

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**O.M.P. 819/2011 & and I.A. 19638/2011 (for vacation of interim stay)**

**AITREYA LIMITED**

..... Petitioner

Through: Mr. Rajiv Nayyar, Sr. Advocate with  
Mr. Rishi Agrawala, Mr. Abhishek  
Kale, Mr. Harshvardhan,  
Mr. Thomas P. Kuruvilla and  
Mr. Arnab Kumar, Advocates.

versus

**DANS ENERGY PVT LTD & ORS**

..... Respondents

Through: Mr. Sandeep Sethi, Sr. Advocate with  
Ms. Kanika Agnihotri, Advocate  
for R1 and R3.  
Mr. Sitesh Mukherjee and  
Mr. Parinay Deep Shah, Advocate  
for R-2.

**CORAM: JUSTICE S. MURALIDHAR**

**JUDGMENT**

**23.12.2011**

1. The Petitioner, Aitreya Limited, a limited company incorporated under the laws of the British Virgin Island, has filed this petition under Section 9 of the Arbitration & Conciliation Act, 1996 ('Act') seeking interim reliefs against Respondent No. 1 Dans Energy Private Limited ('DEPL'), Respondent No. 2 Energy Innovations Limited, Dubai, UAE ('EIL') and Respondent No. 3 Mr. T. Nagendra Rao.

***The Investment Agreement***

2. Under an Investment Agreement dated 7<sup>th</sup> March 2008 the Petitioner invested a sum of US\$ 2.5 million dollars in EIL with an understanding that EIL shall then re-invest the same in the DEPL which would entitle the

Petitioner to a 50% stake in DEPL indirectly through investment in EIL. Under the Investment Agreement, the Petitioner along with its affiliates and/or funds under its direct or indirect management and/or control is collectively referred to as the 'Investor'. EIL is referred to as the 'Company', DEPL as the 'Project Company'. DEPL, EIL and Respondent No. 3 Mr. T. Nagendra Rao & Affiliates ('TNRA') are collectively referred to as 'parties'. The recitals of the Investment Agreement state that TNRA owns 100% of the share capital of DEPL which is currently developing the 96 MW Jorethang Loop Hydroelectric Project ('JLHP') in the State of Sikkim in India. Further it was stated that the Investor and its affiliates were currently raising the 'Fund' through one of its Affiliates.

3. Under the Investment Agreement the amount of US\$ 2.5 million dollars was to be treated as a loan until the Petitioner was satisfied with the due diligence and until further negotiations were confirmed. Under the 'Definitions and Interpretation' part of the Investment Agreement, the following terms, which are relevant for the purposes of the present petition, were defined:

**"Applicable Law** – means all applicable statutes, enactments, acts of legislature or Parliament, laws, ordinances, rules, by-laws, regulations, notifications, guidelines, policies, directions, press notes, directives and orders of any Governmental Authority, tribunal, board, court or stock exchanges and modifications thereof in force from time to time.

**First Tranche** means the amount of US\$ 2.5 million that Aitreya is investing in the Company pursuant to this Agreement, subject to the terms and conditions contained herein, forming a part of the Total Investment Amount.

**Fund** means the private equity fund being raised by Investor in Mauritius which on the satisfaction of the Second Tranche Conditions Precedent shall have a right to invest up to the Total Investment Amount in the Company.

**Further Negotiations** means and refers to the good faith negotiations to be conducted amongst the Parties after the First Tranche Completion to discuss and finalize the terms and conditions which are to be made applicable to the Total Investment Amount, including but not limited to corporate structure, share valuation of the First Tranche investment and the Second Tranche investment respectively – The Investor’s entitlements to the amount of shareholding in the Company, management rights and information covenants etc., in order to conclude definitive Transaction Documents that will detail all final terms and conditions affecting the Total Investment Amount to the end and effect that the terms and conditions contained in the Transaction Documents to be executed shall supersede the terms contained herein.

**Investor** collectively means and refers to Aitryea and its Affiliate companies or a Fund under its direct or indirect management and/or control.

**Total Investment Amount** – means the sum total of the First Tranche and the Second Tranche proposed to be invested by the Investor/Fund in the Company subject to the terms and conditions hereof and such that the Investor is entitled to a 50% stake in the Project Company indirectly through its investment in the Company.”

4. Clause 2 referred to ‘Scope of the Agreement and Governing Principles.’

Clause 2.2 reads as under:

“2.2 The Parties agree that the Total Investment Amount shall be invested by the Investor in the Company which shall then re-invest the same in the Project Company so as to entitle the Investor to a 50% stake in the Project Company indirectly through its investment in the Company.”

