IN THE HIGH COURT OF BOMBAY AT GOA

ARBITRATION PETITION NO. 1 OF 2017

M/s. VEDANTA LIMITED
(formerly known as Sesa Sterlite Ltd)
having its registered office
at Sesa Ghor, 20 Edc Complex
Patto, Panaji Goa 403 001
through its Chief Operating officer
and Authorized signatory,
Mr. Sauvick Mazumdar
son of B. N. Mazumdar
Age 45 years, Indian National
residing at B-262, Landscape
Pinto Park, Campal,
Panaji-Goa 403001. .... Petitioner

Versus

1. Noble Resources International Pte Ltd.
Having its registered office at
60 Anson road, #19-01
Mapletree Anson,
Singapore, 079914
2. IDBI Bank Ltd.
Trade Processing Centre,
4th Floor, Mafatlal Centre,
Nariman Point, Mumbai - 400021 .... Respondents

Shri S. D. Lotlikar, Senior Advocate with Mr. D. Lawande, Mr. Abhijit Gosavi and Mr. A. Phadte, Advocates for the petitioner.

Shri S. G. Dessai, Senior Advocate with Mr. Shivan Dessai, Mr. Udit Mendiratta, Advocates for the respondent no.1.

Ms. Shreevardhini Parchure and Mr. Abhishek Sawant, Advocates for the ICICI Bank.

CORAM:- C. V. BHADANG, J.

DATE:- 12th June, 2017.

JUDGMENT :

This is an application under Section 9 of the

Arbitration and Conciliation Act, 1996 (Act, for short), seeking interim measures.

2. The brief facts necessary for the disposal of the application may be stated thus:-

The petitioner is a Company registered under the Companies Act, 1956 and is inter-alia engaged in the business of extraction, sale and export of iron ore. The respondent no.1 is a Private Limited Company incorporated under the laws of Singapore and is engaged in the business of commodity trading. On 15.04.2016, the petitioner and the respondent no. 1 entered into a 'Master Agreement', for sale and purchase of iron ore (Master Agreement, for short), under which the petitioner agreed to sell processed and screened iron ore fines to the respondent no.1 on terms and conditions, as more specifically described in the Master Agreement. In short, the respondent no. 1 had agreed to purchase 12,70,000 Wet Metric Tons (WMT) in separate shipments as per the schedule set out in Clause 3.8 of the Master Agreement. The ore was to be shipped in fifteen shipments from 10th June, 2016 to 10th May, 2017. The first two shipments were to be of 50,000 WMT each, while the remaining of 90,000 WMT each. There is no dispute about the first two shipments as they have been delivered and the petitioner has received the sale price of the same. The third shipment has also been shipped by the petitioner and has received part sale price of the same. The real dispute arose when the respondent no. 1 refused to accept the fourth and the subsequent shipments.

3. Clause 5.2.3 of the Master Agreement to the extent relevant for the purpose, reads as under:-

> *"5.2.3 The Buyer agrees to make payment under this Agreement as follows :*
>
> *a) At least 3 calendar days before the first day of the laycan for each shipment, the Buyer shall establish an irrevocable, non-restricted and payable at sight, at the counters of negotiating bank, letter of credit (hereinafter called "LC") in the format acceptable to the Seller and opened with a first class international Bank acceptable to Seller in favour of the Seller in US Dollars covering 100 % of the full amount of the shipment value of the Commodity.*

4. As per Clause 9.2 of the standard terms and conditions (Annexure 1) to the agreement, the petitioner (seller) is entitled to terminate the contract by written notice, if, the buyer refuses to take/accept the delivery of the commodity on the scheduled date. As per Clause 9.3, upon termination or cancellation of the agreement for any reason, the buyer shall make all payments, which have become due and payable to the seller including payments in respect of outstanding orders and commodity in transit.

5. The shipment no. 4 had a Laycan month of October 2016 with outer shipment date as 10th November, 2016. The petitioner initially nominated a Laycan on 4th October, 2016 and thereafter, on 18th October, 2016 for a revised Laycan period of 4th to 8th October, 2016. According to the petitioner, the respondent ignored all communications regarding shipment no. 4 and failed to accept the nominated vessel MV Indus Victoria and also failed to open a letter of credit in time, as per Clause 5.2.3. The petitioner sent a legal notice on 11th November, 2016, outlining the breaches and called upon the respondent to remedy the same within 30 days as per Clause 9.1.1 of the standard terms and conditions, but, to no avail. As a result, the petitioner was forced to withdraw the vessel on 21st November, 2016 as a measure in mitigation of losses. The respondent was not responsive with regard to fifth shipment and purported to reject the nominated vessel without assigning any reason. The respondent also refused to accept a substitute vessel and hence, the petitioner was constrained to withdraw the vessel in mitigation of losses. Similar breaches occurred in respect of shipment nos. 6 and 7. Finally, on 15th April, 2016, the petitioner sent a notice terminating the agreement on account of 'diverse and multiple breaches of the agreement', by the respondent.

