

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

Reserved on: 16.05.2017
Pronounced on: 03.07.2017

- + **FAO(OS)(COMM) 61/2016, C.M. APPL.28195/2016**
AJAY SINGH Appellant
Versus
KAL AIRWAYS PRIVATE LIMITED AND ORS..... Respondents
- + **FAO(OS)(COMM) 62/2016, C.M. APPL.28197/2016**
SPICEJET LIMITED Appellant
Versus
KAL AIRWAYS PRIVATE LIMITED AND ORS..... Respondents
Through: Sh. Atul Sharma, Sh. Anand Srivastava,
Sh. Abhishek Sharma, Sh. Abhinav Sharma and
Sh. Kashish Arora, Advocates, for appellants.
Dr. Abhishek Manu Singhvi, Sr. Advocate with Sh.
Rajiv Nayyar, Sr. Advocate, Sh. Anirban
Bhattacharya, Sh. Bharat Chugh, Sh. Shikhar Deep
Agarwal, Sh. Aditya Vikram, Sh. Chahat Chawla
and Sh. Abhishek Gupta, Advocates, for
respondents.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE YOGESH KHANNA

MR. JUSTICE S. RAVINDRA BHAT

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1. The appellants, under Section 37 of the Arbitration and Conciliation Act, question the order of a learned single judge under Section 9, directing them to deposit ₹579 crores in court. The respondents to this appeal moved the applications (hereafter referred to as “the petitioners”).
2. The petitioners were the shareholders of SpiceJet, the original first

respondent (hereafter called “the company” or “SpiceJet”) owning 35,04,28,758 equity shares, constituting 58.46% of the share capital of which 26,73,70,826 Equity Shares were free from all encumbrances and 8,30,57,932 equity shares were encumbered with different lenders. In 2013-2015, SpiceJet faced acute financial crisis that caused it difficulties in maintenance of its fleet, staff and operational integrity. The petitioners wished to revive the company and bring it back to the path of financial health. By a Loan Agreement dated 18.12.2013 (hereinafter "First Agreement"), ₹ 75,00,00,000/- (Rupees Seventy Five Crores only) was given by the petitioner to the company. This amount was later reduced by another agreement (dated 07.11.2014) by which parties agreed to reduce the amount of ₹ 10,40,83,830/- (Rupees ten crore forty lakh eighty three thousand eight hundred and thirty only) from the loan amount provided under the First Agreement and utilize that sum towards the payment of exercise of option attached to 1,91,69,000 warrants issued on preferential basis to the Petitioner by the company. Accordingly, the outstanding loan amount under the First Agreement stood at ₹64,59,16,170/- (Sixty Four Crore Fifty Nine Lakh Sixteen Thousand One Hundred and Seventy only). Later, another loan of ₹ 1,14,00,00,000/- (Rupees One Hundred and Fourteen Crores only) was given by the petitioner to the company by loan Agreement dated 21.11.2014 (hereinafter "Second Agreement").

3. Through a Board of Directors resolution of the company on 21.08.2014 the warrants were to be issued "in accordance with Regulation 76 of the *SEBI (Issue of Capital & Disclosure Requirements) Regulations, 2009* ..." (hereafter “SEBI Disclosure Regulations”). As a result, the company

applied to the Bombay Stock Exchange (BSE). The company was still under the control and management of the Petitioner and KAL Airways Private Limited. The general meeting of the company had approved the issuance of the warrants at a conversion price of ₹ 16.30 per Equity Share. The resolution also recorded that the issuance of Warrants would be in accordance with the SEBI Disclosure regulations. On 15.01.2015 the company presented a scheme to the Ministry of Civil Aviation for transferring of shares from the Petitioner and KAL Airways Private Ltd.(hereinafter "KAL") to the appellant. On 22.01.2015 the Civil Aviation ministry approved the scheme of reconstruction and revival for takeover of the ownership, management and control of SpiceJet Ltd (hereafter "the Scheme").

