* IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Reserved on: June 02, 2021**

Pronounced on: July 22, 2021

\+ **FAO(OS) (COMM) 63/2020 & CM No.11090/2020 (for stay)**

DLF LTD. ..... Appellant

Through: Mr. Rajiv Nayar, Sr. Adv. and Mr. Randeep Rai, Sr. Adv. with Mr.Kartik Nayar, Ms. Meghna Mishra, Ms. Simran Brar, Mr. Saurabh Seth, Mr. Varun Kumar, Mr. Ankit Rajgarhia, Ms. Deveshi Mishra, Mr. Tarun Sharma & Ms. Apoorva Neral, Advs.

Versus

LEIGHTON INDIA CONTRACTORS PRIVATE LTD. & ANR. .....Respondents

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Krishnendu Datta and Mr. Manish Srivastava, Advs. for R-1 Mr. Nitin Soni & Mr. Deepjyot Singh, Advs. for R-2/Axis Bank Ltd.

AND

\+ **FAO(OS)(COMM) 64/2020 & CM No.11223/2020 (for filing additional documents)**

LEIGHTON INDIA CONTRACTORS PRIVATE LTD. .... Appellant

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Krishnendu Datta and Mr. Manish Srivastava, Advs.

Versus

DLF LTD. & ANR. .....Respondents

Through: Mr. Rajiv Nayar, Sr. Adv. and Mr. Randeep Rai, Sr. Adv. with Mr.Kartik Nayar, Ms. Meghna Mishra, Ms. Simran Brar, Mr. Saurabh Seth, Mr. Varun Kumar, Mr. Ankit Rajgarhia, Ms. Deveshi Mishra, Mr. Tarun Sharma & Ms. Apoorva Neral, Advs for respondent No. 1
Mr. Nitin Soni & Mr. Deepjyot Singh, Advs. for R-2/Axis Bank Ltd.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

[VIA VIDEO CONFERENCING]

ASHA MENON, J.

1. This order will dispose of the two appeals filed under Section 37 of the Arbitration & Conciliation Act, 1996 ("**A&C Act**", for short), challenging an interim order dated 13th May, 2020, passed by the learned Single Judge in O.M.P.(I)(COMM.) 109/2020 on an application filed by Leighton India Contractors Private Ltd. (hereinafter referred to as "**Leighton**") under Section 9 of the A&C Act.

2. While taking note of this fact, this Court had passed the following order on 8th July, 2020:

> *"1. Though the appeals are listed today for hearing but while reading the files today morning, it was*

realized that the order dated 13th May, 2020 impugned in these appeals is not the final order on the petition under Section 9 of the Arbitration & Conciliation Act, 1996 filed by Leighton India Contractors Private Ltd. against DLF Ltd. but in the nature of an ad-interim order and the Single Judge, after passing the said order running into 23 pages, has adjourned the proceedings for filing of replies and rejoinders and posted the matter for hearing on 17th August, 2020.

2. This being only an ad-interim order, we have put it to the senior counsels for the parties, whether not the process, of our deciding the appeals and thereafter the Single Judge dealing with the petition under Section 9 of the Act and appeals being preferred thereagainst, be avoided and either the matter be heard by the Single Judge finally or the counsels make a statement that the petition under Section 9 of the Act be treated as disposed of in terms of the impugned order and the present appeals be considered as appeals against the final order on the Section 9 petition.

3. The senior counsel for Leighton India Contractors Private Ltd. states that the direction of the Single Judge in the impugned order has been suspended due to the pendency of the appeals and owing whereto Leighton India Contractors Private Ltd. is suffering; else, it is stated that the petition under Section 9 be treated as disposed of in terms of the impugned order.

4. Though the senior counsel for DLF Ltd. also is agreeable to the petition under Section 9 of the Act *being treated as disposed of in terms of the impugned order but contends that DLF Ltd. has not had an opportunity to file a reply to the Section 9 petition as yet.*

5. The senior counsel for Leighton India Contractors Private Ltd. states that the Single Judge had granted four weeks time for filing reply and which is long since over and the reply has not been filed and the matter be heard on the basis of documents on record.

6. To avoid any technicalities, it is deemed appropriate to grant an opportunity to DLF Ltd. to file reply.

7. Reply be filed on or before 18th July, 2020.

8. Rejoinder if any before 31st July, 2020.

9. It is however made clear that Section 9 petition from which these appeals arise is treated as disposed of in terms of the impugned order dated 13th May, 2020.

10. List on 4th August, 2020.

11. Interim arrangement to continue."

<u>BRIEF FACTS OF THE CASE</u>

3. The facts as are relevant for the purpose of disposal of these appeals may be stated in brief. The parties had entered into a Contract Agreement ("**C.A.**", for short) dated 19th September, 2013, in respect of works for the project of DLF Limited (hereinafter referred to as "**DLF**"), named as "The Camellias", which was a residential project with a

Contract Price of Rs.1438,72,27,078/-. In this C.A., 9 Residential Towers and 3 Basements consisting of 429 flats were required to be constructed at DLF City, Phase-V, Gurugram.

