

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

COMMERCIAL ARBITRATION APPEAL NO.10 OF 2024

ALONG WITH

INTERIM APPLICATION NO.8120 OF 2024

INTERIM APPLICATION NO.313 OF 2025

Ashoka Buildcon Ltd.,	]	
Having Registered Office at :	]	
S.No.861, Ashoka House,	]	
Ashoka Marg, Vadala, Nashik-422011	]	.. Appellant/Applicant

Versus

1. Maha Active Engineers India Pvt. Ltd.,	]	
Having Registered Office at :	]	
F-108, Eastern Business District,	]	
Lal Bahadur Shastri Marg, Bhandup (West),	]	
Mumbai – 400 078.	]	
Through its Director – Mr. Sunil V. Vidolkar	]	
2. Maharashtra State Electricity Distribution	]	
Company Ltd.,	]	
Having Registered Office at :	]	
Prakashgad, G-9, Anant Kanekar Marg,	]	
Bandra (East), Mumbai – 400 051.	]	
Through its Chief Engineer (Project)	]	.. Respondents

Mr. Nikhil Sakhardande, Senior Advocate, with Mr. Hrishikesh Chitale, Mrs. Shubra Swami, i/by Mr. Hitesh B. Sangle and Mr. Abhinav Vyas, Advocates for the Appellant-Applicant.

Mr. Sharan Jagtiani, Senior Advocate, with Mr. Vishal Kanade, Ms. Bindi Dave, Mr. Aayesh Gandhi and Mr. Gaurang Samel, i/by Wadia Ghandy & Co., Advocates for Respondent No.1.

Mr. Rahul Sinha, Advocate, i/by DSK Legal, for Respondent No.2-MSEDCL.

CORAM : A.S. CHANDURKAR & RAJESH PATIL, JJ

The date on which the arguments were concluded : 21ST FEBRUARY, 2025.

The date on which the Judgment is pronounced : 30TH APRIL, 2025.

JUDGMENT : [Per A.S. Chandurkar, J.]

1. Admit. The Commercial Arbitration Appeal is taken up for final disposal with consent of learned counsel for the parties.

2. In this Commercial Arbitration Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (*for short, "Act of 1996"*), a common order dated 15th March 2024 passed by the learned District Judge – 2, Nashik below Exhibits 1, 5 and 25 in Commercial Arbitration Application No.1 of 2024 is under challenge. By the said order, the Arbitration Application preferred by the 1st respondent – Maha Active Engineers India Private Limited (*"MAEIPL" for short*) under Section 9 of the Act of 1996, read with Section 10 of the Commercial Courts Act, 2015, came to be allowed. A direction was issued to the appellant – Ashoka Buildcon Limited (*"ABL" for short*) to deposit a sum of Rs.63,27,46,890/- in Court within a period of six weeks with an alternative to furnish a bank guarantee of a nationalized bank of the said amount within a period of six weeks. ABL was also restrained from disposing of, selling, encumbering, alienating, transferring, parting with possession of, creating any third-party rights or otherwise dealing with its assets and properties, movable

and/or immovable till the commencement of the arbitration proceedings. It was also directed to deposit 20% amount as received by it from the 2nd respondent – Maharashtra State Electricity Distribution Company Limited (*“MSEDCL” for short*) within a period of six weeks and further to disclose on oath all its assets, movable and immovable, tangible and intangible with encumbrances and furnish necessary details within a period of six weeks. ABL was also directed not to enter into any compromise with MSEDCL which would have the effect of prejudicing the rights of MAEIPL without its consent. By the said order the application preferred by MSEDCL below Exhibit-25 for deleting its name from the proceedings was rejected. ABL being aggrieved by the aforesaid order, as passed below Exhibits 1 and 5, has filed the present Commercial Arbitration Appeal raising a challenge to the same.

3. Facts in brief that are relevant for considering the challenge as raised are that on 3rd October 2008, a Form of Contract Agreement came to be executed between MSEDCL and ABL pursuant to Tender No.8 floated by MSEDCL for various works of erection, testing and commissioning of sub-transmission lines, distribution lines with allied works to be carried out at the Jalna Circle, Aurangabad Rural of MSEDCL. Thereafter a Contract Agreement was entered into between ABL and MAEIPL with regard to works that were sub-contracted to MAEIPL by ABL. It is the case of MAEIPL that the work under the Contract Agreement was completed on

31st March 2011, after which ABL received some amounts from MSEDCL in that regard. MAEIPL made its demand from the aforesaid amount received by ABL and part payment thereof came to be made. After exchange of communications between ABL and MAEIPL in the matter of making of payments, MAEIPL on 19th September 2016 issued a communication to ABL seeking resolution of certain issues between them. ABL on 7th December 2016 issued a communication to MAEIPL stating therein that only an amount of Rs.2.44 crores was due and payable by it. MAEIPL on the same day pointed out the difference in the amounts and pursued its claim with ABL. After further exchange of communications, MAEIPL on 12th December 2019 raised further claims while seeking settlement of its outstanding dues. On 13th December 2019, MAEIPL demanded an amount of Rs.1.94 crores from the admitted liability of Rs.2.44 crores from ABL. Thereafter on 16th December 2019, MAEIPL invoked the arbitration clause and nominated its Arbitrator based on the cause of action dated 7th December 2016. In reply, ABL on 28th December 2019 stated that no discussions had taken place between the representatives of the parties in the light of the Dispute Resolution clause in the Contract Agreement. On 13th January 2020, MAEIPL without prejudice to its notice sought amicable resolution of the disputes with ABL. In the meanwhile, on 15th February 2020, an award was passed in favour of ABL and against MSEDCL by which ABL was awarded an amount of

