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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.864 OF 2015

M/s.Caps & Tabs Trading Company,
Office at "Olive" 35/1G,
Ponneith Road, Opposite
Kavitha Theatre, Kannur – 670 001,
Kerla. ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
"Elder House", Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.847 OF 2015

Vijetha Pharmaceuticals
Office at Sai Lakshmi Venkatesha Nilayam
Door No.1-3-183-40/A/5, Gandhi Nagar
P & T Colony, Hyderabad – 560 080,
Telangana. ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
"Elder House", Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.848 OF 2015

Empee Distributors
80/1, New Timber Yard Layout,
Mysore Road Cross,

Bangalore – 560 026, State - Karnataka ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.850 OF 2015

M/s.P.R. Enterprises,
Office at 150/B,
Arya Kumar Road,
Rajendra Nagar, Patna - 800 016,
Bihar. ….Petitioner

….Versus....
Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.851 OF 2015

M/s.Sindh Pharma Distributors,
Office at 58-B, Green Park,
Opposite Sabzi Mandi,
Niranjanpur, Deharandum,
Uttaranchal. ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.853 OF 2015

M/s.Cheminova,
Office at Prabhu Kripa,
120 S.R. Compound,
Lasudia Mori, Dewas Naka,
Indore, Madhya Pradesh. ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.854 OF 2015

Modern Distributors,
Office at 42-A,
Lal Bahadur Shastri Road,
Allahabad – 211 001,
Uttar Pradesh. ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.855 OF 2015

M/s.Pharma Traders,
Office at 3-A Celler,
S.K. Medicine Centre,
Neptune Tower, Opp. Nehru Bridge,
Asharam Road, Ahmedabad – 380 009,
Gujarat. ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.861 OF 2015

M/s.Sindh Pharma Private Limited,
201-B, Begum Bridge,
Meerut, Uttar Pradesh. ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.1211 OF 2015

M/s.Capital Enterprises,
Office at 87, Kharavela Nagar,
Unit-3, Bhubanswar,
Orissa – 751 001 ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.1212 OF 2015

M/s.Medichem,

Office at Prabhu Kripa,
120 S.R. Compound,
Lasudia Mori, Dewar Naka,
Indore, Madhya Pradesh. ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.1256 OF 2015

M/s.Zeezest Enterprises Private Limited,
Office at Vinayaka Agarbatti Factory,
Opp. Chutia Thana, Chutia,
Ranchi – 834 001, Jharkand. ….Petitioner

….Versus....

Elder Pharmaceuticals Limited.
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.849 OF 2015

M/s.Yamuna Sales.
Office at 35, Havelock Road,
Lucknow – 226 001, Uttar Pradesh ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.856 OF 2015

M/s.Diwakar Enterprises,
Office at “Manoram”,
2 Ambeshwar Colony,
New Sanganer Road,
Jaipur – 302 019,
Rajasthan. ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

WITH
ARBITRATION PETITION NO.860 OF 2015

M/s.Exim Distributors Private Limited,
4B, Dr.Rajendra Road,
Bhawanipur, 2nd Floor,
Kolkata – 700 020,
West Bengal. ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
“Elder House”, Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

AND
ARBITRATION PETITION NO.1209 OF 2015

Sai Uma Agencies,
Office at 1-3/27-3/3,
Muvvalavari Street,
Near Venkateswara Swami Temple,
Quarry Centre, Vidyadharapuram,
Vijayawada – 520 012,

Andhra Pradesh ….Petitioner

….Versus....

Elder Pharmaceuticals Limited,
"Elder House", Plot No.C-9,
Dalia Industrial Estate,
Off Veera Desai Road,
Andheri (West), Mumbai - 400 053. ….Respondent

Mr.A.M. Kulkarni with Mr.Sarthak Diwan for the Petitioner.

Mr.Ali Abbas Delhiwala with Ms.Nidhi Singh i/b Joy Legal Consultant for the Respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 15TH OCTOBER, 2015
PRONOUNCED ON : 29TH OCTOBER, 2015.

