rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO.629 OF 2021

J P Parekh & son & Anr.	]	..	Petitioners
vs.			
Naseem Qureshi & Ors.	]	..	Respondents

Mr.J.P. Sen, Senior Advocate a/w Shanay Shah, M.S. Federal, Murtuza Federal, Mihir M., Sudarshan Satalkar and Nikhil Jalan for Petitioners.

Mr.Prateek Seksaria a/w Nishant Chotani, Rohit Agarwal, Dipti Karadkar i/b Ramiz Shaikh for Respondent Nos.1 and 2.

Mr.Aseem Naphade a/w Shabbir Shora i/b Shabbir Shora for Respondent No.3.

CORAM	**:**	**BHARATI DANGRE, J**
RESERVED ON	**:**	**22nd NOVEMBER, 2022**
DATE	**:**	**08th DECEMBER, 2022**

JUDGMENT :

1] Petitioner No.1, a partnership firm engaged in rendering comprehensive architectural services comprising of Petitioner No.2 as a Partner, has filed this Petition under Section 9 of the Arbitration and Conciliation Act, 1996, in which the following reliefs are sought :

> "(a) This Hon'ble Court be pleased to order and direct Respondent Nos.1 and 2 to forthwith pay to or deposit with the Petitioner a sum of Rs.3.39,76,770/- (Rupees Three Crores Thirty Nine Lakhs Seventy Six Thousand Seven Hundred Seventy only) as the admitted fees payable under the Letters of Appointment as per the particulars set out in Exhibit "MM" hereto;

(b) In the alternative to prayer clause (a) this Hon'ble Court be pleased to order and direct Respondent Nos. 1 and 2 to deposit in this Hon'ble Court or to furnish solvent security to the satisfaction of this Hon'ble Court in any other manner that this Hon'ble Court may deem fit, for the sum of Rs.3,39,76,770/- (Rupees Three Crores Thirty Nine Lakhs Seventy Six Thousand Seven Hundred Seventy only) as per the particulars set out in Exhibit "MM" to the present Petition.

(c) This Hon'ble Court be pleased to stay the effect and implementation of the purported termination letter dated 15th September, 2021 and to restrain Respondent Nos. 1 and 2 from acting upon or in furtherance thereof until payment to the Petitioner of the fees of the Petitioner as set out in the particulars at Exhibit "MM" hereto;

(d) This Hon'ble Court be pleased to restrain Respondent No. 1 and 2, their servants, agents or assigns or any other persons claiming by, through or under them, including but not limited to the new architects Respondent No.3, from taking any further steps in respect of redevelopment of the said Plot until payment of the fees of the Petitioner as set out in the particulars at Exhibit "MM" hereto."

The aforesaid reliefs are sought on the basis of dispute that has surfaced between the parties and pending the commencement, hearing and final disposal of the arbitral proceedings and passing of the Arbitral Award. The Petitioners have sought the above reliefs by way of interim measures, with insistence that the reliefs so granted, shall continue to remain in force till arbitration proceedings are culminated.

2] Primordially let the parties to the proceedings be introduced.

Respondent Nos.1 and 2 the owners of an old tenanted building comprising of ground plus three floors known as 'Cassinath Building', at Mahim, Mumbai, which was constructed prior to 1940. The property was acquired by Respondent Nos.1 and 2 with an intention to redevelop and they approached the Petitioner-firm with a proposal, to appoint it as an Architect for the redevelopment project which

envisaged *inter alia* construction of new building on the existing plot and shifting tenants/occupants from the existing building to the alternate transit accommodation.

Accordingly, by the first Letter of Appointment issued on 16.02.2015, Petitioner No.1 came to be appointed as an Architect for the proposed redevelopment work. The Letter of Appointment highlight the scope of work as well as details of the fees payable by the Respondents and it also stipulate the timelines within which the fees were to be paid, being 30 days from the date of receipt of each bill.

The said Letter of Appointment also contain a very specific clause about the Petitioners being paid the fees in case of decision on the part of Respondents to sell or grant development rights to any other person and I would make reference to the said clauses a little while later.

Another Letter of Appointment came to be issued in favour of the Petitioners on 20.03.2018 enlisting the scope of work and clarifying that separate letter will be issued, detailing professional fees payable alongwith mode of payment and other terms and conditions agreed between the parties. The said letter also contemplated the manner in which the Agreement could be terminated and also retained the power to appoint any Architect after obtaining NOC from the Petitioners.

3] With the Letter of Appointment being placed in hand and terms and conditions of engagement of services being crystalized, the Petitioners, as they were supposed to, applied and secure several permissions and approvals from various statutory authorities including MCGM, obtained requisite NOC from the Traffic, Fire and and Building Proposal Department and also secured Intimation of Disapproval (IOD) on 28.07.2016. Permission with respect to the temporary transit structure was secured and even Commencement Certificate(CC) was also procured on 25.07.2019, setting the stage ready for the project.

