to be powerless nor can its power be fettered or hedged by any provision of the CPC and the Court should be held to have the power to pass such orders as would secure the amount in dispute. It is submitted that in the present case, this has been done by directing the appellant to furnish a Bank Guarantee.

[4.4] It is further submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that filing of the application under section 9 of the Arbitration Act for such relief cannot tantamount to execution as contended on behalf of the appellant. It is submitted that the decision of the Hon'ble Supreme Court in the case of Pressteel & Fabrications (Supra) would not be applicable to the facts of the case on hand. It is submitted that the case of Pressteel & Fabrications (Supra) was passed in different context and does not apply to the present case since it does not deal with the powers of a Court under section 9 of the Arbitration Act. It is submitted that even otherwise the aforesaid decision does not in any manner restrict the powers of the Court under section 9 of the Arbitration Act and to pass such interim measures as would be necessary for securing the amount in dispute. Shri Trivedi, learned Counsel appearing on behalf of the original applicant has relied upon the

decision of the Andhra Pradesh High Court in the case of Sudershan Rao and Ors. V. Evershine Builders Private Limited Mumbai reported in 2013(2) ARB LR 52 (AP) [Para 15] and the decision of the Delhi High Court in the case of Veda Research Laboratories Ltd. V. Survi Projects reported in 164 (2009) DLT 388 [Para 13]. It is further submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that even the decision of the Hon'ble Supreme Court in the case of Pressteel & Fabrications (Supra) came to be considered by the Hon'ble Supreme Court subsequently in the case of SAIL V. AMCI PTY Ltd. & Anr. reported in 2011(3) ARB LR 502 (Delhi) [Para 64] and Delta Construction Systems Limited Hyderabad V. Narmada Cement Company Limited Mumbai reported in (2002)2 BOMLR 225 (Para 11). It is submitted that therefore the decision in the case of Pressteel & Fabrications (Supra) would not be applicable to the facts of the case on hand.

[4.5] It is further submitted that even the relief which was sought by the original applicant directing the appellant to deposit the awarded amount in the Court only amounts to securing the amount in dispute in the arbitration as envisaged under section 9(ii)(b) of the Arbitration Act. It is submitted that such relief of depositing the monies into Court under section 9(ii)(b) of the Arbitration Act in a post award scenario, has been awarded in SAIL (Supra) and Delta Construction Systems Limited Hyderabad (Supra).

[4.6] It is further submitted that when section 9 of the Arbitration Act seeks to confer wide powers, as the very language used therein clearly suggests there is a difference between pre award scenario and post-award scenario, more particularly when after the award, rights of the parties get crystallized, which is obviously not so in case of pre award scenario. It is further submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that scope and powers available to the Court under section 9 of the Arbitration Act are very wide. It does not contain any fetters on the powers of the Court. It is submitted that section 9 of the Arbitration Act is divided into 2 parts - the first part lays down the purposes for which the party can approach the Court to seek interim measures for protection and the second part lays down that for meeting those objectives, "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." It is submitted that therefore, the powers of the Court under section 9 of the Arbitration Act are very wide enough to pass the orders that would meet the objective and purpose for which a party has approached the Court. It is submitted that when the Court decides an application under section 9 of the Arbitration Act, it must have due regard to the underlying objectives of the Arbitration Act, which is to permit the efficacy of arbitration as a form of dispute

resolution. It is submitted that it is in fact for the achievement of the said objective that the Parliament has used very wide language under section 9 of the Arbitration Act, which cannot be rendered ineffective or nebulous by strictly complying the provisions of the CPC. It is submitted that just as on one hand, the exercise of the power under section 9 of the Arbitration Act cannot be carried out in an unchartered territory ignoring the basic principles of procedural law contained in the CPC, the rigors of every procedural provision in the CPC, cannot be put into place to defeat the grant of relief which would sub serve the paramount interests of justice and a balance has to be drawn between the said two considerations. It is further submitted that while considering the whole matter slightly from a different angle, it may be appreciated that if one of the stipulated objectives under section 9 of the Arbitration Act is to secure the awarded amount, then it has to be held that the Court has the power to pass such orders so as to meet that objective and purpose. Thus, it cannot be said that the power of the Court is in any manner fettered, hedged or subject to the conditions in the CPC.

[4.7] It is submitted that the appellant has attempted to read into section 9 the provisions of the CPC strict sensu and has contended that the powers of the Court under section 9 have to be exercised in accordance with the CPC. It is submitted that the appellant has done so by relying on the words used in section 9 i.e. "same power for making orders as it has for the purpose of, and in relation to, any proceedings before it". It is submitted that the aforesaid construction of the appellant is erroneous as it amounts to reading into the statute, the words which neither exist nor were meant to exist. The only clear meaning of the above sentence is that in order to meet the purposes for which a party has approached the Court under section 9, the Court shall have all such powers which the Court ordinarily has while dealing with a matter before it. It is submitted that it only lays down the width of the powers of the Court under section 9 of the Arbitration Act and that those powers are wide enough, but does not in any manner fetter the powers of the Court or to make it conditional on the provisions of the CPC. It is submitted that in short, under section 9 of the Arbitration Act, the Court will have the power to order for providing security of the amounts in dispute / grant injunction / order attachment / appoint Receiver etc. but it would not mean that such powers of the Court under section 9 of the Arbitration Act have to be exercised strictly in accordance with the CPC or that the conditions under the CPC for exercise of such power would apply strict sensu.

[4.8] It is further submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that the provisions of the CPC can at best act only as guiding principles for a Court exercising its powers under section 9 of the Arbitration Act. It is submitted that for instance, while granting injunction, the Court under section 9 of the Arbitration

Act could consider the celebrated guiding principles of prima facie case, balance of convenience etc. In support of his above submissions, Shri Trivedi, learned Counsel appearing on behalf of the original applicant has heavily relied upon the decisions of the Bombay High Court in the case of National Shipping Company of Saudi Arabia (Supra) as well as the decision in the case of Delta Construction Systems Limited Hyderabad (Supra).

[4.9] Now, so far as the contention on behalf of the appellant that the respondent herein - original applicant did not make out any case that the appellant "is about to dispose of the whole or any part of his property, or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court" and without making out such a case the Court cannot pass the interim measures of protection is concerned, Shri Trivedi, learned Counsel appearing on behalf of the original applicant has submitted that firstly the provisions of Order 38 Rule 5 of the CPC relating to "Attachment before Judgment, etc." would not apply in a post-award situation, where the rights of the parties have been crystallized. It is submitted that secondly, in any event, a direction to furnish a bank guarantee to secure the amounts in dispute cannot be equated to an order for attachment. It is submitted that thirdly the powers of the Court under section 9 of the Arbitration Act to secure the awarded amount in a post-award situation cannot be made conditional or subject to fulfilling the requirements of Order 38 Rule 5 or proving that the appellant is about to dispose or remove the whole or any part of his property from the local limits of the jurisdiction of the Court. It is submitted that once such an application is made, it would be the duty of the Court to secure the awarded amount in a post award situation, more particularly when the party approaching the Court as bonafide apprehensions that if the amount is not secured, then it will not be able to get the award executed at a later stage and would be left with a mere paper decree. It is submitted that in the present case as such the original applicant had made such grounds for the bonafide apprehension.

[4.10] It is further submitted that at the post award stage, the party applying is neither required to plead/prove nor is the Court required to find a case where a party "is about to dispose of the whole or any part of his property, or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court". It is submitted that the power of the Court is thus to be exercised ex debito justicia. In support of his above submissions, Shri Trivedi, learned Counsel appearing on behalf of the original applicant has heavily relied upon para 10 of the decision of the Bombay High Court in the case of National Shipping Company of Saudi Arabia (Supra); para 45 of the decision of the Delhi High Court in the case of SAIL (Supra).