JUDGMENT :-

1. By these petitions filed under section 9 of the Arbitration & Conciliation Act, 1996 (for short "Arbitration Act"), the petitioner seeks an order and direction against the respondent to deposit in this Court and/or to secure in any appropriate manner, various amounts mentioned in each of the petition in this Court and seeks injunction against the respondent from creating any third party rights of any nature in any of their assets movable or immovable, until the disputes between the petitioner and the respondent are finally adjudicated upon by the learned arbitrator. By consent of the parties, all the arbitration petitions were heard together and are being disposed of by a common order.

2. Since the facts of all these petitions are almost identical, this Court will summarize the facts in Arbitration Petition No.864 of 2015.

3. The petitioner carries on business as clearing and forwarding agent and provides warehousing and transportation service in respect thereof. On 19th October, 2012, the petitioner entered into a "Clearing and Forwarding Agent Agreement" with the respondent thereby appointing the respondent as an agent in the city of Kerala for warehousing, storing and onward transmission of products manufactured / purchased / marketed by it and any other item which the respondent would deposit with the petitioner for storing from time to time on the terms and conditions set out therein. The said agreement was to be valid till 31st March, 2015 unless earlier determined by the respondent.

4. Under clause 8 of the said agreement, the petitioner as an agent was required to bear certain expenses. Under clause 9 of the said agreement, certain expenses set out therein were to be borne by the respondent. Under clause 10 of the said agreement, it was provided that the petitioner shall be entitled to a commission as and by way of consideration of services to be rendered to the respondent which were to be calculated and payable on monthly basis at the rate provided therein. Under clause 14 of the said agreement the

petitioner was under an obligation to furnish initial advance in the form of bank draft in favour of the respondent for an amount equal to one month average sale. The said security deposit was refundable only after the said agreement would come to an end and full accounts between the petitioner and the respondent was settled. It was provided that no interest shall be paid from the date of termination of the agreement pending settlement of accounts.

5. Clause 17 of the said agreement provides for termination of the said agreement by the respondent. Under clause 18 of the said agreement, it was provided that upon termination of the said agreement, the petitioner shall deliver to the respondent forthwith the products which may then be remaining with it and all other goods and property of the respondent then under its custody or under its control and all books of accounts and other documents and other materials relating to the agency thereby created. Under the said agreement, the arbitration clause provides for settlement of disputes arising out of the said agreement. It is not in dispute that the said agreement came to an end on 31st March, 2015.

6. Learned counsel appearing for the petitioner invited my attention to the letter addressed by the respondent to the petitioner on 15th July, 2014 informing that the account of the petitioner in the books of the respondent showed credit balance of Rs.1,12,00,000/-

as security deposit on 30th June, 2014 and requested the petitioner to confirm the said figure and to return the original copy of the said form with signature of the petitioner. It was also provided that in case the balance as shown in the said letter did not reconcile with the books of the petitioner, the petitioner shall send their reconciliation to the respondent to enable to look into their books for any possible omissions. It was stated that if the respondent did not receive confirmation of balance of the petitioner within 15 days from the date of the said letter, the respondent would consider the balance shown in the said letter as confirmed by the petitioner. The petitioner confirmed the said balance affixing their signature and rubber stamp thereby confirming that the books of the petitioner shown a debit balance of Rs.1,12,00,000/- as on 30th June, 2014.

7. On 27th January, 2015, the respondent sent an e-mail to the petitioner objecting to the petitioner sending a copy of their e-mail to all their other agents and informed them that Dr.Anuj Saxena of the respondent was ready to meet all the agents on one basis in the next week to discuss all the issues, including payment.

8. On 18th February, 2015, the respondent forwarded a copy of the ledger of the petitioner as on 31st January, 2015 in response to the request made by the petitioner. According to the said ledger account of the petitioner sent by the respondent, there was a credit

balance of Rs.18,40,847/- towards interest and expenses, credit balance of Rs.43,54,819 towards commission showing net credit balance of Rs.61,95,666/-.