4] The Petitioners, put forth their case by submitting that their firm rendered architectural services with respect to Planning, Design and Preparing the Drawings/Plans etc. as required for the purpose of accomplishment of the project and played a pro-active role. The Petition contain a specific submission that the Petitioners raised running account bills bearing Nos. I to X for the services rendered and the same were duly acknowledged by Respondent Nos.1 and 2 and periodically, part payments were also released as against the bills raised. The last running bill was submitted by the Petitioner on 22.12.2020, but the grievance of the Petitioners pertain to non-clearance of the bills, despite a specific clause in the Agreement to make payment against each bill, within 30 days of its receipt. The

Petitioners allege that Respondent Nos.1 and 2 consistently failed to clear the bills within the agreed period, despite repeated requests being made and communications being exchanged with Mr. Yusuf Mukri, son of Respondent No.2 who was representing and acting on behalf of Respondents. The correspondence and communications addressed by the Petitioners in the form of emails, WhatsApp messages are clearly set out in the Petition.

In the month of December, 2020, the Petitioner No.2 came across a Public Notice regarding proposed redevelopment through a Developer, who was ready and willing to take up the project. The Petitioners raised running bills upon the Respondent Nos.1 and 2, but the bill amount remained outstanding. In fact, the Petitioners offered several options to the Respondents for clearing the amount due and payable to them. To draw curtain on the past transactions, the Petitioners were informed that the proposed developer did not require the services of the Petitioners, as he had his own team of Architects and the Developer had asked the Respondents to obtain NOC from the Petitioners. In turn, Respondent Nos.1 and 2 offered the Petitioners a sum of Rs.50 Lakhs towards full and final settlement of the dues payable in three installments and for no reasons to guess, the Petitioners rejected the said proposal.

5] Respondent Nos.1 and 2 called upon the Petitioners to provide details of amounts paid by it from the beginning of the Project towards the professional services rendered and the said requirement was responded to by the Petitioners by specifying that an amount of Rs.1,03,54,759/- was payable. After the figure was quoted, Respondent Nos.1 and 2 intimated the Petitioners that the Developer would be paying the amount due and payable and as directed, the Petitioners forwarded statement of charges for the additional services. The Petitioners were taken for surprise when the construction activities commenced on the plot without obtaining their consent and without clearing the outstanding dues and therefore the Petitioners addressed letter to Municipal Corporation of Greater Mumbai, appraising it about unauthorized construction commencing on the plot. The MCGM took cognizance of the complaint and fixed hearing on the application filed by the Petitioners before the Deputy Chief Engineer, as regards to the appointment of new Architect and despite the Petitioner's objection, the new Architect came to be appointed for the project of Respondents.

Not only this, but by communication dated 15.09.2021, the Respondents terminated the services of Petitioners and this letter was received by the Petitioners on 18.09.2021. The MCGM passed an order permitting appointment of new Architect as the building was in dilapidated condition and also granted the proposal for transit camp

construction.

The above-mentioned facts are to be seen as the basis for the prayers sought in the Petition under Section 9, filed by the Petitioner.

6] I have heard Learned senior counsel, Mr.J.P. Sen for the Petitioners and Mr.Prateek Seksaria for Respondent Nos.1 and 2.

Respondent No.3- the newly appointed Architect is represented by Mr.Aseem Naphade.

The learned senior counsel justified the relief sought in the Petition by asserting the existence of Arbitration Clause in the Letter of Appointment in the form of Clause 16 and he would submit that without settling the claim of the Petitioners, as agreed in the Letter of Appointment, the Respondents surreptitiously requested change of Architect before the MCGM and sought its replacement on the ground that the Architect has demanded unreasonable and ill-legitimate professional fees.

The submission of the learned senior counsel is, Respondent Nos.1 and 2 have breached the terms and conditions of the Agreement intentionally and took advantage of the soft approach of the Petitioners who went to the extent of expressing willingness to waive interest component if the amount received by them was cleared within the stipulated period. The learned senior counsel submit that, Respondents

with malafide intent and in futile attempt to evade its obligation to pay the professional fees to the Petitioners under the Agreement, purported to terminate the appointment itself, with respect to the proposed redevelopment scheme.

7] Mr.Sen, would further submit that it is always permissible for the court to grant such relief in exercise of power under Section 9(1)(ii)(b) before institution of the arbitral proceedings as it is within the power of this Court to permit such interim measures or direction as may appear to the Court to be just and convenient. He would submit that interim measures can be for the purpose of amendment**,** protection, reservation, improvements of the property which is subject matter of arbitration agreement and it can also be for the specific purpose of securing the amount in dispute in arbitration.

Ultimately he would submit that, while deciding the Petition under Section 9, the Court must have due regard to the underlying purpose, which is conferred upon the Court, i.e. to permit efficacy of Arbitration, as form of dispute resolution.

In support of the relief sought, particularly seeking deposit of the amount or solvent surety, to that effect, he would submit that prayer is perfectly justified in the present case since there is technically no defence for paybility of the amount and it is in the interest of justice, to

secure the amount, which form part of subject matter of proposed arbitration, even if no case strictly within the purview of Order XXXVIII Rule 1 and 2 is made out.

The learned senior counsel place reliance upon the Division Bench Judgment of this court in the case of ***Valentine Maritime Ltd. vs. Kreuz Subsea Pte Limited & Anr., 2021 SCC OnLine Bom 75*** and also another Division Bench decision in the case of ***Jagdish Ahuja and Another vs. Cupino Limited (2020) 4 Bom CR 1***, to buttress his submission that where there was no defence to the invoices issued and when the amount due and payable was admitted, there was good chances of succeeding in arbitral proceedings which justified grant of interim measures pending the arbitration reference, even if no case was strictly made within the purview of Order XXXVIII, Rule 1 and 2.

