

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision : October 3, 2008

OMP NO. 182 of 2005

M/s Shin Satellite Public Company Limited PETITIONER
! Through: Mr. Sanjay Jain Sr. Advocate with
Mr.D.Singh Advocate for Petitioner

Versus

\$ M/s Jain Studios Limited RESPONDENT
Through: Mr. K.N.Bhatt Sr. Advocate with Mr. Vijay
Gupta, Mrs. Geeta Goel and Mr. Ashish Gupta
Advocates for the Respondent

OMP NO. 183 of 2005

M/s Shin Satellite Public Company Limited PETITIONER
! Through: Mr. Sanjay Jain Sr. Advocate with
Mr.D.Singh Advocate for Petitioner

Versus

\$ M/s Jain Studios Limited RESPONDENT
Through: Mr. K.N.Bhatt Sr. Advocate with Mr. Vijay
Gupta, Mrs. Geeta Goel and Mr. Ashish Gupta
Advocates for the Respondent

OMP NO. 184 of 2005

M/s Shin Satellite Public Company Limited PETITIONER
! Through: Mr. Sanjay Jain Sr. Advocate with
Mr.D.Singh Advocate for Petitioner

Versus

\$ M/s Jain Studios Limited RESPONDENT

Through: Mr. K.N.Bhatt Sr. Advocate with Mr. Vijay Gupta, Mrs. Geeta Goel and Mr. Ashish Gupta
Advocates for the Respondent

CORAM :-

*** HON'BLE MR. JUSTICE ANIL KUMAR**

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| 1. Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. To be referred to the reporter or not ? | NO |
| 3. Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

1. This order will dispose of three petitions filed by the petitioner being OMP No. 182 of 2005, OMP No. 183 of 2005 and OMP No. 184 of 2005, under Section 9 of the Arbitration and Conciliation Act seeking appointment of receiver in respect of the respondent's moveable and immovable properties situated in New Delhi or elsewhere in India and an injunction against the respondent from selling, alienating, transferring possession, creating any third-party right/claim/interest and/or creating charge or dealing with in any manner whatsoever all the movable and immovable properties and in case the respondent does not comply with the orders which may be passed for appointment of receiver, to attach all the properties of the respondent. The petitioner has also prayed for a direction to the respondent to disclose his movable and immovable, tangible and

intangible assets including any encumbrance thereon and for a direction to the respondent to deposit with the Court all such sums received by the respondent from its businesses pending disposal of the arbitral proceedings.

2. The petitioner is a company registered under the laws of Thailand having its principal office in Thailand. The petitioner is engaged in the business of providing transponder services under the concessions granted by the Government of Thailand. The Petitioner has a satellite, "THAICOM 3", which is operating in the Geo-Stationary Orbit and the transponder services are provided particularly for the purposes of broadcasting, internet and telecommunication to various firms and companies worldwide. The Petitioner is also stated to have a well-equipped teleport up-linking station to provide up-linking services to the customers and a satellite station to monitor and control its satellite in the Orbit.

3. The Respondent is a public limited company incorporated under the Companies Act, 1956 having its registered office in New Delhi and is in the business of broadcasting and other telecom services like internet services. It also owns the cable TV known as "Jain TV".

4. The petitioner and the respondent entered into 3 agreements- (i) Internet Service Agreement No. SA-INT/09509-2000-4 dated 12th January, 2001 (IS Agreement) (ii) Transponder Service Agreement No. SA-FC-09508-99-1 dated 10th August, 1999 which agreement was amended vide Amendment Agreement No. A1-SA-FC/09508-99-1 dated 14th July, 2000 and again amended vide Amendment Agreement No. A2-SA-FC/09508-99-1, dated 16th January, 2002 (TS Agreement-I) (iii) Transponder Service Agreement No. SA-FC/09501-2001-1 dated 5th January, 2001 which agreement was later on amended, the amended agreement No. being A1-SA-FC/09501-2001-1, dated 16th January, 2002 (TS Agreement-II).

5. Under the IS Agreement, which was valid up to 24th January, 2004, the respondent had hired the services of the petitioner for the purpose of accessing the internet backbone by utilizing part of the transponder capacity and connectivity to the Global Internet Backbone of THAICOM-3 Satellite for a period of three years. As per the clause 3 of the IS agreement service fee was payable @ US\$ 3900/Mbps and US\$ 4200/Mbps with a minimum commitment of 20 Mbps per month and less than 20 Mbps respectively.

6. Under the TS Agreement-I, which was valid up to 18th September, 2002, the respondent had availed the transponder

services of the petitioner for the purposes of television/broadcasting application. As per clause 5.1.1 read with Appendix-A of the said agreement service fee was payable on a monthly basis in advance before the due date @ US\$ 58,333 for using 18MHz.

7. Under the TS Agreement-II, which was valid up to 14th January, 2004, the respondent had hired the services of the petitioner for the purpose of transmitting one digital television channel through non-preemptible unprotected extended C-Band regional Beam Transponder of THAICOM-3 Satellite. As per clause 5 read with Appendix-A of the said agreement the quarterly service fee payable was US\$ 196,875 and US\$ 370 000 per annum for using 4.5 MHz and 9 MHz respectively.

8. The petitioner contended that despite using the services under the agreements, the respondent never paid the service fee as had been agreed and kept on promising to pay the amounts which became due under the terms of the agreements time and again. The petitioner has filed three different applications seeking appointment of receiver and injunction in respect of the properties of the respondent as the respondent failed to pay the amounts due to the petitioner in respect of above mentioned three agreements.

9. It is averred by the petitioner that after repeated communications regarding the non-payment of dues by the respondent, a meeting was held at the office of the petitioner on 17th September, 2001 where the President of the respondent company lamented about his poor financial condition. The petitioner made a proposal to the respondent during the meeting which the President of the respondent company agreed to discuss with his associates and revert by 21st September, 2001. However the President of the respondent intimated the President of the Petitioner, by communication dated 19th September, 2001, about the problems confronting the respondent on account of non-availability of the support of Banks and Financial Institutions and requested the petitioner to restructure the payment schedule and proposed to review the situation on 2nd October, 2001. Since the petitioner had already extended several relaxations and could not suffer any further loss on account of the respondent, by an e-mail dated 21st September, 2001, the petitioner reminded the President of the respondent that he was to revert by 21st September, 2001 on the proposal made by the petitioner and warned that they may have to suspend its services to the respondent in case no response is received from the respondent by 5.00 pm on 21st September, 2001.

