

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>RESERVED ON ::</i> <i>31.03.2021</i>	<i>PRONOUNCED ON ::</i> <i>02.06.2021</i>
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CORAM :

THE HONOURABLE Ms. JUSTICE P.T. ASHA

OA.No.1148 and 1100 of 2019

and

A.Nos.9765, 9766, 9768 and 9769 of 2019,

and

A.Nos.9491 to 9494 of 2019

1. Aapico Investment Pte. Limited
745 Toa Payoh Lor 5,#01-07,
The Actuary, Singapore 319455
Through the Authorised Representative,
Kaikhushru Vicaji Taraporevala
Level 42, Six Battery Road,
Singapore - 049909

1st applicant in O.A.No.1148 of 2019,
applicant in O.A.No.1100 of 2019,
A.Nos.9765, 9766, 9768 and 9769 of 2019 and
A.Nos.9491 to 9494 of 2019

2. Aapico Hitech Public Company Limited
99 Mool Hitech Industrial Estate, Tambol Ban Lane,
Amphur Bang Pa-in, Ayutthaya, Thailand - 13160
Through the Authorised Representative,
Kaikhushru Vicaji Taraporevala,
Level 42, Six Battery Road,
Singapore - 049909.

2nd applicant in O.A.No.1148 of 2019

Vs.

Mr. Manickam Mahalingam

...Respondent in

OA.No.1148 and 1100 of 2019

and

A.Nos.9765, 9766, 9768 and 9769 of 2019

and

A.Nos.9491 to 9494 of 2019

Prayer in OA.No.1148 and 1100 of 2019 and A.Nos.9491 to 9494 of 2019:

Application filed under Order XIV Rule 1 and 8 of OS Rules read with Section 9 of the Arbitration and Conciliation Act, 1996 and Section 151 of CPC to pass an order of interim injunction restraining the respondent, his representatives, agents, successors or any other person claiming through or under the respondent from in any manner dealing with the respondent's assets - movable and immovable, monies, bank

accounts wherever situated and from encumbering, selling, transferring or creating any third party interest by parting with possession of the same, including but not limiting to the list set out in Schedules A and B hereto, pending disposal of the SIAC Arbitration,

Prayer in A.Nos. 9765, 9766, 9768 and 9769 of 2019:

Application filed under Order XIV Rule 1 and 8 of OS Rules read with Section 9 (ii) (b) (c) (e) of the Arbitration and Conciliation Act, 1996 and Section 151 of CPC to pass an order of interim injunction restraining the respondent, his representatives, agents, successors or any other person claiming through or under the respondent from in any manner dealing with the respondent's assets - movable and immovable, monies, bank accounts wherever situated and from encumbering, selling, transferring or creating any third party interest by parting with possession of the same, including but not limiting to the list set out in Schedules A and B hereto, pending disposal of the SIAC Arbitration

For Applicants : Mr. J. Sivanandaraaj

For Respondent : Mr. AR.L. Sundaresan,
Sr.Counsel for respondent

COMMON ORDER

The applicant before this Court has filed various applications seeking interim measures under Section 9 of the Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation(Amendment) Act 2015, in respect of an International Commercial Arbitration. The Arbitral proceedings are underway in respect of two Loan Agreements dated 25.05.2017 and 29.09.2018. These applications are in respect of the Personal Guarantee Deeds executed by the Respondent as security for the said Loan Agreements on 25.05.2017 and 01.10.2018 respectively.

2.VARIOUS APPLICATIONS FILED:

(a)A.No.1100, 9491, 9492, 9493 and 9494 of 2019 is in respect of the Loan Agreement dated 25.05.2017.

(b)A.No.1148, 9765, 9766, 9768 and 9769 of 2019 is with regard

to the Loan Agreement dated 29.09.2018.

Identical interim reliefs have been sought for in respect of the two agreements.

(a) To restrain the respondents, his representatives, agents, successors or any other person claiming through or under him from in any manner dealing with the respondents assets, movable and immovable, monies, bank accounts wherever situated and from encumbering, selling, transferring or creating any third party interest by parting with possession of the same, including but not limited to the list set out in Schedule A and Schedule B pending disposal of the SIAC Arbitration. **(Application Nos.1100 and 1148 of 2019 - Identical schedule of properties are given in both the applications).**

(b) To order Status-Quo ante in relation to the recent transfer of significant shares of the respondents, shareholders in ABT India to his family Members pending disposal of the SIAC Arbitration.

(Application Nos.9491 and 9769 of 2019).

