

**HIGH COURT OF GUJARAT (D.B.)****SANGHI INDUSTRIES LIMITED***Versus***RAVIN CABLES LTD****Date of Decision:** 11 February 2022**Citation:** 2022 LawSuit(Guj) 2707**Hon'ble Judges:** [N V Anjaria](#), [Sandeep N Bhatt](#)**Case Type:** First Appeal; Civil Application (For Stay)**Case No:** 3253 of 2021; 1 of 2021**Subject:** Arbitration, Civil**Acts Referred:**[Code Of Civil Procedure, 1908 Sec 96](#)[Arbitration And Conciliation Act, 1996 Sec 9, Sec 37](#)[Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts Act, 2015 Sec 13](#)**Final Decision:** Appeal dismissed**Advocates:** [K S Nanavati](#), [Kunal Vyas](#), [Nanavati Associates](#), [Devang Nanavati](#), [Prachiti V Shah](#), [Nanavati & Nanavati](#)**Cases Referred in (+): 11****N.V.Anjaria, J.**

**[1]** By preferring the present Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, read with Section 96 of the Code of Civil Procedure, 1908, the appellant seeks to call in question order dated 13th October, 2021 passed by the Commercial Court, Bhuj-Kutch, partially allowing application of respondent herein, under Section 9 of the Arbitration and Conciliation Act, 1996.

1.1 As per the impugned order, the Commercial Court directed the appellant herein-original opponent No.1 to deposit in the Court the amount of performance

bank guarantees pertaining to Purchase Order Nos.1, 2, and 3 invoked by it. The direction regarding investment of the amount and further direction permitting the arbitral tribunal to pass any further interim measures in respect of the deposit after the commencement of the arbitral proceedings, were also passed.

**[2]** Before hearing of this First Appeal, the parties filed the relevant pleadings and documents on record, about the contents of which they were ad idem. In that light and in view of learned advocates for both the sides stating that the pleadings were complete and no further pleadings were to be added or supplemented, and that they argued the appeal finally, with consent and request of the parties, the appeal was accordingly heard finally.

**[3]** Shorn off unnecessary details, the relevant facts involved in the dispute are inter alia that respondent herein is a company engaged in manufacturing of domestic power cables. The appellant company awarded the contract through the tender process to the respondent. The contract work was in the nature of providing complete design, engineering, manufacturing, testing, supply, supervision of erection and commissioning of power cables approximately 478 km. long in the project.

3.1 Seven Purchase Orders came to be issued under the contract. The details of these Purchase Orders are-(i) PO No.SIL/PROJ/PO/1419000195, dated 0rd July, 2019; (ii) PO No.SIL/PROJ/PO/1419000198, dated 03rd July, 2019; (iii) PO No.SIL/PROJ/PO/1419000201, dated 03rd July, 2019; (iv) PO No.SIL/PROJ/PO/1419000571 (CPPII) & 1419000572 (Grinding Unit), dated 25th November, 2019; (v) PO No.SIL/PROJ/PO/1419000571 (CPPII) & 1419000572 (Grinding Unit), dated 25th November, 2019; (vi) PO No.SIL/PROJ/PO/1419000733, dated 24th January, 2020 and (vii) PO No.SIL/PROJ/PO/1419000732, dated 24th January, 2020. Out of the said seven Purchase Orders, for the subject matter dispute, the Purchase Orders sanctioned at (i), (ii) and (iii) above stand relevant.

3.1.1 In each of the three Purchase Orders which are subject matter herein, Clause 4 dealing with terms of payment is identically worded, reading thus.

#### "04. Payment Terms

1. 10% of basis contract value shall be released as an advance against furnishing of order acceptance & Advance Bank Guarantee valid till completion of supply with one month period for any claim of equivalent amount.

2. 80% contract value with 100% GST shall be released 30 days from the date of receipt of materials at site along with submission of original dispatch documents.

3. 10% contract value shall be released after commissioning against submission of original performance bank guarantee (which shall be valid for 12 months from the date of commissioning or 18 months from the date of last supply whichever is earlier) or 60 days from the date of receipt of Last Consignment at site whichever is earlier."

