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HIGH COURT OF GUJARAT (*D.B.*)

ARCELORMITTAL NIPPON STEEL INDIA LTD
Versus
ESSAR BULK TERMINAL LTD

Date of Decision: 17 August 2021

Citation: 2021 LawSuit(Guj) 2521

Hon'ble Judges: R M Chhaya, Nirzar S Desai

Case Type: Special Civil Application

Case No: 10492 of 2021

Subject: Arbitration, Civil, Constitution

Editor's Note:
Code of Civil Procedure, 1908 - Section 18 - Arbitration and Conciliation Act, 1996 - Sections 11, 9, 37, 17 and 36 - Arbitral proceeding - Interim application - Under Section 9 - Scope - Held - Scope and object of Section 9 is only limited to the interim measures and it is not akin to the provisions of Section 8 of the Act wherein the Court has power to refer the parties to the arbitration where there is an arbitration agreement - Section 9 of the Act only deals with the interim measures and it is not within the scope of this Section for the Court to refer the dispute to the Arbitral Tribunal - Section 9 can be resorted to by a party even before the arbitral proceedings and pendency of any arbitral proceeding is not a pre-condition for exercise of power by a Court under Section 9 - Petition dismissed. [Paras 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25]

Law Point - Section 9 can be resorted to by a party even before the arbitral proceedings and pendency of any arbitral proceeding is not a pre-condition for exercise of power by a Court under Section 9.

Acts Referred:
Constitution Of India Art 227, Art 15, Art 134(2)
Code Of Civil Procedure, 1908 Sec 18
Arbitration And Conciliation Act, 1996 Sec 11(6), Sec 9(1), Sec 9, Sec 9(3), Sec 37, Sec 17, Sec 9(2), Sec 36, Sec 11
Arbitration And Conciliation (Amendment) Act, 2015 Sec 9, Sec 17

Final Decision: Petition dismissed

Advocates: Mihir Thakore, Gourab Banerjee, Navin Pahwa, Nirag N Pathak, Rishab Gupta, Sairam Subramanian, Shreya Gupta, Swagata Ghosh, Juhi Gupta, Saloni Gupta, Archismita Raha, Kapil Sibal, Saurabh Soparkar, Keyur D Gandhi, Mahesh Agarwal, Raheel Patel, Amita Katragadda, Nizam Pasha, Nanavati Associates

Cases Referred in (+): 32

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[1] By way of this petition under Article 227 of the Constitution of India, the petitioner - original applicant has challenged the order dated 16.7.2021 passed by the Commercial Court and learned 12th Additional District Judge, District and Sessions Court, Surat below interim application filed by the applicant in Commercial CMA no.2 of 2021.

As all documents including the material relied upon before the trial court is forming part of the record of this petition, we do not deem it fit to call for the original record and proceedings but to decide this petition on the basis of the record before us. The pleadings and documents which are relied upon by the parties before the trial court is part of the paper book. We have called for the original record and proceedings of IAAP 5 of 2021.

[2] Following noteworthy facts emerge from the record of the petition:-

2.1 That, the parties to this petition entered into Cargo Handling Agreement (CHA) (hereinafter referred to as "the agreement") on 21.2.2011. It appears from the record that Article 15 of the said agreement stipulates that the disputes between the parties arising out of the said agreement shall be settled by way of arbitration. As per the record, several amendments were made in the said agreement. However, they are not necessary to be mentioned in this order. Record further shows that the disputes arose between the parties regarding the agreement in the month of December, 2019. The record further shows that the petitioner issued a notice to the respondent invoking the arbitration between the parties in relation to the agreement in the question on 22.11.2020. The notice dated 22.11.2020 was replied by the respondent on 30.12.2020. The petitioner herein filed a petition before this Court under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for the sake of brevity) which came to be registered on 5.1.2021 before this Court as IAAP no.5 of 2021 seeking appointment of an Arbitral Tribunal to adjudicate the disputes between the parties. On 8.1.2021, this Court (Coram: Ms. Bela M. Trivedi, J.) issued notice in IAAP no.5 of 2021. The petitioner herein filed an application under Section 9 of the Act before the

Commercial Court at Surat on 15.1.2021. The said application was contested by the respondent before the Commercial Court at Surat and hearing of the said application took place before the Commercial Court at Surat from January 18, 2021.

2.2 The respondent also filed an application for interim measure as provided under Section 9(1) of the Act before the same Court i.e. Commercial Court at Surat.

2.3 Both the applications were heard together and final arguments in both the applications under Section 9(1) of the Act were made by both the sides before the Commercial Court at Surat between May 17, 2021 to June 7, 2021 both were made by both the sides before the commercial Court the applications were heard together and kept for orders ultimately on June 7, 2021. Record indicates that the Commercial Court at Surat was to pronounce the orders on both the applications filed by the respective parties under Section 9(1) of the Act on June 18, 2021, however, did not pronounce the orders and the matter was adjourned to 3.7.2021 for pronouncement of orders. Even on that day, the Commercial Court could not pronounce the orders on both the applications under Section 9(1) of the Act filed by the respective parties and the matter was kept for orders on July 20, 2021. Meanwhile, the application filed under Section 11(6) of the Act by the petitioner was allowed with consent on an express written agreement between the parties and by an order dated 9.7.2021, which is referred to hereinafter, this Court was pleased to appoint Arbitral Tribunal, consisting of Hon'ble Mr. Justice Vikramjit Sen and Hon'ble Mr. Justice G.T. Nanavati, former Judges of the Hon'ble Supreme Court of India as arbitrators and Hon'ble Mr. Justice Deepak Gupta, former Judge of the Hon'ble Supreme Court as presiding arbitrator. The petitioner herein filed an application before the Commercial Court at Surat on July 16, 2021 and, inter-alia, prayed as under:-

"a. Pass an order referring all disputes between the parties as mentioned in the AMNS Petition and EBTL Petition to the arbitral tribunal for adjudication; and"

2.4 The Commercial Court at Surat, after hearing both the parties, was pleased to dismiss the said application and while dismissing the said application filed by the petitioner, vide impugned order dated 16.7.2021, granted 10 days' time to the petitioner herein-original applicant to enable them to challenge the order before this Court. Being aggrieved by the same, the present petition is filed under Article 227 of the Constitution of India.

2.5 This Court passed the following order on 26.7.2021:-

"Heard Mr. Harish Salve, learned Senior Advocate, Mr. Mihir Thakore, learned Senior Advocate, Mr. Navin Pahwa, learned Senior Advocate assisted by Mr. Nirag N. Pathak, learned advocate, Mr. Rishab Gupta, learned advocate and Mr. Sairam Subramanian, learned advocate for the petitioner and Mr. Kapil Sibal, learned Senior Advocate, Mr. Saurabh Soparkar, learned Senior Advocate assisted by Mr. Keyur Gandhi, learned advocate for Nanavati Associates and Mr. Mahesh Agarwal, learned advocate for the respondent.

Heard both the learned Senior Advocates appearing for the respective parties extensively.

Considering the issue involved in the matter, we deem it fit to fix the matter for **final disposal on 2 nd August, 2021 at 02:30 p.m.**

Both the parties shall submit their written submissions as well as copies of judgments, which they intend to rely upon.

As can be seen from the record that the trial Court fixed the matter for pronouncement of order on 20.07.2021, as while pronouncing the impugned order in para-21, the trial Court has granted 10 days time to the applicant-petitioner herein to enable the applicant-petitioner herein to challenge the order dated 16.07.2021. In the facts and circumstances of the case, as this Court has taken cognizance of the matter, the trial Court is directed to postpone the date of pronouncement of judgment to 09.08.2021.

The Registrar General is directed to communicate a copy of this order to the trial Court through e-mail / FAX forthwith.

Direct service is permitted."

[3] Both the sides have filed their written submissions. However, the learned counsels have not based their arguments entirely on such written submissions, which are taken on record.

[4] The application under consideration was filed by the petitioner-original applicant. It was averred by the petitioner that the Court had heard the applications filed by the petitioner as well as the respondent under section 9(1) of the Act extensively and reserved the applications for pronouncement of orders and was listed on 20.7.2021 for pronouncement of order. Referring to and relying upon the order passed by this Court in IAAP no.5 of 2021, it was contended by the petitioner that as the Arbitral Tribunal has now been constituted, it is imperative under Section 9(3) of the Act that all disputes between the parties including the interim reliefs claimed by the petitioner

and/or the respondent be adjudicated by the Arbitral Tribunal. Relying upon the judgment of the Hon'ble Calcutta High Court in the case of Tufan Chatterjee Vs. Rangan Dhar, 2016 AIR(Cal) 213 as well as judgment of this Court in the case of Manbhupinder Singh Atwal Vs. Neeraj Kumarpal Shah, 2019 4 GLR 3229 as well as the judgment of the Hon'ble Bombay High Court in the case of **Nehru Nagar Vijay Lenyadri C.H.S.L. Vs. S.D. Bhalerao Construction Pvt. Ltd.,2018 SCCOnLineBom 20461**, it was contended by the applicant before the Commercial Court that in light of the order whereby the Arbitral Tribunal has been constituted, it becomes imperative that the application filed by both, the petitioner and the respondent, pending before the Commercial Court at Surat be referred for adjudication to Arbitral Tribunal. It was also contended by the petitioner-original applicant that there is no reason why the reliefs claimed for by the petitioner as well as the respondent in their respective applications filed under Section 9(1) of the Act would be rendered inefficacious if they are adjudicated by the Arbitral Tribunal as opposed to the Commercial Court. It was also contended on the same aspect that more than four months have passed since then and none of the parties have faced any prejudice owing to pendency of the applications and it was contended that as such there is no urgency in the said matter and the matter can wait adjudication by the Arbitral Tribunal and on such factual basis, the petitioner has prayed for the prayers as referred to hereinabove.

[5] Heard Mr. Mihir Thakore, Mr. Gourab Banerjee, Mr. Navin Pahwa, learned Senior Advocates assisted by Mr. Nirag Pathak, Mr. Rishab Gupta, Mr. Sairam Subramanian, Ms. Shreya Gupta, Ms. Swagata Ghosh, Ms. Juhi Gupta, Ms. Saloni Gupta, Ms. Archismita Raha, learned advocates for the petitioner and Mr. Kapil Sibal, Mr. Saurabh Soparkar, learned Senior Advocates assisted by Mr. Keyur D. Gandhi, Mr. Mahesh Agarwal, Mr. Raheel Patel, Ms. Amita Katragadda, Mr. Nizam Pasha, learned advocates for Nanavati Associates for the respondent.

[6] By an order dated 5.8.2021, the compilations filed by both the sides are taken on record and are also made basis of this judgment and order.

[7] Mr. Mihir Thakore, learned counsel for the petitioner, at the outset, contended that the respondents have raised an objection to the effect that the petitioner cannot seek a writ of **certiorari** in a matter arising from the Trial Court is correct. Mr. Thakore further submitted that what has been prayed for is to call for the record and proceedings and the petition is under Article 227 of the Constitution of India and the word "certiorari" is a surplus aid. Mr. Thakore, at this stage, contended that the petitioner has no objection to delete the word "certiorari" and that this Court may be pleased to permit the petitioner to amend the petition and delete the relevant portion out of the prayers. Mr. Thakore contended that the petitioner would pray only for calling for the record and proceedings and merely to quash and set aside the impugned order. Mr. Thakore,

referring to the factual matrix arising out of this petition, contended that a Cargo Handling Agreement dated 21.2.2011 was entered into between the respondent and Essar Steel Ltd., the predecessor of the present petitioner now known as ArcelorMittal Nippon Steel India Limited. Mr. Thakore, referring to Article 15 of the agreement, contended that an arbitration clause is provided thereunder. It was also pointed out by Mr. Thakore that the agreement has undergone various amendments. However, it was submitted that those amendments were not relevant for the present purpose. Mr. Thakore also referred to the Service Level Agreement entered into between the parties which came to be revised on 1.4.2016 and more particularly, referred to in Paragraphs 7 and 11 of the said Service Level Agreement. Mr. Thakore, further relying upon the factual matrix, contended that a notice for invoking the arbitration clause was given by the petitioner to the respondent on 22.11.2020 and as there was no response to the notice for a mandatory period of 30 days, the petitioner filed an application under Section 11 of the Act for appointment of arbitrator on 24.12.2020 before this Court. It was contended by Mr. Thakore that after the said application under Section 11(6) of the Act was filed before this Court, the respondent gave reply to the notice of arbitration vide their reply dated 30.12.2020. Mr. Thakore further contended that on 12.1.2021, there was a sudden and abrupt reduction in the draft of the port announced by the respondent, which they claimed that this is as per the agreement. It was contended that there were vessels waiting with a higher draft which could not enter because of change in draft declared by the respondent and those vessels were the vessels, which were approved by them earlier. Mr. Thakore pointed out that because of such reason, an application for interim measures was filed by the petitioner on 15.1.2021 before the competent Court i.e. Commercial Court at Surat. The respondent gave reply to the same on 13.2.2021 and the said application was kept for hearing by the Trial Court. Mr. Thakore further pointed out that on 15.3.2021, the respondent also filed an application under Section 9(1) of the Act for interim measures. Mr. Thakore contended that it is the claim of the respondent in the said application under Section 9(1) of the Act that the petitioner has to pay as per the amended provision of the agreement tariff on dollar rate basis rather than in rupee terms. Mr. Thakore, further referring to the application filed by the respondent, contended that the respondent claimed before the Trial Court that they are required to fulfill minimum requirements and hence, the petitioner is required to pay that amount and other claims which were made. Mr. Thakore contended that thus, the application under Section 9(1) of the Act filed by the respondent primarily is to recover the amount which according to them is payable by the petitioner. Mr. Thakore, further elucidating the contentions raised and the prayers prayed for by the respondent in their application under Section 9(1) of the Act, contended that the petitioner has also claimed that there was a provision for providing Bank Guarantee or a letter of credit. Mr. Thakore contended that both the applications were heard together and thereafter kept for orders and lastly on

20.7.2021. However, no orders were passed. Mr. Thakore relied upon the order passed by this Court in IAAP no.5 of 2021. Mr. Thakore also submitted that the respondent filed an independent Suit in the Civil Court, wherein the petitioner moved an application under Section 8 of the Act. Mr. Thakore also referred to the orders dated 15.3.2021 and 30.3.2021 passed by the Civil Court rejecting the application filed by the petitioner under Section 8 as well as the orders passed by the Appellate Court allowing the appeal, whereby the disputes arising out of the Suit were referred to the arbitration. Mr. Thakore, however, contended that the same has no direct relevance to the present petition. Mr. Thakore further contended that in view of the order passed by this Court, the Arbitral Tribunal came to be constituted vide order dated 9.7.2021. Mr. Thakore further contended that the petitioner filed an application on 16.7.2021 before the order was pronounced which was to be pronounced on 20.7.2021 for the prayers prayed for therein. Mr. Thakore contended that it was prayed that, the disputes pending under Section 9(1) of the Act should now be determined by the Arbitral Tribunal and the pending applications be referred to the Arbitral Tribunal. Mr. Thakore submitted that the said application was heard on 16.7.2021 which came to be dismissed vide impugned order.

