

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 01ST DAY OF JUNE 2017

THE HON'BLE DR.JUSTICE S.VIMALA

O.A. No.347 of 2017

and

A. Nos.2270 & 2271 of 2017

O.A. No.347 of 2017:-

In the matter of Section 9 of
the Arbitration and
Conciliation Act of 1996

And

In the matter of the
Arbitration Agreement
contained in Contract dated 27
July 2015 between M/s Archer
Power Systems Private Limited
and Kohli Ventures Limited &
Ors.

M/s. Archer Power Systems Private Limited
403 L Pantheon Road, Egmore, Chennai - 600 008
Now at: 3rd Floor, Block A, Bannari Amman Towers
No.29, Dr.Radhakrishnan Road, Mylapore,
Chennai - 600 004, represented by its Director,
Rohit Rabindernath. ... Applicant

-Versus-

1. Kohli Ventures Limited
Company incorporated in British Virgin Island
Having its office at:9th Floor, Suite 4,
Berkeley Square House, Berkeley Square,
London, 1DJ6DD United Kingdom
2. Cascade Energy Pte Ltd.,
Nominee of Kohli Ventures Limited
Having its registered office at
203, Hougang Street, No.03-73
Singapore-530 203
3. Zynergy Solar Projects and Services Private Limited
403 L Pantheon Road, Egmore, Chennai-600 008
Now at:3rd Floor, Block A, Bannari Amman Towers
No.29, Dr.Radhakrishnan Road, Mylapore, Chennai-600004

4. Rohit Rabindranath
S/o.Late Mr.Rabindranath

Road No.26, Poes Garden
Gopalapuram, Chennai -600 086.
5. Greatshine Holdings Private Limited
403 L Pantheon Road, Egmore, Chennai-600 008
Now at:3rd Floor, Block A, Bannari Amman Towers
No.29, Dr.Radhakrishnan Salai,
Mylapore, Chennai-600004.
6. Alectrona Energy Private Limited
403 L Pantheon Road, Egmore, Chennai-600 008
Now at:3rd Floor, Block-A, Bannari Amman Towers
No.29, Dr.Radhakrishnan Salai,
Mylapore, Chennai-600004.
7. Zynergy Capital Pte Ltd.
No.3, Philip Street, No.17-02,
Royal Group Building, Singapore-048693.
Now at:100, Jalan Sultan, #03-45,
Sultan Plaza, Singapore-199001. ... Respondents

Original Application praying that this Hon'ble Court be pleased to pass an order of interim injunction, restraining the respondents 1 & 2, their men, servants, agents or any person claiming through them from in any manner whatsoever, exercising any of their rights under the Strategic Investment Agreement dated 27th July 2015 and consequently direct Respondents 1 & 2, their men, servants, agents or any person claiming through them from in any manner whatsoever not to exercise any of their rights under the:

- (i) Shareholders Agreement dated 27th July 2015 including the rights on allotment of shares and stay the operation of the Restated Articles of the 3rd respondent company;
- (ii) FCCB Agreement dated 11.08.2015 and;
- (iii) OFCD Agreement dated 11.08.2015,

pending disposal of the arbitral proceedings.

A. Nos.2270 & 2271 of 2017

Cascade Energy Pte Ltd.,
 Nominee of Kohli Ventures Limited
 Having its registered office at
 203, Hougang Street, No.03-73
 Singapore-530 203. ... Applicant/Respondent No.2

-Versus-

1. M/s. Archer Power Systems Private Limited
 403 L Pantheon Road, Egmore, Chennai - 600 008
 at: 3rd Floor, Block A, Bannari Amman Towers
 No.29, Dr.Radhakrishnan Salai, Mylapore,
 Chennai - 600 004, represented by Director,
 Mr.Rohit Rabindernath ... 1st Respondent/Applicant
2. Kohli Ventures Limited
 Company incorporated in British Virgin Islands
 Having its office at:9th Floor, Suite 4,
 Berkley Square House, Berkley Square,
 London, 1DJ6DD United Kingdom.
3. Zynergy Solar Projects and Services Private Limited
 403 L Pantheon Road, Egmore, Chennai-600 008
 Now at:3rd Floor, Block A, Bannari Amman Towers
 No.29, Dr.Radhakrishnan Salai,
 Mylapore, Chennai-600004
4. Rohit Rabindranath
 S/o.Late Mr.Rabindranath
 Road No.26, Poes Garden
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 Now at:3rd Floor, Block A, Bannari Amman Towers
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 Mylapore, Chennai-600004.