3.1.2 The respondent agreed to provide performance bank guarantees as stipulated under the terms of contract, upon the appellant releasing the last tranche of 10% of payment to the respondent commissioning the work. The three performance bank guarantees in connection with three Purchase Orders were given-(i) bearing No.03007BGK20000036 dated 20th February, 2020 for Rs.52,81,445/-, (ii) bearing No.03007BGK20000009 dated 30th January, 2020 for Rs.21,05,395/- and (iii) bearing No.03007BGK20000053 dated 17th March, 2020 for Rs.05,72,150/-, respectively. The three bank guarantees were totaling Rs.79,58,990/-.

3.1.3 Under the aforementioned Purchase Orders, material worth Rs.13,10,30,559.52 was supplied. The payment to the tune of Rs.11,80,07,653.63 was made by the appellant. The balance outstanding of Rs.01,30,22,906/- has not been paid by the appellant. The non-payment of the said amount was on account of the dispute between the parties about the quality of the cables supplied.

3.2 According to the case of the appellant herein, upon commissioning of cables, power failure occurred on 10th April, 2021 at the generation plant of the appellant and that it was due to inferior quality of the cables. The request of the appellant to remedy the situation, it was stated, was not attended to by the respondent and respondent did not visit the site. It is the case that appellant had to incur huge loss to the tune of more than Rs.21.00 crores. Reminder letters to the respondent failed to receive any response.

3.3 On the other hand, as per the respondent's case, the appellant was required to make payment of Rs.01,30,22,906/- simultaneously as per the payment terms in clause 4. The said outstanding amount was demanded by addressing emails dated 26th March, 2020, 25th May, 2020, 26th May, 2020 and 05th June, 2020, but in vain. It is stated that as per email dated 06th June, 2020, the Director of the appellant company at last admitted that they were committed to fulfill the payment obligation. It is the case of the respondent that no dispute was raised at that juncture about the quality of the cables and even in correspondence afterwards.

3.3.1 It is the case of the respondent that further emails were exchanged as the payment was not forthcoming. In email dated 21st July, 2020 issued by Assistant Manager (Sales) of the appellant company, liability of payment was again accepted

and it was further requested that the respondent should continue to supply the cables as per the Purchase Orders. As per the case of the respondent, at that time non-payment of the amount was justified on the ground of currency of pandemic and financial set back.

3.3.2 It was stated that despite outstanding amount becoming Rs.01.50 crores, appellant had released payment of Rs.09.21 lakhs only. Telephonic conversation of the representatives of the parties recorded in email dated 23rd November, 2020 wherein, submits the respondent, the appellant agreed to make balance of payment in the first week of December, 2020.

3.3.3 It is the say of the respondent that in further email exchanged, the appellant again stated that payment will be cleared and schedule of payment will be given, but schedule of payment was not provided, much less the payment made. The commitment was not honoured and the conduct of the appellant was evasive, stated the respondent herein. A notice dated 13th July, 2021 was required to be issued by the respondent on account of non-response on behalf of the appellant asking the appellant to make payment of the outstanding amount, failing which, it was stated, that the proceedings under the Insolvency and Bankruptcy Code would be initiated.

3.3.4 It is the further case of the respondent that in a reactionary step, the appellant invoked all seven performance bank guarantees without any prior intimation by letter dated 21st July, 2021. The proceedings under Section 9 of the Arbitration and Conciliation Act came to be filed by the respondent in the Bhuj Commercial Court in respect of three bank guarantees in question and for the remaining bank guarantees, before the Commercial Court at Ahmedabad.

3.4 The dispute about the quality of cables supplied by the respondent has the origin in the say of the appellant that on 10th April, 2021 when the cables were commissioned, there was power failure at the generation plant. Notice dated 11th June, 2021 was issued by the appellant claiming quality dispute in respect of the cables. It is stated by the respondent that it replied the said letter by communication dated 19th June, 2021 elaborated denying all allegations about inferior quality of cables. It was further stated that an inspection report of M/s.Bureau Veritas had confirmed that cables were free from any manufacturing defect. By letter dated 13th July, 2021, as sated above, respondent demanded outstanding dues of Rs.01,30,22,906/- and thereafter the appellant proceeded to invoke the bank guarantees in respect of all Purchase Orders.

3.5 The arbitration clause was contained in Article 15 is similarly worded in all Purchase Orders. On 22nd July, 2021 appellant issued notice invoking arbitration for adjudication of disputes including about the loss claimed to have been suffered. As the performance bank guarantees were invoked, respondent filed application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act, 1996'). The application was filed on 23rd July, 2021.

