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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1012 of 2018

Yusufkhan @ Dilip Kumar	]	
Mumbai, Indian Inhabitant,	]	
Residing at Plot No. 16, Pali	]	
Hill, Bandra (West),	]	
Mumbai 400 050.	]	..PETITIONER.

vs.

- | | | | |
|----|--|---|----------------|
| 1. | Prajita Developers Pvt. Ltd. |] | |
| | A Company registered under the |] | |
| | Companies Act, 1956, having |] | |
| | its registered office at Oracle |] | |
| | Point, 7 th Floor, Guru Nanak |] | |
| | Road, Opp.Bandra Railway |] | |
| | Station, Bandra (West), |] | |
| | Mumbai 400 050. |] | |
| 2. | Gold Beam Construction Private |] | |
| | Limited A company registered |] | |
| | under the Companies Act, 1956, |] | |
| | having its registered office |] | |
| | at 34-B, Pali Hill, Nargis Dutt Road, |] | |
| | Bandra (West), Mumbai 400 050. |] | ..RESPONDENTS. |

Mr. Rajeev Kumar, Senior Advocate with Chirag Shah, I/by
Mr. J.J.Shah, for the Petitioner.

Mr. Aspi Chinoy, Senior Advocate a/with Mr. Zal
Andhyarujina, Mr. Avrup Dasgupta, Mr. Rakesh Reddy, Mr.
Shrey Shah I/by Jhangiani Narula & Associates for
Respondent No.1.

Mr. Rahul Chitnis with Akshay Shah for Respondent No.2.

CORAM : **B. P. COLABAWALLA, J.**
RESERVED ON : **5th March, 2019.**
PRONOUNCED ON : **25th March, 2019.**

JUDGMENT:-

1. Admit. Respondents waive service. By consent of the parties, the Arbitration Petition is taken up for hearing and final disposal.

2. This Arbitration Petition has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short **“the Act”**) challenging the order dated 31st May, 2018 passed by the Arbitral Tribunal (for short the **“impugned order”**) under Section 17 of the Act. By the impugned order, the Tribunal directed the petitioner to furnish an undertaking to the effect that he will not alienate or encumber or part with possession of the property which was the subject-matter of the arbitration to the extent of Rs.25 crores till the arbitration proceedings are concluded. It was further clarified that this undertaking shall be in respect of a specific property i.e. certain specific portion of the developed property that falls to the share of the petitioner or any other unencumbered personal property of the

petitioner.

3. At the outset, when I went through the impugned order, I found that there are several inconsistencies therein. I was therefore inclined to set aside the impugned order and remand it back to the Arbitral Tribunal for a fresh decision. However, both the learned Senior Counsel appearing in the matter (for the petitioner as well as respondent No.1 – the contesting respondent) stated before me that they do not seek a remand and would rather have me decide whether the order passed by the Tribunal is justified or otherwise. It is in these circumstances that I have proceeded to hear the present Arbitration Petition.

4. Before advertng to the legal submissions canvassed by both the parties, it would be necessary to advert to a few basic facts. The subject-matter of the arbitration proceedings is a Development Agreement dated 23rd June, 2006. The petitioner herein is respondent No.1 before the Arbitral Tribunal. Respondent No.1 herein is the claimant and respondent No.2 herein is respondent No.2 before the Arbitral Tribunal. For the sake of convenience, I shall refer to the parties as they were arrayed before the Arbitral

Tribunal.

5. Respondent No.1 before the Tribunal is 95 years old. The claimant is a company incorporated under the Companies Act, 1956 and is engaged in the business of construction and development of properties. Respondent No.2 also is a company engaged in the same business. It is not in dispute that respondent No.1's wife, her brother and nephew are the Directors and only shareholders of respondent No.2.

6. As set out in the petition, pursuant to several indenture of leases, respondent No.1 before the Tribunal acquired leasehold rights in respect of various properties admeasuring 2,016 square meters situated at Pali Hill, Bandra (West), Mumbai (for short the **“said property”**) for a period of 999 years and on the terms and conditions mentioned therein. On this property, a bungalow was also built. Pursuant thereto, the name of respondent No.1 is entered in the property card of the said property.

7. In order to develop the said property, a Development Agreement dated 23rd June, 2006 was executed between respondent

No.1, Sharyans Private Limited (for short **“Sharyans”**) and respondent No.2, whereby respondent No.1 granted development rights jointly to Sharyans and respondent No.2 in respect of the said property. Under the said Development Agreement, Sharyans and respondent No.2 were to develop the said property by consuming the FSI available as also by loading TDR as was permissible by the Development Control Regulations of Greater Mumbai. Under this Development Agreement, Sharyans and respondent No.2, as joint Developers, were to give 50% of the developed area to respondent No.1 along with 50% of the car parking spaces. The remaining 50% of the developed area and residential car parking spaces was the entitlement of the joint Developers i.e. Sharyans and respondent No.2 and the same was to be divided equally between them. Under this Development Agreement, the developers were also to pay to respondent No.1 a consideration of Rs.10 crores.

8. Thereafter, on 20th April, 2010, Sharyans, with the consent of respondent No.1, assigned their right, title and interest in respect of the development rights in the said property to the claimant. This was done because, Sharyans and the claimant (both being companies) had the same Directors.

9. According to respondent No.1, there was no progress of any nature whatsoever with respect to the development of the said property and there were persistent breaches of the terms and conditions of the Development Agreement. This was brought to the notice of the claimant by respondent No.1.

10. Be that as it may, on 15th April, 2015, the claimant filed Arbitration Petition No. 829 of 2015 under Section 9 of the Arbitration and Conciliation Act, 1996 seeking an order of injunction restraining respondent No.1 from (a) dispossessing the claimant from the said property; and (b) creating any third party rights, title or interest in respect of the said property. Though initially an ex-parte order was passed in this petition, it was finally dismissed by this Court vide its detailed order dated 14th January, 2016. While dismissing the petition, this Court in Paragraphs 21 and 22 inter alia opined that the claimant had not made out any prima facie case for an injunction and neither it was able to establish any balance of convenience in its favour. Paragraphs 21 and 22 of this order read thus:-

“21. Considering the above mentioned principle, this court have to decide the present petition. In the present petition,

in development agreement 23.6.2006, it is specifically stated that developer has to complete the construction within 24 months. It is also stated in the development agreement that owner can permit the developer to enter upon the said property for development and to carry on construction and other acts. Bare reading of clause 17 of development agreement as reproduced herein above, clearly shows that for the development work, owner permitted developer only to enter the said property. No where it is stated in the said development agreement that the owner handed over vacant and peaceful possession of said property to the developer for carrying out development activities. Therefore, the claim of the petitioners that they are in peaceful possession of the said property at present, cannot be acceptable. The owner allowed the developer only to enter into the said property for development activities. Injunction can be granted against the true owner unless and until extraordinary case is made out. The authorities cited by the petitioners are not applicable in the facts and circumstances of the present case for deciding grant of injunction. Hence, I do not find that the petitioners have made out any prima facie case for injunction against respondent about possession of the said property.

22. The next question is whether the petitioner has shown balance of convenience in their favour, in the event of refusal of injunction, would cause great inconvenience to them. In the present proceeding, as per the development agreement dated 23.6.2006 and subsequent deed of assignment dated 28.4.2010 petitioners had right to develop the said property and get their share. Considering the fact on record for last 10 years the developer has carried out only following construction activities i.e. a) demolition of the old bungalow. b) Excavation work necessary to lay foundation of the new building, c) pilling work, d) foundation work etc., it is very difficult to accept that if injunction is not granted, great inconvenience will be caused to the petitioners. Apart from that if the petitioners succeed before the Arbitral Tribunal, he may demand for specific performance of the development agreement dated 23.6.2006 and or compensation for loss and or damages incurred by them. If injunction is granted at this stage, irreparable loss and injury will be caused to respondent No.1 who is 92 years old Senior Citizen and whose property remained undeveloped for last more than 10 years. In any case, if

injunction is not granted petitioners will not suffer irreparable loss, same can be compensated by way of money.”