7. Zynergy Capital Pte Limited,
 having its office at
 No.3, Philip Street, No.17-02,
 Royal Group Building, Singapore-048693.
 Now at:100, Jalan Sultan, #03-45,
 Sultan Plaza,
 Singapore-199001. ... Respondents 2 to 7/
 Respondents 1, 3 to 7

A. No.2270 of 2017

Application praying that this Hon'ble Court be pleased to vacate the Injunction Order dated April 7, 2017 passed in the captioned Original Application No.347/2017.

A. No.2271 of 2017

Application praying that this Hon'ble Court be pleased to suspend the order dated 07.04.2017 in O.A. No.347 of 2017.

These applications coming on this day before this court the court made the following order:-

This Original Application has been filed by the Applicant, under Section 9 of the Arbitration and Conciliation Act, 1996, (hereinafter will be referred to as "the Act") praying for an order of injunction, **restraining respondents 1 and 2 from exercising any of their rights under the Strategic Investment Agreement**, dated 27.07.2015 and **consequently**, to direct respondents 1 and 2, from in any manner, not to exercise any of their rights, under the:

(i) **shareholders agreement, dated 27.07.2015**, including the rights on allotment of shares and stay the operation of the

Restated Articles of the third respondent company; (ii) **FCCB agreement dated 11.08.2015;** and (iii) **OFCD Agreement dated 11.08.2015,** pending disposal of the Arbitral proceedings.

2. This Court, by the order, dated 07.04.2017, granted an order of interim injunction, restraining the respondents 1 and 2 from exercising any of the rights under the Strategic Investment Agreement and Shareholders agreement, dated 27.07.2015.

3. Application Nos.2270 and 2271 of 2017 have been filed by the second respondent, Cascade Energy Pvt. Ltd., praying to vacate and suspend the order of injunction, dated 07.04.2017.

4. The parties are referred to as per their nomenclature in Original Application No.347 of 2017.

Brief facts:-

4. The transaction is governed by four agreements, even though all the agreements are not signed by all the parties to the Original Application No.347 of 2017.

4.1. As per the terms of Strategic Investment Agreement, Kohli Ventures was to bring a total investment of Rs.30 crores to Synergy India and this agreement also

sets out the manner and the mode by which investment will be arranged by Kohli Ventures. ***It has the option either to bring in investment by itself or to arrange for the same through other parties.***

4.2. Ultimately, the actual investments were made not by Kohli Ventures, but by Cascade Energy Pte Ltd., who was not a party to the Strategic Investment Agreement.

4.3. Three forms of investments, as envisaged in the Strategic Investment Agreement, were made into Synergy India, by Cascade Energy Pvt. Ltd., and each of the three separate investments are governed by separate agreements, namely, Shareholders agreement (Kohli Ventures is not a party), FCCB Agreement under which Cascade Energy purchased 522160 FCCBs issued by Synergy India for a sum of Rs.5,22,16,000/-; in this agreement also Kohli Ventures is not a party.

4.4. The Cascade Energy purchased 2000000 OFCDs issued by Synergy India for a sum of Rs.20,00,00,000/-.

4.5. Based on all these facts, the Cascade Energy Pvt. Ltd., has filed the Application, seeking to vacate the order of injunction already granted, mainly on two grounds, namely, that the order of injunction sought for is against the provisions of Section 9 of the Act and contrary to the terms of the underlying agreements / contract.

5. The first contention of the learned senior counsel

appearing for the second respondent is that the shareholders agreement excludes the applicability of the Act and thus, this Court does not have any power to grant interim relief under Section 9 of the Act.

