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

MASHREQ BANK PSC
Versus
INDIAN OVERSEAS BANK & 3 OTHER(S)

Date of Decision: 13 September 2021

Citation: 2021 LawSuit(Guj) 3766

Hon'ble Judges: J B Pardiwala, Vaibhavi D Nanavati

Eq. Citations: 2022 1 GLH 419

Case Type: First Appeal; Civil Application (For Stay); Cross Objection

Case No: 319 of 2021; 1 of 2021; 24 of 2021

Subject: Arbitration, Civil, Contract

Acts Referred:
Arbitration And Conciliation Act, 1996 Sec 9(1), Sec 2(h), Sec 9, Sec 9(3), Sec 37, Sec 17, Sec 9(2)
Specific Relief Act, 1963 Sec 41
Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 Sec 13

Final Decision: Appeal disposed

Advocates: Mihir Joshi, Digant M Popat, Harshit S Tolia, Parth S Tolia, S N Soparkar, Paurami B Sheth, R S Sanjanwala, Nanavati, Nanavati Associates

Cases Referred in (+): 27

J.B.Pardiwala, J.

[1] "Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win."

The above quote from the "Art of War" authored by Sun Tzu is not superlative in the context of Section 9 of the Arbitration and Conciliation Act, 1996, which confers power to the Courts to grant interim measures of protection. Section 9 is one of the most crucial and widely invoked provisions under the Act. Such measures become necessary to prevent damage to or loss of, the subject matter of the dispute in the

interim period, i.e. before the final adjudication of the dispute by an Arbitral Tribunal.

[2] This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, "the Act, 1996") read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (for short, "the Act, 2015") is directed against the order passed by a learned Single Judge of this Court dated 27th November 2020 in the Civil Application No.4 of 2020 filed in the Commercial Arbitration Petition No.9 of 2020; by which the appellant came to be restrained from proceeding further with the suit instituted by it before the Supreme Court of the State of New York against the respondent No.1 herein namely Indian Overseas Bank.

[3] The facts giving rise to this appeal may be summarized as under:

[4] The respondent No.2 herein - Shital Ispat Private Limited and the respondent No.3 namely Red Snapper Maritime Limited entered into a Vessel Purchase Contract (VPC) dated 30th October 2019. It appears from the Memorandum of Agreement dated 30th October 2019 that the respondent No.3 - Red Snapper agreed to sell two vessels named AMIL 19 and AMIL 50 respectively (subject vessels). The respondent No.2 - Shital Ispat agreed to purchase the two vessels in accordance with the terms and conditions of the Memorandum of Agreement for a lumpsum price of USD 1,238,238.00.

[5] The record further reveals that the respondent No.1 - Indian Overseas Bank (IOB), upon request made by the respondent No.2 - Shital Ispat, issued an irrevocable Letter of Credit in the amount of USD 1,238,288 with the documentary credit No.016960119000032 (subject LC). The subject LC is governed by the Uniform Customs and Practice for Documentary Credits, 2017 Revision, ICC Publication No.600 (UCP 600). The beneficiary of the subject LC is the respondent No.3 - Red Snapper. The subject LC was advised by the Red Snapper's Bank namely Noor Bank, Dubai, UAE (Noor Bank). The Noor Bank acted as the Presenting Bank. It appears that the appellant Bank was merely acting as the negotiating bank between the Noor Bank and IOB for the subject LC.

[6] The record further reveals that on 8th January 2020, the IOB confirmed with the appellant Bank that Shital Ispat had taken the physical delivery of the subject vessels and further, the subject LC had become operative. The IOB authorized the appellant Bank to encash the LC documents. It is not in dispute that the appellant Bank complied with its obligations and transferred the bill amount to the tune of USD 1,238,288 in the account of Noor Bank for the benefit of the Red Snapper. However, the IOB refused

reimbursement alleging that the LC documents were discrepant on account of the alleged forgery. The appellant Bank disputed such stance of the IOB.

[7] It appears that in view of the aforesaid, the Shital Ispat filed a petition in this Court being the Commercial Arbitration Petition No.9 of 2020 on 27th January 2020 under Section 9 of the Act, 1996. Such petition under Section 9 came to be filed against the Red Snapper and IOB respectively. It appears that on 27th January 2020, a learned Single Judge of this Court restrained the IOB from making any payment under the subject LC. Indisputably, the appellant Bank, by that time, had already transferred the money on 14th January 2020.

[8] The order passed by the learned Single Judge dated 27th January 2020 reads thus:

> "Notice returnable on 30/01/2020. Ad-interim relief in terms of Para 17(a) is granted till then.
>
> Direct service is permitted today. The petitioner is permitted to serve respondent No.1 through Email."

[9] In the wake of the aforesaid developments, the appellant Bank first filed the Civil Application No.2 of 2020 seeking to be impleaded as a party respondent in the Arbitration Petition No.9 of 2020. The said application came to be allowed by a learned Single Judge of this Court vide order dated 24th August 2020. The same reads thus:

> "1 The applicant-Bank has filed the present application requesting the Court that the applicant bank be impleaded as respondent in the petition.
>
> 2 The application is under the following facts:
>
> 2.1 Arbitration Petition No. 9 of 2020 has been filed by Shital ISPAT Pvt Ltd. It is the case of the arbitration petitioner that it has purchased vessels for a lumpsum price of USD 1,238,288.00/- from the respondent NO.1 in the arbitration petition, namely, Red Snapper Maritime Limited.
>
> 2.2 It is the case of the arbitration petitioner that it opened a Letter of Credit with the respondent No.2 of the petition, namely, Indian Overseas Bank in favour of respondent No.1 as beneficiary, for which payment was to be made by the petitioner in 90 days usance.
>
> 2.3 It is the case of the petitioner that subsequently, it was found that though projected that the vessels were free from encumbrances, the petitioner Shital ISPAT received a legal notice from Oak Tree Capital Management (U.K) that the

vessels were mortgaged to the respondent No.3 in the arbitration petition, namely, Fleet Scale NSMH Ltd as mortgagee by the owner Cleveland Shipping Ltd. The petitioner, therefore, addressed the letter to the bank that the Letter of Credit may not be entertained and all documentation be rejected. The case of the petitioner, therefore, is that the respondent No.1 Red Snapper Maritime Ltd., created a fraud and though projected that the vessels were not mortgaged on the receipt of the legal notice the arbitration petitioner was made aware of the mortgages created on the vessel, and therefore, requested the respondent No.2, Indian Overseas Bank not to make any payments.

2.4 The prayer in the arbitration petition is that the respondent no.2 Indian Overseas Bank be restrained from releasing any amount in any manner under the Letter of Credit dated 26.12.2019 in favour of respondent No.1- Red Snapper Maritime Ltd. The applicant who wishes to be joined as a party has come out with the application that pursuant to the Letter of Credit that the petitioner opened with the Indian Overseas Bank, the applicant bank was the beneficiary bank.

3 Mr. Sanjay kumar, learned advocate, appearing with Mr.Nachiket Dave, learned advocate, would draw the attention of the Court to the Letter of Credit and submit that it is evident from the Letter of Credit that the reimbursing bank was Wells Fargo Bank NLA and the applicant, Mashreq Bank was the negotiating bank. Pleadings in the application indicate that on the issuance of the Letter of Credit by the Indian Overseas Bank, on instructions of the arbitration petitioner, the applicant Mashreq bank, via swift message on confirmation from the Noor Bank, honoured the Letter of Credit and transferred the bill amount of USD 1,238,288.00/- in the Noors Bank account for the benefit of the respondent Red Snappers Maritime Limited.

3.1 In other words, it has paid the amount towards the contract which is a subject matter of an arbitration petition to Noor Bank, and therefore, it is directly concerned with the petition of the Arbitration Petition No. 9 of 2020.

4 Ms. Harshida Darji, learned advocate for the bank would submit that an affidavit-in-reply has been filed by the bank which suggests that the beneficiary bank i.e. the applicant Mashreq Bank has not been paid as the LC documents were not accepted as the dispute is subjudiced.

5 Considering these facts, what is apparent is that the prayer of the arbitration petitioner is that the Letter of Credit given by the petitioner to the Indian Overseas Bank i.e. respondent No.2 need not be honoured since the amount of transactions has been reimbursed by the applicant bank through Noor Bank. 6 Having heard

learned advocates for the respective parties, I deem it fit to grant the application. The applicant is joined as party respondent in the arbitration petition. The application is allowed, subject to the rights and contentions that may be advanced on behalf of the respective parties at the time of hearing the main arbitration petition. The application is allowed, accordingly, with no orders as to costs."

[10] Thereafter, the appellant Bank filed the Civil Application No.3 of 2020 seeking inter alia vacation of the ad-interim order dated 27th January 2020 referred to above or in the alternative, sought clarification that the order dated 27th January 2020 referred to above shall not preclude the appellant Bank in any manner in availing such legal proceedings as may be available to it in law against the IOB for enforcing its claim under the subject LC.

[11] The Civil Application No.3 of 2020 came to be disposed of by a learned Single Judge of this Court vide order dated 25th September 2020. The same reads thus:

"Heard learned counsel for the respective parties through video conferencing.

It is no need to clarify in paragraph No.20(c) that the applicant needs a clarification for filing a legal proceedings as may be available in law. The order dated 27.1.2020 in no manner prevents any parties from taking recourse to any proceedings which are otherwise available in law. Prayer in terms of para No.20(c) is, therefore rejected.

This application stands disposed of in above terms."

[12] The appellant Bank construed the aforesaid order as one permitting it to initiate appropriate proceeding before the competent forum, and accordingly, the appellant Bank initiated the recovery proceedings before the Supreme Court of the State of New York against the IOB. We quote the verified complaint filed before the Supreme Court of the State of New York as under:

"VERIFIED COMPLAINT

Plaintiff, MASHREQBANK PSC, NEW YORK BRANCH ('Plaintiff' or "MBNY"), by and through its attorneys Sabharwal & Finkel, LLC, as and for its Verified Complaint against the Defendant, Indian Overseas Bank ("Defendant" or "IOB"), alleges as follows:

PRELIMINARY STATEMENT

1. This is an action to recover monies due and owing by Defendant to Plaintiff as a result of Defendant's anticipatory repudiation of its cortract with Plaintiff, fraud by

Defendant against Plaintiff, and breach of Defendant's obligations to Plaintiff under the Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 ("UCP 600") in relation to a letter of credit issued by Defendant on behalf of one of its customers.

2. Defendant's wrongful acts include, but are not limited to, refusing to authorize Wells Fargo New York to pay Plaintiff although Defendant took possession from Plaintiff of documents of title to two (2) ships, transferring such documents of title to its customer, allowing its customer to take possession of the ships, convert the ships to scrap metal, sell such scrap metal and place the proceeds of such sale with Defendant.

PARTIES

3. The Plaintiff is the New York Branch of a banking corporation incorporated and existing under the laws of the United Arab Emirates.

4. The Plaintiff is licensed to do business in the State of New York and maintains its principal office within New York County at 17 State Street, New York, New York 10004.

5. The Defendant is a banking corporation incorporated and existing under the laws of India, with its principal office located at 763, Anna Salai, Chennai, Tamil Nadu 600002 India.

6. Defendant conducts business regularly in New York County by way of, inter alia, correspondent banking relationships and transactions, and maintains, pursuant to the Patriot Act, an address for service of process in New York at: Global Payment Advisory Group, 90, Village Green Bardonia, New York 10954. Attached hereto as Exhibit 1 is a copy of Defendant's Certification Regarding Correspondent Accounts for Foreign Banks.