3.6 By filing application under Section 9 of the Arbitration Act, 1996, respondent prayed for interim measures seeking following relief.

(a) Pending commencement of the arbitration proceedings until their conclusion and until enforcement of the arbitral award, the Court may restrain respondent No.1 and its agents, officers etc. from invoking and/or encashing the three bank guarantees, In the alternative, it was prayed,

(aa) Court may restrain respondent No.2 Bank, its agents and officers from making payment to respondent No.1-appellant herein under the said bank guarantee,

(b) Court may direct respondent No.1-appellant herein, its agents and officers, to pay and deposit in the Court the entire amount received from the Bank under the said bank guarantees, Alternatively it was prayed,

(bb) The Court may pass order directing respondent No.1-appellant herein, its agents and officers to furnish appropriate security to the applicant or to the Court to secure the entire amount received under the bank guarantees.

3.7 Partially allowing the application, the Commercial Court passed the following operative directions as interim protective measures.

"1. The application is hereby PARTIALLY ALLOWED.

2. Opponent No.01 SANGHI INDUSTRIES LIMITED hereby directed to deposit the amount of performance Bank Guarantees pertaining to P.O No.01, 02 and 03 invoked and realized from Opponent No.02 Bank, in this Court for ninety days or up to appointment of arbitral tribunal whichever is earlier.

3. Upon deposit of such amount, Nazir Shri, of this court shall secure the amount in Nationalized Bank for the same period in term deposit in the nationalized Bank having account of this court.

**[4]** Concern Arbitral Tribunal may order any further interim measures regarding deposit of amount of Performance Bank Guarantee as per the provision of the



Arbitration and Conciliation Act after commencement or during the continuance of arbitral proceedings."

4. Assailing the order passed by the Commercial Court and questioning its legality and justification, vehement submissions were raised by learned senior advocate Mr.K.S. Nanavati with learned advocate Mr.Kunal Vyas for Nanavati Associates for the appellant. Taking the Court through the contents of the bank guarantees, it was submitted that the bank guarantees were unconditional and irrevocable under which the Bank had undertaken and guaranteed to pay to the appellant the money without protest or demand. It was submitted relying on the decision in [Vinitec Electronics Private Limited v. HCL Infosystems Limited](#), 2008 1 SCC 544 that no injunction could be granted against invocation of unconditional bank guarantee except in the cases of fraud or irreparable injury.

4.1 It was submitted that therefore the appellant was within its right to entitled to invoke the bank guarantees. It was submitted further that the appellant was entitled to invoke the bank guarantees for any loss or damages suffered by it and such encashment had even taken place. It was also submitted that prayer for seeking injunction was rendered infructuous as the bank guarantees were invoked. It was sought to be contended that contract was one though different Purchase Orders were issued and each Purchase Order cannot be treated as separate contract.

4.1.1 Learned senior advocate by referring to certain averments in the application under Section 9 of the respondent submitted that those averments suggested that the respondent prayed for interim measures from the Court under Section 9(ii)(b) of the Arbitration Act, 1996. It was submitted that the impugned order has been passed on the purported ground that amount is required to be secured. In this regard it was submitted that principles governing Order XXXVIII Rule 5, Code of Civil Procedure are applicable.

4.1.2 Decision of the Supreme Court in [Roman Tech & Process Engg. Co. v. M/s.Solanki Traders](#), 2008 2 SCC 302 and other decisions on the point were relied on to submit that the object of Order XXXVIII Rule 5 is to prevent any defendant from defeating the realisation of the decree or award that may be ultimately passed in favour of the plaintiff and further that there should be a reasonable chance of a decree being passed. It was submitted that the power should be exercised sparingly.

4.1.3 Asserting again that the powers were exercised by the Commercial Court under clause (b) only of Section 9(ii) of the Act, learned senior advocate for the

appellant next submitted that there were no averments in the application by the respondent herein that the defendant was defeating or realisation of the possible decree or obstructing the execution of the award in any manner which was essential requirement. According to learned senior advocate, the powers are exercised by the Court under Section 9(ii)(b) for securing the amount in dispute in the arbitration, for which all the aforesaid principles underlying Order XXXVIII Rule 5, CPC were required to be applied.