5.1. This contention is supported by Clause 91 of the Share Holder's agreement, under which it is stated that Indian Arbitration Act, 1996, will not apply to arbitration proceedings as the law applicable to such proceedings shall be the British Law. It is further stated therein that to enforce the decision of the arbitrator, the parties shall be free to take the support of Indian Courts and Judicial systems in terms of the International Law.

6. The learned senior counsel for the petitioner contended that Cascade Energy Pvt. Ltd., is not a party and therefore, it is not open to the said company to challenge the jurisdiction of the Indian Courts.

6.1. This argument is against **clause 79 of the shareholders agreement dated 27.07.2015**, where-under the clause reads that this agreement (shareholders agreement) together with strategic investment agreement dated 27.07.2015 constitutes the entire agreement between the parties with respect to matters dealt with therein.

6.2. It is relevant to point out that the strategic investment agreement is also dated 27.07.2015 (the same date as that of the shareholders agreement) wherein it is

stated that the expression 'Kohli Ventures' shall mean and include their legal successors, executors, administrators, group companies and assigns'. In the shareholders agreement also, Cascade Energy Pvt. Ltd., has been described as nominee of Kohli Ventures Limited.

6.3. It is relevant to point out that the Kohli Ventures has brought in investment through Cascade Energy Pvt. Ltd.,

6.4. From the description of parties in both the agreements and in the light of the clause 79, reciting that both agreements together constitute the entire agreement; even though the Strategic Investment Agreement is the primary agreement, which is supplemented and complimented by shareholders agreement, it is clear that the Cascade Energy Pvt. Ltd., (R-2) is a party to the agreement, impliedly of course.

7. The contention of the learned senior counsel appearing for the Original Applicant is that, Strategic Investment Agreement is the master / parent agreement and all the other three remaining agreements are subordinate agreements, which derive their validity only through master agreement.

7.1. It is specifically contended by the learned senior counsel appearing for the Original Applicant that it is only the arbitration clause under the Strategic

Investment Agreement, which can be used to decide the dispute, which has arisen between the parties, as the status of the second respondent, as an investor / shareholder lies in Strategic Investment Agreement.

7.2. The learned counsel appearing for the second respondent pointed out that, clause 49 of the Strategic Investment Agreement where it states that, in case of disputes the matter shall be referred to arbitration by International Chamber of Commerce, London and pointing out this, it is contended by the learned senior counsel appearing for the second respondent that, ***this Court has no jurisdiction and only the Courts at London alone has got jurisdiction.***

7.3. The learned counsel appearing for the Original Applicant would respond to it, by submitting that, as per clause 50, this Court has got jurisdiction, ***as the agreement is executed at New Delhi and the applicable laws are the laws of India.***

8. The learned senior counsel appearing for the Original Applicant, invited the attention of this Court to clause 22 of the OFCD subscription agreement and clause 19 of FCCB subscription agreement, where they read as follows:-

"22) The provisions of clause of the Strategic Investment Agreement shall apply to the

resolution of any such disputes and to any such arbitration."

"19) The provisions of clause of the Strategic Investment Agreement shall apply to the resolution of any such disputes and to any such arbitration."

10. The contention of the learned senior counsel for the Original Applicant is that, when there are overlapping issues requiring adjudication upon the rights and obligations under multiple agreements, forming part of the same composite transaction, the arbitration clause in the master agreement alone can be invoked and not the arbitration clause under the shareholders agreement, which can be invoked only when the disputes have arisen within the four corners of shareholders agreement alone.

10.1. In support of this contention, the decision reported in **(1999) 5 SCC 651 (Olympus Superstructures v. Meena Vijay Khetan and others)** is relied upon:-

".. If there is a situation where there are disputes and differences in connection with the main agreement, and also disputes in regard to "other matters" "connected" with subject matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So

far as Clause 5 of the Interior Decorator Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonized or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, - (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) - it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the Schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which, overlap in the two agreements..."