8] Per contra, the learned counsel Mr. Seksaria would contest the Petition by posing a straight question, as to whether relief sought as interim measure, can be granted.

The submission is, the contract between the parties is in the nature of service contract and claim is in the form of monetary claim and since the contract is determinable, no Court would grant specific performance and in any case at the end of the proceedings of Arbitration, the Petitioners may claim damages/compensation. He

would place reliance upon decision of the learned Single Judge of this Court in case of ***Spice Digital Ltd. vs. Vistaas Digital Media Pvt. Ltd. 2012 SCC OnLine Bom 1536***, in support of his submission.

He would also place reliance upon the decision of the learned Single Jude of this Court in the case of ***Kotak Mahindra Bank Limited vs. Williamson Magor & Co. Ltd. & Anr. 2021 SCC OnLine Bom 305***.

9] The learned counsel wound raise another objection for entertaining the application, relying upon the decision of the Apex Court in the case of ***Firm Ashok Traders & Anr. vs. Gurumukh Das Saluja & Ors. (2004) 3 SCC 155,*** by submitting that Section 9 permits filing of the application before commencement of the arbitral proceedings, but it do not give indication of how much before and by relying upon the decision of the Apex Court, he would submit that the party invoking section 9 may not have actually commenced the arbitral proceedings, but must be able to satisfy the Court that the Arbitral proceedings were actually contemplated or manifestly indicated, and were positively going to commenced within a reasonable time. He would submit that the law has been crystalized in the decision of ***Firm Ashok Traders*** (*supra*) that the distance of time must not be such as it would destroy the proximity of relationship of the two events between

which it exists and elapses.

Applying the above principles to the facts in hand, the submission comes from Mr.Seksaria, that the alleged termination notice is dated 15.09.2021 and Petition under Section 9 has been filed on 26.10.2021 pending the hearing and final disposal of the arbitral proceedings, but it is submitted that despite lapse of period of almost a year, no Arbitration proceedings are instituted and therefore he would question the timelapse by advancing his submission that there is no material to indicate that the arbitral proceedings are actually contemplated or manifestly intended, and in these circumstances, the argument is, the relief under Section 9 must be turned down to such a party, in such a situation.

The learned counsel for Respondent Nos.1 and 2 would also oppose the ground of relief by submitting that in order to be entitled for which relief claimed, being deposit of amount, the rigors of Order XXXVIII Rule 5, for adjudication before Judgment, must be strictly complied with, since what is sought by the Petitioner is nothing but an attachment before judgment and therefore the parameters contemplated for exercising the said power must be satisfied even before the Court from whom interim measures of such nature are prayed for.

10] The learned counsel or Respondent No.3 has adopted the arguments of Mr.Seksaria and submit that he has nothing more to add.

11] In the wake of contentious arguments, I have perused the copy of Petition alongwith its accompanying annexures and also the additional Affidavit filed by the Petitioners.

The onset of the relationship between the Petitioners on one hand and Respondent Nos.1 and 2 on the other, is the Letter of Appointment dated 16.02.2015, when the Petitioner came to be engaged as an Architect, to avail his professional services, relating to architectural work of planning, designing, obtaining various approvals and for preparation of detailed working drawings and to assist/advise the Respondents on construction methodology to the Project Management and other consultants to be appointed for the permissible development of the project.

The Letter of Appointment, stipulate the professional fees to be paid as per the scope of the work mentioned, depending on the estimated built up area of the project or actual build up area whichever is higher, which was set out in Para 1, itself in the following manner :

> "a] at Rs.76.50 per sq. ft. of gross proposed built-up area as defined hereunder. The gross proposed built-up area (as defined above) of the project as presently designed is estimated as 1,00,000 sq. ft (approximately)."

Clause 2 of the Letter of Appointment set out the mode of payment of the professional fees payable, as per clause 1 in accordance with the stages mentioned therein.

On perusal of the chart, it is evident that before submission of the Building Completion Certificate (B.C.C.) for the occupation of building or part thereof from Municipal Corporation, 100% of the total fees (less received earlier), shall become payable to the Petitioners.

12] Certain other important clauses in the Agreement which are relevant for the purpose of present case are reproduced below :

> "9. In addition to your fees as stated above, we agree to pay you professional fees, for the additional services which may be required to be rendered by you for obtaining EACH of the remarks, permissions, N.O.Cs. from various authorities, and if done, shall be paid by us extra, as per the amount indicated in the "List of Additional Services" annexed with this agreement as Annexure "A".
>
> 13. In the event, if we decide to sell or grant development rights to any other persons, after your obtaining approval of plans from BMC, (i.e. IOD and/or C.C. in part or full is obtained), then, you shall be paid full fees as per Clause No.1, irrespective of the stage of development and the quantum of services rendered by you upto that stage and we agree to pay you the same immediately on our taking the aforesaid decision."
>
> 15. This engagement may be terminated at any time by either party [either by consent referring to arbitration as per clause no.16] upon prior notice being given, and provided that as a condition precedent, the fees due to you as per Clauses (1) to (14) above are paid to you or an amount as directed by the arbitrator is first deposited with him, and not withstanding any thing contained herein, your termination will not take effect and we shall not appoint any other Architect for the proposal on the property under reference till such fees are paid to you or deposited with the arbitrator as the case may be.
>
> 16. We confirm and agree that it has been expressly agreed by and between yourself and ourselves that except for clause no.15, any dispute or difference between us as to the terms of your engagement as

> Architect/s as aforesaid shall be decided by arbitration of such panel of arbitrators or individual arbitrator who shall be member or members of "PEATA" and such arbitration proceeding shall be governed by the provision of the Indian Arbitration Act 1940, or any statutory modification or re-actment thereof, subject to the observance of the condition precedent obligation by either parties as per clause 15 above."