4. In compliance of Clause 15 of the C.A. dated 19th September, 2013, Leighton furnished a total of six Bank Guarantees ("**BGs**", for short); two were towards Retention Money ("**RBGs**", for short) worth Rs.78,18,77,583/- and four were towards Performance Security ("**PBGs**", for short) worth Rs.143,87,22,708/-.

5. The original stipulated date of completion of the project under the C.A. was 3rd September, 2017. However, it appears that with mutual agreement, this stipulated date was extended from time to time, finally till 30th June, 2018.

6. According to Leighton, it had completed the project by September, 2017. The interior fit-out works of the flats were not awarded to Leighton. However, some minor works remained to be completed. According to them, no defects in the execution of the project had been pointed out to them by the Independent Engineer ("**I.E.**", for short) or DLF. However, despite request, DLF did not issue the Completion Certificate ("**C.C.**", for short) to them and rather sought to encash the BGs. Thus, Leighton was forced to come to court with its application under Section 9 of the A&C Act.

7. The reliefs sought in the said application under Section 9 of the A&C Act were incorporated in the following prayers:

> *"(a) Restraining Respondent No.1, its agents, officers, employees etc. from invoking and/or*

encashing Bank Guarantee(s) as detailed Paragraph No. [73] herein above issued by Respondent No.2 during pendency of the present Petition till conclusion of arbitration proceeding; and/or;

(b) Restraining Respondent No.2, its agents, officers, employees etc. from making any payment to Respondent No.1 under Bank Guarantee(s) as detailed Paragraph No. [73] herein above during pendency of the present Petition till conclusion of arbitration proceeding; and/or;

Or

In alternative, if amount is already released by the Respondent no.2 in favour of the Respondent no.1 under Bank Guarantee(s) as detailed Paragraph No. [73],

(c) Direct the Respondent No.1, its agents, officers, employees etc. to pay to and deposit the complete amount received under Bank Guarantee(s) as detailed Paragraph No. [73] with the Petitioner during pendency of the present Petition as well as during arbitration proceeding; and/or;

(d) Direct the Respondent No.1, its agents, officers, employees etc. to pay to furnish appropriate security to the Petitioner or to this Hon'ble Court to secure the complete amount received by the Respondent No.1 under Bank Guarantee(s) as detailed Paragraph No. [73] during pendency of the present Petition as well as during arbitration proceeding; and/or;

(e) ad-interim reliefs in terms of prayer (a) to (d) above.

(f) for costs:

(g) Pass any such other or further orders as may be deemed fit by this Hon'ble Court in facts and circumstances of the present case;"

8. DLF took the stand that the said application under Section 9 of the A&C Act had been filed after the BGs were invoked on 4th May, 2020 and the amounts credited into its account by the Bank. Therefore, the application filed on 5th May, 2020 was an infructuous application. It was also submitted that invocation of BGs could be sought only in case of an "egregious fraud" or "special equities", but since the BGs constituted an independent contract with the Bank, no relief, as prayed for under Section 9 of the A&C Act, could be granted to Leighton as nothing remained once the monies had been credited to DLF.

9. The learned Single Judge took the view that while the reliefs (a) and (b), reproduced hereinabove, had indeed become infructuous, as the BGs had been encashed, however, the alternate reliefs (c) and (d) survived for consideration. Vide the impugned order, it was held that the court was empowered under Section 9 of the A&C Act to grant protection on what appeared to it would be appropriate and just in the circumstances. The following directions were, thus, issued:-

"26. Accordingly, it is directed that out of the amount credited by the Bank to DLF, DLF shall create a fixed deposit for a sum of Rs.143,87,22,708/- and place the same in an interest bearing fixed deposit on auto renewal mode. The same shall be made out in the name of the Registrar General of this Court. The original fixed deposit receipt shall be filed in this Court along with an undertaking by the bank issuing the fixed deposit that the said deposit shall not be

permitted to be encashed until further orders of this Court in the present petition. The interest etc., that accrues on the said Fixed Deposit shall also be retained by the bank issuing the Fixed Deposit which shall be initially for a period of six months. Reply be filed to the petition within four weeks, rejoinder with four weeks thereafter. The FDR be placed on record on or before 20th May, 2020."

10. Both, Leighton as well as DLF are aggrieved by these directions. Both have filed appeals. FAO(OS)(COMM) 63/2020 has been filed by DLF, questioning the directions to keep the money it has received on the encashment of the PBGs amounting to Rs.143,87,22,708/- in Fixed Deposits, whereas Leighton has filed FAO(OS)(COMM) 64/2020, being aggrieved that the court had not restored completely, the *status quo ante* by directing DLF to return the entire amount encashed by it, and in the alternative, not including the RBGs also while directing DLF to secure the amount encashed, which included both the RBGs as well as PBGs, and thus direct DLF to deposit, as Fixed Deposits, the entire sum of Rs.222,06,00,291/-.