11. This Order (passed under Section 9 of the Act) was challenged all the way upto the Supreme Court without any success. The Supreme Court dismissed the Special Leave Petition on 16th March, 2016.

12. In the meanwhile, on 12th September, 2015, the claimant filed a petition under Section 11 of the Act seeking the constitution of an Arbitral Tribunal in terms of Clause 14 of the Development Agreement dated 23rd June, 2006. This petition was withdrawn with liberty to file a suit as recorded in this Court's order dated 25th July, 2016 read with the order dated 5th August, 2016. After withdrawal of the Section 11 Petition, the claimant filed Commercial Suit No.295 of 2016 in this Court.

13. Being aggrieved by the withdrawal of the Section 11 Petition, respondent No.1 preferred a Special Leave Petition to the Supreme Court. In this SLP, leave was granted and after noting the facts of the case, the Supreme Court, vide its order dated 30th

August, 2017, opined that they saw no justification for the demand of the claimant to seek specific performance of the agreement dated 23rd June, 2006. In these circumstances, the Supreme Court was of the opinion that permitting the continuance of the suit (Commercial Suit No.295 of 2016) for specific performance of the Development Agreement dated 23rd June, 2006 and which is more than a decade old, and that too against a person from whom the claimant had secured development rights only to the extent of 25% of the monetary benefit of the development potential as against the rights of respondent No.1 along with respondent No.2 who are correspondingly entitled to 75% of the monetary benefit, would be unjust. In other words, the claim for specific performance was knocked out by the Supreme Court vide the said order. The Supreme Court accordingly directed respondent No.1 to deposit an amount of Rs.20 crores in the Registry of the Supreme Court and which the claimant was allowed to withdraw subject to them handing over possession of the said property. It is not in dispute that this amount of Rs.20 crores has in fact been paid over to the claimant and possession of the said property has been handed over by the claimant to respondent No.1. Be that as it may, the Supreme Court also opined that in the facts and circumstances of the case,

whether the claimant would be entitled to any damages (apart from receiving the above mentioned amount of Rs.20 crores), was a matter which required some examination. They therefore deemed it appropriate to refer the said question for resolution by arbitration between respondent No.1 and the claimant and accordingly directed the parties to submit the above mentioned dispute to arbitration.

14. This order of the Supreme Court was thereafter clarified by it vide its order dated 21st September, 2017. Though in the order dated 30th August, 2017 it was recorded by the Supreme Court that the claimant would be only entitled to damages, if any, from respondent No.1, it was submitted before the Supreme Court that the question of damages would arise only if the claimant was able to establish that they are entitled for specific performance of the contract. It was in this light, that a clarification was sought by the claimant to demonstrate before the Arbitral Tribunal that there is a breach on the part of respondent No.1 of the Development Agreement and therefore the claimant would be entitled for a decree of specific performance, but for the order of the Supreme Court dated 30th August, 2017. The Supreme Court found substance in this submission and accordingly clarified that it would be open to the

claimant to plead and establish before the Arbitral Tribunal that there is a breach of the contract on the part of respondent No.1 entitling the claimant for a decree of specific performance, but only for the limited purpose of examining the further question, whether the claimant was entitled to damages, and if entitled, what would be the quantum thereof. It was further made clear that all the parties to the agreement were entitled to raise such claims and defences, as the case may be, with regard to the respective claim for damages, if any. The clarification application was therefore disposed of in the aforesaid terms.

15. Thereafter, pursuant to the aforesaid orders of the Supreme Court, the claimant filed its statement of claim and supporting documents before the Arbitral Tribunal. On the date of the preliminary meeting before the Arbitral Tribunal, the claimant also moved an application under Section 17 of the Act seeking the following reliefs:-

“(a) That this Hon'ble Tribunal may be pleased to direct the Respondents to maintain status-quo in respect of minimum 50% of the property, including Development Potential of the said share and the FSI/Built up area etc., in the subject property being the land admeasuring 2056 square meters and bearing Plot No. 16 of Pali Hill Estate in the village of Danda (Bandra) Taluka – Andheri, Bandra, Mumbai – 400 051 pending the hearing and final disposal of the present arbitral

proceedings.

(b) That this Hon'ble Tribunal may be pleased to restrain the Respondents from creating any third party rights in respect of minimum 50% of the property, including Development Potential of the said share and the FSI/Built up area etc., in favour of any other party.

(c) That this Hon'ble Tribunal be please to restrain the Respondents from acting in any manner, or giving effect to the Development Agreement dated 21/3/2016 executed by Respondent No.1 with the new Developers, in respect of minimum 50% of the property, including Development Potential of the said share and the FSI/Built up area etc.

(d) For such other and further reliefs as this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case.”

16. This application (filed under Section 17) was vehemently opposed by the respondents before the Tribunal. After hearing the parties, the Arbitral Tribunal passed the impugned order under which the Tribunal directed respondent No.1 to furnish an undertaking to the effect that he will not alienate or encumber or part with possession of the property which was the subject-matter of the arbitration to the extent of Rs.25 crores till the arbitration proceedings are concluded. It was further clarified that this undertaking shall be in respect of a specific property i.e. a certain specific portion of the developed property that falls to the share of respondent No.1 (the petitioner herein) or any other unencumbered

personal property of respondent No.1. It is in these circumstances and to challenge this impugned order that the present petition has been filed under Section 37 of the Act.

17. In this factual backdrop, Mr. Rajiv Kumar, the learned Senior Counsel appearing on behalf of the petitioner herein (respondent No.1 before the Tribunal), submitted that there was absolutely no justification in passing the impugned order. In this regard, he took me in great detail through the impugned order. Mr. Rajiv Kumar submitted that the relief that was granted was basically creating a security in favour of the claimant whose claim admittedly was only in the nature of damages. There was no admitted liability by respondent No.1. He submitted that even on the question of damages, the Tribunal had not even come to any prima facie finding that there was some merit in the aforesaid claim and that the same needed to be secured in the event the claimant was to succeed therein. He submitted that whilst passing an order of the nature that was done by the Tribunal, it was incumbent upon the Tribunal to keep in mind the underlying principles of Order XXXVIII Rule 5 of the CPC and the tests laid down therein. In the facts of the present case, Mr Rajiv Kumar submitted that nothing of the sort

was even pleaded. The only statement made by the claimant was that the said property was the only property available with respondent No.1 and if he was allowed to create any third party rights in relation thereto, any order that may ultimately be passed, would be rendered ineffective. Mr. Rajiv Kumar submitted that apart from this bald assertion nothing was brought on record by the claimant to establish these facts. He submitted that in any event, this was factually incorrect because respondent No.1 owned another property in Lonavala which was worth almost about Rs.220 crores and which was the subject matter of another dispute between this very claimant and respondent No.1 in a suit filed between them and in which an injunction order was already passed with reference to the said Lonavala property. This being the case, even factually therefore the averments made by the claimant that only the said property was available against which the claimant could execute the award, if passed in its favour, was wholly incorrect.

