

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION APPEAL (ST.) NO. 19737 OF 2019

Centrient Pharmaceuticals India Pvt. Ltd.	...Appellant
<i>Versus</i>	
Hindustan Antibiotics Ltd.	...Respondent

**WITH
ARBITRATION APPEAL NO. 20 OF 2019**

Hindustan Antibiotics Ltd. Thr. Its Company Secretary Shri. Ashok B. Gawari	...Appellant
<i>Versus</i>	
Dsm Sinochem Pharmaceuticals India Pvt.Ltd. formerly DSM Anti-infectives(India)ltd. Thr. co. secretary	...Respondent

**WITH
CIVIL APPLICATION NO.24 OF 2019
IN
ARBITRATION APPEAL NO. 20 OF 2019**

Hindustan Antibiotics Ltd. Thr. Its Company Secretary Shri. Ashok B. Gawari	...Applicant
<i>Versus</i>	
Dsm Sinochem Pharmaceuticals India Pvt.Ltd. formerly DSM Anti-infectives(India)ltd. Thr. co. secretary	...Respondent

Mr.Sanjiv Puri, Senior Advocate with Mr.Dinesh Pednekar, Mr.Ashish Prasad, Mr.Alok Jain, Mr.Avinash Tripathi, Mr.Chanakya Keshwani I/b. Economic Laws Practice, for the Appellant in ARAST 19737/19.

Mr.Ray Choudhari, Senior Advocate i/b. Mr.D.G.Dhanure, for the Respondents in ARPST 19737/19 and for the Appellant in ARP 20/19 with civil application no.24/19.

CORAM : G.S. KULKARNI, J.

DATE : 31 July 2019

ORAL JUDGMENT:

1. A short question which arises for consideration in these proceedings is as to whether prayers for interim measures under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) are available to an award creditor, during the pendency of the Section 34 proceedings and in a situation that the award has become enforceable.

2. These are cross appeals filed under Section 37 of the Act. Arbitration Appeal (St.) No.19737 of 2019 is filed by Centrient Pharmaceuticals India Pvt. Ltd. and formerly known as DSM Sinochem Pharmaceuticals India Pvt. Ltd. (for short, “**DSM**”) against Hindustan Antibiotics Ltd. (for short, “**HAL**”) and Arbitration Appeal No.20 of 2019 is filed by HAL against DSM.

3. Both these appeals challenge a common order dated 1 July 2019 passed by the learned District Judge-1, Pune on Civil Miscellaneous Application No.746 of 2015 filed by “HAL” under Section 9 of the Act.

The impugned operative order reads thus:-

“

ORDER

- 1] Application Exhibit. 14 is hereby partly allowed.
- 2] Applicant DSM Sinochem Pharmaceuticals India P. Ltd. and its successors, if any, are hereby directed to deposit 50% amount of majority award in the Court within 30 days from the date of this order.
- 3] No order to costs.”

4. DSM is aggrieved by paragraph 2 of the said order whereby DSM has been directed to deposit 50% of the award amount within 30 days from the date of the said order passed by the learned District Judge. Whereas HAL is also aggrieved by paragraph 2 of the order in as much as the learned District Judge not directing DSM to deposit the full award amount. Hence the present appeals.

5. Shorn of details some background is required to be noted. Disputes and differences had arisen between HAL and DSM under a Memorandum of Understanding (MOU) dated 20 June 1994 entered between them. Under the MOU the parties had agreed to form a joint venture company (JVC) between DSM and HAL for the production of penicillin. Accordingly, a JVC was incorporated between HAL and DSM. The object of forming a JVC could not be successful in view of certain Government policies as the Government of India had planned to delete penicillin from

the negative list and to lower the import duties, making it imperative for the JVC/HAL to compete with the price of imported penicillin, lower than the current price of domestic penicillin. Thus disputes had arisen between the parties which were referred for arbitration to a three member arbitral tribunal of which Mrs. Justice Sujata V. Manohar (Retd.) was a Presiding Arbitrator. The arbitral tribunal rendered its award dated 26 June 2015. One of the members of the arbitral tribunal delivered a dissenting award. The majority award directed DSM to pay an amount of Rs.337.526 Crores to HAL. There was also a counter-claim as made by DSM which was not allowed by the majority members of the arbitral tribunal.