11. Extensive oral arguments were advanced by learned Senior Counsel appearing for both the sides. Written submissions have also been filed, which we have perused. Reference to the arguments hereinafter will include both, oral and written submissions, though not separately mentioned.

ARGUMENTS OF LEIGHTON

12. Sh. Sandeep Sethi, learned Senior Counsel, submitted that

Leighton received an email dated 4th May, 2020 at 6:44 P.M. from Axis Bank informing that DLF had approached it seeking invocation of the BGs. Neither the letter of invocation was provided nor were the details of whether the amounts stood remitted or transferred to DLF, given to Leighton. In these circumstances, the application under Section 9 of the A&C Act was filed on 5th May, 2020 by mentioning at 9:30 A.M., for interim relief. Therefore, the prayers (a) and (b) were made so that the BGs would not be encashed by DLF and the Bank would not pay the amount to DLF. Therefore, there was no suppression of material facts by Leighton at the time of the filing of the application.

13. It is contended that it was only during the hearing on 6th May, 2020 that Leighton learnt that the letter of invocation of the BGs was dated 2nd May, 2020 and the invocation was for two reasons namely, that Leighton had failed to "*extend the validity of Performance Bond in advance",* and "*for various dues and defaults*". This was as far as PBGs were concerned, while in respect of RBGs, a vague reason that Leighton had failed to perform the work, was given.

14. According to the learned Senior Counsel for Leighton, Leighton has claimed that its application under Section 9 of the A&C Act was maintainable despite the fact of invocation of BGs and remittance of money as DLF was not entitled to monies covered under the BGs in view of the express provisions of the C.A.; the reasons given for invocation in the letter dated 2nd May, 2020 were false to the knowledge of DLF and were vague and unsustainable; prayers for restoration had also been made; and, since DLF had wrongly recovered the monies by encashing

the BGs, the prayers in the application could not be decided on the laws relating to the BGs, but on equities, as what was wrongfully recovered could not be retained by DLF and thus, Leighton was entitled to restoration. In this regard, it was contended that the terms of the C.A. were rightly looked into by the learned Single Judge to uphold the claims of Leighton that DLF had wrongly encashed the BGs.

15. According to the learned Senior Counsel, the first ground taken by DLF for invocation of the BGs, that is, non-extension of BGs, was wrong and contrary to their own instructions. As per Clause 15.1 of the C.A., PBGs were to be extended 30 days in advance. Vide email dated 21st April 2020, the I.E. had directed Leighton to submit the extended BGs by 10th May, 2020. Acting on the instructions contained in the said email, Leighton confirmed that it will submit extended BGs by 10th May, 2020. However, deceitfully and fraudulently, DLF had invoked the BGs on 4th May, 2020 itself. DLF cannot be allowed to wriggle out of the instructions contained in the email dated 21st April, 2020, as the letter of the I.E. had been copied to and was thus within the knowledge of Mr. Ajay Arora, who was the representative of DLF, and other senior officials of DLF, such as Mr. Harish Malhotra, but no one had sent any protest to these instructions of the I.E.. The learned Senior Counsel submitted that on 4th May, 2020, the BGs stood extended and confirmed by the Axis Bank by their letter dated 5th May, 2020 and DLF, by alleging that the BGs had not been extended in terms of Clause 15.1 of C.A., had no right to invoke the BGs.

16. With regard to the vague allegation that there were other dues and

that Leighton had failed to perform the work, the learned Senior Counsel submitted that no letter had been issued till 7th April, 2020 in which the I.E. had found fault with the works being carried out by Leighton. According to Leighton, the work in respect of the project was complete in material respects at the time DLF applied for Occupation Certificate in November, 2016 and obtained the same on 27th July, 2017 i.e., almost 3 years prior to the invocation of the BGs. This would indicate that the work was virtually complete even prior to the stipulated date of completion i.e., 3rd September, 2017. The Occupation Certificate was issued by the Director, Town and Country Planning Department, Haryana, in respect of the completed project on the basis of various certificates issued by the Statutory Authorities, including Fire Safety, which were pre-conditions for the application for Occupation Certificate. These statutory certificates would not have been issued had the work remained incomplete. It was in this background that Leighton had requested for issuance of C.C. under Clause 61 of the General Condition of Contract ("**GCC**", for short) to DLF but DLF withheld the C.C. for more than two years, without any valid reasons, since 1st June, 2018. It is also submitted that on the basis of an agreement reached by the parties on 16th January, 2018, recorded by email dated 25th January, 2018, works of value of Rs.10,40,00,000/- were agreed to be de-scoped and this agreement was also confirmed through amendments. This fact was not disputed by DLF, yet, in its letter dated 7th April, 2020, it falsely alleged that Leighton had not carried out such works that were already de-scoped.