5. Clause 3 deals with ‘Exclusivity Period’. Clause 3.1 states that commencing from the effective date, the Investor shall get an exclusivity period of ninety days during which the Investor and their agents would complete business, financial, legal and accounting due diligence and further negotiations acceptable to the parties were to be undertaken and the

Transaction Documents were to be executed between all parties.

6. Under Clause 4.1 on satisfaction of conditions precedent as set out in Clause 6.2 below and within two business days therefrom, the Investor was to transfer the First Tranche to the nominated bank account of the Company by means of a wire transfer. Clauses 4.2 and 4.3 of the Investment Agreement read as under:

“4.2 It is agreed by the Parties that until the Second Tranche Completion Date, the First Tranche shall be treated by the Company and the Investor as a loan to the Company by the Investor.

4.3 The repayment of the First Tranche by the Company to the Investor shall take place in accordance with Clause 11 hereof.”

7. Under Clause 5.1 the First Tranche shall be converted into equity shares of the EIL simultaneously with the investment of the Second Tranche at the valuation of the EIL arrived at in accordance with Clause 5.2. Clause 5.2 sets out the manner in which the valuation of the equity shares of EIL would be arrived at. Under Clause 10.3 both the parties were entitled to terminate the Agreement by notice in writing to the other concerned party in the event *inter alia* one of the other concerned parties committed a material breach of the Agreement subject to notice of that breach being given by the innocent party to the defaulting party including its intention to treat the breach as a terminating event if un-remedied within fifteen days.

8. Clause 11 sets out the ‘consequences of termination and default’ which reads as under:

“11.1 In the event of termination of the Agreement in terms of Clause 10 above, the Company shall repay to the Investor within ninety Business days from the end of Exclusivity

Period the amount already invested by it in the Company with an interest of 12% per annum;

11.2 In the event of Further Negotiations not being concluded within the Exclusivity Period, then the Company shall repay to the Investor within ninety business days from the end of Exclusivity Period the amount already invested by it in the Company with an interest of 12% per annum or the Investor may at its option continue to remain invested in the Company at terms to be mutually negotiated.

11.3 In the event of Further Negotiations not being completed successfully or the Second Tranche Completion Date not being achieved or in the event of the Fund not being raised by the end of the Exclusivity Period, then also the Company shall return/repay to the Investor within ninety business days from the end of Exclusivity Period the amount already invested by it in the Company with an interest of 12% per annum or the Investor may at its option continue to remain invested in the Company at terms to be mutually negotiated.”

9. Clause 13.1 concerned the ‘Governing Law’ which reads as under:

“13.1 This Agreement and all questions of its interpretation shall be construed in accordance with the laws of England, without regard to its principles of conflicts of laws.”

10. Clause 14 deal with ‘Dispute Resolution/Arbitration’ which reads as under:

**“14.1 Arbitration Procedure** – Any dispute controversy, claims or disagreement of any kind whatsoever between or among the Parties in connection with or arising out of this Agreement or the breach, termination or invalidity or the execution or interpretation hereof (‘Dispute’) shall be referred to and finally resolved by arbitration. The arbitration proceedings shall be governed by the Rules of Arbitration and Conciliation of the International Chamber of Commerce by a panel of three arbitrators to be designated as per the said Rules. The parties commit to honour the arbitration award as soon as issued. This Agreement and the

rights and obligations of the Parties shall remain in full force and effect pending the award in such arbitration proceeding, which award, if appropriate, shall determine whether and when any termination shall become effective.

#### **14.2 Venue of Arbitration**

The seat of the arbitration shall be Singapore or such other place as mutually agreed upon among the Parties.

#### **14.3 Arbitrator/Arbitral Tribunal**

It is agreed that any dispute shall be referred to a panel of three Arbitrators as per the aforementioned rules (the 'Tribunal').

**14.4** The award shall be issued no later than the one hundred-eightieth (180<sup>th</sup>) day following the appointment of arbitrator or the last of them. The award shall be in writing, shall give reasons for the decisions reached by the Tribunal and shall be signed and dated by the arbitrator(s) and a copy of the award shall be contemporaneously delivered to each of the Parties. The Party against which an award assesses a monetary obligation or enters an injunctive or mandatory order shall pay that obligation or comply with that order on or before the thirtieth (30<sup>th</sup>) calendar day following the receipt of the final, signed award or by such other date as the award may provide.

#### **14.5 Language of Arbitration**

The arbitration shall be conducted and the award rendered solely in the English language.

#### **14.6 Award**

The award rendered by the Arbitrator shall be in writing and shall set out the reasons for his decision. The award shall include interest, which shall run from the date of any breach or violation of an Agreement, which shall be determined by the Tribunal in its Award. Interest shall continue to run from the date of award until the award is paid in full at the interest rates.