The Agreement is accompanied with the schedule of additional services in the form of Annexure A.

13] For the purpose of obtaining necessary permissions from the Municipal Corporation of Greater Mumbai, on 28.03.2016, once again an appointment letter is issued in favour of the Petitioners appointing the Petitioner No.1 as an Architect, which pitched two more conditions for appointment :-

> "8. A thirty days clear notice in writing is required by either of the parties to terminate the agreement, during the pendency of which your services shall be continued to be rendered. However, on termination of the agreement, the fees shall be paid to you as per agreement entered into with you separately in this regard.
>
> 9. We confirm that we can appoint any other Architect/Licensed Surveyor only after obtaining your NOC. We will not carry out any further work till the new architect/Licensed Surveyor is appointed and is accepted by the authorities. In this event, your NOC will not be withheld unreasonably and will be deemed to be issued on our paying your dues, or in the event of dispute on the mater being referred to the arbitration and the detailed terms and conditions mentioned in our agreement entered into with you in this regard and shall prevailo.
>
> 10 In event of any dispute, the matter shall be referred to arbitration as per our detailed agreement."

14] Now, I shall turn my focus on the actual dispute about payment of architectural fees, which has surfaced in the Petition.

It is on 25.07.2019 the commencement certificate was issued by the MCGM. The Petitioners, with reference to the letter of appointment, issued the last running bill, Bill No.X dated 22.12.2020 , comprising of professional services and informed the Respondents, that an amount of Rs. 1,03,54,759/- is payable towards professional fees, by calculating the interest on delayed payment. The said statement in the form of Bill at Exhibit F bifurcate the amount due and payable as per the clauses contemplated in the Letter of Appointment dated 16.02.2015.

The Petitioners have placed on record communication received from the Respondents dated 03.05.2018, where the following statement is made.

> "Please be rest assured your money is safe and all your dues will be cleared in full, we only request you for some more grace period. Needless to say all your dues will be cleared at the earliest."

The Petitioners claim that since Respondents had assured about timely payment and in the wake of long professional relationship shared between them, the work was continued, until it was informed about termination of services by letter dated 15.09.2021 by citing the following reasons

> "With reference to the subject cited above we would like to inform you that there is a tremendous pressure from the tenants of the building whose lives are at a stake, and you have not been co-operating as an Architect of the project, we do hereby cancel and terminate your appointment as an Architect of the above mentioned project.
>
> This letter of Cancellation/Termination is being sent to you, as the same was raised by you, in the meeting called by the Hon. Dy.

> Chief Engineer in his chamber yesterday.
>
> Please note that you are no more our architect in the above project and the new architect Aman & Associates, appointed by us and informed to the Hon. Dy. Chief Engineer, shall here onwards, apply and obtain all further approvals and permissions required."

15] The Petitioners submit that instead of paying the amount which was due and payable, the Respondents chose to terminate services of the Petitioners on the ground of their alleged non-cooperation as an Architect of the project and this stand is seriously contested by the Petitioners.

Admittedly, the dispute revolving around the appointment letter is liable to be referred to the Arbitrator, in light of Clause 16, contained in the Letter of Appointment, but pending the commencement and hearing of the arbitral proceedings to be instituted, the Petitioners seek payment of the amount towards professional fees payable to them under the Letter of Appointment or a direction is sought against Respondent No.1 and 2 to deposit the said amount in this Court or furnish solvent surety which this Court may deem fit.

In order to secure this relief, a specific statement is made in the Petition, which read thus :

> "51. From the communications exchanged between the Petitioner and Respondent No.1 and 2 and on their behalf by the said Mr.Yusuf Mukri (son of Respondent No.2), it is clear that Respondent Nos.1 and 2 on their own admission are in the process of dissipating their assets, which may render an Award in favour of the Petitioner a paper Award. The Respondent No.1 and 2 have admitted the Petitioner's claim for its professional fees and other charges under the Letter of Appointment. This is a fit case for an order of payment/deposit

against Respondent Nos.1 and 21 at this stage itself."

16] The grant of the above relief is opposed on the ground that the claim is in the nature of money suit and therefore the relief prayed can not be granted as it would amount to grant of the decree.

Reliance is placed upon decision in the case of ***Maharashtra Jeevan Pradhikaran & Anr. vs. Lark Construction Pvt. Ltd. 2005 (1) MH.L.J. 953***, which pertains to the power to be exercised by the Civil Court under Order 39 Rule 1 and 2, where it was categorically held that the grant of final relief in the form of final relief to pay the amount at the interim stage would not be a permissible mode and what could have been possibly done was to release part of the money claim involved in the suit.

