

PRADESH

CMA NO.489 OF 2015

Between:

M/s. ICICI Bank Limited

....Appellant/Respondent No.1

and

1. M/s. IVRCL Ltd (formerly known as ICRCL Projects and Infrastructure Ltd) and others.

.... Respondents/Petitioners

DATE OF JUDGMENT PRONOUNCED: 10.08.2015.

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN & HON'BLE
SRI JUSTICE S. RAVI KUMAR

1	<u>Whether Reporters of Local newspapers may be allowed to see the Judgments?</u>	<u>Yes/No</u>
2	<u>Whether the copies of judgment may be marked to Law Reports/Journals</u>	<u>Yes/No</u>
3	<u>Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?</u>	<u>Yes/No</u>

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*** THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**
AND
THE HON'BLE SRI JUSTICE S. RAVI KUMAR
-
+ CMA NO.489 OF 2015

% Dated 10-08-2015

M/s. ICICI Bank Limited

....Appellant/Respondent No.1

Vs.

\$ 1. M/s. IVRCL Ltd (rformerly known as ICRCL Projects and Infrastructure Ltd) and others.

.... Respondents/Petitioners

! Counsel for the Appellant: Sri L. Ravichander, Learned Senior Counsel, and Sri S. Niranjana, Learned Counsel

^ Counsel for respondents: Sri D.V. Sitharam Murthy, Learned Senior Counsel appearing on behalf of the first respondent for Sri Thoom Srinivas, Learned Counsel

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> HEAD NOTE:

? Citations:

- 1) 2011 (5) ALD 327 (DB)
- 2) (Judgment of the Full Bench in CMA No.1206 of 2012 dated 12.06.2015)
- 3) LAWS(BOM)-2014-5-8 = BCR-2014-3-551/TLMHH-2014-0-549
- 4) LAWS(GAU)-2009-12-5 = GAULT-2010-1-141/GAULJ-2010-1-320 (Gauhati HC)
- 5) 2003 (2) ARBLR 259 (Gujarat HC)
- 6) (2011) 9 SCC 735
- 7) (2011) 6 SCC 179
- 8) (2011) 6 SCC 161
- 9) (2014) 7 SCC 603
- 10) (2012) 9 SCC 552
- 11) (2002) 4 SCC 105
- 12) (2008) 4 SCC 190
- 13) (1996) 1 SCC 735
- 14) 2015 (4) SCALE 62
- 15) AIR 1999 SC 3710
- 16) (1998) 1 SCC 174
- 17) (2006) 13 SCC 599

- 18) (1984) 1 ALL ER 351 (CA)
- 19) (1994) 1 SCC 502
- 20) (1995) 6 SCC 68
- 21) (1995) 6 SCC 76
- 22) (1995) 4 SCC 515
- 23) (1996) 5 SCC 34
- 24) (1997) 1 SCC 568
- 25) (1981) 2 SCC 766
- 26) (1986) 4 SCC 136
- 27) (1993) 3 SCC 161
- 28) (1994) 4 SCC 225

**THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND**

THE HON'BLE SRI JUSTICE S.RAVI KUMAR

-
CMA NO.489 OF 2015

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JUDGMENT:(Per Honourable Sri Justice Ramesh Ranganathan)

This appeal is preferred by ICICI Bank Limited (hereinafter called "the appellant"), under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996, (hereinafter called the "Act"), aggrieved by the order passed by the Chief Judge, City Civil Court, Hyderabad in Arbitration OP No.1031 of 2015 dated 22.06.2015. The appellant herein is the 2nd respondent in O.P. No.1031 of 2015. The said O.P. was filed by the 1st respondent herein under Section 9 of the Act requesting the Court below to grant an injunction restraining the Nepal Electricity authority (2nd respondent herein) from invoking the bank guarantees issued by the appellant through Laxmi Bank Limited, Nepal and Nepal Investment Bank Limited, Nepal (respondents 3 and 4 herein); and to restrain the appellant and respondents 3 and 4 from honouring or encashing the bank guarantees. Parties shall, hereinafter, be referred to as they are arrayed in this appeal.

In the petition filed by them before the Court below, under Section 9 of the Act, the 1st respondent stated that the 2nd respondent had invited a tender for construction of civil works; they participated in the tender process, and were the successful bidder; a letter of intent was issued on 07.10.2010, and a letter of acceptance was issued by the 2nd respondent to the 1st respondent; an agreement was entered into between respondents 1 and 2 on 04.11.2010; the 2nd respondent had violated the conditions of the contract; they had, by their letter dated 10.01.2014,

proposed appointment of a dispute adjudication board, and Mr. Dinakar Sharma as the arbitrator, but to no avail; they had issued four bank guarantees through respondents 3 and 4 to respondent No.2 for various amounts; two of them were valid till 15.07.2016 and the remaining two were valid upto 15.07.2015; the appellant had, in turn, given a counter-guarantee to respondents 3 and 4 banks; the 2nd respondent held the bank guarantees of respondents 3 and 4 which were counter-guaranteed by the appellant; the 2nd respondent failed to fulfil its obligations for execution of the contract, in making payment, in the appointment of a dispute adjudication board, in the supply of drawings, and in obtaining clearances from the prescribed authorities; the 2nd respondent had, under the guise of the contract agreement, cheated the 1st respondent, and had played fraud on them extracting work from them without making any payment; there was no drawback or failure, in the performance of the contract, by them; the 2nd respondent had, with a fraudulent intention and with the intention of extracting money from them, been trying to invoke the bank guarantees without providing sufficient cause or reason; and if the 2nd respondent was not restrained from encashing the bank guarantees, two of which would expire by 15.07.2015 and the other two by 15.07.2016, they would be put to grave and irreparable loss and injury.