Rs.48,41,40,260/-. MSEDCL challenged the aforesaid award in this Court and by an order dated 19th December 2023, on the basis of a workable arrangement between the said parties, MSEDCL deposited an amount of Rs.21,10,10,828/- by way of cash deposit and Rs.31,65,31,242/- by way of bank guarantee. The amount deposited in cash was permitted to be withdrawn by the ABL subject to furnishing an undertaking as regards refund. Thereafter on 12th January 2024, MAEIPL again invoked the arbitration clause claiming an amount of Rs.113,76,27,213/-. On 17th January 2024, MAEIPL filed an application under Section 9 of the Act of 1996 against ABL and MSEDCL making various prayers including deposit of a sum of Rs.63,27,46,890/-. ABL filed its reply on 12th February 2024 opposing the prayer for interim relief. After MAEIPL filed its rejoinder on 24th February 2024, the learned Judge by the impugned order dated 15th March 2024 decided the Arbitration Application under Section 9 of the Act of 1996, which order is impugned in the present Appeal.

4. The Commercial Arbitration Appeal was taken up on 15th July 2024 and by an interim order it was directed that subject to ABL complying with Condition No.1(iv) of the impugned order and seeking prior leave of this Court in the context of Condition No.1(v), it was permitted to deal with its assets and properties. Pursuant thereto, ABL on 3rd August 2024 filed an affidavit-of-disclosure as regards details of its assets and liabilities as well

as a provisional working balance sheet as on 18th July 2024. The investments of ABL as well as its net-worth as a Company was indicated. It is in the aforesaid backdrop that the learned counsel for the parties have been heard.

5. Mr. Nikhil Sakhardande, learned Senior Advocate for ABL made the following submissions :-

- (a) MAEIPL invoked jurisdiction under Section 9 of the Act of 1996 after considerable delay and laches :-

It was submitted that for the purpose of seeking relief under Section 9 of the Act of 1996 prior to commencement of the arbitration, it was necessary for an applicant seeking such relief under Section 9 to move the Court with reasonable expedition. The conduct of the applicant in doing so was the relevant factor while determining whether it was entitled for such relief. According to the learned Senior Advocate, the initial notice for appointment of the Arbitrator having been issued by MAEIPL on 16th December 2019, it ought to have taken immediate steps to seek relief under Section 9 of the Act of 1996. Considering the fact that the contract in question was executed and

completed by 31st March 2011, the first claim made by MAEIPL was on 19th September 2016. It was urged that the breaking point resulting in disputes between the parties had arisen on 19th December 2011 itself as it was the case of MAEIPL that the retention amount received by ABL was not paid to it within a period of seven days. Except for issuing various communications, there was silence on the part of MAEIPL after 7th December 2016 till the issuance of communication dated 12th December 2019. Thus, on the own showing of MAEIPL, the notice seeking appointment of an Arbitrator was barred by limitation. In this backdrop therefore the reliefs sought by MAEIPL could not have been granted under Section 9 of the Act of 1996. Referring to the decision of the Supreme Court in *B and T AG Vs. Ministry of Defence, 2023 INSC 549*, it was submitted that mere exchange of communications or undertaking of negotiations between the parties would not postpone the cause of action that had accrued earlier. To further substantiate this contention, the learned Senior Advocate also placed reliance on the decisions in *Bharat Sanchar*

Nigam Limited and Anr. Vs. Nortel Networks India Private Ltd., 2021 INSC 175, Geo Miller and Company Private Ltd. Vs. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd., 2019 INSC 989 and Arif Azim Company Ltd. Vs. Aptech Ltd., 2024 INSC 155. It was thus urged that the learned Judge while exercising jurisdiction under Section 9 of the Act of 1996 failed to give serious consideration to this aspect of the matter. On account of the delay on the part of MAEIPL in filing proceedings under Section 9 of the Act of 1996, the relief sought ought to have been denied to it.

- (b) In the absence of any prima facie case, balance of convenience being indicated and the absence of likelihood of any irreparable loss being made out, relief under Section 9 of the Act of 1996 could have been granted :-

It was urged that the direction issued by the learned Judge under Section 9 to deposit an amount of Rs.63,27,46,890/- within a period of six weeks or to furnish a bank guarantee of a nationalized bank for

the said amount was in the nature of a direction issued under provisions of Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (*for short, “the Code”*). Unless the principal conditions of the said provision were satisfied and unless there were specific allegations made with cogent material by MAEIPL that ABL intended to deprive MAEIPL of the fruits of litigation, such direction could not have been issued. Referring to the decision of the Supreme Court in *Sanghi Industries Ltd. Vs. Ravin Cables Ltd. and Anr., 2022 INSC 1050*, it was submitted that there was absence of necessary pleadings in this regard in the application filed under Section 9 of the Act of 1996. Though the Supreme Court in its decision in *Essar House Private Ltd. Vs. Arcellor Mittal Nippon Steel India Ltd., 2022 INSC 957* had observed that if a strong prima facie case had been made out and the balance of convenience was in favour of grant of interim relief, the same could not be refused on the basis of mere technicalities such as absence of necessary pleadings incorporating the grounds seeking attachment before judgment under Order XXXVIII