The learned counsel for the Respondent has also relied upon the decision of the Court in the case of ***Spice Digital Ltd. vs. Vistaas Digital Media Pvt. Ltd.*** *(supra)*, wherein the issue of grant of relief under Section 9 and 17 of the Act of 1996 arose for consideration, and it has been specifically held as under in para 15 and 16 :-

"15. It is not in dispute that even during the lock in period, the respondent can terminate the contract if there was material breach of contract. Whether the contract was rightly terminated or not is the issue which is pending before the arbitral tribunal and would be decided at the time hearing of the claims made by the Appellant before the arbitral tribunal. The question that arises for consideration of this court is that whether interim measures can be grasnted in a contract which is determinable.

> 16. The arbitral tribunal in the impugned order after referring to clause 6.2 as amended and clause 12.1 of the agreement has recorded prima facie finding that the agreement by its very nature is determinable even during the lock in period. It is held that in case other than for material breach, the licensor if it invokes clause 12 and terminated the agreement, the the licensee is entitled to certain rights which include withholding any license fees that may be due and payable and also moving the competent court for whatever reliefs the Licensee would be entitled. In Para 36 of the impugned order the arbitral tribunal has recorded a finding that the contract by its nature is determinable and interim relief by way of injunction cannot be granted. In Para 29 of the impugned order, it is held that if the agreement by its very nature is determinable within the meaning of section 14(1)(c) of the Specific Relief Act, specific performance cannot be granted. If specific relief cannot be granted, then in terms of Section 41(e) of the Specific Relief Act no injunction can be granted. It is held that if the licencee is not entitled to final relief of permanent injunction, then in that event no interim relief by way of injunction can be granted".

17] The observations made above are to be read in the facts of the case, which reveal that the Respondents issued termination notice to the Petitioners alleging breaches and the Petitioners specifically denied such breaches and made a request for continuing discharge of the obligations under the licensed agreement. The Petition filed by the Petitioners under Section 9 of the Act sought a relief that the Respondents shall not act on the basis of termination notice, the dispute being referred to the Sole Arbitrator and the Arbitrator dismissed the Application filed under Section 17 of the Arbitration Act. It is, in this background, observations were made in Para 21 to the following effect :-

> "21. In my view, the injunction sought by the Appellant under section 17 of the Arbitration Act, 1996 for the contract which is determinable or is terminated even according to the appellant, such

> injunction is statutorily prohibited. In my view, at the interim stage, the arbitral tribunal while deciding application under section 17 and the court deciding application under section 9 of the Arbitration Act, 1996 cannot continue operation of such determinable contract or the same having been terminated otherwise it would amount to re-writing the contract. In my view the arbitral tribunal was thus right in refusing to grant injunction under section 17 of the Arbitration Act, 1996. Even otherwise, the arbitral tribunal has given a finding of fact after considering the facts, provisions of the agreement and the provisions of Specific Relief Act and thus no interference is warranted by this court with such finding of fact recorded by Che arbitral tribunal at this stage."

18] The power to grant interim measures under Section 9 of the Arbitration and Conciliation Act is guided by the underlying principles which govern the exercise of analogous power under the Civil Procedure Code (CPC) and it is settled position of law that this power cannot be totally independent of those principles. 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, but at the same time, procedural provisions enumerated in the Code, cannot be invoked to defeat the grant of interim relief, when the Court would decide Application under Section 9 of the Act.

The existence of an arbitration agreement or arbitral clause is a sine qua non for contracting parties, to refer their disputes to arbitration and to avail any interim relief in terms thereof. While exercising this power, the Court will ascertain the manifest intention on the part of the Applicant to take recourse to the arbitral proceedings at the time of filing of the Application under Section 9 of the Act and this intention can

be gathered from the surrounding circumstances which may include issuance of notice in a given case, establishing the manifest intention to refer the dispute to arbitral tribunal .

The Court exercising powers under Section 9 possess wide powers including “the same power for making orders as it has for the purposes and in relation to any proceeding before it”. Nevertheless discretion will not be exercised lightly and unless the Court is satisfied that the essential conditions for grant of such relief have been met by the party seeking it.

19] The time or the stage of invoking jurisdiction of the court under the Section is also clearly set out by sub-section (1) being a party approaching the Court before or during the arbitral proceedings or at any time after making of arbitral warrant, but before its enforcement in accordance with Section 36.

The amendment inserted by Act 3 of 2016 has created an imperative mandate in a contingency where the Application is preferred for interim measures before commencement of the arbitral proceedings and the court passed an order in any interim measure of protection, then arbitral proceedings shall be commenced within a period of 90 days from the date of such order or within such further time, that the Court may determine.

In any case, an application filed is not a Suit and it is also not necessary that the party invoking Section 9, must had actually commenced the arbitral proceedings, but suffice to establish before the Court that the proceedings are actually contemplated or manifestly intended. The purpose of interim protection to be granted by the court evidently is to protect the interest of the party seeking such order until its rights are finally adjudicated by the arbitral tribunal and to ensure that the Award passed by the Tribunal is capable of enforcement.