#### **14.7 Confidentiality**

Except to the extent necessary for proceedings relating to enforcement of the arbitration agreement, the award or other, related rights of the Parties, the fact of the arbitration, the

arbitration proceeding itself, all evidence, memorials or other documents exchanged or used in the arbitration and the arbitrators' award shall be maintained in confidence by the Parties to the fullest extent permitted by Applicable Law and except as permitted by Clause 12 (Confidentiality) and save as required in order to enforce the arbitration agreement and/or any award made pursuant to this Agreement.

#### **14.8 Injunctive Relief**

Notwithstanding anything to the contrary contained herein, the Parties shall have the right to approach any Court or competent jurisdiction at any point of time for suitable interim relief, including injunction.

#### **14.9 Survival**

The provisions contained in this Clause 14 shall survive the termination of this Agreement.”

#### ***Facts as stated by the Petitioner***

11. It is stated by the Petitioner that pursuant to Clauses 4.1 and 4.2 of the Investment Agreement, the Petitioner disbursed a sum of US\$ 2.5 million dollars to EIL on 11<sup>th</sup> March 2008. The Petitioner stated that in and around May/June 2008 as part of the further negotiations, the Petitioner verbally made an offer, after undertaking the valuation of DEPL and EIL, to purchase 25% equity stake of DEPL (at a premium of Rs. 7.50 per share having par value of Rs. 10/-). However, on 9<sup>th</sup> June 2008 Ms. Sonal Somani Gupta, Vice President (Finance), DEPL sent an email to the Petitioner rejecting the offer made by the Petitioner on the ground that it did not meet the requirements of DEPL. In response thereto, by an email dated 17<sup>th</sup> June 2008, the Petitioner informed DEPL *inter alia* as under:

“Please note that as this transaction is no more being pursued and hence there is no intention to have the investment from our side in Dans Energy/Energy Innovation, it would be appropriate to inform the bankers (whoever have been provided with our comfort letter) accordingly with a copy to us. Consequently, we will not charge the comfort letter fee.

Also, we trust that you would have initiated steps for refund of the First Tranche along with interest within the time prescribed under the Investment Agreement.”

12. On 16<sup>th</sup> July 2008 DEPL by an email confirmed that DEPL would be meeting with their bankers and would resolve the issues. After waiting for repayment the Petitioner through its advocate sent a legal notice on 29<sup>th</sup> August 2009 to Respondents 1 to 3 demanding repayment of the first tranche investment monies of US\$ 2.5 million together with interest. Respondent Nos. 1 and 3, i.e., DEPL and EIL replied to the legal notice on 25<sup>th</sup> September 2009 stating that DEPL was merely a confirming party and therefore, they would not be entitled to repay the Petitioner. The stand taken by Respondent 2 in their reply dated 25<sup>th</sup> September 2009 was that the Petitioner had invested in the share capital and EIL had expected that the second tranche amount would also be invested. This was negated by the Petitioner which sent a further request on 12<sup>th</sup> October 2009 reiterating the demand of repayment of the first tranche amount which was to be treated as a loan since no shares were in fact issued in EIL.

13. It is stated by the Petitioner that subsequently on 27<sup>th</sup> May 2010 EIL admitted to the claim of the Petitioner and disbursed US\$ 500,000 as part repayment of the US\$ 2.5 million claim of the Petitioner. A copy of the payment advice is enclosed in the list of documents filed by the Petitioner. This was followed by EIL further disbursing US\$ 500,000 to the Petitioner on 4<sup>th</sup> July 2010 which, according to the Petitioner, was under Clause 11.2 of the Investment Agreement. On 21<sup>st</sup> September 2010 the EIL further disbursed a sum of US \$ 250,000. It is stated that around early December 2010 the EIL requested the Petitioner to grant it time until mid January 2011 for repaying the balance. Further time was sought till March 2011.

However, no further repayment was made.

14. It is stated by the Petitioner that DEPL had since achieved financial closure and therefore, the Respondents had a bounden duty under the Investment Agreement to retire the loan advanced by the Petitioner. It is alleged that the EIL was mis-utilizing the funds made available by the Petitioner to purchase shares in DEPL. The specific allegation is that the EIL was fraudulently and illegally not returning to the Petitioner the balance amount, and instead transferring the said funds to DEPL in the form of capital. It is, therefore, claimed that DEPL and EIL are liable to return these funds to the Petitioner. To substantiate this allegation the Petitioner pointed out that on 7<sup>th</sup> June 2011 and 30<sup>th</sup> September 2011 5,28,316 and 85,578 shares respectively were issued to EIL by DEPL for which EIL paid Rs. 2,07,96,451/- to DEPL. It is further submitted that balance sheet of DEPL showed that it obtained huge loans from banks and institutions as well as allotted shares to the parties at a premium of 26%. In the circumstances, it is apprehended by the Petitioner that EIL and DEPL would encumber or alienate their assets in order to defeat the claim of the Petitioner. Stating that the Petitioner intended to take steps to invoke the arbitration clause, the present petition has been filed.

