

**(2014) 11 BOM CK 0069**

**In the Bombay High Court**

**Case No :** Arbitration Petition No. 1127 of 2014

Baker Hughes Singapore Pte

APPELLANT

Vs

Shiv-Vani Oil and Gas Exploration Services Ltd.

RESPONDENT

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**Date of Decision :** 11-11-2014

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 17, 17(1), 17(2), 27, 34  
Transfer of Property Act, 1882 — Section 6(e)

**Citation :** (2015) 1 ABR 133 : (2015) 1 ARBLR 155 : (2015) 1 BomCR 377

**Hon'ble Judges :** R.D. Dhanuka, J

**Bench :** Single Bench

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## **Judgement**

R.D. Dhanuka, J.—This petition is filed under section 37 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the said Act) for impugning the order dated 19th May, 2014 passed by the learned arbitrator rejecting the application under section 17 filed by the petitioner for interim measures of protection.

2. In the arbitration petition for interim measures the petitioner had prayed for an order and direction against the respondent to deposit monies to the extent of the outstanding amounts of the petitioner under the Mud Services Contracts in the sum of USD2495809.75 and cost or in the alternative to provide security in regard to the said claim. The petitioner had also prayed for an injunction restraining the respondent from alienating, disposing of and/or otherwise encumbering any property and/or assets of the respondent until the final disposal of the arbitration proceedings and directing the respondent to disclose its assets and properties by way of affidavit. Some of the relevant facts for the purpose of deciding this petition are as under:

3. The petitioner is a company incorporated under the laws of Singapore. The respondent is having registered office at New Delhi and also has a Mumbai Office. The respondent is engaged in conducting various businesses. The respondent has entered into several contracts with Oil and Natural Gas

corporation Ltd. for charter hire of several land rigs with integrated services. During the period between June, 2009 and April 2010 the petitioner and the respondent entered into five contracts for supplying materials, equipments, products and personnel in relation to mud services for a period of three years.

4. It is the case of the petitioner that the contracts commenced in or around 2009 when the Mud Engineering Personnel were fully mobilized and started operations. All the contracts entered into between the parties are materially identical. Under clause 2.4 of the "Mud Services Contracts" the respondent had agreed to pay to the petitioner on a day rate basis payable from the first date of spudding of well with Mud Engineering Services and on continued operational days during the term of the contract. The petitioner raised various invoices along with supporting documents. Under clause 6.1 of the contract, the respondent agreed to pay to the petitioner undisputed invoices within 60 days from the date of submission of such invoices.

5. It is the case of the petitioner that around June, 2012 onwards the petitioner sent reminders to the respondent and placed on record that the respondent has to pay to the petitioner USD 2495809.75 towards Mud Services Contract alone. It is the case of the petitioner that the invoices sent by the petitioner were never returned, disputed or challenged on any ground. The respondent even failed to pay invoices on opening letter of credit.

6. By email dated 10th May, 2012 the respondent informed the petitioner that the respondent was waiting for their payment worth USD 90 millions to be released by ONGC which was held up with them due to various reasons against their integrated services project, Bokaro and other integrated drilling projects across India. The respondents assured the petitioner that a payment of USD 2 million would be released to the petitioner within the month of 2012 and balance payment would also be cleared in the month of June or July, 2012 hopefully as the respondent was expecting that the issue of their held up payments with ONGC would also be resolved by them.

7. On 7th June, 2012 the petitioner issued a notice for payment of outstanding invoices upon the respondent and sent a final reminder to remit the total outstanding amount of USD 4095054.07 including amount of USD 1275971.20 to the petitioner within a period of seven calendar days and informed that in case of failure to pay, the petitioner would withdraw their equipments/material and personnel and suspend performance services in each case under the contracts and initiate action under the contracts for recovery of the balance amount along with interest. On 15th June, 2012 the petitioner issued a notice for withdrawal of their equipments/material and personnel upon the respondent considering the non payment as fundamental breach of the unconditional obligations of the respondent under the contracts, reserving their rights under the contract for recovery of the balance amount with interest.

8. The respondent by their email dated 17th June, 2012 informed the petitioner

that the respondent was ready to transfer USD200000 immediately and further USD200000 to be transferred by 22nd June, 2012 and agreed to transfer further USD400000 in the next week. The respondent also informed that the respondent would try to fulfill the balance amount before 10th/12th July, 2012. The respondent informed that 200 million dollars could not be arranged in very short time without getting payment from ONGC. Their major liquidity was blocked in ONGC due to some contractual issue. It is stated that the petitioner could verify the same with ONGC. The petitioner was informed that the respondent had given all their payment schedule to the petitioner and requested to resume the operation immediately as ONGC had issued very serious letter to take action against the contractor as well as Mud Services Providing Company Baker Hughes. The respondent requested the petitioner to resume operation and informed that the respondent was committed for the payment to the petitioner as stated by the petitioner.

9. By email dated 17th June, 2012 in response to email of the respondent, the petitioner placed on record the extreme pressure on their cash flows as they were required to make payment to their employees. However, as a special case the petitioner informed the schedule and the amount acceptable to the petitioner from the respondent based on special exemption from the region management. According to the said schedule the entire amount was directed to be paid by the respondent to the petitioner by 13th July, 2012.

10. By their email dated 20th June, 2012 the respondent informed the petitioner about their next payment schedule and agreed to pay the balance amount before 20th August, 2012 and requested the petitioner to resume Rig No. 27 Rajahmundry Operation. On 22nd June, 2012 the petitioner sent a letter to the respondent that the petitioner would not be sending Mud Engineering Crew on Rig 28 until the respondent pays at least USD 2 Million out of the total outstanding payment and remedies at least part of its continuing breach under their contract with the respondent.

11. The petitioner by their notice dated 29th June, 2012 informed that the petitioner had received payment of USD988000 out of the total amount of USD 4095054. The petitioner informed that it would withdraw its services unless the balance amount was remitted immediately. By letter dated 5th July, 2012 and 17th July, 2012 the petitioner withdrew its personnel and suspended performance of services under the different contracts. The petitioner informed that it would resume work if the respondent repays 2 million dollars by 20 July, 2012.