Before the Court below, the first respondent herein contended that the 2nd respondent failed to give them the drawings even after one year from the date of signing of the contract; they had, by their letter addressed to the 2nd respondent on 29.08.2011, invoked the arbitration clause, and had sought appointment of the dispute adjudication board as per Clause 20.2 of the conditions of contract; they had nominated Mr. Dinakar Sharma as the arbitrator on their behalf; there was no response from the 2nd respondent to their letter dated 29.08.2011; they sent a reminder on 21.11.2011, requesting the 2nd respondent to appoint the dispute adjudication board; the 2nd respondent sent a reply only on 01.12.2011 informing them that the appointment of the dispute adjudication board was under consideration, and the process of appointment was at a final stage;

meetings were held on 16.04.2013, 08.05.2013, 10.05.2013 and on various other dates in which high level officials of the 2nd respondent participated; they had assured the 1st respondent that they would appoint a dispute adjudication board, reschedule the date of commencement and the date of completion, and make payment of Rs.14,21,76,692.70/- for the work done by the 1st respondent; however, as against the agreed amount, the 2nd respondent had released only Rs.3.96 crores; the 1st respondent again, by its letter dated 10.01.2014, sought appointment of the dispute adjudication board; the 2nd respondent, however, issued notice dated 22.12.2014 directing them to complete construction of certain works within thirty days from the date of the notice; the 2nd respondent had also insisted upon extension of the bank guarantees, given by them towards mobilisation advance, till 30.06.2015; and they had, accordingly, extended the bank guarantees till then. The 1st respondent herein sought an injunction, from the Court below, to restrain the 2nd respondent from invoking or encashing the bank guarantees issued by the appellant through the 3rd and 4th respondents; to further restrain the appellant and respondents 3 and 4 banks from honouring or encashing the bank guarantees; and to award costs.

In its order in ARB OP No.1031 of 2015 dated 22.06.2015, (the order now under appeal before us) the Court below noted the submission, urged on behalf of the 1st respondent, that they had entered into a contract with the 2nd respondent on 04.11.2010; they had also entered into a memorandum of understanding on 12.10.2010 and had, accordingly, furnished bank guarantees to the 2nd respondent towards mobilisation advance; the delay in initiation of the project was solely to be attributed to the 2nd respondent; there was abnormal delay on the part of the 2nd respondent in getting the environmental clearance and clearance from the forest department for laying the approach road for the project, and in not appointing the project Manager consultant as per the clauses in the contract till 19.10.2012; despite the abnormal delay, the 1st respondent

had completed 90% of the work, and had submitted the bills; the 2nd respondent, instead of clearing the bills, was threatening to invoke the bank guarantees furnished by the first respondent, and issued by the appellant and respondents 3 and 4; and, hence, they were seeking interim injunction.

The Court below, by a cryptic order dated 22.06.2015, held that it had perused the record; the documents filed by the 1st respondent showed that they had a *prima facie* case and the balance of convenience was in their favour; and, if the 2nd respondent encashed the bank guarantees, the 1st respondent would be put to irreparable loss. The Court below dispensed with the notice under Order 39 Rule 3 CPC, and granted interim injunction restraining the 2nd respondent from invoking or encashing the scheduled bank guarantees issued by the appellant through respondents 3 and 4; and also restraining the appellant and respondents 3 and 4 from honouring and encashing the scheduled bank guarantees. The 1st respondent was directed to renew the bank guarantees for a period of six months, and to transmit copies of the proceedings to the appellant and respondents 2 to 4. The Court below issued notice to the respondents returnable by 22.07.2015. It is against this *ex parte* order dated 22.06.2015, that the appellant has preferred the appeal, in C.M.A.No.489 of 2015, before this Court.

Elaborate submissions were put forth by Sri L. Ravichander, Learned Senior Counsel, and Sri S. Niranjan Reddy, Learned Counsel for the appellants and Sri D.V. Sitharam Murthy, Learned Senior Counsel appearing on behalf of the first respondent. The points which arise for consideration in this appeal are:

- 1) Whether an appeal under Section 37 of the Act is maintainable against an *ex-parte* order of ad-interim injunction passed under Section 9 of the Act?
- 2) Whether Part-I of the Act has, either expressly or by necessary implication, been excluded by the parties to the arbitration agreement, and whether the Court below had jurisdiction to entertain the petition filed under Section 9 of the Act?
- 3) Whether the Court below exceeded its jurisdiction in

restraining invocation or encashment of the bank guarantees, and the counter-guarantee issued by the appellant?

- 4) Whether the first respondent has suppressed material facts, and has indulged in forum shopping by filing the petition, under Section 9 of the Act, before the Court below?

Point No.1:

Sri D.V. Sitarama Murthy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that the appellant could not have invoked the jurisdiction of this Court, under Section 37(1)(a) of the Act, against the *ex parte* ad interim injunction order passed by the Court below under Section 9 of the Act.