4. After discussions and with a view to restore operations and regain the company's market position, the petitioners had agreed to transfer their shares and the appellant agreed to acquire them. The Sale Purchase Agreement ("SPA") was executed between both the petitioners and the appellants on 29.01.2015. By the SPA, the appellant had acquired 35,04,28,753 equity shares in the company i.e. 58.46% share capital of both petitioners, i.e. Kalanithi Maran and KAL Airways Pvt. Ltd. in SpiceJet by paying ₹ 2 (two). Each share of the company was around ₹16.30/- at the time of entering into the SPA (the value of the said equity shares was about ₹765 crores at that time) subject to the terms that the payments also included the adjustments of the advances monies provided to SpiceJet by the Petitioner and KAL Airways Pvt Ltd under the loan agreements dated 18.12.2013 and 21.11.2014 and loan amendment agreements dated 07.11.2014, 05.12.2014

and letters dated 29.01.2015 issued by the petitioner to the company. This position was not disputed by the appellant, before the learned single judge, as noted in the impugned judgment.

5. The SPA contained stipulations whereby the parties agreed that the 8,16,80,629 and 10,74,11,749 warrants of the Company issued to the Sellers (the petitioners) in terms of details set forth in Schedule D ("Warrants"), were convertible into Equity Shares in the Financial Year 2015-16 and Financial Year 2016-17, respectively. The Warrants were to be converted at a conversion price of ₹16.30 per Equity share, as per the price arrived in accordance with *SEBI Disclosure Regulations*, for which the Sellers were required to pay to the Company, a sum of ₹3,08,21,89,461 (Rupees Three Hundred and Eight Crores Twenty One Lakhs Eighty Nine Thousand Four Hundred and Sixty One only) in aggregate of which the amount payable on or before 15.02.2015, has been set out in Schedule D ("Balance Warrants Payment"). The petitioner/sellers agreed to make the Balance Warrants Payment on or before 15.02.2015. The Parties acknowledged that the company *"shall issue the Warrants within fifteen (15) Business Days of receipt of all the necessary approvals including the Governmental Approvals required for the same."* Clause 3.3 of the SPA stated that subject to other terms and

"the simultaneous payment of the Tranche 1 CRPS Amount to the Company in the manner set out in this Agreement, and in consideration of the mutual covenants set out herein, the Sellers agree to subscribe on or before the Second Closing Date and the Company agrees to thereafter, issue and allot on a preferential basis, the Tranche 1 CRPS Shares, the particulars of which are set forth in Schedule B, free and clear from all and

any Encumbrance, together with all rights and advantages now and hereafter attaching or accruing thereto such that the Sellers shall, upon allotment of the Tranche 1 CRPS Shares in their name, receive full legal and beneficial ownership and all shareholder rights relating thereto."

6. Other consequential stipulations were agreed to by the parties, relating to the issue of shares that were to be subscribed to by the petitioners, on a preferential rights basis, upon receipt of the Tranche 2 CRPS Amount to be delivered in a single tranche in immediately available funds to a designated account (No 1), the Tranche 2 CRPS Shares, the particulars of which were set out in Schedule B, free and clear from all encumbrances, together with all rights and advantages to enable the appellants full beneficial ownership of such shares. Under clause 12.3 of the SPA, the appellant indemnified, ensured and undertook to take all steps to defend and hold harmless the petitioner and KAL from any penal action, liability or claim due to non-payment of statutory dues in relation to the company. That condition is as follows:

"12.3. The Acquirer shall procure that the Company shall undertake the Business in compliance with Governmental Approvals and shall ensure that the Company undertakes all steps to defend and hold harmless the Sellers, the nominee Directors of the Sellers who have resigned on the First Closing Date or Representatives of the Sellers as well as existing Directors on the Effective Date from any penal action, liability or claim due to non-payment of statutory dues stated in Schedule I in relation to the Company. " The company also issued a letter dated 24.02.2015 to the Petitioner and KAL, indemnifying, ensuring and undertaking to take all steps to defend and hold harmless the Petitioner and KAL from any penal action, liability or claim due to non-payment of statutory dues in relation to The company. The relevant extract of the

letter dated 24.02.2015 are reproduced below: "The Company undertakes to pay all statutory liabilities to the satisfaction of the authorities concerned and to defend and hold harmless Seller 1 and Seller 2, from any penal action, liability or claim due to nonpayment of statutory dues. "

By letter dated 29.01.2015, Kalanithi Maran, one of the petitioners waived the outstanding interest on the outstanding loan amount of ₹ 64,59,16,170/- (Rupees Sixty Four Crore Fifty Nine Lakh Sixteen Thousand One Hundred and Seventy only) and discharged the company from payment. It was also agreed that the said outstanding loan amount of ₹ 64,59,16,170/- (Rupees Sixty Four Crore Fifty Nine Lakh Sixteen Thousand One Hundred and Seventy only) shall be utilized for the future subscription to the non-convertible redeemable cumulative preference shares of the company.

