

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

Reserved on:29.05.2014
Pronounced on: 01.09.2014

+ FAO (OS) No.203/2014

C.V. RAO & ORS.

....Appellants.

Versus

STRATEGIC PORT INVESTMENTS KPC
LTD. & ORS.

.... Respondents.

+ FAO (OS) No.204/2014

KRISHANAPATNAM PORT COMPANY LIMITED Appellants.

Versus

STRATEGIC PORT INVESTMENTS KPC
LTD. & ANR.

.... Respondents.

+ FAO (OS) No.205/2014

CHINTA INVESTMENTS PRIVATE LTD.

....Appellant

Versus

STRATEGIC PORT INVESTMENTS KPC
LTD. & ORS.

.... Respondents.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

Counsel for the Appellant: Mr. A.S. Chandhiok, Sr. Adv. along with Mr. Ritesh Kumar, Mr. Dhruv Dewan, Mr. Sulabh Kenoria, Mr. Arjun Pall, Ms. Mallika Ahluwalia, Mr. Mayank Bamniyal and Ms. Ishita, Advs.

Mr. Akhil Sibal, Adv. along with Mr. Guntur Pramod Kumar and Ms. Perna Singh, Advs. in FAO(OS)205/2014.

Counsel for the respondent: Mr. Rajiv Nayyar, Sr. Adv. along with Mr. Shankh Sengupta, Mr. Udit Mendiratta and Ms. Srishti Jain, Advocate for R-1.

Mr. Arvind Nigam, Sr. Adv. along with Mr. S. Rewari and Mr. Arjun Pall, Adv. in FAO(OS) 203/2014.

COMMON J U D G M E N T

: Ms.G.ROHINI, CHIEF JUSTICE

1. Aggrieved by the common order dated 31.03.2014 passed by the learned Single Judge in I.A.Nos.4493 and 4494 of 2014 in OMP No.218/2014, all these appeals are preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Act').
2. Strategic Port Investments KPC Ltd., which is arrayed as respondent No.1 in all the appeals, is the petitioner in OMP No.218/2014 filed under Section 9 of the Act seeking various directions to the respondents therein pending resolution of disputes through arbitration.
3. By the order under appeal, the learned Single Judge issued certain directions and aggrieved by the same, the present appeals are filed.
4. The appellants in FAO (OS) 203/2014 are Mr.C.V.Rao and 8 others who are arrayed as respondents No.2 to 5 and 7 to 11 in OMP No.218/2014.
5. The appellant in FAO (OS) 204/2014 is the respondent No.1 in OMP No.218/2014.
6. The appellant in FAO (OS) 205/2014 is the respondent No.6 in OMP No.218/2014.

7. The facts in brief are as under:-

8. The appellant in FAO (OS) 204/2014, is a company by name Krishnapatnam Port Company Ltd. (hereinafter referred to as 'KPCL'). It is a Public Limited Company registered under the Companies Act, which owns and operates Krishnapatnam Port, a port located on the East Coast and is spread over a vast land bank of approximately 6,900 acres. The appellant No.1 in FAO (OS) 203/2014 - Mr.C.V.Rao - is the Chairman of KPCL whereas the other appellants in the said appeal as well as the appellant in FAO(OS) 205/2014 are the promoters and shareholders of KPCL who are holding 86.45% of the issued Capital Equity of the company. According to the appellants, 4.07% of the issued capital shares of KPCL are owned by corporate entities affiliated to Mr.C.V.Rao.

9. Coming to the respondent No.1 in all the appeals, i.e., the petitioner in OMP No.218/2014, it is a company incorporated under the laws of the Republic of Mauritius. It is pleaded that the said company is owned by 3i India Infrastructure Fund, US\$ 1.2 billion fund managed by the 3i group, investing in a diversified portfolio of investments in India, focussing on the port, airport, road and power sectors.

10. On 19.02.2009 an Investment Agreement was entered into between KPCL, its promoters & shareholders and the respondent No.1 under which it was agreed by the respondent No.1 to subscribe to 6,978,260 (Six Million Nine Hundred and Seventy Eight Thousand Two hundred and sixty) equity shares at a subscription price of Rs.148.32 per share for an aggregate consideration of Rs.1,03,50,00,000/-. Respondent No.1 had also agreed to subscribe to 70,00,00,000 compulsorily convertible cumulative participatory

preference shares of a face value of Rs.10/- each at a time subscription price of Rs.10/- per preference share for an aggregate consideration of Rs.700,00,00,000/-.

11. Clause 14 of the said Investment Agreement dated 19.02.2009 provided for a Put Option. As per Clause 14.1, respondent No.1 at any time after 31.03.2013 but before the end of business hours on 31.09.2013 will have the right to issue Put Notice to the shareholder parties and the KPCL requiring to purchase/buy back all the shares invested by them at a price with a compounded internal rate of return of 18% per annum from the date of investment until 31.03.2013 after reducing the sale proceeds received by respondent No.1 from the sale of its shares acquired pursuant to the Investment Agreement and calculated from the sale of investment until 31.03.2013 on the aggregate monies invested by respondent No.1 in the KPCL. In the event of not issuing in writing such Put Notice before 31.09.2013, the investor, i.e., respondent No.1 shall be deemed to have been issued the Put Notice exercising its Put Option on 30.09.2013. Clause 14.3 further clarified that in the event of respondent No.1 intimating KPCL and its promoters & shareholders in writing that it does not propose to exercise its Put Option (which is called Put Waiver Notice) then the outstanding preference shares shall convert into equity shares and 50% of the then outstanding preference shares shall convert into one Equity Share. As per Clause 14.6 if KPCL fails to make payment of the Put Consideration in full or any part thereof, then respondent No.1 would be entitled to 26% of the Equity Share on a fully diluted basis.

12. It is also relevant to note that Clause 22 of the Investment Agreement provides for dispute resolution by way of arbitration. As per the said Clause, if any dispute, controversy or claim between the parties arises out of or in connection with the Investment Agreement and if the parties are unable to resolve the disputes amicably within 15 days of service of the dispute notice then the dispute shall be referred to arbitration and settled by way of arbitration conducted in accordance with the Rules of the London Courts of International Arbitration in terms of Clause 22.2.

13. In pursuance of the abovesaid Investment Agreement, Respondent No.1 invested Rs.803.50 crores in to KPCL by investing (i) Rs.103.5 crores to acquire equity shares of the company and (ii) Rs.700 crores to acquire compulsorily convertible preference shares. Thus, respondent No.1 holds 9.48% of the Equity Share Capital and 99.88% of the issued Preference Share Capital of KPCL.

14. On 28.09.2013, the respondent No.1 issued a notice exercising its Put Option in terms of Clause 14.3 of the Investment Agreement and called upon KPCL, its promoters & shareholders to purchase its shareholding for Rs.1588,18,15,427.60 (Rupees One thousand Five Hundred and Eighty Eight Crores Eighteen Lakhs Fifteen Thousand Four Hundred and Twenty Seven Rupees and Sixty Paise) on the basis of the compounded Internal Rate of Return (IRR) of 18% per annum as per the valuation certificate annexed to the said notice.