6. On 29th December, 2016, the petitioner filed a notice

of arbitration pursuant to Clause 7.3 of Annexure-1 of the agreement, which envisages the referral and resolution of the disputes and differences by arbitration administered by the Singapore International Arbitration Centre (SIAC). The petitioner proposed the names of three experienced persons, out of which a sole arbitrator was to be appointed, however, the respondent no. 1 in their response, has rejected the proposal. The Arbitral Tribunal is yet to be constituted.

7. Incidentally, there was a separate contract entered into between the parties, under which the petitioner had purchased coal from the respondent no. 1, against which the petitioner had opened a letter of credit dated 03.11.2016 (the said LC) for approximately USD 18.81 Million through IDBI Bank (Mumbai Branch). Indisputably, the said agreement has been duly performed, in which the petitioner has received the delivery of the coal. The said LC is becoming payable on 12th June, 2017 i.e. today.

8. The petitioner filed this petition under Section 9 of the Act, initially seeking an order directing the IDBI Bank not to transmit or effect the payment under the said LC. It so happened that the the respondent in the meanwhile got the said LC discounted through ICICI Bank and the ICICI Bank has made the payment of the discounted amount to the respondent on 12th

January, 2017. The petitioner amended the petition and incorporated an alternate prayer B as under :-

> *“B:- In alternative and without prejudice to prayer clause A above, this Hon'ble Court be pleased to direct Respondent No.1 to provide security as interim measure, by way of cash deposit in this Hon'ble Court or by way of deposit in escrow account subject to orders of the arbitral Tribunal or by way of irrevocable Bank Guarantee to the satisfaction of this Hon'ble Court, to secure the amount in dispute.”*

9. The petitioner also incorporated para 28A, thereby, bringing on record that the petitioner had filed an application in the Court at Pennsylvania, USA on 19th January, 2017 and at New Jersey, USA on 20th January, 2017, which were only in respect of the maritime claims in relation to the Master Agreement. In the said proceedings, the respondent no. 1 has filed a motion for approval of security before the US Court on 14th February, 2017. The petitioner had also volunteered to answering respondent directly to put up security by way of an escrow account. The escrow agreement has been signed by all the parties on 22nd February, 2017.

10. In this petition, the petitioner is seeking a direction to IDBI Bank not to effect or transmit payment under the said LC to respondent no. 1 or its beneficiary bank, namely the

Standard Chartered Bank (Hong Kong) Ltd. and in the alternative to direct the respondent no. 1 to provide security by way of cash deposit in escrow account, subject to the orders of the Arbitral Tribunal or by way of irrevocable Bank Guarantee to secure the amount in dispute.

11. This Court by an order dated 31.01.2017 had granted ad-interim relief, directing the second respondent not to effect or transmit the payment under the said LC till next date. Feeling aggrieved by the said order, the respondent no. 1 filed MCA No. 163/2017 for vacating the said order. On 01.03.2017, this Court refused to continue the ad-interim order dated 31.01.2017, on the ground that the respondent no. 1 had already received the payment by discounting the LC on 12.01.2017 and even otherwise, the said LC was to become payable on 12.06.2017.

12. ICICI Bank filed MCA No. 173/2017, seeking recall of the order dated 31.01.2017 and for impleading it as a party respondent or in the alternative to permit it to address the Court on the application filed by the petitioner.

13. The respondent no. 1 indicated that the contents of its application for vacating the order dated 31.01.2017 be read as reply to the petition. The contentions raised on behalf of the

respondent may be briefly noted at this stage. It is contended that the claim of the petitioner is based on the premise that the respondent no. 1 is not possessed of sufficient assets to satisfy the claim of the petitioner, which is false to the knowledge of the petitioner and is based on gross suppression of material facts. It is submitted that the respondent is a sound commercial enterprise and is able to satisfy the claim if found payable. It is contended that the respondent no. 1 is a part of Noble Group and operates as a subsidiary of Noble Group, which manages a portfolio of global supply chain across a range of industrial and energy products. The Noble Group is the largest commodity trading company in Asia and is widely recognised as an industry leader, having business presence across the Globe. The respondent has then set out the details of the financial statements to show that it is a sound enterprise to satisfy any claim, if granted.

14. It is contended that the petitioner has wrongfully terminated the Master Agreement. There is repudiatory breach of the Master Agreement committed by the petitioner and as such the petitioner is liable to compensate the respondent. It is the material defence that the petitioner has committed breach of the confidentiality clause by making unauthorised disclosures to third parties about the subject matter of the Master Agreement. It is the respondent, which has suffered losses due to said

breach.