6. Both the parties are accordingly before the learned District Judge challenging the award by filing their respective Section 34 applications. DSM is aggrieved by the award made against it directing DSM to pay an amount of Rs.337.526 Crores to HAL and HAL has challenged the award as the arbitral tribunal did not grant certain claims as made by HAL. It is not in dispute that Section 34 applications are pending. The Court's attention is drawn by the learned Senior Counsel for DSM to the orders dated 24 November 2017, 23 February 2018 and 20 February 2019 passed by this Court in different proceedings whereby the learned District Judge

was directed to dispose of the Section 34 proceedings at the earliest. The last order dated 20 February 2019 directed that the parties will not seek any adjournment before the District Judge when hearing of the Section 34 application would commence.

7. However, what has transpired during the pendency of Section 34 proceedings before the learned District Judge, is of concern in the present proceedings. The events that have occurred are quite peculiar.

8. DSM filed the Section 34 application on 18 September 2015 before the Court of learned District Judge, Pune. Immediately thereafter on 22 September 2015 HAL filed its Section 34 application and on the same day HAL also filed an execution application being Darkhast No.2382 of 2015 seeking to execute the majority award.

9. With effect from 23 October 2015 the Act was amended by Act No.3 of 2016, whereby sub-section (2) of Section 36 came into operation, providing that filing of an application under Section 34 shall not by itself render the award unenforceable, unless the Court grants an order of stay, of the operation of the arbitral award in accordance with the provisions of

sub-section (3) on a separate application praying for stay. Sub-section (3) conferred a power on the Court to stay the operation of the award subject to such conditions as may be deemed fit. The proviso below sub-section (3) of Section 36, stipulates that the Court, shall while considering the application for grant of stay, in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the CPC. Admittedly there was no stay application filed by DSM praying for a stay of the award.

10. As the assets of DSM were situated in Punjab, on 22 April 2016 HAL filed an application seeking transfer of the execution proceedings to the appropriate Court in the State of Punjab. On 20 June 2016 DSM filed a reply to Darkhast No.2382 of 2015. The execution proceedings had remained pending. During pendency of the execution proceedings HAL on 13 December 2016 HAL filed an application under Section 9 of the Act (Exhibit 14) praying for a direction to the DSM to deposit in Court or to pay to HAL an amount of Rs.337.526 Crores. HAL's section 9 application was contested by DSM by filing a reply dated 20 January 2017. The learned District Judge by an order dated 20 January 2017 directed that the Section 9 application be heard along with principal proceedings

namely the Section 34 application. This order of the learned District Judge was challenged by HAL before this Court in a writ petition which came to be disposed of by an order dated 23 June 2017, whereby this Court directed the learned District Judge to dispose of the Section 9 application filed by HAL. Pursuant thereto the learned District Judge on 27 September 2017 heard the parties on the Section 9 application and by an order rejected the Section 9 application. Against the rejection of Section 9 application, HAL preferred an appeal before this Court (Arbitration Appeal No.3 of 2019). This Court by an interim order dated 24 November 2017 directed the learned District Judge to proceed with the hearing of Section 34 application and not to await the disposal of the said Section 37 appeal filed against the order rejecting the Section 9 application of HAL. During the pendency of the section 37 appeal before this Court, on 21 February 2019 HAL withdrew the execution proceedings (Darkhast No.2382 of 2015). The learned District Judge by the said order permitting unconditional withdrawal of the execution proceedings instituted by HAL enforcing the award. This order was passed by the learned District Judge after hearing the parties.

11. The Section 37 appeal was thereafter taken up by this Court for hearing on 19 June 2019 and by an order passed on the same day, the said appeal was disposed of in terms of the following order:-

“

ORDER

- i. The impugned order dated 29 September 2017 is set aside.
- ii. The application of the appellant filed under Section 9 of the Act below Exhibit 14 stands restored to the file of the learned District Judge-1, Pune to be decided on its own merits;
- iii. All contentions of the parties on the said application and on merits of the disputes are expressly kept open.
- iv. The parties are directed to appear before the learned District Judge-1, Pune, on 25 June 2019 at 11.00 a.m.
- v. The learned District Judge-1, Pune, shall endeavour to take up Section 9 application of the appellant and decide the same on or before 3 July 2019.
- vi. The appeal is disposed of in the above terms. No costs.
- vii. Civil application No.46 of 2017 and civil application No.47 of 2017 would also not survive and are disposed of keeping all contentions of the parties open.