10. The president of the Respondent vide his fax dated 21st September, 2001 agreed that a monthly payment of US\$ 58333 would be made starting from the month of October 2001 till the month of December 2001 which would be revised to US\$ 100000 per month thereafter. It was stated by the petitioner that the respondent again sent an e-mail dated 23rd January, 2002 acknowledging the payment scheduled agreed between them on 17th September, 2001. However in the said e-mail the respondent also expressed its inability to make payment of US\$ 100000 per month with effect from January 2002. It is asserted by the petitioner that the President of the respondent had intimated to the Chief Financial Officer of the petitioner by communication dated 9th July, 2002 that the petitioner was rightly interested in recovery of all its outstanding dues and referring to the last visit of the President of the respondent, it was reiterated that the respondent would start clearing the dues on regular basis and would also reduce its transponder utilization by going digital and efforts would be made to increase the utilization of its teleport by up-linking more THAICOM-3 customers and will use the proceeds to clear backlog of petitioner's payment.

11. Since the respondent failed to make the payments, the petitioner by a letter dated 11th July, 2002 communicated to the respondent that the outstanding dues of the respondent in respect of

all the three agreements aggregated to US\$ 571215.75 and that if the same was not paid by 12.00 clock (Bangkok time) on Friday, 12th July, 2002 the petitioner would be left with no alternative but to suspend the services of the respondent. Since the payment was not made within the stipulated time, the petitioner by a letter dated 17th July, 2002 terminated all the three agreements entered with the respondents and intimated that the outstanding dues on account of all the three services amounted to US\$ 729,870.25 on the said date.

12. Petitioner has alleged that despite the termination of all the agreements the respondent illegally continued up-linking its signal to the petitioner's satellite forcing the petitioner to file a petition under Section 9 of the Arbitration and Conciliation Act, 1996 being OMP NO.102/2003 seeking restraint against the respondent from transmitting any signal to any transponder of THAICOM-3 Satellite. During the course of hearing of the said petition, the learned counsel for the respondent made a statement on instructions from the General Manager (Commercial) of the respondent that the respondent is no longer using the transponders of the petitioner and shall not use the same in future. In view of the above-said statement of the learned counsel for the respondent, the petition was disposed of.

13. The petitioner has contended that the respondent has failed to pay the amounts, which had become due from respondent, despite several notices being sent by the petitioner to the respondent. In the circumstances, the petitioner has also claimed late payment charges on the outstanding dues from 17th July, 2002 @ 1.5% per month as per clause 3 of all the three agreements. The petitioner has also claimed that the respondent is also liable to pay 50% of the unpaid service fees as per clause 14.2 of the TS Agreement-II. It is further asserted by the petitioner that as per the terms of the three agreements, since there is a breach on the part of the respondent, the respondent is also liable to pay other damages incurred by the petitioner.

14. On the failure of the respondent to pay the dues, a notice under Section 434 of the Companies Act, 1956 was also given by the petitioner, dated 7th June, 2004 calling upon the respondent to pay US\$ 213,182.30 due under the IS Agreement, US\$ 443,382.50 due under the TS agreement-I and US\$ 71,640.62 under the TS Agreement-II.

15. The petitioner has averred that a very cryptic reply was received to the said notice stating that no amount is due from respondent to the petitioner and therefore, the petitioner was forced to invoke the

arbitration clauses in the respective agreements (clause 14 of IS Agreement, clause 23 of TS Agreement-I and clause 22 of the TS Agreement-II) vide letters dated 9th September, 2004.

16. An Arbitral Tribunal comprising of the Former Chief Justice of India, Mr. Justice R. S. Pathak (Retd.), Former Chief Justice Mr. Justice M.L. Pandse (Retd.) and Hon'ble Mr. Justice Sat Pal Arora (Retd.) has been constituted to resolve the disputes between the parties arising out of the IS Agreement and the preliminary hearing took place on 30th April, 2005 in London. Another Arbitral Tribunal comprising of Former Chief Justice of India Mr. Justice R.S. Pathak (Rtd.), the Presiding Arbitrator/Chairman, Former Chief Justice Mr. M.L.Pendse (Rtd.) and Mr. Justice Sat Pal Arora (Retd.) was constituted to resolve the disputes arising out of the TS Agreement-II and the hearing was fixed for the 5th and 6th February, 2005 in Singapore.

17. The petitioner has further averred that the respondent admitted his precarious financial position by their letter dated 2nd February, 2005 and showed unwillingness to attend the arbitration proceedings in Singapore. It is further averred that during the preliminary meeting on 5th February, 2005 the Tribunal had asked the petitioner to bear the entire expenses of the said meeting and directed the respondent to

reimburse 50% of the total expenses incurred by the petitioner towards the said meeting. Even though the petitioner had called upon the respondent by letter dated 21st March, 2005 to pay a sum of Rs. 1, 26,369.66, being half of the amount of Rs. 2, 52,739.33, which is the total expenses incurred by the petitioner in arranging the preliminary meeting in Singapore, the respondent has failed to pay the said amount.

18. As far as the TS Agreement-I is concerned it is averred that though the petitioner had served upon the respondent a notice of demand for arbitration vide letter dated 9th September, 2004 and intimated the respondent about its intention to nominate the former Judge, Bombay High Court and the former Chief Justice, Karnataka High Court Mr. Justice M.L. Pendse as their arbitrator, the respondent has refused to appoint an arbitrator. It is submitted that since the respondent failed to appoint its arbitrator, the petitioner filed an Arbitration Application No. 1/2005 in the Hon'ble Supreme Court of India under Section 11(6) of the Arbitration and Conciliation Act, 1996 and that the same was allowed by the Supreme Court of India on 31st January, 2006.

19. Petitioner's plea is that the respondent never had any intention whatsoever from the commencement of services under the three

agreements to pay the outstanding dues. The petitioner has further contended that he has a claim of US\$ 351831.77 under the IS Agreement; US\$1378141.40 under the TS Agreement-I and US\$ 243676.56 under the TS Agreement-II till 28th February, 2005 and that the respondent is also liable to pay 18% interest per annum on the outstanding bills from 1st March, 2005. The petitioner has asserted that they seriously apprehend that the respondent in order to defeat and defraud the petitioner will sell, transfer, dispose of or create third-party rights in respect of its properties situated at New Delhi or elsewhere in India thereby making the arbitration awards which will be passed in favor of petitioner non-executable and they will become paper decrees. The petitioner also contended that there are serious disputes between the respondent and the other creditors and in the circumstances the respondent may even go in liquidation.