It is further submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that at the stage of passing an order under section 9(ii)(b) of the Arbitration Act and at the post award stage, the Court is only required to consider that since there is already an award in favour of the party applying, whether the party applying would suffer irreparable injury if no order securing the awarded amount is passed on the materials brought on record. It is submitted that in the aforesaid background, while passing the impugned order, the Court below has considered the irreparable injury that would be caused to the original applicant if the order securing the awarded amount is not passed and that the award is not reduced to a paper decree.

[4.11]It is further submitted that even while exercising the powers under section 9 of the Arbitration Act, the Court is not required to examine the merit and correctness of the issues involved in the arbitral proceedings, especially when such merits have been adjudicated upon and decided by the competent and mutually appointed Arbitral Tribunal and while challenges to such awards are pending before competent Courts in CMA No.295/2012 and CMA No.444/2013. It is submitted that in such circumstances, the Court is required to only examine whether the circumstances awarding a security have been satisfied or not. In support of his above submissions, he has relied upon the decision of the Hon'ble Supreme Court in the case of Adhunik Steels (Supra). Learned Counsel appearing on behalf of the original applicant has also relied upon the decision of the Madhya Pradesh High Court in the case of Nepa Limited V. Manoj Kumar Agrawal reported in AIR 1999 MP 57 [Para 17] and another decision of the Bombay High Court in the case of Newage Fincorp (India) Ltd. V. Asia Corp Securities Limited reported in 2000(4) MH LJ 134 [Para 35].

[4.12]Now, so far as the submissions/contentions on behalf of the appellant whether the financial condition of the appellant warrants a deposit to secure the amounts awarding the arbitration is concerned, it is submitted that a detailed averments and documentary evidence regarding the financial condition of the appellant including the losses, the outstanding debts and the demands made by the appellant in its letter to the Government of Gujarat and the sales tax pleadings before the Hon'ble Supreme Court had been placed before the learned District Court, which concluded that the financial condition of the appellant was such that the respondent would be unlikely to recover the amounts awarded to it in the arbitration. It is submitted that once the competent Court has exercised its discretion to reach such a conclusion, the Appellate Court would re appreciate the evidence with a view to substitute the findings of the trial Court by its own findings. In support of his above submissions, he has relied upon the decisions of the Hon'ble Supreme Court in the case of Wander Ltd. V. Antox India (P) Ltd.

reported in 1990(Supp) SCC 727 [Para 14] and Mohd. Mehtab Khan and Ors. V. Khushnuma Ibrahim reported in (2013)9 SCC 221 [Paras 20 22].

[4.13]It is further submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that even otherwise the following aspects substantiates the apprehension of the respondent that the appellant company is in a precarious financial position and that the original applicant would not be able to effectively enforce the awards against the appellant.

a. The miniscule profits earned by the appellant in the last 2 quarters have done nothing to wipe out the huge losses being suffered by the appellant in the last 9 years. Even with the profit of Rs.126 Crores earned in the financial year 2013 14, the cumulative losses suffered by the appellant over the last 9 years remain at Rs.5,378.17 Crores.

b. The current outstanding debt liability of the appellant company amount to Rs.21,000 Crores.

c. The appellant has admitted during the course of arguments that its fixed assets are mortgaged / under the charge of banks. d. The purported profits sought to be relied upon the appellant are misleading and are a mere case of window dressing. These so called profits only arise due to internal transactions between the appellant's group companies which were non cash transactions. The said profits in the last 2 quarters arise due to an advance received from Essar Energy Holdings towards Global Depository Schemes and due to conversion of convertible bonds (FCCB's) received from Essar Energy Holdings into equity shares to a promoter company.

[4.14]Now, so far as the submission on behalf of the appellant regarding its financial condition relying upon its balance sheet for the year 2013 14 and the submission that the appellant made a profit of Rs.125.8 Crores on the year ending 31.03.2013 as against a loss of Rs.1180.44 Crores on 31.03.2013 and that the reserves and surplus had gone upto Rs.954.51 Crores as on 31.03.2014 as against an earlier negative balance of Rs.275.44 Crores as on 31.03.2013 and therefore the submission on behalf of the appellant that their financial condition has been improved is concerned, it is submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that as such the profit of Rs.125.8 Crores was against a turnover of Rs.98610 Crores in the same year and is, therefore, a ministerial amount. It is submitted that while proceedings were pending before the learned District Court, as such the appellant at that time had suffered a loss of Rs.860 Crores in the first quarter of financial year 2013 14. It is submitted that the appellant had made losses in 3 out of 4 financial quarters of the year 2013-14 and was able

to make some profits in the last quarter of the year 2013 14 resulting in an annual profit of Rs.125.8 Crores. It is submitted that the profit in the year 2013 14 did not mean that the losses made by the appellant company to the tune of Rs.1180.44 Crores for the year 2012 13 was in the preceding years, were wiped out. It is submitted that the said losses continued to remain. It is submitted that if the losses in each of the financial years from 2005 06 till 2012 13 are to be taken into account the total losses of the appellant are as follows:

Essar Oil - Stand Alone and Cumulative Profit/Loss for the past 9 years
Amount in INR; Crores Sr. Financial Year Net Profit/(Loss) Net Profit/ No.
[Stand Alone] (Loss)

1. 2005 2006 (93.68) [Page 37 of NA Respondent's Affidavit] 2. 2006 2007 (67.49) [Page 38] NA 3. 2007 2008 (41.48) [Page 38] (51.45) 4. 2008 2009 (1,652.71) [Page 40] (1,696.16) 5. 2009 2010 (931.94) [Page 42] (2,627.65) 6. 2010 2011 (251.69) [Page 42] (2,879.34) 7. 2011 2012 (1,285.48) [Page 46] (4,164.82) 8. 2012 2013 (1,180) [Page 47] (5,345.26) [Pg.44] TOTAL (5,504.17)

It is submitted that even if the profit of Rs.125.8 Crores made in the year 2013 14 is factored, the sum total of stand alone losses of the appellant for the last 9 years would only reduce from Rs.5504.17 Crores to Rs.5378.37 Crores.

It is submitted that similarly the outstanding debts of the appellant company, which are identified as non-current liabilities in the balance sheet, have continued to remain at very high levels since the year 2009 10.

It is submitted that even in the year 2013 14, the debts of the appellant company have only reduced from Rs.16,670 Crores to Rs.14528.56 Crores. It is submitted that one of the major ingredients of the non-current liabilities are "Long Term borrowings", which are the loans taken by the appellant company from banks and other financial institutions.

It is submitted that the appellant company has an outstanding debt liability of Rs.21,000 Crores as stated by the appellant's Chief Executive Officer on 06.03.2014.

It is further submitted that the balance sheet for the year 2013 14 also shows that "Trade Payables" of the appellant company have increased from Rs.11364.54 Crores [as on 31.03.2014] to Rs.19815.04 Crores [as on 31.03.2014]. It is submitted that "Trade Payables" are the amounts of money that the appellant company has to pay towards raw materials,

goods and services in the short term. It is submitted that the aforesaid also shows an increase in the liability of the appellant company.

It is further submitted that the balance sheet shows a fixed asset of the appellant company, but the said all assets are mortgaged / under the charge of the banks. It is further submitted that even the reliance on increase in reserves and surplus from Rs.964.51 Crores as on 31.03.2014 as against the earlier negative balance of Rs.275.44 Crores as on 31.03.2013 is absolutely misleading. It is submitted that as per "Note 5" of the balance sheet, the said increase took place because of an addition of sum of Rs.1256.15 Crores on account of conversion of convertible bonds [FCCBs] into equity shares to Promoter Company. It is submitted that thus a loan given by a Promoter Company to the appellant company was converted into equity and the loan amount got added as reserves and surplus resulting in a positive figure. It is submitted that this was a non-cash transaction. It is submitted that therefore reserves and surplus did not increase on account of any positive transactions of the company. It is submitted that in any case as on 31.03.2014, the carry forward losses of the previous year remained as high as Rs.5,219.58 Crores.