JURISDICTION AND VENUE:

7. Jurisdiction is proper in New York pursuant to CPLR 302(a) because, as set forth hereinbelow, the Plaintiffs causes of action arise from Defendant's transaction of business within New York, Defendant's commitment of tortious acts within and without New York caused injury to Plaintiff within New York, and because Defendant regularly does business in New York and Defendant should have reasonably expected the acts complained of herein to have consequences in New York.

8. Venue is proper pursuant to CPLR 503. Plaintiff is a resident of this County.

RELEVANT FACTS;

9. Plaintiff repeats and re-alleges each and every allegation contained in paragraphs 1 through 8.

10. On or about December 26, 2019, Defendant issued an irrevocable letter of credit in the amount of $1,238,288, with Documentary Credit Number 016960119000032, explicitly subject to UCP 600 (the "LC"). The applicant for the LC was Defendant's customer Shital Ispat Private Limited, with an address at Plot No. 141M S.R.Y. Sosiya District, Bhavnagar, India (the "Applicant"), the purchaser of two (2) ships for the purpose of breaking the ships into scrap metal and selling such scrap metal. The beneficiary on the LC was Red Snapper Maritime Limited, Ajman Free Zone, Bi Office No. 214, Ajman Free Zone, UAE (the "Beneficiary"), the seller of the two (2) ships.

11. The LC was advised by Beneficiary's bank, Noor Bank, Dubai, UAE ("Noor Bank") to MBNY. Plaintiff MBNY was the confirming bank. The LC set forth explicitly the documents to be presented to MBNY as confirming bank (the "LC Documents"). Wells Fargo Bank NA, New York International Branch, 375 Park Avenue, New York, NY 10152 was to act as the reimbursing bank ("Wells Fargo").

12. A copy of the LC, with amendments 1s attached hereto as Exhibit 2.

13. As confirming bank, MBNY was obligated under UCP 600 | to pay the Beneficiary an amount of $1,238,288 upon presentation of compliant LC Documents, and IOB was obligated to reimburse MBNY through Wells Fargo.

14. On January 8, 2020, IOB confirmed that the Applicant had accepted the Notice of Readiness of the two (2) ships on January 6, 2020 and had taken physical possession of the two (2) ships. The SWIFT message further stated that "LC BECOMES OPERATIVE", and includes an authorization from IOB to MBNY to negotiate the LC Documents. A copy of the SWIFT message dated January 8, 2020 is attached hereto as Exhibit 3.

15. On January 9, 2020 MBNY received a SWIFT message from Noor Bank advising that Noor Bank was sending credit compliant LC Documents via DHL. A copy of the SWIFT message from Noor Bank dated January 9, 2020 is attached hereto as Exhibit 4.

16. Credit compliant LC Documents were presented by Noor Bank to MBNY on January 10, 2020 via the DHL shipment referenced above. The cover letter from Noor Bank is attached hereto as Exhibit 5. This cover letter states, inter alia, that "Documents are presented within the LC validity and presentation period", and that

"Documents comply with the terms and conditions of the credit." (Exhibit 5, numbered items 6 and 7 respectively).

17. On January 13, 2020, MBNY requested Noor Bank to confirm the authenticity of the LC Documents. Noor Bank did so on January 14, 2020, confirming the authenticity of the LC Documents sent via DHL, and confirming that the LC was drawn down in the "mount of $1,238,288 by way of the LC Documents presented to MBNY via the DHL shipment referenced above. A copy of the Noor Bank SWIFT message dated Januaty " 2020 is attached hereto as Exhibit 6.

18. MBNY, as per its obligations under UCP 600, negotiated the LC Documents as per the LC and paid Noor Bank an amount of $1,238,288 on January 14, 2020. A copy of the SWIFT message dated January 14, 2020 is attached hereto as Exhibit 7.

19. On January 15, 2020 MBNY contacted Wells Fargo for reimbursement confirmation and on January 16, 2020 was informed by Wells Fargo that Wells Fargo had not received authorization from Defendant IOB to confirm reimbursement. Copies of the SWIFT messages from MBNY to Wells Fargo and from Wells Fargo to MBNY dated January 15, 2020 and January 16, 2020 respectively are attached hereto as Exhibit 8.

20. On January 17, 2020, MBNY then contacted IOB via SWIFT to request IOB to send the requisite authorization to Wells Fargo. A copy of the SWIFT message dated January 17, 2020 is attached hereto as Exhibit 9.

21. On January 21, 2020, IOB sent a SWIFT message to MBNY falsely and fraudulently claiming that the LC Documents were discrepant due to alleged forgery of some of the LC Documents, and, on that basis of falsely and fraudulently alleged "discrepancies" in the LC Documents, JOB refused to authorize reimbursement from Wells Fargo to MBNY. A copy of the SWIFT message dated January 21, 2020 is attached hereto as Exhibit 10.

22. Such refusal was in direct violation of UCP 600, which explicitly provides that banks issuing, confirming, or advising letters of credit act on the face of documents presented under a letter of credit, examining the presented documents only to confirm on the face of the documents that such documents are in compliance with the documents as listed on the letter of credit.

18. MBNY, as per its obligations under UCP 600, negotiated the LC Documents as per the LC and paid Noor Bank an amount of $1,238,288 on January 14, 2020. A

copy of the SWIFT message dated January 14, 2020 is attached hereto as Exhibit 7.

19. On January 15, 2020 MBNY contacted Wells Fargo for reimbursement confirmation and on January 16, 2020 was informed by Wells Fargo that Wells Fargo had not received authorization from Defendant IOB to confirm reimbursement. Copies of the SWIFT messages from MBNY to Wells Fargo and from Wells Fargo to MBNY dated January 15, 2020 and January 16, 2020 respectively are attached hereto as Exhibit 8.

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21. On January 21, 2020, IOB sent a SWIFT message to MBNY falsely and fraudulently claiming that the LC Documents were discrepant due to alleged forgery of some of the LC Documents, and, on that basis of falsely and fraudulently alleged "discrepancies" in the LC Documents, JOB refused to authorize reimbursement from Wells Fargo to MBNY. A copy of the SWIFT message dated January 21, 2020 is attached hereto as Exhibit 10.

22. Such refusal was in direct violation of UCP 600, which explicitly provides that banks issuing, confirming, or advising letters of credit act on the face of documents presented under a letter of credit, examining the presented documents only to confirm on the face of the documents that such documents are in compliance with the documents as listed on the letter of credit.

23. Further, IOB did not, as required by UCP 600 and as per standard bank practice and procedure, accept the LC Documents although it had issued the Notice of Readiness (Exhibit 3 hereto), and allowed its customer, the Applicant, to take possession of the two (2) ships, and commence ship breaking processes. Subsequently, the proceeds of such ship breaking process have been placed in escrow with IOB.

24. On January 22, 2020, MBNY sent a SWIFT message to IOB disputing the alleged "discrepancies" and reiterating that the LC Documents were compliant as per UCP 600. A copy of the SWIFT message dated January 22, 2020 is attached hereto as Exhibit 11.

25. On January 24, 2020, IOB via SWIFT message raised new false and fraudulent allegations of "discrepancies" on matters clearly outside the terms of the LC, and known by IOB to be irrelevant to IOB's obligations to authorize payment to MBNY

as required under the LC and UCP 600. For IOB to make such assertions of "discrepancies" was also a violation of the "single notice rule" of UCP 600, which rule requires that all discrepancies be noticed to the presenter (in this case MBNY) in a single notice - here IOB had already noticed alleged (and fraudulent) "discrepancies" in its previous notice dated January 21, 2020 (Exhibit 9 hereto) and yet attempted to notice more (fraudulent) "discrepancies" on January 24, 2020. A copy of the SWIFT message dated January 24, 2020 is attached hereto as Exhibit 12.

26. On January 24, 2020, IOB via another SWIFT message also made a fraudulent reference to an unrelated court order by the Gujrat High Court (in India). A copy of the SWIFT message dated January 24, 2020 is attached hereto as Exhibit 13.

27. On January 29, 2020, MBNY sent a response to IOB noting the repeated wrongful nature of IOB's allegations of "discrepancies", and that such alleged "discrepancies" were outside the terms of the LC. A copy of the SWIFT message dated January 29, 2020 is attached hereto as Exhibit 14.

28. On January 30, 2020, IOB sent a SWIFT message to MBNY referring to a stay order issued by the Gujrat High Court dated January 27, 2020 enjoining IOB from making payment under the LC (the "Stay Order"), and, on the basis of such Stay Order, IOB refused to authorize Wells Fargo to pay MBNY. A copy of the SWIFT message dated January 30, 2020 is attached hereto as Exhibit 15.

29. Under UCP 600, and as per standard practice and procedure between banks, IOB was obligated to accept the compliant documents and authorize Wells Fargo to reimburse MBNY.

30. However, instead of committing to reimburse MBNY, IOB raised false and fraudulent "discrepancies" and made reference to an unrelated court order in an effort to delay and allow its customer, the Applicant, to obtain the Stay Order.

31. It is evident that the "discrepancies" raised by IOB are false and fraudulent from the record, and from the fact that when Applicant made an application to the Gujrat High Court on January 27, 2020 for the Stay Order, such application did not once mention any "discrepancies". The application to the Gujrat High Court was based on fraud in the underlying transaction, a matter that, under UCP 600, has no bearing on the obligations of banks, and between banks, to honor letters of credit so long as the documents presented to the banks are compliant with the documentary requirements of the letter of credit.

32. Attached hereto as Exhibit 16 is a copy of the application made before the Gujrat High Court. Paragraphs 4(iv) through 4(vii) of this application explicitly acknowledge that the LC Documents were presented by MBNY to IOB and by IOB to Applicant, and no mention is made of any discrepancies. Paragraph 4(vi) acknowledges that Applicant took possession of the two ships. Then, in paragraph 4(xii), the truth comes out - IOB tells Applicant that IOB must honor the LC unless there is an injunction. IOB does not say the LC can be dishonored due to discrepancies.

33. MBNY participated subsequently in the Gujrat High Court proceedings and has obtained an order from the Gujrat High Court allowing MBNY to proceed with litigation against IOB. A copy of such order is attached hereto as Exhibit 17.

AS AND FOR THE FIRST CLAIM FOR RELIEF:

(Anticipatory Repudiation of Contract)

34. The Plaintiff repeats and re-alleges each and every allegation contained in paragraphs 1 through 33.

35. IOB's actions in presenting the "discrepancies" constitute an anticipatory breach of contract by IOB, causing losses to MBNY.

36. Such anticipatory breach occurred prior to the issuance of the Stay Order, and MBNY's cause of action accrued prior to the issuance of the Stay Order. :

AS AND FOR THE SECOND CLAIM FOR RELIEF:

(Fraud)

37. The Plaintiff repeats and re-alleges each and every allegation contained in paragraphs 1 through 36.

38. IOB's actions in presenting the false and fraudulent "discrepancies" constitute fraud against MBNY, causing losses to MBNY.

39. Such fraud occurred prior to the issuance of the Stay Order, and MBNY's cause of action accrued prior to the issuance of the Stay Order.

AS AND FOR THE THIRD CLAIM FOR RELIEF:

(Breach of Obligation Under UP 600)

40. The plaintiff repeats and re-alleges each and every allegation contained in paragraphs 1 through 39.

41. IOB's actions in not authorizing Wells Fargo to reimburse MBNY constitute a breach of IOB's obligations to MBNY, causing losses to MBNY.