10. At this stage, Mr.Tamboly would draw my attention to the orders which are passed by this Court, by which this Court had directed the learned District Judge should take up the petition under Section 34 of the Act and decide the same expeditiously. The District Judge shall take up Section 34 petition and endeavour to dispose of the same as expeditiously as possible and in any event, within a period of three months from today.”

12. It needs to be noted that when the above order was passed by this Court, the plea as urged on behalf of HAL was that as the execution proceedings stood withdrawn by HAL, the basis on which the learned District Judge had rejected the Section 9 application had vanished and accordingly, HAL would be entitled to seek reliefs under Section 9 of the Act. It is on this premise that the Court keeping open all contentions of the parties directed that the parties be heard afresh by the learned District Judge on the Section 9 application and accordingly had set aside the order dated 29 September 2017 passed by the learned District Judge rejecting Section 9 application.

13. On remand the learned District Judge heard the parties on the Section 9 application filed by HAL. It would be appropriate to note the prayers as made in the section 9 application by HAL, which was filed on 13 December 2016, which read thus:-

“a. Direct DSM Sinochem Pharmaceuticals India Pvt. Ltd., to deposit in court or to pay to the petitioner the amount of Rs. 337.526 Crores being the Award amount directed to be paid to the petitioner Hindustan Antibiotics Ltd. by the Arbitration Tribunal with interest @ 12 percent from the date of the award as calculated in the Annexure III to this petition till the said award is implemented subject to result of the section 34 proceedings under the Arbitration and Conciliation Act, 1996 as amended;

b. The petitioner DSM Sinochem Pharmaceuticals India Pvt. Ltd. (the opposite party in the present Sec.9 application)

be directed not to sell, mortgage or to encumber and or to otherwise deal with any movable or immovable asset/s of the said company till the award is satisfied/implemented and or set aside.

c. In view of grave urgency the learned court may kindly pass Ex-parte/ or in presence of the opposite party Ad interim orders in terms of prayer (a) above by directing the respondent / opposite party to deposit in court the entire amount of Rs.337.526 Crores including interest @ 12% and also the cost of Rs.30 Lacs till date as per the calculation being annexure-III to this Petition.

d. Ad interim Ex-parte-or otherwise be passed in terms of order of injunction to restrain the opposite party M/s.DSM Sinochem Pharmaceuticals India Pvt. Ltd not to sell, mortgage, encumber and or otherwise deal with any movable or immovable assets of the said company in any manner what so ever till the said award is implemented / and or otherwise satisfied with and / or till the section 34 proceeding being Misc Case No.746/2015 is disposed of.

e. Pass any order/s as the Hon'ble court deem fit and proper in the facts and circumstances of the case.”

14. The case of HAL before the learned District Judge on the Section 9 application on remand, was that the execution proceedings which were filed by HAL having stood withdrawn, HAL would be entitled for its prayer in the Section 9 application for deposit of the award/decretal amount by DSM. This considering the requirement to have the decretal amount for payment to its creditors as also the employees who were not paid salaries and pension for last several years and one of the employees having committed suicide. HAL thus contended that it was imperative that DSM be directed to deposit the award amount in the Court. HAL in supporting

the said plea had also filed an application before the learned District Judge on 13 February 2019 to place on record four documents which were in the nature of newspapers cuttings to contend that more than 200 retired employees had assembled at the gate of HAL and had made demonstrations demanding from HAL the unpaid salaries, pension etc. Also a newspaper report was placed on record that one of the workers had committed suicide as he was not paid the outstanding amounts towards salary by HAL. It is stated that this application was numbered as Exhibit-40. Learned Senior Counsel for HAL has pointed out that DSM did not file any reply to this application and hence the contents therein were deemed to be admitted.