7.1 At this stage, Mr. Thakore contended that first sitting of the Arbitral Tribunal was held on 30.7.2021 and the procedural order is already passed. A copy of the said order was also referred to by Mr. Thakore.

7.2 Mr. Thakore contended that the issue which arises in this petition is that whether once an Arbitral Tribunal is constituted, can the Court which is seized of the matter under Section 9 of the Act, continue to determine the matter irrespective of the stage at which that matter is pending. Mr. Thakore contended that it is completely irrelevant whether the matter is part heard, heard or totally heard. It was contended that so long as there is no order under Section 9 of the Act, the matter will have to be treated as pending matter before the Court under Section 9 of the Act and any such matter, except when it falls within the four corners carved out in Section 9, the Court would have to say that the Court will not further determine the matter and one must approach the Arbitral Tribunal for determination on the issue of the interim relief. Mr. Thakore, referring to Sections 9 and 17 of the Act pre-amendment, contended that there was absolutely no provision for enforceability of interim orders passed by the Tribunal in pre-amended Section 17 of the Act. Mr. Thakore contended that with this limitation, practically, the only remedy available for obtaining the interim relief was Section 9. Mr. Thakore further contended that the order of the Arbitral Tribunal under Section 17 of the Act was the premises for filing the application under Section 9 of the Act to make it enforceable. It was contended that in the alternative, only Section 9 was

filed and Section 17 was not filed. Referring to the judgment of Hon'ble Delhi High Court in the case of **MSTC Limited Vs. K.A. Malle Pharmaceuticals Limited** passed in F.M.A. no.982 of 2017, it was contended by Mr. Thakore that the Hon'ble Delhi High Court referred to and relied upon Section 27(5) of the Act to find out the way of enforcing an order passed under Section 17 of the Act. It was further contended that the said view is pre-amended view. It was further contended that it was in this background that the Law Commission report suggested certain amendments. Referring to the foot note and referring to the judgment of the Hon'ble Apex Court in the case of Alka Chandewar Vs. Shamshul Ishrar Khan, 2017 16 SCC 119, it was contended by Mr. Thakore that the amended Section 17 of the Act is pari materia to Section 9 of the Act. It was therefore contended that with effect from 2015, Section 17 of the Act was made pari materia to Section 9 of the Act. Mr. Thakore contended that the Arbitral Tribunal during the arbitration proceedings had the same powers as that of the Courts and the party could apply to the Arbitral Tribunal for all reliefs which earlier could be applied under Section 9 of the Act before the Court. Referring to Section 17(2) of the Act, it was contended that the interim order of the Arbitral Tribunal can even be executed under Order 21 of the Code of Civil Procedure, 1908. It was contended that this is the teeth which is given to the orders of the Tribunal and when such teeth was given to the orders of the Arbitral Tribunal, it was necessary also to amend Section 9 of the Act. Mr. Thakore referred to the post-amendment Sections 9(1), 9(2) and 9(3) of the Act and contended that while the same powers were retained with the Courts, these powers were made subject to sub-section (3) of Section 9 of the Act which provides that once the Arbitral Tribunal has been constituted, the Court shall not entertain any application under Section 9(1) of the Act unless the Court finds that the circumstances exist which may not render the remedy provided under Section 17 of the Act efficacious. Mr. Thakore submitted that the word "entertain" cannot mean filing of an application under Section 9. 'Entertain' would mean filing and all the way upto final disposal of the application under Section 9. It was contended that thus, there is embargo in the Court to entertain an application unless it gives a finding that the remedy provided under Section 17 of the Act is not efficacious. The Court has not given such a finding and what is material is that even after the order dated 09.07.2021 of the High Court was placed before the Trial Court, the Court has said that the Tribunal has not come into existence and that the Tribunal has not become functional. Mr. Thakore contended that the Tribunal has become functional the moment it is constituted and the parties can approach the Tribunal for an interim order even before filing of the statement of claim. Mr. Thakore contended that the parties can approach under Section 9 of the Act and they can as well approach under Section 17 without filing a statement of claim and invariably, are being approached. It was contended that the order of the Tribunal in this case also

clearly spells out that as and when such application will be filed, time table for deciding that application will be laid down and the same has nothing to do with the application for filing statement of claim or reply. Referring to the impugned order, Mr. Thakore contended that only two grounds are raised basically by the Trial Court. It was contended that first ground is that there are 3 stages, (i) that the Arbitral Tribunal has already come into existence and an application is filed, (ii) application is filed before the Arbitral Tribunal comes into existence, but is not determined, and (iii) after the matter is heard, but before judgment is pronounced, the arbitral tribunal is constituted. This is clearly a brain wave of the concerned Judge drawing a distinction between the pending application and the pending application which is heard. In both cases, it is pending. Mr. Thakore contended that the Court takes a view that if it is pending without being heard, then he will have to send it to the Arbitral Tribunal, however, he has further observed that the Court shall not pass such an order as the application is heard and only the order is to be passed. Mr. Thakore contended that the distinction which is drawn is incorrect and the second reason which is given that the Arbitral Tribunal has not become functional is also incorrect. Mr. Thakore submitted that the Law Commission report speaks of "ordinarily not entertained", whereas the statute says "shall not entertain" which is a mandate. Mr. Thakore further contended that the whole object of amendment is that unless the remedy of Arbitral Tribunal is not efficacious, all applications must be determined by the Arbitral Tribunal. Mr. Thakore extensively took this Court, more particularly, to Paragraphs 7, 9, 15 and 17 of the impugned order. Relying upon the judgment of the Hon'ble Delhi High Court in the case of **Benara Bearings & Pistons Ltd. Vs. Mahle Engine Components India Pvt. Ltd.,2017 SCCOnLineDel 7226**, it was contended by Mr. Thakore that the said matter relates to the period after the amendment of the Act. Mr. Thakore contended that Section 9 application was filed before the Hon'ble Delhi High Court and on facts, the learned Single Judge came to the conclusion that in fact, there was no agreement much less an arbitration agreement and even if there was an agreement, it cannot specifically be enforced. Referring to Paragraphs 23 to 26 of the said judgment, it was contended that the said judgment was challenged before the Hon'ble Supreme Court and the SLP came to be rejected. Mr. Thakore contended that factual matrix in the said matter shows that there was no agreement between the parties and the agreement was unenforceable. Referring to the judgment of **Benara Bearings & Pistons Ltd.** (supra), it was contended that in the said case, the appointment of Arbitral Tribunal was made on 28.7.2016, whereas the judgment was pronounced by the Court on 26.8.2016. Mr. Thakore, distinguishing the said judgment, contended that the word "entertain" and the emphasis on exception carved out in Section 9(3) of the Act is not dealt with. Mr. Thakore also referred to the judgment of Calcutta High Court in the case of Srei Equipment Finance Ltd. (SEFF) vs. Ray

Infra Services Pvt. Ltd. and Ors.,2016 SCCOnLineCal 6765 and more particularly, Paragraph 7 thereof as well as judgment of the Delhi High Court in the case of **Energo Engineering Projects Vs. TRF Ltd.,2016 SCCOnLine6560**, more particularly, Paragraphs 22, 23, 27 and 34. Mr. Thakore thereafter heavily relied upon the case of **Tufan Chatterjee** (supra) and heavily relied upon the observations made by the Hon'ble Calcutta High Court in Paragraphs 8, 12, 15, 16, 18, 26, 34. Mr. Thakore contended that the said judgment lays down two issues i.e. the principle that even with respect to pre 2015 amendment, application of new Act will apply as far as Court proceedings are concerned. It was contended that thus, the Court is denude of the power. Mr. Thakore also referring to the judgment of **Tufan Chatterjee** (supra) contended that it also lays down the principle of interpretation of Section 9(3) and the Court is denude of the powers to grant interim relief once the Arbitral Tribunal is constituted. According to Mr. Thakore, two separate things are determined; firstly, the amended provision will also apply to the past/earlier arbitration; and secondly that Section 9 once it is there, the Court is denude of its power. According to Mr. Thakore, second part is never questioned by anybody in any judgment. Distinguishing the judgment of the Delhi High Court in the case of **Ardee Infrastructure Pvt. Ltd. Vs. Ms. Anuradha Bhatia,2017 SCCOnLineDel 6402**, it was contended that it is not a matter under Section 9 or Section 17 of the Act and the same has nothing to do with the interpretation of Section 9 of the Act. According to Mr. Thakore, the said judgment in the case of **Ardee Infrastructure Pvt. Ltd.** (supra) relied upon by the respondent herein has only to do with applicability of the amended provision to pre-amendment arbitral proceedings and post amendment arbitral proceedings. Mr. Thakore contended that the said judgment does not in any manner deal with Section 9, which is also interpreted by the Hon'ble Calcutta High Court in the case of **Tufan Chatterjee** (supra).

7.3 Learned counsel Mr. Mihir Thakore again referred to the judgment of the Hon'ble Calcutta High Court in the case of Tufan Chatterjee (supra) and the judgment of the Hon'ble Delhi High Court in the case of Benara Bearings & Pistons Ltd. (supra). Learned counsel Mr. Thakore submitted that in Tufan Chatterjee's judgment (supra), the matter was arising out of the provisions of Section 9 of the Act, whereas, in Benara Bearings & Pistons Ltd.'s case (supra), it was more related to the provisions of Section 17 of the Act. According to learned counsel Mr. Thakore, Tufan Chatterjee's case (supra) deals with the situation of arbitral proceedings which commenced prior to the amendment, whereas, the case of Benara Bearings & Pistons Ltd. (supra) deals with Section 17 of the Act since the core issue that was determined in different context and as in Benara Bearings & Pistons Ltd.'s judgment (supra), there is no comment about Tufan Chatterjee's case

(supra). Learned counsel Mr. Thakore submitted that looking to the controversy in question, the judgment in the case of MSTC Limited Vs. K.A. Malle Pharmaceuticals Limited (supra) also deals with the aspect of Section 17 and not Section 9 of the Act. Learned counsel Mr. Thakore also submitted that the Hon'ble Delhi High Court in the case of Benara Bearings & Pistons Ltd. (supra) has not considered the judgment in the case of Tufan Chatterjee (supra). According to learned counsel Mr. Thakore, the judgment delivered by this Court in the case of Manbhupinder Singh Atwal (supra) is more relevant to determine the present controversy. According to learned counsel Mr. Thakore, Section 9(3) of the Act, in clear terms, mandates, not to entertain any application by the Court once the Arbitral Tribunal is constituted. It is submitted that in the instant case, now since the Arbitral Tribunal is constituted, the Commercial Court must be stopped from entertaining the application any further. He submitted that the Commercial Court has committed an error by considering the application preferred by the petitioner by taking into consideration the sole ground that the matter was heard and is reserved for judgment. It is submitted that the judgment of this Court in the case of Manbhupinder Singh Atwal (supra) would be a binding precedent for the Commercial Court Judge, but the said judgment has not been taken into consideration by the Trial Court. There can only be one exception to that judgment and that is, in case if remedy under Section 17 of the Act is not efficacious and Arbitral Tribunal has already been constituted and therefore, in absence of any such exception about inefficacy of the Tribunal, the judgment of this Court in the case of Manbhupinder Singh Atwal (supra) was required to be followed by the Trial Judge while passing the impugned order.