10.2. Contending that the Strategic Investment Agreement is the parent agreement and the other agreements are implementation agreements or follow up agreements and therefore, the availability of the provision for

arbitration has to be decided only based upon Strategic Investment Agreement, the decision reported in **(2013) SC 641 (Chloro Controls India Pvt. Ltd., v. Seven Trent Water Purification Inc.,)** is relied upon:-

".... 71. The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or inter-dependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of 'composite performance' would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other....."

10.3. The learned senior counsel appearing for the Original Applicant relied upon amendment made to Sections 2 and 9 of the Act and has contended that according to

proviso to Section 2 (2) of the Arbitration Act, interim relief under Section 9 can be granted even where the seat of arbitration is outside India.

"Proviso to Section 2 (2) states that:

"..... Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (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 recognized under the provisions of Part II of this Act.."

11. The learned senior counsel appearing for the Original Applicant would point out that the amendment made to Act 1996 has been specifically amended which stipulates that Section 9 would apply even to arbitrations seated outside India. In support of the same, the 246th Report of the Law Commission of India is relied upon.

11.1. The contention of the learned counsel for the Original Applicant is sought to be strengthened by relying upon the decision of the High of Delhi, in the case of **Raffles Design International India Private Limited and ors. v. Educamp Professional Education Limited and Ors (2016) (6) ARBILR 426 (Delhi) :-**

"86) As noted earlier the very purpose of amending Section 2 (2) of the Act was to enable a

party to approach the courts in India for interim relief in respect of the arbitral proceedings held or to be held outside India. The need for this amendment was highlighted by the Law Commission of India, in its 176th Report in the following words:-

Section 2(2) states that Part - I of the Act applies to arbitration in India. That would mean that in the case of arbitration between Indian nationals and also where one party is not an Indian national, and where the place of the arbitration is in India, Part I of the Act will apply. While the UNCITRAL Model Law permits certain Articles like 8, 9, 35 and 36 to apply to arbitrations outside the Country, there is an omission in this behalf in the 1996 Act. Consequently, for example in the absence of availability of Section 9 in the case of an arbitration outside India, the Indian party is unable to obtain interim measures from Indian Courts, before arbitration starts outside India. The absence of an express provision as stated above has led to conflicting judgments in the Delhi and Calcutta High Courts. It is proposed to allow Section 9 to be invoked whenever arbitration is outside India."

11.2. It is relevant to point out that the amendment to Sections 2 and 9 of the Arbitration and Conciliation Act, 1996, has been made applicable retrospectively from

23.10.2015. The litigation pertains to the agreements, dated 27.07.2015. Even otherwise, when the application of the entire enactment has been excluded, there is no question of invoking Section 9 of the Act, for the purpose of resolution of disputes or as a measure of interim protection.

11.3. Contending that the jurisdiction of the Company Law Board under Sections 397 and 398 of the Companies Act, 1956, cannot exclude the jurisdiction of this Court, under Section 9 of the Act, on the ground that the relief to be provided under Sections 397 and 398 of the Company Law cannot be granted by the learned Arbitrator, the following two decisions are relied upon:-

(i) ***(2007) 141 Comp Cases 111 (Mad) (Sporting Pastime India Limited and K.K.Shivakumar v. Kasthuri and Sons Limited):-***

"Further, the reliefs claimed in the Company Petition cannot be granted by an arbitrator, which are available under the provisions of Sections 397 and 398 read with Sections 402 and 403 of the Act from the CLB alone and the statutory jurisdiction of the CLB can neither be ousted even by the consent of the parties. The Arbitral Tribunal would deal with reference to the specific terms of the agreement, especially when the jurisdiction and scope of powers of the CLB and those of the Arbitral Tribunal are quite different. When there is an allegation of acts of

oppression and mismanagement, the CLB is empowered to deal with it independently."

(ii) ***(2015) 192 Comp Cases 516 (Bom) (Rakesh Malhotra v. Rajinder Kumar Malhotra):-***

"The jurisdiction of the CLB under Sections 397 and 398 of the Companies Act does not exclude the jurisdiction of a civil court for oppression and mismanagement. Therefore, all disputes before the CLB in Sections 397 and 398 action can and must also be referred to arbitration."