20. In the circumstances, the petitioner has prayed for appointment of court receiver since the respondent's financial position is precarious and the respondent is likely to sell, dispose of its properties. The petitioner has also prayed that the respondent be restrained from selling, assigning and entering, transferring possession, letting out, creating third-party rights or creating charge or dealing in any manner with movable and immovable properties in New Delhi or elsewhere in India.

21. The petitioner has also prayed that the respondent be directed to deposit US\$ 351831.77 in OMP No. 182 of 2005; US\$1378141.40 in OMP No. 183 of 2005 and US\$ 243676.56 in OMP No. 184 of 2005 along with interest @ 18% per annum from 1st March, 2005 till the date of realization or to furnish security to the satisfaction of the Court for the above said amounts. In the circumstances, petitioner has also prayed that grave and irreparable loss, harm and injury will be caused to the petitioner in case the reliefs as prayed by the petitioner are not granted and the loss which will be caused to the petitioner cannot be compensated in terms of money and therefore, it is averred that the balance of convenience is in favor of petitioner.

22. The petitions are contested by the respondent contending, inter alia, that the grant of an order of injunction, attachment or appointment of a receiver is not justified on the basis of averments made in the petition. Relying on Section 2 (2) of the Arbitration and Conciliation Act, 1996, it was contended that the Courts at Delhi has no jurisdiction to entertain the petitions - OMP No. 182 of 2005 and OMP No. 184 of 2005, as the place of arbitration in the above mentioned cases is at London and Singapore respectively and an application under Section 9 of the Arbitration and Conciliation Act can be made only if the place of arbitration is in India. The respondent

also pleaded that principle governing the grant of any interim protection under the English Law has to be resorted to as the parties agreed in the contract that the arbitration will be subject to English Laws and, therefore, Indian Law has no applicability to the present dispute. In OMP No. 183 of 2005 the respondent contended that the arbitration clause contained in TS Agreement I is invalid as it ousts the jurisdiction of Indian Courts to the challenge of any award. The respondent has also contested the petitions on the ground that the petitioner has not exhausted his remedy under Section 17 of the Act and has wrongly and maliciously chosen to file the present petitions. The respondent also contended that the disputes referred for arbitration are without any merit and the respondent has filed a counter claim and is hopeful of succeeding in its counter claim.

23. The respondent also pleaded that petitioner is trying to frame the respondent for the second time as earlier also OMP No.102/2003 was filed and considering the facts and circumstances there are no fresh circumstances warranting any petition under Section 9 of the Act. It was contended on behalf of the respondent that it is a widely held public listed company with over 10000 shareholders, listed in 7 stock exchanges including the National and Bombay Stock Exchanges and it has over 150 employees and a dealer network of over 1000 entrepreneurs. Relying on its audited balance sheet, it is stated that

its sales are over 44 crores whereas the current liabilities of the company are merely 9 crores and the company had declared operating profits as on 31st March, 2005 of 1.26 crore and holds investments of around 3.6 crore.

24. The respondent further contended that the petitioner has not been able to make out a prima facie case against respondent and the alleged apprehension shown by the petitioner about the respondent's selling or disposing of all properties are baseless and irresponsible. It was stated that the allegation made by the petitioner are factually incorrect and no basis for the allegations have been disclosed. In the circumstances the respondent stated that the balance of convenience is in favor of respondent. It was also contended that the respondent has not used the service as envisaged under TS Agreement-II and that the petitioner had failed to deliver the commercially acceptable quality of service as promised under the IS Agreement and TS Agreement-I and that the petitioner has failed to adduce any evidence to substantiate their claims under the said agreements. It is also contended that the petitioner has claimed US\$ 343676 as outstanding dues under the TS Agreement-II in the arbitral proceedings in Singapore, whereas, in OMP No.184 of 2005 the amount claimed is US\$ 243676 and that the inconsistency reflects lack of bona fide on behalf of the petitioner.

25. The respondent has further averred that as per the terms of the agreements, the place for arbitration in respect of disputes arising out of IS Agreement is London; in respect of TS Agreement-I, it is New Delhi and in respect of TS Agreement-II it is Singapore. The respondent has pleaded that it has all along been requesting the petitioner to have all the disputes arising out of the three agreements to be settled by the same set of arbitrators in India, as the three agreements relate to identical transactions with no major difference as far as dispute resolution is concerned. In the circumstances it is alleged that due to the unreasonable attitude adopted by the petitioner, the same arbitrators and their lawyers travel to Singapore and come back and then again travel to London and this involves enormous expenditure which is avoidable and unnecessary. It is contended that this unreasonable attitude of the petitioner is a relevant consideration for refusing any assistance in the form of injunction to the petitioner.

26. The petitions were filed by the petitioner in May, 2005 and by an ex-parte order dated 23rd May, 2005 the respondent was restrained from selling, alienating or parting with possession of his moveable as well as immovable properties. The petitioner filed rejoinder denying the allegations made by the respondent and contended that the *ex*

parte order dated 23rd May, 2005 restraining the respondent from selling, alienating or parting with possession of the moveable and immovable properties belonging the respondent is liable to be confirmed. Relying on Section 9, it was contended that it is applicable to international arbitrations and the arbitrations held outside India and therefore, it has been contended that the Court in India has jurisdiction. Refuting the alleged counter claim, it is contended that counter claim is being raised for the first time in the present proceedings and the respondent has not acted in the letter and spirit of the agreement and has even failed to pay the arbitration expenses.

27. I have heard the learned counsel for the parties in detail on two occasions. The counsel for the petitioner had also sought time once to take instructions regarding giving up the prayers regarding appointment of receiver and attachment of all the properties of the respondent. Thereafter an additional affidavit of the authorized representative of the respondent company dated 6th September, 2005 was filed deposing that the TDS liability of the respondent company as on 20.12.2004 was Rs.16,07,887/- as per the Income Tax department and part of the dues had been cleared and after adjustment of the amount to be refunded the liability is Rs.8,21,224/- only. It was also stated that the market capitalization of the respondent company is Rs.32.53 crores as on 5th August, 2005. A copy of the certificate of the

Chartered Accountant has also been filed showing the status of assets and liabilities.