7. The petitioner, in terms of the arrangement, by another letter dated 29th January 2015 (with respect to the outstanding amounts as per the Second Loan Agreement) stated the following:

- i) ₹33,90,40,000/- (Rupees Thirty Three Crore Ninety Lakh Forty Thousand only) from the outstanding loan amount of ₹114,00,00,000/- (Rupees One hundred and fourteen crore only) to be utilized for the subscription to 208,00,000 warrants to be issued by respondent No. 1 company and convertible in the financial year 2015-2016;
- ii) ₹ 43,84,70,000/- (Rupees Forty Three Crore Eighty Four Lakh Seventy -Thousand -only) from the outstanding loan amount of ₹114,00,00,000/- (Rupees One Hundred and Fourteen Crore only) to be utilized for the subscription to 269,00,000 warrants to be issued by the company and convertible in the financial year 2016-2017;

iii) The balance loan amount ₹ 36,24,90,000/- (Rupees thirty-six crore twenty-four lakh ninety thousand only) to be utilized for the future subscription to the non- convertible redeemable cumulative preference shares of face value of ₹ 1,000/-(Rupees One Thousand only) per share of the company.

8. By letter dated 14th February 2015, the first closing date under clause 5.1 of the SPA was amended and the date was extended to 24th February, 2015. By letter dated 17th February, 2015 the SPA was amended and extension of closing dates were agreed upon; by a similar letter of 23rd February, 2015, the SPA was further amended and the dates were again extended. The petitioners, in terms of the SPA, paid ₹ 100,00,00,000/- (Rupees Hundred Crores only) under Clause 3.2 towards balance warrant payments defined under clause 3.1 on 24.02.2015; Tranche 1 CRPS amount payment of 100,00,00,000/- (Rupees Hundred Crores only) under Clause 3.2 of the SPA; payment of ₹20,02,93,039/- (Rupees Twenty Crore Two Lakh Ninety Three Thousand and Thirty Nine only) in terms of Clause 3.3 of the SPA on 24.02.2015; Tranche 2 CRPS Amount payment of ₹ 94,79,64,450/- (Ninety Four Crore Seventy Nine Lakh Sixty Four Thousand Four Hundred and Fifty only) to the company in terms of Clause 3.4 of the SPA on 24.02.2015; Tranche 1 CRPS payment ₹ 5,20,35,549/- (Rupees Five Crore Twenty Lakh Thirty Five Thousand Five Hundred and Forty Nine only) in terms of Clause 7.2.1 of the SPA to the company on 24.02.2015; Balance Warrant Payments for an amount of ₹ 79,97,06,961/- (Rupees Seventy Nine Crore Ninety Seven Lakh Six Thousand Nine Hundred and Sixty One only) in terms of Clause 7.2.1 of the SPA into the designated accounts on

24.02.2015; Payment of the Fixed Deposit amount of ₹ 100,00,00,000/- (Rupees One Hundred Crore only) in City Union Bank Ltd., Maildaveli in lieu of the release of collaterals on 24.02.2015; Tranche 2 CRPS Amount payment of ₹ 50,00,00,000/- (Rupees Fifty Crore only) into the Designated accounts on 03.06.2015.

9. The appellants were obliged to seek approval of the Competition Commission of India for the sale and purchase of the equity shares in the company. On 19.02.2015, the appellant - Mr. Ajay Singh received the approval of the Competition Commission of India for the sale and purchase of 35,04,28,758 equity shares in the company constituting 58.46% of the paid up equity share capital of the company and to issue warrants as agreed. He became the promoter, director and majority shareholder of the company and is a signatory to the SPA including the arbitration agreement contained in Clause 16 thereof. The equity shares of the company are listed and admitted to trading on the Bombay Stock Exchange.