Making above submissions, it is requested that in the aforesaid facts and circumstances of the case, the learned District Court has rightly exercised the powers under section 9(ii)(b) of the Arbitration Act and has rightly passed an order directing the appellant to furnish the Bank Guarantee for an amount of Rs.79,61,76,998.58 ps. with a view to secure the amount due and payable to the original applicant under the awards and with a view to see that ultimately the award does not remain a paper decree.

[4.15]Now, so far as the reliance placed upon the decisions of the Hon'ble Supreme Court in the case of Adhunik Steel (Supra) and Arvind Construction (Supra), Raman Tech (Supra) and the decisions of the Delhi High Court in order to contend that the principles governing the attachment of a property before the execution of decree as set out in Order 38 Rule 5 of the CPC will be applicable to the application under section 9(ii)(b) of the Arbitration Act, by the learned Counsel appearing on behalf of the appellant is concerned, it is submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that none of the aforesaid cases would be applicable to an application under section 9(ii)(b) of the Arbitration Act. It is submitted that none of the cases state that the principles of Order 38 Rule 5 of the CPC would strictly apply in an application under section 9(ii)(b) of the Arbitration Act where a deposit into Court is sought after the pronouncement of a unanimous and detailed award. It is submitted that the cases relied upon by the appellant are in relation to the attachment of property and

the appointment of a receiver. It is submitted that even the two Supreme Court judgments relied upon by the learned Counsel appearing on behalf of the appellant, namely Adhunik Steels Ltd. (Supra) and Arvind Construction (Supra) do not contain any reference whatsoever to Order 38 Rule 5. It is submitted that the observations of the Apex Court in the aforesaid two judgments cannot and should not be read like a statute. It is submitted that nevertheless all that the Apex Court ruled in said case of Adhunik Steels Ltd. (Supra) is to the effect that the power under section 9 of the Arbitration Act is not totally independent of well known principles governing the grant of an interim injunction that generally governs the Courts.

[4.16]It is further submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that even the decisions relied upon by the appellant in the case of Raman Tech (Supra), Rajasthan Cylinder and Container Ltd. (Supra), Premal Mundra (Supra) and Saraswat Co operative Bank Ltd. (Supra) in support of their submission that while exercising powers under section 9 of the Arbitration Act, the principles governing Order 38 Rule 5 of the CPC would be applicable is concerned, it is submitted by Shri Trivedi, learned Counsel appearing on behalf of the original applicant that in none of the aforesaid decisions the provisions of section 9(ii)(b) of the Arbitration Act in a post award scenario were under consideration. Therefore, aforesaid decisions are wholly irrelevant for the adjudication of the present dispute.

It is further submitted that even the decision of the Bombay High Court in the case of O.P. Roongta (Supra), which has been relied upon by the learned Counsel appearing on behalf of the appellant, will not be applicable to the facts of the case on hand as in the case before the Bombay High Court, the order was passed under section 9(ii)(b) of the Arbitration Act, however in the present case the order has been passed under section 9(ii)(b) of the Arbitration Act.

Making above submissions and relying upon above decisions and submitting that considering the precarious financial condition of the appellant, the learned District Court has not committed any error in passing the impugned order in exercise of powers under section 9(ii)(b) of the Arbitration Act and therefore, it is requested to dismiss the present appeal.

5 Heard learned Counsel appearing on behalf of respective parties at length.

6 A short but an interesting question of law posed for consideration before this Court is the scope and ambit of the powers of the Court while considering the application under section 9(ii)(b) of the Arbitration Act post-award scenario and

the principles governing the order passed by the Court in exercise of the powers under section 9(ii)(b) of the Arbitration Act post-award scenario?

At the outset it is required to be noted that in the present case the award/s passed by the Arbitral Tribunal are subject matter of the proceedings before the District Court being Civil Misc. Application Nos.295/2013 and 444/2013 under section 34 of the Arbitration Act. Therefore, as such and considering section 36 of the Arbitration Act, the award/s challenged under section 34 of the Arbitration Act are not executable considering section 36 of the Arbitration Act. As such the aforesaid cannot be disputed by the original applicant and as such Shri Trivedi, learned Counsel appearing on behalf of the original applicant is not disputing the above. Even any decision on the aforesaid is required, the observations made by the Hon'ble Supreme Court in the case of Pressteel & Fabrications (Supra) is required to be considered. In the case before the Hon'ble Supreme Court a request was made by the party in whose favour the award was declared by the Arbitral Tribunal requesting to atleast direct the other party to deposit the amount awarded by the Arbitral Tribunal in the competent Civil Court so that the applicant could enjoy the fruit of the said award during further proceedings under section 34 of the Arbitration Act and to that and considering the provision of section 34 of the Arbitration Act, the Hon'ble Supreme Court has observed as under and has declared to grant any such relief. The Hon'ble Supreme Court in the said decision in para 10 has observed and held as under:

"At one point of time, considering the award as a money decree, we were inclined to direct the party to deposit the awarded amount in the Court below so that the applicant can withdraw it, on such terms and conditions as the said Court might permit it to do so as an interim measure"

"...there is no discretion left with the Court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible."

Thus, considering the aforesaid observations made by the Hon'ble Supreme Court as well as the mandatory language of section 34 of the Arbitration Act, when the award/s are challenged under section 34 of the Arbitration Act and thus they became unexecutable, the aforesaid questions posed for our considerations are required to be considered.

[6.1] From the application submitted by the original applicant before the learned District Court on which the learned District Court has passed an

interim order and considering the impugned order passed by the learned District Court and as it is not in dispute that the original applicant submitted the application for appropriate order by way of interim measure to secure the amounts awarded by the learned Arbitral Tribunal, invoking the jurisdiction of the District Court under section 9(ii)(b) of the Arbitration Act. It was the specific case on behalf of the original applicant that as there is already an award/s declared by the learned Arbitral Tribunal and looking to the financial position of the appellant and as the appellant is running in losses and is heavily indebted, it was requested to protect the interest of the original applicant by directing the appellant to deposit the amount of costs as per the final award declared by the learned Arbitral Tribunal so that ultimately if at all the award/s are to be executed, the award may not remain as paper decree / award. Therefore, the sole ground on which the relief was sought by the original applicant under section 9(ii)(b) of the Arbitration Act was the bad financial condition of the appellant and that the appellant was running in huge losses and was / is heavily indebted and there was a huge sales tax liability of the State Government to the extent of Rs.6,169 Crores, which was required to be paid by the appellant to the State Government. At this stage it is required to be noted that neither before the learned District Court nor even before this Court, it was the case on behalf of the original applicant that there was any attempt on the part of the appellant herein is/was about to dispose of the whole or any part of its property, or is/was about to remove the whole or any part of its property from the local limits of jurisdiction of the Court with an intent to obstruct or delay the execution of any decree/award that may be passed against it.

It is submitted that it is the case on behalf of the appellant that unless and until the essential requirements of Order 38 Rule 5 of the CPC are satisfied and the Court is satisfied that the appellant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property, or is about to remove the whole or any part of his property from the local limits of the jurisdiction of this Court, no such relief / order can be passed by the Court in exercise of powers under section 9(ii)(b) of the Arbitration Act. Therefore, it is the case on behalf of the appellant that even while passing the order under section 9 of the Arbitration Act, the provisions of the CPC more particularly while passing such an order under section 9(ii)(b) of the Arbitration Act, the provisions of Order 38 Rule 5 of the CPC would be applicable and all the requirements of Order 38 Rule 5 of the CPC are required to be satisfied.