28. During the arguments by the parties, another additional affidavit was filed by the authorized representative of the respondent dated 2nd November, 2007 contending that the respondent company has made payments of not less than US\$ 1.4 million (Rs.6.5 crores at the prevailing currency exchange rates) to the petitioner in the course of its business for using his services. A certificate of Chartered Accountant in this regard was also filed by the respondent. The respondent disclosed its networth at Rs.36.40 crores as on 31st March, 2007 and its assets as per the audited balance sheet of Rs.63.72 crores on the said date. The respondent also disclosed that it is listed on National Stock Exchange and Bombay Stock Exchange and five other stock exchanges in India and its market capitalization as on 9th October, 2007 was Rs.30.28 crores. The respondent also disclosed its profit for financial year ended on 2006-07 as Rs. 2.61 crores before tax and net profit of Rs.2.1 crores. The respondent also filed its 17th Annual Report, 2006-2007. Yet another additional affidavit dated 11th December, 2007 was filed by the authorized representative of the respondent detailing the payments made by the respondent to the petitioner.

29. The petitioner filed an affidavit of its authorized signatory dated 2nd January, 2008 in reply to the affidavit of the respondent detailing the payments made to the petitioner and gave the details of payments received from the respondent under TS Agreement-1 dated 10th August, 1999 amended on 14th July, 2000 and again amended on 16th January, 2001. It was deposed that said payments have been accounted for and are not the subject matter of the claim of the petitioner. According to the petitioner the outstanding under the TS Agreement I as set out in the petition are US\$ 1,378,141.70 amounting to Rs.5,99,49,163.55. It was specifically averred that the invoices which have been settled and paid have not been included in the claim of US\$ 1,378,141.70. The petitioner also filed another statement giving the total payment received from the respondent. The petitioner had claimed termination fees of 149,722.21 under clause 13.6 (a) and late payment fees of 210,583.54 and Cost of Arbitration fees of 100,000 in Annexure P which was filed with the petition.

30. The plea of the respondent is that the Courts at Delhi do not have jurisdiction to entertain the petitions, OMP No.182/2005 (IS Agreement) and OMP No.184/2005 (TS II Agreement) as the place of arbitration in the above cases is at London and Singapore respectively. According to the respondent an application under Section 9 of the

Arbitration & Conciliation Act, 1996 can be made only if the place of arbitration is in India.

31. It has been held in a number of cases that the power of the Court to grant injunctions under Section 9 of the Arbitration & Conciliation Act, 1996 would also extend to international arbitrations. Reliance for this can be placed on Kitechnology NV & Another v. Union Gmbh Rahn Plastmaschinen and Another, 77(1999) DLT 813; Suzuki Motor Corporation v. Union of India and Another, 68(1997) DLT 827; Dominant Offset Pvt. Ltd. v. Adamovske Strojirny A.S, 68(1997) DLT 157 and Marriott International Inc. and Ors. v. Ansal Hotels Ltd. and Anr., 82 (1999) DLT 137. On perusal of the provisions of the Arbitration & Conciliation Act, 1996, it is apparent that there is no justification to restrict the application of Part I only to domestic arbitrations. So long as the territorial jurisdiction of the Court is present on account of properties of the respondent within the jurisdiction of the Court, relief cannot be denied on technicalities. The Supreme Court in Bhatia International Vs Bulk Trading S.A & Anr., (2002) 4 SCC 105 had held that a party could apply to the Court under Section 9 before, during arbitral proceeding or after making of the arbitral award. An application for interim measures can be made to the Courts in India, whether or not the arbitration takes place in India, before or during arbitral proceedings. This cannot be disputed

that awards covered by Part II are deemed to be decrees. Section 9 does not suggest that once an award is made, an application for interim measure can only be made if the award is a domestic award as defined in Section 2(7) of the said Act. In *Bhatia International (Supra)* at page 123 in para 32, the Apex Court held that provisions of Part I would apply to all arbitrations and to all proceedings relating thereto and that in the case of international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement, express or implied exclude all or any of its provisions. The said paragraph 32 is as below:-

32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

32. Though the IS Agreement dated 12th January, 2001 and TS Agreement II dated 5th January, 2001 and their amendments contemplate place of arbitration at London and Singapore respectively, however, neither the agreements nor their amendments incorporate express or implied exclusion of the provisions of Part I of the

Arbitration & Conciliation Act, 1996 or any other provision. The respondent is working for gain at Delhi and this fact that the immovable and movable properties of the respondent are at Delhi has not been denied. In the circumstances it cannot be denied that the cause of action against the respondent has arisen at Delhi. Thus the plea of the respondent that the petitions, under Section 9 of the Arbitration & Conciliation Act, 1996 being OMP No.182/2005 and OMP No.184/2005 are not maintainable at Delhi is not sustainable and is rejected.

33. The learned counsel for the respondent contended that in none of the petitions, the petitioner has given the details and full account of how the amounts paid were adjusted and did not disclose facts correctly before seeking an equitable relief from this Court. Mr. Bhatt, learned Senior Counsel for the respondent, asserted that the failure to disclose the particulars of payments received in the petition was an attempt to project that no payments at all had been made by the respondent and this action on the part of the petitioner disentitles him to benefit of injunction. According to him, the petitioner first time admitted that some payments were made only in its affidavit dated 2nd January, 2008. The justification given for not disclosing earlier the payments made is that those payments related to other bills which should not be accepted. It was further contended on behalf of the

respondent that the entry regarding the receipt of US\$ 1.75 lakhs has also not been disclosed in the petition and therefore, the injunction already granted should be vacated on this ground also.

34. It is no more *res integra* that the principles applicable to the exercise of the general power to grant interim relief, including specific injunctive relief, under Order XXXIX of Code of Civil Procedure and the Specific Relief Act would be applicable while exercising the powers under Section 9 of Arbitration & Conciliation Act, 1996. Though the arbitration proceedings are pending, the powers under Section 9 available to the Court and the powers under Section 17 available to the Arbitral Tribunal to make interim measures are independent despite some degree of overlap between the two provisions. The court is empowered to appoint a receiver in respect of property which is the subject matter of arbitration and take such interim measures or protections as may be just and convenient. Reliance can be placed on *Adhunik Steels Limited v. Orissa Manganese and Minerals Pvt. Limited*, (2007) 7 SCC 125; *Escorts Finance Limited v. Mohd. Hanif D. Khan*, 2001(1) RAJ 546; *Atul Limited v. Prakash Industries Limited*, 2003 (2) RAJ 409; *National Highways Authority of India v. China Coal Construction Group Corporation*, 2006(1) RAJ 621 and *Modi Rubber Limited v. Guardian International Corporation*, 2007(2) RAJ 556.