15. It is contended that the petitioner had suggested the names of English lawyers based out of England and the respondent had refused to accept the names as proposed, as the arbitration proceedings were seated in Singapore. The respondent had suggested the names of three renowned commercial arbitrators based in Singapore, which have been rejected by the petitioner as a result of this, the SIAC will now decide on the appointment of the sole arbitrator.

16. It is contended that there is a separate agreement under which the petitioner had agreed to purchase coal from the respondent and the petitioner had raised the said LC in respect of the said contract which is duly performed. The respondent got the said LC discounted from the ICICI Bank as per the standard commercial practice and has received the payment on 12.01.2017. Thus, the petitioner cannot seek injunction against IDBI Bank from honouring the said LC.

17. It is submitted that the petition suffers from suppression of material facts, in as much as, in the petition, as originally filed, the petitioner has failed to disclose the proceedings before the US Court.

18. ICICI Bank has contended that the said irrevocable LC, which was issued on 03.11.2016 at the request of the petitioner in favour of the respondent as beneficiary, has been discounted by the bank as per the ICC Uniform Customs Practice For Documentary credits (UCP 600) and the payment is made on 12.01.2017. It is submitted that the contract in respect of which, the said LC was opened, has been duly performed and the petitioner cannot justifiably claim injunction against IDBI Bank from honouring the said LC. It is submitted that an injunction against honouring bank guarantee can be issued, in exceptional circumstances, where there is fraud alleged and proved, and/or if an irretrievable loss/ prejudice is demonstrated.

19. I have heard Shri Lotlikar, the learned Senior Counsel for the petitioner and Shri Desai, the learned Senior Counsel for the respondent no.1. I have also heard Ms. Shreevardhini Parchure, the learned Counsel for the ICICI Bank. There was no appearance on behalf of the IDBI Bank. The parties have also filed written notes.

20. Shri Lotlikar, the learned Senior Counsel for the petitioner has raised the following contentions :

(i) That the said LC is for an amount of approximately USD 18.81 Million, whereas the claim of the petitioner as on the date of the petition is approximately USD 11.90 Million, out of which the respondent no.1 has already secured the amount towards the maritime claim. Thus, the petitioner is not, in any event, seeking to injunct the encashment of LC as a whole, but only to the extent it is necessary to secure the claim of the petitioner.

(ii) This, the respondent no.1 can avoid by furnishing independent security towards the claim of the petitioner. Thus, it is for the respondent no.1 to avoid the payment of the said LC being injuncted against, as it is only alternate claim in the event the respondent no.1 fails to secure the amount of claim.

(iii) As per the settled legal position, the Courts are entitled to restrain remittances under the LC in the event of (a) a fraud or (b) an irretrievable injury. (See ***Continental Construction Ltd and another V/s. Satluj Jal Vidyut Nigam Ltd*** ; 2006(1) ARBLR 321(Delhi).

(iv) It is contended that the respondent no.1 voluntarily got the LC discounted from ICICI Bank well before its due date and thus, it is for the respondent no.1 to protect the interest of the discounting bank (ICICI Bank), by securing the amount of claim, in which event, no orders would be necessary against the encashment of the LC.

(v) The respondent although has secured the amount of the maritime claim before the US Court has "surprisingly chosen to contest" the present claim. (see ***Beker Hughes Singapore***

Pte Vs. Shiv Vani Oil and Gas Exploration Services ltd; 2014 SCC Online Bom 1663 and ***Impex Trading Gmbh Vs. Anunay Fab. Ltd & Ors***; 2007 SCC Online Del 1618).

(vi) It is contended that the respondent no.1 is admittedly a non-resident entity not owning any assets in India, which is one of the reasons why the amount of claim of the petitioner needs to be secured.

(vii) It is submitted that the respondent no.1 cannot justifiably condemn the petitioner, who knowingly entered into a contract with respondent no.1 although it is a non-resident entity, not owning any assets in India.

(viii) It is contended that under the master agreement, the respondent no.1 was required to open the letter of credit covering 100 % of the value of the cargo, at least 3 days before the first day of laycan for each shipment and the respondent no.1 must be held to this bargain and he cannot walk out of the same.

(ix) It is contended that the respondent no.1 failed to open the letter of credit and accept the nominated vessel after the first 2 shipments, without any cause or justifiably reason.

(x) It is contended that the claim of the respondent no.1 about breach of confidentiality clause is an afterthought and is “as vague as vagueness could be” and is without any particulars and is moonshine defence. It is submitted that in their application bearing No.MCA No.163/2017, there is no reference to the Maquarie Bank and Cargill or to any other known / unknown entities, which are alleged business competitors of the respondent no.1, to whom such disclosure is allegedly made by the petitioner.