10. The petitioners contended that they paid the entire amount towards their contractual obligations under the binding SPA including the amounts which were dues of the company to the statutory authorities. They claimed that the appellants received the amount of ₹ 679 crores till 23.02.2015 but failed to honour any contractual commitments under the binding SPA. With these pleas, they filed applications under Section 9 of the Act to preserve the subject matter of the disputes arising on failure of the appellants to honour their contractual obligations under the Share Sale and Purchase Agreement dated 29.01.2015 (hereinafter referred to as "SPA"). The defaults complained of against the appellants was their failure to issue the 'Warrants'

in terms of Clauses 3.1 and 3.2 of the SPA; failure to issue and allot the Tranche 1 and Tranche 2 CRPS Shares in terms of Clauses 3.3, 3.4, 7.2.2 and 8.1 of the SPA; the appellants' failure to utilize the amounts in the Designated Account 2 in order to pay the outstanding statutory dues in terms of Clause 12.2 of the SPA. Failure of the appellants to issue the Collaterals in terms of Clauses 4.1.3(b), 7.2.3 and 8.2.3 of the SPA was also pleaded. The petitioners highlighted that inspite of the fact that statutory dues were to be paid by 12.02.2015, the company applied to the Central Board of Direct Taxes for waiver of interest leviable under Section 201 (1A) of the Income Tax Act, 1961 in terms of Section 119 of the said Act. This was after two complaints were filed against the company, by the revenue under Section 200 of the Code of Criminal Procedure, 1973 ("Cr.PC") for alleged contravention under Sections 276B, read with Sections 278B, 279 (1) and 278E of the Income Tax Act against the petitioner in which the Additional Chief Metropolitan Magistrate, Tis Hazari Court, Delhi took cognizance of the alleged offence and issued summons by order dated 20.07.2015. The petitioners alleged that in terms of clause 12.2 of the SPA read with Schedule-H and I, all amounts were deposited by them in the designated Accounts, which were to be utilized for settlement of the statutory dues of the company- including Income Tax liabilities, service tax etc. with respect to which the criminal proceedings were initiated. However, the respondents failed in their obligation. In these circumstances, the petitioners, by letter dated 24.09.2015 demanded for the issue of warrants as well as the issue and allotment of the Tranche 1 CRPS Shares and Tranche 2 CRPS Shares to them in terms of the letter and spirit of clauses 3.3, 3.4, 7.2.2 and 8.1 of the SPA. They also demanded that the company should discharge its statutory

liabilities and compound the criminal cases. The petitioners alleged that the appellants received ₹ 679 Crores till 23.02.2015 but failed to honour even a single contractual commitment under the binding SPA and on the other hand, the Petitioners' money was used to run the company and pay the statutory dues.

11. The respondent/appellant denied liability and stated, *inter alia* that the petitioners were aware that the application made to the BSE may not fructify. They relied on the condition in the SPA executed between the parties that warrants would be issued within 15 days "*of receipt of all the necessary approvals including the Governmental Approvals*" required for the purpose. It was urged that the appellants not only complied with the terms of the SPA but went beyond their obligations by utilizing the amounts in Designated Accounts for the prescribed purposes only and have in addition to releasing the mortgage and personal guarantee of the Petitioner, also paid the entire outstanding Income Tax liabilities including the interest thereon.

12. It was also urged that the subject matter of the dispute, was the issue of allotment of Warrants, Tranche 1 CRPS and Tranche 2 CRPS. However, the BSE and the SEBI have made their stand clear that in light of the *SEBI Regulations* the Warrants cannot be issued in the prevailing facts and circumstances. The petitioners did not initiate any action to challenge/appeal the stand taken by SEBI and BSE by the parties. Therefore, having accepted the position that the Warrants cannot be issued, the petitioner is not entitled to any relief and the same ought to be dismissed with costs. It was not in the control of the respondents to insist upon the SEBI and BSE to allot the warrants. The appellants also urged that in view of the requirements of 42 (3)

of the Companies Act, 2013, the company cannot make an invitation for fresh offer of securities unless and until the offer or invitation for issue and allotment of securities made earlier have been completed or that offer or invitation has been withdrawn or abandoned by it. Consequently, until the close of the issuance of the Warrants and completion of the obligations of the petitioner under the SPA, the company would be in violation of applicable laws and the terms of the SPA, if it issued CRPS Shares; issuance of CRPS Shares would, therefore, be illegal and irregular.