18. Mr. Rajiv Kumar submitted that before granting any interim relief the claimant has to satisfy the Arbitral Tribunal that (a) there is a serious question to be tried at the hearing and there is a probability that he is entitled to the relief sought by him, or in

other words, that he has a prima facie case to go to trial; (b) that the Tribunal's interference is necessary to protect a party from that species of injury which the Tribunal feels is irreparable before his legal right is established at the trial; and (c) that the comparative mischief or the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it. Mr. Rajiv Kumar submitted that if one goes through the impugned order, apart from there being no such findings of the Arbitral Tribunal, there are, in fact, findings which would go to show that the claimant had in fact not made out any prima facie case. This being the position, Mr. Rajiv Kumar submitted that there was absolutely no justification for passing the impugned order whereby respondent No.1 was directed to furnish an undertaking in the terms as mentioned in Paragraphs 8.1 & 8.2 of the impugned order. In support of his arguments, Mr. Rajiv Kumar relied upon the following decisions:-

- (a) **Nimbus Communications Limited Vs. Board of Control for Cricket in India and Anr [2012 SCC OnLine 287 : 2013 (1) MAH LJ 39];**
- (b) **Mahaguj Collieries Limited vs. Adani Enterprises Limited [Commercial Arbitration Petition No. 681/2018 decided on 25th February, 2019];**
- (c) **Wind World (India) Limited v. Enercon GmbH [2016 SCC OnLine Bom 1404].**

19. On the other hand, Mr. Chinoy, the learned Senior Counsel appearing on behalf of the claimant (respondent No.1 herein), submitted that there was no merit in the contentions canvassed by Mr. Rajiv Kumar. Mr. Chinoy submitted that respondent No.1 is totally incorrect in submitting that no prima facie case was made out by the claimant for passing the impugned order. In this regard, Mr. Chinoy brought to my attention the averments made by the claimant in its Section 17 application and more particularly Paragraph 61 thereof. Whilst relying upon the aforesaid Paragraph, Mr. Chinoy submitted that the order of injunction was all the more necessary in the present matter since the said property was the only asset through which the claimant could recover its claim for damages as also for its share in the property or in the amount invested by them in the project of redevelopment of the said property. In these circumstances, Mr. Chinoy submitted that it was all the more imperative that respondent No.1 maintained status-quo in relation to the said property. Mr. Chinoy submitted that despite this, the impugned order gives only a limited relief to the claimant inasmuch as it directs respondent No.1 to furnish an undertaking to the effect that he will not alienate or, encumber or part with possession of the

property worth Rs.25 crores. This being the case, Mr. Chinoy submitted that the impugned order can by no means be termed as perverse requiring interference.

20. Mr. Chinoy, then, submitted that it was incorrect on the part of respondent No.1 to submit that before granting an order for securing the claim, the principles of Order XXXVIII Rule 5 of the CPC have to be read into Section 17(1)(ii)(b) of the Act. He submitted that an order under Section 17(1)(ii)(b) is in the nature of an interim protection order. In a special provision like Section 17(1)(ii)(b), the exercise of power by the Arbitral Tribunal cannot be restricted by importing the provisions of Order XXXVIII Rule 5. The Legislature while enacting the said Section did not intend to read into it the provisions of Order XXXVIII Rule 5, was the submission. In support of this proposition, Mr. Chinoy relied upon a decision of a Division Bench of this Court in the case of **National Shipping Company of Saudi Arabia v Sentrans Industries Ltd. [2004 (2) Bom CR 1]**. He submitted that in the facts of the present case, it was incumbent that the claim be secured considering that the suit property was the only source that would be available to the claimant to execute the award, if passed in its favour. He submitted

that on similar facts another learned Single Judge of this Court in the case of **Baker Hughes Singapore Pte v. Shiv-Vani Oil and Gas Exploration Services Ltd [2014 SCC OnLine Bom 1663 : (2015) 1 Bom CR 377]** passed an order under Section 9(ii)(b) [prior to its amendment in 2015] of the Act and which is identical to Section 17(1)(ii)(b). In the facts of that case also the pleading was that considering the financial condition of the respondent, it ought to be directed to provide security and/or deposit the amount claimed by the petitioner. This relief was granted by the learned Single Judge. A similar relief was granted by the Tribunal in the present case, and therefore, there was nothing wrong in the impugned order that required interference under Section 37 of the Act, was the submission.

21. As far as prima facie case is concerned, Mr. Chinoy brought to my attention the findings of the Arbitral Tribunal in Paragraph 7.2 wherein the Arbitral Tribunal has recorded that keeping in mind the spirit of the order of the Supreme Court dated 30th August, 2017 and the approach in relation to damages, the test of prima facie case can be said to have been satisfied, without going into further details. To substantiate this finding, Mr. Chinoy placed

heavy reliance on the order of the Supreme Court dated 30th August, 2017 and more particularly Paragraph 22 thereof which inter alia states that considering the background of the facts and circumstances of the case, whether the claimant would be entitled for any damages (apart from receiving an amount of Rs.20 crores) from respondent No.1 is a matter which requires some examination. Mr. Chinoy submitted that it was in these circumstances that the Supreme Court deemed it appropriate to refer the said question (regarding the claim for damages only) for resolution by arbitration between the claimant and the respondents. When one reads the findings of the Arbitral Tribunal with the order of the Supreme Court dated 30th August, 2017 it is clear that a prima facie case was made out and the Tribunal was fully justified in granting the reliefs it did. In any event, Mr. Chinoy submitted that when the findings of the Arbitral Tribunal are read along with the order of the Supreme Court dated 30th August, 2017, it certainly cannot be canvassed that the findings given are in any way perverse requiring interference under Section 37 of the Act. For all the aforesaid reasons, Mr. Chinoy submitted that there is no merit in this arbitration petition and the same ought to be dismissed.

22. I have heard the learned senior counsel for the parties at length and perused the papers and proceedings in the arbitration petition. I have also carefully gone through the impugned order and the findings rendered therein. Regarding whether the principles of Order XXXVIII Rule 5 of the CPC and the tests laid down therein apply to the Arbitral Tribunal while granting relief under Section 17(1)(ii)(b) is no longer *res integra*. A Division Bench of this Court in the case of **Nimbus Communications (supra)** has clearly held that the principles laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Act. The underlying principles of Order XXXVIII Rule 5 of the CPC therefore have to be borne in mind while deciding an application under Section 9(ii)(b), is the finding given by the Division Bench. This finding is arrived at by the Division Bench after considering two Supreme Court judgments in the case of **Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corpn. [(2007) 6 SCC 798]** and in the case of **Adhunik Steels Limited v. Orissa Manganese and Minerals (P) Ltd. [(2007) 7 SCC 125]**. The Division Bench in the case of **Nimbus Communications (supra)** also considered another Division Bench judgment of this Court in the case of **National**

Shipping Company (supra) and thereafter gave its findings as mentioned above. Paragraphs 16 to 24 of the judgement passed in **Nimbus Communications (supra)** has discussed the law on the subject in great detail and it would be apposite to reproduce the said paragraphs which read thus:-

“16. Section 9 of the Arbitration and Conciliation Act, 1996 enables a party to apply to the Court either before or during the arbitral proceedings or at any time after the making of an award but before it is enforced in accordance with Section 36. Clause (ii) enables a party to seek an interim measure of protection in respect of the following matters:

- “(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;*
- (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*
- (d) interim injunction or the appointment of a receiver;*
- (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”*