15. Learned District Judge considering the rival submissions and in passing the impugned order on HAL's Section 9 application, framed the following three points for determination:-

“

Sr.No.	Points	Findings
1	Whether HAL has made out prima-facie case and balance of convenience lies in their favour ?	Yes.
2	Whether HAL will suffer irreparable loss, if the application is rejected ?	Yes.

3	Whether HAL is entitled for the interim relief as prayed for ?	As per final order.
4	What order ?	As per final order.

16. Learned District Judge in answering point No.1 in the affirmative in paragraph 21 observed that as per majority award, DSM was liable to pay to the HAL an amount of Rs. 337.526 crores along with interest @ 12% p.a., plus costs of Rs. 30 lakhs, and that the award was in the nature of a money decree. The learned District Judge observed that as per provisions of Civil Procedure Code, money decree cannot be stayed and as there was no stay to the majority award, the learned District Judge was of the opinion that DSM should deposit 50% of majority award. The relevant observations made by the learned District Judge are required to be noted which read thus:-

“21. As per majority award, DSM is liable to pay an amount of Rs. 337.526 crores along with interest @ 12% p.a., plus costs of Rs. 30 lakhs. It means it is money decree. As per Civil Procedure Code, money decree cannot be stayed. As there is no stay to the majority award, it is, in my view enforceable. Undoubtedly, award / decree can only be executed by way of execution and not by other modes. If judgment debtor / majority award debtor deposits the amount in any of the proceedings, other than execution, like in application under Section 34 of the Arbitration Act, there is no question of execution.

23. As per Section 9 of Arbitration and Conciliation Act, 1996, any party i.e. Award Holder / Award Debtor / other person who may have in the interest in the matter may before

or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with Section 36 apply to the Court for seeking reliefs mentioned in Section 9 including that securing the amount in dispute in the Arbitration. Award is already passed on 26.06.2015 and is enforceable, though Misc. Civil Applications filed by both DSM and HAL and are pending for adjudication.

24. Merely, because majority award is challenged, it is not automatically stayed, by filing of an application under Section 34 of the Arbitration and Conciliation Act, 1996. As majority award is challenged by DSM and though it is in respect of money decree and though till today no majority award is stayed, in my view direction to DSM to deposit 50% of majority award will meet the ends of justice, to avoid starvation of employees, workers of HAL. Therefore, it can be said that HAL has made out prima facie case and balance of convenience is in their favour.”

17. In assailing the impugned order passed by the learned District Judge, Mr.Puri, learned Senior Counsel for DSM, at the outset would concede that as per requirement of Sub-section (2) and (3) of Section 36 (as inserted by the 2015 amending Act) DSM has not filed any application seeking stay of the arbitral award. However on instructions Mr.Puri, learned Senior Counsel for DSM, would submit that his clients are prepared to furnish a bank guarantee of the entire principal amount of the award in favour of HAL and which shall be without prejudice to the rights of DSM in the pending Section 34 proceedings. He submits that the bank guarantee would be kept alive for a period of 30 days after Section 34 proceedings are disposed of.

18. Mr.Puri, learned Senior Counsel for DSM however would have serious objection in law to the impugned order passed by the learned District Judge. Mr.Puri would contend that in the fact situation, the learned District Judge could not have exercised jurisdiction under Section 9 of the Act and moreover to pass an order directing DSM to deposit the amount, in as much as the arbitral award dated 26 June 2015 had already become enforceable, compounded by the fact that HAL has filed execution proceedings (Darkhast No.2382 of 2015). It is submitted that once an award has become enforceable, certainly proceedings under Section 9 of the Act could not have been filed and pursued by HAL and no orders could have been passed by the learned District Judge. Mr.Puri submits that when this Court by an order dated 19 June 2019 remanded the Section 9 application to be heard afresh by the learned District Judge, this Court had expressly kept all contentions open, which would certainly include the contentions of DSM on the maintainability of Section 9 application, in the facts of the case. It is submitted that the issue of maintainability of the Section 9 application was categorically urged before the learned District Judge, however, the learned District Judge did not frame such a point, so as to determine such issue. It is thus Mr.Puri's submission that on the

principal ground of applicability of Section 9 in the present circumstances, when the award had become enforceable as per provisions of Section 36 of the Act, the learned District Judge ought not to have entertained the section 9 application and ought to have dismissed the same. In support of his submission Mr.Puri has placed reliance on the decision of the learned Single Judge of this Court in **Delta Construction Systems Ltd., Hyderabad Vs. Narmada Cement Company Ltd., Mumbai**¹. Mr.Puri has also placed reliance on the decision of learned Single Judge of Delhi High Court in **SMJ-RK-SD (JV) Vs. National Highways Authority of India**² wherein the Court had taken a similar view that powers under Section 9 could not be exercised after the award had become enforceable.