42. Such breach occurred prior to the issuance of the Stay Order, and MBNY's cause of action accrued prior to the issuance of the Stay Order. WHEREFORE, the plaintiff respectfully requests judgment against the defendant in the amount of $1,238,288, together with interest, attorney's fees and other costs of collection; and for such other and further relief as this Honourable Court deems just, proper and equitable in the premises.

Dated : New York, New York

November 9, 2020."

[13] In the wake of the aforesaid developments, the IOB filed an application before this Court being the Civil Application No.4 of 2020 and prayed for the following reliefs:

"(A) Your Lordships may be pleased to allow this application;

(B) Your Lordships may be pleased to issue appropriate directions securing the LC amount in such manner as may be deemed fit;

(C) Your Lordships may be pleased to hold and declare that the Notice dated 14.10.2020 issued by the opponent No.4 as invalid and infirm;

(D) Your Lordships may be pleased to quash and set aside the Notice dated 14.10.2020 issued by the opponent NO.4;

OR IN THE ALTERNATIVE

(E) Your Lordships may be pleased to declare that IOB was within its rights and constrained by its obligations under the UCP-600 to withhold the LC amount 14.0.1.2020 till 27.01.2020;

OR IN THE ALTERNATIVE

(F) Your Lordships may be pleased to vacate the interim order dated 27.01.2020 passed in Commercial Arbitration Petition No.9 of 2020 in view of the threats issued by the opponent No.4 Bank;

(G) Pending hearing and disposal of the present application, Your Lordships may be pleased to restrain the opponent No.4 from instituting / continuing with any proceedings against the applicant before the Courts at New York or any other place in pursuance of the notice dated 14.10.2020;

(H) Your Lordships may be pleased to grant such other and further reliefs as may be deemed just and proper may kindly be granted;

(I) Your Lordships may be pleased to award costs of the present application to the applicant."

[14] The learned Single Judge allowed the Civil Application referred to above to the extent of restraining the appellant Bank from proceeding further with the proceedings initiated in the Court at New York. We quote the relevant observations made by the learned Single Judge in its impugned order:

"13. Having considered the rival submissions and having gone through the materials on records, it emerges that this Court granted the injunction by order dated 27.01.2020 restraining the applicant bank from releasing the amount of Letter of Credit on the ground that prima facie there is a fraud committed by the opponent no.2- original owner-Red Snapper Maritime Limited who has chosen not to appear before this Court in spite of issuing notice and service of notice upon the opponent no.2.

14. Moreover, it is also emerging from the record that the opponent no.4 has approached this Court who has discounted the Letter of Credit issued by the applicant bank and paid the discounted price of the LC to the opponent no.2, has stepped into the shoes of opponent no.2 and therefore, has approached this Court by filing Civil Application No.2 of 2020 to join in the present proceedings which was allowed by this Court by order dated 24.08.2020 with a rider that the application is allowed, subject to the rights and the contentions that may be advanced on behalf of the respective parties at the time of hearing the main arbitration petition. In such circumstances, the opponent no.4 applied again by filing Civil Application No.3 of 2020 by making the following prayers :

"20 (a) Vacate the order dated 27.01.2020 and all subsequent orders passed in this regard whereby an adinterim in-junction was granted restraining Respondent No.2 from releasing payments under the Letter of Credit.

(b) Clarify that the order dated 27.01.2020 and all subsequent orders passed in this regard will have no application in so far as Respondent No.4 is concerned and Respondent No.2 can release payment under the Letter of Credit to Respondent No.4.

(c) In alternative to prayer (a) and (b) and strictly without prejudice, pass an order modifying/clarifying the order dated 27.01.2020 and all subsequent orders passed in this regard to the effect that it would not bar Respondent No.4 from availing

such legal proceedings as may be available in law against Respondent No.2 / Indian Overseas Bank for enforcing its claim under the Letter of Credit in question and also the Respondent NO.2 / Indian Overseas Bank from complying with any order passed in those proceedings subject to such legal remedies as may be independently available to Respondent No.2 / Indian Overseas Bank in this regard.

(d) Pass any other order(s) that this Hon'ble Court deems fit in the facts and circumstances of this case."

15. This Court (CORAM : Hon'ble Mr.Justice Biren Vaishnav) passed the following order on 25.09.2020 :

"Heard learned counsel for the respective parties through video conferencing.

It is no need to clarify in paragraph No.20(c) that the applicant needs a clarification for filing a legal proceedings as may be available in law. The order dated 27.1.2020 in no manner prevents any parties from taking recourse to any proceedings which are otherwise available in law. Prayer in terms of para No.20(c) is, therefore rejected.

This application stands disposed of in above terms."

16. It is shocking and surprising that when this Court has categorically rejected the prayer made in terms of Para 20(c) in the order dated 25.09.2020, the opponent no.4 conveniently misinterpreted the same and made a disclosure in the memo of plaint filed before the Supreme Court at New York in the following terms :

"MBNY participated subsequently in the Gujarat High Court proceedings and Has obtained an order from the Gujarat High Court allowing MBNY to proceed with litigation against IOB."

From the above averments made in the plaint filed before the Supreme Court at New York, it is clear that the opponent no.4 has made a misrepresentation before the Supreme Court at New York by stating that this Court has allowed the opponent no.4 to proceed with the litigation against the applicant bank. It is trite to state that this Court has not granted or clarified the order dated 27.1.2020 and this Court has rejected prayer in terms of Para 20(c) of the Civil Application no.3 of 2020 filed by opponent no.4 in categorical terms. Observations made by this Court that "the order dated 27.01.2020 in no manner prevents any parties from taking recourse to any proceedings which are otherwise available in law" could not have been interpreted to mean that this Court has granted permission to the opponent no.4 to initiate proceedings before any other forum. The order passed by this Court

is to be read as whole inasmuch as the opponent no.4 sought for clarification of the order which was denied and in that circumstances this Court has observed that there is no need for clarification and accordingly, the "Prayer made in para 20(c) is rejected".

17. In such circumstances, the conduct of the opponent no.4 to misrepresent the order passed by this Court in the plaint in the aforesaid Para 33 of the plaint before the Supreme Court at New York is deprecated.

18. With regard to the contention raised by learned advocate Mr. Sanjay Kumar that the prayer made by the applicant bank is in nature of anti-suit injunction is not tenable in as much as opponent no.4 is a party before this Court in the present proceedings and it has come before this Court with an application to be joined as a party respondent in the present proceedings. In such circumstances when opponent no.4 is very much party to the proceedings, there is no question of considering the prayer made by the applicant-bank in the nature of anti-suit injunction. It is a well settled principle of anti -suit injunction that when the party is required to be prevented from filing a suit to any other place than only such application of anti-suit injunction is required to be made and in that context Hon'ble Supreme Court has laid down guidelines in the aforesaid case of Modi Entertainment Network (supra)."

[15] Being dissatisfied with the aforesaid order passed by the learned Single Judge, the appellant Bank is here before this Court with the present appeal.

[16] The cross-objection filed by the IOB is against the relief which came to be declined by the learned Single Judge i.e. the relief to vacate the interim order passed by the learned Single Judge in the Arbitration Petition filed by the Shital Ispat.

- **SUBMISSIONS ON BEHALF OF THE APPELLANT:**

[17] Mr. Mihir Joshi, the learned Senior Counsel assisted by the learned advocate Mr. Digant M. Popat appearing for the appellant Bank vehemently submitted that the impugned order passed by the learned Single Judge could be said to be ex-facie incorrect. It is argued that the learned Single Judge committed a serious error in construing the true purport of the order dated 25th September 2020 referred to above. It is argued that the order dated 25th September 2020 makes it abundantly clear that it would be open for the appellant Bank to proceed further with the proceedings in the Court at New York, or in other words, the order could be construed as clarifying that nothing precludes the appellant Bank from initiating appropriate proceeding before the appropriate forum in accordance with law.

[18] Mr. Joshi would submit that the learned Single Judge laid much emphasis on that part of the order passed by another learned Single Judge dated 25th September 2020; by which the prayer in terms of para 20(c) came to be rejected. According to Mr. Joshi, it was otherwise not necessary to observe that the prayer in terms of para 20(c) was being rejected in view of the clarification in the said order.

[19] Mr. Joshi submits that the finding recorded by the learned Single Judge in his impugned order that the appellant misrepresented the facts before the Supreme Court of New York could be said to be absolutely incorrect. Mr. Joshi pointed out that his client has produced the order passed by the learned Single Judge dated 25th September 2020 in the proceedings at New York, and in such circumstances, there was no question of any misrepresentation at the end of his client.

[20] Mr. Joshi vehemently submitted that in the first instance, the application filed by the IOB seeking such relief was not maintainable. Section 9 of the Act, 1996 entitles a party to invoke the jurisdiction of the Court to seek interim measures and the term "party" as defined under Section 2(h) of the Act, 1996 means "a party to the Arbitration Agreement". It is argued that the IOB is not a party to the Arbitration Agreement and the reliefs sought for and granted is only against the appellant who is also not a party to the Arbitration Agreement. In other words, the relief granted to the IOB has no relation whatsoever with the arbitration proceedings between the Shital Ispat and Red Snapper. It is argued that such application is clearly not contemplated under Section 9 of the Act, 1996.

[21] Mr. Joshi pointed out that the perusal of the reliefs prayed for in para 27(c) and (d) respectively would indicate that it seeks an adjudication or a declaration that the demand notice dated 14th October 2020 issued by the appellant to the IOB is invalid and deserves to be quashed. The prayer 27A seeks a relief of declaration that the IOB was within its right under the UPC 600 to withhold the payment under the Letter of Credit. Mr. Joshi would argue that such relief seeking final adjudication / declaration between the non-party to the Arbitration Agreement could be said to be beyond the scope of Section 9 of the Act and clearly not maintainable or tenable in law. It is argued that the interim relief, as prayed for, in terms of para 27G restraining the appellant herein from proceeding in the Court at New York in pursuance of the notice dated 14th October 2020 is clearly in furtherance of the reliefs referred to above and could not have been granted as a final relief.

[22] Mr. Joshi submitted that his client has an independent right as contemplated under the UPC 600 inter alia at the Articles 4, 5 and 13 respectively to claim reimbursement from the IOB and such independent right cannot be interdicted in the proceeding under Section 9 of the Act. He would argue that even the Letter of Credit is

an independent contract quite distinct from the contract between the parties to the arbitration. Mr. Joshi submitted that the contention canvassed on behalf of the IOB that an anti-injunction suit is warranted is wholly misconceived.

[23] Mr. Joshi vehemently submitted that even as per the stance of the IOB as evident from its reply filed opposing the application for impleadment filed by the appellant herein and its reply to the First Appeal as well as the prayer in terms of para 27E made in the subject application that the IOB is asserting its right to withhold payment independent of the injunction. In such circumstances, according to Mr. Joshi, his client even otherwise is entitled to institute a suit for recovery / reimbursement on the ground that such withholding of payment is unlawful.

[24] In the last, Mr. Joshi submitted that the right of his client to seek reimbursement is based on an independent contract and practice under the UPC 600 and has been explicitly and unequivocally recognized by the Supreme Court in various of its decisions. He would submit that the institution of the proceedings at New York, in no manner, precludes the IOB to raise all defenses available to it in the said suit.