9. The petitioner vide their letter dated 3rd July, 2015, requested the respondent to release pending amount and informed that since the dues of the petitioner were not paid by the respondent, staff members of the petitioner were not doing any job in the office and that the petitioner was incurring expenses for past six months without any revenue and could not run the office any more without any business.

10. On 3rd November, 2014, the respondent sent an e-mail to all the agents of the respondent including the petitioner regarding that all such agents were admitted that the respondent would start to clear all pending dues at the earliest and had already initiated process and cleared some dues but unfortunately could not pay the amount anticipated by all the agents. By the said e-mail, all the agents are informed that the respondent would clear all the dues and there was no intention of not paying any agent and sought some more time. The respondent informed that all the agents shall be paid by the respondent and sought their help and co-operation to ensure that their activities were smooth and un-hindered so that they would be in a position to pay to the petitioner back at the earliest.

11. By their e-mail dated 30th December, 2014 to all the clearing and forwarding agents, including the petitioner the respondent informed that the last two years had been tough and post their transaction with Torrent, the respondent had spent past few months and was trying to work options on how to revive the organization and turn it around. The respondent informed that it had been tough time for everybody and the respondent was trying all options and solutions to revive and bring the company back on track from January. The respondent tendered apologies to all the agents for hardships and difficulties that they had been enduring. Similar e-mail was sent by the respondent to all the clearing and forwarding agents, including the petitioner on 21st January, 2015 and tendered apology for putting all the clearing and forwarding agents in difficult times. The respondent sent another e-mail dated 28th January, 2015 to all the agents including the petitioner to bear with the respondent and re-assure their endeavour to get out of these issues at the earliest.

12. On 20th March, 2015, the petitioner through their advocate sent a notice to the respondent placing various facts on record and also informed about the details of the outstanding dues recoverable by the petitioner from the respondent and invoked arbitration agreement. By the said notice, the petitioner suggested three names of the advocate practicing in this Court and called upon the

respondent to give their consent to the appointment of any one of them as the sole arbitrator. There was no response to the said notice from the respondent to the petitioner. The petitioner therefore filed the present petition *inter-alia* praying for interim measures. Learned counsel for the petitioner invited my attention to various provisions of the agreement and also the correspondence exchanged between the parties. My attention is also invited to various allegations made by the respondent in their affidavit in reply and rejoinder of the petitioner thereto.

13. It is submitted by learned counsel that the agreement has come to an end as far back as on 31st March, 2015. The respondent had though assured the petitioner several times to repay their dues, the respondent has neither returned the security deposit nor paid over the legitimate dues of the petitioner. He submits that the financial condition of the respondent is very precarious. Several company petitions are filed against the respondent for winding up of the respondent. Several other proceedings by various creditors are also filed for recovery of their dues. Learned counsel also invited my attention to the letter dated 20th April, 2015 from the respondent to the petitioner informing that the account of the petitioner in the books of the respondent showed a credit balance of Rs.1,12,00,000/- as security deposit as on 31st March, 2015 and requested the petitioner

to confirm the said balance and return the original copy of the said form with their signature. He submits that the petitioner has confirmed that their books showed the debit balance of the said amount as a security deposit as on 31st March, 2015.

14. The respondent also forwarded a copy of the ledger account of the petitioner for the period 1st April, 2014 to 31st March, 2015 showing credit balance insofar as interest and expenses are concerned and credit balance of Rs.43,60,075/- insofar as commission is concerned.

15. Learned counsel for the petitioner invited my attention to the order passed by this Court on 1st October, 2015 in Company Petition No.961 of 2014 along with other companion matters. By the said order passed by this Court, all company petitions filed by various creditors against the respondent have been admitted and made returnable on 23rd November, 2015. This Court has also granted an injunction against the respondent from disposing of any of its assets and properties or creating any third party rights otherwise than in due course of its business, without the leave of this Court. Learned counsel invited my attention to various observations made by this Court and *prima-facie* findings rendered by this Court against the respondent about their precarious financial condition. He submits that this Court has already taken a view that the respondent is clearly

unable to pay its debts and such inability to pay does not appear to be a temporary phenomenon, due to transient liquidity problems and even as of this date there is no concrete plan for payment of these liabilities.