19. Mr.Puri would also submit that sometime back Section 34 proceedings was being heard by the learned District Judge but the hearing for some reason could not conclude. It is informed that the present presiding District Judge, had commenced hearing of the Section 34 proceedings, however, he is now scheduled to retire in September 2019 and it may not be possible for the Court to conclude the hearing and pronounce a judgment as the record is voluminous.

1 2002(1) Mh.L.J. 684

2 OMP 613/2008 decided on 07.08.2009

20. On the other hand, Mr.Ray Chaudhari, learned Senior Counsel for HAL would submit that the learned District Judge has rightly entertained HAL's application under Section 9 of the Act. He submits that there is an error on the part of learned District Judge in not directing DSM to deposit the entire award amount. Mr.Ray Chaudhari would submit that HAL's Section 9 application was maintainable for the prayers as made therein which were reliefs in the nature of interim measures, post the award and during the pendency of Section 34 proceedings, more so when after hearing the parties the Court unconditionally permitted HAL to withdraw the execution proceedings on 21 February 2019. It is submitted that the facts and circumstances of the case, as placed on record before the learned District Judge, clearly demonstrate the dire need for the award amount to be deposited by DMS in the Court to be utilised for valid purposes. This in as much as not only there were dues of workers which were required to be paid, but of several creditors which included nationalized banks being required to be paid. It is submitted that the workers are awaiting payment of their salaries and pension. Mr.Ray Chaudhari would submit that all these circumstances which warranted deposit of the award amount, have remained undisputed, in as much as there was no opposition to these

contentions as urged on behalf of HAL. Mr.Ray Chaudhari submits that the arbitral award in the present case is a money decree and once it is a money decree, the basic principles for any stay on the money decree, would be that the award debtor is required to deposit the award amount in the Court. He submits that there could not have been any deviation from these principles of law, in the facts of the present case as rightly held by the learned District Judge in deciding the Section 9 application by the impugned order. His submission is that a correct approach has been adopted by the learned District Judge in entertaining the Section 9 application. Mr.Ray Chaudhari submits that it has been a consistent view taken in several decisions that when it is a money decree, decretal amount necessarily would be required to be deposited by the judgment debtor as a condition to stay the execution of a decree. He would refer to a decision of the learned Single Judge of Calcutta High Court in **The Board of Trustees for the Port of Kolkata Vs. ABG Kolkata Container Terminal Private Limited**³. Mr.Ray Chaudhari also refers to an order dated 7 January 2019 passed by the Supreme Court in Special Leave Petition No.31316 of 2018 in the case of **SAIL Vs. M/s. Tata Projects Ltd. & Anr.**, wherein the Supreme Court dismissed a Special Leave Petition filed by SAIL against the ad-interim order dated 28 September 2018 passed by the

3 GA No.589 of 2019 with AP No.590 of 2011 decided on 16.04.2019

learned Single Judge of Delhi High Court in OMP No.392/2018, whereby the learned Single Judge while issuing notice on SAIL's petition for stay of the money decree had directed SAIL to deposit the award amount of Rs.300 Crores as a condition to stay on the enforcement of an arbitral award. Mr.Ray Chaudhari would accordingly submit that the appeal filed by HAL is required to be allowed by directing DSM to deposit the entire award amount and the appeal filed by DMS should be dismissed.