(c)To pass an order directing the respondent to forthwith disclose on affidavit before this Court details of all his assets, movables (including but not limited to shares) and immovables monies bank deposits and accounts held by him singly or jointly (with any person or entity) and/or severally wherever in the World pending disposal of SIAC Arbitration **(Application Nos.9492 and 9768 of 2019).**

(d)To direct the respondents to forthwith furnish liquid security to the tune of USD57.4 million/approximately INR 407 Crores and in the event of failure by the respondent to furnish such security pass an order of attachment of the assets of the respondents in Schedule A and Schedule B pending disposal of the SIAC Arbitration. **(Application No.9493 of 2019. Similar prayer is made in Applications No.9766 of 2019 in respect of USD65 Million/approximately INR 462**

Crores. Further, the A and B Schedule properties are identical in both these applications. These properties are also the schedule of properties in Application Nos.1100 and 1145 of 2019).

(e)To direct the respondents to forthwith disclose on affidavit before this Hon'ble Court full details of all transactions entered into by his disposing of/alienating/dissipating or creating any third party rights including encumbrance mortgage, pledge or lien over his assets movable and immovable within a period of one year prior to the date of filing of the application pending disposal of the SIAC Arbitration **(Application Nos.9494 of 2019 and 9765 of 2019).**

The application in respect of the 2017 loan Agreement is filed by the AAPICO Investment Private Limited and the applications filed with regard to the 2018 Loan Agreement has one more applicant, AAPICO Hitech Public Company Limited and in both the applications, the respondent is Mr.Manickam Mahalingam.

3.FACTS GIVING RISE TO THE ABOVE

APPLICATIONS:

(i)The facts in all these applications are identical and a brief narrative is hereinbelow set out.The applicants are referred to as AAPICO Investment/ AAPICO Hitech and collectively as AAPICO.

The dispute is between the applicant Group and the Group headed and controlled by the respondent. In the year 2017, AAPICO Investment had invested in Sakthi Global Auto Holdings Limited, UK, (hereinafter called SGAH) to the tune of USD50 million (approximately INR 358 Crores) as equity and a loan of an equal amount was granted for which a loan agreement dated 25.05.2017 was entered into. In addition to the Loan Agreement, a Deed of Guarantee dated 25.05.2017 was entered into between SGAH, ABT, UK in favour of AAPICO Investment and a Deed of Personal Guarantee by the respondent and ABT, UK in favour of AAPICO Investment.

(ii) In the year 2018, AAPICO Investment decided to invest a further equity investment of USD 25 Million (approximately INR 180 crores) and granted a further loan of USD 40 Million (approximately INR 286 Crores) to SGAH. By reason of these investments, AAPICO became a Shareholder of 49.99% shares of SGAH. The Loan Agreement dated 29.09.2018 was entered into between SGAH, ABT, UK and AAPICO Hitech. In addition to the Loan Agreement, a Deed of Corporate Guarantee dated 01.10.2018 was entered by ABT, UK and SGAH in favour of AAPICO Investment and AAPICO Hitech. The respondent and ABT, UK have also entered into a Deed of Personal Guarantee on 01.10.2018 in favour of AAPICO Investment and AAPICO Hitech. ABT, UK had also executed a Share Charge Deed dated 01.10.2018 in favour of AAPICO Investment and AAPICO Hitech. This Deed was entered into as security for both the Loan Agreements dated 25.05.2017 and 06.09.2018. The deeds which are the subject matter of these applications are the Personal Guarantee Deeds

dated 25.05.2017 and 01.10.2018.

(iii) It is the case of AAPICO that in the year 2019, SGAH has committed defaults in respect of both the Loan Agreements. By letter dated 02.04.2019, sent separately in respect of the 2017 and 2018 Loan Agreement, AAPICO had informed SGAH that an event of default had occurred and that AAPICO reserved its rights to enforce the loan. By a Letter dated 05.04.2019, the respondent and SGAH was informed about an event of default occurring in view of the transfer of ownership of ABT, UK to Token Communities Limited. By Letter dated 13.08.2019, AAPICO demanded the immediate payment of the Principal outstanding, total capitalised interest and enforcement costs. Under the 2017 Loan Agreement, the same was a sum of USD58,089,506 (approximately INR 415 Crores). As regards the 2018 Loan Agreement, the same was USD 44,688,260 (approximately INR 320 Crores). The payment was demanded by letters dated 14.08.2019.

Simultaneously, AAPICO had invoked the Corporate Guarantee by Letter dated 14.08.2019 and directed ABT, UK to pay USD 58,089,506 (approximately INR 415 Crores) towards the 2017 Loan Agreement and USD 44,688,260 (approximately INR 320 Crores) towards the 2018 Loan Agreement. AAPICO exercising its right under the Share Charge Agreement had also appropriated the charged shares by a Notice of Appropriation dated 15.08.2019. Consequently, AAPICO held 100% of the shares of SGAH.