16. Learned counsel for the petitioner also invited my attention to various financial documents of the respondent which were relied upon by the respondent and would submit that even those documents would clearly reflect that the liabilities of the respondent is much more than their assets. He submits that the respondent has not disputed the liability of the petitioner and even today in their books of account various amounts due and payable to the petitioner by the respondent are reflected as due and payable. He submits that the petitioner has good chances of succeeding in arbitration proceedings and if the respondent is not directed to secure the claim of the petitioner by appropriate order and directions of this Court, the petitioner would not be able to recover any amounts from the respondent. It is submitted that the respondent is heavily indebted and is likely to create third party rights in respect of all their properties and thus reliefs as prayed in the arbitration petition be granted by this Court.

17. Learned counsel for the respondent on the other hand submits that though the respondent had forwarded the letter seeking confirmation of the petitioner of the credit balance shown in their

books of account, insofar as security deposit is concerned, the said amount of security deposit is subject to adjudication of various amounts recoverable by the respondent from the petitioner. It is submitted that the petitioner has not disclosed various e-mails exchanged between the parties, by which the petitioner had admitted that the petitioner had retained some of the materials with them and had misappropriated. He submits that the petitioner has not come to this Court with clean hands. He submits that though various stocks had been returned, worth lacs of rupees to the petitioner, the petitioner had failed and neglected to issue credit notes in respect of such goods to the respondent which are to be accounted for and appropriated by the respondent against the security deposit. He submits that since the accounts are not finally drawn by the parties, the petitioner cannot ask the respondent to deposit the amount of security deposit or to secure the disputed claim of the petitioner.

18. It is submitted by learned counsel for the respondent that the respondent company has 1357 number of employees all over India as on 31st March, 2015. The assets of the respondent company excluding brands are approximately Rs.640 crores. The liability of the respondent company is only Rs.586/- crores and thus the respondent company is fundamentally strong company. He submits that the petitioner has not given inspection of all the documents demanded by

the respondent.

19. It is submitted by learned counsel for the respondent that the petitioner has failed and neglected to deposit the cheques encashed by the respondent company and has withheld various cheques. He submits that even the claim of the petitioner for payment of commission is also disputed. The petitioner has committed various breaches of the agreement dated 19th October, 2012. The respondent has also disputed the claim of the petitioner towards interest on security deposit. It is submitted that Exhibit "B" annexed to the petition is the ledger of the respondent company which was subject to reconciliation and settlement of account and thus there was no admission of liability as canvassed by the learned counsel for the petitioner.

20. Insofar as the e-mails dated 3rd November, 2014, 6th November, 2014 and 21st January, 2015 are concerned, it is submitted that these three e-mails were common e-mails and were sent by the Director of the respondent to all their C & F Agents without verifying accounts of each C & F Agents and therefore, the same cannot be construed as any admission of liability on the part of the respondent.

21. Learned counsel for the respondent placed reliance on the following judgments of this Court in support of his submission that the

liability of the petitioner having been disputed by the respondent, no order as prayed by the petitioner for furnishing security against the respondent which is in the nature of order of attachment before judgment under Order 38 Rule 5 of the Code of Civil Procedure, 1908 can be passed by this Court. It is submitted that this Court cannot convert an unsecured debt of the petitioner into a secured debt.

1). Judgment of this Court in case of ***Tata Capital Financial Service Ltd. & Ors. vs. Deccan Chronicle Holdings Limited & Ors., 2013(3) Bom.C.R. 205***,

2). Judgment of this Court in case of ***Herald Engineers vs. Wonderpack Industries Pvt. Ltd. & Anr. 2013(4) Mh.L.J. 217***,

3). Judgment of Supreme Court in case of ***Raman Tech. & Process Engg. Co. & Anr. vs. Solanki Traders, (2008) 2 SCC 302***,

4) Judgment of Madras High Court in case of ***L.V. Bhujanga Rao vs. Ch.Venkateswara Rao & Ors. AIR 1993, Madras 246***, and

5) The judgment of the Division Bench of this Court in case of ***Deccan Chronicle Holdings Limited vs. L & T finance Limited in Appeal (Lodging) No.130 of 2013 in Arbitration Petition No.1095 of 2012,*** delivered on 8th August, 2013.