13. It was contended that the subject matter of the dispute did not concern the shares of the company because, due to non-compliance with certain regulations, it was unable to issue Warrants. Since the shares of the company to which the petitioner would have been entitled to upon conversion of the Warrants have not even come into existence, the petitioner cannot claim any interim relief in the nature of a restrain from allotting / transferring / issuing any shares of the company. When ₹ 178 crores was brought in as loan by the petitioners, the company was under the management and control of the Petitioners. The said amount was used for the operations of the company before execution of the SPA. In addition to that an amount of ₹100 crores was received from the petitioners by the respondents in terms of the SPA. As such, an amount of ₹278 crores out of the total ₹308 crores is already accounted for and therefore, the entire dispute, if any, pertains to ₹30 crores.

14. The appellants urged that the issuance of warrants at the earlier price has become an impossibility. Consequently, it was contended that the petitioners' claim could be one for restitution, which would in turn amount to a money claim which has to be decided by a tribunal in arbitration

proceedings because issue of warrants was rendered impossible. The appellants stated that if the petitioners were to abandon the application for warrants and the bar of Section 43 of the Companies Act was removed, they could also offer to issue CRPS shares for the value for which warrants were to be issued to the petitioners thereby settling the entire dispute between the Parties. As such, no cause for grant of interim relief to the petitioner has arisen, therefore, the present petition should be dismissed and the interim relief granted by this Court should be vacated.

15. The learned single judge noted that the principal disputes raised on behalf of the petitioner in the present matters are about (i) non issuance of warrants and (ii) non-convertible redeemable cumulative preference shares ("CRPS") (iii) failure to compound the offences under the Income Tax Act. The impugned order dealt with each issue separately, having regard to the materials, pleadings and parties' contentions. Each head was to be dealt with separately in view of point-wise submissions made by the parties. On the first, the impugned order noted that though the appellant got hold of over 58% of the company's shares, for a consideration of only ₹ 2 (two) when the value of the said stake was at least ₹ 765 crores, the appellants' contractual responsibility to issue the warrants – (in Tranche 1 and Tranche 2 under the SPA) at an agreed price of ₹ 16.30/- per share remained unfulfilled. It was held that *prima facie*, amounts received/adjusted by the appellants were lying with them, and no warrants and CRPS shares were allotted. Therefore, they were liable to refund the said amount to the petitioners. Such amount was ₹579 crores. The impugned order noted, however, that the claimed losses, i.e. ₹ 403 crores were a subject matter of arbitration and, therefore, had to be

preserved by the appellants. Further, the learned single judge felt that *prima facie* since the company accepted the consideration for the CRPS in violation of Section 42 (6) of Companies Act, 2013, it was statutorily liable to return the monies to the respondents in terms of that provision. The learned single judge noted the mandate of the said provision, which requires that if a company is “*not able to allot the securities*” within the prescribed period of “*fifteen days from the date of completion of sixty days*” “*it shall be liable to repay that money with interest at the rate of twelve per cent per annum from the expiry of the sixtieth day:*”. The company’s failure and that of the appellant, according to the learned single judge, exposed them to penal action under Section 42 (10) of the Companies Act. The operative part of the learned single judge’s directions in the impugned order is as follows:

“110. The petitioners at this stage are also claiming compensation and interest on the amount which is in possession of by the respondents. However, in the facts and circumstances of the present case, the entire amount as asked by the petitioner cannot be secured. The petitioner is also seeking the relief of amount to a total loss of huge amount on account of difference between Rs.16.30 in terms of SPA and Rs.66.30 (price of the shares at the time of filing of petitions) together with interest @12% per annum which comes to more than three hundred crores. This Court is of the view at this stage only undisputed amount should be secured. The claim of compensation and interest would be considered by the Arbitral Tribunal after evidence and hearing of the parties as there are some disputed facts. Therefore, this Court is not inclined to secure the entire amount as prayed for while deciding the petition under Section 9 of the Act.

111. Barring Rs.100 crores which is not received by the respondents as informed during the hearing, the respondents are in possession of Rs.579 crores towards value of warrants

and shares of CRPS. The amount was paid towards their contractual obligation under the SPA. The respondents agreed to comply the terms of Clause 3 of SPA.

112. Thus in the facts of the present cases, that if the respondents will dispose of the shares of respondent No.1 to the third party, award if passed in favour of the petitioners, the same will become merely paper decree.