Rule 5 of the Code. Nevertheless, the said principles were required to be followed and even on that basis MAEIPL had failed to make out a prima facie case, indicate the balance of convenience in its favour and that irreparable loss would be caused to it if such relief was denied. Reference was also made to the judgment of the Delhi High Court in *Dr. Vivek Jain Vs. Prepladder Private Ltd.*, 2023 SCC OnLine Del 6370. It was urged that on a complete reading of the impugned order, there was no finding whatsoever that the Court was satisfied that there existed a prima facie case in favour of MAEIPL, the balance of convenience was in its favour and there was likelihood of irreparable loss being caused to it. Hence, no relief under Section 9 of the Act of 1996 could have been granted to it. In absence of any finding on these relevant and material aspects, the learned Judge erred in granting relief in favour of MAEIPL.

- (c) Absence of reasons to indicate the manner in which the figure of Rs.63,27,46,890/- was arrived at :-

After referring to the averments made in the application filed under Section 9 of the Act of 1996,

the reply filed by ABL, the rejoinder filed to it by MAEIPL as well as the exchange of communications between the parties it was urged that there was no indication as to how MAEIPL had arrived at the figure of Rs.63,27,46,890/-. It was submitted that till December, 2016, MAEIPL had claimed dues of Rs.2.44 crores. However in the arbitration notice issued on 16th December 2019, this figure became Rs.44,86,29,320/- without indicating the basis for the same. Subsequently, in the second arbitration notice dated 12th January 2024, the amount increased to Rs.113,76,27,213/-. In the absence of any nexus being established between the figure of Rs.63,27,46,890/- to the documents on record, the learned Judge was not justified in accepting the said figure and directing ABL to deposit such amount. Referring to the reply filed by ABL to the application filed under Section 9 of the Act of 1996, it was submitted that denial of the pleadings as made by MAEIPL was sufficient for the purposes of opposing the application filed under Section 9 of the Act of 1996. The claim if made by MAEIPL could be opposed on merits in the arbitration proceedings.

Merely on the ground that there was a mere denial of pleadings and absence of a specific case being put forth by ABL, the learned Judge was not justified in accepting the entire case set up by MAEIPL. The burden to make out a prima facie case was on MAEIPL which it failed to do. The learned Judge therefore misdirected himself while passing the impugned order under Section 9 of the Act of 1996.

(d) Scope for interference under Section 37 of the Act of 1996 :-

It was submitted that it would be open for the Court exercising jurisdiction under Section 37 of the Act of 1996 to interfere with the discretion exercised by the Court of first instance if it is shown that the Court while granting interim relief has ignored the settled principles of law and has thus exercised discretion arbitrarily. In the present case, no clear finding was recorded by the learned Judge of a prima facie case being made out by MAEIPL and that balance of convenience was on its side. It was further not found that if no relief under Section 9 was granted in favour of MAEIPL, the award if passed in its favour would be

unenforceable. Considering the fact that the arbitration proceedings had not commenced when the impugned order was passed, it was necessary for the learned Judge to have given due importance to these aspects before granting any relief under Section 9 of the Act of 1996. Referring to the judgment of this Court in *M/s. Halliburton India Operations Pvt. Ltd. Vs. Vision Projects Technologies Pvt. Ltd., 2024 BHC-OS:8918-DB*, it was submitted that ABL had made out a strong case for interference under Section 37 of the Act of 1996.

On these grounds it was urged that the impugned order was liable to be set aside and the application filed by the MAEIPL under Section 9 of the Act of 1996 was liable to be dismissed.

6. Mr. Sharan Jagtiani, learned Senior Advocate appearing on behalf of MAEIPL opposed the Commercial Arbitration Appeal and submitted as under :-

- (a) There was no delay on the part of MAEIPL in seeking relief under Section 9 of the Act of 1996:-

It was urged on behalf of MAEIPL that after receiving its notice dated 16th December 2019, ABL continued

engaging in discussions with promises of releasing the due amounts as a result of which MAEIPL awaited the payment of its dues. MAEIPL being a sub-contractor, ABL was in a dominating position and hence it had initiated proceedings under Section 9 of the Act of 1996 as a matter of last resort. In the meeting held on 15th July 2023, ABL had promised resolution of all pending issues as it was expecting to receive funds from MSEDCL pursuant to the award passed in its favour on 15th February 2020. MAEIPL got information of the fact that there was a settlement between ABL and MSEDCL pursuant to which amounts were deposited in the proceedings filed by MSEDCL for challenging the award passed against it. Since ABL stopped its discussions thereafter, it became apparent that ABL had no intention to pay the dues of MAEIPL. It was in these circumstances that the proceedings under Section 9 of the Act of 1996 came to be filed. There was no delay whatsoever in initiating such proceedings. It was further submitted that before the learned Judge, ABL had raised a plea of the arbitration proceedings being barred by limitation. The bar of

limitation was not specifically pressed in the present proceedings by contending that the same would be raised in the arbitral proceedings. However, the aspect of delay on the part of MAEIPL in filing the proceedings under Section 9 of the Act of 1996 was being raised for the first time in appeal. In any event, it was submitted that the proceedings under Section 9 had been filed with promptitude and that the learned Judge after been duly satisfied in that regard had granted relief to it. There was no substance in this contention of ABL.