35. The Supreme Court in Adhunik Steels Limited (supra) had considered the scope of power of court to pass interim orders and had held that the well recognized principles applicable to the exercise of general power to grant interim relief including specific injunctive relief under Order XXXIX of Code of Civil Procedure and the Specific Relief Act would be applicable to exercise of power under Section 9 of Arbitration & Conciliation Act. The Apex Court had held that at the initial stage mere consideration of existence of arbitration clause is not justified as no special condition is contained in Section 9 of the Act and no special procedure is indicated. It was held that the grant of relief by way of injunction is, in general, governed by the Specific Relief Act and, therefore, the provisions of Specific Relief Act cannot be kept out of consideration. In para 11 at pages 132-133 of the judgment, the Apex Court had held as under:-

11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was 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.

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. Seenaiiah & 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. Brookside 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. “

37. For appointment of a receiver, a person seeking appointment is to make out a case of waste or damage to the property. A receiver cannot be appointed merely because it is expedient or convenient to one of the parties to do so or because it will do no harm to do so. Though the appointment of receiver is discretionary, exercise of such a discretion is to be based on sound judicial principles. A receiver can be appointed in case no other adequate remedy or means of accomplishing the desired object of the judicial proceeding is available. It is to be based on a very good prima facie case of plaintiff succeeding in the legal proceeding. In order to have a receiver appointed plaintiff not only has to show a conflicting claim to the property but must also show some emergency or damage or loss demanding immediate action. It is also no more res integra that normally receiver is not to be appointed where it has an effect of depriving a defendant of a de facto possession which may cause irreparable loss to the defendant. The conduct of the parties is also very relevant. In *Rajeshwar Nath Gupta v. Administrator General &*

Ors, AIR 1989 Delhi 179 it was held that where the defense set up is bona fide and the proposition of law is arguable, it is not advisable for the Court to appoint a receiver to take possession of immovable property from the defendants unless and until the Court is of the opinion that there is well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the Court gives a protection. It is only if more than a prima facie case is made out by the plaintiff of the likelihood of the suit being decreed and if there is no tangible defense raised by the defendants and if it will lead to manifest injustice, then in exceptional circumstances the Court would be justified in appointing a receiver and granting interim injunction. The Court has enunciated five principles which can be described as the 'panch sadachar' of our Courts exercising equity jurisdiction in appointing receivers as:

“(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute. It is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit.

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action

and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only, the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm.

(4) An order appointing a receiver will not be made when it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio' that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. Otherwise a receiver should not be appointed in supersession of a bona fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to the Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence, etc."

38. Regarding appointment of a receiver a Single Judge of the Bombay High Court in Syed Khuwaja Syed Ahmed v. The Maharashtra

Housing and Area Development Authority, AIR 1983 Bombay 73 had held that it must be determined not only on the facts of a particular case but also in the context of a social situation. A Division Bench of this Court in Ravi Kumar v. Misha Vadhera & Ors. AIR 1995 Delhi 175 had held that the discretion to appoint a receiver is not arbitrary or unregulated but has to be exercised cautiously, judicially and according to the legal principles after consideration of the whole of the circumstances of the case. A receiver cannot be appointed merely because it is expedient or convenient to one of the parties to do so or because it will do no harm. A bonafide possessor of property should not be dispossessed pending suit unless there is substantial reason such as, well founded fear that the property in question being dissipated or that some other irreparable mischief may occur unless the Court gives its protection. Before appointing a receiver the matter should be considered judicially in all aspects including prima facie case that is either a good title to the property or special equity in his favor requiring immediate dispossession of the defendant or that the property in the hands of the defendant is in the danger of being wasted.

39. The learned senior counsel for the respondent, Mr. Bhatt, has relied on Mahadeo Savlaram Shelke and Others v. Pune Municipal Corporation and Another, (1995) 3 SCC 33; Gujarat Bottling Co. Ltd.

and Others v. Coca Cola Co. and Others, (1995) 5 SCC 545 and Firm Ashok Traders and another v. Gurmukh Das Saluja and Others, (2004) 3 SCC 155 to contend that in the facts and circumstances as alleged by the petitioner, he is not entitled to claim appointment of the receiver for running the business of the respondent. In Firm Ashok Traders and Another (supra), Supreme Court had considered appointment of a receiver of a running business. It was held that the appointment of a receiver on a running business is a serious matter and on the basis of bald and general allegations of mis-management and siphoning of funds, it will not be just and convenient to appoint a receiver. In this case, a group of persons 'B' were running a business. On the basis of bald and general allegations of mis-management and siphoning of funds, the High Court had appointed the persons of Group 'A' as the Captain of the Ship. The Supreme Court had held that there was no logic behind such a change as appointment of a receiver on a running business is a serious matter. The apex Court held that High Court erred in appointment of a receiver as the retail liquor trade has its own intricate parameters and is a tricky trade and could not be entrusted to a third party.

40. The respondent business has its own typical parameters. The annual report for 2006-2007 filed on behalf of respondent reflects that the respondent is in the business of broadcasting and related

activities; training and education; third party video production; annual distribution of digital contents; digitization of all intellectual properties owned by company and setting up of an international distribution channel and setting up of online version of Jain TV. The audited balance sheet filed on behalf of the respondent for the financial year ended on 31st March, 2007 reflects the net worth as Rs.36.40 crores and the assets at Rs.63.72 crores. The petitioner had alleged that ever since commencement of service, the respondent did not pay any service fee in respect of TS Agreement II and claimed an outstanding aggregated to US\$ 571215.75. While terminating TS Agreement I, TS Agreement II and IS Agreement by letter dated 17th July, 2002, the petitioner demanded payment of outstanding dues aggregating to US\$ 712870.25 as due under TS Agreement II. Similarly in other petitions also it has been alleged that the petitioner has never paid the service fees as per terms of the other agreements. But it has not been disclosed as to what amounts have been paid and how those amounts have not been paid in terms of the agreements executed between the petitioner and the respondent.