7.4 Learned counsel Mr. Thakore relied upon the judgment in the case of **Bhubhaneshwar Expressway Vs. National Highway Authority of India,2019 SCCOnLineDel 11390** and tried to point out from Paragraph 46 as to what can be said to be inefficacious. Mr. Thakore further relied upon the judgment of the Hon'ble Bombay High Court in the case of **Tata Capital Vs. Nectar Prints,2019 SCCOnLineBom 4546** and also relied upon the judgment in the case of Nehru Nagar Vijay Lenyadri C.H.S.L. (supra) and also one more decision of the Hon'ble Bombay High Court in the case of **Krishanlal S. Attkan Vs. Union of India,2019 SCCOnLineBom 4549** and submitted that once the Arbitral Tribunal is constituted, Section 9 application can be treated as Section 17 application and the dispute be referred to the Arbitral Tribunal and it was pointed out by the learned counsel that those orders are passed by the consent of the parties. Learned counsel took us to the order dated 26.7.2021 passed by the Hon'ble Supreme Court in the case of **Johnson Stephen V. MCEES Trading & Ors.,** rendered in SLP(C) no.6538-6539 of 2021 and submitted that the Hon'ble Supreme Court in the aforesaid matter passed an order by directing that all issues arising in the interim application

including an application for receiver can now be decided by the arbitrator untrammeled by the observations made by the High Court. According to learned counsel, in the aforesaid SLP also, the issue was in respect of Section 9 application before the Kerala High Court, wherein Kerala High Court entertained Section 9 application.

7.5 Thereafter, learned counsel took us to the various judgments, whereby the word "entertain" is interpreted. According to Mr. Thakore, word "entertain" can only mean "till final disposal" and it means adjudication and disposal of Section 9 application. It cannot have any other meaning in the context in which it is used, once Arbitral Tribunal is constituted. It was submitted that if Section 9(1) of the Act is looked into, it provides that a party may before or during the arbitral proceedings or at any time after making of arbitral award, but before it is enforced in accordance with Section 36 apply to a Court for interim protection, would mean that entertaining an application would not just confine to its filing. Any party can file an application under Section 9 of the Act even after constitution of an Arbitral Tribunal. Filing of an application is always permissible at any stage, but it can be entertained only if it is decided that whether remedy under Section 17 of the Act is efficacious or not. The word "entertain" can have a wider meaning than just mean "filing of an application". What is required to determine first while considering the application under Section 9(3) of the Act is to see as to whether the remedy under Section 17 of the Act is efficacious or not. Once if it is decided that the remedy under Section 17 of the Act is not efficacious, then only, such application can be entertained and decided. If it is found that remedy under Section 17 of the Act is an efficacious, then, the learned Trial Judge can always say that in view of the fact that Section 17 is efficacious remedy, he should not entertain such an application. Therefore, at which stage, the application is filed is not much relevant whether it is filed before the Arbitral Tribunal is constituted or after the Arbitral Tribunal is constituted. What is important is to determine whether to entertain such an application or not and therefore, the word "entertain" must be interpreted as final adjudication of the application. There cannot be any other meaning considering the context in which the word "entertain" is used. Learned counsel Mr. Thakore took us to the Dictionary meaning of Black's Law Dictionary which reads as under:-

"Entertain, vb. - 1. To bear in mind or consider; esp., to give judicial consideration to <the court then entertained motions for continuance>. 2. To amuse or please. 3. To receive (a person) as a guest or provide hospitality to (a person). 4. Parliamentary law. To recognize and state (a motion); to receive and take into consideration <the chair will entertain the motion>."

7.6 Thereafter, learned counsel, relying upon the judgment in the case of Lakshmi Rattan Engineering Works Ltd. Vs. Asst. Commission of Sales Tax, 1968 AIR(SC) 488, submitted that in Paragraphs 7 and 9 of the said judgment, the word "entertain" has been interpreted. Sum and substance of submission of Mr. Thakore based on the aforesaid judgment was that "entertain" does not mean "receive" or "accept", but proceed to consider on merits or adjudicate upon. Then, Mr. Thakore relied upon the judgment of Allahabad High Court in the case of Kundan Lal Vs. Jagan Nath Sharma, 1962 AIR(All) 547 and relying upon Paragraphs 5 and 7 of the aforesaid judgment, it was submitted by the learned counsel that "entertain" means actually to dispose of an application on merits. Learned counsel further substantiated his submission in respect of interpretation of word "entertain" by relying upon two more judgments in the case of Hindustan Commercial Bank Ltd. Vs. Punnu Sahu (Dead) Through LRs, 1971 3 SCC 124 and relying upon Paragraph 4 of the said judgment that a number of decisions of various Courts while interpreting word "entertain" has taken a view that "entertain" means "adjudicate upon" or "proceed to consider on merits". Similarly, the judgment of the Hon'ble Supreme Court in the case of Martin & Harris Ltd. Vs. Additional District Judge & Ors., 1998 1 SCC 732 and more particularly, Paragraphs 8 and 10 of the said judgment was pressed into service to substantiate his argument in respect of interpretation of the word "entertain". The learned counsel, by citing the aforesaid judgment, submitted that the word "entertain" cannot be interpreted by giving it a narrow meaning considering the interpretation of word "entertain" by various High Courts including the Hon'ble Supreme Court. The word "entertain" can have only one meaning and that is to consider it till final disposal. Learned counsel Mr. Thakore also pointed out from the compilation of judgments by reading out the judgment in the case of **Anil Kunj Bihari Saraf Vs. Namboodas,1996 SCCOnLineMP 112** and submitted that in view of the judgments relied upon by the petitioner, the Commercial Court Judge has committed an error in interpreting the word "entertain" by relying upon the judgment in the case of Anil Kunj Bihari . Based upon the aforesaid argument, learned counsel Mr. Thakore submitted that as per the language of Section 9(1) of the Act, when an application for interim measure can be filed at any point of time, once if such an application is filed, the Court will have to determine whether remedy available before the Arbitral Tribunal is efficacious remedy, then, it must withdraw itself from deciding that application. In light of this, it will not make any difference whether the matter is heard for a week, 10 days or month because the word "entertain" would mean that it has to consider an application pending before him and yet not entertained it by adjudicating upon it. It was submitted that no one can go behind the mind of a Judge as the same is expressed by words which are translated into judgments and therefore, entertaining an application can be said only when a Judge delivers the

judgment. Before a Judge delivers the judgment, the word "entertain" comes into play and therefore, first he has to take the decision whether he should decide or hold that this is a case where he finds that the remedy available before the Arbitral Tribunal is an efficacious remedy or not. A Judge can only travel further on merits of an application only in case if he decides that remedy under Section 17 of the Act is not an efficacious remedy.

7.7 Since it was objected by the respondent that the present petition seeking a writ of certiorari is not maintainable as what is under challenge by way of this petition is an order passed by the subordinate Court and therefore, the draft amendment was forwarded. The same was taken on record. At that juncture, learned counsel Mr. Thakore conceded that insertion of word "certiorari" with some words relevant to it in the prayer clause was by mistake and therefore, to cure the said mistake, the amendment application was given. He submitted that certainly writ of certiorari cannot be prayed for in a petition under Article 227 of the Constitution of India and looking to the cause title of the petition and considering the nature of the prayer to call for the record and proceedings, the present petition is preferred only under Article 227 of the Constitution of India.

7.8 Learned counsel Mr. Thakore thereafter tried to meet with the objections raised by learned Senior Advocate Mr. Sibal against the amendment in prayer clause by deleting the word "certiorari" and a portion related to that and submitted that the objections raised by the respondent instead of prayer of certiorari and amendment is of highly technical in nature. Learned counsel has placed reliance upon the judgment in the case of Ram Kishan Fauji Vs. State of Haryana, 2017 5 SCC 533 and relied upon Paragraphs 41 and 42.3, which read as under:-

"41. We have referred to these decisions only to highlight1 that it is beyond any shadow of doubt that the order of civil court can only be challenged under Article 227 of the Constitution and from such challenge, no intra-court appeal would lie and in other cases, it will depend upon the other factors as have been enumerated therein.

42.3 A writ petition which assails the order of a civil court in the High Court has to be understood, in all circumstances, to be a challenge under Article 227 of the Constitution and determination by the High Court under the said Article and, hence, no intra-court appeal is entertainable."

7.9 On the basis of the aforesaid observation of the Hon'ble Supreme Court, the learned counsel submitted that even if Article 226 and certiorari is written in the Writ Petition, it can only be treated as Article 227 petition. Mr. Thakore further

relied upon the decision of the Hon'ble Supreme Court in the case of Radhe Shyam & Anr. Vs. Chhabi Nath & Ors., 2015 5 SCC 423 and submitted that considering the fact that what is challenged by way of the present petition is an order passed by the Subordinate Court and therefore, considering the ratio laid down in the judgment in the case of Radhe Shyam (supra), it is amply clear that the present petition is preferred only under Article 227 of the Constitution of India and writ of certiorari was erroneously prayed for and this Court can certainly treat the present petition as a petition under Article 227 of the Constitution of India even without amendment and therefore, the amendment sought for by the petitioner is required to be allowed. It is submitted that the word "certiorari" is surplus word which can deny the remedy to the petitioner and therefore, the Court may consider the petition as a petition under Article 227 considering the scope of a petition under Article 227 of the Constitution of India. Learned counsel Mr. Thakore in support of the aforesaid contention also referred to and relied upon the judgment in the case of Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil, 2010 8 SCC 329. Based upon the aforesaid judgment, learned counsel submitted that the present petition under Article 227 of the Constitution of India is maintainable. He submitted that the Commercial Court has committed two patent perversities (i) by classifying the pending application in two sub-categories (a) pending hearing of Section 9 application, the Tribunal is constituted, and (b) after the matter is heard, but before the judgment is pronounced, the Tribunal is constituted; as in both the scenario, the matter remains pending and therefore, such classification can be said to be a patent perversity, and (ii) relying upon the Order 22 Rule 6 of the Code of Civil Procedure, 1908, which refers to a Suit being not abetting after it is kept for judgment, which according to Mr. Thakore, was a patent perversity on the face of the order impugned and therefore, the impugned order is bad in law. Learned counsel then relied upon Paragraph 14 of the judgment of the Hon'ble Supreme Court in the case of Waryam Singh & Anr. Vs. Amarnath & Anr., 1954 AIR(SC) 215 and submitted that in the instant case also, the Commercial Court has not acted within it's bound or it's authority and therefore, this is a fit case for exercising the powers of superintendence conferred to the High Courts under Article 227 of the Constitution of India.

7.10 Learned counsel also relied upon the judgment of the Hon'ble Supreme Court in the case of Ajay Singh & Anr. Vs. State of Chattisgarh & Anr., 2017 3 SCC 330 and more particularly, the observations made by the Hon'ble Supreme Court in Paragraph 24 and contended that the High Court can interfere under Article 227 of the Constitution of India in case of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of

authority or discretion, a patent error in procedure, arriving at a finding which is perverse or based on no material or resulting in manifest injustice and submitted that the present case is a fit case to exercise the powers under Article 227 of the Constitution of India.

7.11 Learned counsel Mr. Thakore thereafter took us to the concept of two models relating to involvement of Court in respect of interim relief which is as per the prevailing international practice. According to Mr. Thakore, one model is called free choice model or Court subsidiarity much less emphasized on the parties ability to approach any forum i.e. Court or Arbitral Tribunal for grant of interim relief. Second model is Court subsidiarity model which gives privacy to the Arbitral Tribunal over the Courts. According to learned counsel today, the party autonomy has been held to be brooding and guiding spirit of arbitration. The same being corner stone of 1996 Act, the true interpretation of Section 9(3) of the Act would necessarily mean that once the Tribunal has been constituted, the Court should not continue to adjudicate unless the Court finds that the circumstances exist which may not render the remedy provided under Section 17 efficacious. According to Mr. Thakore, the amendment to Section 9 of the Act denotes the shift in thinking from free choice model to the Court subsidiarity model. The learned counsel thereafter took us to the relevant Sections and provisions of the England, Singapore, USA, Hong Kong and South Africa and submitted that international practice of "Court-Subsidiarity" supports the interpretation of the petitioner that once an Arbitral Tribunal is constituted, the Court must defer to proceed further unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious. Such an interpretation is consistent with the principle of party autonomy and least interference to the Arbitral Tribunal which is the body chosen by the parties to resolve their disputes. On the premises of the aforesaid, the learned counsel submitted that the impugned order dated 16.7.2021 passed by the Commercial Court, Surat is contrary to the settled principles of law and is contrary to the provisions of Section 9(3) of the Act. If such an order is allowed to continue, it will lead to a situation of parallel proceeding and will render the provisions of Section 9(3) of the Act redundant and hence, the same is required to be quashed and set aside.

[8] Per contra, Shri Kapil Sibal, learned Senior Counsel for respondent submitted that the very application preferred by the petitioner before the Commercial Court is preferred with a view to defeat the urgent interim orders that the present respondent is seeking from the Commercial Court. It is submitted that by way of interim application preferred by the respondent before the Commercial Court at Surat what is sought to be demanded was in respect of previous amount owed to the respondent to

the tune of Rs.800 crores. From January onward, the petitioner is not even paid the minimum amount as guaranteed. The respondent is required to pay the amount to the Bank. Shri Sibal, learned Senior Counsel for the respondent submitted that if an application under Section 9 is preferred prior to appointment of Arbitral Tribunal, present petitioner would contend that his application for appointment of Arbitral Tribunal is pending and hence the Court may not decide the issue. Whereas now once the Arbitral Tribunal is constituted, the petitioner has come out with a case that in view of the fact that Arbitral Tribunal is constituted, Section 9(3) of the Act provides a bar to the Commercial Court or a learned Judge to decide the issue of interim relief. That shows that actually the present petitioner is interested more in delaying the proceedings rather than taking part in adjudication of the dispute. Shri Sibal, learned Senior Counsel submitted that the present petition preferred by the petitioner is premature in a way that in case if the Court comes to the conclusion that the remedy under Section 17 is an efficacious remedy, in that case, the present proceedings under Section 9(1) would end there and then itself and the proper course of action for the parties would be to approach the Arbitral Tribunal seeking interim protection. It is only in an eventuality that if the Commercial Court comes to the conclusion that remedy under Section 17 is inefficacious remedy then and then only such order can be challenged by the present petitioner. In the instant case, the petitioner by way of present petition has tried to see that even that order is not pronounced by the trial Court and therefore, unless the trial Court is granted an opportunity to apply it's mind and pronounce an order as to whether the remedy provided under Section 17 of the Act is an efficacious remedy or not, until such order is pronounced, present petition ought not to have been entertained by the Court as the same would amount to entertaining premature petition and hence he submitted that the trial Court must be given an opportunity to disclose it's mind and to adjudicate the issue at least to the extent that whether remedy provided under Section 17 is an efficacious remedy or not. He further submitted that today a situation has arisen that once the petitioner has preferred an application before the Commercial Court seeking a relief to refer the dispute between the parties to the Arbitral Tribunal and that order is reserved and therefore, that application awaits adjudication. Once that application is awaiting adjudication and order is reserved, it is not open for the petitioner to say that the learned Commercial Court has passed an order without jurisdiction since there is no order, it cannot be said that the order is without jurisdiction. Same way reserving the order, cannot also be construed as lack of jurisdiction. Therefore, unless the trial Court finds that there is an urgency and passes any order, in that case, such order only can be said to be an order, which can be challenged before this Court and in such eventuality only, the petitioner can file an appeal or appropriate application and say that order is erroneous or without jurisdiction but as on today, it is not open for the petitioner to contend that the order of the trial Court is without jurisdiction.