(xi) It is contended that the respondent no.1 failed to set up the said case when the respondent no.1 was asked to remedy the breaches and failed to issue any reply to the notice of termination of the contract. It is contended that the said case was set up for the first time in the reply to the notice for appointment of arbitrator.

(xii) It is submitted that the quantification of the loss has not appropriately been disputed by the respondent no.1 in M.C.A. No.163/2017 cum reply. It is contended that the net worth of the respondent no.1 has eroded by 107 Million dollars much less in the year 2014-2015 and its tangible assets are only to the tune of 4 Million Dollars that too consisting of IT assets. It is, thus, submitted that the respondent no.1, which is a loss making entity, would be unable to satisfy the claim if granted. It is submitted that in such circumstances, this Court can exercise powers under Section 9 of the Act to secure the claim so that the sanctity and effectiveness of the arbitration proceedings is lost.

(xiii) It is contended that in the reply dated 12/01/2017, for the first time, there is a reference to the earlier e-mails raising the issue of breach of confidentiality.

(xiv) It is submitted that the powers under Section 9 of the Arbitration Act are wide and not strictly regulated or limited by the provisions of Order XXXVIII, Rule 5 and Order XXXIX of the Code of Civil Procedure. It is submitted that the rigours of every procedural provision in the Code of Civil Procedure cannot be imported in an application under Section 9 of the Act. (See ***Welspun Infratech Limited Vs. Mr. Ashok Khurana and Ors***; 2014 SCC Online Bom 39).

(xv) It is submitted that although the said LC is under a different contract, it is in respect of the contract between the same parties and in an appropriate case, the Court can grant interim measures even if the property or things are not the subject matter of dispute in arbitration. (See ***Tata Capital Financial Services Ltd Vs. Deccan Cronicles Holdings Ltd***; 2013(3) Bom C.R. 205).

(xvi) It is submitted that the contention about suppression of material facts is without any merit. It is contended that the proceedings before the US Court and the present petition were initiated “almost simultaneously” and no prejudice whatsoever is caused to the respondent no.1 nor any benefit is accrued to the petitioner by not mentioning about the proceedings before the US Court, in the present petition.

(xvii) Lastly, it is contended that the respondent no.1 is indulging in an 'obstructive conduct', thereby delaying the arbitration proceedings, which would be evident from the letter dated 30/03/2017 from SIAC as the respondent no.1 has failed to deposit the bare minimum costs with the Tribunal to enter upon the arbitration and commence the proceedings.

21. *Per contra,* it is submitted by Shri Dessai, the learned Senior Counsel for the respondent no.1 that the petitioner has wrongfully terminated the master agreement and the respondent no.1 is not liable to pay any amount as claimed. It is contended that it is the petitioner, who has committed a 'repudiatory breach', of the master agreement and is liable to compensate the respondent no.1 for losses arising out of such repudiatory breach. It is contended that the petitioner is bound under the master agreement by covenants of confidentiality. However, the petitioner, in breach thereof, has made unauthorised disclosures about the subject matter of the master agreement to various third parties, including the petitioner's business competitors, such as Maquarie Bank and Cargill amongst other unknown individuals/ entities.

It is contended that the said LC is in respect of a different contract, which has already been performed and the petitioner cannot seek injunction against encashment of the said LC, which has already been discounted and the respondent no.1 has received the payment on 12/01/2017.

It is submitted that the principles governing the grant of interim measures under Section 9 of the Act are similar to one for grant of interim injunctions under Order XXXIX, Rule 1 & 2 of CPC. Reliance in this regard, is placed on the decision of the Supreme Court in the case of (i) ***ITI Ltd Vs. Siemens Public Communications Network Ltd***; (2002)5 SCC 510 (ii) ***Arvind Constructions Vs. Kalinga Mining Corporation***; (2007)6 SCC 798 and decision of this Court in ***Nimbus Communications Ltd V. Board of Cricket Control in India***; 2013(1) Mh.L.J. 39. It is submitted that the petitioner is seeking order in the nature of attachment before judgment and thus will have to satisfy the rigours of Order XXXVIII Rule 5 of the Code. (See ***Raman Tech & Process Engg. Co. and another Vs. Salonki Traders***; (2008)2 SCC 302). It is submitted that attachment before judgment is a drastic remedy, which cannot be used to convert an unsecured creditor into a secured creditor only because a suit is filed against such party. It is submitted that merely because the respondent no.1 is a non-resident entity and has no assets in India, does not entitle the petitioner for an order to secure the amount in dispute. (See ***Remedial Resolutions Advisors Pvt. Ltd. Vs. Capri UK Investments Ltd***; 2014(4) Bom CR 658). It is submitted that such an order, which penalises a non-resident merely on account of his residential status, would discourage a non-resident from carrying on business in India (See ***Iridium India Telecom Ltd. Vs. Motorola Inc.***; 2003(6) Bom CR 511). It is submitted that as per the well settled legal position, a security ought not to be granted to secure the claim “simpliciter for damages” as opposed to a claim for recovery of liquidated damages due under a contract.