17. The provision enunciates that the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. Now it is in this background, that it would be necessary to consider the basic issue raised. The submission of the first respondent is that

when a Court passes an order providing for an interim measure of protection for securing the amount in dispute in arbitration, the power can be exercised only subject to the restrictions which are spelt out in Order 38, Rule 5 of the Code of Civil Procedure, 1908. Order 38, Rule 5 applies in a situation where at any stage of a suit, the Court is satisfied that the defendant (i) is about to dispose of the whole or part of his property or (ii) is about to remove the whole or part of his property from the local limits of the jurisdiction of the Court with intent to obstruct or delay the execution of any decree that may be passed against him. In such an event the Court may direct the defendant either to furnish security in such sum as may be specified in the order, to produce the property and place it at the disposal of the Court when required or the value of the same or such portion as may be sufficient to satisfy the decree. The exercise of the power under Rule 5 of Order 38 is thus conditioned by two requirements, the first being in regard to the conduct of the defendant, in that he is about to alienate his property or to remove it from the jurisdiction of the Court and the second, the intention of the defendant to obstruct or delay the execution of a decree that may be passed against him. Parliament in the provisions of Section 9(ii)(b) contemplated an interim measure of protection to secure the amount in dispute in the arbitration. The object underlying the conferment of the power upon the Court is to ensure that the fruits of an arbitral award which may eventually be passed against the defendant to the claim are not lost to the claimant by a dissipation of the property in the meantime. The issue as to whether the power which has been conferred on the Court under Section 9 is hedged in by the specific provisions of the Code of Civil Procedure, 1908 came up before a Division Bench of this Court initially in National Shipping Company of Saudi Arabia v. Sentrans Industries Limited, 2004 (2) Mh.L.J. 696 : 2004 (2) Bom.C.R. 1. The issue before the Court was whether the power exercisable by the Court under Section 9(ii)(b) of passing an interim measure for securing the amount in dispute in the arbitration was restricted by the conditions of attachment before judgment as prescribed under Order 38, Rule 5. Mr. Justice R.M. Lodha (as the Learned Judge then was) speaking for the Division Bench held that as a principle of law a special provision of the nature embodied

in Section 9(ii)(b) cannot be restricted by importing the provisions of Order 38, Rule 5. The Division Bench held that though the power under Section 9(ii)(b) has not been made subject to the stringent provisions of Order 38, Rule 5, the exercise of the power is guided by the paramount consideration that the claimant who obtains an award in his favour before the arbitrator ultimately is able to derive the fruits of the adjudication in executing the award. The Division Bench held as follows:

“The order under Section 9(ii)(b) is in the nature of interim protection order. In a special provision of the nature like Section 9(ii)(b), we are afraid, exercise of power cannot be restricted by importing the provisions of Order 38, Rule 5 of the Code of Civil Procedure as it is. The legislature while enacting Section 9(ii)(b) does not seem to us to have intended to read into it the provisions of Order 38, Rule 5 of the Code of Civil Procedure as it is.

The provisions of Order 38, Rule 5, Civil Procedure Code cannot be read into the said provision as it is nor can power of the Court in passing an order of interim measure under Section 9(ii)(b) be made subject to the stringent provision of Order 38, Rule 5. The power of the Court in passing the protection order to secure the amount in dispute in the arbitration before or during arbitral proceedings or at any time of making of the arbitral award but before it is enforced cannot be restricted by importing the provisions set out in Order 38 of Civil Procedure Code but has to be exercised *ex debito justitiae* and in the interest of justice. The Court while considering the application for interim protection under Section 9(ii)(b) is guided by equitable consideration and each case has to be considered in the light of its facts and circumstances. The interim protection order contemplated under Section 9(ii)(b) is granted by the Court to protect the interest of the party seeking such order until the rights are finally adjudicated by the Arbitral Tribunal and to ensure that the Award passed by Arbitral Tribunal is capable of enforcement. Though the power given to the Court under Section 9(ii)(b) is very wide and is not in any way controlled by the provisions of the Code but such exercise of power, obviously, has to be

guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the arbitrator is in a position to get the fruits of such adjudication and in executing the Award. While dealing with the application for direction to the other party to deposit the security of the amount in dispute in the arbitration, the Court also has to keep in mind the drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that denial of such order would result in grave injustice to the party seeking such protection order inasmuch as in the absence of such order, the applicant party succeeding before the Arbitral Tribunal may not be able to execute the Award. The obstructive conduct of the opposite party may be one of the relevant considerations for the Court to consider the application under Section 9(ii)(b). The party seeking protection order under Section 9(ii)(b) ordinarily must place some material before the Court, besides the merits of the claim that order under Section 9(ii)(b) is eminently needed to be passed as there is likelihood or an attempt to defeat the Award, though as indicated above, the provisions of Order 38, Rule 5, Civil Procedure Code are not required to be satisfied. The statutory discretion given to the Court under Section 9(ii)(b) must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. In our view, this is the proper approach for consideration of the application for interim relief under Section 9(ii)(b) and we hold that the provisions of Order 38, Rule 5 of the Code of Civil Procedure cannot be read as it is and imported in Section 9 of the Act of 1996. We also hold without hesitation that the Court is competent to pass an appropriate protection order of interim measure as provided under Section 9(ii)(b) outside the provisions of Order 38, Rule 5 Code of Civil Procedure. Each case under Section 9(ii)(b) of the Act of 1996 has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience.”

18. In a subsequent decision of the Supreme Court in Arvind

Constructions Co. (P) Ltd.v.Kalinga Mining Corporation, 2008 (1) Mh.L.J. (S.C.) 7 : (2007) 6 SCC 798 the Supreme Court held that the power under Section 9 cannot be read as independent of the Specific Relief Act and it could not be contended that the restrictions placed by the Specific Relief Act cannot control the exercise of the power under Section 9. The Court observed that while entertaining an application under Section 9, the Court must have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. Consequently the general rules that govern the Court while considering the grant of an interim injunction at the threshold would be attracted even while dealing with an application under Section 9. The Court also noted the principle that when a power is conferred under a special statute and is conferred on an ordinary Court of the land, without laying down any special condition for the exercise of that power, the general rules of procedure would apply. The Supreme Court adverted to the position which was inter alia taken by the Division Bench of this Court that the power under Section 9 is not controlled by Order 38, Rule 5 of the Code of Civil Procedure 1908, but left it open to be determined in an appropriate case.

19. In the decision of the Supreme Court in Adhunik Steels (supra) the respondent had obtained a mining lease from the State Government of Orissa and had an agreement with the appellant for raising manganese ore on its behalf. The term of the agreement was ten years with an option to renew. The respondent issued a notice of termination calling upon the appellant to remove itself from the site contending that its contract was in violation of the Mineral Concession Rules, 1960. The appellant thereupon moved the District Court under Section 9 for an injunction restraining the respondent from terminating the contract and from dispossessing it at site. The District Court allowed the application under Section 9. The High Court in appeal upheld the contention of the respondent that the loss if any that may be sustained by the appellant could be calculated in monetary terms and that in view of Section 14(3)(c) of the Specific Relief Act, an injunction could not be granted. In that view of the matter, the High Court did not consider it fit to enquire into the issue of the balance of convenience. Before the Supreme Court it was

urged on behalf of the appellant that Section 9 was independent of Order 39 of the Code of Civil Procedure 1908 and the exercise of the power was not subject to the provisions contained in the Specific Relief Act. The Supreme Court dealt with the submission in the following terms:

“The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of ‘just and convenient’ while speaking of passing any interim measure of protection. The concluding words of the Section, “and the Court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it” also suggest that the normal rules that govern the Court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary Court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that Court would govern the exercise of power conferred by the Act.”

20. The Supreme Court noted that the power to grant injunction by way of specific relief is covered by the Specific Relief Act, 1963, injunction being a form of specific relief. Section 9, the Supreme Court noted does not contain any special condition nor does it provide for a special procedure. The Court noted that whether an interim measure should be ordered permitting the appellant to carry on mining operations in the face of an attempted termination of the contract would lead the Court to a consideration of the classical rules for the grant of such an interim measure. This, it was held, had to be considered based on the well settled principles in that behalf. Consequently the Supreme Court held as follows:

“Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles

governing the grant of an interim injunction that generally govern the Courts in this connection.”