***The present petition***

15. In the present petition under Section 9 of the Act, the Petitioner has *inter alia* sought the following interim reliefs:

- (i) a direction to the Respondents to deposit the claim amount of US\$ 2,349,083 (principal amount of US\$ 2,013,893 plus interest @ 15% US\$ 335,189);
- (ii) a direction to the Respondents to maintain status quo in respect of the shares of DEPL and EIL;

- (iii) an injunction against the Respondents from either directly or indirectly dealing/alienating/encumbering any of its assets; and
- (iv) a direction to the Respondents to disclose their assets of affidavit.

16. When the petition was listed on 4<sup>th</sup> November 2011 this Court noted the submissions of Mr. Rajiv Nayar, learned Senior counsel appearing for the Petitioner that although the venue of the arbitration is Singapore, under Clause 14.8 of the Investment Agreement the parties shall have the right to approach “any court or competent jurisdiction at any point of time for suitable interim relief, including injunction”. On merits, it was submitted that the apprehension was that Respondent No. 2 EIL was utilizing the money given to it to transfer the shares of DEPL to other entities. It was, accordingly, directed that till the next date of hearing, the EIL would not transfer any of the shares to any other entity or person utilizing the funds made available by the Petitioner to it.

17. DEPL filed an application IA No. 19638 of 2011 on 7<sup>th</sup> December 2011 seeking vacation of the interim stay granted by this Court on 4<sup>th</sup> November 2011. Notice was issued in the said application on 8<sup>th</sup> December 2011 and the case was listed for hearing on 19<sup>th</sup> December 2011.

18. It is pointed out by DEPL in its application that on the strength of the interim order passed on 4<sup>th</sup> November 2011 the Petitioner had written to the financial institutions of DEPL claiming that the investments and claims of the Petitioner had priority over the investment/loans granted by the said financial institutions to DEPL and that the Petitioner holds priority over any security that the financial institutions had on the shares of DEPL. It is submitted that this was a misrepresentation of the interim order passed by

this Court on 4<sup>th</sup> November 2011. It is further stated in the said application that this Court had no territorial jurisdiction to entertain the present petition. It is submitted that in accordance with the law laid down by the Supreme Court in ***Videocon Industries Limited v. Union of India (2011) 6 SCC 161***, there was an express exclusion of Part 1 of the Act. The intention of the parties was to completely exclude the jurisdiction of Indian Courts. A similar plea has been urged by EIL as well.

***Territorial jurisdiction of this Court to entertain the present petition***

19. In support of the plea that this Court has jurisdiction to entertain the present petition under Section 9 of the Act, Mr. Rajiv Nayar, learned Senior counsel appearing for the Petitioner has placed reliance on the decision of the Supreme Court in ***Bhatia International v. Bulk Trading S.A. (2002) 4 SCC 105***. Mr. Nayar submitted that the facts of the present case were similar to those in ***Bhatia International v. Bulk Trading S.A (2002) 4 SCC 105***, in which the International Chamber of Commerce ('ICC') Rules of Arbitration were made applicable. In terms of Article 23 of the ICC Rules, notwithstanding that the law of the contract was a law other than Indian law and the venue of the arbitration was a place outside India, the parties were permitted to apply to any competent judicial authority for interim or conservatory measures. The Supreme Court held that in such case an application could be made under Section 9 of the Act. Mr. Nayar pointed out that in the decision of the Bombay High Court in ***Liverpool and London Steamship v. Arabian Tankers Co., Lle 2003 (3) Arb LR 537 (Bom)*** it was noticed that in ***Bhatia International*** the governing law under the agreement in question was the law of Switzerland, the seat of arbitration was Paris and the Rules governing the arbitration proceedings were the ICC Rules.

20. On the other hand Mr. Sandeep Sethi, learned Senior counsel appearing for DEPL, placed considerable reliance on the decision in ***Videcon Industries Limited v. Union of India*** as well as the decision of the Gujarat High Court in ***Hardy Oil and Gas Limited v. Hindustan Oil Exploration Company Limited (2006) 1 GLR 658*** which was approved in ***Videcon Industries Limited***. He urged that there was an implied exclusion of Indian law as well as the jurisdiction of Indian courts in the Investment Agreement. Mr. Sethi further placed reliance on the decision of the Supreme Court in ***Yograj Infrastructure Limited v. Ssang Yong Engineering and Construction Co. Limited 2011 IX AD (SC) 339*** and ***National Thermal Power Corporation v. Singer Company AIR 1993 SC 998***.