17. Learned Senior Counsel submitted that it was clear that the second

reason given that there were defects in the work done by Leighton was an afterthought, on the basis of which DLF sought to justify the wrongful encashment of the BGs. The original date of completion of the project was 3rd September, 2016, but six extensions were granted till 30th June, 2018. The C.A. had also been amended 246 times, the last 39 amendments being after 1st June, 2018 i.e. the date when Leighton had requested for issuance of C.C. under Clause 61 of the GCC. Letters dated 16th June, 2018 and 16th July, 2018 issued by DLF reveal that no defects or snags in works were ever pointed out by DLF in terms of Clause 61 within 15 days after due inspection. During all this time, from 3rd September, 2017 till the invocation of the BGs, no allegations of delay were made against Leighton and no monetary claims were raised. This would indicate that in fact there were no defects and Leighton was actually entitled to the C.C.. It was submitted that possession of more than 200 flats out of 429 completed flats were handed over to DLF and were in the possession of the allottees.

18. Attention of this Court was also drawn to the Closure Report dated 7th December, 2019 issued by DLF, to point out that 129 defects, which find mention in the letter dated 7th April, 2020, were either completed or were not within the scope of works of Leighton, which shows that the allegations in the letter dated 7th April, 2020 that work was not done was false. In any case, Leighton had responded to the letter dated 7th April, 2020 vide its reply dated 4th May, 2020, but by then, DLF had wrongly encashed the BGs.

19. The further submission made by the learned Senior Counsel was

that assuming that there were some minor works, repair or maintenance related issues, which were required to be attended by Leighton, the value of the same could not be more than Rs.50 lakhs and in such circumstances, invocation and encashment of the BGs for a sum more than Rs.222 crores was patently illegal, fraudulent and an abuse by DLF in order to unjustly enrich itself during Covid-19 situation.

20. Further *mala fides* were disclosed by the action of DLF in invoking the BGs during the nationwide lockdown, knowing fully well that no work could be executed during the said period. When certain relaxations were granted, DLF refused to open the site and allow access to enable Leighton to assess the alleged outstanding snags/defects. Thus, the Notice of Default was only a ploy to encash the BGs and DLF never intended to get any alleged defect rectified. Moreover, a minimum of 42 days period was required to be given under Clause 15.2(c), as amended by Clause 7 of Special Conditions of Contract ("**SCC**", for short), for rectification of the defects and that period had not expired on 4th May, 2020, when the BGs were encashed. On the other hand, in terms of Clause 15.5 and Clause 16.3 of SCC, as inserted vide Clause 7 and replaced by Clause 9 of SCC respectively, DLF was required to allow the reduction in the BGs to the extent of one half and instead, it had wrongfully encashed the BGs. Further, none of the circumstances provided for under Clause 81 of GCC entitling DLF to terminate the C.A. and therefore, invoke the BGs existed justifying the action of DLF. Thus, the BGs had been invoked only to put pressure on Leighton to withdraw its legitimate monetary claims against DLF.

21. It was in these circumstances that Leighton sought interim measures of protection in relation to the amount illegally received by DLF by patently illegal actions and to that extent, had sought that a sum of Rs.222,06,00,291/- was required to be secured and protected and therefore, directions for deposit of payment of the said sum were required to be issued to DLF. Since the learned Single judge granted interim measures of protection to the extent of Rs.143,87,22,708/-, therefore, the said order be modified to include the RBGs worth Rs.78,18,77,583/- i.e., for a total sum of Rs.222,06,00,291/-.

22. Relying on the judgments reported as ***Supertrack Hotels Pvt. Ltd. v. Friends Motels Pvt. Ltd.,*** 2017 SCC Online Del 11662, ***Ajay Singh v. Kal Airways Pvt.Ltd. & Ors.,*** 2017 SCC OnLine Del 8934 and ***National Highways Authority of India v. M/s Jetpur Somnath Tollyways Limited,*** 2017 SCC Online Del 11312, learned Senior Counsel urged that the powers of the court to pass orders under Section 9 of the A&C Act could not be restricted by importing the provisions set out in Order XXXVIII Rule 5 CPC as they were very wide, including to grant interlocutory mandatory injunction to compel the undoing of wrong acts and restoration of that, which was wrongfully taken from the aggrieved party, till the final Award is passed by the learned Arbitral Tribunal.

ARGUMENTS OF DLF

23. Sh. Rajiv Nayar and Sh. Randeep Rai, learned Senior Counsel submitted that the petition under Section 9 of the A&C Act was based on non-disclosure of material facts as the petition was filed for stay on invocation and encashment of BGs, which stood already encashed prior

to the filing of the petition. It was further submitted that the PBGs and RBGs were unconditional BGs as per Clause 2 of the BG's, vesting the complete right on the owner i.e., DLF, to be the sole judge with regard to the performance of the Contract, and the Bank was not to question or ask any evidence when any demand notice was sent for encashment of the guarantees. Thus, in view of the settled law, including ***UPCOF v. Singh Consultants and Engineers*** (1988) 1 SCC 174 and ***CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corporation of India Limited & Ors.*** 2020 SCC OnLine Del 1526, Leighton could not have questioned the invocation of the BGs by DLF.