- (b) A prima facie case having been made out by MAEIPL, relief was rightly granted to it :-

In this regard, the learned Senior Advocate referred to the averments made in the Arbitration Petition filed under Section 9 of the Act of 1996 as well as the affidavit-in-reply filed by ABL. Except for vague denials, ABL did not contest the claims as made by MAEIPL in the Arbitration Petition. It only raised the issue of limitation specifically. On the basis of these pleadings, it was submitted that the learned Judge in paragraphs 21 and 23 of the impugned order came to

the conclusion that MAEIPL had made out a strong prima facie case and therefore proceeded to grant the reliefs prayed for by it. There was sufficient documentary material on record to support the findings recorded by the learned Judge in this regard. The conduct of ABL clearly indicated its unwillingness to pay the dues of MAEIPL. By wrongfully withholding substantial amounts that were due to be received by MAEIPL, the learned Judge was justified in granting relief in favour of MAEIPL. Moreover, one of the considerations while exercising jurisdiction under Section 9 of the Act of 1996 was to protect the subject matter of the dispute till the passing of an award and its enforcement. Relying upon the decision of this Court in *Valentine Maritime Ltd. Vs. Kreuz Subsea Pte Ltd. and Anr., with connected matter, 2021 SCC OnLine Bom 75*, it was submitted that denial of such relief would have resulted in grave injustice to MAEIPL that was seeking a protective order. It was thus submitted that the relief granted by the learned Judge in favour of MAEIPL was not liable to be interfered.

- (c) Even in absence of the case being strictly made out under the provisions of Order XXXVIII Rule 5 of the Code, relief could be granted in the interest of justice :-

In this regard it was submitted that the learned Judge took into consideration the judgment of the Supreme Court in *Essar House Private Limited (supra)* as well as other decisions of this Court and thereafter turned down the objection as regards non-compliance of the provisions of Order XXXVIII Rule 5 of the Code by MAEIPL. The defence raised by ABL in its reply was also taken note of and thereafter on being satisfied that denial of interim relief to MAEIPL would cause prejudice, the learned Judge proceeded to grant this relief. Moreover, the obstructive conduct of ABL was also evident from the documentary material on record coupled with its ill intention of not paying the dues under contract T-08 to MAEIPL. On being satisfied that the award that was likely to be passed would merely be a paper award and that its execution would be defeated, relief was granted in favour of MAEIPL. In this regard the learned Senior Advocate placed

reliance on the decisions in *Deccan Chronicle Holdings Ltd. Vs. L & T Finance Ltd.*, 2013 SCC OnLine Bom 1005, *Ajay Singh Vs. Kal Airways Private Ltd. and Ors.*, with connected matter, 2017 SCC OnLine Del 8934, *Jagdish Ahuja and Anr. Vs. Cupino Ltd.*, with connected matter, 2020 SCC OnLine Bom 849, *Dinesh Gupta and Ors. Vs. Anand Gupta and Ors.*, 2020 SCC OnLine Del 2099, *Kotak Mahindra Bank Ltd. Vs. Williamson Magor & Co. Ltd. and Anr.*, 2021 SCC OnLine Bom 305, *J.P. Parekh and Anr. Vs. Naseem Qureshi and Ors.*, 2022 : BHC-OS : 8897 and *Karanja Terminal & Logistics Pvt. Ltd. Vs. Sahara Dredging Ltd.*, 2023 SCC OnLine Bom 594. It was thus submitted that this contention raised by ABL did not warrant acceptance.

(d) Interference with exercise of discretion by the Court of first instance :-

It was submitted that in exercise of appellate jurisdiction under Section 37 of the Act of 1996, the Court would not interfere with the exercise of discretion of the Court of first instance and substitute its discretion in that regard. It was only if the Court of

first instance had exercised discretion arbitrarily, capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions, there was a scope for interference. Since the learned Judge considered all relevant aspects that were urged before him and after being duly satisfied in that regard proceeded to grant interim relief, there was no reason to interfere with the same only on the premise that different view of the matter could be taken by this Court. Since a possible view of the matter was taken by the learned Judge under Section 9 of the Act of 1996, there was no reason to interfere with the exercise of such discretion. To substantiate this contention, the learned Senior Advocate placed reliance on the decisions of the Supreme Court in *Wander Ltd. and Anr. Vs. Antox India P. Ltd.*, 1990 Supp Supreme Court Cases 727, *Shyam Sel and Power Ltd. and Anr. Vs. Shyam Steel Industries Ltd.*, 2022 INSC 303 and the decisions of this Court in *Stoughton Street Tech Labs Pvt. Ltd. Vs. Jet Skyesports Gaming Pvt. Ltd. (Appeal (Lodging) No.16492 of 2022 decided*

on 6th June 2022), Ambrish H. Soni Vs. Chetan Narendra Dhakan and Ors., with connected matter, 2024 SCC OnLine Bom 2820 and M/s. Halliburton India Operations Pvt. Ltd. (supra). It was therefore urged that ABL had failed to make out any case whatsoever for causing interference in exercise of appellate jurisdiction under Section 37 of the Act of 1996.