It is contended that, even though the seat of Arbitration is at London, as per clause 49 of the Strategic Investment Agreement, having regard to the amendment made to Section 2 of the Act, this Court has got jurisdiction, especially in the light of Clause 50 of the Strategic Investment Agreement.

11.4. This argument that in the light of Clause 50 of the Strategic Investment Agreement, Indian Courts have got jurisdiction is incorrect, as clause 50 talks about the appropriate Court and not about Indian Courts. When the seat of arbitration is at London, the appropriate court in respect of issues relating to that agreement is only Courts at London and not Indian Courts.

12. It is also pointed out that, under Clause 49 it is stated that the dispute may arise out of the Strategic

Investment Agreement or any of the implementation agreement and therefore, the clause providing for arbitration under Strategic Investment Agreement alone would cover the law relating to arbitration and not the shareholders agreement.

13. Needless to point out that, both the agreements together constitute the entire agreement and the contention that, one agreement is the parent agreement cannot be accepted. Infact, if it is possible to interpret the provisions relating to dispute resolution by taking into account, the provisions in both the agreements together, if it is not inconsistent with each other, it would be proper.

14. It is contended that, in the context of minced silence and muted whisper as to the governing / curial law, in the Strategic Investment Agreement, which is the law / provision relating to Arbitration to be invoked is the main question to be answered.

14.1. Clause 89 of the Shareholders agreement answers this issue. In the said clause, it is stated that the Arbitration Proceedings shall take place in London and under the Rules and regulations of ICC (International Chamber of Commerce (Arbitration Rules)) in terms of Indian Laws, by a sole arbitrator appointed by ICC.

14.2. In the shareholders agreement, the clauses relating to arbitration, i.e., clauses 88 to 91 provide for

settlement of disputes through Arbitration. ***Under clause 91, it is specifically stated that the Indian Arbitration Act, 1996, will not apply to the arbitration proceedings, as the law applicable to such arbitration shall be the British Law. Only for enforcement of the decision of the Arbitrator, the parties are free to take the support of Indian Courts and judicial systems in terms of International Law.***

15. The learned counsel appearing for the second respondent relied upon the decision in the case of *Union of India v. Reliance Industries* (2015) 10 SCC 213, in order to support the contention that Part I of the Arbitration and Conciliation Act, 1996, will not apply where either the juridical seat is outside India or the *lex arbitri* is other than Indian Law:-

“The potential intervention of Indian courts over foreign seated arbitrations in the arena of international arbitration was the subject matter in the above case. The SCI found that Indian courts had no jurisdiction to set aside an award made in London.”

15.1. The disputes between *Union of India* and *Reliance* arose from two oil and gas production-sharing contracts. These contracts were governed by Indian substantive law, and provided for UNCITRAL arbitration, with the seat in

London, and the arbitration agreement governed by the laws of England. *Reliance* commenced arbitration, and *Union of India* challenged the arbitrability of certain claims. On 12 September 2012, the tribunal issued a final partial award concluding that the claims put forward by *Reliance* were arbitrable.

15.2. Union of India started proceedings to set aside that award in the Delhi High Court, India. These proceedings were filed according to Section 34, Part I, of the Indian Arbitration and Conciliation Act 1996 ("ACA"). Section 34, in essence, provides for the application for setting aside an arbitral award.

15.3. Although the seat of the arbitration was London, the Delhi High Court accepted jurisdiction to hear the set aside proceedings. It reasoned this decision on three points: (i) the applicability of Part I of the ACA had not been excluded; (ii) English procedural law did not extend to issues of arbitrability or challenges to an award; and, (iii) since the dispute raised by *Union of India* carried considerations of the public policy of India, the jurisdiction of the Indian courts could not be excluded.

15.4. *Reliance*, in turn, lodged a special appeal in the SCI. It argued that the parties had excluded the application of Part I of the ACA and, therefore, the set aside proceedings should have been filed in the seat of the arbitration, i.e., English courts.

15.5. The SCI overturned the Delhi High Court's decision on jurisdiction. It found that the Indian courts had no jurisdiction to hear the set aside proceedings because the arbitration agreement provided for: (i) London-seated arbitration; and (ii) English law as the law governing the arbitration agreement. According to the SCI, this *"would clearly show that the parties have by express agreement excluded the applicability of Part I of the [Indian Arbitration Act] to the arbitration proceedings"*.