24. It was further contended that under Clause 15 of the GCC read with SCC, Leighton was required to renew the BGs 30 days prior to the expiry and non-renewal gave a right to DLF to invoke the BGs. Learned Senior Counsel further argued that though Leighton had baldly alleged fraud of an egregious nature, nothing had been established. The courts would injunct the invocation of the BGs only if there was "egregious fraud" or "special equities". Merely claiming that in Covid-19 times, financial hardship would be caused to Leighton on account of the encashment of the BGs by DLF, did not constitute "special equities".

25. To say that fraud was committed because notice had been issued by the I.E. asking renewal within 21 days i.e., till 10th May, 2020, and then encashing the same on 4th May, 2020, is without any basis as the I.E. had no powers to vary the Clauses of the GCC read with SCC, which obligated Leighton to extend/renew the BGs 30 days prior to its expiry i.e., by 30th April, 2020. DLF had only exercised its contractual rights.

26. Learned Senior Counsel further submitted that all the questions relating to the completion of work, as raised by Leighton, that more than 98% of the work had been completed, that the alleged Notice of Default dated 7th April, 2020, included work that was beyond the scope of works awarded to Leighton, that DLF had not given them the C.C., etc., were really to be decided by the learned Arbitral Tribunal.

27. According to learned Senior Counsel, the question of refund does not arise in these circumstances also because the admitted position was that some work still remained to be completed by Leighton. The value of such work was yet to be determined. DLF has opposed the arbitrary fixation of the value of such balance work at Rs.50 lakhs and contended that until and unless the Arbitral Tribunal determined what amount was actually due and payable to DLF or to Leighton, the BGs having been encashed as per law in terms of the C.A., cannot be directed to be returned to Leighton.

28. It was also informed that DLF had invoked the Arbitration Clause on 7th July, 2020 (Clause 101 of GCC, as amended by Clause 51 of SCC read with Section 21 of the A&C Act), and Justice A.K. Sikri had been appointed as the Arbitrator with the consent of Leighton. It was also informed that both the parties have filed applications under Section 17 of the A&C Act seeking various interim reliefs and securities.

29. Learned Senior Counsel also submitted that Leighton was seeking a refund under Order XXXVIII Rule 5 CPC without even disclosing a case inasmuch as there is no pleading that DLF was indulging in any such activities, which would defeat an Award, if at all granted in favour of

Leighton. In any case, the powers under Section 9 of the A&C Act cannot be so expanded to include within it powers the mandatory injunction of the nature sought by Leighton. Reliance has been placed on the decision of this Court in ***Mala Kumar Engineers Pvt. Ltd. (MKE) v. B. Seenaiah and Co. (Projects) Ltd. (BSCPL***) 2005 SCC OnLine Del 38.

30. Reliance has also been placed on the decision of this Court in ***National Highways Authority of India v. Bhubaneswar Expressway Private Limited*** 2021 SCC OnLine Del 2421 to submit that this Court ought not to enter into the arena of interpretation of the Clauses in the contract to determine either the question of improper invocation of the BGs or the mutual obligations and rights. It was also submitted that since both sides had now filed applications under Section 17 of the A&C Act before the Arbitral Tribunal and Leighton had included in its claim the refund of the amount encashed by DLF on invocation of BGs, this Court should allow the learned Arbitral Tribunal to determine the issue and not give any opinion in the matter.

31. It was also submitted that substantial disputes pending with the Arbitral Tribunal relating to claims and counter-claims are yet to be resolved. Before such resolution, any view taken by this Court on merits would be prejudicial to the parties. Reliance has been placed on the judgment of this Court in ***Ashwani Minda & Anr. v. M/S U-Shin Limited & Anr*** 2020 SCC Online Del 721.

32. It was next submitted that if the relief, as claimed by Leighton, was to be granted, namely, the refund of the value of the encashed BGs, it would tantamount to grant of final relief, as if the Section 9 application

was a recovery suit.