8.1. By referring to the impugned order, Shri Sibal, learned Senior Counsel for the respondent further submitted that in the instant case learned Commercial Judge has already admitted the matter for consideration and hearing is concluded, the only formality that remains is to pronounce the judgment and therefore, at this juncture, nothing further remains to be entertained. Once the final hearing of the matter is concluded, merit is considered and the matter is reserved for judgment, the application can be said to have been already entertained and hearing is concluded and hence word entertain cannot be interpreted in such a way to undo what is already done and hence learned Senior Counsel submitted that bar of Section 9(3) of the Act would not apply even when the Arbitral Tribunal is constituted, once the judgment is reserved by the Court under Section 9.

8.2. He further submitted that the matter was reserved for judgment on 20.7.2021 and the application of the petitioner dated 16.7.2021 was dismissed. The learned Judge on that application by giving reasons passed order saying that he will not refer the dispute to the Tribunal under Section 9. Such order cannot be said to be an order lacking jurisdiction vested in a Judge or can be said to be perverse because he is yet to decide Section 9 application in light of the fact that now Tribunal is constituted. It was further submitted that Section 9(1) provides that a party may approach the Court at any stage before or during the arbitration proceedings or even after arbitration proceedings but before award is enforced under Section 36 and hence a bare reading of provision of Section 9 would suggest that word 'during' is not taken away from Section 9. If argument of the petitioner is believed, in that case, it would amount to oust the jurisdiction of Civil Court, whereas language of Section 9 does not suggest so. On the contrary, Section 9(1) provides that a party may make an application before or during the arbitral proceedings or even after the arbitration proceedings but before the award is enforced under Section 36. Whereas Section 9(2) gives an idea as to relief of which nature can be prayed for an application under Section 9. Mr. Sibal, learned Senior Counsel for the respondent further submitted that hypothetical situation by showing that suppose if a party prefers an application for release of goods and nature of good is perishable goods. If such application is preferred even after constitution of Arbitral Tribunal then considering the nature of goods which is of perishable nature can trial Court say that though the applicant needs interim protection, the Court would first decide as to whether the remedy for interim measures under Section 17 before the Arbitral Tribunal is an efficacious remedy or not and then only after pronouncing the order on efficacious remedy, would decide the issue on merits. Even if Section 9(3) of the Act is taken into account then also overall circumstances are required to be taken into consideration and the trial Court is required to pass an order bearing in mind efficacy of remedy. Mr. Sibal, learned

Senior Counsel for the respondent further contended that the application preferred by the present respondent under Section 9(1) for interim measures is in respect of charges to be paid by the present petitioner for using its Jetty. Now, since the petitioner has stopped paying money, the respondent needs money, whereas, the petitioner has stopped paying money for every ships that comes in. According to Mr. Sibal, learned Senior counsel for the respondent even if the Arbitral Tribunal is constituted but a man is under debt, he cannot wait till he is declared insolvent. When the petitioner has stopped paying money to the present respondent, the urgency is required to be seen and therefore, considering the fact that present respondent has preferred application for interim measures as he wants urgent money, the Commercial Court should be permitted to pronounce the order which is kept reserved. How the other side can say that present respondent does not require any protection. According Mr. Sibal, learned Senior counsel for the respondent the entire genesis of Section 9 revolves around urgency and protection. The urgency would also cover efficacy of remedy provided under Section 17 but to determine that, the matter is required to be decided and therefore, also it was insisted upon that the Court must permit the trial Judge to pronounce the order. It was submitted that since the respondent owed an amount of more than Rs.800 crores as a dire urgency though the petitioners have continued to use Jetty facilities which the respondent is providing, the petitioner is not paying for the same and hence there cannot be a better urgency then the urgency which the respondent has. Mr. Sibal, learned Senior counsel for the respondent submitted that today the order does not exist and therefore, it would not lie in the mouth of the petitioner to say that order is without jurisdiction. Suppose, if the learned trial Court dismisses the application, then in that case, can it be said that he has jurisdiction to dismiss the application or it is only in case if the trial court pronounces the order, it can be contended that the order is without jurisdiction. Reserving the order for pronouncement, cannot be said to be an order without jurisdiction. Mr. Sibal, learned Senior counsel for the respondent took the contention in respect of prayer of writ of certiorari in this petition. Elaborate arguments in respect of whether writ of certiorari can be prayed or not, were made.

8.3. Mr. Sibal, learned Senior counsel for the respondent further contended that considering the fact that both the parties have preferred separate applications under Section 9, before the Commercial Court seeking interim protection and hence there should be two separate applications pointing out bar under Section 9(3) of the Act. In the instant case, the present petitioner has preferred only one application and that too in his own application for interim measures stating that the now his application is not required to be decided in view of the fact that Arbitral

Tribunal is constituted but at no point of time present petitioner has preferred any such application in the application preferred by the present respondent before the Commercial Court in Section 9 proceedings seeking interim measures and therefore, it can be said that the present petition preferred by the petitioner is an appeal in his own application. In case, if an application or appeal is preferred, the ground must be established on the basis of statute. The contention of the petitioner that a Judge must examine first and determine as to whether circumstances exist for a Judge to pass an order under Section 9(3), in that case, along with that the Judge is required also to decide Section 9 application because entire Section 9 application is preferred on the basis of urgency for seeking interim measures. Merely on the ground that a Judge must decide as to remedy under Section 17 is an efficacious remedy or not, it cannot be said that a Judge should first decide the aspect of efficacy of remedy under Section 17 considering the fact that Section 9 application itself is preferred on the basis of urgency to seek interim measures and considering the fact that in absence of there being any specific provision under Section 9(3) which may mandate a Judge to decide the issue of efficacy of remedy under Section 17. A Judge is required to determine and decide both the issues of efficacy of remedy under Section 17 and urgency together and therefore, if the Commercial Court is permitted to pronounce the judgment, which is kept reserved since 7.6.2021, permitting him to pronounce the order would be in consonance with the scheme of the Act and more particularly, as per Section 9. Mr. Sibal, learned Senior counsel for the respondent then took us to prayer clause of the application preferred by the petitioner before the Commercial Court and drew attention of the Court that the prayer sought for by the petitioner before the Commercial Court is to refer the dispute to the Arbitral Tribunal. Mr. Sibal, learned Senior counsel for the respondent submitted that under Section 9 application, the Court does not have any power either to transfer the dispute to Arbitral Tribunal or to refer it to the Arbitral Tribunal. Looking to the prayer made in the original application before the Commercial Court, argument advanced by the learned senior counsel for the petitioner itself would be self contradictory. The Commercial Court has yet to decide whether there is any urgency or not, the contentions of the learned senior counsel for the petitioner are more based on assumption than reality as in case there was no urgency, the trial Court also has an option to dismiss the application, but the trial court has heard both the applications together for 16 days and that itself shows that there is an element of urgency.

8.4. Mr. Sibal, learned Senior counsel for the respondent further submitted by reiterating that present petition under Article 227 of the Constitution of India would also not lie, as today there is no order and whatever he has challenged cannot be said to be without jurisdiction. The right of a Judge to dismiss an application cannot

be said to be without jurisdiction, more particularly, looking to the prayers made in the application to refer all the matters to the Arbitral Tribunal. The order either can be correct order or erroneous order but fact remains that as per the scheme of the Act, the learned Judge has no power to transfer or refer the matter and therefore, resultant effect of the order is such that the learned trial Judge has refused to refer the matter to the Arbitral Tribunal. The same way order of the trial Court of reserving the matter for pronouncement of order also cannot be said to be without jurisdiction. Mr. Sibal, learned Senior counsel for the respondent submitted that by way of present amendment in the prayer clause now the present petitioner is trying to cure the defect and to expand the scope of the prayer. Mr. Sibal, learned Senior counsel for the respondent further submitted that the learned trial Judge was right in considering three scenario, which may occur in a given case. (1) Section 9 application is filed after constitution of Tribunal (2) Pending hearing of Section 9 application, Tribunal is constituted and (3) after the matter is heard but before judgment is pronounced, the Tribunal is constituted. In first and second scenario, considering provisions of Section 9(3) it can be safely presumed that once the Tribunal is constituted Court must not entertain Section 9 application of parties. However, looking to the language of Section 9(3) in 3rd scenario jurisdiction of Civil Court is not ousted in entertaining such application and therefore, the learned trial Court has passed the order bearing in mind the scheme of the Act. Even the order that the trial Court may pass is appealable order under Section 37 of the Act and even in appeal under Section 37, this very issue will be argued but at that juncture there will be reason for passing an order on hand. Today as the situation has occurred that the petitioner is trying to ensure that the Tribunal may not be allowed to give reasons but still the order must be set aside. Such an attempt may not be permitted as unless Court comes to know as to whether there exist any special circumstances or not which may render remedy of Section 17 inefficacious and unless such issue is decided, the matter cannot be referred to Tribunal or party may approach the Tribunal. If argument of the petitioner is believed, in that case, it will take a long time. The Court has consumed time in hearing the parties for 16 hearings. If the application for interim measures is not decided, in that case, the respondent may be bankrupt and may be tried under Insolvency of Bank Code and therefore, also learned counsel insisted for dismissal of the petition by allowing trial Judge to permit him to pronounce the order. Mr. Sibal, learned Senior counsel for the respondent then submitted that every application under Section 9 once filed and if the interpretation of the same, as per the petitioner is believed, in that case, such application will take a long time to be decided and by that time urgency will be lost. As in such a scenario, moment any application under Section 9 is filed, a party would say that Tribunal is not yet constituted, though provision of arbitration is there and may seek adjournment. Thereafter, after sometime, if Arbitral Tribunal

is constituted and yet if such an application is preferred or is already pending, a party may take a stand that, now in view of the fact that Arbitral Tribunal is constituted and in view of Section 9(3) of the Act, allow the Tribunal to consider prayer for interim measures under Section 17. This would only prolong the proceedings and purpose behind granting or considering application for interim measures would be frustrated. Therefore, under such circumstances, what is expected from the Court is to act in aid of Arbitrator usually but that does not mean that aspect of urgency and efficacy of remedy under Section 17 is overlooked. A Judge is expected to decide the application under Section 9 considering the urgency of the party seeking interim measures and may come to a conclusion that there is an urgency or that remedy under Section 17 is an efficacious remedy but any order that a Judge may pass, cannot be said to be without jurisdiction. Further, once such an application is decided then that order is also an appealable order and therefore, rule of aid of the Arbitrator would be not to start the parallel proceedings under Section 227 of the Constitution of India so that on one can go to the Hon'ble Supreme Court and everything gets settled. Arbitration Act is complete code in itself and therefore, Court must act in aid of Arbitration Act. The proper way to act in aid of Arbitration Act would be to prefer an appeal under Section 37 and not to prefer petition under Article 227 of the Constitution of India.

8.5. Mr. Sibal, learned Senior counsel for the respondent further submitted that filing petition under Article 227 of the Constitution of India against an order passed by the Commercial Court and thereafter to carry the order that may be passed in a petition under Article 227 of the Constitution of India would reach upto the Hon'ble Supreme Court under Article 136 of the Constitution of India. If this happens in every arbitral proceedings and in respect of every Section 9 applications, that itself would frustrate the very purpose of Scheme of the Act and therefore, on the basis of the aforesaid submission, it was submitted that the Commercial Court may be permitted to pronounce the judgment and if the petitioner feeling aggrieved by the same, it would not render him remediless and there is still remedy of challenging the aforesaid order under Section 37 of the Act and in that appeal, the petitioner can take all the contentions that the petitioner may chose to and therefore, the present petition under Article 227 of the Constitution of India on a premise that the order that the Commercial Court may pass on an application under Section 9 after constitution of Arbitral Tribunal would be without jurisdiction, is without any basis and on the premise of misinterpretation of provision of law. Mr. Sibal, learned Senior counsel for the respondent further submitted that here it is more a case of petitioner's reluctance to avail remedy available under Section 37, may be because the petitioner does not want the learned Judge of Commercial Court to pass an

order but wording of Section 9(3) it is not even remotely indicated that the jurisdiction of the Commercial Court is ousted. In fact, Section 5 of the Arbitration Act which reads thus:

"Section 5: Extent of judicial intervention: Notwithstanding anything contained in nay other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

It was submitted that non-obstante clause in the language of Section 5 is provided to uphold the intention of the Legislature as provided in the Preamble to adopt UNCITRAL Model of Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act. Mr. Sibal, learned Senior counsel for the respondent then relied upon the judgment of the Hon'ble Supreme Court in the case of **Bhaven Construction Through Authorized Signatory Premjibhai K Shah vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd and Another,2021 SCCOnlineSC 8** and submitted that in the said case a sole arbitrator was appointed and application was filed disputing the jurisdiction of sole Arbitrator, petition under Article 227 was filed challenging the jurisdiction of sole Arbitrator and sole Arbitrator was appointed by the Court and question arose as to whether such a petition would lie or not, whether appointment of sole Arbitrator can be challenged under Article 227 of the Constitution of India or not and there, in para 11 to 22, the Hon'ble Supreme Court has observed thus:

"11. We need to note that the Arbitration Act is a code in itself. This phrase is not merely perfunctory, but has definite legal consequences. One such consequence is spelled out under Section 5 of the Arbitration Act, which reads as under "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part." The non-obstante clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act.