15. In the meanwhile, KPCL sought clarification from the Reserve Bank of India (for short 'RBI') with regard to the validity of Put Option Clause incorporated in the Investment Agreement dated 19.02.2009. Pursuant

thereto RBI by letter dated 20.09.2013 informed KPCL to remove the Put Option Clause in the agreement to be in conformity with the FEMA Regulations. Since the respondent No.1 had already issued a Put Notice by that time, KPCL by letter dated 29.10.2013 requested the RBI to advice about the further steps to be taken. In response to the same, RBI by letter dated 16.12.2013 informed KPCL that Put Option under Clause 14.1 provides the non-resident investor an exit route with assured return, it imparts debt like features to the compulsorily convertible cumulative participatory preference shares and thus, makes it ineligible as an FDI compliant instrument under the extant FDI policy. Thus, it was made clear by RBI that the Put Option Clause is not in line with the FDI policy/FEMA Regulations. Accordingly, KPCL was advised to amend the agreement suitably by taking immediate steps for deletion of the Put Option Clause.

16. On 09.01.2014, a Circular was also issued by RBI bringing to the notice of all Category-I Authorized Dealer Banks the amendment dated 12.11.2013 made to the Foreign Exchange Management (Transfer or Issue of Security by a person resident outside India) Regulations, 2000 with regard to optionality Clauses in FDI instruments.

17. On 28.01.2014 respondent No.1 issued a Dispute Notice in terms of Clause 22.1 of the Investment Agreement and called upon KPCL, its promoters & shareholders for amicable resolution of the dispute on several issues including the alleged failure to seek consent of respondent No.1 while deviating from the Business Plan of the company.

18. On 17.02.2014 respondent No.1 preferred OMP No.218/2014 under Section 9 of the Act with the following prayers:

- “(i) Directing the respondents to ensure and procure that the Company does not avail of any additional debt in any form, or enter into any agreements to avail any debt, in breach of Clause 10.1 read with Schedule 4 and Schedule 5 of the Investment Agreement, without the specific consent of the Petitioner,
- (ii) Directing the Respondents to provide all of the information requested by the petitioner till date (including specifically the information which is set out in paragraph 22 of this petition) and to provide the Petitioner with all information required to be provided under Clause 9 of the Investment Agreement on an ongoing basis;
- (iii) Restraining the respondents from passing, giving effect to or taking any action pursuant to any resolution contrary to Clauses 10.1 (i.e. the Petitioner’s affirmative voting rights) and Clause 13.29 (i.e. the implementation Plan sent out in the Investment Agreement);
- (iv) Restraining the respondents from amending or taking any action to amend the articles of association of the Company in breach of Clause 10.1 read with Item (v) of Schedule 4 of the Petitioner;
- (v) Restraining the Company from issuing (or entering into any agreement, arrangement or commitment to issue) any shares or securities which are convertible into shares, to any person in breach of Clauses 13.19-13.22 of the Investment Agreement;
- (vi) Restraining the Company from passing any special resolutions without consent of the petitioner;
- (vii) Restraining the Respondents and their nominees from exercising their voting rights as shareholders/board committee members in breach of the petitioner’s affirmative voting rights specified in Clause 10.1 of the Investment Agreement;
- (viii) Directing the respondents to deposit with the Hon’ble Court and amount of Rs.1588,18,15,427.60 (Rupees One thousand Five Hundred and Eighty Eight Crores Eighteen Lakhs Fifteen Thousand Four Hundred and Twenty Seven Rupees and

Sixty Paise) being the amount equivalent to the Put Consideration and due and payable by the Respondents to the Petitioner pursuant to Clause 14.4 of the Investment Agreement;

(ix) Directing the respondents to disclose on affidavit, details of all their respective interests (legal, beneficial and/or economic) in movable and/or immovable properties (including but not limited to monies lying in bank accounts, land, properties encumbered/charged to third parties), whether such properties may be located within India or outside and whether held by them or by a third party (such as a trustee, nominee or fiduciary) for their benefit, on their behalf or at their direction;

(x) Restraining the respondents from selling/transferring/ alienating/ disposing and/or encumbering their interests (legal, beneficial and/or economic) in any and all properties of the Respondents, wherever located within India or outside, other than in the ordinary course of business;

(xi) Pass ex-parte orders in terms of the prayers above.”

19. On 19.02.2014, an *ex parte* interim order was passed by the learned Single Judge in terms of the above-mentioned prayers (i) and (vi) till the next date, i.e., 19.03.2014.

20. On 07.03.2014, KPCL and the other respondents to OMP No.218/2014 filed applications being I.As.No.4493 and 4494 of 2014 to vacate the order dated 19.02.2014. The said applications were heard by the learned Single Judge on 31.03.2014 and by the order under appeal the following directions were issued:

- i. All the respondents are directed to file their respective affidavits disclosing the information as sought in para 22 except the information sought for in sub-para ‘E’ & ‘H’ for the time being. The said

respondents should also disclose the information sought in para (ix) of the prayer Clause. The affidavits be filed within two weeks.

- ii. All the respondents are restrained in terms of prayer (x) of the petition till the next date.
- iii. The injunction granted vide order dated 19.02.2014 shall continue to operate till the next date.

List on 01.05.2014.”

21. Thus, by virtue of the order under appeal, the reliefs in terms of prayers (i), (vi), (ix) & (x) in OMP No.218/2014 have been granted.

22. Aggrieved by the above said order the present appeals are filed in which an interim order was passed on 29.04.2014 suspending the order under appeal subject to the condition of the appellants depositing/furnishing appropriate security for a sum of Rs.50 crores before 01.05.2014.

23. Against the said order, respondent No.1 preferred Special Leave Petitions before the Supreme Court and the same were disposed of by order dated 02.05.2014 which reads as under:-

“In our opinion, since the matter has been fixed on 12th May, 2014, it is not necessary for us to examine the issue raised herein. However, considering the questions raised, we deem it appropriate to request the High Court to take up the matter for final disposal on 5th May, 2014.”

24. In pursuance thereof, we have taken up the hearing of the appeals and elaborate submissions have been made on behalf of both the parties on various issues.

Preliminary Objection:-

25. Before advertng to the contentions advanced on merits, it is necessary for us to consider the preliminary objection raised on behalf of the respondent No.1 that no relief can be granted to the appellants since they failed to challenge the order dated 19.02.2014 passed by the learned Single Judge. In other words, the contention is that by the order under appeal dated 31.03.2014, the learned Single Judge had merely extended the earlier order granted on 19.12.2014 and, therefore, without challenging the order dated 19.02.2014, the appellants cannot maintain the appeals only against the subsequent order dated 31.03.2014.

26. Per contra, it is contended by the learned Senior Counsel appearing for the appellants that the order dated 19.02.2014 which is an *ex parte* order merged with the subsequent order dated 31.03.2014 passed after hearing both the parties and as such there is no need to challenge the order dated 19.02.2014 by preferring a separate appeal.