[25] In such circumstances referred to above, Mr. Joshi prays that there being merit in his appeal, the same may be allowed and the impugned order may be set aside.

- **SUBMISSIONS ON BEHALF OF THE IOB:**

[26] Mr. R. S. Sanjanwala, the learned Senior Counsel assisted by Mr. Nanavati, the learned advocate appearing for the IOB has vehemently opposed the present appeal submitting that no error, not to speak of any error of law could be said to have been committed by the learned Single Judge in passing the impugned order. Mr. Sanjanwala would submit that in the present litigation, the situation of his client is quite precarious. According to him, although his client wants to discharge its obligations under the Letter of Credit, yet the interim order passed by the learned Single Judge of this Court in the Arbitration Petition restrains him from doing so. Mr. Sanjanwala, in the heat of exasperation, submitted that on one hand, this Court has injuncted him from making the payment to the appellant Bank, and on the other hand, the appellant Bank wants to proceed against him at New York. According to Mr. Sanjanwala, this is something not legally permissible nor equitable.

[27] According to Mr. Sanjanwala, his client thought fit to file cross-objection only to make good its case that the learned Single Judge ought not to have granted injunction in the Arbitration Petition filed under Section 9 of the Act, 1996 by Shital Ispat. He would submit that either this Court may vacate the interim order or restrain the appellant herein from proceeding further at New York.

[28] Mr. Sanjanwala would argue that the rule is well established that a Bank issuing or confirming a Letter of Credit is not concerned with the underlying contract between the buyer and seller. The duties of a Bank under a Letter of Credit are created by the document itself. Mr. Sanjanwala would argue that his client has come to know that Shital Ispat Private Limited and Red Snapper Maritime Limited are already before the Arbitral Tribunal at London and the Letter of Credit is not a subject matter of the arbitral proceedings before the Arbitral Tribunal. Mr. Sanjanwala laid much emphasis on Section 9(2) and and Section(3) of the Act, 1996. He would submit that in his cross-objection, this Court may grant the relief vacating the injunction granted against his client in the Section 9 application as the Shital Ispat and Red Snapper are now already before the Arbitral Tribunal.

[29] Mr. Sanjanwala further submitted that the learned Single Judge could be said to have rightly exercised its discretion to grant an anti-suit injunction restraining the appellant herein from proceeding further at New York.

[30] Mr. Sanjanwala has placed strong reliance on two decisions of the Supreme Court :

[1] Modi Entertainment Network and another vs. W.S.G. Cricket PTE Ltd, 2003 4 SCC 341

[2] United Commercial Bank vs. Bank of India and others, 1981 2 SCC 766

[31] In such circumstances referred to above, Mr. Sanjanwala prays that this Court may, in its discretion, tilt the balance so as to protect the interest of his client. He prays that either the injunction operating in the Arbitration Petition may be vacated to enable his client to discharge his liability or restrain the appellant herein from proceeding further at New York.

- **SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.2 - SHITAL ISPAT PRIVATE LIMITED:**

[32] Mr. Soparkar, the learned Senior Counsel assisted by Ms. Paurami B. Sheth, the learned counsel appearing for the respondent No.2 would submit that his client had to come before this Court with Section 9 application as fraud has been played upon with his client by the respondent No.3 - Red Snapper Maritime Limited. Mr. Soparkar pointed out that two vessels, which the Red Snapper sold to his client, are mortgaged. There is an encumbrance upon the vessels in question. This fact was suppressed by Red Snapper. In cases of fraud of this type, a party is entitled to come before the High Court and seek appropriate relief under Section 9 of the Act, 1996. Mr. Soparkar would

submit that the Section 9 application will have to be heard on its own merits and his client is no way concerned with the dispute between the IOB and the appellant Bank.

[33] Mr. Soparkar submitted that the stance of the IOB to a certain extent is not bona fide and the same is borne out from the reply filed by the IOB while opposing the application filed by the appellant Bank seeking to be impleaded as a party respondent in the Arbitration Petition No.9 of 2020. Mr. Soparkar invited the attention of this Court to para 10 of the reply which was filed by the IOB. Para 10 reads thus:

> "With respect to the contents of paragraphs 15 and 16 of the captioned impleadment application, I reiterate that the decision to refuse to make the payment is independent of the orders of injunction granted by this Hon'ble Court and the same was conveyed by the Respondent No.2 prior to the order of injunction granted by this Hon'ble Court. Hence under the guise of the order of order of injunction, the present Applicant cannot seek the impleadment in the subject proceedings. It is pertinent to note that the present Applicant has not taken any action independently against the respondent no.1 and it is not entitled to claim any amount by seeking to be impleaded in the captioned petition."

[34] From the aforesaid, Mr. Soparkar would submit that even according to the IOB's own showing, its decision not to make the payment to the appellant Bank is independent of the order of injunction granted by this Court. According to Mr. Soparkar, in such circumstances, it does not lie in the mouth of the IOB that the injunction is coming in its way so far as the discharge of their liability towards the appellant Bank is concerned.

[35] Mr. Soparkar would submit that it may be true that his client and Red Snapper, as on date, may be before the Arbitral Tribunal at London, but there is nothing on record to indicate whether the subject LC is a part of the arbitral proceedings or not.

[36] Mr. Soparkar would submit that it is true that the contract of guarantee is an independent contract and the Court's interference should be minimal, but interference may be warranted in cases where fraud is pleaded or invocation of the bank guarantee is not in accordance with the terms of the contract of guarantee. He would submit that the encashment of bank guarantee of a beneficiary is not determinative of the rights between the parties and the amount encashed under the bank guarantee cannot be said to belong to the beneficiary as a matter of right for all times to come. It is only because of the agreement between the parties to provide for in a certain situation as an interim measure. He would argue that ultimately, the rights and liabilities are to be determined in the arbitration proceedings. If that is so, the bank guarantee amount

even if it is encashed in fact would only be towards the adjustment on the final award passed by the Arbitrator.

[37] In such circumstances referred to above, Mr. Soparkar prays that the interest of his client may be protected and the relief prayed for by the IOB in cross-objection may not be granted. In other words, according to Mr. Soparkar, his Section 9 application is yet to be adjudicated on merits, and therefore, the order of injunction may not be disturbed.

[38] We also heard Mr. Harshit Tolia, the learned counsel, who is appearing for the party in whose favour Red Snapper has created mortgage over the vessels. However, Mr. Tolia has minimal role to play in the present litigation.

- **ANALYSIS:**

[39] Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the learned Single Judge was justified in granting the anti-suit injunction restraining the appellant from proceeding further in the Court at New York.

[40] The Supreme Court has explained the principles governing the grant of anti-suit injunction in the case of **Modi Entertainment Network (supra)**. We quote para 24 of the said judgement as under:

"From the above discussion the following principles emerge :

(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects : -

(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

(b) if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity - respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind;

(2) in a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may

grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens;

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case;

(4) a court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like;

(5) where parties have agreed, under a non- exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti- suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to non-exclusive jurisdiction of the court of their choice which cannot be treated just an alternative forum;

(6) a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non- exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens; and

(7) the burden of establishing that the forum of choice is a forum non-conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same."

[41] The aforesaid decision of the Supreme Court has been referred to and relied upon in the case of Dinesh Singh Thakur vs. Sonal Thakur, 2018 17 SCC 12, wherein the Supreme Court has observed as under:

> "9) Anti-Suit Injunctions are meant to restrain a party to a suit/proceeding from instituting or prosecuting a case in another court, including a foreign court. Simply put, an anti-suit injunction is a judicial order restraining one party from prosecuting a case in another court outside its jurisdiction. The principles governing grant of injunction are common to that of granting anti-suit injunction. The cases of injunction are basically governed by the doctrine of equity.
>
> 10) It is a well-settled law that the courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. However, before passing the order of anti-suit injunction, courts should be very cautious and careful, and it should be granted sparingly and not as a matter of routine as such orders involve a court impinging on the jurisdiction of another court, which is not entertained very easily specially when the it restrains the parties from instituting or continuing a case in a foreign court.
>
> 14) In **Modi Entertainment Networks (supra)**, this Court has reiterated this position by holding that the courts in India like Court in England are courts of law and equity. The principles governing the grant of anti-suit injunction being essentially an equitable relief; the courts in India have the powers to issue anti-suit injunction to a party over whom it has personal jurisdiction in an appropriate case; this is because the courts of equity exercise jurisdiction in personam; this power has to be exercised sparingly where such an injunction is sought and if not granted, it would amount to the defeat of ends of justice and injustice would be perpetuated."

[42] Thus, **Modi Entertainment Network (supra)** and **Dinesh Singh Thakur (supra)** envisage, essentially, two considerations, which would govern the grant, or refusal, of anti-suit injunctions in respect of proceedings pending in a foreign Court. The two considerations are, first, that the defendant, who is sought to be injuncted, is amenable to the jurisdiction of the Indian Court issuing the injunction, and secondly, that refusal of the prayer for injunction would result in defeating the ends of justice and perpetuating injustice. The relief, fundamentally, has to be equitable in nature. While applying these twin considerations, the Supreme Court cautions that the principle of comity of Courts, pre-eminent in the private international law, should be scrupulously borne in mind. Needless to say, the anti-suit injunctions, in respect of the proceedings pending in the foreign Courts, restraining the parties from prosecuting proceedings pending in foreign Courts are not to be granted as a matter of course.

[43] The principles that emanate from the two decisions referred to above of the Supreme Court regarding the grant of anti-suit injunctions, may be enumerated thus:

(a) The principles governing the grant of injunction, are also applicable to the grant of anti-suit injunction.

(b) The grant of injunction is essentially guided by equity.

(c) The power to grant anti-suit injunction is required to be exercised sparingly "because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another Court". This aspect is underscored where the order would restrain the parties from instituting or continuing a case in a foreign Court.

(d) The anti-suit injunction cannot be granted, where any of the inhibiting factors, enumerated in Section 41 of the Specific Relief Act, 1963, applies.

(e) The injuncted defendant must be amenable to the jurisdiction of the Indian court granting anti-suit injunction.

(f) Declining of an anti-suit injunction would result in defeating the ends of justice, and would perpetuate injustice.

(g) While granting anti-suit injunctions, the principle of comity of courts is required to be borne in mind.

[44] We may also refer to a Queen's Bench Division Commercial Court decision in the case of Starlight Shipping Co (a company incorporated in the Marshall Islands) and another vs. Tai Pin Insurance Co. Ltd., Hubai Branch (a company incorporated in China) and another, 2007 EWHC(Comm) 1893. We quote the relevant observations: "Historically, anti-suit injunctions to protect the jurisdiction of the English Courts were granted under the terms of section 37 of the Supreme Court Act. That section gives the court general power to grant an injunction "in all cases in which it appears to the court to be just and convenient to do so". Similarly, anti-suit injunctions to protect arbitration clauses were historically granted under that section, whether interim or final relief was being given. As mentioned by Lord Hoffmann in paragraph 10 in The Front Comor, 2007 1 LloydsRep 391at 393 (HL) "the English courts have regularly exercised this power to grant injunctions to restrain parties to an arbitration agreement from instituting or continuing proceedings in the courts of other countries: see The Angelic Grace." He then went on to say that, additionally, by section 44(1) and 44(2)(e) of the Arbitration Act 1996, the court has power to grant an interim injunction "for the purposes of and in relation to arbitral proceedings". That decision involved a reference

to the European Court of Justice because the proceedings which were the subject of the attempted restraint order, were commenced in a Member State. No such European complication arises here. The Owners submitted that section 37(1) of the Supreme Court Act 1981 gave rise to a power to grant injunctions whether or not arbitration had been commenced and pointed to Through Transport Mutual Insurance v New India Assurance Co Ltd, 2005 1 LloydsRep 67 where the Court of Appeal, in discharging the injunction, treated it as having been made under section 37, in accordance with the decisions referred to in paragraphs 67-75 and 87- 92 - see also paragraph 97."