(iv) The applicants would submit that all the Agreements contemplated the Resolution of Disputes through arbitration. All the Agreements have provided that the Contract would be governed by the Laws of England and Wales and Arbitration through the Rules of SIAC. It was also agreed that Singapore would be the venue for arbitration. The respondent was issued a Demand Letter dated 30.11.2019 for payment of a sum of USD57,423,996 pursuant to the

2017 Personal Guarantee and USD65,000,000 pursuant to the 2018 Personal Guarantee. These amounts are yet to be paid. It is to secure the amounts due that the applicant has come before this Court by filing a Section 9 Application seeking various interim measures which have been extracted supra.

4. DETRIMENTAL ACTS DONE BY THE RESPONDENT

SGAH AND ABT, UK:

(i) Failure to repay the dues despite demand.

(ii) ABT India files a suit before the District Court, Coimbatore to declare Share Charge Agreement and the 2017 and 2018 Share Pledge Agreements, are violative of the Foreign Exchange Management Act. This suit has been injunctioned by the Courts at England which is the jurisdictional Court under the Share Charge Agreement.

(iii) ABT India sells its interest in ABT, UK to Token Communities Limited.

(iv)When AAPICO had moved an Emergency Arbitration proceeding before the Court of Arbitration of SIAC against ABT, UK and Sakthi Auto Competent Limited (SACL) ABT India filed O.S.No.704 of 2019 on the file of the District Court, Coimbatore to injunct AAPICO from proceeding with the arbitration.

(v)The respondent is making use of the various corporate entities under him to abuse the process of Law and attempt to frustrate the efforts of AAPICO to enforce its Contractual rights.

(vi)Removing the nominees of AAPICO from the Board of Directors of SCAL without notice despite the fact that AAPICO effectively controls SGAH with a 100% shareholding and in SACL, they control 77.04% of the shares.

(vii)The respondent is engineering collusive and vexatious litigation all with the view of ensuring that AAPICO is prevented from enforcing its rights.

(viii)On 30.09.2019, the respondent had disposed of a significant

share of his shareholding in ABT India to his family members. This is an attempt by the respondent to remove the assets from out of the reach of the Creditors. Further, this is in total violation of the Personal Guarantee executed by the respondent in favour of AAPICO.

It is for the aforesaid reasons that the applicants are now before this Court seeking interim measures of protection.

5.COUNTER OF THE RESPONDENT:

The only defense raised by the respondent in his counter is that the applications are not maintainable for want of jurisdiction. The respondent would emphatically contend that he is not dealing with the averments in the applications as he is not submitting to the jurisdiction of this Court.

6.SUBMISSION:

6.1.Mr. J. Sivanandaraaj, learned counsel appearing on behalf of the applicant would submit that this Court is clothed with the jurisdiction to consider and pass orders on the above applications. On the merits of the case, he would submit that the acts of the respondent and his Group Companies would clearly show that the respondent has no intention to honour his commitments under the Personal Guarantee Deeds. Further, the clandestine act of transferring a major share of the respondent in ABT India to his family members would demonstrate the malafide intention of the respondent, particularly, when these acts have been done after the applicant had issued the Notice of Demand. He would contend that after the amendment to Section 2(2) of the Arbitration and conciliation Act, by the Amendment Act 3 of 2016, this Court has the jurisdiction to pass orders in the Section 9 Applications with reference to International Commercial Arbitrations. He would refer to the 246th Report of the Law Commission with reference to the

application of PART - I of the Act to International Commercial Arbitration, the statement and objects of the Amendment Act as also the Notes or Clauses. He would further submit that the SIAC Rules also contemplates approaching the Domestic Court for effective interim orders. The learned counsel has relied on the following Judgments in support of his contention that this Court has the jurisdiction to entertain the applications filed under Section 9 of the Act.

(1)2017 SCC Online BOM 631 [Aircon Feibars FZE v. Heligo Charters Private Limited] (Single Judge)

(2)2018 SCC Online 1388 [Heligo Charters Private Limited v. Aircon Feibars FZE]

(This is the Division Bench Order confirming the Single Judge's order at Sl.No.1)

(3)Unreported Judgment of the Delhi High Court

in O.M.P.(I) (Comm.).23 of 2015 and C.C.P.(O).59 of 2016, I.A.Nos.25949 of 2015 and 2179 of 2016 - Raffles Design International India Private Limited and another v. Educomp Professional Education Limited and others].

(4)Unreported Judgment of the Delhi High Court in O.M.P.(I)(Comm.) 112 of 2020 [Big Charter Private Limited v. Ezen Aviation Pty Limited and others].