On the other hand it is the case on behalf of the original applicant that the provisions of the CPC more particularly Order 38 Rule 5 of the CPC

would not be applicable *stricto sensu* while exercising the powers by the District Court / Court under section 9 more particularly section 9(ii)

(b) of the Arbitration Act more particularly at post award stage. While considering the aforesaid rival submissions and the scope and ambit of section 9 of the Arbitration Act and powers to be exercised by the learned District Court under section 9 of the Arbitration Act while passing the order under section 9 of the Arbitration Act whether the provisions of Code of Civil Procedure, 1908 *stricto sensu* apply, section 9 of the Arbitration Act is required to be considered which reads as under:

9. Interim measures, etc. by Court. 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) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing 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.

Considering the provisions of section 9 of the Arbitration Act, the Court may pass any order as provided under section 9(i) to section 9(ii)

(e) either pre award or post award and if it is pre award before it is enforced in accordance with section 36. It also further specifically provides that while passing any order as provided under section 9 in exercise of powers under section 9 of the Arbitration Act, the Court shall have the said power for making orders as it has for the purpose of, and in relation to any proceedings before it. The order which can be passed as provided under section 9(ii) of the Arbitration Act could be in the nature of interim measure of protection in respect of (a) the preservation, interim custody or sell of any goods which are the subject matter of the arbitration agreement; (b) securing the amount in dispute in arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing 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 of the appointment of receiver; (e) such other interim measures of protection as may appear to the Court to be just and convenient. Considering the order that may be passed under section 9(ii) more particularly section 9(ii)(b); section 9(ii)(d) and section 9(ii)(e) are akin to Order 38 Rule 5 of the Code of Civil Procedure, 1908 and under Order 39 Rules 1 and 2 of the CPC. The object and purpose of the powers conferred upon the Court to pass any order under section 9 of the Arbitration Act seems to be to protect the interest of the parties and so as to see that either arbitration proceedings do not become infructuous or to see that if ultimately the award is passed and executed under section 36 of the Arbitration Act, the party in whose favour the award is declared, is able to enjoy the fruit of the litigation / arbitral award. At this stage it is required to be noted that Shri Kamal Trivedi, learned Counsel appearing on behalf of the original applicant has also agreed and submitted that the provisions of CPC can at the best act only as a guiding principle for a Court exercising its powers under section 9 of the Arbitration Act, for instance, while granting injunction, the Court under section 9 of the Arbitration Act could consider the celebrated guiding principles of prima facie case, balance of convenience etc. Even as observed herein even in section 9 of the Arbitration Act itself, it is specifically mentioned that it provides that while passing the order under section 9 of the Arbitration Act, 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. It cannot be disputed that whenever any powers are conferred upon the Court to pass a particular order as provided under the Statute, the grant of such relief is necessarily required to be based on accepted principles and not in an unguided manner. In the present case while exercising the powers under section 9 of the Arbitration Act, therefore the Court is required to grant any relief and/or

pass any order as provided under section 9 of the Arbitration Act, while considering the principles of grant of such orders under the CPC and therefore, it can be said that while passing any order under section 9 of the Arbitration Act, the Court is required to be guided by the provisions of CPC.

In the case of Adhunik Steels (Supra) while considering the powers of the Court and to pass an order of interim measures under section 9 of the Arbitration Act more particularly while granting the order of injunction, the Hon'ble Supreme Court has specifically observed and held that it would not be correct to say that the power under section 9 of the Arbitration Act is totally independent of the well known principles governing the grant of interim injunction that generally governs the Courts in this connection. While observing and holding so in paras 10 and 18, the Hon'ble Supreme Court has observed and held as under:

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

18. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject-matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to O.M.M.

Private Limited for a period of 10 years and its attempted abrupt termination by O.M.M. Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of O.M.M. Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of the Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by O.M.M. Private Limited or the termination of the contract by O.M.M. Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case."

In the case of Arvind Constructions Company Ltd. (Supra), in para 15, the Hon'ble Supreme Court has observed and held as under: "15.The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot prima facie be accepted.The reliance placed on Firm Ashok Traders and Anr. V. Gurumukh Das Saluja and Ors.

[(2004) 3 S.C.C. 155] in that behalf does not also help much, since this Court in that case did not answer that question finally but prima facie felt that the objection based on Section 69 (3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court under Section 9 of the Act. The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court

while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order XVIII Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver."

In the case of Goel Associates (Supra), in para 2, the Hon'ble Supreme Court has specifically observed and held that though the provisions like Order 38 Rule 5 of CPC are not contained in Arbitration and Conciliation Act, but its principles are to be applicable as such. It is also specifically observed that the provisions of CPC would be the guiding principle. In para 2 the Hon'ble Supreme Court has observed and held as under:

"2. Mr. Munjal, learned counsel for the appellant has relied upon a judgment of the learned Single Judge titled as Rite Approach Group Ltd. V. M/S Rosoboronextport MANU/DE/0439/2004 : 111(2004)DLT816 and another judgment of learned Single Judge of the Bombay High Court in Delta Construction Systems Ltd., Hyderabad V. Narmada Cement Company Ltd., Mumbai 2002(2) Arb. LR 47 (Bom) and on the basis of above said authorities, it was contended that the power to grant interim relief cannot be controlled or restricted by invoking the provisions of Order 38 Rule 5 of the Code of Civil Procedure. To our mind, there cannot be any dispute to the proposition of law as enunciated by the learned Single Judge of Bombay High Court and this Court. We have carefully analysed the judgment of the learned Single Judge which is impugned before us.

What has been stated in the judgment is that in the given circumstances, the relief of attachment cannot be granted. No doubt that the provisions like Order 38 Rule 5 Code of Civil Procedure are not contained in the Arbitration and Conciliation Act but its principles are to be applicable as such. However, one cannot lose the sight that the provisions of Code of

Civil Procedure would be the guiding principles as has been held by Supreme Court in *ITI Ltd. V. Siemens Public Communications Network Ltd.* MANU/SC/0502/2002 : [2002]3 SCR 1122. It was held that for want of specific exclusion of Code of Civil Procedure in the Act of 1996, it cannot be inferred that Code was not applicable but that would mean that the provisions of Code have to be read into as it is when the Court exercises its powers as prescribed in the Act of 1996. The procedural aspect provided in the Code about which the Act of 1996 is silent, needless to say, when the Court exercises its substantive power under the Act of 1996 shall be applicable but the guiding factor for exercise of power by the Court under section 9(ii)(b) has to be whether such order deserves to be passed for justice to the cause. The learned Single Judge has relied upon the provisions of Order 38 Rule 5 Code of Civil Procedure to exercise his discretion for the purposes of exercising power under section 9(ii)(b) as to whether that was a fit case for grant of an order of attachment or not. Therefore, it can't be said that the impugned order suffers from infirmity merely because the learned Single Judge has stated in one sentence that the provisions of Order 38 of the Code of Civil Procedure must be kept in view while disposing of such application."