Discussion and Conclusion:

21. Having heard the learned Senior Counsel for the parties and having perused the record, at the outset some admitted facts are required to be noted. It is not in dispute that although the award is dated 26 June 2015 even after coming into force of the amended provisions of Section 36 (w.e.f. 23-10-2015 by amending Act No.3 of 2016), there is no application filed by DSM praying for stay of the award which is admittedly in the nature of a money decree. It is also not in dispute that HAL on 22 September 2015 filed an execution application (Darkhast No.2382 of 2015) to execute the majority award. The execution application had remained pending for almost 4 years till the same was withdrawn by HAL on 21 February 2019. It is also not in dispute that during the pendency of

execution application, HAL on 13 December 2016 filed a section 9 application praying that DSM be directed to deposit the award amount of Rs.337.526 Crores which came to be rejected during the pendency of execution proceedings by an order dated 29 September 2017 passed by the learned District Judge. This order was challenged by HAL approaching this Court in a Section 37 appeal. HAL after almost 17 months of the rejection of the said application during the pendency of the Section 37 appeal, thought it appropriate to file an application on 21 February 2019 to withdraw the execution application. This Court consequently disposed of HAL's Section 37 appeal by an order dated 19 June 2019 remanding the matter back, for reconsideration of the section 9 application keeping all contentions of the parties open.

22. On this admitted factual conspectus the point which arises for consideration in this proceeding is whether the learned District Judge in the facts of the present case had jurisdiction to entertain HAL Section 9 application when the arbitral award dated 26 June 2015 had become enforceable, as admittedly DSM had not filed any application seeking stay of the arbitral award as per the requirement of the amended provisions of Section 36(2) of the Act.

23. To determine the above question, it would be necessary to consider the scope of jurisdiction of the Court under Section 9 of the Act. Section 9 provides for interim measures which can be granted to a party before, or during arbitral proceedings or at any time after making of the arbitral award “but before it is enforced” in accordance with Section 36 of the Act. The nature of such interim measures which can be granted by the Court are clearly set out in clause (i), (ii), (a) to (e) of sub-section (1). In exercising such jurisdiction, sub-section (1) would provide that the Court shall have same powers for making orders as it has for the purpose of and in relation to any proceedings before it. However, post the award these reliefs under sub-section (1) (i) (ii) (a) to (e) can only be granted, before the award is enforced in accordance with section 36.

24. In this context the legislative scheme under the amended provisions of Section 36 of the Act, which provides for enforcement of an award, is required to be noted. Section 36 provides that where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil

Procedure, 1908 in the same manner as if it were a decree of the Court. Sub-section (2) of Section 36 provides that where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay to the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose. Sub-section (3) categorically provides that upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing. The proviso to sub-section (3) stipulates that the Court shall, while considering the application for grant of stay in case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

25. Thus, from a cumulative reading of the amended provisions of Section 9 and Section 36, it is quite clear that the jurisdiction of the Court can be called upon to be exercised under Section 9 of the Act by an award creditor, only in the circumstances sub-section (1) of Section 9 would

postulate. In the present case on the filing of the application under Section 34 of the Act challenging the arbitral award, there was no stay to the execution of the award. HAL was in fact pursuing the execution proceedings. Thus the obvious consequence was that once the award had become enforceable the only remedy available to the award creditor was to execute the award and a recourse to Section 9 of the Act was not available. This is clearly derived from a plain reading of section 36 of the Act as it stands after the amendment, when it clearly provides that there would not be an automatic stay to the award on mere filing of section 34 proceedings. A party seeking a stay of the award would be required to file a separate application as provided under sub-section (2) of section 36. Such application would fall for adjudication of the Court and the Court in the facts of the case would exercise its jurisdiction to stay the operation of the award for the reasons to be recorded in writing and subject to such terms and conditions as it may think appropriate. Further the proviso to sub-section (3) would stipulate that the Court would be required to take into consideration the rules/principles under the provisions of the Code of Civil Procedure when an applicant is seeking stay on the money award namely the provisions of Order 41 Rule 1 of the CPC.

26. The jurisdiction under Section 9 and Section 36(2) in my opinion is quite compartmentalized and there cannot be any intermixing of the jurisdiction(s) when the Court is considering either Section 9 application or Section 36(2) application. In other words the provisions of Section 9 cannot take away as to what Section 36(1) would provide qua the enforcement of the award, when it comes to exercise of jurisdiction by the Court post award.