12. The petitioner therefore, withdrew their services under 3 mud services contracts by letters dated 15th June, 2012, 29th June, 2012 and 5th July, 2012. On 6th August, 2012 petitioner issued notice upon the respondent and invoked arbitration agreement recorded in clause 19 and 20 of the contracts and proposed the name of a senior advocate to act as the sole arbitrator and called upon the respondent to accept the name of the said senior advocate as sole

arbitrator. The respondent did not agree to the name of arbitrator suggested by the petitioner.

13. The respondent by their letter dated 5th September, 2012 to the petitioner alleged that the services of the petitioner were unsatisfactory and there were deviations in the deployment of personnel for mud services and goods which was brought to the notice of the petitioner several times and the disputes had arisen. The respondent contended that they had always agreed to pay the balance amount if any after sorting out the disputes which were pending. It was alleged that the petitioner had violated the terms of contract and had suspended the services though there was no provision under the contract to suspend the operations. It is alleged that due to such withdrawal the entire rig operations were stopped and therefore petitioner was liable to pay daily operating charges of rig. It is also contended that the unilateral withdrawal/suspension of wire looming services led into several complications for which the petitioner would be solely responsible. The respondent reserved their right to make appropriate claims/counter claims against the petitioner. The respondent suggested the name of Mr. Manoj Arora advocate as arbitrator.

14. It is the case of the petitioner that on 21st January, 2013, schedule of payments was framed between the parties. In accordance with the schedule of payments respondent agreed to pay USD 500000 every month commencing from February, 2013 and to clear all the outstanding invoices by June, 2013. The said schedule of payment was in relation to all the contracts and not just Mud Services Contracts. According to the petitioner, an amount of USD 2495809.75 was pertaining to Mud Services Contract. The said schedule was duly signed by the authorized representatives of both the parties and is forming part of the record. It is the case of the petitioner that the said email along with schedule thereby reconciling the amounts by and between the parties constitutes an admission of liability.

15. On 24th April, 2013 the petitioner once again issued notice invoking arbitration agreement and suggested the name of Mr. Anant Shende advocate as the sole arbitrator. The petitioner thereafter filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 against the respondent seeking relief in the nature of attachment before judgment in respect of the claim of the petitioner. By an order dated 21st March, 2014 it was ordered that the said petition shall be converted into an application under section 17 of the Act and all the affidavits shall be treated as pleadings of the respondent. This court had directed the learned arbitrator to dispose of the said application within two months from the date of the said order. The respondent was directed to file an affidavit disclosing their encumbered and unencumbered assets. It was made clear that while passing the said order the relative merits of the respective cases was not considered by this court. The respondent was free to object to any part of the prayers for interim reliefs being granted. The petitioner did not press his prayer for receiver in the application under section 17. The parties agreed that the

learned arbitrator may consider the application under section 17 on the basis that he had jurisdiction to consider such an application.

16. Before the learned arbitrator, the respondent filed written statement and also counter claim inter alia praying for sum of USD 16398542161 under various heads. One of the counter claim was in the sum of USD 65756.57. In paragraph 11 of the counter claim it is alleged by the respondent that the claimant had raised the invoices for the period when rigs were under inter-location movements and also there were short deployment, unapproved deployment of the crew for which the respondent had continuously asked for a credit notes to the tune of USD 65756.57. It is alleged that since the said credit notes were not issued, the respondent is entitled to receive the said amount from the claimant. Rest of the claims are towards damages including interest.

17. By an order dated 19th May, 2014 the learned arbitrator rejected the application filed by the petitioner before this court under Section 9 which was treated as an application under section 17 on the ground that at this stage it was not necessary to go into the details of the merits of the claim and counter claim since evidence was yet to be led. It is held that both the parties are disputing the correctness of the documents produced and the accuracy of the amounts mentioned therein. Though the claim is not in the nature of unliquidated damages, the amount of alleged liability of the respondent is yet to be ascertained. The learned arbitrator also noticed that as against the claim of USD 2495809.75, there was a counter claim of USD 16398542.61. The learned arbitrator after referring to the judgment of the Supreme Court in case of Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., and judgment of Supreme Court in case of GAIL (I) Ltd. Vs. Bal Kishan Agarwal Glass Industries Ltd., and judgment of Delhi High Court in case of Intertoll Ics Cecons. O and M Co. Pvt. Ltd. Vs. National Highways Authority of India, held that a bare perusal of language used in Section 9 elaborating different interim measures under clause (i) and (ii) shows the width and amplitude of the court's powers as compared to the limited power of the arbitral tribunal under section 17 ordering a party to take any interim measure or protection in respect of the subject matter of the dispute. It is held that it was not possible to hold that the claimant had made out a case at this stage for passing an interim order as prayed in terms of prayer clause (a) or (b) and rejected the said application. The learned arbitrator however, made it clear that he had not expressed any views on the merits of the claim, since the evidence was yet to be laid and what was stated in that order was merely for the purpose of deciding of the said application under section 17 of the Act.

18. Mr. Jagtiani learned counsel for the petitioner submits that the respondent had admitted the liability at least in so far as Mud services contract is concerned. The respondent had promised to pay the amount demanded by the petitioner from time to time and had furnished schedule of payment. The payment of the respondent with ONGC was held up according to the respondent which caused

delay in releasing the payment of the petitioner. The respondent as a matter of record had also made part payment pursuant to such schedule of payment conveyed to the petitioner. Since the respondent did not pay the admitted dues of the petitioner, which the respondent were liable to pay within sixty days from the date of invoice under clause 6.1 of the contract, the petitioner were compelled to withdraw the services to the respondent.

19. It is submitted by the learned counsel that as against the claim of the petitioner based on various invoices, to the tune of USD 2495809.75, the respondent had demanded issuance of credit note only to the tune of USD 65756.57. It is submitted that even if for the time being that part of the counter claim is considered and adjusted against the claim of the petitioner based on invoices for services rendered, still the admitted liability of the respondent to the petitioner would have been for the substantial amount. As far as counter claim made by the respondent is concerned, he submitted that the counter claim for damages which was in the nature of unascertained sum. The petitioner had strongly objected to such claim for damages which was never made in the past when the petitioner had demanded the payment under various invoices. It is submitted by the learned counsel that the learned arbitrator in the impugned order ought to have taken a prima facie view after considering the material on record including correspondence exchanged between the parties which clearly indicates an admission of liability with a promise to pay to the petitioner. The learned arbitrator however, has refused to go into that issue on the ground that the evidence in the matter was yet to be led.

