HIGH COURT OF DELHI

CORAM: HON'BLE MR. JUSTICE SANJEEV SACHDEVA

HON'BLE MR. JUSTICE MANOJ JAIN

Date of Decision: 06th March 2024

FAO (OS) (COMM) 213/2022 & C.M. APPL. 38181/2022

SHANGHAI ELECTRIC GROUP CO. LTD. …… Appellant

Versus

RELIANCE INFRASTRUCTURE LTD …… Respondent

Legislation:

Arbitration and Conciliation Act, 1996 (Sections 9, 17, 36, 37, 44-49)

Section 13 and 44A, Order 38 Rule 5 of the Code of Civil Procedure, 1908

Subject: Commercial arbitration appeal involving disputes over equipment supply and service contracts for the Sasan UMPP, with an underlying issue of securing due payment post-award through interim measures.

Headnotes:

Civil Law – Arbitration – Interim Measures – In the case of Shanghai Electric Group Co. Ltd. Versus Reliance Infrastructure Ltd., the Delhi High Court examined the issue of granting interim measures under Section 9 of the Arbitration and Conciliation Act, 1996, in the context of an international commercial arbitration. The Court considered the enforceability of a foreign arbitral award and the interim protection of assets for securing the award amount. [Para 1-87]

Interim Measures for Foreign Arbitral Awards – Upheld – The Court held that interim measures can be sought under Section 9 of the Arbitration Act even after the making of an arbitral award, until it is enforced in accordance with Section 36 for domestic awards and Sections 44 to 49 for foreign awards. This was to ensure that the assets against which the award is to be enforced are preserved. [Para 74-81]

Jurisdiction – Determination – The Court found that it had jurisdiction under Section 9 of the Arbitration Act based on the location of assets in Delhi. It was determined that the situs of the assets was a key factor for maintaining a petition under Section 9 of the Arbitration Act, even in cases of international commercial arbitration. [Para 24-37]

Financial Condition of Respondent – Consideration – The Court considered the financial condition of Reliance Infrastructure and the previous assurances given to the court regarding the preservation of assets. It was observed that the Respondent's failure to provide a satisfactory assurance regarding the availability of assets to satisfy the arbitral award necessitated the grant of interim measures. [Para 67-70, 72-73]

Order – Restraint on Asset Alienation – The High Court ordered Reliance Infrastructure Ltd. To refrain from selling, alienating, transferring, or encumbering its assets amounting to US$ 135,320,728.42, ensuring the enforceability of the arbitral award. The restraint was subject to any existing charge on the assets created in favor of banks or financial institutions. [Para 85-86]

Decision – Dismissal of Cross Objections – The cross objections raised by Reliance Infrastructure concerning jurisdiction and the applicability of Section 9 of the Arbitration Act were dismissed by the Court. [Para 87]

Referred Cases:

- Big Charter Private Limited v. Ezen Aviation Pty. Ltd. & Ors. (2020)
- Trammo DMCC v. Nagarjuna Fertilizers and Chemicals Ltd., 2017 SCC Online Bom 8676

Representing Advocates:

For the Appellant: Mr. Rajiv Nayyar, Mr. Dayan Krishnan, Mr. Ketan Gaur, Mr. Aayush Mitruka, Mr. Abhinav Srivastava, Ms. Pragya Prakash, Ms. Presksha Gupta

For the Respondents: Mr. Sandeep Sethi, Mr. Parag Tripathi, Mr. Vijayendra Pratap Singh, Mr. Aditya Ganju, Mr. Aditya Vikram Jalan, Mr. Asif Ahmed, Ms. Shruti Garg, Mr. Akash Ray, Ms. Shreya Choudhary, Mr. Arjit Oswal

JUDGMENT

SANJEEV SACHDEVA, J.

1. Appellant- Shanghai Electric Group Co. Ltd (hereinafter referred to also as *Shanghai Electric*) by way of this Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "*Arbitration Act*") impugns judgment dated 19.07.2022, whereby petition filed by it under Section 9 of the Arbitration Act was dismissed.