In the case of *Brand Value Communications Ltd.* (Supra), the Division Bench of the Calcutta High Court has held that while dealing with an application under section 9(ii) of the Arbitration Act, the Court should be guided by said principle as required to be followed while disposing of the applications under Orders 38 to 40 of the CPC. While holding so the Division Bench of the Calcutta High Court in paras 14 to 19 has observed as under:

"14. In the application under Section 9 of the Act, no such allegation has been made. The respondent has even admitted that it had no idea about the assets of the appellant except the fact that it has equipments and machineries for telecasting of the films. Thus, there was no justification of passing direction for payment of money by way of security. 15. The object of Section 9(ii) of the Act is similar to those contained in Section 94 read with Orders 38 40 of the Code of Civil Procedure as would appear from the language employed therein which is quoted below :

9. Interim measures, etc. by Court. 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) for an interim measure of protection in respect of any of the following matters, namely :

(a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

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

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

16. Therefore, the power entrusted to a Court in any suit or proceedings for passing orders as mentioned in the Supplemental Proceedings indicated in Part VI of the body of the Code of Civil Procedure has been substantially repeated in Section 9(ii) of the Act by making it clear that in dealing with such an application, the Courts shall have the same power as it has for the purpose of or in relation to any proceedings before it.

17. Thus, it is clear that while dealing with an application under Section 9(ii) of the Act, the Court should be guided by the same principles, which are required to be followed while disposing of the applications under Orders 38-40 of the Code.

18. In the case before us, the dispute between the parties being purely conflicting monetary claims advanced by the parties, in our opinion, the learned Single Judge erred in law in passing a direction for deposit of the money on the appellant merely on a prima facie finding on merit in the absence of any finding that the appellant was either transferring or alienating his properties to avoid payment of money that may be awarded against it or that it was threatening or intending to remove or dispose of his properties with a view to defrauding his creditors. At this stage, we may profitably refer to the following observations of the Supreme Court in the case of Raman Tech and Process Eng. Co. V. Solanki Traders reported in (2008) 2 SCC 302 while considering a case of grant of relief of attachment before judgment :

"5. The power under Order 38, Rule 5, C. P. C. 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 utilise the provisions of Order 38, Rule 5 as 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.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38, Rule 5, C. P. C. Courts should also keep in view the principles relating to grant of attachment before judgment. (See Premraj Mundra V. Md. Manech Gazi for a clear summary of the principles.)" (Emphasis given by us)

19. The principles mentioned above squarely apply to the proceedings under Section 9(ii) of the Act and a Court before passing any direction in the nature of attachment before award should follow those principles. The learned Single Judge, as it appears from the order impugned, totally ignored the abovementioned principles.

In the case of Shin Satellite Public Co. (Supra), the learned Single Judge of the Delhi High Court after considering various other judgments on the point enumerated the principles for exercise of discretion under section 9 of the Arbitration Act in para 36. The Delhi High has observed as under:

"36. In Escorts Finance Limited (supra) a Division Bench of this Court had held that the mere fact that the arbitrators had been appointed who also could exercise power to appoint a receiver could not be a ground to dismiss the petition under Section 9 of Arbitration & Conciliation Act summarily. Another single Judge of this Court in Atul Limited (supra) had held that recourse under Section 17 of Arbitration & Conciliation Act, 1996 is an enabling additional recourse and is not in substitution of Section 9 and, therefore, Section 17 cannot operate as an ouster of jurisdiction of court granted under Section 9 of the Act and, therefore, the court would have powers to pass appropriate orders under Section 9

of the Act notwithstanding the pendency of the arbitral proceedings. Similarly, in National Highways Authority of India (supra), it was held that despite the overlap between the powers under Section 17 and Section 9 of the Arbitration & Conciliation Act, 1996, it is apparent that the powers under Section 9 of the Act are much wider inasmuch as they extend to period - pre and post the award - as well as with regard to subject matter and nature of orders and, therefore, pendency of application under Section 17 does not oust the jurisdiction of the court under Section 9 of the Arbitration & Conciliation Act, 1996 to pass interim orders. Another Learned single Judge of this Court in Modi Rubber Limited V. Guardian International Corp, 141 (2007) DLT 822 had held that the proceedings under Section 9 are concerned only with preservation of property and to prevent violation of claimed rights of the parties so that no irreparable loss and damage inures to the parties till the arbitration results in a dispute redressal. It was also held that the issues which are to be decided in the substantive arbitration proceedings cannot be gone into in a petition under Section 9 of the Arbitration & Conciliation Act, 1996. In the said judgment relying on various other judgments, the principle, manner and limitation of exercise of discretion while appointing a receiver or an injunction has been culled out in paragraph 209, as also the effect of suppression of material facts and delay. The relevant paras 209 and 210 enumerating the principle for exercise of discretion are as under:

209. It is also necessary to examine the parameters within which the Court shall exercise such power. The manner and limits of exercise of such discretion have fallen for consideration in several judicial pronouncements and the principles laid down can be usefully called out thus:

(i) Even though Section 9 does not embody the ingredients of Order 38 Rule 5 of the Code of Civil Procedure, 1908 nor the conditions of the Order 38 Rule 5 can be read into it, however for the exercise of discretion thereunder, the Court can take guidance from the provisions of Order 39 as well as Order 38 of the Code of Civil Procedure, 1908 [Ref. 2004 (111) DLT 816 : 2004 (4) AD (Delhi) 618 : 2004 (75) DRJ 104, Rite Approach Group Ltd. V. Rosoboron Export].

(ii) The scope of Section 9 of the Arbitration and Conciliation Act, 1996 is in pari materia with the provisions of Order 39 of the Code of Civil Procedure, 1908. The power vested in the Court by virtue of Section 9 must be exercised in consonance with equity which tempers the grant of discretionary relief as the relief of interim injunction is wholly equitable in nature. [Ref. (1995) 5 SCC 545, Gujarat Bottling Co. Ltd. V. Coca Cola & Ors.; 2004 (115) DLT 219=2004 (8) AD (Delhi) 361, Reliance Infocomm Ltd. V. Bharat Sanchar Nigam Ltd.]

(iii) The intention of the defendant is a sine qua non for invoking Section 9 where the claim is to secure the amount in dispute in arbitration. The Court can take guidance from Order 38 Rule 5 of the CPC and Sections 18 and 41 of the Arbitration Act, 1940 for considering whether such a relief as has been prayed for in the petition under Section 9 deserves to be granted [Ref. AIR 1998 Delhi 397=1998 (3) RAJ, M/s. Global Co. V. M/s. National Fertilisers Ltd.; 2005 (117) DLT 183 : 2005 (2) AD (Delhi) 592, Mala Kumar Engineers Pvt. Ltd. (MKE) V. B. Seenaiyah & Co. (Projects) Ltd.].

(iv) Protection under Section 9 can be granted only when a prima facie case is made out and balance of convenience and possibility of irreparable loss and injury to the petitioner is made out. Section 23 of the Specific Relief Act, 1963 provides that the provision of liquidated damages is not a bar to the specific performance of the contract. The general rule of equity is also that if a thing is agreed to be done, though there is a penalty attached thereto to secure its performance, yet the Court in its discretion enforces specific performance thereof. The jurisdiction of the Court is discretionary and must be exercised on such judicial principles when balance of convenience and possibility of irreparable loss and injury is shown to the plaintiff [Ref. 2005 (120) DLT 387, Geep Batteries (India) Pvt. Ltd. V. Gillette India Ltd.; 2005 (118) DLT 591 : 2005 (81) DRJ 233, Techno Construction V. Kunj Vihar Co-operative Group Housing Society].

(v) The discretionary power of the Court under Section 9 has to be exercised by the Court sparingly and cautiously, bearing in mind that the objective of the Court is to create an alternative dispute redressal mechanism and, consequently, the interference by the Court is not required at every stage [Ref. 2006 (128) DLT 694 DB, Sanrachna (India) Inc. V. AB Hotels Ltd.]. Whenever the powers of the Courts are invoked under Section 9 with the objective of supporting the arbitration, the Court must act with alacrity. However, this would not justify grant of interim orders and relief on the mere asking [Ref. 2000 (87) DLT 449 : 2000 (6) AD (Delhi) 509 : 2000 (55) DRJ 750, CREF Finance Ltd. V. Puri Construction Ltd.; 2006 (91) DRJ 83, Sea Transport Contractors Ltd. V. Indian Farmers Fertilizers Co operative Ltd.].