20. It is submitted by the learned counsel that the parties had not argued the petition filed by the petitioner under Section 9 before this court on merits. The said petition was converted into an application under section 17 by this court by order dated 21st March, 2014 recording an agreement that the learned arbitrator may consider the application under section 17 on the basis that he had jurisdiction to consider such an application. The respondent was however, granted liberty to object any part of the prayers for interim relief being granted and keeping all contentions of parties on merits expressly open.

21. It is submitted by the learned counsel that several winding up settlement orders have been passed against the respondent recording the agreement of respondent to pay to various creditors as per payment schedule agreed upon making it clear that in case of failure, the winding up proceedings pending before the Delhi High Court would be admitted. The UK High Court, Commercial Court, Queens Bench Division also has passed a summary judgment against the respondent on 29th Jan 2014 for USD 84100000.33. It is submitted that in the month of April, 2014, Supreme Court of Mauritius has frozen the assets of the respondent for securing FCCB bonds worth USD 84 billions. Learned counsel submits that even according to the affidavit of encumbered assets filed by the respondent themselves, it is clear that all its assets are encumbered with the banks. Learned counsel submits that the respondent has informed the UK Stock

Exchange that their CDR proposal/scheme had been approved and outlined the reasons for financial crunch of the respondent.

22. Learned counsel submits that considering such financial condition of the respondent the learned arbitrator ought to have exercised powers under section 17 and ought to have directed the respondent to provide a security and/or to deposit the amount claimed by the petitioner. It is submitted by the learned counsel that under section 17(2) of the Act, it is contemplated that the arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub section (1) of sub section (17). Such order for providing appropriate security can be ordered by the tribunal under section 17(1) of the Act itself. It is submitted that securing a money claim is one of the form of interim protection. If security can be ordered under section 17(2) in connection with a measure ordered under section 17(1), such relief for providing security can be granted as part of section 17(1) by way of providing security. It is submitted that money claim itself is the subject matter of dispute and thus security in connection with money claim can be ordered under section 17(1) itself. Learned counsel submits that the learned arbitrator however, has failed to exercise his powers though the petitioner had made out a prima facie case for securing their claim which was subject matter of the dispute.

23. Learned counsel placed reliance on the judgment of Kerala High Court in case of K.G. Rathish Kumar and Others Vs. NPR Finance Ltd., and in particular paragraph 3 thereof and would submit that under section 17 of the Arbitration and Conciliation Act, 1996 any interim measure or protection can be ordered by the learned arbitrator which may include an order for providing appropriate security in connection with the measure ordered under section 17(1) of the Arbitration and Conciliation Act, 1996. Paragraph 3 of the said judgment reads thus:

"3. We are satisfied that the impugned order is a non-speaking one and hence it is unsustainable. Further, learned counsel for respondent submitted that even if the said order is set aside, the order of attachment may be allowed to continue for a particular or until respondent gets an order from the arbitrator. Admittedly, arbitration proceedings are initiated. Therefore, going by section 17 of the Arbitration and Conciliation Act, 1996 any interim measure of protection afforded to a party by a Arbitral Tribunal. The Tribunal may also require the party to provide appropriate security in connection with the measure ordered under section 17(1) of the Arbitration and Conciliation Act, 1996. Therefore, having initiated arbitral proceedings it is possible to obtain an order from the Arbitral Tribunal itself."

24. Learned counsel placed reliance on the judgment of Andhra Pradesh High Court in case of SPA Agencies [India] Private Limited Vs. Harish Rawtani, and more particularly paragraph 8 in support of the submission that arbitrator may order for an injunction to furnish security, to appoint commissioner to take evidence. Paragraph 8 of the said judgment reads thus:

"8. section 17(1) of A & C Act is couched in broad language and confers power on arbitral tribunal to pass interlocutory orders as may be considered necessary. In our considered opinion, having regard to the phraseology in section 17(1), an arbitrator can pass all orders as may be necessary. These orders may include an order - for injunction, to furnish security, to appoint commissioner to take evidence (in addition to Section 27), to appoint experts etc. But any such interim order shall be directed only to parties to arbitral proceedings and not to third party, and any interim order by the arbitrator cannot go beyond the reference of arbitration agreement. Be it also noted that a petition under Section 9 is not a suit before a Civil Court, but a remedy provided to a party to an arbitration agreement to seek interim order in relation to subject-matter of the arbitration pending adjudication."

25. Learned counsel placed reliance on the judgment of the Supreme Court in case of GAIL (I) Ltd. Vs. Bal Kishan Agarwal Glass Industries Ltd., in support of its submission that under section 17 of the Arbitration and Conciliation Act, interim orders can be passed by the learned arbitrator.

26. Learned counsel placed reliance on the judgment of Division Bench of this court in case of Nimbus Communications Limited Vs. Board of Control for Cricket in India and another, and in particular paragraph 24 and would submit that the principles laid down by the Division Bench of this court that when the court decides a petition under Section 9 must have regard to the underline purpose of the conferment of the power upon the court which is to promote the efficacy of arbitration as a form of dispute resolution shall be applied to the powers of arbitrator under section 17. Learned counsel submits that powers of arbitrator under section 17 and powers of court under Section 9 for granting interim measures by way of attachment before judgment are identical. A party cannot be compelled to approach the court under Section 9 for seeking an order by way of attachment before judgment.

Paragraph 24 of the judgment of Division Bench of this court in case of Nimbus Communications (supra) reads thus:

"24. A close reading of the judgment of the Supreme Court in Adhunik Steels would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under Section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic

principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b)."