(5)Unreported Judgment in C.S.(Comm.) 493 of 2020 [Future Retail Limited v. Amazon.com Investment Holdings LLC and others]

(6)Unreported Judgment of the Punjab and Haryana High Court in Arb.ICA.No.1 of 2018 [ISGEC Heavy Engineering Limited v. Cavite Biofuel Producers Inc and another]

(7)2017 SCC Online Mad 36458 [Archer Power Systems Private Limited v. Kohli Ventures Limited Co.

and others/

7.2.Per contra, Mr.AR.L.Sundaresan, learned Senior Counsel appearing on behalf of Mrs.A.L.Gandhimathi, counsel for the respondent restricted his oral arguments only to the maintainability and had not made any oral submissions on the merits though extensive arguments on merits had been submitted by the learned counsel for the applicant. Written arguments have also been submitted. However, in the Written arguments the respondent has addressed the merits of the case as well.

7.3.The gravamen of the arguments is that as per the terms of the Arbitration Clause contained in the Personal Guarantee deeds dated 25.05.2017 and 01.10.2018, the law governing the Guarantee deed was the Laws of England and Wales, that the dispute was to be finally resolved under the Rules of Singapore International Arbitration Centre

(SIAC) Rules, that parties were entitled to approach the SIAC Arbitration Centre for appointment of a sole Arbitrator and the place of arbitration is Singapore. The learned Senior counsel would submit that the Loan Agreement, Corporate Guarantee Deed and the Share Charge Agreement had similar Clauses. He would therefore submit that the parties had impliedly agreed that Sections 9, 27 and Section 37(1)(b) and 37(3) in PART - I of the Act would not be applicable to the Agreements in question. Therefore, considering the language of the Proviso to Section 2(2) of the Act, these applications are not maintainable before this Court as this Court lacks jurisdiction by Agreement of parties. Reliance has been placed on the following Judgments;

(i)(2002) 4 SCC 105 [Bhatia International v. Bulk Trading SA and another]

(ii)(2011) 6 SCC 179 [M/s.Dozco India Private Limited v. Doosan Infracore Co. Limited]

(iii)(2011) 9 SCC 735 [Yograj Infrastructure Limited v. Ssang Yong Engineering & Construction Co. Ltd.]

(iv)(2012) 9 SCC 552 [Bharat Aluminium Company (BALCO) v. Kaiser Aluminium Technical Service Inc.]

(v)(2014) 7 SCC 603 [Reliance Industries Limited and another v. Union of India]

(vi)(2016) 4 SCC 126 [Bharat Aluminium Company v. Kaiser Aluminium Technical Service Inc.]

(vii)(2017) 14 SCC 722 [Roger Shashoua and others v. Mukesh Sharma and others]

(Viii)O.S.A.No.144 of 2017 [M/s.Archer Power Systems Private Limited v. Kohli Ventures Limited and

others.

(This Judgment is also relied on by the counsel for the applicant)

7.4. The entire thrust of the arguments of the learned Senior Counsel was that the words "agreement to the contrary" appearing in the proviso to Section 2(2) of the Act could be express or implied. To buttress this argument, the learned Senior Counsel would rely on the 246th Law Commission Report which had suggested the application of the word "express" before "agreement to the contrary" which the legislature had consciously omitted. Therefore, the learned Senior counsel would argue that the intent of the legislature was to include both express as well as implied agreements.

7.5. It is the argument of the respondent in their written arguments that the pleadings and evidence is complete before the Arbitral Tribunal and written submissions have also been filed by

either party and what remained was only the passing of the Award. The respondent would further submit that the applicant has not made out a *prima facie* case for the grant of interim measure. The applicant while entering into the various agreements was well aware of the status and assets of the respondent and they cannot use the provisions of Section 9 of the Act and make a roving enquiry about the wherewithal and assets of the respondent all over the World. Further, the obligation of the respondent who has given the Personal Guarantee, kick starts only if the Principal borrowers fails to make the payment. That apart, the value of the shares appropriated by the applicant has to be first evaluated before arriving at the outstanding. Therefore, on the ground of maintainability, lack of a *prima facie* case and on the ground of the claim being pre-mature, the respondent sought to have the applications dismissed.

8. DISCUSSION:

8.1.The primary argument advanced, particularly on the Respondents behalf, is on the maintainability of the applications before this court. Once this Court decides in favour of the maintainability, then the merits of the case can be traversed through for deciding whether the Applicants are entitled to the interim reliefs sought for by them. In order to appreciate the arguments regarding the maintainability, it is necessary to extract the arbitration Clause in the Personal Guarantee Deeds dated 25.05.2017 and 01.10.2018 executed by the respondent as security for the Loan Agreements dated 25.05.2017 and 29.09.2018 since in these applications we are only concerned with the Personal Guarantee Deeds referred supra.