113. Without expressing anything on merit, as all the disputes have to be decided by the Arbitral Tribunal the part prayers in both petitions are allowed. The said amount of Rs.579 crores shall be deposited by the respondents without prejudice in five equal monthly installments by way of fixed deposit for twelve months in the name of Registrar General of this Court. The first installment amount shall be deposited by the respondents on or before 7th August, 2016. Thereafter, the remaining installments shall be deposited on every succeeding month. Till the time all five installments are deposited, the interim order shall continue. As and when the amount is deposited, the petitioners would be at liberty to file the application for releasing of amount, the same would be considered on merit as well as the issue of interim orders.

114. Both the parties shall take the necessary steps for the purpose of constitution of Arbitral Tribunal and once the Tribunal is constituted, it is expected that Arbitral Tribunal would publish the award within the period of twelve months. Liberty is also granted to move the application under Section 17 of the Act before the Arbitral Tribunal if so necessary or under any change of circumstances.”

16. The appellant submits that Section 9 of the Arbitration and Conciliation Act, 1996 (“the Act”) does not allow passing of an order as an interim measure which would result in enormous, far-reaching and devastating effects on thousands of persons and public institutions also, apart from numerous consumers. It is submitted that no interim order can be

passed in a private dispute between the company and the erstwhile promoters who reduced the Company to debt and huge losses, to safeguard the erstwhile promoters at the expense of thousands of employees. Counsel contends that the impugned order has misappreciated the facts and arrived at a *prima facie* conclusion that the company and the Appellant would be due to pay the petitioner the amounts specified, ignored the vital aspects of balance of convenience and irreparable hardship, and has failed to consider the public interest which would override everything else. It is argued that no interim order, and that too under Section 9 of the Act, can be passed that would have a wide ranging effect on public and financial institutions.

17. The appellant's senior counsel argues that the learned single judge has failed to appreciate that BSE and SEBI refused to grant approval to issuance of warrants on the ground that the promoters of the company had changed. Thus, the non-grant of permission from BSE and SEBI was for a reason contributed by the Petitioners and the responsibility and liability for the non-issuance of warrants could not be fastened on the company. Counsel argues that the learned single judge has failed to appreciate that Section 56 of the Indian Contract Act, 1872 is not attracted in the present case. The learned single Judge, it is urged, erroneously placed reliance on the said provision to hold that "under these circumstances, the petitioners are entitled to protect the said amount".

18. It is submitted that firstly, in the present facts and circumstances, Clause 17.6 of the SPA is attracted and, therefore, no occasion for the invocation of Section 56 has arisen and secondly, without prejudice, it is submitted that there was no promise from the Appellant or the company to

do an act that they knew to be impossible or might have known to become impossible. On the contrary, it is the Respondents No. 1 and 2 who made the offer dated 13.01.2015 to the Appellant by which he undertook all the liabilities of the company on the promise that the petitioners would pay an amount of ₹ 450 crores and on the premise that in consideration of having paid that amount for effectuating the revival of the company the petitioners would be issued warrants and CRPS in terms of the SPA. Therefore, it is on the said promise of the petitioners that the Appellant agreed to the terms of the offer which also stated that an application based on the board resolution passed while the Petitioners were in control and management was already pending before the BSE. The learned senior counsel argues that it is, therefore, wholly incorrect to assume that the Appellant was aware that the process of issuance of warrants, the genesis of which is at the time of the control and management of the petitioners would not fructify and become an impossibility at a later stage.

19. Learned counsel submits that the provisions of Section 9 have to be applied having regard to the principles underlying Order 38, Rule 5, CPC. For this, he relies on *Goel Associates v. Jivan Bima Rashtriya Avas Samiti* 114 (2004) DLT 478 and *Rite Approach Group Ltd. v. Rosoboron Export* 2004 (111) DLT 816. It is urged on behalf of the appellant that while issuing directions to deposit amounts, pending adjudication in arbitration, the court should be alive to the degree of harm and the likelihood of irreparable injury, such a direction would result in. Therefore, the court should be satisfied that conditions governing exercise of power under Order 38, i.e. the likelihood of the party fleeing or avoiding jurisdiction of the court and the eventuality of

its defeating a decree, are satisfied. Learned counsel emphasized that neither of these elements were present in the present case; the impugned order has not even discussed these aspects. On the other hand, compliance with directions would deal a crippling financial blow on the company, which it would be unable to recover from.