22. Learned counsel appearing for the respondent states that since the petitioner has not come to his Court with clear hands and has suppressed some of the e-mails exchanged between the parties and had accepted the fact that some of the goods were lying with the petitioner and the same was misappropriated by the petitioner, this Court cannot grant any interim measures in favour of the petitioner. He submits that the petitioner has actually committed fraud on this Court and thus no relief can be granted in favour of the petitioner. He placed reliance on the judgment of the Supreme Court in support of this submissin :-

i). ***S.P. Chengal Varaya Naidu (Dead) By L.Rs. vs. Jagannath (Dead) by L.Rs. & Ors. (1994) 1SCC 1*** and

ii) ***Badami (Deceased) By Her L.Rs. vs. Bhali, (2012) 11 SCC 574.***

23. Insofar as Arbitration Petition No.1209 of 2015 is concerned, learned counsel appearing for the respondent submits that the petitioner in this case has committed breach of clauses 7(d) and 7(f) which stipulate that all the cheques / demand drafts received from the stockist should be in the name of the respondent company and shall be deposited in the account operated by the respondent and the petitioner shall not accept any cash payment. Reliance is also

placed on e-mail of the respondent to the petitioner alleging certain breaches on the part of the petitioner insofar as dispatch of the goods is concerned. He submits that the petitioner has only denied these averments of the respondent vaguely.

24. Insofar as Arbitration Petition No.847 of 2015 is concerned, learned counsel placed reliance on e-mail dated 4th October, 2014 to the petitioner in which it was alleged that the petitioner had Rs.10.00 lacs worth of cheques which they had not deposited in the account. He submits that the petitioner had withheld the cheques of Rs.47.00 lacs with them and thus had committed breach of the agreement entered into between the parties. He submits that e-mail dated 10th March, 2015 from the petitioner to the respondent is fabricated.

25. Insofar as Arbitration Petition No.856 of 2015 is concerned, it is submitted by learned counsel for the respondent that the petitioner had admittedly deposited security amount with Elder Health Care Limited and not with the respondent. In support of this submission, learned counsel placed reliance on Exhibit “B” to the petition which is dated 17th July, 2014 from the said Elder Health Care Limited to the petitioner. He submits that the petitioner thus cannot seek reliefs against the respondent to secure the claim of the petitioner or cannot pray for depositing the said amount in this Court.

26. It is submitted by the learned counsel that the petitioner has fabricated the document dated 1st July, 2015, which is annexed at Exhibit “AR-1” to the affidavit in rejoinder filed by the petitioner. He also placed reliance on the averments made in the petition and in particular paragraph 3(f) and submits that the contentions of the petitioner that all the business and security deposit of Elder Health Care Limited was transferred to the respondent is disputed by the respondent. He submits that Elder Health Care Limited is not a party to the present proceedings. The respondent has also disputed the alleged confirmation letter dated 1st July, 2015. He submits that though the respondent has not disputed the ledger account annexed at Exhibit “AR-2”, the said document does not pertain to the security deposit, it shows credit balance only of Rs.4,47,935/-.

27. Insofar as Arbitration Petition No.850 of 2015 is concerned, it is submitted by learned counsel that the respondent vide their e-mail dated 27th February, 2015 had called upon the petitioner to pass necessary entry in books of account to deduct a sum of Rs.10.00 lacs regarding stock of Eldervit Injection,which was given to Patna Clearing and Forwarding Agent. He submits that this amount was not reflected in the ledger account of the petitioner contrary to clauses 7(d) and 24(f) of the agreement. The petitioner has suppressed this e-mail from this Court.