27. Admittedly, the order dated 19.02.2014 is an *ex parte* order. By that order the respondents/appellants herein were restrained in terms of prayers (i) and (vi) of the petition till the next date of hearing, i.e., 31.03.2014. On 31.03.2014, elaborate arguments were advanced by both the parties after completion of pleadings and the learned Single Judge while continuing the injunction granted earlier on 19.02.2014 further granted the reliefs in terms of prayers (ix) and (x) of the petition. It is clear from the order under appeal dated 31.03.2014 that the interim relief granted on 19.02.2014 in fact was enlarged and altogether four prayers, namely, prayers (i), (vi), (ix) and (x) of the petition were allowed. It is also relevant to note that the order dated

19.02.2014 was in fact in operation only till the next date of hearing, i.e., 31.03.2014 and on 31.03.2014 while reiterating the said order, further reliefs were granted as mentioned above. The appellants in the instant appeals are challenging all the directions issued by the learned Single Judge in terms of prayers (i), (vi), (ix) and (x). Therefore, we find force in the submission of the learned Senior Counsel for the appellants that the earlier order dated 19.02.2014 stood merged with the order under appeal dated 31.03.2014. A perusal of the order dated 31.03.2014 wherein the learned Single Judge extended the earlier order by assigning fresh reasons, shows that it is a comprehensive and composite order granting the reliefs in terms of prayers (i), (vi), (ix) and (x). Hence there is no substance in the objection raised by the respondents as to the maintainability of the appeals on the ground that the appellants failed to challenge the earlier order dated 19.02.2014.

28. So far as the merits of the case are concerned, the contentions advanced on behalf of the parties may be summed up as under:

Contentions on behalf of the appellant in FAO (OS) 203/2014:

(i) Sh. Arvind Nigam, the learned Senior Counsel appearing for the appellants at the outset has brought to the notice of this Court that after the order under 03.04.2014 in terms of Clause 14.6 calling upon the appellants to convert the preference shares held by it into equity shares and thereafter on 25.04.2014 the respondent No.1 sought for reference of the disputes to arbitration in terms of Clause 22.2 of the Investment Agreement.

(ii) Pointing out that there is absolutely no pleading on record with regard to the 1st respondent's request for conversion of shares, the same being a

subsequent event, the learned Senior Counsel submitted that the only remedy available to the respondent No.1 in the light of the subsequent developments is to file a fresh petition under Section 9 of the Act.

(iii) Without prejudice to the above contentions, it is further contended by the learned Senior Counsel that by issuing the conversion notice dated 03.04.2014 the respondent No.1 elected to pursue the relief seeking 26% shareholding and thus, waived its right to claim the alleged put consideration of Rs.1588 crores. By such election, according to the learned Senior Counsel, the entire *substratum* of the petition under Section 9 of the Act stands changed and therefore, the order under appeal shall be set aside on the said ground alone.

(iv) While submitting that as per the scheme of the Investment Agreement the right of conversion under Clause 14.6 would accrue only upon the failure of KPCL in making the payment of put consideration under Clause 14.1, it is contended by the learned Senior Counsel that the rights available to the 1st respondent under Clause 14.1 and Clause 14.6 are mutually exclusive of each other and therefore it is not open to the 1st respondent to maintain the recovery action under Clause 14.1 after seeking conversion under Clause 14.6 of the Investment Agreement.

(v) It is further contended that the learned Single Judge ought not to have granted any relief to the respondent No.1 since there was neither a plea in the petition under Section 9 of the Act nor any other material was produced by the respondent No.1 to establish that the appellants intended to obstruct or delay the execution of any decree that may be passed and that the appellants were about to dispose of their properties to this end.

(vi) Placing reliance upon *Adhunik Steels Ltd. Vs. Orissa Mangnese & Minerals (P) Ltd.*; (2007) 7 SCC 125, *Mala Kumar Engineers Pvt. Ltd. (MKE) Vs. B. Seeniah and Co. (Projects) Ltd. (BSCAC)*; 117 (2005) DLT 183 and *Nimbus Communications Ltd. Vs. Board of Control For Cricket In India & Anr.* 2012 (4) Arb. L.R. 113 and *Trehan Promoters & Builders Pvt. Ltd. Vs. Welldone Technology Parks Development Pvt. Ltd.* 2010 (3) R.A.J. 332, wherein it is held that the grant of an interim prohibitory injunction or an interim mandatory injunction under Section 9 of the Act is governed by the basic principles contained in Order 39 Rules 1 & 2 of Civil Procedure Code, 1908 (C.P.C.), the learned Senior Counsel would further contend that the learned Single Judge exceeded the jurisdiction conferred under Section 9 of the Act.

(vii) It is further contended that the order under appeal is erroneous in the absence of any pleadings whatsoever mainly for two reasons that; (a) the appellants would be unable to repay any amount found due to the respondent No.1; and (b) the appellants were taking steps to defeat or render ineffective any relief or award that may be granted against them in the arbitration proceedings.

(viii) It is submitted that without requiring the respondent No.1 to first establish the above, the learned Single Judge erred in passing the orders of restraint akin to an attachment under Order 38 Rule 5 of C.P.C. In support of the said submission, the learned Senior Counsel relied upon *Raman Tech. & Process Engg. Co. & Anr. Vs. Solanki Traders* (2008) 2 SCC 302, *Rashmi Cement Ltd. Vs. Trafigura Beheer B.V.* AIR 2011 Calcutta 37, *Sterling and Wilson Electricals Pvt. Ltd. Vs. Silicon Graphics Systems*

(India) Pvt. Ltd.; 159 (2009) DLT 634 and Uppal Eng. Co. (P) Ltd. Vs. Cimmco Birla Ltd.; 121 (2005) DLT 539.

(ix) It is also contended that the direction in the order under appeal to disclose on affidavit of the details sought for in prayer (ix) is unwarranted and unjustified since the alleged liability of the appellants against the 1st respondent is yet to be determined. It is contended that the impugned direction on the basis of on un-adjudicated claim would vitally impinge on the commercial interests and privacy of the appellants.

Contentions on behalf of the appellant in FAO (OS) 204/2014:

(i) It is submitted by Sh.A.S.Chandhiok, the learned Senior Counsel that the Put Option exercised by the respondent No.1 could not be honoured not only on account of the decision of RBI, which is the final regulatory authority with respect to all foreign investments in India, but also because the Put Option Clause under the Investment Agreement is contrary to law.

(ii) It is also pointed out by the learned Senior Counsel that the inoperability of an exit Clause with an assured return was reiterated in the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (17th Amendment) Regulations, 2013, dated 12.11.2013.

(iii) Thus, it is sought to be contended by the learned Senior Counsel that the validity or the binding effect of the decision of RBI with regard to the Put Option Clause being incapable of resolution by arbitration in terms of Clause 22 of Investment Agreement, the claim of the respondent No.1 under Section 9 of the Act for interim relief ought not to have been entertained.