(vi) The scope and object of Section 9 of the statute is to grant such relief by way of interlocutory injunction so as to mitigate the risk or injustice to the petitioner during the period before that uncertainty can be resolved. Its object is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages which would be recoverable in the action if the uncertainty were resolved in his favour at the trial [Ref. AIR 1995 SC 2372, Gujarat Bottling Co. V. Coca Cola & Co.; 2006 (4) AD (Delhi) 38, Country Development &

Management Services Pvt. Ltd. V. Brookeside Resorts Pvt. Ltd.]. In 2006 133 DLT 153, Shaw V. Him Neel Breweries Ltd., learned Single Judge of this Court held that the interim orders are calculated to ensure that the assets of the party are not dissipated or frittered away and that such orders do not fall within the moratorium of Section 22.

(vii) The application seeking interim measures of protection under Section 9 of the Arbitration and Conciliation Act, 1996 pertaining to the preservation, interim custody or sale of equipment which is the subject matter of the agreement would be covered under Section 9(ii)(a) as also under Sections 9(ii)(c), 9(ii)(d) and 9(ii)(e) of the Act [Ref. 2006 (3) AD (Delhi) 168 : 2006 (87) DRJ 225 : 2006 (127) DLT 776 : AIR 2006 Delhi 134, National Highways Authority of India (NHAI) V. China Coal Construction Group Co.].

(viii) The Court has the power to pass an order under Section 9 during the pendency of the arbitration or even after the arbitral award but before the award is enforced in accordance with Section 36. Such order can be passed for preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement or securing the amount in the dispute and the like [Ref. 2006 (128) DLT 694, Sanrachna (India) Inc. V. AB Hotels Ltd.; 2000 (87) DLT 449, CREF Finance Ltd. V. Puri Construction & Ors.].

(ix) The power under Section 9 to grant interim relief is available to the Court while under Section 17, such powers to make interim measures are made available to the Arbitral Tribunal. Even though there may be some degree of overlap between the two provisions, however, the powers under Section 9 are much wider inasmuch as they extend to the pre and post award period as well as with regard to the subject matter and the nature of the orders which the Court is empowered to pass. Therefore, pendency of an application under Section 17 before the Arbitral Tribunal does not denude the Court of its power to make an order for interim measures under Section 9 of the statute [Ref. 2006 (3) AD (Delhi) 168 : 2006 (87) DRJ 225 : AIR 2006 Delhi 134 : 2006 (127) DLT 766, National Highways Authority of India (NHAI) V. China Coal Construction Group Co.].

(x) It has been held that though Section 9 enables a party, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced under Section 36 of the Act, may apply to the Court for an interim order under Section 9, however, without a substantive move for reference or declaration on the petitioner's stand on the substantive relief by an appropriate forum, Section 9 cannot be invoked for grant of interim relief [Ref. 2004 (3) SCC 155, Firm Ashok Tralers & Another V. Gurmukh Das; AIR 1999 SC 565, Sudarshan

Finance Ltd. V. NEPC; 1998 (1) AD (Delhi) 513 : 1998 (44) DRJ 399, National Building Construction Corporation Ltd. (NBCC) V. Ircon International Ltd.]. (xi) So far as the questions which can be considered in a petition under Section 9 of the Arbitration and Conciliation Act, 1996 are concerned, certainly issues which are to be decided in the substantive arbitration proceedings cannot be gone into in a petition under Section 9 of the statute. Thus, a question as to whether the agreement between the parties was validly entered into or whether it was validly terminated has to be determined only in the arbitration proceedings and cannot be determined in a petition under Section 9 of the statute [Ref. 2002 (8) AD (Delhi) 617 : 2003 (66) DRJ 239, S. Raminder Singh V. NCT of Delhi].

A similar question had arisen before this Court in MANU/Del./1524/2001, D.R. Sondhi V. Hella K.G. Hueck & Co. In para 14 of the judgment, it was held by this Court that the question as to whether the material breach has been committed or not or if there is any breach at all was agitated but it was not gone into for the reason that it is not the question for determination at present.

210. This Court while considering the petition under Section 9 of the Arbitration and Conciliation Act, 1996, does not have the jurisdiction to return a finding on the merits of a claim made or a dispute raised by the parties before the arbitrator. However, there can be no dispute that this Court is required to examine the existence of a prima facie case on the assertions of the petitioner with regard to the termination of the agreement in the facts and law applicable and as to strength in the petitioner's case as to the bindingness and subsistence of the SHA."

[6.2] In another decision in the case of Mala Kumar Engineers Pvt. Ltd. (MKE) (Supra) in paras 21 and 22, it is observed and held as under:

"21. In the decision MANU/DE/0656/1998 : AIR 1998 Delhi 397, M/s. Global Company V. M/s. National Fertilizers Ltd., learned Single Judge of this Court held that the intention of the defendant is sine qua non for invoking section 9 where claim is to secure the amount in dispute in the arbitration. It was held that guidance could be taken from Order 38 Rule 5 of CPC and Sections 18 and 41 of the Arbitration Act, 1940. In para 11, it was observed as under:

"11. It is true that the said Arbitration Act, 1940 stands repealed by the Act of 1996 and the provisions contained in the Code of Civil Procedure are not applicable to the proceedings under the Act, still, in my opinion, in the absence of guidelines how the power for grant of relief under Section 9(ii)(b) is to be exercised by the Court, the principles underlying the aforesaid sections are to be applied. It is only on adequate material

being supplied by the petitioner that the Court can form opinion that unless the jurisdiction is exercised under the said section 9(ii) there is real danger of the respondent defeating, delaying or obstructing the execution of the award made against it. On the basis of the only ground of protection of financial interest of the petitioner taken in para 6 of the petition, the respondent a Govt. of India Undertaking cannot be legally directed to furnish security for the amount of US \$ 88,250 together with interest @ 9% p.a. Petition thus deserved to be dismissed."

22. Petitioner has not averred that the respondent is a bankrupt or a near bankrupt company. Petitioner has nowhere alleged that if the amount is not secured, it would not be possible for the petitioner to recover the amount, if awarded during arbitration. There is no averment that respondent No.1 has taken resort to any action which could be indicative of an intention to deprive the petitioner the benefit of the award, if in favor of the petitioner."

Considering the law laid down by the Hon'ble Supreme Court in the aforesaid decisions and the various decisions of other High Courts referred to herein above and the scope, ambit, object and purpose of passing the order of interim measure as provided under section 9(ii) of the Arbitration Act, it can be said that the Court exercises powers under section 9 of the Arbitration Act either in a pre award situation or post-award situation has to be guided by the provisions of the CPC such as Order 38 Rule 5; Order 39 Rules 1 and 2 and other provisions of the CPC. The powers conferred upon the Court under Section 9 of the Arbitration Act therefore, to that extent cannot be said to be unfettered and/or unguided. Therefore, keeping the larger question open whether while exercising the powers under section 9 of the Arbitration Act, the provisions of the CPC *stricto sensu* would apply for not, it is held that while exercising the powers under section 9 of the Arbitration Act by the Court and while passing the orders under section 9(ii) of the Arbitration Act i.e. order to interim measure, the Court is required to be guided by the principles of grant of such or a similar reliefs under the CPC and while passing such orders the Court is required to bear in mind the celebrated principles while passing such orders under the CPC. As observed herein above, even the learned Counsel appearing on behalf of the original applicant has also submitted that while granting the interim injunction under section 9(ii) of the Arbitration Act, the Court is required to consider the principles laid down while granting the relief under Order 39 Rules 1 and 2 of the CPC i.e. the *prima facie* case, balance of convenience and irreparable loss. If that be so then even while passing the order of interim measure and furnishing the security and/or passing any order of interim measure under section 9(ii) of the Arbitration Act, the Court is certainly required to be guided by the provisions of the CPC more particularly Order 38 Rule 5 of the CPC etc. At this stage it is

required to be noted that as such the arbitration proceedings in Arbitration Act are substituted of the civil proceedings before the Civil Court.