28. Insofar as Arbitration Petition No.1212 of 2015 is concerned, learned counsel for the respondent placed reliance on e-mail dated 9th December, 2014 from the respondent to the petitioner giving their no objection to the petitioner to their proposal of billing eldervit injection of 85000 vials to Medichem stockist which is owned by the petitioner. He submits that the petitioner has misappropriated the said injection of huge quantity. The respondent sent reminder to the petitioner vide their e-mail dated 10th January, 2015. By an e-mail dated 12th February, 2015 the respondent called upon the petitioner to clarify till which month the petitioner had paid VAT.

29. Insofar as Arbitration Petition No.854 of 2015 is concerned, the respondent submits that the petitioner had stopped the work under the agreement entered into between the parties in the month of August, 2014 itself. Reliance is placed on an e-mail dated 14th August, 2014 from the respondent to the petitioner and e-mail dated 16th August, 2014 from the petitioner to the respondent calling upon to the petitioner to return the stock. He submits that denial of the petitioner in paragraph 8 of the affidavit in re-joinder is totally vague. Insofar as the letter dated 1st July, 2015 annexed at Exhibit "AR-1" to the re-joinder is concerned, he submits that the said letter is fabricated by the petitioner.

30. Learned counsel appearing for the petitioner in re-joinder

invited my attention to the letter addressed by the respondent requesting the petitioner to confirm the credit balance of the petitioner in the books of account of the respondent insofar as the security deposit is concerned in the month of July, 2015, which was for the period ending March, 2015. The petitioner has confirmed the said credit balance of the petitioner in the books of account of the respondent. He submits that the respondent had also sent ledger account of the petitioner in the year 2014-2015 showing various credit balance in the account of the petitioner in the books of account of the respondent. He submits that the respondent has not denied such letters sent by the respondent asking the petitioner to confirm the credit balance and the letter of the petitioner confirming the said balance insofar as the security deposit is concerned and also towards interest, expenses and commission charges.

31. Insofar as Arbitration Petition No.856 of 2015 is concerned, it is submitted by the learned counsel for the petitioner that though initially the security deposit amount was with M/s.Elder Health Care Limited which is a sister concern of the respondent, the said amount was subsequently transferred to the account of the respondent. The respondent has acknowledged the said amount in their books of account and had sent similar confirmation of account thereby calling the petitioner to confirm the credit balance of the said

security deposit in the name of the petitioner in the books of account of the respondent. He submits that the respondent thus cannot now allege that the security deposit in respect of Arbitration Petition No.856 of 2015 was not with the respondent.

32. Learned counsel appearing for the petitioner submits that insofar as some of the e-mails referred by the respondent in their argument is concerned, the petitioner has not suppressed any of these e-mails. He submits that even after exchanging such e-mails in few matters, the fact remains that the respondent has admitted their liability in the letters sent by the respondent on 1st July, 2015 asking the petitioner to confirm the credit balance of the petitioner in their books of account. He submits that exchange of few e-mails in few cases would not assist the case of the respondent. Learned counsel for the petitioner distinguished the judgments relied by learned counsel for the respondent.

33. A perusal of the record clearly indicates that there is no dispute that the petitioner had made security deposit with the respondent in each petition. The respondent has not disputed the receipt of such security deposit from the petitioner and that the same were reflected in the accounts of the petitioner in the books of the respondent. The respondent has also not disputed that the respondent had asked the petitioner to confirm the said credit balance

of the petitioner in the account of the respondent even till 1st July, 2015. Though various proceedings are filed by the respondent, the factum of such confirmation of the credit balance has not been disputed by the respondent. The only submission of the learned counsel for the respondent in this respect is that the said confirmation was for the audit purposes and in any event was subject to the final accounts being prepared. I am not inclined to accept this submission of the learned counsel for the respondent. Though in most of the cases the contracts have come to an end on 31st March, 2015, till date the respondent has not finalized the accounts of the petitioner. The respondent thus in my view, could not have withheld the amount of security deposit, which were liable to be returned by the respondent to the petitioner upon completion of the contract.