On the other hand Sri S. Niranjan Reddy, Learned Counsel for the appellant, would submit that, against an *ex parte* order of injunction, granted by the Court below under Section 9 of the Act, an appeal lies to this Court under Section 37(1)(a) of the Act. Learned Counsel would rely on **Bilasraika Sponge Iron Pvt. Ltd., Hyderabad v. Devi Trading Co, Hongkong**^[1]; and **M/s. East India Udyog Ltd. v. Maytas Infra Ltd.**^[2]).

The Arbitration & Conciliation Act, 1996 (Act 26 of 1996) (for short the “Act”) is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, and enforcement of foreign arbitral awards, as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Part-I of the Act contains 10 chapters. Chapter II thereof relates to the arbitration agreement. Section 9, under Chapter-II, relates to interim measures by Court and, under clause (ii) thereof, the party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court for an interim measure of protection in respect of (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; and (e) such other interim measure of protection as may appear to the Court to be just and convenient; and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. Chapter IX of the Act relates to Appeals and Section 37

thereunder relates to appealable orders. Sub-section (1)(a) of Section 37 stipulates that an appeal shall lie from an order, granting or refusing to grant any measures under Section 9, to the Court authorised by law to hear appeals from original decrees of the Court passing the order. Part-II of the Act relates to enforcement of certain foreign awards.

Since the jurisdiction to order interim measures is conferred on the Court, under Section 9 of the Act, in respect of any grievance of a party before or during arbitral proceedings, it is axiomatic that the Court has the power, authority and jurisdiction to order ad-interim measures as well, and pending ordering of measures after hearing affected parties (arrayed as respondents to an application under Section 9). Section 9 of the Act incorporates a power in the Court to grant ad-interim measures, pending grant of measures after hearing the concerned parties, and without the necessity of reliance on the provisions of Order XXXVIII Rule 5 CPC. An order under Section 9 of the Act, granting ad-interim measures, can be appealed against under Section 37 of the Act. The appeal provided under Section 37 of the Act comprises within its locus an appeal against an order granting ad-interim measures, pending passing of final orders, under Section 9 of the Act. (**Bilasraika Sponge Iron Pvt. Ltd., Hyderabad**^[1]). Grant or refusal of an interim measure of protection, by way of an ex-parte ad-interim order under [Section 9](#) of the Act, is an appealable order under [Section 37](#) thereof. ([Mrs. Perin Hoshang Davierwalla v. Mr. Kobad Dorabji Devierwalla](#) (Bomby High Court)^[3]; **M/s. East India Ydyog Ltd.**^[2]; **Sati Oil Udyog Ltd. v. Avanti Projects and Infrastructure Ltd.**^[4], and [Aventis Pasteur S.A v. Cadila Pharmaceuticals Ltd.](#)^[5]). It is evident, therefore, that an appeal lies under Section 37 of the Act against an *ex-parte* order of ad-interim injunction passed under Section 9 of the Act. Point No.1 is answered accordingly.

Point No.2:

Sri S. Niranjan Reddy, Learned Counsel for the appellant, would submit that the appellant is not even a party to the contract between respondent Nos.1 and 2 dated 04.11.2002; invocation of the arbitration clause therein, seeking relief against the appellant, is wholly untenable; no

cause of action arose in India, let alone within the jurisdiction of the Court at Hyderabad; even from the pleadings of the 1st respondent, in the application filed by them under Section 9 of the Act, it is evident that the entire cause of action arose in Nepal; the tender was floated by the 2nd respondent in Nepal; the contract dated 04.11.2010 was executed between respondents 1 and 2 in Nepal; the entire works, pertaining to the contract dated 04.11.2010, were carried out in Nepal; respondents 1 and 2 had agreed to be governed by the rules of arbitration of UNCITRAL; they had consciously chosen not to include application of Part-I of the Act; once the parties have expressly chosen, and have agreed to be governed by the rules of arbitration of UNCITRAL, the intention of the parties is to implicitly exclude applicability of Part-I of the Act; the parties to the contract dated 04.11.2010 (respondent Nos.1 and 2) had specifically and expressly agreed that the arbitration proceedings shall be conducted in Kathmandu, Nepal; they had expressly agreed that the substantive law, governing the contract, would be Nepalese law; the seat and situs of arbitration was agreed to be in Nepal; Part-1 of the Act is inapplicable; and, consequently, the application under Section 9 of the Act could not have been entertained. Learned Counsel would rely on **Yograj Infrastructure Ltd. v. Ssang Yong Engineering & Construction Co. Ltd**^[6]; **Dozco India (P) Ltd v. Doosan Infracore Co.Ltd**^[7]; **Videocon Industries Ltd. v. Union of India**^[8]; and **Reliance Industries Ltd. v. Union of India**^[9]).

On the other hand Sri D.V. Sitaram Murthy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that Part-I of the Act is attracted in the present case; and, as Part-I of the Act is attracted, the 1st respondent was entitled to invoke the jurisdiction of the Court below under Section 9 of the Act. Learned Senior Counsel would rely on **Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.**^[10]; and **Bhatia International v. Bulk Trading S.A.**^[11]).

Before examining the relevant contractual provisions, including the arbitration clause in the agreement entered into between respondents 1

and 2, it is useful to briefly note the law declared by the Supreme Court in the aforesaid judgments. In **Bharat Aluminium Company**¹⁰ a Constitution bench of the Supreme Court held that the judgment in **Bhatia International**¹¹ was rendered on 13th March, 2002; since then, the aforesaid judgment was followed by all the High Courts as well as the Supreme Court on numerous occasions; in fact, the judgment in **Venture Global Engineering v. Satyam Computer Services**^[12] was rendered on 10th January, 2008 in terms of the ratio of the decision in **Bhatia International**¹¹; and, in order to do complete justice, the law declared by it in **Bharat Aluminium Company**¹⁰ would apply prospectively to all the arbitration agreements executed hereafter. As noted hereinabove, the arbitration agreement between respondents 1 and 2 dated 04.11.2010 is prior to the judgment of the Supreme Court in **Bharat Aluminium Company**¹⁰. Consequently the law declared by the Supreme Court, in **Bhatia International**¹¹, would apply to the facts of the present case.