12. The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.

13. Any party can enter into an arbitration agreement for resolving any disputes capable of being arbitrable. Parties, while entering into such agreements, need to fulfill the basic ingredients provided under Section 7 of the Arbitration Act.

Arbitration being a creature of contract, gives a flexible framework for the parties to agree for their own procedure with minimalistic stipulations under the Arbitration Act.

14. If parties fail to refer a matter to arbitration or to appoint an arbitrator in accordance with the procedure agreed by them, then a party can take recourse for court assistance under Section 8 or 11 of the Arbitration Act.

15. In this context, we may state that the Appellant acted in accordance with the procedure laid down under the agreement to unilaterally appoint a sole arbitrator, without Respondent No. 1 mounting a judicial challenge at that stage. Respondent No. 1 then appeared before the sole arbitrator and challenged the jurisdiction of the sole arbitrator, in terms of Section 16(2) of the Arbitration Act.

16. Thereafter, Respondent No. 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Article 226 /227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as 'Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)'. The use of term 'only' as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.

17. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In Nivedita Sharma v. Cellular Operators Association of India, 2011 14 SCC 337, this Court referred to several judgments and held:

"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - L. Chandra Kumar v. Union of India, 1997 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/ instrumentality or any public authority or order passed by a quasi- judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the

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aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

(emphasis supplied)

18. It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.

19. In this context we may observe M/s. Deep Industries Limited v. Oil and Natural Gas Corporation Limited,2019 SCCOnlineSC 1602, wherein interplay of Section 5of the Arbitration Act and Article 227of the Constitution was analyzed as under:

"15. Most significant of all is the non- obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2)of the Act)

16. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."

20. In the instant case, Respondent No. 1 has not been able to show exceptional circumstance or 'bad faith' on the part of the Appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage. It is brought to our notice that

subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by the Respondent No. 1 in a separate Section 34 application, which is pending.

21. Viewed from a different perspective, the arbitral process is strictly conditioned upon time limitation and modeled on the 'principle of unbreakability'. This Court in P. Radha Bai v. P. Ashok Kumar, 2019 13 SCC 445, observed:

36.3. Third, Section 34(3) reflects the principle of unbreakability. Dr Peter Binder in International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, 2nd Edn., observed:

"An application for setting aside an award can only be made during the three months following the date on which the party making the application has received the award. Only if a party has made a request for correction or interpretation of the award under Article 33 does the time-limit of three months begin after the tribunal has disposed of the request. This exception from the three-month time-limit was subject to criticism in the working group due to fears that it could be used as a delaying tactics. However, although "an unbreakable time-limit for applications for setting aside" was sought as being desirable for the sake of "certainty and expediency" the prevailing view was that the words ought to be retained "since they presented the reasonable consequence of Article 33".

According to this "unbreakability" of time-limit and true to the "certainty and expediency" of the arbitral awards, any grounds for setting aside the award that emerge after the three-month time-limit has expired cannot be raised.

37. Extending Section 17 of the Limitation Act would go contrary to the principle of "unbreakability" enshrined under Section 34(3) of the Arbitration Act.

(emphasis supplied)

22. If the Courts are allowed to interfere with the arbitral process beyond the ambit of the enactment, then the efficiency of the process will be diminished."

Citing the above referred paragraphs, Mr. Sibal, learned Senior counsel for the respondent then submitted that after making the aforesaid observation, the Hon'ble Supreme Court opined that the High Court erred in utilizing its discretionary powers available under Articles 226 & 227 of the Constitution of India and allowed the appeal and impugned order passed by the Division Bench of the High Court was quashed and set aside and the Hon'ble Supreme Court granted liberty to the respondent no.1 to raise legally permissible objections regarding jurisdiction in

pending Section 34 proceedings. By relying upon the aforesaid judgment, Mr. Sibal, learned Senior counsel for the respondent submitted that present petition also deserves to be dismissed at the threshold as the petitioner has failed to show bad faith or exceptional circumstances as stated by the Hon'ble Supreme Court in the paragraphs referred herein above. It is complete abuse and misuse of process of law and the petitioner should rather avail remedy of preferring an appeal under Section 37 once the Judge of the Commercial Court passes an order, in case if he is desirous to challenge the same. It was contended that in case if the application preferred by the present respondent is dismissed, in that case, the matter ends and therefore, present petition is nothing but a tool to consume time and in that event the trial Court must be directed to pronounce the order as whole time consumed in this petition and any further proceedings in continuation of this proceedings would amount to wastage of precious time of judicial process.

8.6 Mr. Sibal, learned Senior counsel for the respondent then dealt with aspect of Section 9(1) to 9 (3) to counter the argument of Mr. Mihir Thakore, learned Senior Counsel for the petitioner. It was submitted that stage of application 9(3) has not yet arisen. The learned Judge of Commercial Court is aware about provisions of Section 9 and he will pass the order in accordance with scheme of the Act since the present petition is a premature as occasion for learned Judge of Commercial Court has not arisen to pass any order and there should not be any challenge against the pronouncement of such order by seeking direction to mandate the Trial Court not to pronounce the order.

8.7. Mr. Sibal, learned Senior counsel for the respondent then distinguished the judgment of the Calcutta High Court in the case of Tufan Chatterjee (supra) and after taking us to the facts of the case elaborately, it was submitted that not only on facts but on law also judgment in case of Tufan Chetterjee (supra) would not apply in the facts of the present case as the aforesaid judgment is in respect of position prevailing prior to amendment of the Act and the application under Section 9 was moved prior to amendment. In the case of Tufan Chatterjee (supra),application for interim relief under Section 9 was moved in the Court in August 2015 whereas the amendment took place w.e.f. 23.10.2015. While application was pending, arbitral proceedings commenced under 1996 Act, an Arbitral Tribunal was constituted. The moot question before the Court in that case was whether the amendment Act would denude the Court of power to grant interim relief to the applicant under section 9. The proceedings which has commenced before amendment of the Act or not and whether such amendment would automatically stay the proceedings before the Arbitral Tribunal and therefore law laid down in the case of TufanChatterjee (supra) by the Hon'ble Calcutta High Court

would not apply in the facts of the present case. While making the aforesaid submission, Mr. Sibal, learned Senior counsel for the respondent drew attention of this Court to para 12 of the said judgment, which reads thus:

"12.The short question in this appeal is whether the Court has been denuded of power to grant interim relief to the appellant under Section 9 of the Act, from the date on which the Amendment Act of 2015 came into force, since an Arbitral Tribunal has been constituted and arbitral proceedings have commenced."

8.8 Mr. Sibal, learned Senior counsel for the respondent submitted that if the argument of Mr. Mihir Thakore, learned Senior counsel for the petitioner is accepted, that once Arbitral Tribunal is appointed the Court losses its jurisdiction but in the case of Tufan Chatterjee (supra) the challenge was also against the order passed by the Court dated 5.1.2016 passed by the Civil Court under application under Section 9 of the Act and the appeal was dismissed, that itself would suggest that said judgment would not help the petitioner as the order passed by the Civil Court was upheld. The judgment of Tufan Chatterjee (supra), according to, Mr. Sibal, learned Senior counsel for the respondent does not deal with post amendment proposition. In fact, according to Mr. Sibal, learned Senior counsel for the respondent, the said judgment says that once prior protection is given by the Court, the same does not require any interference even if the Arbitral Tribunal is constituted thereafter. The party may approach the Tribunal and till Tribunal decides the issue of interim order, the prior protection granted would remain operative. Thereafter, Mr. Sibal, learned Senior counsel for the respondent tried to distinguish the judgment in case of Manbhupinder Singh Atwal (supra). It was submitted by Mr. Sibal, learned Senior counsel for the respondent that the aforesaid judgment has no relevance if read from the context of the facts of the present case. It was submitted that in case of Manbhupinder Singh Atwal (supra) the Tribunal was not functional and considering that fact into consideration, judgment was delivered, which is not the fact in the present case and therefore, reliance placed by the petitioner on the aforesaid judgment is misplaced. It was submitted by Mr. Sibal, learned Senior counsel for the respondent that in case of Manbhupinder Singh Atwal (supra) since Tribunal was not functional the remedy under Section 17 was held to be inefficacious and therefore, an application under Section 9 was entertained. The proposition in the present case is absolutely opposite. In case of Manbhupinder Singh Atwal (supra), the application under Section 17 was pending but because of non availability of Arbitrator, Arbitral Tribunal had become non functional and therefore, remedy under Section 9 was exhausted and entertained. In the instant case, application under Section 9 is already pending and hearing is concluded. It is nobodies case that remedy under

Section 17 would be inefficacious and therefore, also in view of the fact that the judgment in case of Manbhupinder Singh Atwal (supra) deals with entirely on different scenario, the same is not applicable to the facts of the present case. Thereafter, Mr. Sibal, learned Senior counsel for the respondent took us to the judgment of the Division Bench of the Delhi High Court in the case of **Benara Bearings & Pistons Ltd vs Mahel Engine Components India Private Limited,2017 SCCOnlineDel 7226** and submitted that looking to the controversy in question and considering the facts of the present case, this judgment is the only judgment which would render some assistance in determining the issue on hand as the said judgment takes care of a situation which arose post amendment Act. Para 24 of the said judgment reads thus:

"24.It was contended on behalf of the appellant that as the petition under Section 9 was filed on 27.04.2016 and the Arbitral Tribunal was constituted on 28.07.2016, the learned Single Judge ought not to have delivered the judgment dated 26.08.2016. According to the learned counsel for the appellant, when the Arbitral Tribunal had been constituted, that is, on 28.07.2016, this Court had already taken up the petition under Section 9 and on 29.04.2016 had passed an interim order in favour of the appellant. It was contended that because of the provisions of Section 9(3), once the Arbitral Tribunal was constituted on 28.07.2016, the Court ought to have relegated the parties to seek their remedy before the Arbitral Tribunal but with the injunction order of 29.04.2016 intact! There was a great deal of debate as to what has meant by the word "entertain? as used in Section 9(3). On the one hand, the learned counsel for the appellant submitted that the said word meant not only entertainment of application at the threshold but the continuation of the application. On the other hand, it was contended on behalf of the respondent that the word "entertainment only referred to ? the consideration of the application at the threshold. It was also contended on behalf of the respondent that as there was no arbitration agreement between the parties because of the fact that there was no binding contract, the provisions of Section 9 would not come into play at all. It was further contended that an appeal is a continuation of the original proceedings and, therefore, the submission that the application under Section 9 could not be entertained by the Single Judge would also apply to this appeal and would, therefore, be a self-defeating argument on behalf of the appellant. The provisions of Section 4 of the said Act were also relied upon to submit that the fact that the appellant participated and continued to participate in the Section 9 proceedings before the learned Single Judge amounted to a waiver, in any event. We are of the view that Section 9(3) does not operate as an ouster clause insofar as the courts powers ? are concerned. It is a well- known principle that whenever the Legislature intents an ouster, it makes it clear. We may also note that if the argument of the

appellant were to be accepted that the moment an Arbitral Tribunal is constituted, the Court which is seized of a Section 9 application, becomes coram non judice, would create a serious vacuum as there is no provision for dealing with pending matters. All the powers of the Court to grant interim measures before, during the arbitral proceedings or at any time after the making of the arbitral award but prior to its enforcement in accordance with Section 36 are intact (and, have not been altered by the amendment) as contained in Section 9(1) of the said Act. Furthermore, it is not as if upon the very fact that an Arbitral Tribunal had been constituted, the Court cannot deal with an application under sub-section (1) of Section 9 of the said Act. Section 9(3) itself provides that the Court can entertain an application under Section 9(1) if it finds that circumstances exist which may not render the remedy provided under Section 17 efficacious."

Mr. Sibal, learned Senior counsel for the respondent submitted that it was the respondent who preferred an application for interim measures to get protective order. The said application was objected and contested by the petitioner and it took 16 hearings for the Court to adjudicate the issue. Ultimately, the learned Judge has reserved the order after 16 effective hearings and thereafter now the petitioner has come up with a case that there is an efficacious remedy under Section 17 of the Act as the Arbitral Tribunal is constituted. If such circumstance is permitted to continue, in that case, it may take six more months before the Arbitral Tribunal to adjudicate the issue in respect of interim measures. For all these times, urgency would remain; the respondent is facing financial crunch and liquidity problem. The first hearing before the Arbitral Tribunal after pleadings are over is scheduled in the year 2022. Under the circumstances, when an application for interim measures is fully heard before the Commercial Court and only order is reserved, the same must be given precedent and learned Judge of the Commercial Court must be permitted to pronounce the order.