4.1.4 Vociferous submissions were made by learned senior advocate for the appellant that in the present case while passing directions under Section 9 as per the impugned order, the Commercial Court has treated the dispute as amount in dispute in arbitration, consequentially the exercise of powers fell under Clause 9(ii) (b). It was contended that amount of bank guarantee is an "amount in dispute in arbitration", furthering submission that principles under Order XXXIX Rule 5, CPC are not considered. When the parameters under the said Order have not been satisfied, exercise of powers under Section 9(ii)(b) of the Arbitration Act by the Commercial Court could not be said to be in accordance with law, he submitted.

4.1.5 It was next submitted on the basis of the decision of the Division Bench of this Court in [Essar Oil Limited v. United India Insurance Co. Ltd.](#), 2015 3 GLH 28 that since the exercise of powers would be analogous to powers under Order XXXVIII Rule 5, CPC, the criteria would be the conduct of the party that property is likely to be disposed of by the party to defeat the future decree or awards. It was submitted that such situation being absent in the present case, Section 9(ii)(b) of the Act could not have been resorted to by the Commercial Court.

4.1.6 It was then submitted that in passing the impugned order, the Commercial Court has adverted to Clause 9(i)(d) and/or 9(i)(e) of the Act which is untenable in law, for, the relief could not have been considered except under 9(i)(b) to be guided by the above principles. It was submitted that Section 9(ii) (e) is in the nature of residuary and residuary powers can be exercised only when the relief does not fall within any of the specific powers available to the Court. Learned senior advocate proceeded to rely on decision in [State of Uttar Pradesh v. Roshan Sing](#), 2008 2 SCC 488, paras-7 & 8.

4.1.7 It was next submitted that the Commercial Court not only erroneously adverted to exercise powers seeking an aid of Section 9(ii)(e), in giving impugned directions, the Court also failed to construe in proper perspective the term "just and convenient". This submission was sought to be buttressed by referring to decision of the Orissa High Court in [Sanatan Barik v. Purna Chandra Barik](#), 2003 AIR(Ori) 127.

4.1.8 Learned senior advocate for the appellant relied on decision of the Supreme Court in [Arvind Constructions Co. \(P\) Limited v. Kalinga Mining Corporation](#), 2007 6 SCC 798 to submit that the powers under Section 9 are required to be exercised on the lines of well recognised principles applicable to exercise of general power to grant interim injunction under Order XXXIX, CPC and the Specific Relief Act. He also highlighted the proposition from the said decision that when a power is conferred under a specific statute and is conferred on an ordinary court of law, without laying down special conditions for exercise of that power, general rules of procedure would apply.

4.1.9 Learned senior advocate further submitted that as held in [Adhunik Steels Limited v. Orissa Manganese and Minerals Private Limited](#), 2007 7 SCC 125, principles analogous to exercise of powers under Order XXXIX, CPC are required to be borne in mind by the courts while exercising powers under Section 9 of the Arbitration Act, 1996 for passing interim measures. It was sought to be submitted that the said principles have been disregarded and the nature of directions issued in the impugned order do not conform to those principles. Accordingly it was submitted that general rules that govern the court while considering the grant of interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act.

4.2 On the other hand, learned advocate for the respondent raised these submissions-

(a) Impugned order is passed under Section 9(ii) (d) and 9(ii)(e) of the Act which makes available to the Court ample powers to pass interim injunction and to balance the equities between the parties. Section 9(ii)(e) confers wide discretionary powers to pass interim measures. In the facts of the case, discretion has been rightly exercised.

(b) Section 9 is similar to Section 94, CPC which is the provision for supplementary proceedings. Clauses (a) to (e) of Section 94, CPC closely resemble the clauses (a) to (e) in Section 9 and that the Court has rightly exercised the analogous powers.

(c) The order impugned cannot be strictly said to be an order of security but of the nature balancing the equities of the parties, the power having been exercised under Section 9(ii)(e) of the Arbitration Act, 1996. Therefore, the contention that provision of Order XXXVIII Rule 5, CPC have to be applied as guiding principles, has no legal basis;

(d) The purported dispute with regard to the quality of cables relates to only one Purchase Order, that is Purchase Order No.2, still however the appellant encashed



all the seven bank guarantees under seven Purchase Orders, three of which is subject matter of present proceedings. This is evident from email dated 10th April, 2021 wherein cables mentioned were part of only said single Purchase Order No.2.