21. Mr. Sitesh Mukherjee, learned counsel appearing for EIL referred to the fact that under the Singapore International Arbitration Act 2002 ('SIAA') and the Singapore International Arbitration Centre Rules ('SIAC Rules'), where the seat of arbitration was Singapore, the law of arbitration would be the SIAA. Therefore, in any event the jurisdiction of the Indian courts stood excluded. He also relied on the decisions in ***Prima Buildwell Pvt. Ltd. v. Lost City Developments LLC 2011 (3) Arb LR 350 (Del)*** and ***Max India Limited v. General Binding Corporation 2009 (3) Arb LR 162 (Del)***

#### ***The position under the Arbitration Act 1940***

22. In the context of the enforcement of a foreign award under the provisions of the Foreign Awards (Recognition and Enforcement) Act 1961 and the Arbitration Act 1940 it was explained by the Supreme Court in ***Sumitomo Heavy Industries Limited v. ONGC Limited (1998) 1 SCC 305*** that the procedural or curial law governing arbitrations was that of the forum of arbitration. It was observed that "the curial law operates during

the continuance of the arbitration proceedings before the arbitrator to govern the procedure and conduct thereof.” A reference was made to the ***Law and Practice of Commercial Arbitration in England***, 2<sup>nd</sup> Edn. By Mustill and Boyd which discussed the problems arising out of a commercial arbitration which might in theory call for the application of any one or more of the following laws (SCC, p. 313):

- “1. The proper law of the contract, i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.
2. The proper law of the arbitration agreement, i.e. the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.
3. The curial law, i.e. the law governing the conduct of the individual reference.”

22.2 It was further observed in the treatise by Mustill and Boyd (SCC, p.313) that “in the absence of express agreement, there is strong *prima facie* presumption that the parties intend the curial law to be the law of the ‘seat’ of the arbitration, i.e., the place at which the arbitration is to be conducted, on the ground that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate.”

23.1 In ***National Thermal Power Corporation v. Singer Company***, which was again in the context of the Arbitration Act 1940, the Supreme Court explained that (AIR, p.1008): “The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express

choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement.” It was further explained in para 25 as under (AIR, p.1008):

“25. The parties have the freedom to choose the law governing an international commercial arbitration agreement. They may choose the substantive law governing the arbitration agreement as well as the procedural law governing the conduct of the arbitration. Such choice is exercised either expressly or by implication. Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract.”

### ***The position under the 1996 Act***

24.1 As already noticed, both ***National Thermal Power Corporation v. Singer Company*** and ***Sumitomo Heavy Industries Limited*** were with reference to the provisions of the Arbitration Act 1940. As regards the position under the 1996 Act, the law has been settled by a three-judge Bench of the Supreme Court in ***Bhatia International v. Bulk Trading S.A.***

24.2 The facts in ***Bhatia International*** were that the contract entered into by the appellant Bhatia International with Respondent No. 1 Bulk Trading SA contained an arbitration clause which provided that the arbitration was to be governed by the ICC Rules. On 23<sup>rd</sup> October 1997 Respondent No. 1 Bulk Trading SA filed a request for arbitration with the ICC. The parties agreed that the arbitration would be held in Paris, France. The ICC

appointed a sole Arbitrator. Bulk Trading SA filed an application under Section 9 of the Act before the Additional District Judge ('ADJ'), Indore, Madhya Pradesh against Bhatia International seeking the interim relief of injunction restraining the parties from alienating, transferring, and/or creating any third party rights, disposing of their business assets and properties. The objection raised by Bhatia International as to the maintainability of the said application was negated. Its further writ petition before the High Court of Madhya Pradesh was also dismissed. Bhatia International thereafter appealed to the Supreme Court.

24.3 After discussing Section 9 of the Act it was held by the Supreme Court in ***Bhatia International*** (SCC, p. 122) that "an application for interim measure can be made to the courts in India, whether or not the arbitration takes place in India, before or during arbitral proceedings." In para 32 the Supreme Court held as under (SCC, p. 123):

"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.**" (emphasis supplied)

24.4. It was contended by the appellant in ***Bhatia International*** that since the parties had agreed that the arbitration would be governed by the ICC Rules "by necessary implication Section 9 would not apply". The Supreme Court proceeded to observe as under (SCC, pp.123-124):

"33. Faced with this situation Mr. Sen submits that, in this case the parties had agreed that the arbitration be as per the

rules of ICC. He submits that thus by necessary implication Section 9 would not apply. In our view in such cases the question would be whether Section 9 gets excluded by the ICC Rules of Arbitration. Article 23 of ICC Rules reads as follows:

"Conservatory and Interim Measures

1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

2. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof."