In **Bhatia International**¹¹, the appellant therein entered into a contract with the 1st respondent therein. The arbitration clause of the contract provided that arbitration should be conducted as per the rules of the International Chambers of Commerce; and that the parties had agreed that the arbitration be held in Paris, France. On the question whether Part-I of the Act was applicable, the Supreme Court held that the provisions of Part I would apply to all arbitrations, and to all proceedings relating thereto; where arbitration is held in India the provisions of Part I would compulsorily apply, and parties are free to deviate only to the extent permitted by the derogable provisions of Part I; in cases of international commercial arbitrations held out of India, the provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions; in that case, the laws or rules chosen by the parties would prevail; and any provision in Part I, which was contrary to or excluded by that law or rules, would not apply.

In **Dozco India (P) Ltd.**⁷ the Supreme Court held that, if the language of [Article 23.1](#) of the agreement was seen in the light of [Article](#)

22.1, it was clear that the parties had agreed that the disputes, arising out of the agreement between them, would be finally settled by arbitration in Seoul, Korea; the rules of arbitration to be made applicable were the rules of the International Chamber of Commerce; this gave the prima facie impression that the seat of arbitration was only in Seoul, South Korea; the language was clearly indicative of the express exclusion of Part I of the Act; if there was such exclusion, then the law laid down in **Bhatia International**¹¹ must apply; the clear language of Articles 22 and 23 of the distributorship agreement between the parties in this case spelt out a clear agreement between the parties excluding Part I of the Act; since interpretation of Article 23.1 suggested that the law governing the arbitration would be Korean law, and the seat of arbitration would be Seoul in Korea, there was no question of applicability of Section 11(6) of the Act and appointment of an Arbitrator in terms of that provision.

In **Videocon Industries Ltd.**⁸ the Supreme Court held that, in its opinion, the learned Single Judge of Gujarat High Court had rightly followed the conclusion recorded by the three-Judge Bench in **Bhatia International**¹¹, and held that the District Court, Vadodara did not have jurisdiction to entertain the petition filed under Section 9 of the Act because the parties had agreed that the law governing the arbitration will be the English law; the parties had agreed that, notwithstanding Article 33.1 of the conditions of contract, the arbitration agreement contained in Article 34 shall be governed by the laws of England; this necessarily implied that the parties had agreed to exclude the provisions of Part I of the Act; and the Court did not have the jurisdiction to entertain the petition filed by the respondent under Section 9 of the Act.

In **Yograj Infrastructure Ltd.**⁶, the Supreme Court held that Section 2(2) of the Act indicated that Part I would apply only in cases where the seat of arbitration is in India; in **Bhatia International**¹¹, while considering the said provision, the Supreme Court held that, in certain situations, the provision of Part I of the Act would apply even when the seat of arbitration was not in India; once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the

SIAC Rules, the decision in **Bhatia International**¹¹, and the subsequent decisions on the same lines, would no longer apply as the parties had willingly agreed to be governed by the SIAC Rules.

In **Reliance Industries Ltd.**⁹, the appellant raised a preliminary objection to the maintainability of the arbitration petition, primarily on the ground that, by choosing English law to govern their agreement to arbitration and expressly agreeing to London seated arbitration, the parties had excluded the application of Part I of the Act. They contended that the Delhi High Court had no jurisdiction to entertain the objection filed by the Union of India under Section 34 of the Act; the Courts of England and Wales had exclusive jurisdiction to entertain any challenge to the award; the parties to the arbitration had agreed that the *seat* of the present arbitration proceedings would be London, England; and the PSC provided that the arbitration shall be conducted in accordance with the UNCITRAL Rules, 1985. It is in this context that the Supreme Court held that the parties were agreed that the *juridical seat* (or legal place) of arbitration shall be London, England; the parties were also agreed that hearings of the notice of arbitration could take place at Paris, France, Singapore or any other location the Tribunal considered convenient; the essential dispute between the parties was whether Part I of the Act would be applicable to the arbitration agreement irrespective of the fact that the *seat* of arbitration was outside India; to find a conclusive answer to the issue, as to whether applicability of Part I of the Act had been excluded, it would be necessary to discover the intention of the parties; Articles 32.1 and 32.2 dealt with the applicable law and the language of the contract; Article 32.1 provided for the proper law of the contract i.e. laws of India; Article 32.2 declared that none of the provisions contained in the contract would entitle either the Government or the contractor to exercise the rights, privileges and powers conferred upon it by the contract in a manner which would contravene the laws of India; Article 33.4 provided that the Arbitral Tribunal shall consist of three arbitrators; each party should appoint one arbitrator; and the arbitrators appointed by the parties should appoint the third arbitrator; Article 33.5 provided that, if the procedure under Article 33.4 failed, the aggrieved party could approach the Permanent Court of Arbitration at The

Hague for appointment of an arbitrator; and further, in case the two arbitrators failed to appoint the third arbitrator within 30 days of the appointment of the second arbitrator, again the Secretary General of the Permanent Court of Arbitration at The Hague may, at the request of either party, appoint the third arbitrator.