8.9. Mr. Sibal, learned Senior counsel for the respondent then relied upon the judgment in case of **Energo Engineering Projects Ltd vs. TRF Limited,2016 SCCOnlineDel 6560** and pointed out that in case of Energo Engineering Projects Limited (supra) the facts were such that the learned Single Judge directed the application under Section 9 of the Act filed by the respondent to be treated as application under Section 17 of the 1996 Act and issue direction that the same may be heard by the Arbitral Tribunal as and when such Tribunal commenced first meeting. After narrating the subject matter, learned Senior Counsel drew our attention to the observations made by the Court in para 30 of the judgment, which reads thus:

"30. In our view, the learned Single Bench patently erred in holding "there is no impediment or situation where the remedy under Section 17 of the Act is not efficacious". The Learned Single Bench failed to appreciate that the pendency of a Special Leave Petition in which the constitution of the Arbitral Tribunal was under challenge, was in itself, a circumstance which rendered the remedy of the parties under Section 17 uncertain and not efficacious."

The Division Bench of the Delhi High Court ultimately by observing as stated above, allowed the appeal and directed the Single Judge to hear and dispose of Section 9 application filed by the respondent in the said case. Mr. Sibal, learned Senior counsel for the respondent submitted that both the aforesaid judgments of the Division Bench of the Delhi High Court in case of **Benara Bearings & Pistons Ltd** (supra) and **Energo Engineering Projects Ltd** (supra) are in fact in favour of the present respondent and the same would not help the present petitioner. Thereafter, Mr. Sibal, learned Senior counsel for the respondent distinguished the judgment cited by the learned Senior counsel Mr.Mihir Thakore in case of **Ardee Infrastructures Private Limited** (supra) and submitted that in that case, the question was with regard to whether prior to 2015 amendment where there was an automatic stay, whether a direction of deposit of decreetal amount can be given and hence the judgment in case of **Ardee Infrastructure Pvt. Ltd** (supra) would also not be applicable to the facts of the present case.

8.10.Mr. Sibal, learned Senior counsel for the respondent thereafter submitted that judgment cited and relied upon by Mr.Thakore, learned counsel for the petitioner in respect of Article 227 of the Constitution of India setout parameters of the High Court in exercise of powers under Article 227 of the Constitution of India. This judgment cannot be applied to the Arbitration Act. The only judgment that can be applied to the arbitral proceedings or a matter relating to the arbitration is the judgment of the Hon'ble Supreme Court in the case of **Bhaven Construction** (supra) and that is the only law laid down by the Hon'ble Supreme Court with respect to exercise of powers under Article 227 of the Constitution of India in context of Arbitration Act. He further submitted that exercise of powers under Article 227 of the Constitution of India is not an alternative remedy, it is jurisdictional remedy. The statute provides for full-fledged appeal which is broader than petition under Article 227 of the Constitution of India. It was contended that appeal is on jurisdiction, is an appeal on facts, every aspects of the matter can be agitated. It was contended that this Court be persuaded in Section 9(1) to 9(3) of the Act when the appeal is provided. Referring to the judgment of the Achutunanda Baidya (supra), more particularly para 10 thereof, it was contended that same does not apply to the case on hand. It was contended that para 10 relates to the High

Court power of superintendence and such general parameters will not apply to the case on hand and not in context of Arbitration Act. Mr. Sibal, learned Senior counsel for the respondent submitted that reliance placed by the learned counsel for the petitioner in respect of Ajay Singh (supra) is not applicable in facts of the present case as the said case was in respect of criminal matter.

8.11.Mr. Sibal, learned Senior counsel for the respondent contended that reliance placed upon in case of Shalini Shyam Shetty (supra) and the proposition canvassed by the learned counsel for the petitioner is in context of Code of Civil Procedure and not in respect Arbitration Act. As far as proposition of law in case of Arbitration Act is concerned, the only applicable law is in respect of Bhaven Construction (supra). Thereafter, Mr. Sibal, learned Senior counsel for the respondent made submissions in respect of interpretation of Section 9(3) of the Act and submitted that entertainment of the application must be after Tribunal has been constituted. If that is the case then plain reading of Section is that once Arbitral Tribunal is constituted then the application must be filed before the Court which is not the case here. In the instant case, application under Section 9 was filed much before the constitution of Arbitral Tribunal and order is made reserved after hearing the parties much before the constitution of Arbitral Tribunal. The order was reserved on 7.6.2021 whereas the Arbitral Tribunal was constituted more than a month thereafter on 9.7.2021.In between also, the matter was posted for orders and this aspect according to Mr. Sibal, learned Senior Counsel for the respondent was one of the most significant aspect as before constitution of Arbitral Tribunal the matter was kept for orders and therefore, once Arbitral Tribunal was constituted on 9.7.2021 the Court would not entertain application under sub-section (1) of Section 9 after 9.7.2021 as the Tribunal was constituted on that day but as bar of Section 9(3) would come into play only from 9.7.2021 and not prior thereto. It was then submitted that language of Section 9(3) is looked into. Section 9(3) provides that " ..unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious". According to Mr. Sibal, learned Senior Counsel for the respondent language of Section 9(3) would suggest that if an application is filed under Section 9 after 9.7.2021 the date on which the Arbitral Tribunal was constituted then the Court will not entertain unless it finds that the proceedings under Section 17 is not efficacious and therefore, such provision can only apply to the situation on hand. In other words, if Section 9 application is filed after Arbitral Tribunal is constituted when the matter is before the Tribunal, Section 9 application will still lie, if the petitioner is able to show that Section 17 is not an efficacious remedy. According to Mr. Sibal, learned Senior Counsel for the respondent, argument of the petitioner is absolutely different and the say of the petitioner is that under Section 9, it is for the petitioner to show that Section 17 is

not an efficacious remedy. In fact, according to Mr. Sibal, learned Senior Counsel for the respondent, it is for the Court to apply its mind and decide as to whether remedy provided under Section 17 can be said to be an efficacious remedy or not and therefore, Section 9(3) would not apply at all to the situation on hand. Further language of Section 9(1) also provides that at every stage date during or after arbitral proceedings but before its enforcement under Section 36, an application can be filed under Section 9 which also means that application under Section 9 can be filed even after Arbitral Tribunal is constituted and therefore, it is for the Court to come to a conclusion that remedy provided under Section 17 is not efficacious remedy. According to Mr. Sibal, learned Senior Counsel for the respondent, therefore, in this context that the Division Bench of the Delhi High Court in case of Benara Bearings & Pistons Ltd (supra) observed that provision of Section 9 does not prevent a party from arguing under Section 9 for getting order under Section 9, even if the Tribunal is being constituted as Section 9 has not an ouster clause. It does not oust the jurisdiction of the Civil Court. If the legislature had an intention to prescribe the jurisdiction, it would have said so, moment the Tribunal is constituted an application for interim measures shall not lie before the Court. Even language of Section 9(1) also suggests that application for interim measures can be filed at any stage as stated above and there is no prohibition for a Court to pass any order even after Arbitral Tribunal is constituted. It was contended that Section 9(3) does not have any pre-condition and therefore, judgments relied upon by Mr.Thakore, learned senior counsel for the petitioner are not applicable to the facts of the present case. It was contended by Mr. Sibal, learned Senior Counsel for the respondent that judgments relied upon by the learned counsel for the petitioner in case of Kundan Lal (supra), Hindustan Commercial Bank Limited (supra) and Martin & Harris Ltd (supra) whereby the word 'entertain' is interpreted in the context of facts of the respective cases and in context of language of the said statute and therefore, aforesaid interpretation of word 'entertain' is misplaced. Interpretation of word 'entertain' differs from context to context, situation to situation and varies from object of act and therefore, expression of word entertain must be understood in context of this statute. It would be misdirection in law in interpreting statute or word in a statute in the context of another statute in a different context. Mr. Sibal, learned Senior Counsel for the respondent then took us to the language of Article 134 of the Constitution of India and submitted that expression 'entertain' and 'hearing' are two different expressions and therefore entertain, hearing and disposal are three separate and distinct and cannot be mixed with each other. Referring to Section 18 of the Code of Civil Procedure, Mr.Sibal, learned Senior counsel for the respondent submitted that it depends upon the nature of proceedings and the nature of statutes, in which the word is used, the manner in which the word is used. It was submitted that while interpreting the particular

word, the object and context of statute is required to be taken into consideration. Mr.Sibal, learned Senior counsel for the respondent also relying upon the language of Order 41 Rule 4 and Order 41 Rule 9 of the Code of Civil Procedure reiterated that the word 'entertain' is required to be interpreted, keeping in mind the object of the statute and the context in which word is used.

8.12 Mr.Sibal, learned Senior counsel for the respondent submitted that application pointing out bar of Section 9(3) was preferred by the present petitioner in his application under Section 9 and no separate application was preferred in respect of application under Section 9 of the Act preferred by the present respondent. It was contended that nature of reliefs claimed by both the parties in their separate applications under Section 9 are different and therefore, it is for the petitioner to prefer application pointing out bar of Section 9(3) and to approach Arbitral Tribunal for interim measures in respect of his own application but in absence of any application filed by the petitioner in Section 9 proceedings initiated by the present respondent, it is not open for the petitioner to ask to refer the dispute under Section 9 for interim measures to the Arbitral Tribunal. However, Mr.Sibal, learned Senior counsel for the respondent did not dispute to the Law Commission Report and submitted that idea is that the Court should no longer interfere with the proceedings of arbitration and therefore, in fact such object would be achieved only in case if the Commercial Court is permitted to pronounce the order and if aggrieved by the same, parties may take recourse of preferring an appeal under Section 37 of the Act. While summing up his submissions, Mr.Sibal, learned Senior counsel for the respondent submitted that the petitioner can always avail remedy provided under Section 37 of the Act rather than approaching this Court under Article 227 of the Constitution of India by filing present petition and more particularly, looking to the ratio laid down by the Hon'ble Supreme Court in case of **Bhaven Construction** (supra) i.e. only remedy available to the present petitioner and if this petition is entertained, it will open up Pandora's box and the flood gates of the litigation will open up which would defeat the basic purpose of Arbitration Act and prayed for dismissal of petition.

[9] Mr.Mihir Thakore, learned Senior counsel for the petitioner in rejoinder extensively referred to the written submission made by Mr.Gaurav Banerjee, learned senior counsel dated 3.8.2021. Mr. Thakore, learned Senior counsel for the petitioner even in rejoinder once again at length reiterated the submissions made by him at the time of his main arguments, more particularly, as regard interpretation of Sections 9(1), 9(2) and 9(3) of the Act and mainly emphasised upon principle of party autonomy. In support of his contention, Mr.Thakore, learned Senior counsel for the petitioner referred to the judgment of the Hon'ble Supreme Court in the case of Bharat

Aluminium Company vs. Kaiser Aluminum Technical Services Inc,2016 4 SCC 1126 and in case of PASL Wind Solutions Private Limited vs.GE Power Conversion India Private Limited,2021 SCCOnlineSC 331. Mr. Thakore also referred to some of the judgments of the Foreign Courts citation of which are as under:

1. Econet Wireless Ltd vs.Vee Networks Ltd, 2006 EWHC(Comm) 1568.

2. Gerald Metals SA vs. The Trustees of the Timis Trust and others,2016 EWHC 2327.

3. NCC International AB vs. Alliance Concrete Singapore Pte Ltd,2008 2 SLR 565.

4. Gary Born, International Commercial Arbitration, Volume II (Third Edition, 2021).

5. Leviathan Shipping Co.Ltd vs.Sky Sailing Overseas Co. Ltd,1998 4 HKC 347.

Upon relying on those judgments, learned Senior counsel for the petitioner once again emphasised principle of party autonomy. The learned counsel submitted that once Arbitral Tribunal is constituted, role of Court becomes very limited and the Court is required and expected only to aid Arbitral Tribunal. Mr.Thakore, learned Senior counsel for the petitioner repeated and reiterated more or less what was argued at the time of advancing principal argument. Learned counsel in its rejoinder submitted that petitioner does not have any objection if the very pleadings which are there before the Commercial Court are put before Arbitral Tribunal without any new filing. Mr. Thakore, learned Senior counsel for the petitioner while reiterating the contention already taken in his submission as well as in rejoinder, further took this Court to the facts as narrated in the application filed by the parties under Section 9 before the Commercial Court at Surat and contended that these are not matter which cannot await for the Arbitral Tribunal to decide. Mr. Thakore, learned senior counsel for the petitioner further contended that as such prayers prayed for are made for money release and the same can be decided by the Arbitral Tribunal after two months. Mr. Thakore also submitted that it is not his submission that this Court may decide the issue, however he submitted that prayers prayed for are not of such urgent nature of demolition of building which cannot be determined by the Tribunal and Tribunal is not only constituted but it has specifically provided that either party may move the Tribunal under Section 17 and prayers prayed for more adequately be determined by the Arbitrator. It was also contended that as such no fresh pleadings are required and Tribunal can fix it within 15 days or one month to determine the matter. Mr. Thakore, also contended that what is nature of urgency is to be tested and tried to highlight1 prayers from the point of view of urgency and paying debts and interest and as such according

to Mr. Thakore, learned Senior counsel for the petitioner whole claim made by the respondent is for recovery of money. It was also contended that urgency cannot be pleaded for the purpose of keeping the matter before the Court and not going before the Arbitral Tribunal. Mr. Thakore, at the end also reiterated that contention as regard Article 227 of the Constitution of India as well as judgment of the Hon'ble Supreme Court in the case of Bhaven Construction (supra), more particularly referring to para 16 and 20 contended that remedy under Section 37 is against the order on merits and not on an issue whether it should be referred to Arbitral Tribunal or not. It was contended that once it is brought to the notice of the Court that Arbitral Tribunal is constituted by merely placing order of the High Court, in such event, the Court will have to withdraw itself from deciding Section 9 application unless of-course it finds that it is urgent and relegate parties to Arbitral Tribunal. According to Mr. Thakore that is the intent of Section 9(3) of the Act. It was contended that Court cannot pass order on merits unless it comes to the conclusion that it is required to be passed because it is so urgent. It was also reiterated that urgency cannot be there in financial matter of this nature. It was contended by Mr.Thakore that even if the orders passed on merits and appeal preferred under Section 37 before the High Court, the High Court may as well as at that stage duty bound to relegate the parties to arbitration. Mr. Thakore contended that even if order is passed and appeal is preferred under Section 37 of the Act before the High Court and Arbitral Tribunal is constituted, the High Court would have to relegate the parties to arbitration unless ofcourse High Court feels that its is urgent. It is contended by Mr. Thakore that once the Arbitral Tribunal is constituted, the Court shall not exercise its jurisdiction and further referred to para 49 of the judgment of Shalini Shetty (supra) as well as judgment of Achunanan Vaidhya (supra) and Ajay Singh (supra) and contended that High Court can interfere and same would not amount to interfering with the arbitral process but it would be supporting the arbitral proceedings.