DISCUSSION

33. The learned Single Judge had declined prayers 'a' and 'b' which related to an injunction upon DLF and the Axis Bank from invoking or paying up the BGs respectively. DLF has relied on a number of judgments [***Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corpn. Ltd***., (1996) 5 SCC 450; ***U.P. State Sugar Corpn. v. Sumac International Ltd***., (1997) 1 SCC 568; ***Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Ltd***., (2016) 10 SCC 46; ***Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd***., (2008) 1 SCC 544; ***Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.***, (2020) 13 SCC 574; and ***State Bank of India v. Sun Pharmaceuticals Industries Ltd.***, 2019 SCC OnLine Cal 2650] to contend that the BG is an "independent contract" distinct from the "main contract". This position in law requires no re-statement. Undoubtedly, a BG is an independent contract and especially when it is unconditional, it is not to be governed by any clause of the main contract or on account of disputes that may arise between the parties to the contract. The Bank cannot refuse to honour the demand and transmit the value of the unconditional BGs, so invoked by the beneficiary, into the account of such beneficiary. Under law, the Bank is not required to obtain the permission or concurrence of the Guarantor. It is nobody's case here, that the BGs furnished by Leighton were conditional. To that extent, there is no fault that can be attached to the action of the Axis Bank in releasing the amount to DLF without seeking a confirmation from or permission of Leighton about

such invocation. This action cannot, therefore, be a reason to grant relief under Section 9 of the A&C Act.

34. DLF has also relied on ***STC v. Jainsons Clothing Corpn***., (1994) 6 SCC 597; ***Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co***., (2007) 8 SCC 110; ***Reliance Salt Ltd. v. Cosmos Enterprises***, (2006) 13 SCC 599; and ***L & T Niro Ltd. v. Mysore Paper Mills Ltd.***, 2005 SCC OnLine Guj 43, to submit that it is only when there is "egregious fraud", particularly in the creation of the BGs and/or there are "special equities" that the court would issue an injunction restraining the beneficiary from invoking the BGs and the Bank from honouring it. Since that part of the relief has not been granted, we do not need to dwell on these issues in this case.

35. There is no dispute, and as is also made out from the record, the application under Section 9 of the A&C Act was filed on the 5th May, 2020, whereas the BGs were invoked on 2nd May, 2020 and the Bank complied with the invocation and transferred the money to DLF on 4th May, 2020. In other words, on 5th May, 2020, the prayers seeking a restraint on DLF and the Bank from encashing the BGs had already become infructuous. There is no need to ascertain whether there was an "egregious fraud" committed or there were "special equities" existing in favour of Leighton to injunct DLF and Axis Bank. That chapter stands closed.

36. Before proceeding further, we may note that the learned Single Judge considered the existence of "special equities" while determining the kind of orders required to be passed while disposing of the application

under Section 9 of the A&C Act. For this purpose, even while observing that the court was not going into the merits of the claims, it looked into and considered the correspondence between the parties as also the Clauses of the C.A. along with the Clauses of the BGs. It was, therefore, concluded that the conditions prescribed for termination and invocation of BGs were not fulfilled. No notice of termination had been issued by DLF. The parties were in communication with each other to work collaboratively. And yet, without notice of invocation of the BG, and in the face of the letter from the I.E. dated 7th April, 2020, DLF had in a most distrustful manner invoked the BGs. Thus, the encashment was not justified. On the basis of all these factual findings, the learned Single Judge concluded that "special equities" existed in favour of Leighton. Thus, it found it "just and convenient" to direct that at least the PBGs be secured by means of the FDRs in the name of the Registrar General of this Court.

37. Arguments have been advanced by both sides on the nature of this order being one under Order XXXVIII Rule 5 CPC. While it has been argued on behalf of DLF that Leighton had not disclosed any case under Order XXXVIII Rule 5 CPC, to warrant such an order, the learned Senior Counsel for Leighton submitted that they had not set up a case under Order XXXVIII Rule 5 CPC but had sought restoration as an illegal act had been done by DLF.

38. Order XXXVIII Rule 5 CPC deals with attachment before judgment, and reads as follows:

> "5. ***Where defendant may be called upon to***

furnish security for production of property.- *(1) Where, at any stage of a suit, the court is satisfied by affidavit or otherwise, that the defendant,* ***with intent to obstruct or delay the execution of any decree that may be passed against him****-*

> *(a) is about to dispose of the whole or any part of his property, or*
>
> *(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,*
>
> ***the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order,*** *to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.*

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."

(Emphasis added)

39. Since the learned Single Judge has directed DLF to furnish security, we may consider whether the court would be guided by the principles of Order XXXVIII Rule 5 CPC, even if it was passing an order under Section 9 of the A&C Act. Would the court need to consider the

existence of circumstances as prescribed in Order XXXVIII Rule 5 CPC before directing a party to furnish security.

40. In ***C.V. Rao & Ors. v. Strategic Port Investments KPC Ltd. & Ors.*** 2014 SCC OnLine Del 4441, this Court had held that while exercising jurisdiction under Section 9 of the A&C Act, the Court cannot ignore the underlying principles which govern the analogous powers conferred under Order XXXIX Rules 1 & 2 CPC and Order XXXVIII Rule 5 CPC. Not only is the court required to be satisfied that a valid arbitration agreement existed between the parties, but the powers under Section 9 of the A&C Act could be exercised only for orders of an interim measure of protection in respect of the matters specified in Section 9 (ii)(a) to (e) of the A&C Act. In other words, the orders must relate to preservation of the property, which is the subject matter of the dispute, till the Arbitral Tribunal decides the same. The scope of relief under Section 9 of the A&C Act cannot be extended to directing specific performance of the contract itself.