[6.3] Under the circumstances, it is held that while exercising the powers under section 9 of the Arbitration Act, the Court is required to be guided by the principles as provided under the provisions of the CPC while passing the similar orders passed by the Court under the CPC such as grant of injunction; Order 38 Rule 5; appointment of receiver and/or any such order of interim measure as provided under the CPC more particularly to protect the interest of the parties.

[6.4] In light of the above observations, this Court is required to consider the legality and validity of the impugned order of interim measure passed by the learned District Court passed in exercise of powers under section 9(ii)(b) of the Arbitration Act.

As observed herein above, the respondent herein submitted the application before the learned trial Court seeking interim relief under section 9 of the Arbitration Act solely on the ground that the financial condition of the appellant herein - original respondent is very poor and is eminent loss to the applicant and alleging inter alia that as the appellant herein - original respondent is making consistent loss and the original applicant is a public sector insurance company and it is likely to take considerable time in the proceedings to recover the amount and it may happen that ultimately in future the awards would potentially be reduced to mere paper award if the applicant is unable to recover the amounts rightfully due to it. It was also submitted that there is a prima facie balance of convenience and irreparable loss in favour of the applicant. Therefore, it was prayed for appropriate orders directing the appellant herein to deposit an amount of Rs.79,61,76,998.58 ps. as awarded by the Tribunal in its awards dated 25.04.2012 and 21.06.2013 with the Hon'ble Court. That the averments made in the application in paras 5 to 19 are as under:

"5. The Applicant submits that the Applicant was drawn into this frivolous and expensive litigation and arbitration since 2003 and the same frivolity on the part of the Respondent continues even now. As was clearly affirmed by the Respondent in good faith, and in fact made an overpayment. The Arbitral Tribunal had ordered the repayment of this amount to the Applicant, but the Applicant has not been able to enforce this Corrected Interim Award dated 25 April 2012 or later the Corrected Final Award dated 21 June 2013.

6. The Awards of the Arbitral Tribunal on their own accord demonstrate that there is a prima facie case in favour of the Applicant. The very fact

that the Arbitral Tribunal has, after a detailed perusal and analysis of the evidence and arguments on all counts and after receiving submissions, rejected the claims of the Respondent and awarded a total amount of Rs.796,176,998.58 (Rupees Seventy Nine Crores Sixty One Lakhs Seventy Six Thousand Nine Hundred Ninety Eight and Fifty Eight Paise) (inclusive of interest at the rate of 18% from the date of the Awards up until 15 August 2013) in favour of the Applicant clearly demonstrates that the Applicant is entitled to the monies as awarded by the Tribunal in its detailed Awards. The Applicant is entitled to these amounts on account of the excess monies paid by the Applicant to the Respondent and the costs incurred towards the arbitration that was preceded by litigation that was instituted by the Respondent.

7. As such, the Applicant is entitled to the amounts duly awarded by the Arbitral Tribunal in its Awards. However, in view Section 36 of the Act, the Award cannot be executed till the determination of the Section 34 petition. Be that as it may, the Applicant is entitled to seek interim protection under Section 9 of the Act in order to secure the amount awarded in favour of the Applicant.

8. In addition to the prima facie case that the Applicant was demonstrated, the financial crisis which the Respondent Company is currently facing and has been consistently facing for many years further augments the need for interim measures to secure the Applicant's entitlements.

9. The Respondent is a loss making entity and had always been a loss making entity. The Respondent's published annual accounts clearly demonstrate that the Respondent is a company running on heavy debt and the Applicant relies on the annual financial statements published by the Respondent to substantiate the same. The following figures since 2005 2006 elucidate the losses incurred annually by the Respondent, and show that those losses are becoming worse:

(a) 2005/06 a loss of Rs.93.68 Crores; (b) 2006/07 a loss of Rs.67.49 Crores; (c) 2007/08 a loss of Rs.51.45 Crores; (d) 2008/09 a loss of Rs.1,696.16 Crores; (e) 2009/10 a loss of Rs.2,627.65 Crores; (f) 2010/11 a loss of Rs.2,879.34 Crores; (g) 2011/12 a loss of Rs.4,164.82 Crores; (h) 2012/13 a loss of Rs.1,180 Crores as incurred in this financial year (i) 2013/14 (First Quarter) a loss of Rs.863 as incurred in this financial quarter The copies of the Financial Reports of the Respondent evidencing the abovementioned figures of losses are annexed herewith and marked as Annexure E (Colly).

10. During the same time, the debts of the Respondent continue to have burgeoned. The outstanding debt of the Respondent is clear from the

figures below: (a) 2009/10 : Rs.10,355 Crores; (b) 2010/11 : Rs.18,047 Crores; (c) 2011/12 : Rs.16,999 Crores; (d) 2012/13 : Rs.16,760 Crores.

The copies of the Financial Reports of the Respondent evidencing the abovementioned figures of outstanding debts are annexed herewith and marked as Annexure F (Colly).

11. The Applicant submits that the Respondent is and has been a loss making entity which is heavily debt ridden. The net worth of the Respondent Company has eroded over the last few years. When the debt ridden Respondent was denied sales tax benefits by the Supreme Court, the net worth of the Company was only about Rs.6,840 Crores and the Company was directed by the Hon'ble Supreme Court to repay Rs.6,300 Crores of benefit which the Respondent had wrongly availed at the expense of the State of Gujarat. This obviously has resulted in the wiping off of a substantial portion of the Respondent's net worth in addition to increasing its debts.

12. The Respondent is a listed public company trading its shares on both the Bombay Stock Exchange and the National Stock Exchange, and the share prices of the Respondent are subject to regular heavy fluctuations, which add to the Applicant's legitimate apprehensions about the Respondent's financial instability.

13. The Applicant is further concerned by the time taken for the final adjudication of the Respondent's Applications under Section 34 of the Act. The Applicant is concerned that the Respondent will seek to delay and disrupt the Section 34 proceedings before this Hon'ble Court and is also likely to drag the Applicant to Appeal Proceedings against the Orders of this Hon'ble Court just for the purposes of denying the Applicant its right to receive monies properly and duly awarded to it. Clearly, if the Applicant is unable to secure the amount which it is entitled to as per the Awards of the Tribunal, the Awards will become nothing but mere paper awards.

14. With its increasing debts and diminishing net worth, and the many investigations and actions affecting the controlling family of the Respondent, the Respondent could alienate its assets at anytime. The Applicant, a public sector undertaking and an unsecured creditor of the Respondent, is gravely concerned that it would not be to recover these monies at the conclusion of the proceedings.

15. Therefore, the Applicant is constrained to approach this Hon'ble Court to secure the interests of the Applicant to recover from the Respondent by seeking deposit of the amount awarded by the Tribunal with this Hon'ble Court. The Applicant is gravely concerned for securing

the sums awarded to it under valid Arbitral Awards, and the Applicant would be seriously prejudiced and subjected to irreparable injury if these sums are not secured.