On the basis of these contentions, it was submitted that there was no merit in the Commercial Arbitration Appeal preferred by ABL and the same was liable to be dismissed.

7. We have heard the learned counsel for the parties at length and with their assistance we have perused the documentary material on record. We have thereafter given due consideration to the respective submissions made by the learned counsel. The same therefore fall for consideration.

7.1 (i) Interference by an appellate Court with the exercise of discretion by the Court of first instance :-

The impugned order dated 15th March 2024 has been passed in exercise of jurisdiction under Section 9 of the Act of 1996. The said order proceeds to issue various directions against ABL to deposit the

quantified amount in Court or furnish a bank guarantee for such amount, restrains it from alienating or creating third party rights in its assets and properties till the commencement of the arbitration proceedings, further directs ABL to deposit 20% of the amount received by it from MSEDCL in the arbitration proceedings with it and also directs it to file an affidavit-of-disclosure of its assets. It restrains ABL from entering into any compromise with MSEDCL in the pending arbitration proceedings. These directions have been issued while exercising jurisdiction under Section 9 of the Act of 1996. The same being in the nature of an exercise of discretion, the scope for interference by the appellate Court is well settled. As held in *Wander Ltd. and Anr. (supra)* that if the Court of first instance has exercised discretion reasonably and in a judicial manner, merely because the appellate Court would have taken a different view would not be a justifiable reason to interfere with the exercise of discretion by the Court of first instance. In its subsequent decision in *Shyam Sel and Power Ltd. and Anr. (supra)*, it was reiterated that the scope for

interference by the appellate Court was limited. The ratio of the aforesaid decisions has been subsequently followed by various Division Benches in the decisions relied upon by the learned Senior Advocate for MAEIPL.

- (ii) On the basis of the aforesaid tests, it would be necessary to examine the challenge as raised by ABL to the impugned order. If it is found that the exercise of discretion by the Court of first instance was without recording any satisfaction as to making out of a prima facie case, absence of consideration of balance of convenience and likelihood of irreparable loss, the impugned order would be liable to be interfered with. As observed in *Shyam Sel and Power Ltd. and Anr. (supra)*, the three tests in the matter of grant of interim injunction are required to be first considered in the form of a prima facie case being made out, balance of convenience being in favour and irreparable injury being caused. Some indication of these tests being satisfied before the grant of injunction would be necessary. Similarly, the consideration as to whether settled principles of law

regulating grant or refusal of interlocutory injunction are satisfied would also require consideration. The scope for interference is no doubt limited but an exercise in the aforesaid context can be undertaken by the appellate Court while examining a challenge to a discretionary order. Keeping these aspects in mind, the challenge to the impugned order would have to be examined.

7.2 Aspect of delay in seeking relief under Section 9 of the Act of 1996 :-

- (i) To consider this aspect, a brief reference to the averments made in the application filed under Section 9 of the Act of 1996 by MAEIPL would be necessary. After referring to various factual aspects, MAEIPL in paragraph 3.31 has referred to addressing a communication dated 19th September 2016 to ABL with regard to the discussions that took place between the parties on 8th September 2016. After referring to the exchange of communications between ABL on 7th December 2016 and the response by MAEIPL on 7th December 2016, it has been stated that on 17th December 2016 ABL paid an amount of

Rs.49,00,000/- to MAEIPL though it was entitled to receive a much higher amount. These averments can be found in paragraph 3.35. In paragraph 3.36, it is pleaded that numerous meetings were held between the parties but ABL did not comply with its obligations under the Contract Agreement. In paragraph 3.37 it is pleaded that MAEIPL addressed a communication dated 12th December 2019 seeking consideration of its claims. As there was no response to the same, it is pleaded in paragraph 3.38 that MAEIPL initiated the arbitral process on 16th December 2019. ABL responded to the same on 28th December 2019 and sought resolution of the disputes amicably as pleaded in paragraph 3.39. There is reference to communication dated 13th January 2020 issued by MAEIPL in paragraph 3.40. After referring to the award passed by the learned Arbitrator in favour of ABL on 15th February 2020 in paragraph 3.43, MAEIPL has thereafter pleaded in paragraph 3.48 that on 5th January 2024 it addressed an e-mail to ABL seeking entitlement to amounts under the Contract Agreement which ABL had received in the award dated 15th

February 2020. On there being no response to the aforesaid, it is stated in paragraph 3.49 that the Advocates of MAEIPL issued further communication on 12th January 2024. It is on this basis pleaded in paragraph 6 that as on 10th January 2024, MAEIPL was entitled to receive an amount of Rs.63,27,46,890/- from ABL. The application under Section 9 of the Act of 1996 was accordingly filed on 17th January 2024.