41. This was only a reiteration of the view taken by the Supreme Court in ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd***., (2007) 7 SCC 125, where it was held that the grant of interim prohibitory or mandatory injunctions is governed by well-known rules and it cannot be imagined that the Legislature, while enacting Section 9 of the A&C Act, intended to make a provision which was *dehors* the accepted principles that govern the grant of an interim injunction or the appointment of a Receiver. Thus, it would not be possible to keep out the concept of *"balance of convenience"*, *"prima facie case"*, *"irreparable*

injury" and the concept of *"just and convenient"*, while passing interim measures under Section 9 of the A&C Act. This Court in ***Goel Associates v. Jivan Bima Rashtriya Avas Samati Ltd.*** 2004 SCC OnLine Del 874 was dealing with an application under Section 9 of the A&C Act, seeking interim orders for attachment, and found nothing amiss in reference to Order XXXVIII Rule 5 CPC while exercising powers under Section 9(ii)(b) of the A&C Act.

42. From the impugned order, it is clear that the learned Single Judge had not looked at the issue from this angle and passed orders on the basis of "special equities". It is apparent that such a case has not been set up by Leighton in its application under Section 9 of the A&C Act that DLF intended to obstruct or delay the execution of any Award that may be passed against it or was in any hurry to dispose of its properties or remove itself from the jurisdiction of the court. In the absence of any averments or pleas taken, that satisfy the requirements of Order XXXVIII Rule 5 CPC, no case for an order of attachment before judgment or for furnishing of security was made out. The orders of the learned Single Judge directing furnishing of security had to be founded on Order XXXVIII Rule 5 CPC in the light of the view taken by the Supreme Court and a Division Bench of this court, which it is not.

43. At the same time, since Leighton has sought relief of either return of the encashed amount or a security furnished by DLF to the tune of an equivalent sum that they had encashed, they are in effect seeking a mandatory injunction to restore Leighton to the *status quo ante*. Following the decision in ***Adhunik Steels Ltd. (supra)***, even then, while

disposing of an application under Section 9, principles governing grant of mandatory injunction would be relevant to decide whether directions for furnishing security are required to be passed.

44. It would be useful to reproduce the guidelines of the Supreme Court recorded in its decision in and ***Dorab Cawasji Warden v. Coomi Sorab Warden,*** (1990) 2 SCC 117, and to test whether the case of Leighton fits the bill. It was held as follows:

> *"**16.** **<u>The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status</u>** which preceded the pending controversy until the final hearing when full relief may be granted or to compel **<u>the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining</u>**. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. **<u>Generally stated these guidelines are</u>**:*
>
> *(1) **<u>The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.</u>***

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

__17.__ Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

45. Of course, it has been vehemently argued before us that DLF had illegally encashed the BGs inasmuch as the I.E. had granted 21 days' time within which the extension was to be effected, that is, Leighton had time till 10th May, 2020 to renew the BGs, but DLF encashed the same on 4th May, 2020. Additionally, it has been argued that the project had been almost completed by Leighton and DLF, as an afterthought, had sought to raise vague allegations of improper and incomplete work having been done by Leighton, to seek a justification for encashing the BGs. In answer thereto, DLF has relied on the Clauses of the C.A. to claim that BGs had to be extended within 30 days of the expiry of the validity of the BGs already furnished and that right could not be circumscribed by any letter. However, the learned Single Judge has not assessed the case on the basis

of these guidelines, but rather accepted the contentions of Leighton as the fact situation to grant relief.

46. In the present case, Leighton has claimed that certain losses were caused to it on account of the act/omission/commission of DLF, whereas DLF has accused Leighton of improper execution of the work and claims damages for breach of the C.A.. What amount would become payable to DLF or Leighton by the other, is a question still under determination. There is no basis to believe that DLF would not be entitled to any money and therefore, the invocation of the BGs would cause irreparable injury to Leighton. Leighton, on the other hand, has the right to include this amount in the claim before the Arbitral Tribunal and if it is made out that DLF was not justified in invoking the BGs, restitution can be made at that stage, and not here and now. It is clear that no strong case for grant of mandatory instructions in the form of direction to DLF to either refund the money or furnish security to the extent of the encashed BGs has been made out. The injury, if any, can be compensated in terms of money by placing a claim before the Arbitral Tribunal. The "balance of convenience" is in permitting the Arbitral Tribunal, which has since been constituted to determine the mutual liabilities and claims.

47. For the said reason, there was no occasion for the learned Single Judge to issue a mandatory direction to DLF to furnish FDRs to secure the amount, which it had encashed on the invocation of the BGs on the ground that it was "just and convenient" to do so.