34. Thus Article 23 of the ICC rules permits parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application can be made under Section 9 of the said Act."

24.5. The decision in ***Bhatia International*** was that even though the law of the contract was the law of Switzerland, the venue of arbitration was Paris, and the arbitration proceedings were to be governed by the ICC Rules, the

parties could file an application under Section 9 of the Act in the Indian courts.

25.1. In ***Videocon Industries Limited v. Union of India*** the facts were that a Production Sharing Contract ('PSC') was executed between the Union of India ('UOI') and, a consortium of four companies consisting of Oil & Natural Gas Corporation Limited ('ONGC'), Videocon Petroleum Limited, Command Petroleum (India) (P) Limited and Ravva Oil (Singapore) (P) Limited (hereinafter referred to as 'the contractor') in terms of which the latter was granted an exploration licence and mining lease to explore and produce the hydrocarbon resources owned by the UOI. Subsequently, Cairn Energy, UK was substituted in place of Command Petroleum (India) (P) Limited and the name of Videocon Petroleum Limited was changed to Petrocon India Limited (which merged with the Appellant Videocon Industries Limited).

25.2. Clauses 33.1 and 34.12 of the PSC read as under:

**"33.1 Indian Law to Govern**

Subject to the provisions of Article 34.12, this Contract shall be governed and interpreted in accordance with the laws of India.

**34.12. Venue and Law of Arbitration Agreement**

The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England."

25.3 The disputes between the parties were referred to the Arbitral Tribunal

under Article 34.3 of the PSC. The Arbitral Tribunal fixed 28<sup>th</sup> March 2003 as the date of hearing at Kuala Lumpur (Malaysia), but later on shifted the venue to London. A partial award was passed by the Arbitral Tribunal on 31<sup>st</sup> March 2005. UOI challenged the partial award by filing a petition in the High Court of Malaysia at Kuala Lumpur. The Appellant Videocon Industries Limited then questioned the maintainability of the case before the High Court of Malaysia by contending that in view of Clause 34.12 of the PSC only the English Courts had jurisdiction to entertain any challenge to the award. After filing the petition before the High Court of Malaysia UOI made a request to the Arbitral Tribunal to conduct the remaining arbitral proceedings at Kuala Lumpur but that request was rejected by an order dated 20<sup>th</sup> April 2006 and it was declared that the remaining arbitral proceedings would be held in London. The UOI filed a petition under Section 9 of the Act in this Court seeking stay of the arbitral proceedings. The award dated 31<sup>st</sup> March 2005 of the Arbitral Tribunal on the issue of exchange rate was also challenged by filing a separate petition. Videocon Industries Limited objected to the maintainability of the petition under Section 9 of the Act and pleaded that the Courts in India had no jurisdiction to entertain a challenge to the arbitral award. The said objection was overruled by the learned Single Judge of this Court by referring to the decision in ***Bhatia International***. It was held that the words “the contract shall be governed and interpreted in accordance with the laws of India” in Article 33.1 were “wide enough to engulf every question arising under the contract including the disputes between the parties and the mode of settlement”. It was further held that “the contract has in every respect the closest and most real connection with the Indian system of law and it is by that law that the parties have expressly evinced their intention to be bound in all respect.” The Supreme Court disagreed with the above finding and referred to Article 34.12 of the PSC. After referring to the decision in

***Dozco India (P) Limited v. Doosan Infracore Co. Limited (2011) 6 SCC 179*** it was held that each move of the Arbitral Tribunal did not of itself mean that the seat of the arbitration changed. The seat of the arbitration remained the place initially agreed by or on behalf of the parties. The Court then extensively discussed the decision in ***Bhatia International*** and held that since there was an express exclusion of the jurisdiction of the Indian courts under Article 34.12 of the PSC, the decision in ***Bhatia International*** would not apply.

25.4 The Supreme Court in ***Videocon Industries Limited*** further discussed the decision of the learned Single Judge of the Gujarat High Court in ***Hardy Oil & Gas Limited v. Hindustan Oil Exploration Co. Limited***. It referred to para 11.3 of the said decision, which discussed the decision in ***Bhatia International*** and observed that “if the parties have agreed to be governed by any law other than Indian law in cases of international commercial arbitration, the same would prevail.” In para 33 of the decision in ***Videocon Industries Limited*** it was held as under:

“33. In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the Respondents under Section 9 of the Act and the mere fact that the Appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the Respondents.”

25.5. The facts in ***Videocon Industries Limited*** show that there was no clause in the PSC which made the ICC Rules applicable to the arbitration proceedings. On the other hand, Article 34.12 constituted an express exclusion of Indian law. It made explicit that the English law would apply

to the arbitration proceedings. Further, there was no clause similar to Clause 14.8 of the Investment Agreement which permits the parties to approach any court of competent jurisdiction.