27. Learned counsel placed reliance on the judgment of this court in case of *Ircon International Limited Vs. Hathway Cable and Detacom Pvt. Ltd.*, and another, 2010 VOL. 112 (2) BLR 491 and in particular paragraph 31 and would submit that jurisdiction of the court should be exercised so as to achieve the ends of justice and not unnecessarily restrict its discretion. Particularly the later approach would lead to frustrate the very object of the Act. Paragraph 31 of the said judgment of the Division Bench reads thus:

"31. Rival submissions have been made before us with regard to operation and effect of proviso to Sub-clause (iv) of Clause (a) of Section 34. According to the appellants the proviso applies to the entire section while according to the respondent, its operation is limited to sub-clause (iv) alone. There seems to be some merit in the contention of the respondent inasmuch as the language of the proviso is directly referable to the section itself and, thus, must take its colour from the principal section viz. 34(2)(iv). A reading of the proviso shows that where severability is possible, the court in the class of the cases falling under sub clause (iv) is expected to set aside the award partially. In other words, a greater obligation is placed upon the court to adopt such an approach when the case in hand is covered under the provisions of sub clause (iv). This contention will not have any adverse effect on the interpretation and scope of Section 34 as a whole. It is a settled rule of interpretation that the statutory provision should be read as a whole to find out the real legislative intent and that provision should be read by keeping in mind the scheme of the Act as well as the object which is sought to be achieved by the Legislation while enacting such a law. There is nothing in the proviso or in the language of Section 34 which has an impact or effect to restrict the power of the court as contemplated under Section 34 read with the opening words of subsections (2) and (4) of Section 34 the Act. *Est boni iudicis ampliare jurisdictionem* is a settled canon of law courts should expand and amplify jurisdiction to achieve the ends of justice and not unnecessarily restrict its discretion particularly when the later approach would lead to frustrate the very object of the Act."

28. In so far as judgment of Delhi high Court in case of *Intertole ICS (Cecons) O & M Company Pvt. Ltd.* (supra) relied upon by the learned arbitrator, in the impugned order is concerned, it is submitted that the said judgment does not lay down a law that power of a court under Section 9 to pass an interim order to

secure the subject matter of the dispute, cannot be exercised by an arbitrator under section 17 of the Act.

Reliance is placed on paragraphs 13, 14, 18 to 22, 24 to 26 which read thus:

"13. The interim measure of protection under section 17 of the Act has to be understood with reference to the "subject-matter of the dispute". A plain reading of the provision shows that an arbitral Tribunal can in exercise of its powers thereunder direct a party "to take any interim measure of protection" "in respect of the subject-matter of the dispute". The words "take" and "protection" give an indication as to the legislative intent behind the words "subject-matter of the dispute." The protection envisaged is in relation to some tangible property and not an indeterminate monetary claim.

14.. The scope of the powers of an arbitral Tribunal under section 17 of the Act has been explained by the Supreme Court in M.D., Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd., :

58. A bare perusal of the aforementioned provisions would clearly show that even under section 17 of the 1996 Act the power of the arbitrator is a limited one. He cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its own force. Even under section 17 of the 1996 Act, an interim order must relate to the protection of the subject matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even under section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof.

17. This Court is of the view that to the extent that there is a clear enunciation in Section 9 of the types of interim relief that can be granted it does appear that powers of the Court thereunder are by their very nature wider than the powers of a Tribunal under section 17 of the Act. Therefore, it is not possible to accept the contention of NHAI, which found favour with the Tribunal in the instant case, that the powers of the Tribunal under section 17 are as wide as that of the Court under Section 9 of the Act and that the principle underlying Section 9 of the Act would ipso facto be applicable to section 17 of the Act.

"Subject-matter of dispute"

18. However, for examining the question as to what could constitute the "subject-matter of the dispute" in the context of section 17 of the Act, it would be useful to draw a comparison with Section 9 of the Act. A reading of the various sub-clauses of Section 9 makes it apparent that a distinction has been drawn between the words "subject-matter of the dispute" [used in Section 9(ii)(a) and (c)] and "amount in dispute" [used in Section 9(ii)(b)]. It is arguable that where the legislature in the same provision uses the words "subject-matter of the dispute" in two sub-clauses and uses the words "amount in dispute" in another

sub-clause it intends to draw a distinction between the two. When Section 9(ii) (a) use the words "subject matter of the dispute", they refer to "goods" in respect of which there could be an order of "preservation" or "interim custody". The same words in Section 9(ii)(c) refer to "any property or thing" in respect of which there could be an order of "detention, preservation or inspection of." Where the claim is of a monetary nature Section 9(ii)(b) talks of "securing the amount in dispute in the arbitration." By the same analogy the words "subject-matter of the dispute" in section 17 should be understood as referring to a tangible "subject matter of dispute" different from an "amount in dispute".

Security in relation to a definitive and not an indeterminate monetary claim

19. Notwithstanding the above legal position, considering that the reliefs sought by the Appellant in its claim and by NHA in its counter claims are monetary in nature, even if the language of the words "subject matter of the dispute" in section 17 are taken to include monetary claims, the provision of "security" in relation to such subject matter can perhaps be in the form of providing a bank guarantee. However, a direction of that nature at an interlocutory stage would indeed be an extraordinary one and has to necessarily be preceded by a determination of the possible extent of the claim that is likely to be awarded. In other words, the power of the Tribunal under section 17 of the Act, even if assumed to be as wide as that of the Court under Section 9 of the Act, cannot extend to directing the provision of security in the form of a bank guarantee in relation to a speculative claim for damages.

20. In *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.* it was held that the expression "amount in dispute" in Section 9(ii)(b) had different connotation and that it should not be used to enable a person "to recover the sums on account of damages in advance" even if the liabilities are in dispute. It was further observed that "it is probable that the Court alone and not the Arbitrator, has power to make such an order" for providing a bank guarantee. Consequently, even if in the impugned orders the Tribunal has observed that language of section 17 is wide, it would extend to requiring a party to furnish security for a claim that is yet to be adjudicated. The expression "any interim measure of protection" cannot obviously be stretched to include providing security for the entire possible sum of damages that could be awarded even at a stage when there is no reason or determination of what that amount might be.

21. The legal basis for the above conclusion can be traced to the decisions concerning the grant of interim mandatory injunctions that can be ordered by a civil court. In *Javed Sheikh Vs. Taher Mallick*, it was explained that a claim for money does not per se become "a suit for enforcement of a debt. The Defendant could not be regarded as a debtor either before or after the institution of the suit till a decree is passed against him making him liable for a definite sum".

23. The above legal position was reiterated by the Punjab & Haryana High Court in *S. Milkha Singh and Others Vs. N.K. Gopala Krishna Mudaliar and Others*, . In

Union of India (UOI) Vs. Raman Iron Foundry, , the Supreme Court cited all the above decisions with approval and held:

11...a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred....

24. The decision in Raman Iron Foundry was overruled in H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, on another point "that the clause in the contract applied to a claim itself and not only to an amount due". However, on the nature of the claim for damages the decision in Raman Iron Foundry has not been overruled and is good law.