What type of measures can be granted in the form of protection for the subject matter are enumerated in sub-section (1) (ii) of Section 9 and this would cover contingencies specified in clause (a) to (e). Clause (e) of sub-section (1) vests the Court exercising power under Section 9, to pass 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. For exercising these powers the Court must derive a conclusion that whatever is considered necessary for protection of the property in dispute, by way of interim measure the protection can be granted and definitely this confer wide discretion on the Court, but it cannot be said to be an unguided discretion, as the guiding factor is the enumeration of such situations by the legislature, though the legislature did not intend that the circumstances shall be

exhaustive. However, the power conferred upon the Court in the Section is not unbridled and it is subject to ascertain measures and restrictions such as, firstly, it can be exercised by the Court to the same extent and in the same manner as it could be for the purpose or in relation to any proceedings before it and secondly, exercise of power to make interim arrangements should not militate against any power which might be vested in arbitral tribunal.

20] One such contingency where the interim measure for protection can be granted is contemplated by clause (b), for securing the amount in dispute in arbitration. This contingency prompting the Court to mould the interim relief for securing the amount in dispute in arbitration is often compared with Order XXXVIII Rule 5 of the CPC and the position as regards whether the party filing an application under Section 9 would strictly bound to adhere to Order XXXVIII Rule 5 is no more resintegra and has been put to rest by two Division Benches of this court and also recently by the Hon'ble Apex court itself in the case of ***Essar House Private Limited vs. Arcellor Mittal Nippon Steel India Limited in Civil Appeal (Arising out of SLP (C) No.3187 of 2021).***

21] In the case of **Jagdish Ahuja and another vs. Cupino Limited, 2020 SCC OnLine Bom 849**, Division Bench of this Court made

specific observations while formulating the question as to whether the Court while granting relief under Section 9 of the Act of 1996 is strictly bound by the provisions of Order XXXVIII Rule 5 and answered it in Para 6 and 7 as follows :-

> “6. As far as Section 9 of the Act is concerned, it cannot be said that this court, while considering a relief thereunder, is strictly bound by the provisions of Order 38 Rule 5. As held by our Courts, the scope of Section 9 of the Act is very broad; the court has a discretion to grant thereunder a wide range of interim measures of protection "as may appear to the court to be just and convenient", though such discretion has to be exercised judiciously and not arbitrarily. The court is, no doubt, guided by the principles which civil courts ordinarily employ for considering interim relief, particularly, Order 39 Rules 1 and 2 and Order 38 Rule 5; the court, however, is not unduly bound by their texts. As this court held in Nimbus Communications Limited v. Board of Control for Cricket in India (Per D.Y. Chandrachud J, as the learned Judge then was), the court, whilst exercising power under Section 9, "must have due regard to the underlying purpose of the conferment of the power under the court which is to promote the efficacy of arbitration as a form of dispute resolution." The learned Judge further observed as follows:
>
> > "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."
>
> 7. In an appropriate case, where the court is of the view that there is practically no defence to the payability of the amount and where it is in the interest of justice to secure the amount which forms part of the subject matter of the proposed arbitration reference, even if no case strictly within the letter of Order 38 Rule 1 or 2 is made out, though there are serious allegations concerning such case, it is certainly within the power of the court to order a suitable interim measure of protection. As we have noted above, the amount is either to be deposited into the treasury in accordance with the agreement between the parties or if, for any reason, it is not payable to the revenue towards the Respondent's tax liability, as is the case of the Appellants here, it is to be paid to the Respondent Itself as part of the

> price of debentures. In fact, when these two options were posed by the learned Single Judge to the Appellants' counsel, in fairness both conceded that there was no third option."

22] Another Division Bench of this Court in **Valentine Maritime Ltd. vs. Kreuz Subsea Pte Limited & Another,** (*supra*), derived a similar inference by relying upon the Apex Court decision in the case of **Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd. (2007) 7 SCC 125** and observed as under :-

> "95. Insofar as judgment of this Court delivered by the Division Bench of this court in case of Nimbus Communications Limited v. Board of Control for Cricket in India Cupra) relied upon by the learned senior counsel for the VML is concerned, this Court adverted to the judgment of Hon'ble Supreme Court in case of Adhunik Steels Ltd. v. Orisa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125 and held that in view of the decision of the Supreme Court in case of Adhunik Steels Ltd., (supra) the view of the Division Bench in case of National Shipping Company of Saudi Arabia (supra) that the exercise of power under section 9(ii)(b) is not controlled by provisions of the Code of Civil Procedure, 1908 cannot stand. This court in the said judgment of Nimbus Communications Limited (supra) held that the exercise of the power under section 9 of the Arbitration Act cannot be totally independent of the basic principles governing grant of interim injunction by the civil Court, at the same time, the Court when it decides the 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.
>
> 96. This court held that 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 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. 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) of the Arbitration Act."

It was thus held that 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, so as to clear the claim which is subject matter of the dispute before the arbitral tribunal if such case is made out by the Applicant.

23] The Hon'ble Apex Court in the case of ***Essar House Private Limited vs. Arcellor Mittal Nippon Steel India Limited*** (*supra*) by making a reference to both the above decisions of the Bombay High Court, has taken the principle ahead and specifically concluded as under :-

> " While it is true that the power under Section 9 of the Arbitration Act should not ordinarily be exercised ignoring the basic principles of procedural law as laid down in the CPC, the technicalities of CPC cannot prevent the Court from securing the ends of justice. It is well settled that procedural safaeguards, meant to advance the cause of justice cannot be interpreted in such manner, as would defeat justice."