It is contended that the respondent no.1 is a Commodity Trading Company in Asia having assets to the tune of approximately 270573000 USD and retained earnings of over USD 200000000. It is submitted that assuming that the respondent no.1 is a loss making entity, the mere fact of insolvency by itself is not sufficient for grant of interim relief in the nature of an attachment before judgment. (See ***Premraj Mundra V. Md. Maneck Gazi***; AIR 1951 Cal. 156). It is contended that the irrevocable letter of credit such as the one in the present case, cannot be interfered with except in case of 'fraud of an egregious nature' of which the bank has notice or where irreparable injury would be caused to the petitioner. (See ***Himadri Chemicals V. Coal Tar Refining Co***; (2007)8 SCC 110 and ***Swenska Handelsbanken Vs. M/s. Indian Charge Chrome*** (1994)1 SCC 502).

It is submitted that the petitioner has suppressed the material facts about the financial position of the respondent no.1 by annexing truncated financial statements. It is, thus, submitted that the petitioner has not made out any case for grant of injunction against the encashment of the LC or for a direction to the respondent to secure the amount of claim, if granted.

22. The learned Counsel for the applicant ICICI Bank has submitted that the petitioner *bonafide* acting in the usual course of its commercial transaction and as per UCP 600, has discounted the LC on 12/01/2017 and the contract in respect of which the said LC was opened, has also been performed by the parties and thus, the second respondent cannot be restrained from honouring the LC in favour of ICICI Bank and it would cause serious prejudice.

23. After the parties were heard and they filed Written Submissions, they were also heard on the point of the maintainability of the petition before this Court.

24. I have carefully considered the rival circumstances and the submissions made. The following points arise for my determination in this petition :

(i) Whether the petition, as framed and filed, is maintainable before this Court ?

(ii) If yes, whether the petitioner is entitled to an order directing the respondent no.2 IDBI Bank, Mumbai Branch not to effect or make payments under the said letter of credit dated 03/11/2016 to the respondent no.1 or his beneficiary bank namely Standard Chartered Bank

(Hongkong) Ltd ?

(iii) Alternatively, whether the petitioner is entitled for a direction to the respondent no.1 to provide security by way of cash deposit in this Court or in an escrow account, subject to orders of the arbitration Tribunal or by way of irrevocable bank guarantee to the satisfaction of this Court, to secure the amount in dispute ?

(iv) What order ?

25. AS TO POINT NO. (i) :-

This issue goes to the root of the matter. In ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.***; 2012(9) SCC 552, a Constitution Bench of the Supreme Court has, *inter alia,* held that part I of the Act (which includes Section 9 of the Act) is inapplicable to International Commercial Arbitration, whose juridical or legal seat of arbitration is outside India (Foreign seated ICA). In the present case, as per the arbitration agreement, contained in clause 7 of the Standard Terms and Conditions (Annexure I) to master agreement, the seat of the arbitration is in Singapore. It would be worthwhile to reproduce clause 7 as under :

"7. ARBITRATION

7.1 If any dispute or difference of any kind whatsoever arises between the parties in connection with or arising out of this contract, either party may give written notice to the other *and they shall make every effort to resolve amicably such dispute or difference by mutual consultation;*

7.2 In the event the Dispute remains unresolved after thirty (30) Business Days and the Parties have failed to reach an amicable settlement with respect to the same, the Dispute shall be submitted to arbitration at the request of either party upon a written notice (hereinafter referred to as the "Dispute Notice") to that effect to the other Party and such arbitration shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre "SIAC Rules" for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be Singapore.

The Arbitration Tribunal shall consist of one arbitrator.

The language of the arbitration shall be English.

7.3 Arbitration proceedings under this contract may be consolidated with arbitration proceedings pending between the Parties if the arbitration proceedings arise from the same transaction or relate to the same subject matter. Consolidation shall be by an order of the Sole Arbitrator/ arbitral tribunal in any of the pending cases or, if the Sole arbitrator/ arbitral tribunal fails to make such an order, upon the Parties applying to a court of competent jurisdiction in the event that such disputes are not subject to arbitration for such a *consolidation order;*

7.4 Notwithstanding any reference to arbitration herein, except as otherwise decided by the arbitrators, the Parties shall continue to perform their obligations;

7.5 Except in the case of manifest error, the determination of the arbitration shall be final and binding;

7.6 The award shall be in writing and shall be a reasoned award. The award given by the arbitrator shall be final and binding on the Parties hereto and shall be enforceable in any competent court of law. The arbitrator(s) may (but shall not be required to) award to the Party that substantially prevails on merits, its costs and reasonable expenses (including reasonable fees of its counsel).