25. Reverting to the case on hand, at the stage at which the impugned orders were passed by the Tribunal, it did not have any reasonable basis to conclude that NHAI would somehow succeed entirely in its counter claims as much as the Appellant would in its claim. If as the Tribunal has done in the instant case, security is ordered to be provided by a Claimant even at the interlocutory stage for the amount constituting the difference between the claim and the counter claims, without even a prima facie determination as to the likelihood of success of the counter claims, then it might result in severe prejudice being caused to a Claimant who has a reasonable chance of success in his claim. For instance, a Claimant with a reasonably good prima facie case for a claim of Rs. 10 crores, may have been reduced to penury on account of the failure to recover that sum. His claim can be defeated by a Defendant with a counter claims for say Rs. 100 crores who is able to obtain an interim order requiring the Claimant to furnish security for the differential amount of Rs. 90 crores. That would cause severe prejudice and have a chilling effect on the ability of the Claimant to pursue his claim."

29. Learned counsel also placed reliance on the judgment of Delhi High Court in case of Emmar MGF Ltd. Vs. Kakade Realities Pvt. Ltd. In Arbitration Application No. 18 of 2013, decided on 21st October, 2013. It is submitted that the Delhi High court in this judgment has adverted to the judgment in case of Intertole (supra), however, does not say that the judgment of Delhi High Court in case of Intertole ICS (supra) lays down a proposition that a claim for money cannot be secured by furnishing security under section 17. It is submitted that the Delhi High Court has upheld the order of the learned arbitrator in that case directing the respondent to provide security. Paragraphs 5.6, 9 and 11 of the said judgment read thus:

"5. Mr. Kaul submitted that the impugned condition requiring the appellant to deposit a sum of Rs. 50 Crores was erroneous and perverse for the following reasons:-

5.1 The appellant was not required to pay any further amount in respect of the first parcel of land in terms of its obligations under the JDA. The total amount that the appellant was required to pay was a sum of Rs. 104 Crores, which was a figure calculated at the rate of Rs. 20 Lakhs per acre for land admeasuring 520 acres. It was the obligation of the respondents to acquire the land and the same had to be transferred to the appellant or its nominee at its option. The appellant was, only responsible for development of the project, at its own cost. The revenue from which, was to be shared between the appellant and the respondents in defined percentages under the JDA. The appellant was to get 68%, while the respondents were entitled to 32%.

5.2 The observation of the learned arbitrator that the respondents had invested a sum of Rs. 70 Crores, was not correct. As pointed out to the learned arbitrator, the consideration paid by the respondents if, the documents deposited with the escrow agent are taken into account, would be only a sum of Rs. 48.57 Crores. This figure, at the highest, would increase to approximately Rs. 52.37 Crores.

5.3 The learned arbitrator having found a prima facie case in favour of the appellant could not have imposed the condition, which is sought to be imposed, by virtue of the impugned order, as in terms of clause 16 of the JDA, the appellant is not required to pay any further amount qua the first parcel of land.

5.4 If at all, the respondents were to succeed, it would be by way of a claim for damages, which would require adjudication by the learned arbitrator. No direction could have been issued qua the respondents for deposit of amounts in anticipation of a counter claim that the respondents may file.

5.5 The impugned direction, which adverts, to the fact that interest accrued on Rs. 50 Crores, shall enure to the benefit of the successful party, is a direction in the nature of award of cost, and that, such a direction could not have been issued at the interim stage.

5.6 In support of his submissions, Mr. Kaul relied upon a judgment of a single Judge of this Court in the case of Intertoll Ics Cecons. O and M Co. Pvt. Ltd. Vs. National Highways Authority of India, .

6. Mr. Goswami, on the other hand, submitted that the impugned order need not be interfered with, on account of the following reasons:-6.1 No demonstrable perversity has been shown by the appellant, which is, perhaps the only ground available to this court to interfere with the impugned order.

6.2 The submissions of the appellant recorded in the impugned order, would show that, they intended, even at that stage, to sue for specific performance, and had, therefore, referred to the clauses in the JDA which according to the appellant gave them, purportedly, that right. It is in this context, Mr. Goswami

contended that the appellant had also relied upon the irrevocable power of attorney executed, apparently, in its favour, for the stated purpose. 6.3 Mr. Goswami said that, the value of Rs. 104 Crores put by the appellant on the land admeasuring Rs. 520 Crores, is not correct. The said amount was in the nature of an adjustable advance. The appellant, undoubtedly, according to Mr. Goswami, seeks to acquire the entire 520 acres. 6.4 Though, it was the stand of the respondents that, the appellant, was in possession of only 2 acres of land, the learned Arbitrator having regard to the facts and circumstances placed before him, has come to a prima facie view, that the, appellant needs to be protected qua 175.19 acres of land subject to the condition incorporated therein. The condition balances, though not fully, but to some extent, the rights of the respondents, and hence, ought not to be disturbed. 6.5 Admittedly, the respondents have invested a sum of Rs. 69,17,66,057/- in acquisition of the land in respect of that, which is, part of the first parcel. This investment was made, at least, as far back as, in 2007. The appellant has been, in breach of its obligations, and therefore the respondents were entitled to a return on its investment, apart from any other relief that may be available to it, in the ongoing arbitration proceedings. If seen, in this context, the impugned condition balances the rights of the parties, and thus, seeks to secure the interest of the respondents.

6.6 In support of his contention, Mr. Goswami has relied upon the following judgments:- Wander Ltd. and Another Vs. Antox India P. Ltd., ; Sabh Infrastructures Ltd. Vs. Jay Shree Bagley and Anr., passed in FAO (OS) 583/2009 and CM No. 16992/2009 on 23.12.2009; and Seema Arshad Zaheer and Others Vs. Municipal Corpn. of Greater Mumbai and Others, .

9. I find that there is nothing in the interim order which calls for interference. None of the factor for grant of interim order are ignored. The discretion, in the grant of interlocutory orders, is that of the authority, which passed the order in the first instance, in this case, the learned arbitrator-Which I do not propose to interdict even if I were to hold a view different from that of the learned arbitrator except in situations articulated hereinabove.