21. The Supreme Court directed that while the respondent should not enter into a contract for mining and lifting of minerals with any other entity until conclusion of the arbitral proceedings, there was no justification in preventing it from carrying on the mining operations by itself.

22. The judgment of the Supreme Court in Adhunik Steels has noted the earlier decision in Arvind Constructions which holds that since Section 9 is a power which is conferred under a special statute, but which is exercisable by an ordinary Court without laying down a special condition for the exercise of the power or a special procedure, the general rules of procedure of the Court would apply. Consequently, where an injunction is sought under Section 9 the power of the Court to grant that injunction cannot be exercised independent of the principles which have been laid down to govern the grant of interim injunctions particularly in the context of the Specific Relief Act, 1963. The Court, consequently would be obligated to consider as to whether there exists a prima facie case, the balance of convenience and irreparable injury in deciding whether it would be just and convenient to grant an order of injunction. Section 9, specifically provides in sub-clause (d) of clause (ii) for the grant of an interim injunction or the appointment of a receiver. As regards sub-clause (b) of clause (ii) the interim measure of protection is to secure the amount in dispute in the arbitration. The underlying object of Order 38, Rule 5 is to confer upon the Court an enabling power to require a defendant to provide security of an extent and value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should be furnished is, however, preconditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be passed against him. In view of the decisions of the Supreme Court both in Arvind Constructions and Adhunik Steels, it would not be possible to subscribe to the position that the power to grant an interim

measure of protection under Section 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure 1908 or that the exercise of that power is untrammelled by the Code. The basic principle which emerges from both the judgments of the Supreme Court is that though the Arbitration and Conciliation Act, 1996 is a special statute, Section 9 does not either attach a special condition for the exercise of the power nor does it embody a special form of procedure for the exercise of the power by the Court. The second aspect of the provision which has been noted by the Supreme Court is the concluding part of Section 9 under which it has been specified that the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. This has been interpreted in both the judgments to mean that the normal rules that govern the Court in the grant of an interlocutory order are not jettisoned by the provision. The judgment of the Division Bench of this Court in National Shipping Company (supra) notes that though the power by Section 9(ii)(b) is wide, it has to be governed by the paramount consideration that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award. The Division Bench noted that the power being of a drastic nature, a direction to secure the amount claimed in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought was regarded as being a material consideration. However, the view of the Division Bench of this Court that the exercise of power under Section 9(ii)(b) is not controlled by the provisions of the Code of Civil Procedure 1908 cannot stand in view of the decision of the Supreme Court in Adhunik Steels.

23. In a recent judgment of a learned Single Judge of the Delhi High Court in Steel Authority of India Ltd. v. AMCIPTY Ltd., O.M.P. 417/2011 decided on 1 September, 2011, the judgment of the Division Bench of this Court in National Shipping Company was relied upon. The Delhi High Court observed that the provisions of Order 38, Rule 5 would serve as a guiding principle for the exercise of the jurisdiction

while dealing with a petition under Section 9 requiring the respondent to furnish security and the basic consideration is that the Court should be satisfied that the furnishing of security is essential to safeguard the interest of the petitioner.

24. A close reading of the judgment of the Supreme Court in Adhunik Steels would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under Section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38, Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b).”

(emphasis supplied)

23. The decision of the Division Bench in the case of **Nimbus**

Communications (supra) was followed by me in the case of **Mahaguj Collieries Ltd (supra)**, wherein I have held that after Amendment of Section 17, the principles laid down in the decision of the Division Bench in the case of **Nimbus Communications (supra)** would equally apply to the Arbitral Tribunal, whilst exercising powers under Section 17 and more particularly Section 17(1)(ii)(b) of the Act.

24. Applying these principles to the facts of the present case, I find that there was no justification for granting the interim reliefs of the nature that was done by the Arbitral Tribunal. The only averments in the section 17 application with reference to this can be found in Paragraphs 61 and 62 which read thus:

“61. It is further submitted that the order of injunction is all the more necessary in the present matter since the subject property is the only asset through which the Claimant can recover its damages for its share in the property and/or the amount invested by them in the said project of redevelopment, in the event this Hon'ble Tribunal is pleased to eventually pass an Award in the Claimant's favour. Therefore, it is all the more imperative for the purpose of maintaining status-quo on the property that an injunction against the respondents be issued pending the hearing and disposal of the arbitration proceedings in order to safeguard the interests of all the parties to the Arbitration.

62. More so, the balance of convenience as well as the interest of justice demand that the respondents maintain status-quo on the property till the claims of all the Parties are adjudicated by this Hon'ble Tribunal in order to avoid

inconvenience to the Parties.”

25. As can be seen from the aforesaid paragraphs, all that is stated is that the injunction is necessary because the said property is the only asset through which the claimant can recover its damages in the event the same is awarded in its favour. Apart from making this bald assertion nothing else is stated. As mentioned earlier, this too appears to be incorrect as there is another property that belongs to respondent No.1 in Lonavala which is almost worth Rs.220 crores and which is the subject-matter of another dispute between this claimant and respondent No.1 and which is also a subject-matter of a suit filed inter-se between them. In that suit, an injunction order is already passed with reference to the said Lonavala property. This being the factual situation, I find that the principles for granting reliefs by way of an injunction to secure the claim preferred by the claimant before the Tribunal have clearly not been satisfied. Before such a drastic order can be passed, the Tribunal has to be satisfied that there is material on record to pass such a drastic order. The Tribunal ought to come to a prima facie conclusion that there is a serious apprehension that in that event an award is passed in favour of the claimant, there would be no property available against which it could execute the said award and

therefore at the interim stage, the claimant was required to be secured. The underlying principles for granting such a relief is not for the purpose of converting an unsecured debt into a secured one. I must mention that in the facts of the present case it is not even a debt at all. It is purely a claim for damages and which becomes a debt only on an award/decreed being passed. In these circumstances, on the basis of the averments made in the Section 17 application, I do not think that the Tribunal was justified in directing respondent No.1 to give an undertaking not to alienate or encumber or part with possession of the property which was the subject-matter of the arbitration to the extent of Rs.25 crores till the arbitration proceedings are concluded. The relief granted is in the nature of security especially considering that the relief of specific performance in relation to the said property was itself knocked out by the Supreme Court vide its order dated 30th August, 2017.

26. Having said this, I shall now independently examine if the claimant had made out a prima facie case for grant of interim reliefs. It is now well settled that before the Arbitral Tribunal grants any interim relief, at least in relation to granting any injunction or securing the claim in the arbitration or for appointing a receiver, the

Tribunal has to be satisfied that a prima facie case has been made out for grant of interim relief. The Tribunal, for the purposes of examining whether a prima facie case has been made out, has to examine whether there is a serious question to be tried at the hearing and there is a probability that the party seeking the interim relief is entitled to it; that the Tribunal's interference is necessary to protect the party from that species of injuries which the Tribunal feels are irreparable before its legal rights are established at the trial; and see that the comparative mischief or inconvenience which is likely to arise from withholding the grant of interim relief will be greater than which is likely to arise from granting it.