The Supreme Court further held that, in the light of these clauses, it was difficult to appreciate the submission of the respondent that the Act (Part I) would be applicable to the arbitration proceedings; in the event, the respondent intended the Act to apply to the arbitration proceedings, Article 33.5 should have provided that, in default of a party appointing its arbitrator, such arbitrator may, at the request of the first party, be appointed by the Chief Justice of India or any person or institution designated by him; that the Permanent Court of Arbitration at The Hague could be approached for appointment of the arbitrator, in case of default by any of the parties, was a strong indication that applicability of the Act was excluded by the parties by consensus; further Article 33.9 stipulated that the arbitration proceedings were to be conducted in accordance with the UNCITRAL Rules, 1976; Article 33.12 provided that *venue* of the arbitration shall be London, and that the arbitration agreement shall be governed by the laws of England; upon a meaningful reading of the aforesaid articles of the PSC, the proper law of the contract was Indian law and the proper law of the *arbitration agreement* was the law of England; the expression “laws of India”, as used in Articles 32.1 and 32.2, had a reference only to the contractual obligations to be performed by the parties under the substantive contract i.e. PSC; Article 32.1 has been made subject to the provision of Article 33.12; Article 33.12 specifically provided that the arbitration agreement shall be governed by the laws of England; the conclusion was inescapable that applicability of Part I of the Act had been ruled out by a conscious decision and agreement of the parties; applying the ratio of the law, as laid down in **Bhatia International**¹¹, it would lead to the conclusion that the Delhi High Court had no jurisdiction to entertain the petition; it could not be contended that the seat of arbitration is not analogous to an exclusive jurisdiction clause; once the parties had

consciously agreed that the *juridical seat* of the arbitration would be London, and that the arbitration agreement will be governed by the laws of England, it was no longer open to them to contend that the provisions of Part I of the Act would also be applicable to the arbitration agreement; the factual and legal issues, involved in **Videocon Industries**⁸, were very similar to the controversy involved in the present appeal; the provisions of Part I of the Act were necessarily excluded being wholly inconsistent with the arbitration agreement which provided “that arbitration agreement shall be governed by English law”; and since the substantive law governing the contract is Indian law, even the courts in England, in case the arbitrability is challenged, will have to decide the issue by applying the Indian law.

In the light of the law declared in the aforesaid judgments, let us now examine whether the relevant clauses in the agreement between respondents 1 and 2 exclude the application of Part I of the Act, either expressly or by necessary implication. Clause 1.4 of the General Conditions of the Contract entered into between the 1st and 2nd respondents relates to law and language, and stipulates that the contract shall be governed by the law of the country (or other jurisdiction) stated in the Appendix to the Tender. Part 2 of the contract documents relates to particular conditions. Clause 1.1.6.2 thereunder substituted the text in its entirety, and defined “Country” to mean Nepal. Clause 20.6(a) of the agreement which is the arbitration clause was substituted in its entirety and, after its substitution, provided that the dispute shall be finally settled under the Rules of Arbitration of the United Nation Commission on International Trade Law (UNCITRAL); the Chairman of the three arbitrators shall be of a nationality which is neither Nepalese nor that of the Contractor or, in case the Contractor is a Joint Venture, of any of the Partners of the joint Venture; and the arbitration proceedings shall be conducted in Kathmandu, Nepal.

The counter guarantee agreement, entered into between the appellant and respondents 3 and 4, records that the 1st respondent had undertaken, in pursuance of the contract dated 12.10.2010, to execute construction of the main civil works for the Rahughat Hydroelectric Project;

the appellant affirmed that they were the guarantor, and they were responsible to respondents 3 and 4, on behalf of the 1st respondent, for the sum referred to thereunder being payable in the types and proportions of currencies in which the contract price was payable; and the appellant undertook to pay them, upon their first written demand and without cavil or argument, any sum or sums within the limits stipulated thereunder without respondents 3 and 4 needing to prove or to show grounds or reasons for demand for the specified sum. Clause 3 of the counter guarantee also stipulated that the counter guarantee shall be governed and construed in accordance with English laws, and shall be subject to the jurisdiction of Courts and Tribunals at England.

It is evident, from the contractual clauses referred to hereinabove, that the laws of Nepal govern the contract (clause 1.4 of the general conditions read with clause 1.1.6.2 of Part-II of the contract document). The contractual disputes are to be settled under the UNCITRAL Rules (clause 20.6.A of the agreement), and the juridical seat of arbitration (ie the place where the arbitration is to be held) is Kathmandu, Nepal. These provisions, when examined in the light of the fact that the contract between respondents 1 and 2 was entered into in Nepal for works to be executed in Nepal, clearly show that the parties to the contract (respondents 1 and 2) had ruled out, applicability of Part-I of the Act, by a conscious decision; and the provisions of Part-I of the Act, being wholly inconsistent with the arbitration agreement, is excluded by necessary implication in the arbitration agreement. Section 9, which is in Part I of the Act, could therefore not be invoked by the first respondent; and, consequently, the Court below lacked jurisdiction to entertain the application filed by the first respondent under Section 9 of the Act. Point No.2 is answered accordingly.