48. There is another aspect that needs to be discussed. While passing interim orders, relief that would amount to grant of a final relief must be

eschewed. Also, while it is true that what would be the nature of an interim measure of protection that would appear to the court to be "just and convenient" would certainly vary from case to case. But, while deciding on the relief, the court ought not to venture into determination of liabilities and the interpretation of clauses. This Bench in ***Bhubaneswar Expressway (supra)*** has held as below-

> *"**44.** If the Courts, in exercise of powers under Section 9, start enforcing the terms of the contract, it would do extreme disservice to the very concept of arbitration, where the parties choose to have their disputes adjudicated, instead of by the Courts, by Arbitrators of their choice. In the present case, the appellant NHAI has disputed its liability for termination payment on diverse grounds, as can be understood from the narrative hereinabove of the arguments of the senior counsel for NHAI. **If this Court, while exercising jurisdiction under Section 9, were to adjudicate whether there is any legal merit in the said grounds or not, this Court would be adjudicating the disputes, which the parties have agreed to be adjudicated by arbitration and in fact there would be nothing left for the Arbitral Tribunal to decide,** as far as the claim of BEPL for the termination payment directed to be made is concerned. In fact, after reading the impugned judgment, we have also wondered what remains for the Arbitral Tribunal to decide, as far as the claim of BEPL for termination payment on a demurer, believing the breach to be on the part of BEPL, is concerned. **It is a hard reality that once there is judicial order on the merits of the dispute and which***

judicial order is not granting any interim measure but granting the final relief claimed in the arbitration proceeding, the Arbitral Tribunal would hesitate from deciding contrary to the findings returned by the Court on interpretation of terms of the Concession Agreement *and of admission, and to which Court, an application under Section 34 of the Act would lie against the award of the Arbitral Tribunal."* ***(Emphasis added)***

49. In the instant case, both sides have extensively referred to communications between them, pertaining to extension of time to complete the project, the issuance of C.C., the defaults found in the work and the Clauses of the C.A., detailing the mutual rights and obligations. Clearly, therefore, these are matters that cannot be considered by the court in an application under Section 9. But the learned Single Judge has clearly dealt with the question of illegality and had laid the fault at the door of DLF. This it did on the basis of an assessment of the facts and the Clauses of the C.A. and concluded that while DLF could have encashed the RBGs, it was not proper to have encashed the PBGs and therefore, found it "just and proper" to direct DLF to furnish FDRs of the value of Rs.143,87,22,708/-. The court has, thus, accepted the stand of Leighton, preferring it over the stand of DLF.

50. In ***CRSC Research and Design Institute (supra)***, we had occasion to make the following observations:

*"**15.** We are unable to agree with the contention of the senior counsel for the appellant that this Court, when approached for the interim*

measure of interference with unequivocal, absolute and unconditional BGs, is required to interpret the contract and/or form a prima facie opinion whether the beneficiary of the BGs has wrongfully invoked the BGs. ***Such exercise, in our view, is to be done in a substantive proceeding to be initiated by the appellant for recovery of the monies of the BGs, if averred to have been wrongly taken by the respondent No. 1 by encashment of BGs****. If any interim relief is also claimed in the said substantive proceedings, the need for taking a prima facie view, will arise therein; however not while dealing with an application for the interim measure of restraining invocation/encashment of BGs……"*

(Emphasis added)

51. Now that the Arbitral Tribunal has been constituted and claims and counter-claims along with applications under Section 17 of the A&C Act have been filed and have to be decided, it would be in the interest of fair play that this Court does not embark into an assessment of material on record to determine who was at fault and whether the BGs have been encashed in terms of the Clauses of the C.A. or illegally and unlawfully and further, to grant a relief of the nature of a final relief of refunding or restituting, as claimed by Leighton. In our view, it would be beyond jurisdiction to direct restitution in proceedings under Section 9 of the A&C Act as restitution by its very nature involves a final determination of rival contentions even if it were to appear just and proper to do so. Substantive questions have to be left to be decided in arbitration, the mode of dispute resolution chosen by the parties.

52. It is for the learned Arbitral Tribunal to determine all these issues relating to illegality of action, entitlement, liability, damages, etc.. It is also for the learned Arbitral Tribunal to consider whether DLF would be required to furnish any security in the light of the claims and counter-claims made by the parties. Suffice it to note, at this juncture, as an interim measure, no case has been made out for grant of the relief claimed of refund or security that has been prayed for by Leighton.

53. In light of the foregoing discussion, the appeal of Leighton being FAO(OS)(COMM) 64/2020 is dismissed, while the appeal of DLF being FAO(OS) (COMM) 63/2020 is allowed and the impugned order dated 13th May, 2020 is set aside. It is made clear that nothing contained in this order shall have any bearing on the arbitral proceedings.

54. Both the appeals are accordingly disposed of along with the pending applications.

55. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

(RAJIV SAHAI ENDLAW)
JUDGE

JULY 22, 2021
pkb/s