- (ii) Coming to the reply filed on behalf of ABL to the application filed under Section 9 of the Act of 1996, it has denied the averments made by MAEIPL in the said proceedings. It has further denied the claim as made by MAEIPL to the amount of Rs.63,27,46,890/-. In its specific pleadings from paragraph 86 onwards, it has been stated that there was no cause of action for MAEIPL to file the application under Section 9 of the Act of 1996. In paragraph 89, it has been pleaded that the claim made by MAEIPL was time barred and that the proceedings were barred by limitation. In paragraph 94, it has been pleaded that since the proceedings had been filed belatedly, there was no

prima facie case in favour of MAEIPL to grant any relief whatsoever. In paragraph 96, it is stated that though the arbitration clause was invoked vide notice dated 16th December 2019, no steps were taken thereafter. It was thus pleaded that no relief be granted to MAEIPL on these counts.

(iii) MAEIPL filed its rejoinder affidavit denying that the proceedings filed by it were barred by limitation. It referred to part payments made by ABL between 27th January 2012 to 13th June 2014. It also referred to certain other payments made thereafter. It has further referred to registration of a First Information Report on 23rd September 2022 against ABL, its General Manager and its employees in relation to a bribery case in Patna, Bihar. It was further stated that in May 2023, the National Highways Authority of India had withdrawn a Letter of Award that had been granted to ABL. On this basis it was reiterated that the prayers made under Section 9 of the Act of 1996 were liable to be granted.

(iv) On a consideration of the pleadings of the parties in the application filed under Section 9 of the Act of

1996 and reply thereto, it becomes evident that the work under the contract was stated to be completed sometime in the year 2011. On 17th December 2016, ABL paid an amount of Rs.49,00,000/- to MAEIPL. After exchange of various communications, MAEIPL invoked the arbitration clause by its communication dated 16th December 2019. There was again some exchange of communications between the parties and in the meanwhile the Sole Arbitrator passed his award in favour of ABL and against MSEDCL on 15th February 2020. In the proceedings filed by MSEDCL for challenging the said award, an interim arrangement was made on 19th December 2023 after which on 5th January 2024 MAEIPL issued an e-mail to ABL seeking payment of its dues under Contract T-08. This was followed by their Advocate's communication dated 12th January 2024 and filing of the proceedings under Section 9 of the Act of 1996 on 17th January 2024.

- (v) One of the factors to be considered before grant of any relief under Section 9 of the Act of 1996 is whether the applicant has approached the Court with reasonable expedition. This aspect has been

considered by the Supreme Court in *Essar House Private Ltd. (supra)* and thereafter in *Sepco Electric Power Construction Corporation Vs. Power Mech Projects Limited, 2022 INSC 981*. In other words, besides the triple test of a prima facie case, balance of convenience and irreparable loss, the conduct of the applicant in approaching the Court with reasonable expedition under Section 9 of the Act of 1996 is also relevant. If the documentary material on record is considered, it becomes clear that MAEIPL has been pursuing its demands with ABL since 2012 onwards after the work under the Contract Agreement was completed by it as a sub-contractor. It is noticed from the record that after ABL paid an amount of Rs.49,00,000/- to MAEIPL on 17th December 2016, the next communication addressed by MAEIPL as pleaded in paragraph 3.37 is on 12th December 2019, “as a matter of final attempt”. Prima facie, this would indicate absence of any steps on the part of MAEIPL after 17th December 2016 till 12th December 2019 as per their pleaded case. Again, after the award was passed by the Sole Arbitrator on 15th February 2020, it

is only on 5th January 2024 that MAEIPL has addressed an e-mail to ABL seeking its dues under the Contract Agreement. Taking the aforesaid as a cause of action for seeking relief, MAEIPL has instituted proceedings under Section 9 of the Act of 1996.

- (vi) On a consideration of the aforesaid pleadings as well as the communication dated 5th January 2024 issued by MAEIPL, it becomes evident that after 17th December 2016 when an amount of Rs.49,00,000/- was paid by ABL to MAEIPL, for a period of about three years it has not been indicated as to whether MAEIPL took any further steps in the matter. We have referred to the pleadings in paragraph 3.37 of the application preferred by MAEIPL under Section 9 of the Act of 1996 in that regard. Further, after invoking the arbitration clause against ABL on 16th December 2019, MAEIPL in its communication dated 5th January 2024 has stated that after 16th December 2019 it did not precipitate the matter and was regularly following it up with ABL. Again, there are no further communications placed on record after 16th December 2019 till the issuance of notice on 5th January 2024. In

the backdrop of the fact that the work under the contract was stated to be completed in 2011, the absence of effective steps from December 2016 till December 2019 and thereafter from 16th December 2019 till 5th January 2024 would be a factor to be considered. This aspect would be relevant while considering the entitlement to grant of discretionary reliefs under Section 9 of the Act of 1996. As noted above, the conduct of a party in moving the Court with expedition is also considered material besides satisfying the triple test of making out a prima facie case, indicating the balance of convenience in its favour and the likelihood of irreparable loss being caused.