26.1 In ***Yograj Infrastructure Limited v. Ssang Yong Engineering and Construction Co. Limited*** the facts were that the National Highways Authority of India, New Delhi ('NHAI') awarded a contract to Ssang Yong Engineering and Construction Co. Limited ('SSY') for the National Highways, Sector-II Project Package, for upgradation to Four Laning of Jhansi/Lakhnadon Section in the State of Madhya Pradesh. Under Clauses 27 and 28 of the Sub-Contract entered into by SSY with the appellant Yograj Infrastructure Limited ('YIL') the law applicable to the arbitral proceedings was the 1996 Act. An application was filed under Section 9 of the Act by YIL before the District and Sessions Judge, Narsinghpur, Madhya Pradesh for interim relief. The dispute was then referred to arbitration in terms of the agreement and a Sole Arbitrator was appointed by the Singapore International Arbitration Centre on 20<sup>th</sup> May 2010. YIL and SSY filed applications under Section 17 of the Act before the Sole Arbitrator for interim relief. The Sole Arbitrator passed an interim order on 29<sup>th</sup> June 2010 aggrieved by which YIL filed an appeal before the District Judge, Narsinghpur under Section 37 (2) (b) of the Act. SSY resisted the appeal contending that since the seat of arbitration was Singapore, the arbitral proceedings were governed by the laws of Singapore. The learned District Judge dismissed the appeal as not maintainable. This decision was upheld by the High Court of Madhya Pradesh. YIL appealed to the Supreme Court.

26.2 After discussing the decisions of the Supreme Court in ***Bhatia International v. Bulk Trading S.A., Venture Global Engineering v.***

***Satyam Computer Services Limited (2008) 4 SCC 190*** and ***Citation Infowares Limited v. Equinox Corporation (2009) 7 SCC 220***, it was held by the Supreme Court that in terms of Clause 27.1 of the agreement, the arbitration proceedings were to be conducted in Singapore in accordance with the SIAC Rules in force at the time of signing of this agreement. Although under Clause 28 of the agreement the governing law was the Indian law, it was held that the arbitration proceedings were to be conducted in Singapore in accordance with the SIAC Rules. It was held that “there is, therefore, no ambiguity that the procedural law with regard to the arbitration proceedings is the SIAC Rules.” The Supreme Court referred to Rule 32 of the SICA Rules which provided that “where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act or its modification or re-enactment thereof”.

26.3 Ultimately, it was concluded that “once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the SIAC Rules, which includes Rule 32, the decision in ***Bhatia International*** and the subsequent decisions on the same lines, would no longer apply in the instant case where the parties had willingly agreed to be governed by the SIAC Rules.”

26.4. As far as the decision in ***Yograj Infrastructure Limited*** is concerned, the question did not concern the applicability or interpretation of the ICC Rules. On the other hand, this was a case of clear exclusion of Indian laws by making explicit the applicability of the SIAC Rules. Again the agreement in that case contained no clause similar to Clause 14.8 of the Investment Agreement.

27. In ***Hardy Oil and Gas Limited v. Hindustan Oil Exploration Company Limited***, the Gujarat High Court was interpreting the London Court of International Arbitration (LCIA') Rules which applied to the arbitration agreement in that case. It was held that once the LCIA Rules applied, then all proceedings had to be in terms of laws of England and the jurisdiction of the Indian courts was impliedly excluded. Even though the wording of the LCIA Rules is similar to the ICC Rules, what was perhaps not noticed in ***Hardy Oil and Gas Limited*** was that in ***Bhatia International*** the law governing the contract was the Swiss law and the seat of arbitration Paris, and yet it was held by the Supreme Court that under the ICC Rules the parties could file a petition under Section 9 of the Act. That the decision in ***Hardy Oil and Gas Limited*** was approved by the Supreme Court in ***Videocon International Limited*** would not make any difference to the legal position explained in ***Bhatia International*** which incidentally is by a larger bench of three judges. As already noticed, in ***Videocon International Limited*** Article 34.1 of the PSC stated that the arbitration agreement would be governed by the laws of England, which impliedly excluded the application of Indian laws and the jurisdiction of Indian courts.

28. Turning to the present case, it is seen that the governing law in terms of Clause 13.1 is the law of England. The venue of the arbitration is Singapore. Under Clause 14.1 the arbitration proceedings are to be governed by the ICC Rules. The situation is, therefore, similar to that in ***Bhatia International*** where the governing law was the Swiss law, the seat of the arbitration was Paris and the ICC Rules governed the arbitration proceedings. There is no implied exclusion of Indian law inasmuch as Clause 14.8 states that "the parties shall have the right to approach any court or competent jurisdiction at any point of time for suitable interim relief, including injunction." Consequently, this Court finds no difficulty in

holding that in terms of ruling in ***Bhatia International*** the present petition under Section 9 of the Act would be maintainable. The objection raised by the Respondents as regards the maintainability of the petition is hereby rejected.