34. A perusal of the correspondence exchanged between the parties placed on record by both the parties clearly indicates that the respondent had not disputed its liability towards security deposit, commission charges, interest etc. The Director of the respondent had addressed several letters to all the clearing and forwarding agents of their company placing their financial difficulties on record and assuring the clearing and forwarding agents, including the petitioner in the aforesaid petitions that the dues of each of the petitioner would be paid, but sought some time. The respondent also tendered

apology in several of such letters for delayed payment and placing the the petitioner in the aforesaid cases and other clearing and forwarding agents in great difficulty due to the respondent not realizing their payment including return of security deposit. I am not inclined to accept the submission of learned counsel for the respondent that those letters sent by e-mails by the respondents to all their clearing and forwarding agents do not disclose any admission of liability. A plain reading of these correspondence clearly indicates that the respondent has not disputed their liability.

35. Insofar as the submission of learned counsel for the respondent that the assets of the respondent company are much more than the liability and that the respondent company is in sound financial condition is concerned, a perusal of the order passed by this Court in Company Petition No.961 of 2014 and other companion matters on 1st October, 2015 which were filed by several creditors of the respondent *inter-alia* praying for winding up of the respondent company clearly indicates that after considering the latest financial documents submitted by the respondent including the audit report, this Court has rendered a prima-facie finding that far from presenting a picture of a fundamentally strong company, these financials present a rather poor prospect of the company's viability. The auditors have in terms observed that the various events noted by them "cast

significant doubt on the ability of the company to continue as a going concern".

36. This Court has also observed that the audited balance sheet at the end of 30th June, 2014 puts the total liability of the company (consolidated) at Rs.1514.84 crores. It is also observed that despite seeking numerous extensions from this Court, meager sum of Rs.2.00 crores to the petitioner in Company Petition No.691 of 2014 could not be paid by the respondent in *toto*. The Company Court has also granted injunction against the respondent from disposing of any of its assets and properties or creating any third party rights otherwise in due course of its business without the leave of the Court. By the said order the said Company Petition No.961 of 2014 along with other company petitions are admitted. I am thus not inclined to accept the submission of learned counsel for the respondent that the financial condition of the respondent company is sound and / or that the assets of the respondent company are more than the liability of the respondent.

37. Insofar as the submission of learned counsel for the respondent that the petitioner has suppressed various e-mails from this Court and have thus committed fraud upon this Court and in support of this submission reliance on two judgments of the Supreme Court i.e. in case of ***S.P. Chengal Varaya Naidu*** and ***Badami***

(Deceased) By Her L.Rs. (supra) is concerned, in my prima-facie view, there is no suppression of any facts by the petitioner and no fraud is committed by the petitioner upon the Court. The respondent on the contrary has not come to this Court with clear hands and has suppressed its true and correct financial position from this Court. Reliance thus placed by the respondent on the judgments of the Supreme Court in the aforesaid two judgments is totally misplaced.

38. Insofar as the judgment of the Supreme Court in case of ***Raman Tech. & Process Engg. Co. & Anr.,*** judgment of this Court in case of ***Herald Engineers*** (supra), the judgment of the Madras High Court in case of ***L.V. Bhujanga Rao*** (supra) relied upon by the respondent in support of the submission that this Court cannot convert unsecured debt into secured debt by directing the respondent to secure the claim of the petitioner is concerned, a perusal of the three judgments indicates that all such judgments were delivered considering the provisions of Order 38 Rule 5 of the Code of Civil Procedure, 1908. It is held by the Supreme Court, this Court as well as Madras High Court that before exercising power under order 38 Rule 5 of the Code of Civil Procedure, the Court should be satisfied that there are reasonable chances of the decree being passed in the suit against the defendant and the plaintiff has a *prima-facie* case. It is also held that purpose of order 38 rule 5 of the Code of Civil

Procedure is not to confirm the unsecured debt into secured debt.