20. Learned counsel submitted that the inability of the company to issue the warrants and the preferential shares was concededly not on account of the appellants' fault. Therefore, the impugned order is in error in recording a *prima facie* finding against the appellants. Furthermore, the learned single judge failed to take into account the fact that today the company has made significant improvements- after the induction of the appellant. No consideration was given to the fact that the appellant took over the liabilities that fell to the share of the petitioners, who were unable to run the company or the airlines. The impugned order and the directions contained in it would result in financial destruction and eventual bankruptcy of the appellant.

21. During the course of hearing, the appellants' counsel had submitted that the impugned judgment may be even suitably modified to enable the appellant to furnish adequate security, in the form of a block of shares, to cover liability and the balance of the amount, to be secured through bank guarantee. The court had granted time to the respondent/petitioners who were willing to accommodate the appellant to the extent of grant of time, but insisted that at least about 50% of the amount directed should be deposited in court, in accordance with the impugned order, to enable its withdrawal subject to furnishing security, by the petitioners.

22. Dr. A.M. Singhvi, learned senior counsel on behalf of the petitioners

argued that that after execution of SPA the appellant and the company were obliged to issue the warrants because on the date of execution of agreement dated 29.01.2015, they were fully aware of the pendency of the application. It is contended that *arguendo* the company is blameless, yet at the same time, it cannot be denied that the warrants were to be allotted to the petitioners and the petitioners paid amounts towards such allotment. On one hand, the appellants allege that the warrants should have been issued and after the prescribed period of time, they were also supposed to issue shares of CRPS. On the other hand, *au contraire*, it is argued- again by the appellant, that the CRPS shares cannot be issued as the warrants could not be allotted, and in the absence thereof, they would be in violation of Section 42 of the Companies Act, 2013.

23. It is argued that the appellants in their reply (in the Preliminary Objections) have stated that the issuance of warrants has become an impossibility in law. Therefore, in view of the submissions of BSE/SEBI and also the appellants' statement supported by an affidavit, it is clear that the issuance of warrants at ₹ 16.30/- per share is an impossibility. Remarkably on one hand the appellants argue that it is impossible in law to issue warrants but on the other hand also argue that the petitioner should have challenged the order of BSE by filing an appeal. It is the appellants who received the consideration from the petitioners and it therefore cannot be comprehended as to why they should litigate with BSE or SEBI who are strangers to the SPA, particularly when it was the appellants' obligation.

Reasoning and conclusions

24. The first question which the court addresses is the one adverted to by the appellant, that principles underlying Order 38, Rule 5 CPC have to be kept in mind, while making an interim order, in a given case, directing security by one party. *Indian Telephone Industries v Siemens Public Communication* 2002 (5) SCC 510 is an authority of the Supreme Court, which tells the courts that though there is no textual basis in the Arbitration Act, linking it with provisions of the CPC, nevertheless, the principles underlying exercise of power by courts –in the CPC- are to be kept in mind, while making orders under Section 9. In *Arvind Constructions v Kalinga Mining Corporation* 2007 (6) SCC 798, the court held as follows:

“The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order XVIII Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer

that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver.”

25. Interestingly, in a previous decision, *Firm Ashok Traders & Anr v Gurumukh Das Saluja & Ors* (2004) SCC 155, the Supreme Court observed that:

“13. ..The Relief sought for in an application under Section 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated.....”

26. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles. In this regard, the observations of Lord Hoffman in *Films Rover International Ltd. v. Cannon Film Sales Ltd.*(1986) 3 All ER 772 are fitting:

“But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as

'guidelines', i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

27. It was observed later, in the same judgment that:

"The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction."