[10] Before dealing with the submissions made by both the sides, it would be appropriate to refer to the prayers as originally prayed for in this petition under Article 227 of the Constitution. The petitioner in para 39(b) has prayed as under-

"b. That this Hon'ble Court be pleased to call for the records and the proceedings in Commercial Civil Misc. Application No. 2 of 2021] and Commercial Civil Misc. Application No. 99 of 2021 and thereafter be pleased to issue a writ of certiorari, and quash and set aside the order in Annexure - B herein passed by the Learned Judge passed in Commercial Civil Misc. Application No. 2 of 2021 and allow the Interim Application filed by the Petitioner in AMNS' Section 9 Petition;"

During the course of argument, the respondent objected to the prayer and submitted that a writ of certiorari would not lie against the order passed by a civil court/competent court. Mr. Mihir Thakore, learned senior advocate appearing for the petitioner candidly submitted that a writ of certiorari would not lie. Draft amendment dated 02.08.2021 was tendered by the petitioner, which was taken on record, wherein it is prayed as under -

"b. That this Hon'ble Court be pleased to quash and set aside the Impugned Order dated 16 July 2021, passed by the Learned Judge below the Interim Application (Annexure-B) filed by the Petitioner herein in Commercial Civil Misc. Application No. 2 of 2021 and allow the said Interim Application filed by the Petitioner in AMNS' Section 9 Petition."

[11] We are in total agreement with the submission made by the learned counsel appearing for the parties that writ of certiorari would not lie against the order of Civil Court and therefore, no further elucidation on the said aspect is necessary. In fact, the learned counsel for the petitioner has also agreed that such a writ of certiorari would not lie and therefore, no further discussion on the prayer originally prayed for would be necessary. As far as amendment is concerned, it may be noted that in the title of the petition, it is clearly mentioned that it is a matter under Article 227 of the Constitution of India. Considering the impugned order and the nature of controversy involved in this petition, ultimately, what is challenged in the present petition under Article 227 of the Constitution is the order dated 16.07.2021 passed by the Commercial Court, Surat, below interim application filed by the petitioner. Considering the judgments cited by both the sides, the petition under Article 227 of the Constitution would be maintainable and the prayer sought for in the draft amendment would not change the nature of the controversy and in opinion of this Court, therefore, the amendment deserves to be granted. The petitioner is permitted to amend the petition accordingly as prayed for in the draft amendment. The draft amendment to be carried out forthwith.

[12] In order to appreciate the contentions raised by both the sides, even at the cost of repetition, it would be appropriate to refer to some basic facts leading to the present controversy. The petitioner as well as respondent are party to the agreement dated 21.02.2011. Suffice it to note that as provided under Article 15 of the said agreement, the petitioner herein evoked arbitration clause and ultimately, the dispute has been referred to arbitration. The factual matrix indicate that the petitioner herein filed an application under Section 9 of the Act before the Commercial Court at Surat on 15.01.2021 and prayed for interim measures. Similarly, the respondent also filed an application under Section 9 of the Act on 15.03.2021 and also prayed for interim measures. As the facts indicate from the record, both the applications were extensively heard for about 16 effective hearings before the Commercial Court at Surat and the

hearing was concluded on 07.06.2021. The learned Trial Court kept both the applications for orders. It is an admitted position that till the said date, i.e., till 07.06.2021, the Arbitral Tribunal was not constituted and the petition filed under Section 11(6) of the Act being IAAP No. 5 of 2021 was pending for adjudication before this Court. With consent of both the parties, IAAP No. 5 of 2021 came to be allowed and Arbitral Tribunal came to be constituted by this Court vide order dated 09.07.2021. The record also indicates that though the Trial Court had kept the matter for orders on 07.06.2021, the same was not pronounced and meanwhile, Arbitral Tribunal came to be constituted by this Court vide order dated 09.07.2021 as aforesaid. The contention raised in this petition as well as the application filed before the Trial Court by the petitioner are required to be considered in light of these basic factual matrix. The record indicates that lastly, the Trial Court had kept both the applications under Section 9 for orders on 20.07.2021 and on 16.07.2021, the petitioner herein approached the trial court and filed the present application and inter alia prayed as under -

"a. Pass an order referring all disputes between the parties as mentioned in the AMNS Petition and EBTL Petition to the arbitral tribunal for adjudication."

The Trial Court heard both the sides and passed the impugned order dismissing the application. Both the learned counsel for the petitioner as well as learned counsel for the respondent have argued the matter extensively before this Court and have relied upon plethora of judgments which are referred to herein after. Considering the submissions made by both the sides, it is contended by the petitioner mainly as under -

1. That the petition is maintainable under Article 227 of the Constitution of India.

2. That the present petition is not premature or speculative.

3. That the impugned order is in violation of Section 9(3) of the Act and overall construct of Arbitration Act.

4. That the word 'entertain' occurring in Section 9(3) of the Act would preclude the Court from proceeding further with the application under Section 9 once the Arbitral Tribunal is constituted and the Court is bound to refer the pending applications under Section 9 to the Arbitral Tribunal for its adjudication.

As against this, it is mainly pointed by the learned counsel for the respondent as under -

1. Whether the High Court can direct the Trial Court to not pronounce its judgment in applications filed by both parties under Section 09 of the Arbitration Act, in

exercise of its powers under Article 227 of the Constitution?

2. Whether the petitioner can maintain a petition under Article 227 when its remedy lies under Section 37 of the Arbitration Act?

3. Whether the present Petition exceeds the jurisdiction of the Hon'ble Court under Article 227 of the Constitution where no case of exceptional circumstance or 'bad faith' is either alleged or demonstrated in the Petition?

4. Whether the Petition is maintainable where the relief of a writ of certiorari is prayed for?

5. Subject to the above, whether the Ld. Judge was right in holding that Section 9(3) is not triggered in the present facts and circumstances since the Section 9 Applications had already been admitted and heard and only the formality of pronouncement of orders remained?

6. Whether the proper interpretation of Section 9 and Section 17 of the arbitration Act would require that the clock be set back on concluded judicial proceedings in light of the express legislative intent to enable the process to be "more user friendly, cost effective and lead to expeditious disposal of cases"?

[13] Before we revert to the main contentions and merits of the matter, we may consider the matter from the angle which was canvassed by the learned counsel for the respondent that the present petition is not maintainable under Article 227 of the Constitution of India, the main contention of the respondent was that today, there is no order. The learned Commercial Court has reserved the order and therefore, the occasion has not arisen for the Court to look into the order and consider whether he has acted beyond his jurisdiction or not and in support of this contention, it was contended by the respondent that relying upon the judgment of Bhaven Construction (supra) that arbitration act being a complete code in itself, it provides for an appeal under Section 37 of the Act. Provision of appeal is already there in Arbitration Act against any order which may be passed in an application under Section 9. Reliance has been placed upon the judgment in the case of Bhaven Construction (supra) by submitting that once the trial court passes any order, then only in case if it grants any relief under section 9, the said order is subject to further challenge under Section 37 of the Act and in case if the trial court comes to the conclusion that there is an efficacious remedy under section 17, in that case, the proper remedy would be to prefer an appropriate application before the arbitral tribunal. However, considering the peculiar facts of the case, we are not convinced with the aforesaid submission made on behalf of the respondent. What is to be seen and adjudicated in this matter is the order passed by the trial court on an interim application filed by the petitioner seeking

direction from the Court below to refer the pending interim applications to Arbitral Tribunal. The facts clearly reveal that the respective applications under section 9 were fully heard together, but order was reserved by the trial court and thereafter, when the Arbitral Tribunal is constituted, whether the trial court should be permitted to pronounce the order or not or that the prayer prayed for by the petitioner to refer the pending applications to Arbitral Tribunal or not is the subject matter of the present petition. If any such application is made for limited purpose by the petitioner in that case, such petition is maintainable under Article 227 of the Constitution as the order under challenge is not an order passed either under section 9 of the Act or under Section 17 of the Act and this order, which is under challenge is passed in respect of whether the learned trial judge should be allowed to pass an order or not and therefore, this order is certainly not an order under section 9 of the Act, which can be challenged under section 37 of the Act. This order is not an order passed on an application for interim measures preferred by either party under section 9 and therefore, though it is an undisputed fact that the Arbitration Act is complete code in itself, considering the nature of application dated 16.07.2021. We can safely hold that the order under challenge before us is merely an order passed by the trial court over which the High Court has supervisory jurisdiction under Article 227 of the Constitution and therefore, such order is very much subject to challenge under Article 227 of the Constitution and would not be appealable under section 37 of the Act because today there is no order passed by the trial court either under section 9 granting or refusing interim relief to either of the party

[14] However, we make it clear that the view expressed by the Hon'ble Apex Court in Bhaven Construction (supra) is in respect of jurisdiction of Arbitral Tribunal whereas here the issue on hand is entirely different issue and therefore, though we are in complete agreement with the ratio laid down in the case of Bhaven Construction (supra), in facts of this case, the order under challenge is held to be an order passed by trial court and hence, we hold that the petition under Article 227 of the Constitution is maintainable. Even considering the ratio laid down by the Hon'ble Apex Court as well as other Hon'ble High Courts relied upon by both the sides, the present petition under Article 227 is maintainable, detailed reference of which would not be necessary in view of the observations made hereinabove.

[15] The main question which arises for consideration of this Court is whether once Arbitral Tribunal is constituted, can a court entertain an application under Section 9(1) of the Act or not. Section 9 of the Act pre 2015 amendment reads as under -

"9. Interim measures, etc. by Court.-

A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

(i)for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely: -

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

At this stage, it would be appropriate to note that Section 9(1) as it stands as on date, was originally section 9 in the 1996 Act. By Act 3 of 2016, with effect from 23.10.2015, sub-sections(2) and (3) came to be inserted. Post 2015 amendment, Section 9 of the Act reads as under -

"9. Interim measures, etc. by Court.-

(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely: - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, A court passes an order for any interim measure of protection under sub-section(1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section(1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

Section 17 of the Act prior to 2015 amendment stood as under-

"17. Interim measures ordered by arbitral tribunal -

"(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)."

By 2015 amendment, Section 17 came to be amended. Further, by amending Act of 2019 being Act 33 of 2019, "or at any time after making of the arbitral award but

before it is enforced in accordance with section 36" came to be omitted. Section 17 as it stands today, reads as under -

"17. Interim measures ordered by arbitral tribunal -

(1) A party may, during the arbitral proceedings apply to the arbitral tribunal -

(i)for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely -

(a) The preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) Securing the amount in dispute in the arbitration;

(c) The detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) Interim injunction or the appointment of a receiver;

(e) Such other interim measure or protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court."

[16] Thus, from the bare reading of the aforesaid section 9, as mentioned hereinabove, before 2015 amendment, section 9 provided for interim measures etc., by the Court at three occasions, before or during arbitral proceeding or at any time after making of the arbitral award, but before it is enforced in accordance with Section 36 of the Act. Before 2015 amendment, sub-section (3) of Section 9 was not in existence. Taking aid of the recommendations of the Law Commission, the same shows

that sub-section (2) was recommended to be inserted to ensure timely initiation of arbitral proceedings by party who is granted interim measure of protection. Similarly, the Law Commission recommended sub-section (3) of section 9 as under :

> "(3) Once the Arbitral Tribunal has been constituted, the Court shall, ordinarily, not entertain an Application under this provision unless circumstances exist owing to which the remedy under section 17 is not efficacious."