(iv) It is further contended that the subsequent claim of the respondent No.1 for conversion of preference shares into equity shares under Clause 14.6 on the basis of the conversion notice dated 03.04.2014 is impermissible since such conversion can be sought only on the occurrence of a “Buyer default” which means the failure to make payment in full or any part of the put consideration payable to the respondent No.1 on its exercise of the Put Option under Clause 14.1. It is pointed out by the learned Senior Counsel that no buyer default has occurred in terms of the agreement since the non-payment of put consideration was only on account of the decision of RBI.

(v) The further contention is that the claim for conversion made by the respondent No.1 itself is not valid in view of the RBI’s decision that the Put Option provided under Clause 14.1 is in contravention of FEMA regulations. It is submitted that the question of conversion under Clause 14.6 would arise only in the event of KPCL’s failure to make payment of put consideration. The learned Senior Counsel has also pointed out that by the date of conversion notice, the respondent No.1 was admittedly aware of RBI’s decision.

(vi) Placing reliance upon *Life Insurance Corporation of India Vs. Escorts Ltd. & Ors.* (1986) 1 SCC 264 wherein it was held by the Supreme Court that RBI alone is competent to consider the question as to whether the various requirements of the RBI Act, Rules, Directions and Orders have been fulfilled, the learned Senior Counsel contended that the dispute raised by the respondent No.1 which has a direct bearing on the decision of RBI is incapable of resolution by arbitration and consequently no petition can be maintained for interim relief under Section 9 of the Act.

(vii) The learned Senior Counsel has also relied upon ***Mannalal Khetan & Ors. Vs. Kedar Nath Khetan & Ors. (1977) 2 SCC 424*** to substantiate his contention that the contract is void, even without express declaration, if prohibited by a statute.

(viii) It is further contended that Clause 22 of Investment Agreement applies only in relation to any dispute, controversy or claim that arises between the parties out of or in connection with the Investment Agreement which means that the dispute must have a nexus with the contract and must be limited to the confines of the contractual term. Therefore, according to the learned Senior Counsel the dispute sought to be raised by the respondent No.1 by way of arbitration which involves consideration of collateral and contemporaneous documents and validity of statutory regulations cannot be determined in the arbitral proceedings.

(ix) The learned Senior Counsel would contend that without deciding the question whether the dispute raised is capable of determination by the arbitral tribunal, the learned Single Judge ought not to have granted any relief to the respondent No.1 pending the petition under Section 9 of the Act. In support of the said submission, the learned Senior Counsel relied upon ***SBP & Co. Vs. Patel Engineering Ltd. & Anr. (2005) 8 SCC 618*** and a decision of this Court in ***Ashok Kumar Jain & Anr. Vs. SBI Officers Association (Delhi Circle) & Anr. 201 (2013) DLT 433***.

(x) Placing reliance upon ***Trehan Promoters & Builders Pvt. Ltd. Vs. Welldone Technology Parks Development Pvt. Ltd. 2010 (3) R.A.J. 332***, the learned Senior Counsel further submitted that Section 9 of the Act does not envisage the situation where the order passed on a petition under Section

9 itself settles the dispute between the parties. It is submitted that the directions issued in the order under appeal by the learned Single Judge virtually amount to finally disposing of the disputes between the parties and the same is beyond the scope of Section 9 of the Act.

(xi) Placing reliance upon the judgment of this Court dated 09.11.2012 in **FAO(OS) No. 538/2012 titled *CPI India Limited Vs. B.P.T.P. Limited & Ors.***, it is further contended that the impugned directions by way of an interim order pending the petition under Section 9 of the Act which would have a grave and significant impact on the interests and business of the appellants are impermissible under law.

Contentions on behalf of the appellant in FAO (OS) 205/2014:

(i) It is submitted by Sh.Akhil Sibal, the learned counsel appearing for the appellant that the Business Plan has become obsolete and irrelevant for the parties on account of substantially altered business circumstances. It is also pointed out that the respondent No.1 never raised any objection since June, 2013 despite being aware of the deviation in the long term borrowing figure but for the first time, by letter dated 31.10.2013 it was alleged that the debt being availed by KPCL is a significant deviation from the Business Plan and therefore requires its consent. It is contended by the learned counsel that this objection which has been raised only on account of disputes that arose between the parties is not *bonafide* and ought not to have been accepted by the learned Single Judge.

(ii) While submitting that the consent of the respondent No.1 is required under the Investment Agreement only when there is a significant deviation

from the figure of senior debt under the Business Plan, the learned counsel, further contended that the learned Single Judge has erroneously held that any and all debts availed by the company shall require the consent of the 1st respondent.

(iii) It is also contended that the learned Single Judge ought not to have ignored the submissions made on behalf of the appellants that the Business Plan had been abandoned by the parties on account of altered business circumstances which the respondent No.1 was very well aware and had never chosen to object; that the figures of long term borrowing and the senior debt are uncomparable; that the senior debt holds a specific and particular connotation in law and that there has been no significant deviation from the Business Plan.

(iv) The further contention is that the finding of the learned Single Judge that the consent of the 1st respondent would be required for unsecured debts as well is patently erroneous.

(v) It is also contended that grant of immediate relief pending the petition under Section 9 of the Act is not at all warranted in the present case in view of the admitted fact that there was a long delay on the part of the respondent No.1 in raising an objection with regard to deviation in the Business Plan.

(vi) It is also contended that the allegation of siphoning of funds to sister concern (NECL) is not substantiated by the respondent No.1. Pointing out that in fact the respondent No.1 itself is a shareholder of NECL holding 11.76% of the share capital of NECL, it is contended by the learned counsel

that the suppression of the said fact by the respondent No.1 disentitles him to claim any relief.

Contentions on behalf of the respondent No.1:

(i) On the other hand, it is contended by Sh.Rajiv Nayyar, learned Senior Counsel appearing for the respondent No.1 that having regard to the admitted fact that the appellants failed to pay the Put Consideration, the respondent No.1 is entitled to conversion of its preference shares to equity shares representing 26% equity share capital of KPCL in which event KPCL cannot pass any special resolution without the consent of respondent No.1. KPCL has also failed to disclose certain information to the respondent No.1 as required under Clause 9.1 of the Investment Agreement and therefore the impugned directions were rightly issued by the learned Single Judge.

(ii) Pointing out that as per Clause 10.1 read with Item-(xiii) of Schedule-IV of the Investment Agreement prior written consent of respondent No.1 is essential for any significant deviation from the Business Plan (Schedule-V to the Investment Agreement) on the basis of which the respondent No.1 made its investment, the learned Senior Counsel contended that KPCL failed to seek consent of the respondent No.1 for obtaining the proposed additional debt of Rs.1,000 crores.

(iii) It is explained by the learned Senior Counsel that until the financial year 2012-13, KPCL adhered to the Business Plan and did not exceed its debts beyond the ceilings stipulated in the Business Plan. However, on 10.6.2013 it was proposed by KPCL to have aggregate long term borrowings of Rs.5196 crores for FY 2013-14 whereas the senior debt of

KPCL is capped at Rs.4268.6 crores in the Business Plan for FY 2013-14. Though this amounts to significant deviation, KPCL not only failed to seek consent of the respondent No.1 nor was there any response to the respondent No.1's letters requesting for clarifications on the rationale for such debts.