15.6. In this case also, the parties have expressly excluded the jurisdiction of the Indian Courts, by providing that Indian Arbitration and Conciliation Act, 1996, would not apply to the dispute resolutions through Arbitration, though the substantive law applicable would be Indian Law. Therefore, this decision would apply directly to the facts of this case.

16. The learned counsel appearing for the second respondent would submit that the Original Applicant has invoked the jurisdiction of NCLT, by filing Company Petition No.13 of 2017, challenging the very validity of the agreement and even taking a specific plea that arbitration clause in the agreement is void, thereby making the intention clear that the applicant has no intention to arbitrate; therefore, the original applicant is not entitled to any relief. In support of the same, the

decision reported in **Firm Ashok Kumar Traders v. Gurumukh**

Das (2004) 3 SCC 155 is relied upon:-

"There are two other factors which are weighing heavily with us and which we proceed to record. As per the law laid down by this Court in M/ s. Sundaram Finance Ltd an application under [Section 9](#) seeking interim relief is maintainable even before commencement of arbitral proceedings. What does that mean? In M/s. Sundaram Finance Ltd., itself the Court has said-"It is true that when an application under [Section 9](#) is filed before the commencement of the arbitral proceedings there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings". [Section 9](#) permits application being filed in the Court before the commencement of the arbitral proceedings but the provision does not give any indication of how much before. The word 'before' means inter alia, 'ahead of; in presence or sight of; under the consideration or cognizance of. The two events sought to be interconnected by use of the term 'before' must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or 'within sight' certainty. The party invoking [Section 9](#) may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended (as M/s Sundaram Finance Ltd. puts it) and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the

nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. The purposes of enacting [Section 9](#), read in the light of the Model Law and UNCITRAL Rules is to provide 'interim measures of protection'. The order passed by the Court should fall within the meaning of the expression 'an interim measure of protection' as distinguished from an all-time or permanent protection."

(ii) *Dirk India v. Maharashtra State Electricity Generation Company* (MANU/MH/0268/2013):-

"12. Two facets of Section 9 merit emphasis. The first relates to the nature of the orders that can be passed under clauses (i) and (ii). Clause (i) contemplates an order appointing a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings. Clause (ii) contemplates an interim measure of protection for: (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 (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration; (d) an interim injunction or the appointment of a receiver; and (e) such other interim measure of protection as may appear to the Court to be just and convenient. The underlying theme of each one of the sub-clauses of clause (ii) is the

immediate and proximate nexus between the interim measure of protection and the preservation, protection and securing of the subject-matter of the dispute in the arbitral proceedings. In other words, the orders that are contemplated under clause (ii) are regarded as interim measures of protection intended to protect the claim in arbitration from being frustrated. The interim measure is intended to safeguard the subject-matter of the dispute in the course of the arbitral proceedings. The second facet of Section 9 is the proximate nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step in aid of enforcement. It is intended to ensure that enforcement of the award results in a realizable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement. Now it is in this background that it is necessary for the Court to impart a purposive interpretation to the meaning of the expression "at any time after the making of the arbitral award but before it is enforced in accordance with section 36". Under Section 36, an arbitral award can be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the Court. The arbitral award can be

enforced where the time for making an application to set aside the arbitral award under Section 34 has expired or in the event of such an application having been made, it has been refused. The enforcement of an award enures to the benefit of the party who has secured an award in the arbitral proceedings. That is why the enforceability of an award under Section 36 is juxtaposed in the context of two time frames, the first being where an application for setting aside an arbitral award has expired and the second where an application for setting aside an arbitral award was made but was refused. The enforceability of an award, in other words, is defined with reference to the failure of the other side to file an application for setting aside the award within the stipulated time limit or having filed such an application has failed to establish a case for setting aside the arbitral award. Once a challenge to the arbitral award has either failed under Section 34 having been made within the stipulated period or when no application for setting aside the arbitral award has been made within time, the arbitral award becomes enforceable at the behest of the party for whose benefit the award enures. Contextually, therefore, the scheme of Section 9 postulates an application for the grant of an interim measure of protection after the making of an arbitral award and before it is enforced for the benefit of the party which seeks enforcement of the award. An interim measure of protection within the meaning of Section 9(ii) is intended to protect through the measure, the fruits of a successful conclusion of the arbitral