(e) The claim of the appellant that the wires were faulty and it suffered damages to the tune of Rs.21,31,77,628/- is baseless and afterthought. In any case, such unliquidated damages are the claims which are required to be proved before the arbitral tribunal.

4.3 Learned senior advocate for the respondent also placed reliance on **Adhunik Steels Limited (supra)** to submit that therein it was opined by the Supreme Court 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.". Observations of the Supreme Court in [Tanushree Basu v. Ishani Prasad Basu](#), 2008 4 SCC 791 were pressed into service,

"It is now well-settled principle of law that Order 39 Rule 1 of the Code of Civil Procedure (Code) is not the sole repository of the power of the court to grant injunction. Section 151 of the Code confers power upon the court to grant injunction if the matter is not covered by Rules 1 and 2 of the Order 39 of the Code." (Para 16)

4.3.1 In **Adhunik Steels Limited (supra)** the Supreme Court had relied on the paragraph from International Commercial Arbitration in UNCITRAL Model Law Jurisdictions by Dr.Peter Binder to be thus highlighting the scope of the phrase "just and convenient" which also occur in Section 9(ii)(e).

"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." (Para 11)

4.3.2 Responding to the submission of the appellant that in passing the impugned order the Commercial Court exercised powers distancing itself from principles underlying Order XXXIX, and de hors the common law principles, decision in [Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal](#), 1962 AIR(SC) 527 was pressed into service by learned senior advocate for the respondent to submit that the Court can issue interim injunction under the circumstances which may not be covered by Order XXXIX, if the Court is of the opinion that interest of justice require issuance of directions of the nature.

4.4 It transpires that the contract material namely cables, were supplied by the respondent herein to the appellant under seven different Purchase Orders. Seven different performance guarantees were executed in light of condition No.4 of the contract. Admittedly, seven corresponding bank guarantees were sought to be invoked by the appellant of which three bank guarantees are subject matter herein, pursuant to the dispute relating to the quality of cables under one Purchase Order above and all of them have been encashed. The issue raised on behalf of the respondent herein that invoking all bank guarantees was hardly justified, and the said aspect was sought to be countered by the appellant by submitting that whether invocation was cross contractual, cannot be gone into at this stage and would have to be a subject matter of adjudication by the arbitral tribunal and according to appellant it was one composite contract. The description of cables in respect of which inferior quality is alleged which is likely to become a dispute before the arbitral tribunal, however was shown to be covered under one Purchase Order. Be as it may.

**[5]** The facts of the case and the dispute emerging therefrom have been attentively noticed by us. The elaborate submissions made by learned counsels for the parties especially on the aspect as to under which clause of Section 9(ii) of the Arbitration Act the powers have been exercised have also been considered by us.

5.1 Section 9 of the Arbitration Act, 1996 providing for interim measures which may be applied by a party before the Court, reads as under.

Section 9: Interim measures, etc., by Court

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

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

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

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

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

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

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

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

(2) Where, before the commencement of the arbitral proceedings, a court passes  
.... ....

(3) Once the arbitral tribunal has been constituted, the court shall not entertain ....  
.... ....

5.2 As we gather the contours of the controversy, it could be viewed that the likely range of disputes to be adjudicated by the arbitral tribunal, for which steps are already made afoot by the parties, would include the entitlement of the appellant to invoke the bank guarantees, the payability of the unpaid amount in the context of condition No.4 of the contract in particular and the dispute between the parties arising under the contract in general in the context of the allegation of the appellant that the cables supplied under one Purchase Order or of inferior quality.

Therefore, the amount encashed qua the bank guarantees could be said to be within the corners of arbitration dispute.

5.3 Noticeably when the Commercial Court took up to decide application under Section 9 of the Act, the situation obtained was that three performance bank guarantees in question were already encashed on 23rd July, 2021. Though application under Section 9 appears to have been filed simultaneously before the date of invocation, when it came for hearing before the Commercial Court on 26th July, 2021, there was no question for the Court to consider to pass restraint order against invocation as the bank guarantees were invoked. The Court therefore adverted to the alternative prayer. The Court directed that the amount of bank guarantees encashed by the appellant shall be deposited in the Court, to be invested in a nationalized bank in fixed deposit, to be further subject to the modification orders which may be considered expedient by the arbitral tribunal which would be constituted for resolution of the disputes of above nature under the contract.