11. The other argument of the appellant that the respondents, if at all could only sue for damages which cannot be secured at the interim stage prior to adjudication, is fallacious, for two reasons. Firstly, the nature of the counter claims that the respondents propose to lodge is not known, at least, at this stage. Secondly, this submission fails to recognize the fact that the appellant by virtue of the injunction is blocking the use by the respondents of 175.19 acres of land which, is a relief that may or may not finally be granted in its favour. The injunction could, therefore, only flow, according to the learned arbitrator's sense of the matter, in favour of the appellant upon the condition incorporated in the impugned order. Unlike the facts obtaining in the Intertoll ICS Cecons. O & M Co. Pvt. Ltd.; the case cited by the appellant, the expected counter claim of the respondents, is not, speculative."

30. Mr. Jagtiani learned counsel also placed reliance on the commentary of the author Gary B. Born and more particularly one of the chapter i.e. provisional relief in international arbitration.

31. Learned counsel appearing for the respondent on the other hand submits that the alleged liability of the respondent as claimed by the claimant is seriously disputed by the respondent. The petitioner has made various claims before the learned arbitrator based on various invoices which do not pertain to Mud Services Contract. Some of the invoices are post termination of the services by the petitioner. The services rendered by the petitioner, were not of quality agreed upon by and between the parties. The personnel supplied by the petitioner were not qualified. The chemicals agreed to be supplied by the petitioner to dilute the mud was not supplied and as a result of respondent had to procure the chemicals from the outside. As a result of illegal withdrawal of the personnel by the petitioner, respondent suffered tremendous financial loss. The other contracts were also stalled because of the illegal termination and withdrawal by the petitioner. It is submitted that the liabilities of the respondent as well as of the petitioner are yet to be ascertained. The claims of the petitioner are not crystallized. The petitioner has also issued invoices for Ankaleshwar site which is not the subject matter of the contract. It is submitted that the unsecured claim of the petitioner cannot be secured in such application made under section 17. The respondent has been carrying on business. Though respondent is under CDR scheme, condition of the respondent is not such that respondent would not be able to clear any liabilities if the petitioner succeeds in their claim ultimately.

32. Learned counsel submits that the oral evidence of the petitioner is already concluded. The oral evidence of the respondent's witness is fixed between 4th and 6th November, 2014. The respondent has good chances of succeeding in the arbitration.

33. Two issues arise for consideration of this court in this appeal filed under section 37 of the Arbitration and Conciliation Act 1996:-

(a) whether arbitral tribunal has power to pass an interim measure directing the respondent to deposit the amount or to provide security in regard to the money claim of the petitioner. (b) to grant injunction against the respondent from alienating, disposing of and/or otherwise encumbering any property or assets of the respondent.

34. The petitioner had filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (742 of 2013) in this court against the respondent. The respondent had filed an affidavit in reply in the said proceedings. The said matter was not argued on merits before this court. By an order dated 21st March, 2014 this court ordered that the said petition shall be converted into an application under section 17 of the Act and all the affidavits shall be treated as pleadings of the respondent. This court also directed the respondent to file an affidavit disclosing their unencumbered and encumbered assets. It was made clear that

while passing the said order the relative merits of the respective cases was not considered by this court. This court recorded the statement of parties that the learned arbitrator may consider the application under section 17 on the basis that he had jurisdiction to consider such application. This court also recorded the statement of the petitioner that the petitioner did not press prayer for appointment of court receiver in the application under section 17.

35. It is not in dispute that the petitioner made a money claim before the learned arbitrator against the respondent based on various invoices issued by the petitioner. The respondent made a counter claim against the petitioner for the sum of USD 16398542.61 with interest at the rate of 24% per annum.

36. A perusal of the impugned order passed by the learned arbitrator makes it clear that the learned arbitrator has rejected the application filed by the petitioner for interim measures by holding that it was not necessary to go into the details of the merits of the claim and counter claim since evidence was yet to be led. It is held that both the parties were disputing the correctness of the documents produced and the accuracy of the amounts mentioned therein. Though the learned arbitrator adverted to the judgment of Supreme Court in case of Union of India (UOI) Vs. Raman Iron Foundry, , considered the factum of the quantum of claim made by the petitioner at USD 2495809.75 and as against that counter claim of the respondent of USD 16398542.61. It is held by the learned arbitrator that though the claim is not in the nature of un-liquidated damages, the amount of alleged liability of the respondent is yet to be ascertained, the learned arbitrator rejected the reliefs claimed by the petitioner on the ground that the arbitral tribunal has limited powers under section 17 as compared to the powers of court under Section 9(i) and (ii) and accordingly held that it was not possible to hold that the petitioner had made out a case for passing an interim order either under prayer clause (a) or (b).

37. Supreme Court in case of Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., , has held that the intention behind Section 9 of the Act is the issuance of an order or preservation of the subject matter of an arbitration agreement. It is held 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 governed the courts in this connection.

38. Division bench of this court in case of Nimbus Communications Ltd. and anr. (supra) after adverting to the judgment of Supreme Court in case of Adhunik Steels Limited (supra) has held that under Section 9 of the Arbitration and Conciliation Act, 1996, the courts shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. The division bench held that when a court decides a petition under Section 9, it must have due regard to the underline purpose of the conferment of the power upon the court which is to promote the efficacy of arbitration as a form of dispute resolution. It is held that just as on the one hand the exercise of the power under

Section 9 cannot be carried out in an unchartered territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure, 1908, the rigors of every procedural provision in the Code of Civil Procedure, 1908 cannot be put into place to defeat the grant of relief which would sub-serve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. It is held that the principles laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory remedies must furnish a guide to the court when it determines an application under Section 9 of the Arbitration and Conciliation Act 1996. The underline basis of order 38, rule 5 therefore has to be borne in mind while deciding an application under Section 9 (ii) (b).

39. Question however arises is whether the power of the court under Section 9 (II) (b) to grant interim measures or protection by ordering a party to secure the amount in dispute in the arbitration, can be exercised by arbitral tribunal under section 17 of the Act.

40. A perusal of section 17 of the Act makes it clear that the arbitral tribunal can order a party to take any interim measure or protection as such tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require a party to provide appropriate security in connection with a measure order under sub-section (I) of section 17. Question then arises is whether a money claim made by a party before the arbitral tribunal can be considered as the "subject matter of dispute".

41. Though this court while disposing of the petition under Section 9 of the Act filed by the petitioner had recorded an agreement of the parties that the learned arbitrator may consider the application under section 17 on the basis that he had jurisdiction to consider such application, the learned arbitrator rejected the application on the ground that his powers to grant the reliefs in terms of prayers (a) and (b) under section 17 of the Act were limited and could not have been exercised.