[45] The litigation before us is quite unusual and the same could have been easily avoided. We are saying unusual because the impugned order merely interprets one earlier order that came to be passed by a learned Single Judge dated 25th September 2020. In the order dated 25th September 2020, the learned Single Judge in no uncertain terms observed that there was no good reason for the appellant herein to seek any clarification for instituting any legal proceedings as may be available to it in law. It is further observed therein that the order of interim relief that came to be passed in the Arbitration Petition No.9 of 2020 dated 27th January 2020, in no manner, prevents any party from taking recourse to any proceeding otherwise available in law. Saying so, the learned Single Judge rejected the prayer in terms of para 20 (c). This order has been interpreted by a Coordinate Bench while passing the impugned order as one declining or rather restraining the appellant herein absolutely from initiating any proceeding available to it in law against the IOB. We are not in agreement with such line of reasoning adopted by the learned Single Judge.

[46] Be that as it may, we propose to look into the matter considering the position of law that should govern the parties. We are saying so because "equity follows the law".

[47] We are of the view that the IOB, not being a "party" to the Arbitration Agreement contained in the VPC, has no locus standi and could not have prayed for any protection under Section 9 of the Arbitration Act.

[48] In the aforesaid context, we may refer to and rely upon a decision of the Supreme Court in the case of Firm Ashok Traders and another vs. Gurumukh Das Saluja and others, 2004 3 SCC 155, more particularly, the observations made in para 13. It reads thus: "The A & C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of A & C Act is to a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filling an application under Section 9 of the Act is enforcing a right arising from a contract? "Party" is defined in Clause (h) of

sub- Section (1) of Section 2 of A & C Act to mean 'a party to an arbitration agreement'. So, the right conferred by Section 9 is on' a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during arbitral proceeding, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in M/s Sundarum Finance Ltd. v. M/s NEPC India Ltd., 1999 AIR(SC) 565 the doubts stand cleared and set at rest and it is not necessary that arbitral proceeding must be pending or at least a notice invoking arbitration clause must have been issued before an application under Section 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court under Section 9 must possess is of being a party to an arbitration agreement A person not party to an arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The reliefs which the Court may allow to a party under clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to 'contemplated', 'pending' or 'completed' arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the arbitral tribunal. Under the scheme of A & C Act, the arbitration clause is separable from other clauses of the Partnership Deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A & C Act. The relief sought for in an application under Section 9 of A & C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the arbitral tribunal; the Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application under Section 9 of A & C Act."

[49] Thus, the ratio discernible from the aforesaid is that the qualification which the person invoking the jurisdiction of the Court under Section 9 must possess is of being a party to an arbitration agreement. A person not party to an arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant. While discussing as to who can approach this Court under

Section 9, the Supreme Court observed that the right conferred by Section 9 cannot be said to be one arising out of a contract and that the qualification which the petitioner invoking jurisdiction of the court under Section 9 must possess is of being "a party" to an arbitration agreement. A person not party to an arbitration agreement cannot enter the court for protection under Section 9. The Supreme Court observed that this has relevance only to his locus standi as an applicant and has nothing to do with the relief which is sought from the court or as a right to be canvassed in support of the relief. The Supreme Court also observed that the court, under Section 9, only formulates interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated.

[50] In the aforesaid context, we may also refer to and reply upon an order passed by a learned Single Judge of the Jammu and Kashmir High Court in the case of Mohammad Ishaq Bhat vs. Tariq Ahmad Sofi and another, 2010 AIR(J&K) 56, more particularly, the observations made in para 9 therein with which we are in complete agreement. It reads thus:

> "Section 9 of the Act provides for interim measures for protection and preservation of the subject matter of arbitration proceedings and matters ancillary thereto. It also provides for interim measures like appointment of guardian for a minor or person of unsound mind to facilitate the arbitral proceedings. The provision enumerates the interim measures that the principal Court of original jurisdiction in a district of the High Court may order, to attain the objects set out therein. The concluding para of Section 9 of the Act provides that "a Court shall have same powers to make orders as it has for the parties for.....any proceedings before it". There can be no disagreement with the legal proposition that right to seek interim measures vide Section 9 of the Act, is conferred exclusively on a party to the arbitration agreement. Section 2 (1)(g) of the Act leaves no room for any doubt in this regard. It defines "party" as "a party to a arbitration agreement". In the circumstances, a stranger to the arbitration agreement cannot press into service Section 9 of the Act and ask the Court to order any interim measure for protection and preservation of the subject matter of arbitration agreement or other interim measures envisioned by the provision. The person, not a party to the arbitration agreement, no matter how grave and serious his grievance is can not approach to the Court with an application under Section 9 of the Act. It is exactly what has been laid down in AIR 2009 Guwahati 110. However restrictions placed on locus of a person to invoke Section 9 of the Act may not be applicable to a person who does not pray for any interim measures but intends to acquaint the Court with facts to enable the Court to make a just and proper order. If a person is materially and substantially interested in subject matter of the arbitration agreements and is likely

to be materially affected by the order, the Court is asked to pass under Section 9 of the Act, is kept at bay there is every likelihood of justice being not done in the matter. A person having vital interest in the subject matter of arbitration agreement can not be asked to watch proceedings from the fence and leave the arena for the parties to the arbitration agreement to cut swords, when the victim of the out come of the dispute is non else but the person pushed to the fence. After all, what is endgame in proceedings before the Court. The Court is required to arrive at just conclusion and do justice between the parties. In order to enable the Court to discharge its mandate, it is necessary to a person who is interested in the subject matter of arbitration agreement and is in a position to render assistance to the Court is allowed to become a party to the proceedings. The case in hand is an illustrative instance of injustice that may be the result, if a person though stranger to arbitration agreement, is not allowed to become a party to the proceedings under Section 9 of the Act. The petitioner claims to be running business in the suit shop, in tenancy of his father for decades together and now in his possession as a tenant thereof. The respondent is claimed to have entered into a partnership with the respondent No. 2 petitioner's son where under tenancy rights in the suit shop along with business run in the suit shop, stands transfered to the firm, a plea vehemently denied by the petitioner. The petitioner as back as on 7-10- 2006, i.e before the application under Section 9 of the Act was moved by the respondent No. 1, filed on declaratory and injunction suit and the ad-interim order has been passed by the Court, fact which has been with held by the respondent in the application under Section 9 of the Act. If in peculiar situation, without hearing the petitioner and affording the petitioner an opportunity to protect his case, any of the interim measures suggested by the respondent No. 1 is ordered, it may have disastrous consequence for the petitioner. To illustrate if, as an interim measure the respondent No. 1 is ordered to be allowed to ran the business in the suit shop, and the petitioner restrained from interfering in the business of the respondent No. 1 or receiver as suggested by the respondent is appointed, person prejudicially affected by such orders may be none else but the petitioner. So viewed Section 9 of the Act can not be interpreted to forbid impleadment of a person, not a party to the arbitration agreement, to the proceedings under Section 9 of the Act. The Court has ample powers to implead a person as a party to the proceedings under Section 9 of the Act where a person asking for impleadment is in a position to convince the Court that he is proper and necessary party to the proceedings and his presence before the Court, is bound to enable the Court to pass just and proper order. Any other interpretation would result in multiplicity of litigation and thus would be against the public policy. What emerges is that whereas' as stranger to an arbitration agreement cannot be allowed to seek interim measure(s) under Section 9 of the Arbitration and Conciliation Act, 1997, a stranger may be impleaded as a

party where the Court is convinced that the applicant is a proper and necessary party to the proceedings and his presence is bound to enable the Court to arrive at a just and proper conclusion."

[51] The principle of law, as discernible from the aforesaid, is that as stranger to an arbitration agreement cannot be allowed to seek interim measure(s) under Section 9 of the Act, 1996, however, he may be impleaded as a party where the Court is convinced that the applicant is a proper and necessary party to the proceedings and his presence is bound to enable the Court to arrive at a just and proper conclusion.

[52] In National Highways Authority of India vs. China Coal Construction Group Corporation, 2006 87 DRJ 225, a learned Single Judge of the Delhi High Court (Coram : Badar Durrez Ahmed, J.) had the occasion to, inter alia, consider the questions as to whether an intervenor can be impleaded as a party in a petition under Section 9 of the said Act 'And, as to whether such an intervenor would be entitled to seek clarification of an order passed by the court on such a petition' In answer to the said questions, it was found that the intervenor in that case had no privity of contract with the petitioner, nor was the intervenor a party to the arbitration proceedings. It was observed that Section 9 of the said Act is with reference to arbitral proceedings and just as the intervenor cannot be a party in the arbitral proceedings pending between the parties thereto, he would have no locus standi in the proceedings under Section 9 of the said Act. It was also noted that the interim orders that may be passed under Section 9 or Section 17 are with reference to the parties to the arbitration and in connection with the subject- matter thereof. The intervenor's application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 was, in that case, disallowed on these grounds. The said decision clearly demonstrates that a person who is not a party to the arbitration agreement cannot seek a variation of an order passed under Section 9 of the said Act. Moreover, the order that is passed under Section 9 of the said Act is one which is in respect of and in connection with the subject-matter of an arbitration agreement, which in the case on hand is between the Shital Ispat and Red Snapper.

[53] We are of the view that the Court in a proceeding under Section 9 of the Act, 1996 should not grant any relief affecting the independent right of a third party. We are not convinced with the impugned order because neither the IOB nor the appellant Bank is a party to the VPC and Arbitration Agreement contained therein and their rights vis-a-vis each other are independent rights / obligations emanating from the subject LC.

[54] In the aforesaid context, we may refer to and rely upon a decision of the Gauhati High Court in the case of Brahmaputra Realtors Pvt Ltd vs. G. G. Transport (P) Ltd and others, 2014 1 GLD 296 (Gau), more particularly, the observations made in paras 54, 59, 62, 63 and 64 respectively:

"54 An order under Section 9 of the Act of 1996 can be passed against a third party, is not an absolute proposition of law in as much as if the said proposition is accepted it would mean that as interim measures could be sought even against a person, who is not connected with the subject matter of an arbitration agreement. Learned counsel for the appellant submitted that the Judgments to which the Respondent No. 1 has referred to had categorically stated that Order under Section 9 of the Act of 1996 can be passed against a third party, if such person is claiming under the party to the Arbitration Agreement. In the instant case, however, the Appellant is claiming an independent right on the basis of Registered Deeds of Sale being executed in its favour and also being in possession of the Schedule land in question. Learned counsel for the appellant pointed out that the appellant is not claiming any right under the Respondents and as such no interim measures could be passed against the appellant, but the learned Court below however failed to appreciate very vital distinction between a person claiming under and the person who had purchased the property from the vendor with or without notice of the Contract and therefore, submitted that the ratio of the judgments rendered by the Hon'ble Bombay High Court has no relevance to the instant dispute.