27. What I have to examine is whether the Tribunal applied these salutary principles whilst directing respondent No.1 to give an undertaking that he shall not alienate or encumber or part with possession of a property worth Rs.25 crores till the arbitration proceedings are concluded. To examine this question, I have gone through the impugned order in great detail. Paragraphs 1 to 4 basically set out the facts of the case. Paragraph 5 sets out the averments and contentions in the Section 17 application filed by the claimant. Paragraph 6 sets out the stand and the opposition of the

respondents. Paragraph 7 onwards is where the Tribunal examines whether a prima facie case on merits exists. In Paragraph 7.1 of the impugned order, the Tribunal holds that in regard to prima facie case, it was not inclined to delve into this aspect in detail. The reasoning given for this is that the Supreme Court observed that the claimant may have a case insofar as damages are concerned and it needs to be decided by the Tribunal. Brushing aside this observation, the Tribunal was not inclined to refer to the merits of the case and express a particular view, especially having regard to the fact that the case had already reached the stage of enquiry/hearing. The Tribunal thereafter in the very same paragraph goes on to hold that the claimant had only laid stress on passing an order directing that appropriate security be furnished to the extent of 25% share of the claimant in respect of the said property. The Tribunal held that the question of placing any restraint order on dealing with said property and which has already been handed over to respondent No.1 pursuant to the order of the Supreme Court dated 30th August, 2017 does not arise at this stage. The Arbitral Tribunal therefore holds that the arbitration is necessarily confined to damages and thus a restraint by way of an interim injunction does not at all arise at this juncture. However, despite giving this finding, in Paragraph 7.2, the

Arbitral Tribunal inter alia holds that looking at the spirit behind the order of the Supreme Court dated 30th August, 2017 read with its clarificatory order dated 21st September, 2017 and the approach of the Supreme Court, the test of prima facie case can be said to have been satisfied without going into any further details. I fail to understand how the Tribunal has come to this conclusion when in the earlier paragraph itself the Tribunal holds that the restraint by way of an interim injunction does not arise at that juncture.

28. Be that as it may, in Paragraph 7.3, the Arbitral Tribunal then decides the question of justification for grant of interim relief under Section 17 having due regard to the balance of convenience. The Tribunal holds that directing the 1st respondent to furnish security for the amount of damages that may or may not be awarded, would be wholly inappropriate. The Tribunal specifically holds that there are no extraordinary grounds to direct security to be furnished for the amount claimed in damages. Despite holding this, the Tribunal however takes a view that the ends of justice would be met by restraining alienation of the property of the 1st respondent worth a certain value, pending arbitration. Keeping in mind this finding, the Tribunal directs respondent No.1 to give an

undertaking as more particularly set out in Paragraphs 8.1 and 8.2 of the impugned order. For the sake of convenience, Paragraphs 7.1, 7.2 and 7.3 of the impugned order are reproduced hereunder:

“7.1 The first point to be addressed is of course whether prima facie case on merits exists. To say that there is no prima facie for the applicant, the Respondents' counsel places reliance on the views expressed by the Bombay High Court while disposing of Section 9 petition filed by the applicant herein. It is pointed out by the learned counsel for the Respondents that the Arbitrator cannot ignore these findings and pass orders at variance with them. Apart from that, both sides have briefly referred to the strength or weakness of the claim put forward by the applicant and the contentious issues involved. In regard to the prima facie case, I am not inclined to delve into this aspect in detail. The reason is that the Hon'ble Supreme Court observed that the claimant herein may have a case insofar as the damages are concerned and it needs to be decided by the Arbitrator. Brushing aside this observation, I am not inclined to refer to the merits of the case and express a particular view especially having regard to the fact that the case has already reached the stage of enquiry/hearing. Secondly, the views expressed or the prima facie findings recorded by the Bombay High Court was in a different context and before the Judgment of Supreme Court of India. In Section 9 petition filed by the claimant before the Bombay High Court, the claimant sought the relief of injunction restraining the 1st Respondent or his agents/assignees from dispossessing the petitioner (claimant herein) from the property. The Hon'ble Court held that in Arbitration Petition No. 829 of 2015 that the petitioner has not made out any prima facie case for the grant of injunction. True, in the present application under Section 17 also, the claimant sought for a direction to the Respondents to maintain status-quo in respect of 50% of the property including development potential and to restrain the Respondents from creating third party rights or giving effect to the Development Agreement dated 21.3.2016 executed by the 1st respondent with the new Developers. However, as already stated, the learned counsel for the claimant has only laid stress on passing an order directing that

appropriate security to be furnished at-least to the extent of 25% share of the claimant in respect of the property. The creation of charge/lien for appropriate sum including deposit of certain amount in the bank as security has been sought for. In fact, the question of placing any restraint order on dealing with the property which has been already handed over to the 1st Respondent pursuant to the order of Hon'ble Supreme Court does not arise at this stage. The arbitration is necessarily confined to damages and entitlement of the amounts said to have been paid to the 1st respondent from time to time and the costs incurred. Thus, the restraint by way of interim injunction does not at all arise at this juncture.

7.2 While deciding this application, it is necessary to bear in mind the scenario that emerges from the decision of the Supreme Court. The Supreme Court while foreclosing the claimant's right and remedy to proceed with the suit for specific performance and allowing the 1st Respondent to get back possession of the property, considered it just and proper to allow the claimant to pursue the claim for damages through the process of arbitration. Apparently, the power under Art. 142 of the Constitution has been exercised by the Hon'ble Supreme Court and a leeway was shown to the claimant to seek the relief by way of damages. For this purpose, to avoid tortuous process of litigation, arbitration was considered to be the proper remedy. It is in this background the whole question of prima facie case or the need to direct appropriate interim measure for safeguarding the interest of claimant in the event of award of damages by this Tribunal shall be appreciated. The spirit behind the Order of the Supreme Court, the approach of the Supreme Court has to be necessarily kept in view by this Arbitral Tribunal. If so viewed, the test of prima facie case in the context of relief sought for the award of damages and other monetary relief can be said to have been satisfied, without going further into details.

7.3 Coming now to the question of justification for interim relief under Section 17 having due regard to the balance of convenience, a balanced view is called for. Directing the 1st Respondent to furnish security for the amount of damages that may or may not be awarded would be wholly inappropriate. It is not a claim for an ascertained sum except insofar as the specific amounts allegedly

paid to the 1st respondent and the alleged costs incurred in connection with the development. There are no extraordinary grounds to direct security to be furnished for the amount claimed as damages. However, this Arbitral Tribunal is of the view that the ends of justice would be met by restraining the alienation of the property of the 1st Respondent worth certain value, pending the arbitration. The fact remains that the 1st Respondent is at an advanced age of 95 years, facing severe health problems. In reply to the claimant's averment that the subject-property is the only property of the 1st respondent from which he can possibly realize the awarded amount, it is merely stated in the affidavit of the 1st respondent that he is a man of substance and has sufficient assets to satisfy the award if any, passed against him. No other details are furnished. These aspects shall be kept in view while addressing the issue of safeguarding the interests of claimant by an appropriate interim order. At the same time, by placing a limited restraint on alienation of property, no serious prejudice or undue hardship is caused to the 1st respondent.”

(emphasis supplied)

29. On carefully going through the findings and conclusions given by the Arbitral Tribunal I find that the Arbitral Tribunal was of the opinion that it was justified to grant interim reliefs to the claimant as the test of prima facie case was satisfied by virtue of the orders passed by the Supreme Court dated 30th August, 2017 read with the clarificatory order dated 21st September, 2017 respectively. I have carefully gone through both the aforesaid orders of the Supreme Court. The order dated 30th August, 2017 sets out the facts of the case from Paragraphs 1 to 16 thereof. After noting the facts, in Paragraph 17, the Supreme Court sets out the

undisputed facts that emerge in the case. In fact, it clearly states that as on that date, no construction worth mentioning is carried out, let alone the completion of the said construction. It is in the background of the aforesaid facts and having regard to the totality of the circumstances of the case, the Supreme Court, in Paragraphs 20 to 22 thereof, directs as under:-

“20. Having regard to the totality of the circumstances, we are of the opinion that the ends of justice would be met in this case by directing as follows :- The appellant shall deposit an amount of Rs.20 crores by demand draft to the Registry of this Court within a period of four weeks from today and intimate the same to PRAJITA. Upon the receipt of such intimation, PRAJITA shall withdraw all the security personnel deployed by it and hand over possession of the property in question within a period of seven days from the date of the receipt of the above-mentioned intimation to the appellant in the presence of the Commissioner of Police, Mumbai or any other senior police officer subordinate to the Commissioner of Police, Mumbai to be nominated by the Commissioner of Police.