42. A perusal of the said order dated 21st March, 2014 passed by this court, does not indicate that it was the case of the respondent or that it was urged by the respondent that upon conversion of petition under Section 9 into an application under section 17, the arbitral tribunal could not have the power to grant such reliefs as prayed. The petitioner had already made a statement that the petitioner would not press their prayer for appointment of court receiver in the application under section 17 consciously knowing well that the arbitral tribunal could not have passed an order for appointment of a court receiver under section 17. The matter was not argued by the parties on merits.

43. On plain reading of section 17 of the Arbitration and Conciliation Act, 1996, in my view the money claim made by the petitioner in the arbitration proceedings would amount to the "subject matter of the dispute". The respondent had in the written statement opposed the said claim. The money

claim was thus the subject matter of the dispute based on the invoices issued by the petitioner upon the respondent.

44. Under section 6.1 of the contract, the respondent had agreed to pay the undisputed invoices to the petitioner within 60 days from the date of submission of such invoices. The case of the petitioner before the arbitral tribunal was that none of those invoices were disputed by the respondent in the correspondence exchanged between the parties till the petitioner invoked the arbitration agreement. The respondent had acknowledged the liability from time to time and had promised the petitioner to pay the amount due and payable under the Mud Services Contract to the petitioner from time to time. The respondent had pleaded difficulties in making payment on the ground that the payments of the respondent due from ONGC was held up. The respondent had submitted schedule of payment from time to time to the petitioner with an assurance to pay. The respondent had also made part payment pursuant to such correspondence exchanged between the parties. Only when the petitioner invoked arbitration agreement, the respondent for the first time raised a dispute and denied the said claim contrary to what was conveyed in the correspondence prior thereto.

45. In the impugned order, the learned arbitrator observed that the claim was not in the nature of un-liquidated damages. Though the arbitral tribunal made these observations and adverted to the judgment of the Supreme Court in case of Union of India vs. Raman Iron Foundry (supra) was oblivious of the fact that the counter claim of the respondent was more than the claim of the petitioner.

46. In my prima facie view on perusal of various letters addressed by the respondent prior to the petitioner invoking arbitration agreement, it is clear that the respondent was pleading financial difficulty on the ground that their payment due from ONGC was held up and did not dispute the liability and on the contrary submitted various schedule of payments from time to time with an assurance to pay.

47. A perusal of the counter claim made by the respondent prima facie indicates that the entire counter claim made by the respondent except an amount of USD 65756.57 which is made under the heading "amount of credit notes required" rest of the claims made by the respondent are towards damages. A perusal of paragraph 11 of the counter claim prima facie indicates that the said claim is made on the allegations that there were short deployment/unapproved deployment of the crew for which the respondent had continuously asked for a credit notes to the tune of 65756.57 and since the said credit notes were not issued, the respondent was entitled to receive the said amount from the claimant.

48. Mr. Jagtiani, learned counsel appearing for the petitioner in my prima facie view is right in his submission that even if the said part of the counter claim in the sum of USD65756.57 is at most considered as a genuine claim which is disputed by the petitioner and is adjusted against the claims of the petitioner being undisputed invoices, petitioner would be still entitled to recover a sum of

USD 2430053.18 from the respondent.

49. In my view once this court had converted the petition filed under Section 9 of the Arbitration and Conciliation Act in application under section 17 and had recorded the agreement that the learned arbitral tribunal had jurisdiction to decide the application under section 17, the arbitral tribunal could not have rejected the application on the ground that he had no jurisdiction to grant such reliefs as claimed.

50. Interim reliefs are in aid of final reliefs. The arbitral tribunal while deciding such application for interim measures ought to have considered the material on record including affidavits for taking a prima facie view. In my view application under section 17 could not have been rejected on the ground that the rival claims could not be considered at all since evidence was yet to be led. For the purpose of considering interim measures, the arbitral tribunal has to consider whether the claimant has made out a prima facie case that he would succeed finally in the arbitration proceedings and whether had made out a case for grant of interim measures. In my view, the arbitral tribunal has failed to exercise that power and duty to even look into the matter for the purpose of taking a prima facie view which is mandatory while considering an application for interim measures.

51. Since the arbitral tribunal is also empowered to make an interim award and to grant money claim on the basis of admitted claim and/or acknowledged liability, in my view the arbitral tribunal has also power to grant interim measures so as to secure the claim which is subject matter of the dispute before the arbitral tribunal if such case is made out by the applicant. The provisions under sections 9 and 17 of the Arbitration and Conciliation Act are meant for the purpose of protecting the subject matter of the dispute till the arbitration proceedings culminates into an award.

52. Division Bench of this court in case of Nimbus Communication Ltd. And another (supra) has adverted to the judgment of division bench of this court in case of National Shipping Company of Saudi Arabia Vs. Sentrans Industries Limited, . The division bench of this court in case of National Shipping company (supra) has held that though the power under Section 9(ii)(b) is wide, it has to be governed by the paramount consideration that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award. Court has to also consider whether a denial of such order would result in a grave injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought is also regarded as a material consideration.

53. In my view the arbitral tribunal could not have compared the claim made by the petitioner under undisputed invoices with the counter claim for damages. A perusal of the correspondence on record prima facie indicates that till the petitioner had invoked the arbitration agreement, the respondent had not raised

any such dispute about the merits of the invoices issued by the petitioner. The arbitral tribunal could not have ignored such material on record for the purpose of taking a prima facie view and considering an application for interim measures.

54. The Kerala High Court in case of Emaar MGF Land Limited (supra) has dismissed an appeal filed under section 37 against an order of the arbitral tribunal granting interim measures directing the respondent to deposit the amount in an escrow account or in a fixed deposit. The Andhra Pradesh High Court in case of SPA Agencies (India) Private Ltd. has held that the arbitral tribunal under section 17 (i) may pass an order to furnish security.

55. Delhi High court in case of Intertoll ICS Cecons O & M Co. Pvt. Ltd. (supra) has considered a situation where claim of both the parties were in the nature of damages before the arbitral tribunal. The counter claim of the respondent was for the amount higher than the claim made by the claimant. The respondent based on such higher claim applied for furnishing a security under section 17 of the Act before the arbitral tribunal. The arbitral tribunal had ordered the claimant to furnish security by calculating the amount by subtracting the amount of claim from the amount of the counter claim and directed the claimant to furnish security for the differential amount to the satisfaction of the registry of that court.