(i) **Deed dated 25.05.2017**

16.Governing Law and Dispute Resolution:

16.1.This Guarantee shall be conclusively deemed to be a contract made under, and shall for all purposes be governed by and construed in accordance

with, the laws of England and Wales, without giving effect to the conflict of laws principles thereof. Any dispute arising out of or in connection with this Guarantee, including, but not limited to, any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the Singapore International Arbitration Centre (such rules, the "Rules"), which Rules are deemed to be incorporated by reference into this Clause. The number of arbitrators shall be one and such arbitrator must be unanimously appointed, provided that if the Parties are unable to agree on the sole arbitrator within 45 days from the date that a dispute arises, either of the Parties shall be entitled to approach the Singapore International Arbitration Centre for the appointment of a sole arbitrator. The place of the arbitration shall be Singapore. The language to be used in

the arbitral proceedings shall be English."

(ii) **Deed dated 01.10.2018**

16. Governing Law and Dispute Resolution:

16.1. This Guarantee shall be conclusively deemed to be a contract made under, and shall for all purposes be governed by and construed in accordance with, the laws of England and Wales, without giving effect to the conflict of laws principles thereof. Any dispute arising out of or in connection with this Guarantee, including, but not limited to, any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the Singapore International Arbitration Centre (such rules, the "Rules"), which Rules are deemed to be incorporated by

reference into this Clause. The number of arbitrators shall be one and such arbitrator must be unanimously appointed, provided that if the Parties are unable to agree on the sole arbitrator within 45 days from the date that a dispute arises, either of the Parties shall be entitled to approach the Singapore International Arbitration Centre for the appointment of a sole arbitrator. The place of the arbitration shall be Singapore. The language to be used in the arbitral proceedings shall be English."

8.2. It would also be useful to extract the following Sections of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015

Section 2(e)(ii): *in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to*

decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of Courts subordinate to that High Court;

Section 2(f): “international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

(i) *an individual who is a national of, or habitually resident in, any country other than India; or*

(ii) *a body corporate which is incorporated in any country other than India; or*

(iii) *an association or a body of individuals whose central management and control is exercised in any*

country other than India; or

(iv) the Government of a foreign country;

Section 2(2):*This Part shall apply where the place of arbitration is in India:*

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.

8.3. Let us consider the provisions of the Act as it stood in the pre-2015 regime. Section 2(e) as it then stood would read as follows:

"(e) "Court" means the Principal Civil Court of

original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such Principal Civil Court, or of any Court of Small Causes".

Similar Section 2(2) without the proviso read as follows:

Section 2(2): This Part shall apply where the place of arbitration is in India"

8.4. By reason of the law governing arbitral proceeding then, particularly of Section 2(2), Part - I of the Act was not applicable to International Commercial Arbitration. However, in the Judgment in ***(2002) 4 SCC 105 [Bhatia International v. Bulk Trading SA and***

another], arguments were advanced that a conjoint reading of the provisions of the Act would show that Part I is applicable to all arbitrations unless expressly excluded, Part I would also apply to International Commercial Arbitration. The three Member Bench considered the arguments and also the consequence of an interpretation that the Indian law would not apply to arbitration held in a Country which is not a signatory to the New York Convention or the Geneva Convention. The learned Judges observed that the language of Section 2(2) of the 1996 Act does not provide that Part I shall not apply where the place of arbitration is not in India. Ultimately, the Bench held as follows in Paragraph 32:

"32.To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent

permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

8.5. Then came the Judgment of the Constitution Bench in **(2012) 9 SCC 552 [Bharat Aluminium Company (BALCO) v. Kaiser Aluminium Technical Service Inc.]** which overruled **Bhatia International** and held that in a foreign seated International Commercial Arbitration an application for interim measures under Section 9 of the Act was not maintainable before the Indian courts. They went on to hold that "*Part I of the Arbitration Act, 1996 is*

applicable only to all the arbitrations which take place within the territory of India."

With regard to the applications under Sec.9, the Bench observed that the provisions of Part I would apply only to arbitrations taking place in India. *"Extending the applicability of Sec.9 to arbitrations which take place outside India would do violence to the policy of territoriality declared in Sec.2(2) of the Arbitration Act, 1996". (Para 163).*

8.6. The Government had requested the Law Commission to suggest amendments to the Arbitration and Conciliation Act as several shortcomings were noticed in its implementation. The Law Commission which undertook this exercise submitted its 246th report. The Commission felt that though the decision in BALCO was a step in the right direction, however there were few areas which were problematic. For instance where the assets of a party is located in India and there is every likelihood of that party dissipating its assets, the other party

would lack an efficacious remedy if the seat is abroad. To seek an interim order from a foreign court and then filing a suit to enforce the same would bring with it several procedural problems and cause delay, delay which is anathema to the arbitral regime. They had suggested amendments to the definition of Court as provided in Section 2 (e) and to insert a proviso to Section 2(2) of the Act. These suggestions have been carried out and significant amendments have been carried out to the definition of the word "Court" in Section 2(e) and the introduction of a proviso to Section 2(2) of the Act which provides that the provisions of Section 9, 27 and Clause (a) of Sub (1) and Sub Section (3) of Section 37 will apply to all international commercial arbitration even where the seat of arbitration is outside India except those cases where there is an Agreement to the contrary between the parties. The proviso is silent as to whether such an Agreement should be express or implied. However, when the statement of objects and reasons which precede the introduction of the Arbitration and Conciliation