Point No.3:

Sri S. Niranjana Reddy, Learned Counsel for the appellant, would submit that the bank, issuing the guarantee, is not concerned with the underlying contract between the parties; the duty of the bank, under the performance guarantee, is created by the document itself; once the

documents are in order the bank, giving the guarantee, is bound to make payment; Courts must be cautious in granting an order of injunction, restraining realisation of a bank guarantee, since it would have serious repercussions in international trade; except, in extraordinary circumstances, no injunction can be granted against invocation/encashment of a bank guarantee; the extra-ordinary circumstances are cases of fraud, and where not granting such an injunction would result in irreparable injury; to restrain encashment of a bank guarantee, the fraud alleged must be of a grave nature which has the effect of vitiating the entire transaction/contract; it is not enough merely to allege fraud; there must be clear evidence both as to the fact of fraud as well as to the bank's knowledge of such fraud; the 1st respondent had miserably failed to even make out a *prima facie* case, let alone furnish evidence of fraud; they have not shown how irreparable injury would be caused to them if the bank guarantees were invoked; the appellants reputation, in adhering to its contractual obligations, is at stake; the counter-guarantee agreement, between the appellant and respondents 3 and 4, required them to make payment to respondents 3 and 4 banks which had honoured the bank guarantees invoked by the 2nd respondent; having given a counter-guarantee, the appellant is obligated to honour the invocation claim of respondents 3 and 4 under the said counter-guarantee without demur; the contract was terminated by respondent No.2 on 18.06.2012, and soon thereafter they invoked the bank guarantees; and it is the appellant which would suffer irreparable injury as its reputation in the international capital market would suffer damage if they are restrained from honouring the counter-guarantee, more so as the bank guarantees have already been invoked by respondent No.2, and have been honoured by respondent Nos.3 and 4. Learned Counsel would rely on **State of Maharashtra v. National Construction Company**^[13]; **Millennium Wires (P) Ltd. v. The State Trading Corporation of India Ltd**^[14]; **Hindustan Construction Company Limited v. State of Bihar**^[15]; and **U.P. Cooperative Federation Limited v. Singh Consultants & Engineers**

Pvt. Ltd^[16]; and **Reliance Salt Ltd. v. Cosmos Enterprises**^[17]).

A bank guarantee is the common mode of securing payment of money in commercial dealings as the beneficiary, under the guarantee, is entitled to realise the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary. A bank guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the principal. An unconditional bank guarantee can be invoked in terms thereof by the person in whose favour the bank guarantee is given, and Courts would be reluctant to grant an injunction against invocation of a bank guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury is likely to be caused to the guarantor. (**Hindustan Construction**¹⁵; **Singh Consultants & Engineers (P) Ltd.**¹⁶; **Bolivinter Oil SA v. Chase Manhattan Bank**^[18]; **Svenska Handelsbanken v. Indian Charge Chrome**^[19]; **Larsen & Toubro Ltd. v. Maharashtra SEB**^[20]; **Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.**^[21]; **National Thermal Power Corpn. Ltd. v. Flowmore (P) Ltd.**^[22]; **National Construction Co.**¹³; **Hindustan Steelworks Construction Ltd. v. Tarapore & Co.**^[23] as also in **U.P. State Sugar Corpn. v. Sumac International Ltd.**^[24]).

There are two exceptions to the rule that the Court must be slow in granting an order of injunction restraining the realisation of a bank guarantee. The first is that it must be clearly shown that a fraud of a grievous nature has been committed and to the notice of the Bank. The second is that injustice of the kind which would make it impossible for the guarantor to reimburse himself, or would result in irretrievable harm or injustice to one of the parties concerned, should have resulted. It is not enough to allege fraud but there must be clear evidence both as to the fact of fraud as well as to the bank's knowledge of such fraud. (**Millenium**

Wires (P) Ltd.¹⁴).

Bank Guarantee constitutes an agreement between the Banker and the Principal, albeit, at the instance of the promisor. When a contract of guarantee is sought to be invoked, it is primarily for the bank to plead a case of fraud, and not for a promisor to set up a case of breach of contract. (**Reliance Salt Ltd.**¹⁷). A bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank, under a performance guarantee, is created by the document itself. Once the documents are in order, the bank giving the guarantee must honour the same and make payment. Ordinarily, unless there is an allegation of fraud or the like, the Courts will not interfere, directly or indirectly, to withhold payment, otherwise trust in commerce, internal and international, would be irreparably damaged. That does not mean that the parties to the underlying contract cannot settle their disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee. The legal position, therefore, is that a bank guarantee is ordinarily a contract quite distinct and independent of the underlying contract, the performance of which it seeks to secure. To that extent it can be said to give rise to a cause of action separate from that of the underlying contract. (**National Construction Co.**,¹³; **United Commercial Bank v. Bank of India**^[25]; **Centax (India) Ltd. v. Vinmar Impex Inc.**^[26] and **Singh Consultants and Engineers (P) Ltd.**¹⁶). Breach of a contract may render a party liable for damages for committing the breach. However, breach of contract alone would not lead to the conclusion that a fraud has been committed thereby. While commission of fraud would include any act to deceive, such acts of fraud must be confined to acts committed by a party to a contract with the intention to deceive another party or his agent or to induce him to enter into a contract. Fraud, which vitiates the contract, must have a nexus with the acts of the parties prior to entering into the contract. (**Reliance Salt Ltd.**¹⁷). Injunctions against the negotiating banks for making payment to the beneficiary must be given cautiously as

constant judicial interference, in the normal practices of the market, can have disastrous consequences as it affects the trustworthiness of the Indian banks and markets. (**Millenium Wires (P) Ltd.**¹⁴).