56. The Delhi High Court in the said judgment observed that the powers of the tribunal under section 17 are not as wide as that of the court under Section 9. It is held that the words "subject matter of the dispute" in section 17 should be understood as referring to a tangible "subject matter of the dispute" different from an "amount in dispute". It is held that at the stage at which the impugned orders were passed by the arbitral tribunal, it did not have any reasonable basis to conclude that the applicant who had filed application under section 17 (original respondent) would somehow succeed entirely in its counter claims as much as the claimant would in its claim. It is held that if the tribunal has done in that case and ordered the security by claimant even at the interlocutory stage for the amount constituting the difference between the claims and the counter claims, without even a prima facie determination as to the likelihood of success of the counter claims, then it might result in severe prejudice being caused to the claimant who has a reasonable chance of success in his claims.

57. It is held by the Delhi High Court in the said judgment that the grant of interim relief under section 17 was required to be preceded by a determination that the party seeking interim relief has a prima facie case. It is held that considering the reliefs sought by the parties in that matter were monetary in nature, even if the language of the words "subject matter of the dispute" in section 17 are taken to include monetary claims, the provision of security in relation to such subject matters can perhaps be in the form of providing a bank guarantee. It is however held that the power of the tribunal under section 17, even if assumed to be as wide as that of the court under Section 9, it cannot extend to directing the provision of security in the form of a bank guarantee in relation to a speculative claim for damages. A perusal of the judgment of Delhi

High Court in case of Intertoll ICS Cecons O & M Co. Pvt. Ltd. (supra) also indicates that the power of the arbitral tribunal to pass an order for providing security in the form of a bank guarantee is accepted however to be exercised not in relation to a speculative claim for damages.

58. In my view even if the counter claim made by the respondent was for amount higher than the claim made by the petitioner, fact remains that the said counter claim was a speculative claim for damages whereas the claims made by the petitioner was in my prima facie view under undisputed invoices, which claim was admitted and liability was acknowledged in the correspondence by the respondent.

59. In my view a party who had made application under Section 9 of the Arbitration and Conciliation Act, 1996 for interim measures in case of a monetary claim whose application was converted into an application under section 17 can not be put to any disadvantageous position. In my view, even in case of money claim which is subject matter of dispute before the arbitral tribunal, the arbitral tribunal has power to order the opponent party to furnish a security so as to secure the claim of other party if a prima facie case is made out by the applicant.

60. A perusal of the impugned order indicates that on one hand the arbitral tribunal has held that it was not necessary to go into the details of the merits of the claim and the counterclaim since evidence was yet to be led and on the other hand has held that the powers of the arbitral tribunal ordering a party to take any interim measures or protection are not as wide as that of the court. After rendering such prima facie finding, contrary to that, the arbitral tribunal held that it was not possible to hold that the claimant had made out a case for passing an interim order. In my view the arbitral tribunal has rendered inconsistent findings and conclusion which deserve to be set aside.

61. The next question arises is whether the petitioner had made out a case for grant of interim measures as prayed in prayers (a) and (b) of the petition or not?

A perusal of the correspondence clearly indicates that the respondent was not able to make the payment of the undisputed invoices to the petitioner and was asking for indulgence. In spite of the payment schedule suggested by the respondent, the respondent could not make payment even according to such payment schedule. A perusal of the record also clearly indicates that several winding up proceedings are filed against the respondent in which conditional orders are passed. The UK High Court has passed a summary judgment against the respondent on 29th January 2014 for USD 84100000.33. Supreme court of Mauritius has already frozen the assets of the respondent in the month of April 2014 for securing FCC bond worth USD 84 million. The respondent has already informed the Bombay Stock Exchange that their CDR proposal had been approved and outline the reasons for their financial crunch.

62. The respondent themselves have admitted in their affidavit dated 21st April 2014 and disclosing that all the assets of the respondent company are already

encumbered with the banks and there are no assets which are unencumbered. It is stated in the affidavit that there are no deposits with the bank and the loan is taken from around 26 banks whose names are disclosed in paragraph 2 of the said affidavit. There is no investment made in floating securities except in assets that are plant and equipments and the figures of all the assets mentioned in the balance sheets are owned by the respondent. It is thus clear beyond reasonable doubt that if the petitioner succeeds in the arbitration proceedings against the respondent, petitioner would not be able to recover any amount from the respondent. In my prima facie view, the petitioner has good chances of succeeding in the arbitration proceedings. The respondent are obstructing the legitimate claims of the petitioner, in my prima facie view. In my view if the respondent in this situation is not directed to provide security by way of furnishing a bank guarantee of a nationalised bank in favour of the petitioner so as to secure the claim of the petitioner, petitioner would not be able to obtain the fruits of the arbitration while executing the award.

63. The learned counsel appearing for parties have informed that the oral evidence of the petitioner is over. The oral evidence of the respondent would commence shortly. In my view that may not be a ground not to consider any relief by this court in the facts and circumstances of this case.

64. In my view interest of justice would be met with if the respondent is directed to furnish a bank guarantee of a nationalized bank in favour of the Prothonotary and Senior Master of this Court in the sum of USD20,00,000 initially for a period of two years and shall be kept alive till the arbitral award is rendered and for a period of three months from the date of the award.

65. I, therefore, pass the following order:-

(a) Impugned order dated 19th May, 2014 passed by the arbitral tribunal rejecting application made by the petitioner for interim measures is set aside.

(b) The respondent is directed to furnish a bank guarantee of a nationalized bank in favour of the Prothonotary and Senior Master of this Court in the sum of USD20,00,000 initially for a period of two years which shall be kept alive till the arbitral award is rendered and for a period of three months from the date of the award. Such bank guarantee shall be furnished within four weeks from the date of this order.

(c) It is made clear that the observations made by this court in this judgment and the observations made by the arbitral tribunal are prima facie and are made for the purpose of deciding appeal under section 37 and application under section 17 respectively. The arbitral tribunal shall decide the dispute on its own merits without being influenced by the observations made in the aforesaid two orders.

(d) The arbitral tribunal is requested to dispose of the arbitral proceedings expeditiously.

(e) No order as to costs.