***The case for interim relief***

29. Turning to the merits of the pleas raised by the Petitioner seeking interim relief it is seen that in terms of Clause 11.2 of the Investment Agreement, it is EIL which is a party, is bound to repay the first tranche amount to the Petitioner. There is no liability of any of the other Respondents in this regard. It was submitted by Mr. Mukherjee on behalf of the EIL that on account of abrupt change of stance of the Petitioner, after advancing the first tranche amount, the EIL was put to considerable losses and damages and therefore, far from having to return the balance amount of US\$ 1.25 million to the Petitioner, it is the Petitioner which owed EIL a much higher sum. The above submission is countered by Mr. Nayar by pointing out that the very fact that the EIL had repaid US\$ 1.25 million to the Petitioner after rejecting the offer of the Petitioner to subscribe the shares of EIL at the valuation suggested by it showed that there was an acknowledgment of liability to repay the amount. Also the balance sheet of DEPL showed that the EIL had in fact picked up shares of DEPL at a considerable amount. This was in all probability done using the first tranche amount borrowed by the EIL from the Petitioner.

30. The correspondence exchanged between the parties, and in particular emails of 9<sup>th</sup> June 2008 from the DEPL to the Petitioner and the reply dated 17<sup>th</sup> June 2008 of the Petitioner to DEPL, show that DEPL rejected the offer made by the Petitioner to purchase the 26% equity stake in the DEPL at a premium of Rs. 7.50 per share having par value Rs. 10/-. Thereafter it

was acknowledged that in terms of the Investment Agreement that the first tranche had to be treated as a loan. This explains the repayment of U.S. \$ 1.25 million to the Petitioner in three instalments. It appears that at a subsequent stage EIL decided that the balance amount need not be repaid. The stand now taken by EIL that it is the Petitioner which owes it money appears to have been taken for the first time in reply to the present petition. Admittedly at no point in time prior thereto did EIL make a written demand to that effect from the Petitioner. In any event the tenability of this claim, and whether any amount is owed by the Petitioner to EIL would be decided in the arbitration proceedings. In the circumstances this Court is satisfied that the Petitioner has made out a *prima facie* case for grant of interim relief.

31. As regards securing the interests of the Petitioner pending the arbitration proceedings, it is seen that there is no denial by EIL that it has in fact subscribed to shares in DEPL as indicated in the petition. Further, it is not disputed that so far U.S. \$ 1.25 million has been repaid to the Petitioner. *Prima facie* it does appear that EIL owes the Petitioner the balance U.S. 1.25 million which would be the principal loan amount. This Court is at this stage not required to determine the exact amount payable towards or the adjustment if any which might result if it is found that the Petitioner owes EIL any sum. Consequently, at the present stage it appears that the balance of convenience is in favour of the Petitioner being secured for at least the principal sum of the balance first tranche amount of US \$ 1.25 million which *prima facie* is owed to it by EIL. The security could be either by directing that EIL will not part with or encumber in any manner the shares held by it in DEPL of the above value or that EIL will furnish a bank guarantee for the said sum favouring the Petitioner which will be kept alive during the pendency of the arbitral proceedings.

***The operative interim order***

32. Consequently, this Court modifies the interim order passed by it on 4<sup>th</sup> November 2011 and directs that Respondent No. 2 EIL will, during the pendency of the arbitration proceedings, not sell, transfer, or otherwise part with or encumber the shares held by it in DEPL to the value of U.S. \$ 1.25 million. The above restraint on the shares held by EIL in DEPL will be lifted in the event that Respondent No. 2 EIL furnishes to the Petitioner a bank guarantee in the sum of U.S. \$ 1.25 million which bank guarantee will be kept alive by EIL during the pendency of the arbitral proceedings. It will be open to the parties to seek interim reliefs by way of modification of this order before the arbitral tribunal in accordance with law. It is clarified that the observations on merits in this order are tentative and will not influence the final decision of the arbitral tribunal. The Petitioner has, in the rejoinder, stated that it already invoked the arbitration clause.

33. The Petitioner will write immediately to the financial institutions to whom it wrote after the order dated 4<sup>th</sup> November 2011 was passed enclosing a copy of this order.

34. The petition and pending application are disposed of in the above terms, with no order as to costs.

**S. MURALIDHAR, J.**

**DECEMBER 23, 2011**

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