It is not the appellant which is pleading fraud, but the first respondent at whose behest respondents 3 and 4 had furnished the bank-guarantees to the second respondent. All that the first respondent stated, in the petition filed by them under Section 9 of the Act is that the second respondent had, under the guise of the contract agreement, cheated and played fraud extracting work from them without making payment; and the second respondent had, with a fraudulent intention and with the intention of extracting money from them, were trying to invoke the bank-guarantees without sufficient cause or reason. Such vague allegations of fraud cannot form the basis for grant of an injunction restraining invocation of the bank-guarantee. It is not even the case of the first respondent that the alleged fraud was to the notice of either the appellant or respondents 3 and 4 banks. Neither the appellant nor respondents 3 and 4 are parties to the agreement between respondents 1 and 2. The duty cast on respondents 3 and 4 is created by the bank guarantee itself, and neither they nor the appellant are concerned with the underlying contract between respondents 1 and 2. Let alone clear evidence of fraud, and of the banks' (appellant and respondents 3 and 4) knowledge of such fraud, being adduced the first respondent has not even stated, in the petition filed by them before the Court below under Section 9 of the Act, that the fraud allegedly committed by the second respondent was to the knowledge of either the appellant-bank or respondents 3 and 4 banks.

Even otherwise, fraud which vitiates the contract must have a nexus to the acts of the parties prior to entering into the contract. No such allegation is made by the first respondent in the petition filed by them under Section 9 of the Act. The first respondent has not even stated that the bank-guarantees were obtained by fraud. Fraud alleged against the second respondent is under the contract between respondents 1 and 2. The irretrievable injury test, necessary to injunct invocation of the bank-guarantee, is also not satisfied. The irretrievable injury caused to the first

respondent must be of a kind which would make it impossible for them to reimburse themselves later. It is not even the case of the first respondent, in the petition filed by them under Section 9 of the Act, that they are likely to suffer any such injury or that it is impossible for them to reimburse themselves, if they were succeed later, either from the appellant or from the respondents. It is evident that, in granting the ex-parte order of ad-interim injunction and in restraining invocation/encashment of the bank-guarantees issued by respondents 3 and 4 or the counter-guarantee issued by the appellant, the Court below exceeded its jurisdiction. Point No.3 is answered accordingly.

Point No.4:

Sri S. Niranjan Reddy, Learned Counsel for the appellant, would submit that the 1st respondent is indulging in forum shopping; they were simultaneously approaching multiple fora seeking identical reliefs; the 1st respondent had approached the Appellate Court of Nepal seeking grant of temporary injunction restraining the appellant and respondents 2 and 3 from invoking and encashing the bank guarantee; by its order dated 28.06.2015 the Appellate Court of Nepal refused temporary injunction, and dismissed the application filed by the 1st respondent; when the local Court in Nepal, within whose jurisdiction the entire cause of action had admittedly arisen, did not deem it fit to grant temporary injunction, the Court below ought not to have granted temporary injunction; the 1st respondent had suppressed the fact that it had approached the local Courts in Nepal simultaneously, seeking identical reliefs; and the balance of convenience also does not lie in their favour as they had approached the court below with unclean hands.

On the other hand Sri D.V. Sitarama Murthy, Learned Senior Counsel appearing on behalf of the 1st respondent, would submit that the suit filed by the 1st respondent in Nepal was against termination of the contract, and not against invocation of the bank guarantees.

The power to grant injunction is an extraordinary power vested in the Court to be exercised taking into consideration the facts and circumstances of a particular case. Courts have to be more cautious when

the said power is being exercised without notice or hearing the party who would be affected by the order so passed. That is why Order 39 Rule 3 of CPC requires that, in all cases, the Court shall, before grant of an injunction, direct notice of the application to be given to the opposite party, except where it appears that the object of granting injunction itself would be defeated by the delay. Whenever a Court considers it necessary, in the facts and circumstances of a particular case, to pass an order of injunction without notice to other side, it must record reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself would be defeated if an *ex parte* order is not passed. (**Shiv Kumar Chadha v. Municipal Corporation of Delhi**^[27]).

As a principle, *ex parte* injunction can be granted only under exceptional circumstances. The factors which should weigh with the Court, in the grant of *ex parte* injunction, are- (a) whether irreparable or serious mischief will ensue to the petitioner; (b) whether the refusal of *ex parte* injunction would involve greater injustice than the grant of it would involve; (c) the court will also consider the time at which the petitioner first had notice of the act complained so that the making of an improper order against a party, in his absence, is prevented; (d) the court will consider whether the petitioner had acquiesced for sometime and, in such circumstances, it will not grant *ex parte* injunction; (e) the Court would expect a party, applying for *ex parte* injunction, to show utmost good faith in making the application. (f) even if granted, the *ex parte* injunction should be for a limited period of time. (g) general principles, like *prima facie* case, balance of convenience and irreparable loss, should also be considered by the court. (**Morgan Stanley Mutual Fund v. Kartick**

Das^[28]). No injunction should be granted unless the petitioner establishes that they have a *prima facie* case, meaning thereby that there is a bona fide contention between the parties or a serious question to be tried. The question that must necessarily arise is whether, in the facts and circumstances of the case, there is a *prima facie* case and, if so, as between whom? Even if there is a serious question to be tried, the Court

should consider the balance of convenience. (**United Commercial Bank²⁵**).