The Commissioner of Police or his nominee shall draw a Panchnama of the fact of the handing over of the property by PRAJITA to the appellant and file the same in the Registry of this Court within a week from the date of the handing over of the possession.

Upon the filing of the Panchnama with the Registry of this Court, PRAJITA shall be at liberty to withdraw the amount of Rs.20 crores deposited by the appellant pursuant to this order.

21. We do not also see any justification for the demand of the PRAJITA for the specific performance of the agreement dated 23.6.2006. In the circumstances of the case, we are of the opinion that permitting the continuance of the suit for specific performance of the AGREEMENT which is more than a decade old against

a person from whom PRAJITA secured the development rights of the property in dispute which ultimately would enable PRAJITA to 25 per cent of the monetary value of the development potential as against the right of the appellant who is entitled for 75 per cent of the monetary value of the development potential would be unjust.

22. The background of the facts and circumstances of the case, whether PRAJITA would be entitled for any damages apart from receiving the above-mentioned amount of Rs.20 crores from the appellant is a matter which requires some examination. We therefore deem it appropriate to refer the said question for resolution by arbitration between the appellant and PRAJITA. We, therefore, direct that the parties shall submit the above-mentioned dispute for arbitration by Hon'ble Shri Justice P. Venkatarama Reddy, former Judge of this Court in accordance with law. Registry is directed to communicate this order to Hon'ble Shri Justice P. Venkatarama Reddy."

(emphasis supplied)

30. I must mention that the appellant referred to by the Supreme Court is respondent No.1 before the Tribunal and "PRAJITA" is the claimant. On reading the aforesaid paragraphs, I fail to understand how the Tribunal has come to a finding that by reading this order, the test of a prima facie case has been made out by the claimant. In fact, in Paragraph 21, the Supreme Court clearly opines that it sees no justification for demand of the claimant for specific performance of the agreement dated 23rd June, 2006 and therefore knocks out the claimant from seeking the said relief in

its suit, namely, Commercial Suit No. 295 of 2016. Thereafter, in Paragraph 22 all that the Supreme Court does is that it keeps the claim of the claimant for damages open and to be resolved through arbitration. Reading this order even with the clarification given on 21st September, 2017, the Supreme Court does not in any way opine one way or the other on the merits of the claim for damages made by the claimant. In fact, the clarificatory order dated 21st September, 2017 makes this abundantly clear. Paragraphs 2 to 5 of this clarificatory order read thus:-

“2. Pursuant to the order dated 30.8.2017, the appellant has deposited a sum of Rs.20 crores. It is also evident from the report of the Assistant Commissioner of Police, Bandra Division, Mumbai, that possession of the property has been handed over to the appellant. Therefore, the first respondent (PRAJITA) is permitted to withdraw the said amount of Rs.20 crores deposited in the Registry of this Court.

3. This Court in the above mentioned order opined that granting of specific performance of the agreement between the parties would be unjust having regard to the facts and circumstances of the case and directed the parties to approach the Arbitrator appointed by this Court for the adjudication of the question whether the Prajita Developers are entitled for damages, if any, from the appellant. Shri Salman Khursheed, learned Senior Counsel submitted that the order dated 30.8.2017 requires a clarification. He submitted that the question of damages can arise only if the Prajita Developers is able to establish that they are entitled for the specific performance of the contract. The question whether any part claiming specific performance of a contract is entitled for the decree of specific performance or only entitled for the relief of a decree of damages is in the realm of the

nature of the relief that could be granted by the Court/Arbitrator. Therefore, he seeks a clarification that Prajita Developers is entitled to demonstrate before the Arbitrator that there is breach on the part of the appellant of the agreement between the parties and therefore Prajita Developers would be entitled for a decree of specific performance but for the orders of this Court dt. 30.8.2017.

4. We see some substance in the submission. We accordingly clarify that it would be open to Prajita Developers to plead and establish before the Arbitrator that there is a breach of contract on the part of the appellant entitling Prajita Developers for a decree of specific performance only for the limited purpose of examining the further question whether Prajita Developers is entitled to damages and if entitled what would be the quantum of damages.

5. We also make it clear that all the parties to the agreement are entitled to raise such claims and defences as the case may be with regard to the respective claims of damages (if any)."

(emphasis supplied)

31. When one goes through this clarificatory order, it clearly demonstrates that the issue of damages was left open to be decided by the arbitrator and the Supreme Court had taken no view on the same, prima facie or otherwise. All that the Supreme Court did was to keep the claim for damages alive to be agitated before the Arbitral Tribunal and which it constituted pursuant to its order dated 30th August, 2017. This being the position, I find that the Arbitral Tribunal completely misconstrued the orders of the Supreme Court to hold that the test of prima facie case had been satisfied. This is

clearly not the case. The Supreme Court did not opine one way or the other on the merits of the claim for damages and therefore, before granting any interim relief, and that too for securing the claim for damages, the Tribunal at least prima facie, ought to have examined whether there is any merit in the claim. It is only once this exercise was undertaken, could the Tribunal have granted any interim relief to the claimant as can be seen from the findings of the Arbitral Tribunal. This exercise was admittedly not undertaken. In fact, the Tribunal categorically holds that it does not refer to the merits of the matter insofar as the claim for damages are concerned. This being the case, there was absolutely no justification by the Tribunal to grant interim reliefs in the nature that it has done and that too for the purpose of securing a part of the claim for unliquidated damages. This, according to me, was wholly impermissible in law without first giving a finding whether such a claim had merit or otherwise, albeit prima facie.

32. This now only leaves me to deal with the decision of this Court in the case of **Baker Hughes Singapore Pte (supra)** and which was heavily relied upon by Mr. Chinoy. The facts in this case, would reveal that the respondent had entered into several contracts

with ONGC for charter hire of several land rigs with integrated services. During the period between June, 2009 and April, 2010 the petitioner and the respondent entered into five contracts for supplying materials, equipments, products and personnel in relation to “Mud Services Contracts” for a period of three years. As per the terms of the contract, the respondent agreed to pay to the petitioner (for the Mud Services Contracts) on a day-rate basis. Around June, 2012 onwards the petitioner sent reminders to the respondent and placed on record of the respondent that it had to pay to the petitioners USD 2495809.75 towards Mud Services Contract alone. These invoices that were sent, were never returned, disputed or challenged on any ground by the respondent. The respondent even failed to pay invoices on opening a letter of credit. It is in this light and considering the facts of the case that a learned Single Judge of this Court thought it appropriate to direct the respondent therein to furnish security. This Court has categorically recorded in Paragraphs 61 and 62 that the respondent was not able to make payment of the undisputed invoices and kept asking for indulgence. In spite of a payment schedule suggested by the respondent, the respondent could not make payment even according to such schedule. Further, the record also clearly indicated that several

winding up proceedings were filed against the respondent in which conditional orders were passed. Even the UK High Court had passed a summary judgment against the respondent for USD 84100000.33. The Supreme Court of Mauritius had also frozen the assets of the respondent in the month of April, 2014 for securing FCC bonds worth USD 84 million. Further, the respondent had also informed the Bombay Stock Exchange that their CDR proposal had been approved and outlined the reason for the same that they were undergoing a financial crunch. It is in these peculiar facts, and after coming to a prima facie finding that the petitioner had a good chance of succeeding in the arbitration proceedings, that the learned Judge directed the respondent to furnish a bank guarantee of a Nationalized Bank in favour of the Prothonotary and Senior Master of this Court in the sum of USD 20,00,000. Paragraphs 61 to 64 of this decision read thus :

“61. The next question arises is whether the petitioner had made out a case for grant of interim measures as prayed in prayers (a) and (b) of the petition or not?