(iv) The further contention is that the allegation of siphoning of funds has been amply established in the light of the admitted facts that Navayuga Engineering Company Limited (NECL) which is a company owned and controlled by the same promoter group i.e., Mr. C.V. Rao & family, would be the direct beneficiary of additional capital expenditure since construction activities for Krishnapatnam Port have been outsourced to NECL and as per the own version of the KPCL Rs.960 crores of debt has been drawn down in FY 2013-14 for the purpose of EPC contract payments to NECL.

(v) With regard to the contention of the appellants that respondent No.1's claim for conversion of shareholding is impermissible, the learned Senior Counsel contended that Clause 14.6 entitles the respondent No.1 to convert the preference shares into equity shares ***without prejudice to any other right of the respondent No.1***. It is also submitted that since the put consideration was admittedly not received by the respondent No.1 as provided under Clause 14.4, without prejudice to its other rights, conversion notice dated 3.4.2014 was rightly issued.

(vi) It is also submitted that Clause 22.1 confers wide jurisdiction on the arbitral tribunal to decide any dispute in connection with the Agreement including the breach, termination or invalidity thereof and therefore, the contention that the dispute raised by the respondent No.1 is incapable of determination by arbitral tribunal is untenable.

(vii) Placing reliance upon a decision of this Court in ***CPI India Limited Vs. BPTP Ltd.***, it is further contended that the legality of the Put Option Clause can be determined by the arbitral tribunal since Clause 22.1 of the Investment Agreement gives the arbitral tribunal the power to decide all issues “in connection with the agreement including the breach, termination and invalidity thereof”. In that regard, the learned Senior Counsel has also relied upon ***Clearwater Capital Partners (Cyprus) Ltd. Vs. Satyajit Singh Majithia & Ors.*** 189 (2012) DLT 362, ***Lalea Trading Ltd. Vs. Anant Raj Projects Pvt. Ltd. & Anr.*** (198) 2013 DLT 339 and ***Modi Rubber Ltd. Vs. Guardian International Corp.*** 141 (2007) DLT 822.

(viii) It is also contended that Put Option continues to remain valid even after the new RBI circular dated 09.01.2014 since the Circular has not held the existing contracts to be void but it merely requires compliance with the conditions specified therein to qualify as FDI compliant.

(ix) The further contention is that Clause 19.12 provides for severance of invalid part of the agreement to give effect to the rest of the agreement and therefore, that part of Clause 14.1 which caps the return at 18% can be severed and the remaining Clause remains valid and enforceable. To substantiate the said contention, the learned counsel relied upon ***Shin Satellite Public Co. Ltd. Vs. Jain Studios Ltd.*** (2006) 2 SCC 628 wherein the Supreme Court explained the applicability of the doctrine of severability and held on facts that the objectionable part is really severable as it is independent of the dispute being referred to and resolved by an arbitrator and Court does not need to rewrite contract or do something that is not contemplated by parties.

(x) It is also contended that Put Option is a deemed right and therefore even if the respondent No.1 had not issued the put notice on 28.9.2013, the respondent No.1 would have been deemed to have been issued put notice on 30.09.2013. Hence, according to the learned Senior Counsel the question of election does not arise.

(xi) It is further contended that bar on mining of Iron ore and deferred commissioning of coal-based power plants around the ports does not amount to a *force majeure* event which was separately dealt with in Clause 14.5 and even otherwise the occurrence of a *force majeure* event cannot be considered as an exemption from the obligations of KPCL under Clause 10.1 of the Investment Agreement.

(xii) In support of his submission that the discretion exercised by the learned Single Judge warrants no interference on appeal, the learned Senior Counsel relied upon ***Wander Ltd. & Anr. Vs. Antox India P. Ltd. (1990) Supp. SCC 727*** wherein it was held that the appellate court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions.

Consideration of the Contentions:

29. The execution of the Investment Agreement between the parties is not in dispute. Admittedly Clause 14.1 provides for a Put Option Clause and

Clause 14.6 provides for conversion of preference shares into equity shares in the event of non-payment of put consideration in full or any part thereof. It is also not in dispute that the 1st respondent invested Rs.803.50 crores and acquired compulsorily convertible preference shares worth Rs.700 crores and equity shares worth Rs.103.50 crores. The 1st respondent exercised the Put Option on 28.09.2013 and called upon the appellants to purchase/buy back its shareholdings for Rs.1588,18,15,237.60 computed as per the terms of the Investment Agreement. Since the put consideration was not paid to the respondent No.1, it issued a dispute notice to the appellants on 28.01.2014. Alleging that the disputes remained unresolved, the respondent No.1 on 17.02.2014 filed OMP No.218/2014 under Section 9 of the Act for the interim reliefs to protect and safeguard its interest pending resolution of the disputes through arbitration.

30. In OMP No.218/2014 the 1st respondent prayed for altogether eleven (xi) reliefs which have been extracted in para-18 *supra*.

31. The learned Single Judge passed an *ex parte* order on 19.2.2014 restraining the appellants herein in terms of prayers (i) & (vi) of the petition holding that a *prima facie* case of breach of agreement dated 19.2.2009 has been made out by the petitioner/respondent No.1 herein.

32. By order dated 31.03.2014 i.e. the order under challenge before us, the learned Single Judge continued the reliefs in terms of prayers (i) & (vi) and in addition to that granted the reliefs in terms of prayers (ix) & (x) thereby directing all the respondents/appellants herein to file their respective affidavits disclosing the information as sought in para-22 of the petition except the information sought for in sub-paras (e) & (h) and further to

disclose the information sought in para (ix) of the prayer Clause within two weeks. That apart, the respondents / appellants herein are restrained from selling / transferring any of their properties in terms of prayer (x).

33. For ready reference, the prayers (i), (vi), (ix) & (x) that have been granted by the learned Single Judge are reproduced hereunder:

(i) Directing the respondents to ensure and procure that the company does not avail of any additional debt in any form, or enter into any agreements to avail any debt, in breach of Clause 10.1 read with Schedule 4 and Schedule 5 of the Investment Agreement, without the specific consent of the petitioner;

(vi) Restraining the respondents from amending or taking any action to amend the articles of association of the Company in breach of Clause 10.1 read with Item (v) of Schedule 4 of the petitioner;

(ix) Directing the respondents to disclose on affidavit, details of all their respective interests (legal, beneficial and/or economic) in movable and/or immovable properties (including but not limited to monies lying in bank accounts, land, properties encumbered/charged to third parties), whether such properties may be located within India or outside and whether held by them or by a third party (such as a trustee, nominee or fiduciary) for their benefit, on their behalf or at their direction;

(x) Restraining the respondents from selling/transferring/ alienating/ disposing and/or encumbering their interests (legal, beneficial and/or economic) in any and all properties of the Respondents, wherever located within India or outside, other than in the ordinary course of business;

34. As we could see, the above said Prayers (i), (iv), (ix) and (x) have been issued recording *prima facie* satisfaction as under:

“(18) Prima facie it appears that on account of the investments made by the petitioner, the respondents agreed to take the consent of the petitioner before undertaking further liabilities over and above the figures projected in the Business Plan. From the communication of respondent No.1 dated 28.12.2013 it appears that the petitioner was not informed of the further liabilities already undertaken by the respondent No.1 before the issuance of the said letter.....