The submission of Sri D.V. Sitarama Murthy, Learned Senior Counsel, that what was questioned before the Appellate Court in Patan, Lalitpur, Nepal was only the termination of the contract is belied by the counter-affidavit dated 27.07.2015 filed by the first respondent before this Court wherein the relief sought for by them before the Court in Patan, Lalitpur, Nepal is extracted and reads as under:

“The contention that this Respondent has approached multiple fora seeking identical reliefs is not correct. This Respondent filed Appellate Court in Patan, Lalitpur, Nepal seeking the following relief:

“That 2nd Respondent not to terminate or cause to terminate the Contract, and not to invoke or cause to invoke the Bank Guarantees until the disputes are resolved through the mechanism mentioned in the Contract and also in the name of Nepal Investment Bank and Laxmi Bank not to make payment or cause to make payment of those Bank Guarantees”..... (emphasis supplied)

It is evident, from the prayer afore-extracted, that not only has the first respondent questioned the action of the second respondent in terminating the contract, but has also sought a direction from the Appellate Court in Nepal to the respondents not to invoke or cause to invoke the bank-guarantees; and to direct respondents 3 and 4 not to make payment or cause to make payment of these bank-guarantees. Having failed in their attempt in securing relief from the Appellate Court in Nepal, and even though the petition filed by them is still pending before the said court, the first respondent has indulged in forum shopping, and has surreptitiously invoked the jurisdiction of the Court below. In the petition filed by them, before the Court below under Section 9 of the Act, the first respondent has suppressed the fact of their having invoked the jurisdiction of the Appellate Court in Nepal. Their attempt to now justify such suppression of material facts is, as noted hereinabove, without any basis for the relief sought by them before the Appellate Court in Nepal did not relate merely to the termination of the contract but also to invocation of the bank-guarantees issued in favour of the second respondent by respondents 3 and 4. The first respondent has failed to show good faith, in making the application under Section 9 of the Act, as they have suppressed the material fact of their having invoked the jurisdiction of the Court at Nepal. Further no serious questions of fact or law arose for consideration in the petition filed

by them under Section 9 of the Act. The balance of convenience clearly lay in allowing the normal banking transactions to go forward. Furthermore, the 1st respondent has failed to establish how they would be put to irreparable loss unless an interim injunction is granted.

It is evident that the first respondent has suppressed material facts, and has indulged in forum shopping by filing the petition before the Court below under Section 9 of the Act. The Court below has also failed to assign any reasons for granting an *ex parte* order of ad-interim injunction restraining invocation of the bank-guarantees/counter-guarantee. A cryptic order, that it had perused the records, the documents filed by the first respondent showed that they had a prima-facie case, the balance of convenience was in their favour and, if the bank-guarantees were encashed, they would suffer irreparable loss, would not suffice. The Court below has exceeded its jurisdiction in granting an *ex parte* order of ad-interim injunction without adhering to the requirements of Order 39 Rule 3 CPC. Point No.4 is answered accordingly.

CONCLUSION:

For the reasons aforementioned the order of the Court below, in Arbitration OP No.1031 of 2015 dated 22.06.2015, is set aside and the C.M.A. is allowed with exemplary costs of Rs.25,000/-, which the first respondent shall pay to the appellant-bank within four weeks from today. Miscellaneous Petitions, if any pending, shall also stand disposed of.

RAMESH RANGANATHAN

S.RAVI KUMAR

Date: 10-08.2015.

Note: L.R.Copy to be marked.
B/O
MRKR/CS

[\[1\]](#) 2011 (5) ALD 327 (DB)

[\[2\]](#) (Judgment of the Full Bench in CMA No.1206 of 2012 dated 12.06.2015)

[\[3\]](#) LAWS(BOM)-2014-5-8 = BCR-2014-3-551/TLMHH-2014-0-549

- [\[4\]](#) LAWS(GAU)-2009-12-5 = GAULT-2010-1-141/GAULJ-2010-1-320 (Gauhati HC)
- [\[5\]](#) 2003 (2) ARBLR 259 (Gujarat HC)
- [\[6\]](#) (2011) 9 SCC 735
- [\[7\]](#) (2011) 6 SCC 179
- [\[8\]](#) (2011) 6 SCC 161
- [\[9\]](#) (2014) 7 SCC 603
- [\[10\]](#) (2012) 9 SCC 552
- [\[11\]](#) (2002) 4 SCC 105
- [\[12\]](#) (2008) 4 SCC 190
- [\[13\]](#) (1996) 1 SCC 735
- [\[14\]](#) 2015 (4) SCALE 62
- [\[15\]](#) AIR 1999 SC 3710
- [\[16\]](#) (1998) 1 SCC 174
- [\[17\]](#) (2006) 13 SCC 599
- [\[18\]](#) (1984) 1 ALL ER 351 (CA)
- [\[19\]](#) (1994) 1 SCC 502
- [\[20\]](#) (1995) 6 SCC 68
- [\[21\]](#) (1995) 6 SCC 76
- [\[22\]](#) (1995) 4 SCC 515
- [\[23\]](#) (1996) 5 SCC 34
- [\[24\]](#) (1997) 1 SCC 568
- [\[25\]](#) (1981) 2 SCC 766
- [\[26\]](#) (1986) 4 SCC 136
- [\[27\]](#) (1993) 3 SCC 161
- [\[28\]](#) (1994) 4 SCC 225