41. The petitioner has also claimed late payment charges and has claimed US\$ 243676.56 under the TS Agreement - II. In OMP No.182 of 2005, the petitioner has claimed US\$ 351831.77 till 28th February,

2005 and the invoices not paid are detailed in para 17 which are as under:

<u>Sl.No.</u>	<u>Invoice No.</u>	<u>Due Date</u>	<u>Amount (US\$)</u>
1.	229001014	13.03.2001	27,022.4. (Balance)
2.	229001021	05.04.2001	27,300.00
3.	229001455	09.07.2001	23,660.00
4.	229001456	09.07.2001	31,200.00
5.	229001772	01.10.2001	31,200.00
6.	229001781	06.10.2001	7,800.00
7.	229001773	01.10.2001	31,200.00
8.	229001782	06.10.2001	7,800.00
9.	229001774	01.10.2001	20,800.00 (Balance)
10.	229001783	06.10.2001	5,200.00 (Balance)

42. Though in respect of some of the invoices, it has been contended that the amount due is the balance amount, however, the petition is apparently silent as to how much amount has been paid by the petitioner. Considering the entire petitions, it appears that the allegation made by the petitioner is that practically no amount has been paid by the respondent.

43. In respect of TS Agreement – I, the petitioner has claimed the amounts in respect of invoices as disclosed in para 17 which is as

under and has claimed a total amount of US\$ 1378,141.70 till 28th February, 2005.

<u>Sl.No.</u>	<u>Invoice No.</u>	<u>Due Date</u>	<u>Amount (US\$)</u>
1.	229000554	19.10.2000	25001.99 (Balance)
2.	229000767	31.01.2001	58,333.00
3.	229000858	01.03.2001	58,333.00
4.	229000963	31.03.2001	58,333.00
5.	229001052	01.05.2001	58,333.00
6.	229001252	01.07.2001	51105.94 (Balance)
7.	229001392	31.07.2001	58,333.00
8.	229002078	14.12.2001	5,833.00
9.	229002703	13.03.2002	15635.95 (Balance)
10.	229002727	03.04.2002	16,406.25
11.	229002736	03.05.2005	16,406.25
12.	229002887	03.06.2002	16,406.25
13.	229003071	03.07.2002	4,921.87

44. Though the petitioner has contended that in view of past experience with the respondent it is inferable that with a view to defraud and defeat the rights of petitioner, respondent will sell, transfer, dispose of or create third party rights in respect of its properties situated at New Delhi and other places. However, no such facts, particulars or details have been disclosed by the petitioner which will show that the respondent has sold, transferred or disposed

of or created third party rights in respect of his properties with a view to defeat the rights of the petitioner. Mere non-payment of dues of the petitioner will not reflect conflicting claims in respect of the immoveable and moveable properties of the respondent. The alleged fear of the petitioner is also not founded on any material facts except that the respondent has not paid the amount despite agreeing to do so and has not paid the statutory dues and expenses for the Arbitration proceedings at Singapore. There are no such facts disclosed by the petitioner that the properties of the respondent are in danger of being wasted. In absence of any particulars or details about any transaction done by the respondent with a view to sell, transfer, dispose of or create third party rights in respect of its properties with a view to defeat the alleged claims of the petitioner, the allegations by the respondent can only be termed as bald.

45. From the perusal of petitions filed by the petitioner the impression which one gets is that no amount had been paid by the respondent under the three agreements executed between the petitioner and the respondent. From the details of invoices whose balance price is claimed, it is not apparent as to how much amount had been received by the petitioner. The petitioner has very deftly avoided to disclose as to how much amount had already been paid under agreements. This information was material to infer the conduct

of the respondent. After an additional affidavit was filed by the respondent contending that about US\$ 13 lakhs has already been paid, it was admitted by the petitioner that it had received the said amount. The details of the amount received and its appropriation was, however, not given. The justification given by the petitioner for non disclosure of the amounts received by the petitioner in the petitions is that they related to other bills. Thereafter, petitioner filed details of the amounts adjusted, however, again the petitioner has not disclosed about the security deposit of US \$ 1.75 lakh which was given by the respondent. In case the petitioner is entitled for the amounts as claimed and the respondent has paid a security deposit of US\$ 1.75 lakh, the petitioner ought to have disclosed as to how much amounts the petitioner would be entitled for from the security deposit and after adjusting the amount of the security deposit, what would be the balance amount due from the respondent. Another relevant fact is that on behalf of respondent, Dr.J.K. Jain had agreed to the conditions and the payment schedule which was to be put in effect from January 2002 onwards and the disagreement, as per letter dated 19th September, 2001 was limited to the period from September 2001 to the year 2002. The petitioner wanted that the respondent should pay US\$ 53000 per month and US\$ 100,000 from January, 2002 and the respondent was not agreeable for the same. It is not that the respondent did not pay any amount. Perusal of the statement of

payments made by the respondent reveals that the payments were made from September, 2001 till 9th July, 2002. In most of the months payments were made on more than one occasion except in April and May, 2002. After July, 2002 no payments have been made and the petitioner also terminated all the agreements with the respondent. The petitioner has also not disclosed whether the petitioner is liable to pay interest to the respondent on the security deposit.

46. The amounts claimed by the petitioner in the notice which was given under Section 434 of the Companies Act, the amounts claimed in the petitions and the amounts claimed before the arbitrator are also different. The explanation given is that the difference in the amounts is on account of the amounts becoming due at different points of time and on account crystallizing of other amounts in the meantime to which the petitioner became entitled. The amounts claimed include the penal interest and the damages. Merely on the basis of the alleged agreements between the parties and the pleas raised by the petitioner, the amounts which the petitioner is entitled for cannot be decided conclusively. From the consideration of the pleas of the respondent it is apparent that some of the amounts as claimed by the petitioner may not be due to him. What exact balance amount the petitioner is entitled to in respect of three agreements is to be decided by the Learned arbitrators. Exact liability of the respondent in the facts and

circumstances is a substantive issue which is to be decided in the Arbitration proceedings. The respondent has also taken the plea that the petitioner failed to deliver the commercial acceptable quality of service as had been promised under the agreements. The respondent has also filed a counter claim which is also pending adjudication before the Learned Arbitrators.