5.4 The crux consideration in order to judge the legality and justification of the impugned order has to be as to whether the powers under Section 9 are properly exercised and the directions fall within the ambit and object of the provision. Section 9 of the Arbitration Act aims at providing interim protective measures to a party in relation to the arbitration.

5.5 Though interim measures contemplated in Section 9 are classified in different categories represented by clauses (a) to (e), reading as a whole, and reading with the legislative purpose of the provisions, it is intended to protect the interest of the parties, would be in the arbitration by bringing out a balancing situation. The balancing of rights may be achieved by applying simultaneously one or more sub-clause under Section 9(ii). It is a whole Section which operates for enabling the Court to provide protective measures of the parties to the arbitration.

5.6 The scope of powers which the Court may exercise under Section 9 of the Arbitration Act, 1996 could be discerned from several judicial pronouncements, few of which have been referred to hereinabove. Measures contemplated under Section 9 are for "interim measure of protection". As held by the Supreme Court in **Adhunik Steels Limited (supra)** though the provisions and principles of Order XXXIX Rule 1 and 2, CPC cannot be said to be applicable *stricto sensu*, the analogous principles will have to be put into play while exercising powers for granting interim measures and the principles underlying other provisions of the Code of Civil Procedure, may have also their own play in passing the order under Section 9 by the Court under various clauses to secure the ultimate purpose of

preserving and protecting the rights of the parties, who would seek resolution of their disputes in the arbitral proceedings.

5.6.1 In granting the protective measures under Section 9 of the Act, in addition to the principles which govern the grant of injunction, also germane would be the other relevant provisions in the Civil Procedure Code such as Section 94 or Section 151. The clauses in Section 9(ii) of the Act, as could be noticed, have similarity with clauses (a) to (e) of Section 94, CPC. There operates conceptual similarity and analogousness in Section 94, CPC and in Section 9 of the Arbitration Act, especially clauses (d) and (e).

5.6.2 In **Manohar Lal Chopra (supra)**, Supreme Court stated that the Court can issue interim injunction in relation to circumstances which may not be strictly covered under Order XXXIX observing thus,

".... .... the Courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order 39 CPC. There is no such expression in Section 94 which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code. It is well-settled that the provisions of the Code are not exhaustive for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression 'if it is so prescribed' is only this that when the rules prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. .... ...."

(Para 18)

5.7 Pausing here, with such comprehension of the provision of Section 9, the reasons supplied by the Commercial Court may be referred to. Partially allowing the application, the Commercial Court recorded as under.

".....10% amount of agreed purchase order has yet not been paid to the applicant by Opponent Co. Additionally aforementioned performance bank guarantees provided by the applicant has also been realized. .... ...."

5.7.1 Stating about the aspect of balance of convenience, thus was stated.

".... .... the applicant has till date invested huge a sum and supplied 100% cables as per the specification of purchase orders. That fact has also not been



opposed by the respondent. Though there is grievance of opponent Co of inferior quality of cable which caused losses and damages, but till such dispute adjudicated by the arbitral tribunal, meantime amount of performance Bank guarantees required to be secured. Therefore, the balance of convenience is also lies in favor of the applicant and if the applicant is not protected at this stage then applicant would suffer irreparable loss and injury."

5.7.2 The aspect is noticed by the Commercial Court that 10% amount of the agreed Purchase Orders is not paid to the applicant-respondent herein. It is observed that respondent has supplied complete material of cables under the Purchase Orders as per the specifications which is not opposed by the appellant herein. It is reasoned that inferior quality of the cables is a dispute to be adjudicated by the arbitral tribunal and during such time the amount of performance bank guarantee is required to be secured.

5.7.3 The reasoning supplied by the Commercial Court cannot be excepted for the material aspects it noted. However as it is stated that the "amount of performance bank guarantees required to be secured", learned senior advocate for the appellant harped on those words namely "required to be secured" and submitted that the Tribunal exercised powers under Section 9(ii)(b) and therefore, the Court could not have invoked Section 9(ii)(e). There is no substance in this submission.