27. As to whether it would be appropriate for a Court to pass interim orders under Section 9 after award has become enforceable was subject matter of consideration in the decisions as referred by Mr.Puri. In the present context, Mr.Puri has rightly relied on the decision of the Single Judge of this Court in **Delta Construction Systems Ltd., Hyderabad Vs. Narmada Cement Company Ltd., Mumbai** (supra) wherein the Court has held that the power under Section 9 in all its force must be available to the extent applicable till the Award becomes enforceable and after the Award had become enforceable, the provisions of Order 21 of the Civil Procedure Code would become applicable, as the Award becomes a decree and can be executed as a decree. The Court in paragraph 11 observed thus:-

“11. We then come to the second contention as to whether after the Award has been passed, the power of this court to grant interim relief insofar as Section 9 is concerned is limited. That the Court has power to grant interim relief under Section 9 before the Award becomes enforceable is no longer in issue. See *Sunderam Finance Ltd. v. N.E.P.C. India Ltd.*, . The argument is canvassed on behalf of the respondent considering the various expressions used in the various clauses of Section 9 of the Act of 1996. It will be very difficult for the court on first principles to accept that the powers of the court to grant interim relief are wider before an award is passed than that after the passing of an award. On the contrary after the Award is passed, the right of the party to an extent is crystalised. For example, in the case of damages, if earlier it is not debt, after the Award, it becomes crystalised subject to enforcement. All that Section 32 of the Act contemplates is the manner in which proceedings come to an end. It does not mean that when proceedings come to an end there is automatically a decree. The Act itself provides for a challenge under Section 34 or for correction under Section 33. It is only on exhausting these remedies resorted under the Act does the Award become enforceable or if there is no challenge, then on the expiry of the period for challenging the award considering Section 34. It is in these circumstances and knowing that a party cannot be left without a remedy before the Award is enforced, that the legislature in its wisdom has used the expression "before it is enforced". Therefore, the power under Section 9 in all its force must be available to the extent applicable till the Award becomes enforceable. After the Award becomes enforceable the provisions of Order 21 of the Civil Procedure Code are applicable, as the Award becomes a decree and can be executed as a decree”

28. Mr.Puri would also be right in relying on the decision of learned Single Judge of Delhi High Court in **SMJ-RK-SD (JV) Vs. National Highways Authority of India** (supra) wherein the learned Single Judge observed that the provisions of Section 9 cannot be invoked to circumvent

the provisions of Section 36 of the Act, although Section 9 of the Act is applicable post-award as well but it is applicable only for the purpose as envisaged under Sub-section (1). The learned Single Judge in paragraph 3 observed thus:-

“3. Section 36 provides that an award is enforceable only after objections filed under Section 34 are dismissed. Asking respondent to pay the amount of award on the strength of bank guarantee to be furnished by petitioner would be contrary to the express provisions of Section 36. Provisions of Section 9 cannot be invoked to circumvent the provisions of Section 36 of the Act. No doubt Section 9 of the Act is applicable post-award as well but it is applicable only for the purpose as provided under Section 9 namely for preservation and interim custody of the subject matter of arbitration agreement or for securing amount in dispute in arbitration or preservation or inspection of any property or things or for appointment of a receiver. The basic and main purpose of Section 9 is to secure by interim measures the subject matter of dispute. Section 9 of the Act is not meant for execution of award during pendency of objections against the award. I find no force in this petition. The petition is hereby dismissed. No orders as to costs. “

I am in respectful agreement with the views taken by the learned Single Judge of this Court in **Delta Construction Systems Ltd., Hyderabad Vs. Narmada Cement Company Ltd., Mumbai** (supra) as also the learned Single Judge of Delhi High Court in **SMJ-RK-SD (JV) Vs. National Highways Authority of India** (supra).