16. The above stated financial status of the Respondent clearly demonstrates that the balance of convenience is in favour of securing the monies due from the Respondent. The very fact that the Arbitral Tribunal passed well reasoned Awards after hearing all the evidence, considering the documentation placed before it and after hearing submissions also confirms that the balance of convenience is in favour of securing the payments due under the Award.

17. The Applicant is a public sector insurance company, operating on public monies. Failure on the part of the Applicant to recover the sums to which it is properly and duly entitled would cause a loss to the public exchequer and would result in grave prejudice. It is submitted that irreparable injury would be caused if the payment of these amounts is kept in abeyance for an indefinite period of time owing to the substantial time the challenge proceedings are likely to take, especially given the misconduct of the Respondent, and the Awards would potentially be reduced to mere paper awards if the Applicant is unable to recover the amounts rightfully due to it. The Applicant submits that this Hon'ble Court should exercise its discretion to prevent any such indefensible loss of public monies.

18. The Applicant states that this Hon'ble Court is fully empowered to grant the reliefs as prayed under Section 9 of the Arbitration and Conciliation Act, 1996. The Applicant has not filed any Application before any other Court seeking these reliefs.

19. The Applicant submits that the Respondent ought to be directed to take necessary steps to secure the awarded amount because of the above stated poor financial condition of the Respondent and also if no deposit is made the Award may reduced into a mere paper award."

Thus, from the aforesaid averments and allegations in the application, the only main ground pleaded was the poor financial condition of the appellant herein and that the appellant is consistently loss making company. At this stage it is required to be noted that except above there are no allegations against the appellant that with a view to defeat in future the decree/awards, the appellant company is trying to dispose off its properties detrimental to the interest of the original applicant.

[6.5] From the material on record it appears that the appellant company is a running company and its financial position has been improved consistently. That in the earlier years they had a financial tax liability of

Rs.6169 Crores (approximately) which has been repaid by the appellant company as per the installments as directed by the Hon'ble Supreme Court. It also appears from the balance sheet that in the financial year 2012 13, its gross turn over was Rs.96,797 Crores (approximately) and it made a cash profit of about Rs.116 Crores and that, in 9 months ended on 31.12.2013, its gross turn over was Rs.79,498 Crores (approximately) and the respondent made a cash profit of about Rs.126 Crores. From the balance sheet it appears that as per the last Balance Sheet (which was showing a loss of Rs.5345.26 Crores), the loss has been wiped out and this resulted in creation of a positive reserve of Rs.964.51 Crores. The financial results for the quarter ended 30th June, 2014 show that for the quarter ended 31 st March, 2014, the company made a profit of Rs.1011 Crores and for the quarter ended 30th June 2014, the company made a profit of Rs.684 Crores, though the aforesaid is disputed by the original applicant. The aforesaid is from the balance sheet of the appellant company. Be that as it may, from the aforesaid, it cannot be said the appellant company is such a loss making company which is likely to run away and/or in future there is likelihood of award becoming paper decree. As observed herein above, as such there are no allegations at all that the appellant company is disposing off its properties to defeat the awards which are in favour of the original applicant. At this stage it is required to be noted that as per the provisions of the Arbitration Act more particularly in view of the provision of section 36 of the Arbitration Act, the awards are unenforceable.

[6.6] Considering the aforesaid facts and circumstances and considering the powers to be exercised by the Court under section 9(ii)(b) of the Arbitration Act and the provisions of Order 38 Rule 5 of the CPC and even if it is considered that the provisions of Order 38 Rule 5 of CPC would not be applicable *stricto sensu*, however even as admitted by the learned Counsel appearing on behalf of the original applicant, the provisions of CPC may be considered and/or the powers to be exercised by the Court under section 9(ii)(b) of the Arbitration Act would be akin to the provisions of CPC more particularly Order 38 Rule 5 of the CPC in absence of any other allegations that the appellant company is disposing off the properties with a view to defeat the awards at the time of execution of the awards, merely on the assumption that the appellant company is making loss, the learned trial Court has materially erred in passing the impugned order. In the facts and circumstances of the case, the impugned order passed by the learned trial Court is not warranted and cannot be sustained.

[6.7] It appears to the Court that while passing the impugned order the learned trial Court has not exercised the discretion judiciously. As such while considering section 9 of the Arbitration Act more particularly section 9(ii)(b) of the Arbitration Act, the powers which are vested with

the Court is to pass any order of interim measure of protection securing the amount in dispute in the arbitration. Therefore, when the awards are unenforceable in view of the proceedings pending before the Court under Section 36 of the Arbitration Act and there are no allegations that the appellant has disposed of any property and/or is about to dispose of any property with intent to obstruct or delay the execution of the awards, merely because the company is making a loss, but otherwise is an absolute running company having the plants and machineries worth thousands of crores and even having yearly turn over of thousands of crores, such an order of interim measure under section 9(ii)(b) of the Arbitration Act is not justified and warranted.

[6.8] From the impugned order it appears that the learned trial Court has considered the prima facie case, balance of convenience which as such are required to be considered while granting interim injunction, which are not required to be considered while passing the order of interim measure under section 9(ii)(b) of the Arbitration Act. What is required to be considered while passing the order of interim measure in exercise of powers under Section 9(ii)(b) of the Arbitration Act is whether during the pendency of the arbitration proceedings either at pre award or post award stage some measure of protection is to be granted so as to secure the amount in dispute in arbitration. So, if at any point of time it is found from the conduct of one of the party more particularly with respect to arbitration proceedings initiated that they are likely to dispose of the property with a view to defeat in future the decree/awards, the Court may in exercise of powers under section 9(ii)

(b) of the Arbitration Act pass an order of interim measure. Therefore, while exercising powers under section 9(ii)(b) of the Arbitration Act and passing any order of interim measure only, aforesaid aspect is required to be considered and at that stage the Court is not required to consider the prima facie case and/or balance of convenience as has been done by the learned trial Court, as, as such in view of the pending proceedings under section 36 of the Arbitration Act, as such the awards are unenforceable.

[6.9] It is also required to be noted at this stage that as such during the pendency of the arbitration proceedings before the learned Arbitral Tribunal, no such application for interim measurement was submitted by the original applicant though as such in past the appellant company was making the loss. It is to be noted that subsequently in last two to three years the financial condition of the company has been improved substantially and even they have also cleared the debts towards tax liability to the extent of Rs.6169 Crores (approximately).

7 In view of the aforesaid facts and circumstances of the case, we are of the opinion that impugned order passed by the learned trial Court directing the appellant to furnish a Bank Guarantee for an amount of Rs.79,61,76,998.58 ps. while passing the order of interim measure under section 9(ii)(b) of the Arbitration Act cannot be sustained and the same deserves to be quashed and set aside.

8 In view of the above and for the reasons stated above, present First Appeal succeeds. Impugned order dated 31.05.2014 passed by the learned Additional District Judge, Vadodara in Civil Miscellaneous Application No.467/2013 directing the appellant to furnish a Bank Guarantee for an amount of Rs.79,61,76,998.58 ps. is hereby quashed and set aside. Present First Appeal is allowed accordingly, however there shall be no order as to costs.

In view of disposal of main First Appeal, no order in Civil Application No.9131/2014.

At this stage Shri Ajay Mehta, learned advocate appearing on behalf of the original applicant has requested to issue appropriate direction directing the learned District Court for expeditious hearing of the applications submitted under section 34 of the Arbitration Act challenging the respective awards. The prayer is not opposed by learned Counsel appearing on behalf of the appellant.

Under the circumstances and in the facts and circumstances of the case, more particularly when the awards are declared under the provisions of the Arbitration Act, learned District Court is hereby directed to decide and dispose of the respective applications under section 34 of the Arbitration Act in which the original awards declared by the Arbitral Tribunal are challenged, preferably within a period of six months from the date of receipt of the present order.