28. The question then is was the discretion exercised appropriately by the learned single judge, in the facts of this case? The facts are fairly straightforward, in the opinion of the court. The appellant was able to get hold of a substantial shareholding in the company (58% to be exact) for an overall cost of ₹ 2/-. This cost carried with it, the obligation to step in and

discharge the petitioners' guarantee to their creditors and issue share warrants at a pre-agreed price, on predetermined dates; it also obliged them to issue preference shares. In exchange, the appellants got ₹ 579 crores (in addition they were to, but did not get a further ₹ 100 crores). The parties agree that the share warrants were not issued; nor were the preference shares. The appellants say that this situation came about because of lack of statutory approval by the SEBI and the lack of permission by BSE. The appellants also did not discharge the statutory tax liabilities, but applied for waiver, *after* prosecution through complaint was launched. Their defence to non-refund or payment is that the petitioners have to establish their claims (including the claim for compensation). However, their pleadings categorically amount to a *prima facie* admission that the obligations they had undertaken were rendered impossible (on account of lack of regulatory approval). Niceties apart, the appellants' pleadings as to the justification for their retaining the amounts, when they clearly cannot deliver their part of the bargain, is feeble and ineffective. So also as to their inability to issue preference shares. On the other hand, the petitioners point out that the share prices have increased (from the agreed of ₹ 16.30/- per share to of ₹ 125/- per share at the time of hearing of the appeal)- a fact not denied. In these circumstances, the petitioners, in the opinion of the court, established *prima facie* a strong case on the merits of their application, with respect to the amounts they paid towards shares that were not allotted. There is also a statutory basis for this- Section 42 of the Companies Act and Section 65 of the Contract Act.

29. Now, coming to the appellants' argument with respect to the learned single judge's non-consideration of the elements pertaining to irreparable prejudice and balance of convenience. In the two sets of appeals preferred against the common impugned order, there is nothing worthwhile in the 50 plus page appeal (in each of the cases) to show that the company's finances are precarious or that its cash position is so stretched that it cannot comply with the learned single judge's order. There is neither reference to any figure or amount, nor reliance on any balance sheet, nor even the income and expenditure statement of the company, to say that compliance with the impugned order would irreparably injure it. The court notices that the nearly 18 month pendency of this appeal, and the non-compliance with the impugned order, has aggrandized the appellant, which was to have the benefit of the amounts. If there were any difficulties, this interregnum period would have helped it considerably tide over its affairs and certainly afforded time to organize it better and in a more orderly fashion to comply with the order.

30. During the hearings, the petitioners had alluded to press reports (in *the Hindu* and *Business Times*, both 21st April 2016 edition) to say that the appellant had announced capacity expansion of the company's aircraft fleet through wet lease by close to 20-25 % and that the company would also place orders for new aircrafts. The appellants' counsel did not deny that, but countered the argument by saying that the wet lease arrangement payments were not through bank or own funding, but rather based on projected increased earnings. The petitioners had urged that the profit before tax for the year ending 31.03.2016 reported by the company was ₹ 579.04 crore.

31. In the opinion of the court, the absence of material to establish that it would be irreparably prejudiced or that balance of convenience would be against it can only mean that it failed to substantiate its contentions. A contrary finding, that they would not be prejudiced in any manner, *sans* documentary materials on the record, but only based on press reports and interpretation of balance sheet for a given year available in the public domain, would be fraught with difficulty. At the same time, the court is aware that there is a possibility that compliance with the impugned directions can result in strapping the company severely and impairing its commercial operations. In these circumstances, while upholding the substantive reasoning of the learned single judge, the court is of the view that a modification of the order is necessary to meet the overall ends of justice.

32. Given the fact that the amount paid by the petitioners is a specific one, ends of justice would be met with by securing it in the form of cash deposit to the extent of ₹ 250 crores and securing the balance ₹ 329 crores through a bank guarantee to the satisfaction of the Registrar of this court. The said amount of ₹ 250 crores shall be deposited by the appellant on or before 31st August, 2017; the bank guarantee for ₹ 329 crores shall be furnished to the satisfaction of the Registrar on or before 31st July, 2017. This court is of the opinion that this modification is essential, not because the petitioners were unable to establish a strong *prima facie* case, but because of the unpredictable nature of the likely injury that may be caused to the commercial operations of the company and the appellants, if the entire amounts were secured through deposit in court.

33. The appeals are bereft of merit; however, the impugned order is modified to the extent indicated above. Parties are directed to be present before the Registrar General for compliance with the directions in the preceding paragraph, on 10th July, 2017. The appeals are dismissed, but subject to the modification in the impugned order, to the extent indicated. In the circumstances, there shall be no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**YOGESH KHANNA
(JUDGE)**

JULY03, 2017