(vii) The aforesaid conduct of MAEIPL as is evident from its pleadings can be dissected into two parts; one part being its entire claim that it has to recover from ABL pursuant to the Contract Agreement dated 24th February 2009 and the other part based on the award passed by the Sole Arbitrator on 15th February 2020 followed by the order passed on 19th December 2023 in the proceedings filed by MSEDCL under Section 34

of the Act of 1996 against ABL. As regards the claim of MAEIPL for recovery of its entire dues is concerned, after receiving an amount of Rs 49,00,000/- from ABL on 17th December 2016 the invocation of the arbitration clause is only on 16th December 2019. Thereafter, the next notice referred to is dated 5th January 2024. This is in view of the interim arrangement made between MSEDCL and ABL in the Section 34 proceedings on 19th December 2023. In the said proceedings as per the Consent Minutes of Order, MSEDCL was required to deposit Rs.91,12,12,106/- being 20% in the form of cash deposit and also furnish a bank guarantee for an amount of Rs.136,68,18,158/- towards balance 30% . The claim made by MAEIPL under Section 9 is for an amount of Rs.63,27,46,890/- as on 10th January 2024. According to MAEIPL's own case, it was entitled for an amount of Rs.9,74,12,889/- from the 20% amount of cash that was directed to be deposited by MSEDCL and Rs.14,61,19,333/- from the 30% amount secured by bank guarantee. This has been specifically pleaded by MAEIPL in paragraph 3.46 of the application filed

under Section 9 by it. The relevant pleadings in that regard read as under :-

“In view of the Contract Agreement, the Petitioner is entitled to receive an amount of INR 48,70,64,444/-, which is the Petitioner’s entitlement from the amounts which Respondent No.1 would receive from Respondent No.2 in respect of the work carried out by the Petitioner. Consequently, the Petitioner is entitled to INR 9,74,12,889/- out of the said 20% amount being deposited by Respondent No.2 and INR 14,61,19,333/- of the said 30% amount being secured.”

This aspect has been referred to in paragraph 9 of the impugned order.

- (viii) In our view, MAEIPL has acted with expedition only after 19th December 2023 when the interim arrangement by consent was arrived at between MSEDCL and ABL. An e-mail has been issued on 5th January 2024 and the Arbitration Petition was filed on 17th January 2024. We are therefore inclined to hold that MAEIPL has invoked the jurisdiction under Section 9 of the Act of 1996 with expedition only in view of the Consent Minutes of Order dated 19th December 2023. Thus, on the backdrop of the said

arrangement between MSEDCL and ABL, the claim of MAEIPL deserves consideration under Section 9 to that extent. This finding is recorded after considering the response of MAEIPL after it invoked the arbitration clause on 16th December 2019 and thereafter proceeded to issue the second arbitration notice only on 12th January 2024.

Thus, considering the overall conduct of parties including the case set up by MAEIPL in the Arbitration Petition under Section 9 of the Act of 1996 as well as its pleadings in paragraph 3.46 referred to earlier, the same deserves to be considered to the extent it is based on the award dated 15th February, 2020.

7.3 Entitlement to relief under Section 9 :-

- (i) The claim made by MAEIPL in the Arbitration Petition filed by it under Section 9 of the Act of 1996 is for an amount of Rs 63,27,46,890/-. The claim in this regard is yet to be adjudicated. The manner in which this figure has been arrived at by MAEIPL has not been clearly indicated in its Arbitration Petition. However, as per the pleaded case of MAEIPL in paragraph 3.46

of the Arbitration Petition it claims entitlement to a portion of amount deposited by MSEDCL in cash and the bank guarantee furnished. The response of ABL in its pleadings is of a general nature. Its specific defence is based on the aspect of limitation qua the entire claim of MAEIPL. It is however not the case of ABL that MAEIPL was never appointed as its sub-contractor for the work under Contract T-08 or that it was not entitled to any amount at all. An amount of Rs 49,00,000/- has admittedly been paid by ABL on 17th December, 2016. The dispute thus is as regards the balance amounts receivable by MAEIPL from ABL. Further, the arbitration proceedings between ABL and MSEDCL resulting into award dated 15th February 2020 also relate to Contract T-08. It is for this very work that MAEIPL was appointed as sub-contractor by ABL.

- (ii) As stated earlier, the reply filed by ABL indicates that it has chosen to simply deny the case of MAEIPL. It contends that adjudication of the outstanding amounts could be undertaken in the arbitration proceedings. It has merely stated that the claim of MAEIPL was barred

by limitation. In our view, ABL ought to have come up with its definite stand on the pleadings of MAEIPL in the Arbitration Petition. Whether an applicant has satisfied the triple test of making out a prima-facie case, balance of convenience in its favour and likelihood of irreparable loss has to be adjudged on the basis of the case pleaded by the applicant and the response of the non-applicant. Simplicitor denial by itself may not, in a given case, dislodge the entire case of the applicant. The overall material on record as well as conduct of parties would be required to be taken in to consideration while recording a prima-facie conclusion in this regard.