7.7 Party shall bear their respective share of expenses to be incurred for appearing in the arbitration proceedings, but the costs and the expenses incurred on the arbitration proceedings would be shared by both the parties, in the absence of any direction in the final award passed by the arbitrators.

7.8 The provisions contained in this Article shall survive the termination and/ or expiration of this Agreement."

26. Clause 8, which is governing law and jurisdiction reads as under :

"8. Governing Law and Jurisdiction

All matters arising from or connected with the Agreement shall be governed by, and constructed in *accordance with English Law."*

27. It can, thus, be seen that the law governing the contract is not the Indian Law, but the English Law. In so far as the arbitration proceedings are concerned, the arbitration is to be administered by the Singapore International Arbitration Centre (SIAC) in terms of Arbitration Rules of SIAC. Thus, the curial law applicable to the arbitration proceedings, is the arbitration rules of SIAC. Clause 7.2 specifically shows that the seat of the arbitration shall be Singapore. Thus, in view of the law laid down by the Supreme Court in the case of ***Bharat Aluminium Company*** (supra), the applicability of part I of the Arbitration Act will stand excluded.

28. A reference at this stage is necessary to the proviso to subsection 2 of Section 2 of the Act, as introduced by an amendment with effect from 23/10/2015. subsection (2) of section 2 of the Act reads thus :

> *"2(2). This part shall apply where the place of arbitration is in India :*
>
> *Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of subsection (1) and subsection (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable*

and recognised under the provisions of Part II of this Act."

29. It was submitted by Shri Lotlikar, the learned Senior Counsel for the petitioner that by virtue of the proviso to subsection (2) of Section 2 of the Act, Section 9 of the Act would be applicable to an International Commercial Arbitration, if there is no agreement to the contrary. It is submitted that there is no agreement to the contrary, which can be found in the master agreement or in the standard terms and conditions, so as to exclude the application of Section 9 of the Act. He, therefore, submits that the application under Section 9 would be maintainable notwithstanding the fact that the petition arises out of an International Commercial Arbitration.

30. *Per contra,* it is submitted by Shri Dessai, the learned Senior Counsel for the respondent no.1 that the agreement to the contrary, as envisaged in the proviso to subsection (2) of Section 2 can, in a given case, may be an implied agreement. In other words, it is submitted that the proviso to subsection (2) of section 2 of the Act does not show that such an agreement to the contrary has to be an express agreement as the proviso does not exclude the possibility of such an agreement, which can be implied and which can be inferred from the contents of the contract as a whole.

31. I have carefully considered the submissions as made. It is true that under the proviso to subsection (2) of Section 2 of the Act, the provisions, *inter alia,* of Section 9 of the Act would also apply to International Commercial Arbitration even if the place of arbitration is outside India. In a given case, the parties can agree to the contrary. Thus, the parties can, in a given case, agree for exclusion of the provisions of Sections 9, 27 and clause (a) of subsection (1) and subsection (3) of Section 37 of the Act. The proviso does not indicate whether such an agreement has to be an express agreement or whether it can even be an implied agreement, which can be inferred from the terms of the contract between the parties. The proviso was introduced recently by an amendment in the year 2015 and till date, there is no assistance (at least nothing was brought to my notice) from any decided case as to whether the agreement to the contrary, as envisaged in the proviso, can, in a given case, be an implied agreement, which can be inferred. However, without laying down any binding precedent, in my considered view, the proviso as it stands, does not exclude such an agreement, which can be an implied agreement, which can be inferred on construction of the terms of the contract as a whole. As noticed earlier, in the present case, the arbitration is to be governed by rules of SIAC, of which the seat is to be in Singapore and general law applicable to the contract is English law. In my considered view,

the conclusion is inescapable that the parties impliedly intended to exclude the provisions of Section 9 of the Act within the meaning of the proviso to subsection (2) of Section 2 of the Act. At any rate, in my considered view, there is a serious doubt as to the maintainability of the petition before this Court. Nonetheless as the parties have addressed the Court also on merits, I propose to deal with point nos.(ii) and (iii) also.