proceedings. A party whose claim has been rejected in the course of the arbitral proceedings cannot obviously have an arbitral award enforced in accordance with Section 36. The object and purpose of an interim measure after the passing of the arbitral award but before it is enforced is to secure the property, goods or amount for the benefit of the party which seeks enforcement."

17. Yet another contention raised by the learned counsel appearing for the second respondent is that the second respondent is entitled to carry out the obligations under the terms and conditions of the four agreements till the matter is adjudicated by the Arbitrator and in support of the same, clause 90 is relied upon, which reads thus:-

"90. Excepting the dispute, difference or question as may have been referred to arbitration, the **Parties shall during the period of submission and pending his adjudication, continue to perform the rest of their obligations under this Agreement without prejudice to a final adjustment in accordance with the said award as may be issued by such arbitration tribunal** duly constituted in accordance with this Article."

17.1. Based on this clause, it is contended that the grant of injunction is against the underlying clause of the agreement which provides for performance of obligations under the agreement till the matter is finally decided by

the learned Arbitrator and thus it would impliedly bar the power of the Court to grant an order of injunction and therefore, the injunction already granted has to be vacated.

17.2. This contention is obviously incorrect, as the clause in the agreement speaks about rest of the obligations which had to be performed other than those which are referred to arbitration. Therefore, this clause would not come to the rescue of the second respondent.

17.3. However, having regard to the clauses which expressly prohibit application of the Indian Arbitration Act, 1996, and clauses which speaks about seat of arbitration at London and applicable lex arbitrai being the rules and regulations of the arbitration at ICC, this Court is of the view that the interim order of injunction already granted has to be vacated and it is vacated accordingly.

18. On the day, when this order is to be pronounced, i.e., 01.06.2016, the learned senior counsel for the petitioner brought to the notice of the Court the order dated 19.05.2017, passed by the Deputy Commissioner of Income Tax, Corporate Circle 1 (1), Chennai, which is addressed to the Registrar of Companies, by which, the 51% of the shares and debentures of M/s.Synergy Solar Projects and Services Private Limited, held by M/s. Cascade Energy Private Limited (branded as Benamidhar) have been directed

to be provisionally attached. But, in the covering letter, it is stated that the 51% of the shares have already been attached invoking the provisions of Section 24 (3) of the Benami Transactions (Prohibition) Amendment Act, 2016. M/s. Cascade Energy Private Limited has been restricted / prohibited from dealing in any manner and from exercising any rights in relation to the shares and debentures.

18.1. Contending that this order has a relevance in deciding the application under Section 9 of the Act, the learned senior counsel for the petitioner produced the said order.

18.2. The learned senior counsel appearing for the respondents submitted that the order dated 19.05.2017, passed under Section 24 (3) of the Benami Transaction (Prohibition) Amendment Act, 2016, is against the provisions of Section 24 itself, as it is passed without notice to the respondents and that, the scope of the order recited in the covering letter is beyond the scope of the orders issued and that in any event, the order passed has nothing to do with the order to be passed under Section 9 of the Act.

18.3. As this Court has decided that this Court has no jurisdiction to grant any order under Section 9 of the Act, it is not necessary to consider the order passed under the Benami Transaction (Prohibition) Amendment Act, 2016.

19. In view of the foregoing reasons, A.Nos.2270 of 2017 and 2271 of 2017, seeking to suspend and vacate the injunction order, dated 07.04.2017, are allowed and O.A.No.347 of 2017, seeking interim injunction, is dismissed. No costs.

sd/-S.V.J.

01/06/2017

//Certified to be true copy//

Dated at Madras this the day of 2016.

COURT OFFICER (O.S.)

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