With the object to reduce the role of Court in relation to grant of interim measures, once the Arbitral Tribunal has been constituted, it is further provided that once the Tribunal is seized of the matter, it is most appropriate for the Tribunal to hear all interim applications. The recommendation of Law Commission further shows that such provision was recommended in spirit of UNCITRAL MODEL LAW as amended in 2006. The amendment in Section 17 of the Act also provides Arbitral Tribunal with the same powers as Court would have under Section 9 of the Act. At this juncture, it may be noted that the Parliament while inserting sub-section (3) of Section 9, instead of words 'ordinarily not entertained' has provided 'shall not entertain an application under sub-section (1)'. Referring to the impugned order at this stage, the learned trial court has given restricted meaning to word "entertain" occurring in sub-section(3) of section 9 in a narrow sense. The learned counsel for the petitioner has heavily relied upon the judgment of Hon'ble Calcutta High Court in the case of Tufan Chatterjee (supra), judgment of this Court in Manbhupinder Singh Atwal (supra) and judgment of Hon'ble Bombay High Court in Nehru Nagar Vijay Lenyadri (supra) to buttress his argument. Whereas the learned counsel appearing for the respondent has relied upon the judgment in the case of Benara Bearings & Pistons Ltd. (supra) of the Delhi High Court.

[17] The question therefore which deserves consideration by this Court at this stage is interpretation of section 9 as a whole in facts arising in the case on hand. As said earlier, section 9(1) has not undergone any change or amendment except it being re-numbered as sub-section (1) of Section 9. This measure is available to a party, before commencement of arbitral proceedings, during arbitral proceedings and even after the award is passed till it is enforced in accordance with Section 36 of the Act. Sections 9(1), 9(2) and 9(3) are to be read in harmonious manner and Section 9(3) cannot be read in isolation. When an application for interim measures for any of the purposes provided under section 9(1) is filed before the arbitral proceedings commences, sub-section (3) of section 9 will have no application. It is true that once the Arbitral Tribunal is constituted, sub-section (3) of section 9 will come into play. In the instant case, the eventuality as provided under sub-section (2) of Section 9 is not relevant. Section 9(3) provides that the once Arbitral Tribunal has been constituted, the Court shall not entertain the application under sub-section (1) of Section 9, unless the Court

finds that circumstances exist which may not render the remedy provided under Section 17 efficacious. In opinion of this Court, therefore, there is no ouster of the jurisdiction of the Court. Even considering the objects and reasons of introduction of sub-section (3) of Section 9, the purport and purpose of the amendment was to reduce the role of the Court and not to eradicate the role of the Court. Sub-section (3) of Section 9 therefore does not take away the jurisdiction of the Court in dealing with the application under Section 9(1) of the Act once the Arbitral Tribunal is constituted. However, later part of sub-section (3) of Section 9 clearly provides that the Court can entertain such an application under Section 9(1) after the Arbitral Tribunal is constituted only if it finds that the alternative remedy as provided under section 17 is not efficacious. Though, there is no total ouster in order to reduce the role of the Court, it does provide for a restriction. The word 'entertain' as interpreted by the learned trial court with respect is very narrow in nature. The word 'entertain' occurring in sub-section (3) of section 9 would not merely mean to admit a matter for consideration, but it also entails the whole procedure till adjudication, i.e., passing of final order. Therefore, in opinion of this Court, sub-section (3) of section 9 provides that if an application under section 9 is filed after constitution of Arbitral Tribunal, while entertaining such application, the Court is duty bound to examine whether remedy provided under section 17 is efficacious or not and if it finds that it is not efficacious, it can entertain and if it finds that the remedy of Arbitral Tribunal is efficacious, it can refuse to entertain application under Section 9 of the Act. Having come to the aforesaid conclusion, while examining the fact situation of the case on hand, it is an admitted position that the application under Section 9(1) was filed by the petitioner before the constitution of Arbitral Tribunal and even the application under section 9(1) filed by the respondent was before the constitution of Arbitral Tribunal. It is an admitted position that both the applications under section 9(1) of the Act were heard before the constitution of Arbitral Tribunal and in fact, as per the record, the matter was kept for orders on 07.06.2021. Even that date was before constitution of Arbitral Tribunal. If the Trial Court would have pronounced the order on 07.06.2021, the situation which has arisen as on date, would not have arisen at all. However, the fact remains that the Trial Court had no occasion uptil now to examine whether the remedy under section 17 is efficacious or not in the instant case. By the application, which is subject matter of this petition, the trial court is made aware by the parties that now the Arbitral Tribunal is constituted by this Court vide order dated 09.07.2021 passed in IAAP No. 5 of 2021 and therefore, the Trial Court before passing any order will have to take into consideration the provisions of section 9(3) of the Act. However, as rightly contended by the respondent, jurisdiction of the trial court is not denuded by operation of section 9(3) of the Act and therefore, it is for the trial court to decide whether the remedy under section 17 which is similar to the remedy as provided under section 9(1) is efficacious or not and under such circumstances, the trial court cannot be prevented

from passing an order. As can be seen from the scheme of the Act, Arbitration Act is a complete Code in itself and if the decision is contrary or otherwise erroneous, it can be remedied by either party by filing an appeal as provided under Section 37 of the Act. Thus, though the trial court, in opinion of this Court, has committed an error in giving restricted meaning to word 'entertain', the fact remains that the trial court cannot be prevented from passing an order and/or considering whether the remedy under section 17 is efficacious or not and therefore, even though this Court does not agree with the reasons given by the Trial Court, ultimately, the trial court has rightly dismissed the same. In opinion of this Court, thus the application filed by the petitioner is a premature petition.

[18] It may also be noted that peculiar fact arises in this writ petition. As noted hereinabove, Section 9 applications were filed by the respective parties before the Arbitral Tribunal was constituted and hearing was over. It is no doubt true that still the order is to be passed and as per the conclusion arrived at by this Court, it would be the duty of the trial court to consider the provisions of sub-section (3) of Section 9 before passing final order on the applications filed by the petitioner as well as the respondent.

[19] As far as interpretation of the word 'entertain' is concerned, both the side have placed reliance on number of judgments before us to convince that word 'entertain' may be interpreted in a way that it may be suitable to the either side. However, on considering all these judgments as well as considering the language of respective statute like Section 18 of CPC, Article 134(2) of the Constitution of India as well as Section 9(3) of the Arbitration Act, we are of the view that instead of catching a particular word in the language of a particular statute and interpreting that particular word strictly by dictionary meaning, what is required is to be examined in the context in which that particular word is used in the statute. While interpreting the word, we cannot overlook the object for which a particular statute is introduced by the legislature and therefore, considering all the above referred aspect, we are of the view that the word 'entertain' should not be interpreted in its strict dictionary meaning by restricting its interpretation to a very narrow meaning. The interpretation of the word must be in the context of object of the Act and it should be given a purposeful interpretation, which may aid in achieving the purpose behind the scope and object of the provision and therefore, as far as section 9(3) is concerned, we hold that the word 'entertain' would not only mean that admitting for consideration but it would mean the whole gamut upto its final adjudication and passing of an order on merits.

[20] Though we are in total agreement with the contention of the learned counsel for the petitioner that the role of the Court is to assist the arbitral proceeding, however, the provisions of section 9(1) read with section 9(3) cannot be totally ignored to mean that once the Arbitral Tribunal is constituted, there is total ouster of court. If that would

have been the intention of the legislature or parliament, it would have also amended section 9(1) of the Act. Even at the cost of repetition, we reiterate that section 9(1) of the Act enables a party to approach the Court for interim measures at three different stages, before the arbitral proceedings, during arbitral proceedings or after the award is passed till it is enforced in accordance with Section 36 of the Act. In light of such clear cut provisions under section 9(1) of the Act, section 9(3) cannot be read as total ouster in order to reduce the role of the Court. It is no doubt true that sub-section (3) of Section 9 provides for restriction of exercise of powers by the Court and it has to decide whether the remedy provided under section 17 is efficacious or not. However, considering the peculiar facts of this case, the prayers prayed for by the petitioner in the interim application before the trial court cannot be granted. The learned counsel for the petitioner has also taken this Court through the law prevailing in England, Singapore, USA, Hong Kong and South Africa. We are in total agreement with the principles enunciated in the said submission that the international practice is of "Court-Subsidiarity", however, such proposition cannot be read in isolation but are to be applied in facts of each case.

[21] The learned counsel for the petitioner heavily relied upon the judgment of the Calcutta High Court in Tufan Chatterjee (supra) and Manbhupinder Singh Atwal (supra) to canvass the case of the petitioner. As far as judgment in the case of Tufan Chatterjee (supra) is concerned, the said judgment in principal canvasses the proposition that once the Arbitral Tribunal has been constituted, unless the court is satisfied that circumstances existed, which may not render remedy provided under Section 17 efficacious, the Court cannot entertain the application for interim relief under section 9(1) of the Act. However, in the instant case, what is required to be seen is that the hearing was concluded on 07.06.2021. On an interim application preferred by both the sides under section 9(1) of the Act, the date on which the order was reserved by the Commercial Court, the Tribunal was not constituted and therefore, the Commercial Court had no occasion to consider the matter from the point of view as to whether remedy under section 17 can be said to be efficacious or not. Arbitral Tribunal was constituted on 09.07.2021 and thereafter, the application was made seeking relief to refer the dispute to Arbitral Tribunal and submitting that now in view of the fact that Arbitral Tribunal is constituted, commercial court should not pronounce the order, in these facts of the case, today the situation has arisen that the commercial court is still seized of with the matter. Order is not passed and therefore, since the order is not passed, it would not be prudent to presume that the commercial court will not touch this aspect and will pass an order ignoring the mandatory provisions of section 9(3) of the Act and therefore, in facts of this case, the judgment of Tufan Chatterjee (supra) will not be applicable to the case on hand.

[22] Secondly, by relying upon the judgment in the case of Manbhupinder Singh Atwal (supra), the petitioner tried to canvass that once the Arbitral Tribunal is constituted, it is for the Court to consider as to whether the remedy under section 17 is an efficacious remedy or not before entertaining the application under section 9 of the Act. In the case of Manbhupinder Singh Atwal (supra) though the Arbitral Tribunal was constituted, but for one reason or another, since the same was not functional and as that fact had come on record, the Court held that the remedy under section 17 of the Act would not be an efficacious remedy and therefore, the Court had an occasion to consider whether the remedy under section 17 is an efficacious remedy or not. In the instant case, the Tribunal is constituted by consensus order by both the parties vide order dated 09.07.2021 before this Court. As submitted by the parties, the first meeting of the arbitral proceeding took place on 30.07.2021 and even during the course of hearing of this petition, it was not the case of the either party that though Arbitral Tribunal is constituted, it has become non-functional. However, in facts of this case, the trial court have had no occasion to examine the fact as to whether the remedy under section 17 of the Act in these facts of circumstances is not efficacious remedy and hence, the judgment in the case of Manbhupinder Singh Atwal (supra) is not applicable to the facts of the present case. Either party can approach the Arbitral Tribunal under section 17 directly as the same is not barred by statute.

[23] As far as the judgment in the case of Benara Bearings & Pistons Ltd. (supra) is concerned, it is true that the said judgment takes care of a situation post 2015 amendment in the Act, but in that judgment the aspect of section 9(3) of the Act has not been dealt with. At the same time, the Court while delivering the judgment in the case of Benara Bearings & Pistons Ltd. (supra) also had no occasion to interpret the word 'entertain' and therefore, even the said judgment would not apply stricto senso in the peculiar facts arising in this case.

[24] Considering the submissions made before us as well as the judgments cited before us by both the sides, though the learned trial court has not given proper reasons for dismissing the application filed by the petitioner, the trial court has committed no error in not granting the prayer prayed for by the petitioner in the interim application filed in CMA No.2 of 2021. In our opinion the trial court should be permitted to pronounce the order on both the applications under section 9 pending before it keeping in mind the observations made by us in this judgment and taking into consideration the provisions of section 9(3) of the Act.

[25] Before parting, we may also refer to the prayers prayed for by the petitioner in the present application before the Trial Court wherein the petitioner has prayed as under -

"a. Pass an order referring all disputes between the parties as mentioned in the AMNS Petition and EBTL Petition to the arbitral tribunal for adjudication; and

b. Pass such other order/s which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

The application in question is styled as interim application on behalf of the applicant, i.e., the present petitioner. Referring to Section 9(3) of the Act and relying upon the judgment of Calcutta High Court in the case of Tufan Chatterjee (supra), as well as judgment of this Court in Manbhupinder Singh Atwal (supra), it is prayed that the Court may pass an order referring all dispute of the parties to the Arbitral Tribunal for adjudication. Section 9(3) of the Act does not provide for referring of the dispute to the Arbitral Tribunal for adjudication. The scope and object of section 9 is only limited to the interim measures and it is not akin to the provisions of section 8 of the Act wherein the Court has power to refer the parties to the arbitration where there is an arbitration agreement. Section 9 of the Act only deals with the interim measures and it is not within the scope of this section for the Court to refer the dispute to the Arbitral Tribunal. Moreover, section 9 can be resorted to by a party even before the arbitral proceedings and pendency of any arbitral proceeding is not a pre-condition for exercise of power by a Court under Section 9. In view of the aforesaid therefore, the prayer prayed for by the petitioner in the interim application before the trial court in opinion of this Court is beyond the scope and ambit of section 9 of the Act and such prayer cannot be granted.

[26] Resultantly, we see no reason to interfere with the impugned order in exercise of our jurisdiction under Article 227 of the Constitution of India with the conclusion arrived at by the learned trial court.

[27] The petition fails and is hereby dismissed. However, there shall be no order as to costs.

FURTHER ORDER

After the order was pronounced, Mr. Navin Pahwa, learned senior advocate appearing for the petitioner has prayed for extension of order dated 26.07.2021 for a further period of three weeks to enable the petitioner to approach the Hon'ble Apex Court. The same is objected to by Mr. Soparkar, learned senior advocate appearing for the respondent.

In facts of this case, we deem it fit to direct the trial court not to pronounce its order in both the applications till 03.09.2021.