A perusal of the correspondence clearly indicates that the respondent was not able to make the payment of the undisputed invoices to the petitioner and was asking for indulgence. In spite of the payment schedule suggested by the respondent, the respondent could not make payment even according to such payment schedule. A perusal of the record also clearly indicates that several winding up proceedings are filed against the respondent in which conditional orders

are passed. The UK High Court has passed a summary judgment against the respondent on 29th January 2014 for USD 84100000.33. Supreme court of Mauritius has already frozen the assets of the respondent in the month of April 2014 for securing FCC bond worth USD 84 million. The respondent has already informed the Bombay Stock Exchange that their CDR proposal had been approved and outline the reasons for their financial crunch.

62. The respondent themselves have admitted in their affidavit dated 21st April 2014 and disclosing that all the assets of the respondent company are already encumbered with the banks and there are no assets which are unencumbered. It is stated in the affidavit that there are no deposits with the bank and the loan is taken from around 26 banks whose names are disclosed in paragraph 2 of the said affidavit. There is no investment made in floating securities except in assets that are plant and equipments and the figures of all the assets mentioned in the balance sheets are owned by the respondent. It is thus clear beyond reasonable doubt that if the petitioner succeeds in the arbitration proceedings against the respondent, petitioner would not be able to recover any amount from the respondent. In my prima facie view, the petitioner has good chances of succeeding in the arbitration proceedings. The respondent are obstructing the legitimate claims of the petitioner, in my prima facie view. In my view if the respondent in this situation is not directed to provide security by way of furnishing a bank guarantee of a nationalised bank in favour of the petitioner so as to secure the claim of the petitioner, petitioner would not be able to obtain the fruits of the arbitration while executing the award.

63. The learned counsel appearing for parties have informed that the oral evidence of the petitioner is over. The oral evidence of the respondent would commence shortly. In my view that may not be a ground not to consider any relief by this court in the facts and circumstances of this case.

64. In my view interest of justice would be met with if the respondent is directed to furnish a bank guarantee of a nationalized bank in favour of the Prothonotary and Senior Master of this Court in the sum of USD20,00,000 initially for a period of two years and shall be kept alive till the arbitral

award is rendered and for a period of three months from the date of the award.”

(emphasis supplied)

33. On going through this judgment in detail, I fail to see how this judgment can apply to the facts of the present case. This judgment is clearly distinguishable on facts. Firstly, in the case of **Baker Hughes**, the amount that was sought to be secured was under undisputed invoices and which were never challenged or disputed by the respondent. Coupled with this was the fact that the respondent was under serious financial strife. Several winding up proceedings were filed against the respondent in which conditional orders were passed. It had also suffered a summary judgment passed by UK High Court and the Supreme Court of Mauritius had also frozen the assets of the respondent. It is in these facts, and after holding that the petitioner prima facie had a good case to succeed in the arbitration, that the learned Single Judge thought it fit to direct the respondent to furnish a security to secure the claim made in the arbitration. The factual situation before me is quite the opposite. In the facts of the present case, what is sought to be secured, is purely a claim in unliquidated damages. This claim for damages is seriously disputed and opposed by the respondents before the Tribunal. There is no admission of any amount as was the case in

Baker Hughes. I therefore think that the reliance placed by Mr. Chinoy on the decision of this Court in the case of **Baker Hughes (supra)** is of no assistance.

34. I must mention that the very learned Single Judge that passed the judgment in **Bakers Hughes** (R. D. Dhanuka, J) subsequently has passed another judgment in the case of **Wind World (India) Ltd. (supra)** wherein the judgment passed in **Bakers Hughes** has been considered and clarified. Paragraphs 82 to 85 of this decision [**Wind World (India) Ltd**] read thus:-

“82. A perusal of the prayers in the statement of claim highlighted in the impugned order clearly indicates that the respondents had made a claim for damages. The claims made by the respondents were strongly protested by the petitioners as is apparent in the affidavit in reply in the application under Section 17. A perusal of the application filed by the respondents under section 17 clearly indicates that the allegations of the respondents for seeking an interim measures even against the petitioner nos. 2 and 3 were totally vague and without particulars and on this ground itself the respondents not having made out any prima facie case, the majority arbitrators could not have passed any interim measures.

83. In my view the arbitral tribunal could not have converted an unsecured debt into a secured debt. Neither there was any averments in the application filed under section 17 nor any such case was made out for applying the principles of Order 38 Rule 5 of the Code of Civil Procedure by the respondents. The judgment of Supreme Court in case of Raman Tech & Process Engg. Co.(supra) applies to the facts of this case. I am respectively bound by the said judgment.

84. Insofar as judgment of Division Bench of this court in case of La-Fin Financial Services Pvt. Ltd. (supra) relied upon by Mr. Chinoy, learned senior counsel for the respondents is concerned, it is held by the Division Bench that grant of the relief under Order 38 Rule 5 is on a different situation from the grant of relief in a temporary injunction. In my view the said judgment of Division Bench would not apply to the facts of this case on the ground that the majority arbitrators have granted interim measures in the nature of attachment before judgment against the third party.

85. Insofar as judgment of this court in case of Baker Hughes Singapore Pte. v. Shiv-Vani Oil and Gas Exploration Services Ltd. (supra) relied upon by both the parties is concerned, this court has held that the money claim was a subject matter of the dispute based on the invoices issued by the petitioners upon the respondents. This court considered a provision of the contract between the parties that the respondents had agreed to pay the undisputed invoices to the petitioners within 60 days from the date of the submission of such invoices. The respondents in that case had admittedly not paid the undisputed invoices in terms of the agreement and had asked for several extension. Several winding up proceedings were filed against the respondents and in that context, this court held that the claim of the petitioner therein was admitted and the liability was acknowledged. The arbitral tribunal had power to pass an order for furnishing security to secure the claim in those circumstances. The order for furnishing security was passed against the party to the arbitral tribunal and not against the third parties. In my view the said judgment of this court would not assist the case of the respondents and is clearly distinguishable in the facts of this case. In my view the order passed by the majority arbitrators granting interim measures being contrary to law and thus deserves to be set aside. It is ordered accordingly.

(emphasis supplied)

35. I therefore find that looking at it from any angle, the Tribunal was wholly unjustified in directing respondent No.1 to give an undertaking that he will not alienate or encumber or part with

possession of the property which was the subject-matter of the arbitration to the extent of Rs.25 crores till the arbitration proceedings are concluded. It was irrelevant whether the undertaking was in respect of specific property (i.e. a certain specific portion of the developed property that fell to the share of respondent No.1) or any other unencumbered personal property belonging to respondent No.1.

36. In view of the aforesaid discussion, the impugned order passed by the Arbitral Tribunal dated 30th May, 2018 is set aside. The arbitration petition is disposed of in the aforesaid terms. However, there shall be no order as to costs.

(B. P. COLABAWALLA, J.)