29. The facts in the present case are peculiar. DSM has taken a clear position that despite amended provisions of Section 36(2) staring at DSM, which would require DSM to file an application seeking stay of the award, DSM has thought it appropriate not to move such an application for stay on the award. On the other hand, HAL initially although instituted execution proceedings by filing Darkhast No.2382 of 2015 and after keeping the execution proceedings pending for quite sometime, as noted above, for reasons best known to it, chose to withdraw the execution proceedings on 21 February 2019. On the basis of the execution proceedings being withdrawn, HAL thought it appropriate to pursue section 9 application. What has emerged from this factual position is that the award is clearly available to HAL to be executed in the manner as provided under Section 36 of the Act, and the award being clearly enforceable, the provisions of Section 9 of the Act, are not available to HAL.

30. In view of the discussion in the foregoing paragraphs, it is quite clear that remedy of filing an application under Section 9 in such a situation was not available to the HAL to be pursued and to seek a prayer for deposit of the award amount, when the award itself had become

enforceable. It is also not the case that HAL cannot re-pursue the execution proceedings in view of the fact that there is no stay to the execution of the award.

31. In the above circumstances, the contention as urged by Mr. Ray Chaudhary, learned Senior counsel for HAL that DSM ought to be directed to deposit the amount more particularly referring to the orders passed by the learned Single Judge of Calcutta High Court in **The Board of Trustees for the Port of Kolkata Vs. ABG Kolkata Container Terminal Private Limited** (supra) as also learned Single Judge of Delhi High Court in **SAIL Vs. M/s. Tata Projects Ltd. & Anr.** cannot be accepted. In both these cases the Court was concerned with an application under Section 36(2) where the party in proceedings under Section 34 sought interim stay to the execution of the award pending the decision of the 34 proceedings. This is certainly not a situation in the present case. There is no ambiguity whatsoever to the legal position, namely that in case there is no stay to the award, there is no legal impediment of any nature for the award creditor to proceed to execute an award.

32. Be that as it may, the Court however, cannot be oblivious to the

peculiar facts and more particularly to the fact that the Section 34 proceedings are now being taken up for adjudication by the learned District Judge as already directed by this Court as noted above. The Court also cannot shut its eyes to the statement as made by Mr.Puri, learned Senior Counsel for DSM that DSM without prejudice to its rights and contentions is prepared to furnish a bank guarantee of the principal award amount in favour of HAL and which would be kept alive till the adjudication of Section 34 proceedings and for a period of 30 days thereafter. Though strictly this would not be the scope of jurisdiction under Section 9 and these consequential proceedings under Section 37 arising therefrom, however, as Mr.Puri learned Senior Counsel for DSM has fairly offered on behalf of his clients to furnish such a bank guarantee, the facts of the case would certainly warrant that this offer which is made on behalf of DSM needs to be accepted as the same would also serve the ends of justice in the pending Section 34 proceedings.

33. In view of the above discussion, the impugned order passed by the learned District Judge cannot be sustained. It is accordingly set aside however with a further direction that the DSM shall deposit with the learned District Judge a bank guarantee of Rs.150 Crores of a nationalized

bank which shall be submitted within 30 days from today. DSM furnishing such bank guarantee shall be subject to HAL not executing the arbitral award. Ordered accordingly.

34. The learned District Judge who is seized of the section 34 proceedings is stated to be retiring in September 2019. In these circumstances, the learned Principal Judge, Pune shall consider assigning the pending Section 34 proceedings as filed by both the parties, to an alternative Court and while so assigning learned Principal District Judge would consider the availability of such Presiding Officer for a substantial duration. Let this exercise be undertaken within three weeks from today. Moreover the learned Principal District Judge needs to ensure that the commercial court so designated is exclusively available to take up commercial causes, as per the expectations and requirement of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

35. The parties are directed to appear before the learned District Judge. All contentions of the parties on the Section 34 proceedings as

also any other proceedings are expressly kept open.

36. The appeals are accordingly disposed of in the above terms. No costs.

37. The observations of the Court in this order are in the context of the jurisdiction of the Court under Section 9 of the Act, and are not any expression on the merits of the observations as made in the impugned order in regard to the need demonstrated on the part of HAL requiring deposit of the said amount. All contentions of HAL and DSM in that regard are kept open to be agitated in appropriate proceedings.

38. It is clarified that in case HAL intends to execute the award, DSM would be at liberty to seek withdrawal/return of the bank guarantee.

39. In view of disposal of appeals, both the civil applications stand disposed of.

(G.S.Kulkarni, J.)