(19) The incurring of additional liabilities – be they secured debts/senior debts or unsecured debts – as owed to NECL; towards foreign exchange variation; Aditya Birla and, Phase-2 subordinate debts, prima facie would impact the petitioner’s ability to realize the put amount. Therefore, prima facie, it appears that the petitioner’s consent could not be limited only in respect of “senior debts”. The petitioner’s consent, prima facie, would be required for taking unsecured debts as well, since the petitioner also would stand in the queue with unsecured creditors of respondent No.1, and would not enjoy any priority in respect of the put amount, if, eventually, the petitioner is required to legally recover the said amount from respondent No.1. If the submission of the respondents were to be accepted, it would mean that the respondents can incur unsecured debts to any extent without the consent of the petitioner, even though the same directly and adversely impinges on the petitioner’s chances of recovering the put amount. Pertinently, the stand now taken by the respondents was not even taken by them in their response dated 28.12.2013. Therefore, prima facie, the respondents have acted in breach of the agreement between the parties and the petitioner’s rights need greater protection than already granted. The submission that the petitioner has valued the shares of respondent No.1 at Rs.1618/- per share is neither here nor there. The said valuation is not accepted by the respondents. The same was made, apparently without having the correct figures as the full liabilities incurred by the

respondents were not made known to the petitioner. The respondent itself states that the amount due as Put Option is to the tune of Rs.1500 Crores. The said amount is likely to rise in time to come, unless paid. Reliance placed on the communication of the RBI, prima-facie, is of no avail since the RBI itself had stated that in case the Put Option is not removed, respondent No.1 should unwind the transaction which could only mean that the amount invested by the petitioner would need to be refunded with a reasonable return.

(20) The submission that the other shareholders, i.e. respondents No.2 to 11 should not be enjoined in terms of prayer (x) even till the next date has no merit. Respondents No.2 to 11 have also jointly undertaken to pay the put amount to the petitioner. The petitioner would be left high & dry in case the said respondents are permitted to dissipate their assets in the meantime. The said respondents cannot be permitted to present a fait accompli to the petitioner in the event of the petitioner's succeeding in enforcing the Put Option which, prima facie, the petitioner is entitled to enforce."

35. It is no doubt true that the order under appeal is an interim order and the petition filed under Section 9 of the Act is still pending before the learned Single Judge. However, the contention on behalf of the appellants is that the order under appeal which has the characteristics and trappings of finality, affects the vital and valuable rights of the appellants and works serious injustice to them. Therefore, it is submitted by the learned counsel for the appellants that it is essential to examine whether the order under appeal stands the tests laid down by the Courts for grant of interim relief under Section 9 of the Act.

36. Having carefully gone through the order under appeal and the other material available on record, we find force in the aforesaid submission made

by the learned counsel for the appellants. However, it is made clear that we are not going into the correctness of the findings recorded by the learned Single Judge, but our endeavour is only to examine whether the order under appeal is in conformity with the standards laid down by the Supreme Court so as to ensure that the impugned directions do not result in irreparable loss to any of the parties.

Legal Position:

37. Section 9 of the Arbitration & Conciliation Act, 1996 vests power on a Court to pass necessary orders and/or interim injunction for preservation, interim custody or sale of any goods which are the subject-matter of a reference and/or for securing the amount in dispute in the arbitration.

38. The law is well-settled that the discretion of the Court to grant interim relief under Section 9 of the Act has to be exercised sparingly and only in appropriate cases and the Courts should be extremely cautious in granting the interim relief. As held in *Olex Focas Pvt. Ltd. & Anr. Vs. Skoda Export Company Ltd. & Anr.*; AIR 2000 Delhi 161 the power to pass orders with regard to interim measures should always be exercised by Court for the purpose of safeguarding the interest of the parties to the arbitration proceeding so that the award is not frustrated. The Court's discretion ought to be exercised in those exceptional cases when there is adequate material on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous, by frittering away the properties or funds either before or during the pendency of arbitration

proceedings or even during the interregnum period from the date of award and its execution. It is also a well settled principle of law that unless and until the petitioner succeeds in bringing the nature of dispute and differences within the ambit of agreement no relief can be granted under the provisions of Section 9 of the Act (See *Smt. Baby Arya vs. Delhi Vidyut Board: AIR 2002 Delhi 50*).

39. In *Adhunik Steels Limited's* case (supra), the Supreme Court explained:

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

ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

XXX XXX XXX

17. In *Nepa Limited Vs. Manoj Kumar Agrawal* [AIR 1999 MP 57], a learned Judge of the Madhya Pradesh High Court has suggested that when moved under Section 9 of the Act for interim protection, the provisions of the Specific Relief Act cannot be made applicable since in taking interim measures under Section 9 of the Act, the court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration Clause and the necessity of taking interim measures for issuing necessary directions or orders. When the grant of relief by way of injunction is, in general, governed by the Specific Relief Act, and Section 9 of the Act provides for an approach to the court for an interim injunction, we wonder how the relevant provisions of the Specific Relief Act can be kept out of consideration. For, the grant of that interim injunction has necessarily to be based on the principles governing its grant emanating out of the relevant provisions of the Specific Relief Act and the law bearing on the subject. Under Section 28 of the Act of 1996, even the arbitral tribunal is enjoined to decide the dispute submitted to it, in accordance with the substantive law for the time being in force in India, if it is not an international commercial arbitration. So, it cannot certainly be inferred that Section 9 keeps out the substantive law relating to interim reliefs.

XXX XXX XXX

21 Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case.”

40. In *Mala Kumar Engineers Pvt. Ltd. (MKE) Vs. B. Seenaiah and Co. (Projects) Ltd. (BSCPL) 117 (2005) DLT 183* it is held as under:-

“20. Though language of Section 9 of the Arbitration and Conciliation Act, 1996 does not expressly state that as a condition precedent for passing an order under Section 9, it has to be established that there is a danger of the respondent defeating, delaying or obstructing the execution of the award, the issue is no longer rest integra.

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

‘11. It is true that the said Arbitration Act, 1940 stands repealed by the Act of 1996 and the provisions contained in the Code of Civil Procedure are not applicable to the proceedings under the Act, still, in my opinion, in the absence of guidelines how the power for grant of relief under Section 9(ii)(b) is to be exercised by the Court, the principles underlying the aforesaid sections are to be applied. It is only on adequate material being supplied by the petitioner that the Court can form opinion that unless the jurisdiction is exercised under the said Section 9(ii) there is real danger of the respondent defeating, delaying or obstructing the execution of the award made against it. On the basis of the only ground of protection of financial interest of the petitioner taken in para 6 of the petition, the respondent a Govt. of India Undertaking cannot be legally directed to furnish security for the amount of US\$ 88,250 together with interest @ 9% p.a. Petition thus deserved to be dismissed."