32. AS TO POINT NO.(ii) :-

The material facts governing this issue, are not in dispute. It is undisputed that the said letter of credit was opened by the petitioner in respect of a distinct contract for supply of coal by the respondent no.1. It is further undisputed that the said contract has been fully performed in which the petitioner has received the delivery of the coal and as such, the amount of consideration, which is the subject matter of the said LC has become payable to the respondent no.1. Not only that the respondent no.1 as per the standard commercial practise got the said LC discounted from the ICICI Bank and has received the entire payment on 12/01/2017. The ICICI Bank, (which is not a party to either of the contracts as also to the petition), has discounted the LC as per the standard commercial practise UCP 600. There are no allegations of fraud much less, of which, the ICICI Bank was aware. (See ***Swenska Handelsbanken*** and ***Himadri Chemicals*** (supra)). Thus, one of the two situations where an injunction could be granted against encashment of bank guarantee, does not exist in this case. It is contended on behalf of the petitioner that the Bank can be injuncted from honouring the letter of credit, if the party concerned, demonstrates irretrievable injury. In my considered view, the petitioner has failed to demonstrate that any such irretrievable injury would result, if the injunction as prayed is not granted. Admittedly, the ICICI Bank, as per the standard commercial practise, has already discounted the LC and the ICICI Bank, as a third party, which has no concern with the interse dispute between the parties, would be seriously prejudiced, if such injunction is granted.

33. The contention that the respondents can avert the order against the encashment of the said LC by furnishing independent security as claimed in prayer clause (B), to my mind, cannot be accepted. It would be significant to note that the petition as originally filed, only sought the relief of an injunction against the encashment of the LC. Even when the petition came to be amended, it continues to be the main prayer of the petitioner. The prayer regarding a direction to the respondent no.1 to provide security by way of cash deposit or by way of deposit in escrow account or by way of irrevocable bank guarantee, is an alternate prayer. Even while amending the petition, the ICICI Bank is not arrayed as party respondent,

although the petitioner is aware that the ICICI Bank in the interregnum has discounted the said LC and paid the amount to the respondent no.1 on 12/01/2017. Be that as it may, having regard to the fact that the said LC is in respect of an independent contract between the parties, which has been fully performed and further having regard to the fact that the ICICI Bank, which is not a party to either of the contracts (namely, the contract out of which the present dispute arises and the contract regarding supply of coal, out of which, the LC was opened.), no injunction can be granted as prayed for.

34. The judgment in the case of ***Satluj Jal Vidyut Nigam Ltd*** (supra) is distinguishable on facts. In that case, the Bank Guarantee in question was sought to be invoked, just prior to the expiry of the performance period. Further, the Bank Guarantee was not invoked in terms of the applicable clause and the respondents themselves had agreed not to invoke the Bank Guarantee on condition that the applicants would keep the Bank Guarantee alive. It was, in these circumstances, found that an order of restraint could be passed against the respondent Bank, not to encash the Bank Guarantee, subject to the condition that the Bank Guarantee is kept alive during pendency of the arbitration proceedings.

35. The fact that the respondent no.1 has secured the

amount of maritime claim, also would not be decisive while deciding this application. The maritime claim and the claim arising out of the alleged illegal breach of the contract and the consequent damages incurred by the petitioner, are distinct claims and the fact that the respondent no.1 has secured the maritime claim, would not be relevant, while deciding the present petition under Section 9 of the Act.

36. In the case of ***Beker Hughes Singapore Pte*** (supra), the application for interim measures filed under Section 9 was converted into an application under Section 17 by order of the Court. This Court took note of its earlier decision in the case of ***Nimbus Communications Ltd*** (supra) holding that the principles laid down in the Code of Civil Procedure for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Code. It has been held that the principles underlying the grant of relief under Order XXXVIII, Rule 5 of the Code has to be borne in mind, while deciding an application under Section 9(ii)(b) (as in the present case). The principles apart, on facts the said case is distinguishable, as the letter of credit, was relatable to the very same contract, out of which the dispute arose. Thus, the prayer (A) has to be rejected.

37. AS TO POINT NO. (iii) :-

The claim of the petitioner is that the respondent no.1 has refused to accept the fourth and subsequent shipments without any justifiable cause, as a result of which, the petitioner was required to sale the ore at a lower price, as a measure for mitigation of losses and thus, the petitioner has suffered losses to the extent of approximately USD 11.90 million. According to the petitioner, the claim of the respondent no.1 that the petitioner has committed breach of confidentiality clause by disclosing material particulars of the contract to business competitors of the respondent no.1, is a moonshine defence, as no particulars of the parties, to whom such disclosure was made, are forthcoming till the respondent no.1 filed an application for vacation of interim relief.