24] Taking cognizance of the decisions from various High Courts, holding that power under Section 9 of the Arbitration Act is wider than the power under the provisions of CPC, it reproduced the relevant observation from the decisions of this Court and held as under :-

> "48. Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral

> award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is, whether the applicant for interim measure has a good prima facie case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.
>
> 49. If a strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC.
>
> 50. Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending Arbitral Award is not imperative for grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice. To assess the balance of convenience, the Court is required to examine and weigh the consequences of refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail."

25] The position of law thus stands crystalized in the above manner and the inference which could be gainfully drawn from the authoritative pronouncement, is that the provisions as contained in Section 9 and 17 of the Arbitration Act, 1996 are meant for protecting the subject matter of the dispute till the arbitration proceedings culminate into an Award. The court is also entitled to consider whether denial of such order would result in great prejudice to the parties seeking such protective order. The obstructive conduct of the party against whom such direction is sought, is also to be recorded as material consideration, apart from the most important element whether there is practically no defence to the paybility of the amount, and, therefore, it is only in the interest of justice to secure the amount, which forms part of the

subject matter of the proposed arbitration reference and in such case, it is certainly within the power of the Court to order suitable interim measures for its protection.

The apprehension expressed in Para 51, based on the correspondence, exchanged by Respondent Nos.1 and 2, is sufficient to secure the claim of the Petitioners by invoking Order XXXVIII Rule 5 of CPC, particularly in absence of specific denial of the claim and since now the MCGM has granted substitution of the Petitioner firm by another Architect.

26] I must gainfully refer to another decision of the Hon'ble Apex Court in case of ***Sanghi Industries Limited vs. Ravin Cables Ltd. & Anr. (in Civil Appeal No.6908/2022)*** where their Lordships of the Apex court, have made pertinent observations, which I must reproduce :-

> 4.1 The order(s) which may be passed by the Commercial Court in an application under Section 9 of the Arbitration Act, 1996 is basically and mainly by way of interim measure. It may be true that in a given case if all the conditions of Order XXXVIII Rule 5 of the CPC are satisfied and the Commercial Court is satisfied on the conduct of the opposite/opponent party that the opponent party is trying to sell its properties to defeat the award that may be passed and/or any other conduct on the part of the opposite/opponent party which may tantamount to any attempt on the part of the opponent/opposite party to defeat the award that may be passed in the arbitral proceedings, the Commercial Court may pass an appropriate order including the restrain order and/or any other appropriate order to secure the interest of the parties. However, unless and until the conditions mentioned in Order XXXVIII Rule 5 of the CPC are satisfied such an order could not have been passed by the Commercial Court which has been passed by the Commercial Court in the present case, which has been affirmed by the High Court."

The above observations necessarily indicate that while considering the application under Section 9 of the Arbitration Act for interim measures, the Court would seek strict compliance of conditions incorporated in Order XXXVIII Rule 5 of the CPC.

However, the aforesaid observations will have to be read in the background of the facts which were involved and on careful reading of the said Judgment, it can be discerned that the dispute revolved around three purchase orders and the Appellant claimed the loss of INR 29.31 Crores, owing to the defective quality of cables supplied. The Appellant invoked bank guarantees issued by Respondent No.1 which according to Respondent No.1 were performance bank guarantees and thereafter the Appellant invoked arbitration and immediately on the next date, Respondent no.1 approached the Court under Section 9 of the Arbitration Act before the Commercial Court and the Commercial Court by invoking Section 9(2)(e) of the Act directed the Appellant to deposit the amount of respective performance bank guarantees, which were already invoked and for which payments were already made by the bank. The High Court dismissed the appeal, which resulted into proceedings before the Hon'ble Apex Court.

The observations made in Para 4, therefore, must be read in the background of paragraph 3 and 4 of the said Judgment and particularly when the Court took note of the fact that before any order could be

passed, the bank had already invoked the bank guarantee and the amount thereunder was already paid prior to passing of the order by the Commercial Court.

In any case, the said decision in **Sanghi Industries Limited** (*supra*) cannot be said to unsettle the position of law which has been consistently followed, being laid down by the Hon'ble Apex Court in the case of **Adhunik Steel** (*supra*), where the Apex Court, issued the guidelines for exercise of power under Section 9, in the following words :-

> "The grant of an interim prohibitory or mandatory injunction is 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 dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since Section 9 itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of Section 9, "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.

The position of law which, therefore emerges is, power under

section 9 of the Act is totally independent of the principles governing grant of injunction that would govern the Courts in this connection.

27] The reliance upon the decision in the case of **Firm Ashok Traders & Another** (*supra*) is of no support to Mr.Sakseria, representing Respondent Nos.1 and 2 as the said decision though have coined the term “proximately contemplated” or “manifestly intended” have categorically held that if arbitral proceedings are not commenced within a reasonable time, of an order under Section 9, the relationship between the order and arbitral proceedings would stand snapped. Even in the said Judgment, after explaining what would be the reasonable period, while granting relief by way of interim measure, Applicant was directed to take steps for appointment of Arbitrator(s) without any further loss of time.

In any case, now when the insertion of sub-section (2) of Section 9 by Act No.3 of 2016, there is a statutory provision which itself contemplate that where interim measures of protection are conferred on party, the arbitral proceedings shall be commenced within a period of 90 days from the date of order or within such time as the Court may determine.

Hence, the decision in the **Firm Ashok Traders and Another** (*supra*) do not take case of the Respondents any further.