(Amendment) Bill, 2015 is examined two amendments that are proposed to be introduced stand out:

i. to amend the definition of 'court' to provide that in the case of international commercial arbitrations, the courts should be the High Court ;

ii. to ensure that the Indian Courts can exercise jurisdiction to grant interim measures, etc; even where the seat of arbitration is outside India.

That apart a reading of the notes of clauses, particularly Clause 2 would reveal that the amendment to Sec.2 by inserting a proviso to sub-section 2 was aimed at making some provisions of Part I of the Act applicable to an International Commercial Arbitration even if the seat is outside India.

8.7. The argument of the respondent is that when the Contract is governed by the Laws of England and Wales and when the parties have

agreed that the SIAC Rules would apply to arbitration and the venue is at Singapore, the curial law is the laws of Singapore. Therefore, there is an implied agreement to the contrary as contemplated under the Proviso to Section 2(2) of the Act. This argument at first blush appears attractive but if this argument is accepted it would render the very proviso otiose. The words **"agreement to the contrary"** implies an Agreement between the parties that they do not intend to make applicable the provisions of Section 9, 27, and 37(1)(a) and 37(3) of the Act. This assumes significance since under the Proviso not all provisions of Part I is sought to be made applicable but only a select few, viz; Secs.9, 27, 37(1)(a) and 37(3). Therefore from the agreement between the parties, whether express or implied, one should be able to arrive at the conclusion that the parties have decided not to make applicable Sec.9, 27, 37(1)(a) and 37(3) of the Act.

That apart if the proviso to Sec.2(2) is analysed in detail the following factors with regard to its applicability would emerge:

i. that the provisions of Sec.9, 27, 37(1)(a) and 37 (3) would apply to all International Commercial Arbitrations (as defined under Sec.2(f) of the Act);

ii. that it would apply to International Commercial Arbitration even if the seat is located outside India;

iii. that the parties have not agreed to make these provisions applicable to their arbitral agreement; and

iv. in case of an arbitral award made or to be made outside India and the same is enforceable and recognised under the provisions of Part II of this Act.

Therefore an agreement to the contrary is contemplated only with reference to the applicability of the provisions of Sec.9, 27, 37(1)(a) and 37(3) of the Act. Given the above, the agreement to the contrary should be specific and general terms regarding the laws governing the contract or the arbitration agreement or the seat/venue cannot be construed as an "agreement to the contrary" as contemplated under the

Proviso to Sec.2(2) of the Act. We have to now examine the agreement between the parties with regard to Arbitration in the light of the above discussion. A reading of Clause 16.1 of the Personal Guarantee only provides that the agreement between the parties would be governed by the laws of England and Wales and the Arbitration Agreement would be governed by the SIAC Rules, the Venue of arbitration by Agreement was a Singapore.

8.8. The Delhi High Court was considering a similar position as in the instant case in an unreported Judgment in ***Raffles Design International India Private Limited and another v. Educomp Professional Education Limited and others, O.M.P.(I) (Comm.).23 of 2015 and C.C.P.(O).59 of 2016.*** Identical Arguments as raised by the learned Senior counsel for respondents were raised before the Delhi High Court, the learned Judge discussed the various decisions relating to "contracting out" and framed the following question for

consideration "Whether an Agreement between the parties that a Foreign Law would be applicable to the arbitration, implicitly excludes the applicability of the Act?" To answer this question, the learned Judge has referred to the 176th and 246th report of the Law Commission, UNCITRAL Model Law and the SIAC Rules. The learned Judge observed that by adopting the SIAC Rules parties have bound themselves to Rule 26.3 of the said Rules which states that "*A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances, thereafter, is not incompatible with these Rules.*" Therefore, the parties have impliedly agree to approach the Courts for interim relief and this would include a Court other than at Singapore.

8.9. The ratio laid down in the case of **Raffles** would squarely apply to the case on hand as the Arbitration Agreement in both cases are similar.