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

41. In ***Nimbus Communications Limited vs . Board of Control for Cricket in India and Anr*** 2012 (4) Arb. L.R. 113 the Bombay High Court held as under:-

“22. The judgment of the Supreme Court in Adhunik Steels has noted the earlier decision in Arvind Constructions which holds that since Section 9 is a power which is conferred under a special statute, but which is exercisable

by an ordinary court without laying down a special condition for the exercise of the power or a special procedure, the general rules of procedure of the court would apply. Consequently, where an injunction is sought under Section 9 the power of the Court to grant that injunction cannot be exercised independent of the principles which have been laid down to govern the grant of interim injunctions particularly in the context of the Special Relief Act 1963. The Court, consequently would be obligated to consider as to whether there exists a prima facie case, the balance of convenience and irreparable injury in deciding whether it would be just and convenient to grant an order of injunction. Section 9 specifically provides in sub-Clause (d) of Clause (ii) for the grant of an interim injunction or the appointment of a receiver. As regards sub-Clause (b) of Clause (ii) the interim measure of protection is to secure the amount in dispute in the arbitration. The underlying object of Order 38 Rule 5 is to confer upon the Court an enabling power to require a defendant to provide security of an extent and value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should be furnished is, however, pre-conditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be passed against him. In view of the decisions of the Supreme Court both in Arvind Constructions and Adhunik Steels, it would not be possible to subscribe to the position that the power to grant an interim measure of protection under Section 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure 1908 or that the exercise of that power is untrammelled by the Code. The basic principle which emerges from both the judgments of the Supreme Court is that though the Arbitration and Conciliation Act 1996 is a special statute, Section 9 does not either attach a special condition for the exercise of the

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

23. In a recent judgment of a learned Single Judge of the Delhi High Court in *Steel Authority of India Ltd. v. AMCIPTY Ltd.* O.M.P. 417/2011 decided on 1 September 2011, the judgment of the Division Bench of this Court in *National Shipping Company* was relied upon. The Delhi High Court observed that the provisions of Order 38, Rule 5 would serve as a guiding principle for the exercise of the jurisdiction while dealing with a petition under Section 9 requiring the respondent to furnish security and the basic consideration is that the Court should be satisfied

that the furnishing of security is essential to safeguard the interest of the petitioner.

24. A close reading of the judgment of the Supreme Court in *Adhunik Steels* would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under Section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b).”

42. In the light of the legal position noticed above, it is clear that while exercising its jurisdiction under Section 9 of the Act the Court cannot ignore the underlying principles which govern the analogous power conferred

under Order 39 Rules 1 and 2 and Order 38 Rule 5 of CPC. It is also necessary for the Court to satisfy itself that there exists a valid arbitration agreement between the parties and that a dispute which is referable to the arbitral tribunal has arisen. Further, as is evident from the language of Section 9 itself, an order can be made under the said provision for an interim measure of protection only in respect of the matters specified in Section 9(ii)(a) to (e). The underlying object of all the Clauses (a) to (e) of Section 9(ii) is to preserve the property which is the subject matter of dispute till the arbitral tribunal decides the dispute. The scope of relief under Section 9 therefore, cannot be extended to directing specific performance of the contract itself, though the Court must have due regard to the underlying purpose of the conferment of the power upon the Court i.e. to promote the efficacy of arbitration as a form of dispute resolution.

43. Coming to the facts of the case on hand, the disputes raised by the respondent No.1 primarily relate to (i) breach of terms and conditions of the Investment Agreement on account of the alleged action of KPCL in proposing to incur excess debt of Rs.1000 Crores for further capital expenditure without the consent of respondent No.1, (ii) alleged non-disclosure of information sought by the respondent No.1 and (iii) alleged failure to make the payment of put consideration.

44. To be more precise, para 5 of the notice dated 28.01.2014 issued by the respondent No.1 wherein the disputes are summed up is reproduced hereunder:

“(i) the disregard for the Investor’s contractual rights and basic corporate governance norms;

- (ii) the illegal, mala fide and unfair actions of the Company and the Shareholder Parties, all calculated to unilaterally undermine the Investor's rights with respect to its investment in the Company;
- (iii) numerous and repeated breaches of the Investment Agreement and the Articles of Association;
- (iv) violation of the Investor's statutory rights; and
- (v) the stated intent of not performing the obligations in respect of the Put Option , in the manner required under the Investment Agreement."

45. A perusal of the reliefs claimed by the respondent No.1 in notice dated 25.04.2014 seeking reference for arbitration further clarifies the nature of the disputes sought to be resolved through arbitration and the same is extracted hereunder for ready reference:-

“VII. RELIEFS

The Claimant seeks:

- (i) to enforce its information rights under Clause 9 of the Investment Agreement on a continuing basis;
- (ii) to enforce its governance rights under Clause 10 of the Investment Agreement;
- (iii) to enforce its exit rights under Clause 14 of the Investment Agreement;
- (iv) to enforce its right to convert the Preference Shares into equity shares of the Company, which, together with equity shares already held by the Claimant, would represent 26% of the fully diluted equity share capital of the Company in accordance with Clause 14.6 of the Investment Agreement;

(v) to seek appropriate damages for various breaches of the Investment Agreement, including, without limitation, damages pursuant to Clauses 5.5(a) and 5.5(c) in connection with the additional indebtedness incurred by the Company in breach of the Investment Agreement;

(vi) an award directing the Respondents to pay the Claimant's legal and other costs in relation to these arbitration proceedings (including, the sums covered by the advance costs, including the administrative charges of the LCIA and the Arbitral Tribunal's fee);

(vii) appropriate interim reliefs to protect the Claimant's interests pending the conclusion of the arbitral proceedings; and

(viii) such further or other relief as may be necessary.”

46. Even before making the request for reference of disputes for arbitration, the respondent No.1 filed OMP No.208/2014 under Section 9 of the Act and in paras 33 & 34 of the said petition, the need for grant for immediate relief has been mentioned as under:

“33. It is submitted that the Respondents have been engaged in a concerted plan to cause prejudice to the Petitioner through illegal and *mala fide* actions. The proposal to avail large amounts of excess debt without the Petitioner's consent and without any clear rationale or explanation, the adoption of the audited financial statements at a purported annual general meeting where the Petitioner was deliberately excluded, the evasive tactics employed by the Respondents to not provide information and clarifications requested by the Petitioner, and the refusal to honor the Petitioner's rights under the Investment Agreement, all consistently lead to a legitimate and reasonable apprehension that the affairs of the Company are being conducted to the detriment of the Petitioner. The

Petitioner is aware of instances where the promoter group has deliberately and wilfully defaulted on its contractual obligations and assurances to investors, and the Petitioner craves leave to refer to specific facts and documents to evidence this before the Hon'ble Court.

34. In view of the consistent breach of its contractual rights and in view of the imminent risk of injury to its interest, the Petitioner is constrained to approach this Hon'ble Court under section 9 of the Arbitration and Conciliation Act, 1996, and seek urgent orders to protect its interests under the Investment Agreement. The Petitioner has approached this Hon'ble court as a last resort. The Petitioner has not been provided with information which has been requested by the Petitioner since June 2013 until date. In these circumstances, the Petitioner has been constrained to issue the Dispute Notice on 28 January 2014. The Petitioner apprehends that the Respondents may take actions which will diminish the value of the Company and prejudice the valuable rights of the Petitioners as envisaged in the Investment Agreement and has accordingly approached this Hon'ble court for urgent interim orders.”