39. This Court in case of ***Nimbus Communications Limited vs. Board of Control for Cricket in India & Anr.*** delivered on 27th February, 2012 in Appeal (Lodging) No.90 of 2012 and other companion matters has adverted to the judgment of the Supreme Court in case of ***Adhunik Steels Limited vs. Orissa Manganese & Minerals (P) Ltd. (2007) 7 SCC 125*** and has interpreted section 9 of the Arbitration & Conciliation Act, 1996. It is held that the object underlying the conferment of the power upon the Court is to ensure that the fruits of an arbitral award which may eventually be passed against the defendant to the claim are not lost to the claimant by a dissipation of the property in the meantime. It is also held that the power under section 9(ii)(b) has not been made subject to the stringent provisions of Order 38 Rule 5, the exercise of the power is guided by the paramount consideration that the claimant who obtains an award in his favour before the arbitrator ultimately is able to derive the fruits of the adjudication in executing the award.

40. It is also held by the Division Bench that though Arbitration & Conciliation Act, 1996 is a special statute, section 9 does not either attach a special condition for the exercise of power nor does it embody a special form of procedure for the exercise of the power by the Court. It is also held that just as on the one hand the exercise of

the power under section 9 cannot be carried out in an unchartered 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 sub serve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The Division Bench of this Court in the said judgment upheld the judgment of the single Judge directing the appellant to secure the claim of the respondent in the petition filed under section 9 of the Arbitration Act. In my view, the principles laid down by the Division Bench of this Court after adverting to the judgment of the Supreme Court squarely applies to the facts of this case. I am respectfully bound by the judgment of the Division Bench of this Court.

41. This Court in case of ***Tata Capital Financial Service Ltd. & Ors. vs. Deccan Chronicle Holdings Limited & Ors.,*** (supra) has taken a similar view and after adverting to the judgment of the Division Bench in case of ***Nimbus Communications*** (supra) has directed the respondent to the said petition to secure the claim of the lender. An appeal against the said judgment filed by the borrower has been rejected by the Division Bench of this Court.

42. Insofar as the submission of learned counsel for the

respondent that in few matters the petitioner had not returned the goods to the respondent or had not issued credit notes in respect of the goods withheld or had not deposited the cheques is concerned, the petitioner has disputed these allegations. A perusal of the record indicates that even after exchanging few such correspondence, the fact remains that the respondent has confirmed the credit balance of the petitioner in their books of account insofar as security deposit and even in respect of interest, commission charges and expenses also in their books of account. In my view, at least there is no dispute insofar as refund of security deposit is concerned.

43. Insofar as the submission of the respondent in Arbitration petition No.856 of 2015 is concerned, a perusal of the record prima-facie indicates that though initially the said amount was deposited as and by way of security by the petitioner with M/s.Elder Health Care Limited, the said amount was subsequently transferred to the account of the respondent. The respondent has acknowledged the credit balance in their account of the said deposit due to the petitioner. The respondent thus now cannot be allowed to take a stand that no such amount of security deposit was given to the respondent by the petitioner.

44. A perusal of the financial documents produced on record by the respondent clearly indicates that the respondent would not be

able to pay any amount to the petitioner even if it succeeds in the arbitral proceedings. The petitioner has good chances of succeeding in the arbitral proceedings. Various company petitions inter-alia praying for winding up of the respondent company are also admitted against the respondent. The liabilities of the respondent are much more than the assets of the respondent. In my view, the petitioner has thus made out a case for securing their claim at least insofar as refund of the security deposit is concerned.

45. I therefore pass the following order :-

i). The respondent is directed to secure the claim of the petitioner in each of the aforesaid petitions by furnishing bank guarantee of a nationalized bank in favour of the Prothonotary & Senior Master to the extent of the amount of security deposit which shall be initially for a period of two years and shall be renewed if the arbitral proceedings are not disposed of by the learned arbitrator within a period of two years or till disposal of the arbitral proceedings. Such security should be furnished within four weeks from today.

ii). The aforesaid arbitration petitions are disposed of in aforesaid terms. There shall be no order as to costs.

(R.D. DHANUKA, J.)

Oral application of the learned counsel for the respondent in aforesaid petitions for stay of the operation of this order is rejected. The respondent has been already granted four weeks' time to furnish security.

(R.D. DHANUKA, J.)