38. The question whether the petitioner was justified in terminating the contract and the question whether there was any breach of confidentiality clause committed by the petitioner, (as claimed on behalf of the respondent no.1) or whether the respondent no.1 has committed any repudiatory breach of the contract, by not accepting the fourth and subsequent shipment, is a matter, which will have to be gone into by the learned Arbitrator. At this stage, it is for the petitioner to prima facie show that it had suffered losses on account of the fact that the petitioner was required to sell the iron ore at a lesser price as a

measure of mitigation of losses. The petitioner has not produced any material on record as to which party, the petitioner was required to sell the iron ore at a lesser price and the petitioner has not come out with necessary particulars as to such distress sale, which would prima facie show that the petitioner had suffered such losses. On a specific query being made about non-production of such material, the learned Senior Counsel for the petitioner had shown willingness to produce such record for the perusal of the Court. However, he had reservations to disclose the same or supply copies of the same to the respondents, on the ground that this may be in breach of the confidentiality clause between the purchasers, to whom the petitioner has sold the iron ore. At any rate, the Court would be unable to consider any such material unless the other side is given an opportunity to meet the same. Thus, the net result is that there is no material at this stage to prima facie show that the petitioner was required to sale the iron ore at a lesser price as a measure in mitigation of losses.

39. The respondent no.1 has now come on record giving the names of at least two parties, to whom the petitioner had made disclosures, which according to the respondent no.1 is in breach of the confidentiality clause. If we carefully weigh the rival contentions, it would appear that the petitioner has neither given the names of the parties, to whom the iron ore was sold at

a distress rate and has also shown reservations for producing the record by giving the copies of the same to the other side. On the other hand, the respondent no.1 has now come on record, with at least two names to whom the petitioner has allegedly made the disclosures, in breach of the confidentiality clause. Thus, in my considered view, the petitioner has failed to establish a prima facie case for grant of damages, which would be relevant while considering the claim for grant of interim measures for securing any such claim, if ultimately granted.

40. In my considered view, the learned Senior Counsel for the respondent no.1 is justified in saying that the relief claimed by the petitioner is in the nature of attachment before judgment, which being a drastic relief, would require a strong case being made out for grant of such relief. The existence of prima facie case is the first and foremost condition for grant of such a relief. Consideration of irreparable loss and balance of convenience can only come later.

41. In the case of ***Welspun Infratech Limited*** (supra), on facts, it was prima facie found that the petitioner had good chances of success in the arbitration proceedings and thus, if the interim measures are not granted so as to secure the claim of the petitioner, the petitioner would not be able to recover any amount even if he succeeds in the arbitration proceedings.

The question whether the petitioner has good chances of success and consequently a prima facie case, would depend upon the facts and circumstances of each case. Even in the case of ***Welspun Infratech Limited*** (supra), this Court has noticed the Division Bench judgment of this Court in the case of ***Nimbus Communications Ltd*** (supra), wherein it has been held that the underlying basis of order XXXVIII, Rule 5 of CPC has to be borne in mind by the Court, while passing the order on an application under Section 9(ii)(b) of the Act.

42. In the case of ***Tata Capital Financial Services Ltd*** (supra), the petitioner had advanced a loan of Rs.25 Crores to the respondents against the security on Simple Mortgage of immovable property. There was an objection raised that the claim as to enforcement of mortgage is not arbitrable in nature and, therefore, the interim measures under Section 9 of the Act, which are to be in aid of final relief, cannot be granted. This Court held that even if a relief by way of enforcement of mortgage may not be arbitrable, the petitioner would always have liberty to decide whether to withdraw such claim and/or seek amendment for moulding its relief, which would be within the jurisdiction of the Arbitral Tribunal. Thus, in my considered view, the case arose in the facts, which are distinguishable.

43. In the case of ***Raman Tech & Process Engg. Co.***

(supra), it has been held by the Supreme Court that for an order under Order under XXXVIII, Rule 5 of CPC, the plaintiff has to prima facie show that his claim is *bonafide* and valid and also has to satisfy the Court that the defendant is about to remove or dispose of the whole or part of his property, with an intention of obstructing and delaying the execution of any decree that may be passed against him. I have already found that the petitioner has *prima facie*, failed to demonstrate that it has suffered loss on account of distress sale of iron ore, in as much as the petitioner has failed to furnish any particulars or to produce any documents to show as to which party, the iron ore was sold and at what rate. Nevertheless a brief reference may be made to the financial/ income statement of the petitioner. It is true that in the year ending 2014, the income statement of the respondent shows a profit of 31,549,000 USD, while for the year ending 2015, the income statement shows loss of 106,890,000 USD. A statement of comprehensive income for the financial year ended 31/12/2015 again shows a loss of 110,393,000 USD over an income of 35438000 USD for the year ending 2014. Similarly, the net current liabilities for year ending 2015 stand at 114012000 USD as against assets of 8537000 for the year ending 2014. However, the retained earnings are shown as 200148000 USD for the year ending 2015. Thus, prima facie, it cannot be accepted that the respondent would not be able to satisfy the claim, if eventually granted.

44. In the result, the petition is without any merit and is, accordingly, dismissed with no order as to costs.

C. V. BHADANG, J.

EV/SMA