5.8 It is true that in a way the entitlement of the amount which would be the subject matter of arbitral dispute is protected, however when the event of invocation of bank guarantees had already occurred and while passing the impugned order, the Court directed the appellant to deposit the encashed amount in the Court and further directed investment of the amount in a fixed deposit in a nationalized bank, to be subjected to further orders which may be passed by the arbitral tribunal which may be constituted, these directions have to be seen basically falling under clause (e) of Section 9(ii).

5.8.1 In the facts and circumstances of the case obtaining and having regard to the nature of directions issued in the impugned order, the Tribunal exercised powers under Section 9(ii)(e) of the Act. It is possible to view that the directions are 'referable' to clause (b) of Section 9(ii) but in the totality of facts, the impugned directions are traceable in the powers under clause (e). They properly fall under clause (e) of Section 9(ii) of the Act.

5.8.2 Having regard to the nature of dispute and the developments taken place between the parties, the Court below considered it to be "just and convenient" to pass the interim measure of the protection of the kind and nature passed. The

amount which will be invested is potent to become an amount in dispute in arbitration. A protective direction for such amount can be said to have been passed by the Commercial Court invoking Section 9(ii)(e) of the Act further.

5.8.3 In *Simplex Infrastructures Ltd. v. National Highways Authority of India*, 2011 SCC Online Del 207 the Delhi High Court succinctly observed that under the erstwhile jural regime, postulated in Section 41 of the Arbitration Act, 1940, the dictates of justice and convenience as conceptualised by the Court was not envisioned. It can be said that in Section 9(ii) (e) of the 1996 Act, the Courts are invested with wide powers to do justice in passing the interim exercise which may, in the discretion in the Court, are just and convenient in the facts of the case to bring about equitable position amongst the parties going to arbitration for their disputes.

5.9 The consideration of equity is a prime consideration, as also in exercise of powers under Order XXXIX Rules 1 and 2, CPC, while considering the prayer for injunction in a civil suit. As the injunction is equitable relief, the measures which are provided or directed by the Court exercising powers under Section 9 of the Arbitration Act would also be intended to secure equity in relation to the rights of the parties are determined in the arbitration.

5.9.1 In Section 9 of the Arbitration Act, 1996, as noticed above, it is clause (e) of Section 9(ii) cover all measures which are just and convenient to be applied. Ensuring equity between the parties to the arbitration would be a measure, indeed falling within this sub-clause. It is discretionary power confers on the Court while deciding the application under Section 9 to order equitable interim measures.

5.9.2 The amount of bank guarantees already encashed is directed to be kept separate by way of deposit before the Court to be invested in the Bank. Undoubtedly, it ensures and secures a balance in the to-be-adjudicated rights of the parties in the impending arbitration proceedings. The order could be said to be a judicial discretion exercised in a manner eminently just, proper and legal.

5.9.3 In the facts and circumstances of the case, the impugned directions are a blend of powers exercised. The order can be said to be a harmony struck between Section 9(ii)(b) and 9(ii)(e) of the Act, although for all purposes, the Commercial Court has invoked Section 9(ii)(e). The order would fundamentally fall within the scope and ambit of clause (e) of Section 9(ii) of the Act. For, essentially, the order is an equitable order ensuring equity between the parties in their lis. It is a prime principle applied under Order XXXIX, CPC while granting injunction that equity is achieved. The analogous powers are exercised by the Court which are entirely

justified under Section 9(ii)(e). When equities are balanced, protection of rights is best secured.

**[6]** When we do not find any material irregularity on part of the Commercial Court in passing the impugned order and the discretion is exercised having due regard to the totality of facts operating, the following observations of the Apex Court in [Wonder Limited v. Antox India P. Limited](#), 1990 Supp1 SCC 727 also guide us.

"The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion." (Para 14)

6.1 The facts of the case operating as above and the kind and the nature of the impugned order passed by the Commercial Court, we do not think that on any count, the order books any error. No interference is warranted.

**[7]** The appeal is meritless and is accordingly dismissed. Consequentially, the Civil Application is disposed of.

As the appeal is dismissed, the direction in the impugned order regarding deposit of the amount shall stand modified and the time to comply with by depositing the amount in the Court is extended by nine weeks.