59 In the instant case, admittedly the appellant herein is claiming independent right in respect of the subject matter of the Arbitration Agreement on their own and not claiming under the Respondent No. 2 alone, who is a party to the Arbitration Agreement. In such a situation, the Court would not have jurisdiction to pass appropriate order by way of interim measures against the appellant herein, since he is not a party to the Arbitration Agreement or the Arbitration Proceedings.

62 In the present case, the appellant has acquired an independent right. Therefore, the appellant cannot equated with a person claiming under the original vendor. The relief or any award in the arbitration proceeding in between the Respondent No.1 and Respondent No.3 would not be able to disturb the right acquired by the appellant by valid purchase from the original owners. Furthermore, the Arbitral Tribunal would not be able to take away the right acquired by the appellant by way of valid purchase from the vendors and original owners.

63 Section 9 of the Act is attracted only if the nature of dispute is subject matter of Arbitration proceedings or agreement. It does not contemplate any such relief which does not stem from the Arbitration Proceedings or the disputes referred to in arbitration for adjudication. The Kerala High Court in the case of Shoney Sanil V. M/s. Coastal Foundations (P) Ltd. and others, 2006 AIR(Ker) 206) was pleased to lay down as under: "The interim measures which are conceived by the Legislature while enacting S.9 are those interim measures which relate to the arbitration agreement between the parties and being interim, they are to confine to the

matters relating to the arbitration agreement between the parties. This intention is explicit from the opening words of S.9, which provides for the party to apply for interim measure. On a plain reading of S.9 and going by the scheme of the said Act, there is no room to hold that by an interim measures under S.9, the rights of third party, holding possession on the basis of a Court sale could be interfered with, injuncted or subjected to proceedings under S.9. Section 9 contemplates issuance of interim measures by the Court only at the instance of a party to an arbitration agreement with regard to the subject matter of the arbitration agreement. This can be only as against the party to an arbitration agreement, or, at best, against any person claiming under him. The petitioner is a third party auction purchaser in whose favour is a sale certificate, followed by delivery of possession. He cannot therefore, be subjected to proceedings under S.9, initiated on the basis of an alleged arbitral agreement between the respondents.

64 This Court is of the view that an order of injunction under Section 9 of the Act, cannot be granted against a third party in exercise of powers, who is not a party to arbitration agreement or arbitration proceedings and who has a distinct right over the property in question. Injunction order can be granted, u/s 9 of the Act against a third party if he is asserting or claiming his right through any of the parties to the Arbitration. More so, when the agreement conceives of compensation for breach of terms of the agreement and an exclusive third party right is created on the property in question, then enjoyment of property by such third party should not be disturbed by passing injunction order."

[55] We may also refer to and rely upon a decision of the Kerala High Court in the case of Shoney Sanil vs. Coastal Foundations (P) Ltd and others, 2006 AIR(Ker) 206, more particularly, the following observations:

"For appreciating the scope of Section 9, the term 'party' has to be understood, following the definition of the said term in Section 2(1)(h), which states that unless the context otherwise requires 'party' means a party to an arbitration agreement. By Section 2(1)(b), 'arbitration agreement' means an agreement referred to in Section 7, whatever be its form as conceived in Sub-section (2) of Section 5 thereof, arbitration agreement, going by Sub-section (1) of Section 7, means an agreement by the parties to submit to arbitration, all or certain disputes which have arisen or which may arise between them in respect of a definite legal relationship, whether contractual or not. Section 9 occurs in Chapter II in Part 1 which defines an arbitration agreement and provides the power of a judicial authority to refer the parties to arbitration, where there is an arbitration agreement and provides further, for interim measures by Court. These are the three provisions contained in Chapter II of Part I. So much so, the interim measures which are

conceived by the Legislature while enacting Section 9 are those interim measures which relate to the arbitration agreement between the parties and being interim, they are to confine to the matters relating to the arbitration agreement between the parties. This intention is explicit from the opening words of Section 9, which provides for the party to apply for interim measure under Section 9. Therefore, only a party to the arbitration agreement can apply to a court invoking Section 9, which consists of two parts. Section 9(i) deals with appointment of a guardian for a minor or a person of unsound mind for the purpose of arbitrary proceedings. Section 9(ii) enumerates five types of interim measures of protection in respect of the matters enumerated in Clauses (a) to (e) of Section 9(ii). Clause (a) deals with preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement. Clause (b) provides for securing the amount in dispute in the arbitration. Clause (c) provides for 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. A reading of the said provision would show that the orders under Section 9(ii)(c) can be passed only in relation to the subject-matter of the dispute in arbitration which may be in the possession of any party since it is not the intention of the Act or any arbitration proceedings as conceived by the law of arbitration, to interfere with or interpolate third party rights. The reason for this is obvious, that, an arbitral tribunal rests its authority on the agreement between the parties to the arbitration agreement and it is not a Court, to interfere with third party rights, as may the Courts authorised in that regard, by the law of the land. The issuance of interim injunction or appointment of receiver provided for under Clause (d) and the residuary provision to issue such interim measure of protection as may appear to be just and convenient in terms of Clause (e) of Section 9(i) and (ii) have to be read in the backdrop of the extent of jurisdiction which can be exercised and, this is limited to the parties who are governed by the arbitral agreement and not in excess thereof. On a plain reading of Section 9 of the Act and going by the scheme of the said Act, there is no room to hold that by an interim measure under Section 9, the rights of third party, holding possession on the basis of a court sale could be interfered with, injuncted or subjected to proceedings under Section 9 of the Act. Section 9 of the Act contemplates issuance of interim measures by the court only at the instance of a party to an arbitration agreement with regard to the subject-matter of the arbitration agreement. This can be only as against the party to an arbitration agreement, or, at best, against any person claiming under him. The writ petitioner

is a third party auction purchaser in whose favour is a sale certificate, followed by delivery of possession. He cannot therefore be subjected to proceedings under Section 9 of the Act, initiated on the basis of an alleged arbitral agreement between the respondents. For the foregoing reasons, the impugned order, as against the writ petitioner, is without jurisdiction. I am of the considered view that the proceedings before the court below, in so far as it is against the writ petitioner is a clear abuse of process of court."

[56] We are of the view, having regard to the dispute between the IOB and the appellant Bank and taking into consideration the relief granted by the Court in favour of the IOB against the appellant Bank that the impugned order is not sustainable in law as the relief granted by the learned Single Judge neither forms part of the subject matter of the Arbitration Agreement nor stamps from the Arbitration Agreement nor has any bearing to the arbitration proceedings. Mr. Joshi, the learned Senior Counsel is right in his submission that such unconnected relief cannot be granted in a petition under Section 9 of the Arbitration Act.

[57] In the aforesaid context, we may refer to and rely upon a decision of the Calcutta High Court in the case of Hindustan Paper Corporation Limited vs. Keneilhouse Angami, 1990 1 CalLT 200 HC, more particularly, the observations made in para 9 therein. It reads thus:

"In our opinion, the point is now well-settled. A bank guarantee may be furnished in terms of a particular contract between two parties. In terms of the conditions of the contract, a bank guarantee may be provided by a bank in favour of one of the parties to the original contract (hereinafter called "the beneficiary"). As to the question of enforcement of the bank guarantee by the beneficiary against the bank, the rights and liabilities are to be governed by the bank guarantee itself and not by the terms and conditions of the original contract. The bank guarantee itself is a contract separate from the original contract pursuant to which the bank guarantee is furnished. The bank is not a party to the original contract. Similarly, the party at whose instance the bank guarantee is furnished pursuant to the agreement, is not a party to the bank guarantee. The bank guarantee is to be enforced if it complies with the terms and conditions of the bank guarantee itself and not when there is any default or breach of the terms and conditions of the main contract. If the condition for payment under the bank guarantee is fulfilled, then such payment is to be made to the beneficiary though ultimately it may be open to the party at whose instance the bank guarantee was furnished to file a suit for damages against the other parties to the contract. It is open to such parties also to file any suit against the bank for recovery of any amount, if any, if the bank has acted contrary to the transaction between the bank and such other parties. That is no ground for

holding that the original contract is to be treated as part of the guarantee or that the arbitration agreement in the original contract can be incorporated in the bank guarantee. If the two contracts are separate, the arbitration clause in the original contract cannot be imported in the contract of bank guarantee. In that event, the arbitration clause in the parent contract cannot include the question as to whether the terms and conditions of the bank guarantee have been fulfilled. Whether the bank guarantee is enforceable or not does not depend on the terms and conditions of the original contract. In this particular case, Clause (b) as such makes it quite clear that the alleged dispute sought to be raised therein is the dispute regarding the right of the beneficiary under the bank guarantee to enforce the bank guarantee as against the bank. It has nothing to do with any breach of contract by the beneficiary under the parent contract. A claim arising out of a bank guarantee is not a dispute arising out of the original contract. As we have pointed out, Clause (b) as such relates to the right of the beneficiary against the bank on the basis of the said bank guarantee and not the right of the beneficiary as such against the other party to the contract under the said original contract. The original arbitration agreement may be very wide or general in terms, but that certainly does not include a dispute arising under a separate agreement with a separate party, that is, the bank guarantee and the bank."

[58] Mr. Joshi is right in his submission that the interim relief of injunction sought in a proceeding under Section 9 of the Act, 1996 must be in aid of an ancillary to the substantive final relief to which the plaintiff's cause of action entitles him in the arbitration proceedings. The same cannot travel beyond the scope of the cause of action available to the parties to an Arbitration Agreement.

[59] In the aforesaid context, we may refer to and rely upon a decision of the Supreme Court in the case of Bharat Aluminium Company vs. Kaiser Aluminium Technical services Inc., 2012 9 SCC 552, more particularly, the observations made in paras 175 to 183 respectively and 192. It reads thus:

"175 In our opinion, pendency of the arbitration proceedings outside India would not provide a cause of action for a suit where the main prayer is for injunction. Mr. Sundaram has rightly pointed out that the entire suit would be based on the pendency of arbitration proceedings in a foreign country. Therefore, it would not be open to a party to file a suit touching on the merits of the arbitration. If such a suit was to be filed, it would in all probabilities be stayed in view of Sections 8 and 45 of the Arbitration Act, 1996. It must also be noticed that such a suit, if at all, can only be framed as a suit to "inter alia restrain the defendant from parting with property." Now, if the right to such property could possibly arise, only if the future arbitration award could possibly be in favour of the plaintiff, no suit for a

declaration could obviously be filed, based purely only on such a contingency. All that could then be filed would, therefore, be a bare suit for injunction restraining the other party from parting with property. The interlocutory relief would also be identical. In our view, such a suit would not be maintainable, because an interlocutory injunction can only be granted during the pendency of a civil suit claiming a relief which is likely to result in a final decision upon the subject in dispute. The suit would be maintainable only on the existence of a cause of action, which would entitle the plaintiff for the substantive relief claimed in the suit. The interim injunction itself must be a part of the substantive relief to which the plaintiff's cause of action entitled him. In our opinion, most of the aforesaid ingredients are missing in a suit claiming injunction restraining a party from dealing with the assets during the pendency of arbitration proceedings outside India. Since the dispute is to be decided by the Arbitrator, no substantive relief concerning the merits of the arbitration could be claimed in the suit. The only relief that could be asked for would be to safeguard the property which the plaintiff may or may not be entitled to proceed against. In fact the plaintiff's only claim would depend on the outcome of the arbitration proceeding in a foreign country over which the courts in India would have no jurisdiction. The cause of action would clearly be contingent/speculative. There would be no existing cause of action. The plaint itself would be liable to be rejected under Order VII Rule 11(a). In any event, as noticed above, no interim relief could be granted unless it is in aid of and ancillary to the main relief that may be available to a party on final determination of rights in a suit. This view will find support from a number of judgments of this Court.