47. In the facts and circumstances it is also apparent that for securing the alleged amount in dispute, the power under section 9 should not be exercised to enable the petitioner to recover the sums on account of damages in advance of the hearing even if a part of the liability is undisputed and monetary award for some amount may be made. The learned senior counsel, Mr.Bhatt has relied on, The Law and Practice of Commercial Arbitration in England, Second Edition by Sir Michael J.Mustill and Stewart C.Boyd regarding securing the sum in dispute. It has been held that the expression 'Amount in dispute' is not equivalent to the claim in arbitration as the expression 'amount in dispute' has a totally different connotation. Relevant para (iv) regarding securing the sum in dispute at page 332 is as under:-

32. (iv) Securing the sum in dispute:- Where the right of a party to a specific fund is in dispute in a reference, the Court has power to order the fund to be paid into Court or otherwise secured. The forms of security most likely to be ordered are the provision of a bank guarantee or the payment of the fund into a bank account in the joint names of the parties or their advisers. It is probable that

the Court alone, and not the arbitrator, has power to make such an order.

It will be noted that this power does not enable a party to recover sums on account of damages in advance of the hearing, even if liability is undisputed and it is clear that some monetary award will be made. The power exists only where an identified fund is in dispute-as where, for example, it is alleged that the respondent is trustee for the claimant in respect of a specific sum of money.”

48. This also cannot be disputed by the petitioner that a notice under Section 434 of the Companies Act was given on 7th June, 2004 calling upon the respondent to pay US \$ 213,182.30 under IS Agreement; US \$ 443,382.50 under TS-II Agreement and US \$ 71,640.62 under TS-II Agreement. Despite the notice under Section 434 of the Companies Act the respondent allegedly did not pay the amounts claimed. Under said section a presumption is raised if the debtor company does not pay the amount within the stipulated time that it is unable to pay its debits unless company is able to show some bonafide disputes. No proceedings have been initiated against the respondent for its winding up. In the circumstances it would be unreasonable to draw any inference prima facie that the respondent company is unable to pay its debts or the defense raised by the respondent is such that it can be ignored and does not require consideration. The respondent has also filed a counter claim and the plea of the petitioner is that the counter claim is not sustainable.

However, prima facie nothing has been shown that the counter claim of the respondent is not sustainable or that the entire claim of the petitioner prima facie has excellent chance of succeeding despite counter claim of the respondent. Applying the principles for appointment of receiver as enunciated by this Court also known as 'Panch Sadachar' it is apparent that the Court does not act on possible danger only. Rather the danger must be great and imminent demanding immediate relief. The petitioner has alleged the case of imminent danger mainly on account of respondent not paying the amounts as had been agreed, non-payment of the statutory dues, dues of other creditors and non-payment of arbitration fees and expenses. The learned Senior counsel for the petitioner, Mr.Jain had laid great emphasis on the fact that the arbitration fees was not paid and the petitioner is unable to pay its due to other creditors and has not been able to meet its statutory demands. According to the respondent its TDS liability as on 20th December, 2004 was Rs.16,07,887/- as per Income Tax Department demand note. Later this demand had been met and the liability was cleared. The respondent has also produced the payment challans to show that the payments were made by the respondent. It is also contended that whatever is left unpaid could be paid before 30th September, 2005. According to the respondent after adjusting the amount which is liable to be refunded, its liability is only Rs.8,21,224/-. The plea of the

respondent that since all the three arbitrations are between the same parties and therefore, in order to minimize the expenses they be held at one place and on that ground not paying the arbitration fee in the first instance, cannot be termed mala fide or such an act which will entail appointment of a receiver of running business of the respondent. In any case it is contended that the part of the expenses have since been paid. Therefore on this ground the petitioner shall not be entitled for appointment of a receiver of the business of the respondent. The pleas as raised by the petitioner do not show such damage or loss to him which will entail appointment of receiver. It is stated that respondent is a widely held public listed company with over 10000 shareholders, listed in 7 stock exchanges including the National and Bombay Stock Exchanges and it has over 150 employees and a dealer network of over 1000 entrepreneurs. It is also stated that its sales are over 44 crores whereas the current liabilities of the company are merely 9 crores and the company had declared operating profits as on 31st March, 2005 of 1.26 crore and holds investments of around 3.6 crore. The market capitalization of the respondent company is alleged to be Rs.32.35 crores as on 5th August, 2005. The respondent also disclosed its networth at Rs.36.40 crores as on 31st March, 2007 and its assets as per the audited balance sheet of Rs.63.72 crores on the said date. The respondent also disclosed that it is listed on National Stock Exchange and Bombay Stock Exchange

and five other stock exchanges in India and its market capitalization as on 9th October, 2007 was Rs.30.28 crores. The respondent also disclosed its profit for financial year ended on 2006-07 as Rs. 2.61 crores before tax and net profit of Rs.2.1 crores. In *Rajeshwar Nath Gupta (supra)* the Court had held that it is only if more than prima facie case is made out, then in exceptional circumstances the Court will be justified in appointing a receiver. The business of the respondent is a running business is apparent from these facts as detailed hereinabove. It has been held that a Court should not appoint a receiver on the ground that it will not do any harm. It has also been held that an order appointing a receiver is not to be made when it has an effect of depriving a defendant of 'de facto' possession. From the facts alleged by the petitioner it cannot be inferred that the properties in the hands of the respondent is in danger of being wasted, dissipated or frittered away. The properties of the respondent are also not the subject matter of arbitration. In the circumstances for the foregoing reasons there are no such facts and pleas disclosed by the petitioner which will entitle him for appointment of a receiver of the running business of the respondent. Therefore the prayer of the petitioner to appoint a Court receiver in respect of all the properties, moveable and immoveable of the respondent in New Delhi or elsewhere in India is declined.