47. As noticed above, the order under appeal came to be passed by way of an interim order pending OMP No.218/2014 restraining the appellants herein from availing any additional debt without the specific consent of the respondent No.1 and also restraining them from selling/transferring/alienating their interest in any of their properties.

48. Apparently, the reliefs so granted by the learned Single Judge are based on the prima facie satisfaction that the respondent No.1 is entitled to realise the put consideration.

49. Since, we do not propose to go into the correctness of the *prima facie* satisfaction recorded by the learned Single Judge, the only question that requires consideration by us is whether on the basis of the averments in OMP No.218/2014 and the other material available on record the injunction as granted by the learned Single Judge is warranted by way of an interim order pending the petition under Section 9 of the Act.

50. We may at the outset point out that the reliefs granted by the order under appeal are in the nature of both prohibitory injunction and attachment before judgment. It is no doubt true that the power of the Court under Section 9 of the Act is wide enough to grant such reliefs, however as held by the Courts in the decisions noticed above, the Court is obligated to consider not only the existence of *prima facie* case but it is also necessary to keep in mind the balance of convenience and irreparable injury in deciding whether it would be just and convenient to grant the reliefs.

51. Further, where Section 9 of the Act is invoked to secure the amount in dispute in arbitration, like the case on hand, it is also necessary for the Court to satisfy itself that the assets which are the subject matter of arbitration, are about to be alienated or removed beyond the limits of the court with an intent to obstruct or delay execution of the award. An order restraining the opposite party from dealing with his properties being drastic in nature, grant of such relief has necessarily to be based on the principles governing Order 38 Rule 5 CPC and before passing such an order the Court has to ensure that a specific case is made out that the party against whom such an order is proposed to be made is attempting to remove or dispose off the assets with the intention of defeating the decree/award that may be passed.

52. In this context, it would be appropriate to notice the following principles laid down by the Supreme Court in ***Raman Tech. and Process Engg. Co. and Anr. vs. Solanki Traders (2008) 2 SCC 302*** with regard to exercise of power under Order 38 Rule 5 of CPC:

“4. The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words 'to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for out of court settlements, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bonafide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 3 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment (See - *Prem Raj Mundra v. Md. Maneck Gazi* AIR 1951 Cal 156, for a clear summary of the principles.)”

Conclusion:

53. Apparently, the order under appeal proceeds on an assumption that the put amount is due and payable to the respondent No.1. It may be pointed out that the claim of Rs.1588 Crores made by the respondent No.1 towards

put consideration comprises the initial investment amount of Rs.803.5 Crores and an amount of Rs.785 Crores towards the assured return on the initial investment amount of Rs.803.5 Crores. The said claim has been contested by the appellants on various grounds including the decision of RBI on the basis of the amended Regulations under FEMA. The specific case of the appellants is that the claim of the first respondent being a matter to be considered by the arbitral Tribunal, no protection by way of interim measure can be granted under Section 9 of the Act unless it is established that the appellants are attempting to remove or dispose off the assets with the intention of defeating the award that may be passed by the arbitral Tribunal.

54. On a careful perusal of the order under appeal, we found that the learned Single Judge has not gone into the question whether there is a danger of defeating, delaying or obstructing the execution of the arbitral award by the appellants and whether the facts and circumstances of the case warrant preservation of the property which is the subject matter of the Arbitration Clause under the Investment Agreement. We have also noticed that the conclusion of the learned Single Judge that the appellants cannot be permitted to present a *fait accompli* in the event of the respondent No.1 succeeding in enforcing the Put Option is not based upon either pleadings or any other material to establish the probability of alienation of the assets of the appellants. In the absence of any material to indicate even remotely the intention of the appellants to frustrate the rights of the respondent No.1 to enforce the arbitral award, if any, in their favour we are of the opinion that no prohibitory order is warranted as an interim measure restraining the appellants from dealing with their moveable/immoveable properties. The

mere allegations that KPCL is attempting to avail additional debt without real need and that it is possible that the appellants herein are siphoning funds through unrecognized capital expenditure to benefit their sister concern – NECL apart from being vague and lacking in material particulars, are not sufficient to establish that the appellants are intending to render the entire arbitration proceedings infructuous by frittering away properties or funds of KPCL either before or during the pendency of arbitration proceedings.

55. It may be added that even if a *prima facie* case is made out by the respondent No.1 as to their claim for put amount, the same will not entitle them to seek an interim measure or protection by restraining the appellants from dealing with their assets unless it is also established that the appellants are intending to defeat the right of the respondent No.1 to enforce the arbitral award.

56. We may also add that the learned Single Judge while issuing the impugned orders of prohibitory injunction missed the important aspect of balance of convenience.

57. Having given our careful consideration to the submissions made by the learned counsel for both parties, we find substance in the submission on behalf of the appellants that the impugned orders of prohibitory injunction would not only harm the reputation and goodwill of the appellants, i.e. KPCL and its shareholders, but the same would also cripple KPCL possibly leading to its eventual shutdown. In comparison, the averments made by respondent No.1 indicate that any damage likely to be caused to respondent No.1 by incurring of additional debt by the appellant a company would be only in quantifiable monetary terms. Thus, it appears to us that the balance

of convenience in the present case would be in favour of the appellants as it is the KPCL which faces the threat of imminent shutdown and irreversible harm to its reputation, as opposed to respondent No.1 who only faces a threat of monetary loss, which can be compensated at any stage. Therefore, the loss/damage the respondent No.1 apprehends to suffer cannot be said to be irreversible. On the other hand, the impugned orders of injunction would result in causing huge financial harm and prejudice to the interests of KPCL as well as its shareholders and if ultimately the Arbitral Tribunal disallows the claim of respondent No.1, it would be impossible to undo the same.

58. Yet another aspect which requires to be taken note of is that the respondent No.1 was admittedly aware of KPCL's proposal to raise additional debt on 10.06.2013 itself. However, it was only after seven months i.e. on 17.02.2014 the respondent No.1 invoked the jurisdiction of the Court under Section 9 of the Act. It is pertinent to note that the petition under Section 9 of the Act is absolutely silent about the prejudice if any caused to the respondent No.1 in the interregnum. We are also of the opinion that in the absence of any plea in the petition under Section 9 of the Act as to the probability of alienation of assets of KPCL or its shareholders, the impugned directions are unwarranted and unjustified, particularly by way of an interim order pending disposal of the petition. In fact, the impugned directions in a way amount to allowing the main OMP itself.

59. For the aforesaid reasons, the order under appeal cannot be sustained and the same is accordingly set aside leaving it open to the learned Single Judge to proceed with the main O.M.P. No.218/2014 and to dispose of the same following due process of law.

60. All the appeals are accordingly allowed. There shall be no order as to costs.

CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 1, 2014
kks