176 In the State of Orissa vs. Madan Gopal Rungta, 1952 AIR(SC) 12 at page 35 this Court held:

"6...An interim relief can be granted only in aid or, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceeding....." 177 Following the above Constitution Bench, this Court in Cotton Corporation Limited vs. United Industrial Bank,1983 4 SCC 525 held:

"10.....But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted. In State of Orissa v. Madan Gopal Rungta a Constitution Bench of this Court clearly spelt out the contours within which interim relief can be granted. The Court said that 'an interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceeding'. If this be the purpose to achieve which power to grant temporary relief is conferred, it is inconceivable that where the final relief cannot

be granted in the terms sought for because the statute bars granting such a relief ipso facto the temporary relief of the same nature cannot be granted....."

178 The legal position is reiterated in Ashok Kumar Lingala vs. State of Karnataka, 2012 1 SCC 321.

179 In matters pertaining to arbitration, the suit would also be barred under Section 14(2) of the Specific Relief Act. Although the provision exists in Section 37 of the Specific Relief Act, 1963, for grant of temporary/perpetual injunction, but the existence of cause of action would be essential under this provision also. Similar would be the position under Section 38 of the Specific Relief Act.

180 Claim for a Mareva Injunction in somewhat similar circumstances came up for consideration in England before the House of Lords in Siskina (Cargo Owners) Vs. Distos Compania Navieria SA,1979 AC 334. In this case, cargo owners had a claim against a Panamanian company. The dispute had no connection with England. The defendant's only ship had sunk and there were insurance proceeds in England to which the defendant was entitled. The cargo owners sought leave to serve the writ on the defendant under what was then RSC Order 11, Rule 1(1)(i). Mocatta, J. gave leave and at the same time granted an injunction in the terms asked for in Paragraph 2 of the writ petition. Subsequently, Kerr, J. set aside the notice of the writ but maintained the injunction pending in appeal. On the cargo-owners appeal, the Court of Appeal by a majority reversed the judgment of Kerr, J. and restored the Mareva injunction as originally granted by Mocatta, J. The matter reached the House of Lords by way of an appeal against the majority judgment of the Court of Appeal. The House of Lords on appeal held that there was no jurisdiction to commence substantive proceedings in England. Therefore, the writ and all subsequent proceedings in the action had to be set aside. Consequently there could be no Mareva injunction. It was held that a Mareva injunction was merely an interlocutory injunction and such an injunction could only be granted as ".... ancillary and incidental to the pre-existing cause of action".

181 Lord Diplock observed that: "it is conceded that the cargo owners' claim for damages for breach of contract does not of itself fall within any of the subrules of Order 11, Rule 1(1); nor does their claim for damages for tort."

It is further observed that

"what is contended by the counsel for the cargo-owners is that if the action is nevertheless allowed to proceed, it will support a claim for Mareva injunction restraining the ship owners from disposing of their assets within the jurisdiction until judgment and payment of the damages awarded thereby; and that this of

itself is sufficient to bring the case within sub-rule (i) which empowers the High Court to give leave for service of its process on persons outside the jurisdictions".

182 Interpreting Order 11 Rule 1(i), it was held that the word used in sub- rule (i) are terms of legal art. The sub-rule speaks of "the action" in which a particular kind of relief, "an injunction" is sought. This pre-supposes the existence of a cause of action on which to found "the action". A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre- existing cause of action. It is granted to preserve the status quo pending the ascertainment by the Court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

183 As noticed earlier, the position is no different in India. Therefore it appears that under the law, as it stands today, an inter-parte suit simply for interim relief pending arbitration outside India would not be maintainable.

192 So far as the Indian Law is concerned, it is settled that the source "of a Court's power to grant interim relief is traceable to Section 94 and in exceptional cases Section 151 CPC. CPC pre-supposes the existence of a substantive suit for final relief wherein the power to grant an interim relief may be exercised only till disposal thereof."

[60] We may also refer to and rely upon a decision of the Supreme Court in the case of Adhunik Steels Ltd vs. Orissa Manganese and Minerals (P) Ltd, 2007 7 SCC 125, more particularly, the observations made in paras 11, 20 and 21 therein. It reads thus:

"11 It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of 'just and convenient' while speaking of

passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

20 No special condition is contained in Section 9 of the Act. No special procedure is indicated. In American Jurisprudence, 2nd Edition it is stated:

"In judicial proceedings under arbitration statutes ordinary rules of practice and procedure govern where none are specified; and even those prescribed by statute are frequently analogous to others in common use and are subject to similar interpretation by the courts."

21 It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to O.M.M. Private Limited for a period of 10 years and its attempted abrupt termination by O.M.M. Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of O.M.M. Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of the Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by O.M.M. Private Limited or the termination of the contract by O.M.M. Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be

considered in the context of well settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case."

[61] Mr. Joshi is also right in his submission that the claim of his client against the IOB should not be permitted to be defeated even assuming for the moment that the primary transaction under the VPC is tainted with fraud. In other words, the argument which is quite appealing to us is that the appellant Bank cannot be restrained by an injunction from obtaining reimbursement.

[62] In the aforesaid context, we may refer to and rely upon a decision of the Supreme Court in the case of Federal Bank Ltd vs. V. M. Job Engineering Ltd and others, 2001 1 SCC 663, more particularly, the observations made in paras 55 to 59 respectively and

66. It reads thus:

"55 In several judgment of this Court, it has been held that Courts ought not to grant injunction to restrain encashment of Bank guarantees or Letters of Credit, Two exceptions have been mentioned- (i) fraud and (ii) irretrievable damage. If the plaintiff is prima facie able to establish that the case comes within these two exceptions, temporary injunction under Order 39, Rule 1, CPC can be issued. It has also been held that the contract of the Bank guarantee or the Letter of Credit is independent of the main contract between the seller arid the buyer. This is; also clear from Arts. 3 and 4 of the UCP (1983 Revision). In case of an irrevocable Bank guarantee or Letter of Credit the buyer cannot obtain injunction against the Banker 0n the ground that there was a breach of the contract by the seller. The Bank is to honour the demand for encashment if the seller pima facie complies with the terms of the Bank Guarantee or Letter of Credit, namely, if the seller produces the documents enumerated in the Bank Guarantee or Letter of Credit If the Bank is satisfied on the face of the documents that they are in conformity with the list of documents mentioned in the Bank Guarantee or Letter of Credit and there is no discrepancy, it is bound to honour the demand of the seller for encashment. While doing so it must take reasonable care. It is not permissible for the Bank to refuse payment on the ground that the buyer is claiming that there is a breach of contract. Nor can the Bank try to decide this question of breach at that stage and refuse payment to the seller. Its obligation under the document having nothing to

do with any dispute as to breach of contract between the seller and the buyer. As to its knowledge of fraud or forgery, we shall presently deal with it.

Knowledge of fraud :

56 Decided cases hold that In order to obtain an injunction against the Issuing Bank, it is necessary to prove that the Bank had knowledge of the fraud.

57 Kerr, J. said in R.D, Harbottle (Mercantile) Lid v. National Westminister Bank Ltd., 1978 QB 146 at 155 at irrevocable Letters of Credit are 'the life blood of international commerce''. He said :

"Except possibly in clear cases of fraud of which the banks have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration.....Otherwise, trust in international commerce could be irreparably damaged."

Denning M.R. stated In Edward and Owen Engineering Ltd. v. Barclays Sank International Lid., 1978 QB 159 that 'the only exception is where there is a clear fraud of which the bank had notice": Browne, LJ. said in the same case : "but it is certainly not enough to alleged fraud, it mast be established" and in such circumstances, I should say, very clearly established", in Bolvinter Oil S.A. v. Chase Manhattan Bank, 1984 1 AllER 351 at P. 352, it was said '

"where it is proved that the Bank knows that any demand for payment already made or which may thereafter be made, will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not be sufficient that this rests Upon the uncorroborated statement of the customer,, for irreparable damage can be done to a bank's credit in the relatively brief time "before the injunction is vacated".

Thus, not only must 'fraud' be clearly proved but so far as the Bank is concerned, it must prove that it had knowledge of the fraud. In United Trading Corp. S.A. v. Allied Ards Bank, 1985 2 LloydsRep 554, it was stated that there must be proof of knowledge of fraud on the part of the Bank at any time before payment. It was also observed that it

"would be sufficient if the corroborated evidence of the plaintiff usually in the form of contemporary documents and the unexplained failure of a beneficiary to respond to the attack, lead to the conclusion that the .only realistic inference to draw was 'fraud'".

In Guarantee Trust Co. of New York v. Hanney, 1918 2 KB 623(KB), the Banker accepted the documents without any knowledge of fraud or falsify and it was held that me defendants could not counter-claim from the Bank. However, it would be the 'Banker's duty to refuse the documents which oh their face bear signs of having been altered (See Re Salomon and Nandszus,1899 81 LT 325. That was a C.I.F. contract. This Court in ITC Ltd. v. Debts Record Appellate Tribunal, 1998 2 SCC 70(at 79) also held that knowledge Of the Bank as to the fraud or forgery had to be prima facie established.

58 The foundation of English law in this area is the American case of Sztejn v. j. Heney Schroder Banking Corpn., 1941 31 NYS2d 631, (Extensive details of this case are available in 'Documentary Credits' by Raymond Jack, 1991 pp. 191-192); This case has been cited in more than one judgment of this Court and the English Courts but we shall give more facts of that case and the principle Of 'holder in due course' laid down therein which arises in the case before us, as per the appellant's pleadings. In that case, the applicant for a credit (i.e. the buyer) claimed injunction against the Issuing Bank Schroder Banking Corporation to prevent it paying on the documents which had been presented. The credit had been advised to the seller in, India by the Issuing Bank's correspondent in India, the Chartered Bank of India, Australia and China, The correspondent had not confirmed the credit The applicant alleged that what had been shipped was rubbish rather than the bristles contracted to be supplied. The Chartered Batik (the Collecting Bank) which received the documents from the seller for 'collection', applied for dismissing the buyer's claim. (This was a proceeding similar to Order 7 Rule 11 CPC)for an injunction on the ground that there was no cause of action. The buyer's, in their application for injunction, informed the Issuing Bank about the fraud of the sellers. For the purpose of hearing tot application of the Collecting Bank, the Court assumed the facts stated in the application of the buyer as to fraud to be true. (Otherwise, this was a difficult burden of proof normally). Shientag, J. held that:

"Where the seller's fraud has been called to the bank's attention before the drafts and documents have been presented for payment the principle of the independence of the bank's obligation under the Letter of Credit should not be extended to protect the unscrupulous seller. It is true that even though the documents are forged or fraudulent, if the issuing bank has already paid the draft before receiving notice of the seller's fraud, it will be protected if it exercised reasonable diligence before making such payment."