The further decision in the case of ***Maharashtra Jeevan Pradhikaran & Anr. vs. Lark Construction Pvt Ltd., 2005(1) Mh.L.J. 953***, is completely based on different circumstances, dealing with the power to grant interim injunction under Order XXXIX Rule 1 and 2 read with Section 151 of the CPC. The impugned order directed the Defendants to release the amount and it was held that it could not have been done as the suit was in the nature of money decree.

It is now settled position that while exercising power under Section 9 of the Arbitration Act, the Court shall not be strictly bound by the CPC and since there is specific power conferred upon the Court to grant such interim measures for protection, reservation of the subject matter of the arbitration agreement, the decision deserve to be distinguished as against the power under Section 9 of the Arbitration and Conciliation Act. Similar is the case relied upon by the learned counsel of the Single Judge of this Court in Spice Digital Ltd. (*supra*) when the Court was dealing with the application filed under Section 17 before the Arbitral Tribunal.

28] In the wake of aforesaid legal scenario, I must now examine whether the Petitioner deserve the relief in terms of prayer clause (a) or (b) by applying the aforesaid parameters.

When the Letter of Appointment which has been construed by

the parties as an Agreement/MoU reached between them is perused, it is evident that the services of the Petitioners were engaged as an Architect which included the professional services related to architectural work of Planning, Designing, Working on Drawings etc. and professional fees was agreed in terms of the scope of the work on the estimated built up area or under the actual built up area whichever is higher. The fees to be paid towards the professional services was to be paid depending upon the stage of the work, with the specifications being mentioned in the Letter of Appointment itself. Clause 5 clearly stipulated that the bill shall be paid within 30 days on its receipt and not only this, 15% interest was also agreed upon the dues remaining outstanding, thereafter. Liberty was also conferred upon the Petitioners to suspend the rendering of the services if the dues remained unpaid for more than 60 days.

Apart from the prevailing fees agreed, fees towards additional services was separately carved out in Annexure A.

29] The Letter of Appointment contain a clause in the form of Clause No. 13, where the Petitioners were assured of the fees in a contingency when Respondents decide to sell or grant development rights to any other person and the liability to pay full dues was taken on themselves, irrespective of the stage of development and quantum of

services rendered by the Petitioner.

The case of the Petitioners specifically pleaded in the Petition unequivocally state that running bills for the services rendered were raised from time to time by the Petitioners and necessary NOCs as well as IOD was also obtained. A specific statement is made that the Petitioner rendered architectural services with respect to Planning, Design and Preparing Drawings/Plans etc. for the purpose of project and raised running account bills which were duly acknowledged by Respondent Nos.1 and 2 . Part payments were made pursuant thereto and in the last bill dated 22.12.2020, forwarded alongwith running account bill, entire details were forwarded to the Respondents. The bills, however, remained unpaid, despite the Petitioners performing their part of obligation, under the Letter of Appointment by rendering substantial services to the Project. The Petitioners raised demand of Rs.1,03,54,759/- due and payable towards prevailing services rendered and from the correspondence that has been placed alongwith the Petition, the Respondent Nos.1 and 2 informed the Petitioners that the amount of outstanding fees would be paid by the new Developer and copy of the communications are placed on record in the form of Exhibit Q and R, but the amount due and payable did not come to the Petitioner and remain unpaid even till date. Since there is no denial from the Respondents about the bills raised and despite several

concessions offered by the Petitioner, the payments are not received, either from Respondent Nos.1 and 2 or from the newly appointed Developer, as it was intimated to the Petitioners that the Developer will clear the dues.

Thus, from the pleadings in the Petition, which are not traversed, it is evident that there is practically no defence to the paybility of the amount and since Respondent Nos.1 and 2 have already appointed new Developer through whom work is likely to be carried out, and on being satisfied that the prima-facie case exist in favour of the Petitioners and balance of convenience also lies in their favour and irreparable loss would be caused to them if the amount is not secured by directing it to be deposited towards the fees due and payable in terms of the Letter of Appointment, in absence of any denial that the amount is not payable, I deem it appropriate to grant relief, pending the commencement of the arbitration proceedings to be initiated within the period of 90 days from today.

As far as prayer clauses (c) and (d) are concerned, I am not intending to stall the Project of Respondent Nos.1 and 2 and they may proceed with the Project with the aid of new Architect being appointed i.e. Respondent No.3.

Hence, following order:-

O R D E R

a] Arbitration Petition is partly allowed.

b] Respondent Nos.1 and 2 are directed to deposit in this Court, 50% of the amount mentioned in prayer clause (a) of the Petition, being Rs.3,39,76,770/- (Rs.Three Crores Thirty Nine Lakhs Seventy Six Thousand Seven Hundred Seventy Only) as admitted fees payable under the Letter of Appointment, as per the particulars set out in the Petition and the remaining 50% of the above amount, by furnishing solvent surety, to the satisfaction of the Registrar of this Court.

c] The aforesaid deposit of 50% of the amount claimed in prayer clause (a) and furnishing of surety for the balance 50% of the amount, shall be made within a period of 8 weeks from today.

d] The Petitioners are at liberty to seek appropriate relief from the arbitral tribunal, once the proceedings are initiated as the relief granted by way of interim measure will have a limited life till the arbitration is invoked.

[BHARATI DANGRE, J]