8.10. A Division Bench of our Court was considering the maintainability of a Section 9 application in an International Commercial Arbitration. The disputes therein covered three Contracts/Agreements and in one of the agreements, in very clear terms it was stated that the Indian Arbitration Act, 1996, will not apply as it is the British Law that is applicable to the Arbitration and only for enforcement support of the India Courts could be taken. In the other three Agreements this express exclusion was not available. The Bench after considering all the Agreements, the provisions of Section 2(2) and its proviso held that "in the normal circumstances Sec.9 would have been applicable to the case on hand but what comes in the way is an agreement to the contrary. Clause 91 of the Shareholders Agreement (SHA) clearly says that the provisions of the A and C Act are completely excluded." Further in Para No.25 the Bench observed as follows:-

"25. The above makes it clear and puts beyond doubt that this case where though the arbitration agreement falls under the Proviso to Sec.2(2) of the A and C Act, there is an agreement to the contrary as envisaged under the Proviso to Sec.2(2) of A and C Act excluding all provisions of the A and C Act and therefore, Sec.9 of A and C Act also will not be applicable to the instant case."

8.11. The Bench had formulated the question for consideration as follows:-

"In an International Commercial Arbitration where the seat of arbitration is outside India, will the provisions of Part I of A

and C act apply?"

8.12. In paragraph 46 of the judgment, the Bench had traced the legal position in relation to the question formulated and ultimately in Para 50 had held that in view of Clause 91 of the SHA the Sec.9 application was not maintainable. In the absence of Clause 91 the result would have been otherwise. In para 24 and 25 of the judgement the Learned Judges had observed that but for Clause 91, the Sec.9 application would have been maintainable.

8.13. The Learned Senior Counsel appearing for the respondent would argue that the ratio laid down by the Bench is that only if parties expressly covenant to make some provisions of Part I, i.e., Sections 9, 27, 37(1)(a) and 37(3) applicable, only then will the instant application be maintainable. He would draw my attention to Paragraph 46(c) of the order. This in my considered view is only a mistake/error as it flies

in the face of the body of the judgment. In the entire Judgment the learned Judges have held that the applications under Section 9 in respect of an International Commercial Arbitration is maintainable before this Court in view of the Proviso to Sec.2 (2). However in the case which was under their consideration, in view of an Agreement to the contrary in the form of Clause 91, the proviso would not be applicable. Therefore, the reliance on Paragraph 46(c) would not come to the aid of the respondent.

8.14. Therefore, from the above discussions, it is clear that in the case on hand, the applications filed under Section 9 of the Act are maintainable since there is no agreement to the contrary between the parties as contemplated in the proviso to Sec.2(2) to exclude the applicability of Sec.9, 27, 37(1)(a) and 37(3) of the Act in the arbitration agreement in the Personal Guarantee Deeds dated 25.05.2017 and 01.10.2018.

8.15. The cause of action/genesis which has catapulted the Applicant into filing these applications, when the arbitral proceedings were at an advanced stage, was the transfer of shares by the respondent which he held in ABT, India in favour of his family members that too after the notice of demand being issued by the applicants. Added to this, ABT India had sold its interest in ABT, UK to Token Communities Limited. These acts clearly manifests the intention of the respondent to dissipate his assets. The respondent has given a Personal Guarantee and admittedly huge amounts are due to the applicants under the two loan agreements. Therefore, a *prima facie* case has been made out by the applicant for the grant of an order of injunction as sought for in Application Nos.1100 and 1148 of 2019 only in respect of the A and B schedule properties pending the SIAC Arbitration. As regards the relief claimed in A.No.9491 and 9769 of 2019 is concerned the transferees are not before this Court as they have not been made

parties. Therefore, the reliefs claimed therein cannot be granted.

8.16. Application Nos.9492 and 9768 of 2019 and A.Nos. 9494 and 9765 of 2019 are more in the form of a roving enquiry and is therefore dismissed.

8.17. Considering the orders passed in A.Nos.1100 and 1148 of 2019, A.Nos.9493 and 9766 of 2019 is closed.

Consequently, the following order is passed:

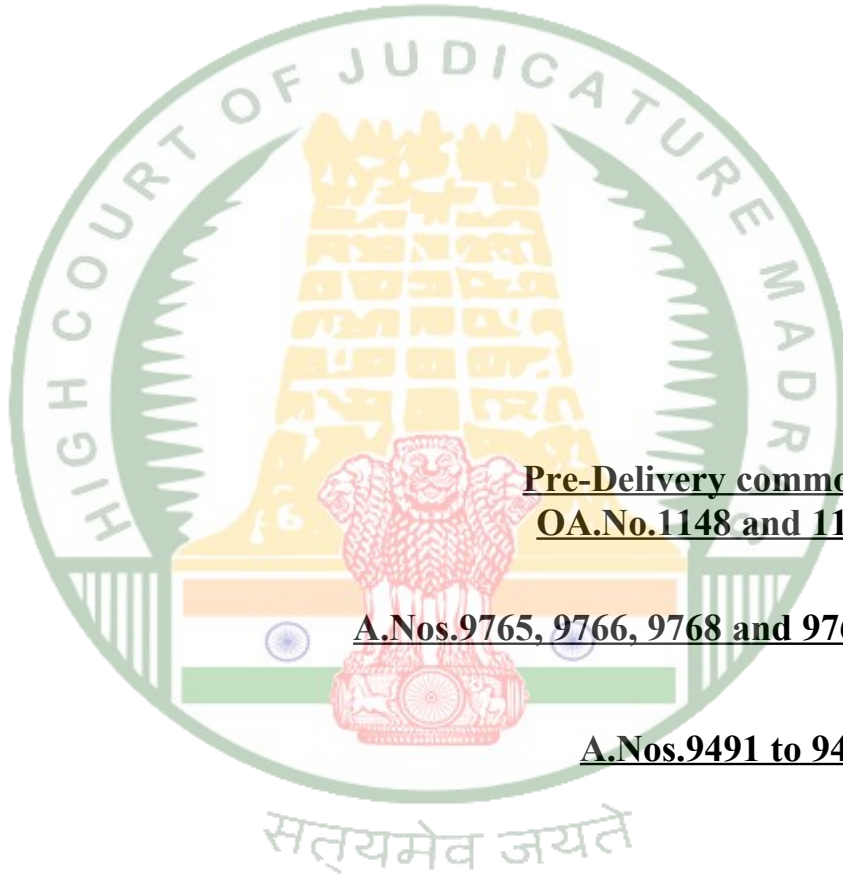
- a. A. Nos.1100 and 1148 of 2019 is ordered only with reference to the A and B Schedule properties therein:
- b. A. Nos. 9491 and 9769 of 2019 stand dismissed.
- c. A. Nos. 9492 and 9768 of 2019 are dismissed; and
- d. A.Nos.9493 and 9766 of 2019 are closed.
- e. A.Nos. 9494 and 9765 of 2019 are dismissed.
- f. No costs.

02.06.2021

Internet : Yes/No
Index :Yes/No
Speaking / Non-Speaking
mps

P.T. ASHA. J,

mps



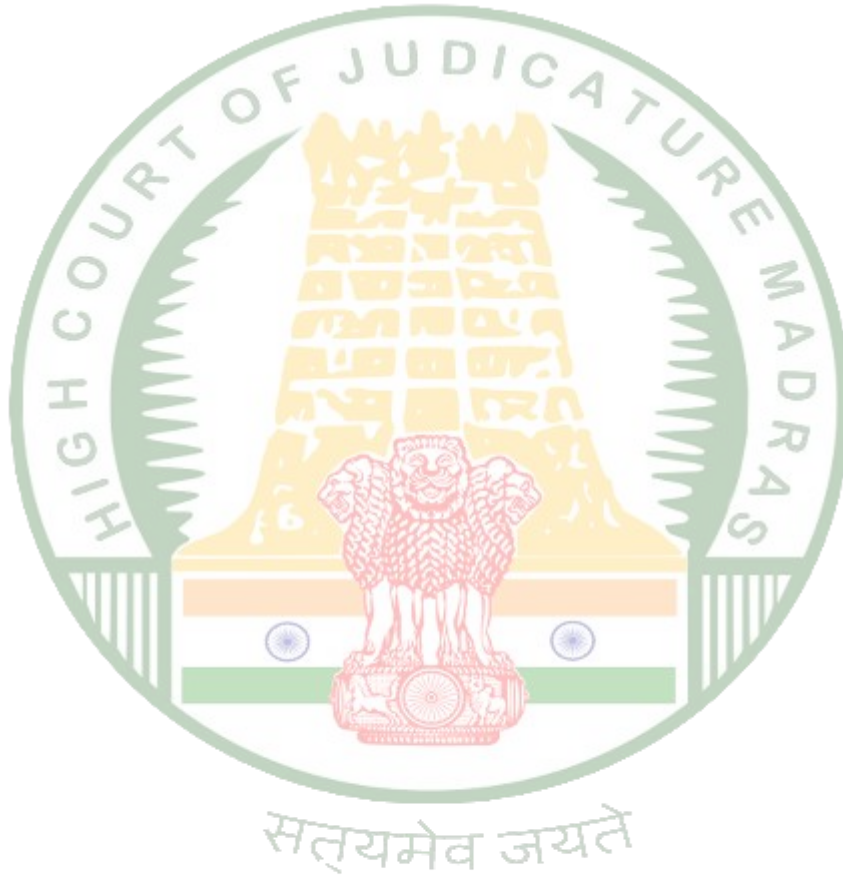
Pre-Delivery common order in
OA.No.1148 and 1100 of 2019
and

A.Nos.9765, 9766, 9768 and 9769 of 2019,
and

A.Nos.9491 to 9494 of 2019

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