49. The petitioner has also sought a direction to the respondent to deposit with the Courts all such sums received by him from its business and attachment of all the amounts. The petitioner has claimed different amounts, in notices, in petitions before this Court and in Arbitration proceedings which are pending. The amounts claimed by the petitioner are yet to be adjudicated. Though the respondent in September, 2001 had admitted a part of the amount to be paid in installment, but later on even those amounts have been denied. Rather a counter claim for the substantial amount has been filed. The apprehension of the petitioner is only that the respondent shall dispose of its properties. However, no instances have been given where the immovable properties or substantial movable properties have been disposed of or transferred by the respondent in order to defeat the alleged amounts which the petitioner may be entitled to recover. Merely on account of an arbitration clause between the parties and merely because the respondent refused to pay the arbitration fees and expenses in the first instance, as the respondent wanted that all the arbitration proceedings be conducted at one place in order to minimize the expenses, it cannot be inferred that the respondent is unable to pay its debts and is striving to dispose of its properties. Before the principles of Rule 5 of order 38 of the Code of Civil Procedure can be invoked it must inter alia, be shown by the

petitioner that respondent has acted or is about to act with intent to obstruct or delay the execution of any decree that may be passed against him. The Court must be satisfied that all the ingredients of the rule exist. Mere fact that no harm would be caused to defendant or that defendant would not be prejudiced by such an order could be no ground to pass order under Order 38 Rule 5 of the Code for attachment before judgment. It must be shown by the petitioner that the respondent 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 only on the satisfaction of all these conditions that the petitioner can be said to be entitled to an order of attachment before judgment in terms of Order XXXVIII Rule 5 of the Code. From the allegations made by the petitioner it cannot be inferred that the respondent is trying to dispose of its properties and is unable to pay the alleged amounts due from him or that the plea raised by the respondent are not bona fide. Any disposal of the moveable properties in the usual course of business cannot be termed as defrauding the petitioner and other creditors. The plea of the petitioner that the three agreements are similar and are between the same parties and in the circumstances Arbitration proceedings be conducted at one place, cannot be termed ex-facie not bonafide or such a plea that on account of it petitioner should be granted attachment of the properties of the respondent on the

principles of Order 38 rule 5 of the Code of Civil Procedure. The other pleas raised by the petitioner are also not sufficient to grant attachment to the petitioner in the facts and circumstances. In the circumstances, it will not be appropriate to attach the properties of the respondent on the principles of Order 38 Rule 5 of the Code of Civil Procedure nor the petitioner is entitled for a direction to the respondent to deposit with the Court all such sums which are received by the respondent from the business. Consequently the prayer of the petitioner to attach the properties of the respondent is declined.

50. It has already been held that the petitioner is not entitled for appointment of receiver of the business and properties of the respondent nor for attachment of its properties. It has been held that for appointment of receiver something more than the prima facie case is required and there should have been substantive reasons as well as well-founded fear that the properties are being dissipated or some other irreparable mischief may occur. Nevertheless, it cannot be held that there is no case in favor of the petitioner and the petitioner does not require any protection. This cannot be disputed that on behalf of respondent, Dr.J.K. Jain had agreed to the conditions and the payment schedule which was to be put in effect from January 2002 onwards and the disagreement, as per letter dated 19th September, 2001 was limited to the period from September 2001 to the new year.

The petitioner wanted that the respondent should pay US\$ 53000 per month and US\$ 100,000 from January, 2002 and the respondent was not agreeable for the same. It is not that the respondent did not pay any amount. Perusal of the statement of payments made by the respondent reveals that the payments were made from September, 2001 till 9th July, 2002. In most of the months payments were made on more than one occasions except in April and May, 2002. After July, 2002 no payments have been made and the petitioner also terminated all the agreements with the respondent. In these circumstances it was contended by communication dated 9th July, 2002 that the respondent is clearing the dues regularly and that the respondent has been able to implement its decisions of going digital.

51. Learned senior counsel for the respondent has painstakingly compared Annexure P with the petition and the Annexure A to the affidavit dated 2nd January, 2008 filed by the respondent and the discrepancies between the two. However, despite the alleged discrepancies between the two statements, it cannot be denied that as per the payment statement filed by the respondent along with the affidavit dated 11th December, 2007, the last payment was made on 9th July, 2002 of Rs.3,00,930/- and a total sum of about Rs.6,25,83,092.47 has been paid by the respondent to the petitioner. In the circumstances, it is apparent that after the determination of the

agreements by communication dated 17th July, 2002 no payments have been made by the respondent though till July 2002 the payments were made by the respondent which may not be in accordance with the representations made on behalf of the respondent in September, 2001. In the circumstances, it cannot be held that there is no case in favor of the petitioner. The petitioner also has grievance about non-payment of his dues. The petitioner is also entitled for some protection in the present facts and circumstances and for the reasons above noted. This is also noticed from the various documents filed on record that the respondent has a running business. By an ex parte interim order dated 23rd May, 2005, the respondent was restrained from selling, alienating or parting with the possession of movable as well as immovable properties belonging to the respondents. Since the respondent has a running business, it will not be appropriate to continue the order of restrain against the movable properties of the respondent in the present facts and circumstances and for the above noted reasons. Learned counsel for the petitioner has also made a grievance about the fact that on the appointment of the Local Commissioner at the first instance he was not allowed to prepare the inventories. From the record of the petitions it is apparent that there are no details of the immovable properties of the respondent. In case the respondent does not make available the details of his immovable properties and some or any of the properties

are disposed of by the respondent, it may cause irreparable loss to the petitioner as amounts admittedly are due to the petitioner and after sale or transfer of properties, the petitioner may not be able to recover the amounts awarded to him. In the circumstances, considering the prima face case, balance of convenience and irreparable loss, it will be just and appropriate to direct the respondent to give complete details of its immovable properties and to restrain the respondents from selling, alienating or encumbering his immovable properties without the prior permission of the court or of the learned Arbitrators before whom the arbitration proceedings in respect of the three agreements are pending. However, the order regarding the restrain from selling, alienating or parting with the possession of the movable properties of the respondent is vacated as the respondent is carrying on its business and such a restrain may hamper its business activities which will be detrimental to the interest of the respondent and in a way be also detrimental to the interest of the petitioner who has allegedly to recover substantial amounts from the respondent according to his own allegations.

52. Therefore, in the totality of facts and circumstances, the prayer of the petitioner to appoint a receiver is declined and the prayer for attachment of all the properties and assets of the respondent is also declined. The prayer for direction to the respondent to deposit all the

amounts received by the respondent in his business is also declined. The respondent is, however, directed to give the details of all its immovable properties to the petitioner within four weeks and is also restrained from selling, alienating or encumbering its immovable properties without the prior permission of this court or the learned Arbitrators before whom the Arbitration proceedings are pending pertaining to three agreements. The order dated 23rd May, 2005 regarding restrain from selling, alienating or parting with possession with the movable properties of the respondent is, however, vacated. The respondent shall be entitled to deal with his moveable properties and can sell, transfer or alienate the moveable properties in due course of his business. With these directions the ex-parte order dated 23rd May, 2005 is partly modified and the petitions are disposed of. However, considering the facts and circumstances, the parties are left to bear their own costs.

October 3, 2008
'Dev/k'

ANIL KUMAR J.