The facts, as stated above, were that the sellers had drawn the draft under the letter of Credit to the order of the Chartered Bank of India, Australia and China and delivered the draft and the fraudulent documents to the said Chartered Bank's

branch at Kanpur for 'collection' on account of the sellers. The Chartered Bank could not compel the issuing Bank, Schroder Banking Corporation, to pay by seeking a dismissal of the buyer's application by way of a demurrer. The plaintiff was entitled to injunction for it had brought the allegation to the knowledge of the Issuing Bank, before the payment was made. Shientag, J. further observed:

"As one Court has stated:

obviously, when the issuer of a letter of Credit knows that a document, although correct in form, is, in point of fact, false or illegal, he cannot be called upon to recognise such a document as complying with the terms of a letter of credit"

No hardship will be caused by permitting the bank to refuse payment where frauds is Claimed, where the merchandise is not merely inferior in quality but consists of worthless rubbish, where the draft and the accompany document are in the hands of one who stands in the same position as the fraudulent seller, where the bank has been given notice of fraud before being presented with the drafts and documents for payment, and where the bank itself does not wish to pay pending an adjudication of the rights and obligations of the other parties."

The Court also noticed that, on facts, the Collecting Bank, Chartered Bank was not a holder in due course but was a mere agent for collection for the account of the seller who was charged by the buyer with fraud. Therefore the Chartered Bank's motion to dismiss the complaint (similar to Order 7 Rule 11 CPC) must be denied. Shientage, J. referred to the principle of 'holder in due course' and said as follows:

"If it had appeared from the face of the complaint that the Bank presenting the draft for payment (i.e. Chartered Bank) was a holder in due course, its claim against the Bank issuing the letter of credit would not be defeated even though the primary transaction was tainted by fraud."

'This passage lays down the law as to when a person becomes a holder in due course in the case of a fraud by the sellers. This last paragraph from the judgment of Shientag, J. is directly applicable to the facts of the case.

59 Applying the said principle, we may state that if the appellant Federal Bank was merely a collecting bank or agent which had approached the Bank of Maharashtra (the issuing Bank) and if the Issuing Bank was sought to be restrained by the buyer before payment was made by the Issuing Bank to the Collecting Bank, the collecting Bank could not have compelled the Issuing Bank to release the money for collection if the buyer informed the Issuing Bank in his plaint that the documents to be presented to it by the Collecting Bank were forged or fraudulent. But where, on

the other hand, the Negotiating Bank, i.e. the Federal Bank (appellant), has said on the basis of a clearance given by the Issuing Bank as to genuineness of documents, and seeks reimbursement, then the Negotiating Bank is in the position of a holder in due course and can claim that the suit of the buyer must fail if it sought to restrain the Issuing Bank from reimbursing the Negotiating Bank- These principles prima facie flow from Shientag, J's judgment which has been followed both in England and by this Court, in several cases.

66 For me aforesaid reasons, we allow me appeal and vacate me temporary injunction granted in favour of the plaintiff against the Bank of Maharashtra in so far as the said injunction precluded the Bank of Maharashtra from reimbursing the appellant-Federal Bank: It Is clarified that me said injunction will not come in the way of the Bank of Maharashtra from complying with its obligation to reimburse the Federal Bank. The Appeal is allowed. No costs."

[63] In view of the aforesaid discussion, we have no hesitation in arriving at the conclusion that the impugned order is not sustainable in law and deserves to be set aside.

[64] We can understand the predicament of the IOB as expressed by Mr. Sanjanwala, but the Law has to take its own course. Equity follows the law. This maxim is also expressed as "aequitas sequitur legem", which means that equity will not allow a remedy that is contrary to the law. This maxim lays down as said by Maitland long ago that equity supplements law and does not supersede it. The discretion of the Court is governed by law and equity which are subservient to one another. Wherever the law can be followed, it must be followed. In the cases where the law does not apply specifically, this maxim suffers limitation. We have not heard of the proposition that some transcendetal equity should be so used as to defeat or amend the law as it stands.

[65] Mr. Sanjanwala is right in his own submission that a Bank issuing or confirming a Letter of Credit is not concerned with the underlying contract between the buyer and seller. The duties of a Bank under a Letter of Credit are created by the document itself. However, in the main proceeding i.e. in the Section 9 proceeding, this Court has passed an order of injunction restraining the IOB from making the payment and the proceedings are still pending as on date. This principle of law, upon which Mr. Sanjanwala seeks to rely upon, may hold good while arguing before the Court in the Section 9 proceeding. Under Section 9, the Court has wide powers to grant interim measures of protection as may appear to the Court to be just and convenient, including for preservation, interim custody, or sell of goods which are the subject matter of

arbitration, for securing the amount in dispute, interim injunction, appointment of a receiver or guardian, etc.

[66] Insofar as an injunction against invocation of bank guarantees is concerned, the Delhi High Court in **Halliburton Offshore Services Inc vs. Vedanta Limited [O.M.P (I) (COMM.) No. 88 of 2020 & I.As. 3696-3697 of 2020 decided on 29th May 2020]** has taken the view that if fraud, irretrievable injury or special equities are not proved, then in such circumstances, injunction should not be granted. All these aspects will have to be looked into and considered by the learned Judge while deciding the Section 9 application finally.

[67] Any further observation as regards the merits of the Section 9 application, at this stage, may cause prejudice to any one of the parties.

[68] Mr. Sanjanwala, the learned Senior Counsel appearing for the IOB argued a lot on Section 9(2) and Section 9(3) respectively of the Act, 1996. By the 2015 amendment to the Act, Section 9 came to be amended to recognize the power given under Section 17 (which was put at par with Section 9) and thereby reduce the role of Courts in the grant of interim protection once the Tribunal was constituted.

[69] In the case on hand, we are informed that the Arbitral Tribunal has been constituted and the proceedings are under way at London. The arbitration proceedings are between the Shital Ispat vs. Red Snapper. As noted above, the progress of the arbitration proceedings at London will have to be brought on record and the Arbitration Judge will have to be not only informed about the same but also about the subject matter of the arbitration proceedings.

[70] Mr. Sanjanwala argued that once the Arbitral Tribunal has been constituted, as per Section 9 (3), the Court shall not entertain an application under Sub-section (1) unless it finds that the circumstances exist which may not render the remedy provided under Section 17 efficacious.

[71] We take notice of the fact that in the case on hand, the Arbitral Tribunal came to be constituted at London after the application under Section 9 came to be filed before this Court.

[72] In the aforesaid context, we may refer to and rely upon a recent pronouncement of the Supreme Court in the case of **Arcelor Mittal Nippon Steel India Ltd vs. Essar Bulk Terminal Ltd [Civil Appeal No.5700 of 2021 arising out Special Leave Petition (Civil) No.13129 of 2021 decided on 14th September 2021] reported in LL 2021 SC 454**. The issue before the Supreme Court in the said litigation was whether the Court has the power to entertain an application under

Section 9(1) once an Arbitral Tribunal has been constituted. The Supreme Court was called upon to explain the true meaning and purport of the expression "entertain" in Section 9(3) of the Act.

[73] The Supreme Court took the view that the bar under Section 9(3) of the Act would operate only where the application under Section 9(1) had not been entertained till the constitution of the Arbitral Tribunal. Once an Arbitral Tribunal is constituted, the Court cannot take up an application under Section 9 for consideration, unless the power under Section 17 is inefficacious. However, once an application is entertained in the sense it is taken up for consideration and the Court has applied its mind to the same, the Court can certainly proceed to adjudicate the application. The Supreme Court made the following observations in this regard:

> **"Meaning of the Expression "Entertain"**
>
> 93. It is now well settled that the expression "entertain" means to consider by application of mind to the issues raised. The Court entertains a case when it takes a matter up for consideration. The process of consideration could continue till the pronouncement of judgment as argued by Khambata. Once an Arbitral Tribunal is constituted the Court cannot take up an application under Section 9 for consideration, unless the remedy under Section 17 is inefficacious. However, once an application is entertained in the sense it is taken up for consideration, and the Court has applied its mind to the Court can certainly proceed to adjudicate the application."
>
> **"No reason why the Court should continue to take up application for interim relief, once the Arbitral tribunal is constituted.**
>
> 68. With the law as it stands today, the Arbitral Tribunal has the same power to grant interim relief as the Court and the remedy under Section 17 is as efficacious as the remedy under Section 9(1). There is, therefore, no reason why the Court should continue to take up applications for interim relief, once the Arbitral Tribunal is constituted and is in seisin of the dispute between the parties, unless there is some impediment in approaching the Arbitral Tribunal, or the interim relief sought cannot expeditiously be obtained from the Arbitral Tribunal."
>
> **"There could be numerous reasons which render the remedy under Section 17 inefficacious.**
>
> "96. Even after an Arbitral Tribunal is constituted, there may be myriads of reasons why the Arbitral Tribunal may not be an efficacious alternative to Section 9(1). This

could even be by reason of temporary unavailability of any one of the Arbitrators of an Arbitral Tribunal by reason of illness, travel etc.

100. ...There could be numerous reasons which render the remedy under Section 17 inefficacious. To cite an example, the different Arbitrators constituting an Arbitral Tribunal could be located at far away places and not in a position to assemble immediately. In such a case an application for urgent interim relief may have to be entertained by the Court under Section 9(1)."

"Principles for grant of interim relief

97. Applications for interim relief are inherently applications which are required to be disposed of urgently. Interim relief is granted in aid of final relief. The object is to ensure protection of the property being the subject matter of Arbitration and/or otherwise ensure that the arbitration proceedings do not become infructuous and the Arbitral Award does not become an award on paper, of no real value.

98. The principles for grant of interim relief are (i) good prima facie case, (ii) balance of convenience in favour of grant of interim relief and (iii) irreparable injury or loss to the applicant for interim relief. Unless applications for interim measures are decided expeditiously, irreparable injury or prejudice may be caused to the party seeking interim relief.

99. It could, therefore, never have been the legislative intent that even after an application under Section 9 is finally heard relief would have to be declined and the parties be remitted to their remedy under Section 17."

"Conclusion

107. It is reiterated that Section 9(1) enables the parties to an arbitration agreement to approach the appropriate Court for interim measures before the commencement of arbitral proceedings, during arbitral proceedings or at any time after the making of an arbitral award but before it is enforced and in accordance with Section 36 of the Arbitration Act. The bar of Section 9(3) operates where the application under Section 9(1) had not been entertained till the constitution of the Arbitral Tribunal. Ofcourse it hardly need be mentioned that even if an application under Section 9 had been entertained before the constitution of the Tribunal, the Court always has the discretion to direct the parties to approach the Arbitral Tribunal, if necessary by passing a limited order of interim protection, particularly when there has been a long time gap between hearings and the application has for all practical purposes, to be heard afresh, or the hearing has just commenced and

is likely to consume a lot of time. In this case, the High Court has rightly directed the Commercial Court to proceed to complete the adjudication."

[74] In view of all the foregoing reasons, the appeal succeeds and the cross-objection fails. The impugned order passed by the learned Single Judge is hereby set aside. We hold that it is legally permissible for the appellant Bank to proceed with the proceedings instituted by it in the Court at New York against the IOB. It is always open for the IOB to appear and put forward its defense in accordance with law.

[75] We are also of view that in the facts and circumstances of the case, the Section 9 application should be taken up for hearing and the same should be disposed of at the earliest. The disposal of the Section 9 application may make the picture clear for all the parties concerned.

[76] In such circumstances, we direct the Registry to notify the Section 9 application i.e. the Commercial Arbitration Petition No.9 of 2020 before the Court concerned at the earliest.

[77] We make a humble request to the learned Arbitration Judge to take up the Section 9 application for hearing and try to dispose it of as early as possible.

[78] With the aforesaid, the First Appeal and the cross-objection are disposed of. The connected Civil Application stands disposed of.