- (iii) As regards the contention raised on behalf of ABL that there was absence on the part of MAEIPL in strictly complying with the requirements of Order XXXVIII Rule 5 of the Code prior to granting any relief under Section 9 of the Act of 1996, in our view, the ratio of the decisions in *Essar House Private Ltd.* and *Sepco Electric Power Construction Corporation (supra)* could be made applicable to the facts of the present case. It has been held in the aforesaid decisions that though

jurisdiction under Section 9 of the Act of 1996 should not ordinarily be exercised, ignoring the basic principles of procedural law, the technicalities of the Code cannot prevent the Court from securing the ends of justice. All that the Court was required to see was whether the applicant seeking relief had made out a prima facie case, whether the balance of convenience was in its favour and whether there was a likelihood of irreparable loss being caused. On these aspects being satisfied, the Court exercising power under Section 9 of the Act of 1996 may not withhold relief merely on the technicality of absence of averments incorporating the grounds under Order XXXVIII Rule 5 of the Code.

- (iv) In this regard, we may refer to a recent decision of the Division Bench of this Court in *Ebix Cash World Money Limited Vs. Ashok Kumar Goel and Ors.*, 2025:BHC-OS:4892-DB. It was observed in the aforesaid context as under :-

8(c)(iii) It is no doubt true that in *Sanghi Industries Limited (supra)*, the Supreme Court has held that if in a

given case all the conditions of Order XXXVIII Rule 5 of the Code are satisfied and that the Commercial Court is satisfied on the conduct of the opposite party that it is trying to sell its properties to defeat the Award that may be passed and/or any other conduct on the part of the opposite party which may tantamount to any attempt on its part to defeat the Award that may be passed in the Arbitral proceedings, the Commercial Court could pass an appropriate order including a restraint order to secure the interest of the parties. It may be noted that the Supreme Court in the said case however noticed that there were serious disputes on the amount claimed by the parties before it which were yet to be adjudicated in the proceedings before the Arbitral Tribunal. We may also note that in *Sepco Electric Power Construction Corporation (supra)*, the Supreme Court considered the decisions of this Court in *Jagdish Ahuja Vs. Cupino Limited*, 2020 4 Bom CR 1, *Valentine Maritime Limited (supra)* and the judgment of the Delhi High Court in *Ajay Singh vs. Kal Airways Private Limited*, 2017 4 ArbLR 186. It specifically approved the view taken in

the aforesaid decisions and thereafter held that the presence of a good *prima facie* case, balance of convenience and approaching the Court with reasonable expedition were relevant factors.

- (v) In that view of the matter, we are of the opinion that the interest of MAEIPL deserves to be protected to the extent of the claim made by it in paragraph 3.46 of the Arbitration Petition. This is in view of the fact that under the sub-contract between ABL and MAEIPL, it is entitled to receive 91% consideration towards the total work of Contract T-08 from the amounts to be received by ABL. The work in question is stated to have been completed on 31st March 2011. Part payment to some extent has been made by ABL. The fact that the Court of first instance has exercised discretion in favour of MAEIPL is also a factor that cannot be entirely overlooked. Thus, taking an overall view of the matter on the basis of the material on record, the conduct of parties and their contractual obligations, we are of the view that MAEIPL has, to a limited extent, made out a case for entitlement to relief under Section 9 of the Act of 1996.

(vi) Having said that, it has to be noted that the learned Judge in the impugned order has not given any reasons for accepting the figure of outstanding dues as Rs.63,27,46,890/- while directing ABL to secure the same. In the absence of MAEIPL showing expedition in invoking the provisions of Section 9 of the Act of 1996 after having invoked the arbitration clause on 16th December 2019 coupled with absence of sufficient material to hold that an amount of Rs.63,27,46,890/- ought to be secured in its favour, the impugned order is liable to be modified to that extent. Instead of accepting this figure as stated by MAEIPL, we would therefore prefer to consider the amount awarded by the learned Arbitrator in his award dated 15th February, 2020. As regards Contract T-08, the amount awarded to ABL is Rs 48,70,64,444/-. As per the pleaded case of MAEIPL, it claims an amount of Rs 9,74,12,889/- from the 20% amount of cash deposited by ABL as per the Consent Minutes. It also claims an amount of Rs.14,61,19,333/- from the 30% amount of bank guarantee furnished by MSEDCL. Except for mere denial, ABL has not set up any specific defence

qua these pleadings. Hence, to that extent the order passed by the learned Judge deserves to be interfered with and modified. It is also to be noted that pursuant to the interim order dated 15th July 2024, ABL has filed its affidavit of disclosure giving details of its immovable and movable assets. The direction issued by the learned Judge to that extent stands complied with.

8. In the light of discussion made hereinabove, the following order is passed :-

- (i) The common order passed by the learned District Judge-2, Nashik below Exhibits 1, 5 and 25 dated 15th March 2024 in Commercial Arbitration Application No.1 of 2024 is partly modified.
- (ii) Ashoka Buildcon Limited is directed to deposit an amount of Rs.9,74,12,889/- and furnish bank guarantee for an amount of Rs.14,61,19,333/- within a period of six weeks from today with District Court, Nashik.
- (iii) Ashoka Buildcon Limited shall not enter into any compromise with the Maharashtra State Electricity Distribution Company Limited that would affect the rights

of Maha Active Engineers India Pvt. Ltd. without its written consent.

9. The Commercial Arbitration Appeal is partly allowed in aforesaid terms, leaving the parties to bear their own costs. The Interim Applications are also disposed of.

[RAJESH PATIL, J.]

[A.S. CHANDURKAR, J.]