2. Appellant filed the petition seeking urgent interim reliefs, *inter alia,* to secure the amount in dispute in arbitration (i.e., approx. INR 1100 Crores) that was allegedly due and payable to the Appellant by the Respondent– Reliance Infrastructure Ltd (hereinafter referred to also as *Reliance Infrastructure*) under guaranteed letter dated 26.06.2008, issued by the Respondent to the Appellant. Appellant filed the Petition contending that the Arbitral Award when passed would be incapable of execution in absence of any interim protection.

3. Learned Single Judge of this Court has dismissed Appellant‟s Petition holding that the concerns raised by Appellantover Respondent‟s financial situation and resources, was a highly contentious issue. The relief sought (i.e. an order to secure the sum sought before the rendering of an Arbitral Award) is comparable and akin to the type of relief sought under Order 38 Rule 5 of the Code of Civil Procedure, 1908 (i.e., attachment before judgment). It has been held that there is nothing to support the assertion that any asset sales were

being made with the aim of keeping Appellantfrom receiving the benefits of the award it was pursuing.

4. It has been further held that in order to obtain the reliefs, Appellants must*inter alia*demonstrate a *prima facie* case or crystallization of debt due, supported by substantial evidence, and prove the suspicion that Respondent was trying to remove, sell or dissipate the assets with the objective of defeating the Arbitral Award that may be passed.

5. Appellant- *Shanghai Electric*is engaged in the business of *inter alia,*supplying equipment and services relating to the design, engineering and manufacturing, installation of the main body of turbines and generators and the supervision of erection and commissioning of boilers, turbines and generators, including associated accessories and spare parts.

6. Respondent -*Reliance Infrastructure* is engaged in the business of *inter alia,* operating and carrying out engineering, procurement and construction services for various power projects, including thermal power plants.

7. On 20.05.2008Appellant and Respondent entered into a Framework Agreement for Long Term Strategic Cooperation for various power generation (Framework Agreement) including the ultra-mega power project (UMPP) at Sasan, Madhya Pradesh (hereinafter referred to as "*Sasan UMPP*").

8. Appellant and a wholly owned subsidiary of the Respondent i.e. Reliance Infra Projects (UK) Limited (hereinafter referred as "*Reliance UK*") entered into an Equipment Supply and Service Contract dated 26.06.2008 (hereinafter referred to as "Supply Contract") under which, *Shanghai Electric* was engaged as the contractor to *inter alia,* supply equipment, erect the main body of the turbines and generators and provide supervision services to *Reliance UK* in relation to erection and commission of six units of boilers, turbines and generators, including associated accessories and spare parts for the six units of *Sasan UMPP*.

9. According to the Supply Contract, *Reliance UK* was obliged, *inter alia,* to pay SEGCL a lump sum contract price of US $1,311,000,000 (approx. INR 9461 crores), which comprised the equipment supply price of US dollars 1,286,000,000 (approx. INR 9,475 crores) and service price of US dollars 25,000,000 (approx. INR 184 crores).

10. Respondent*Reliance Infrastructure* being the parent company of *Reliance UK*, issued a Guarantee Letter dated 26.06.2008 (hereinafter referred to as "*Guarantee Letter*") to Appellant - *Shanghai Electric* to secure the performance and payment obligations of *Reliance UK*.

11. In compliance of the terms of the Contract, *Shanghai Electric* submitted the Contract Performance Guarantee and Advance Bank Guarantee to *Reliance Infrastructure* and received the first 5% of the contract price on 24.07.2008.

12. As per the Appellant, *Shanghai Electric, Sasan UMPP* was commissioned on 30.03.2015, and last consignment of spare parts were delivered on 23.11.2017, however, Appellantwas not paid its dues under the Supply Contract. As per the Appellantan amount of USD 135,320,728.42 (approx. INR 995 Crores) was due under the Supply Contract.

13. On the alleged failure of *Reliance Infrastructure* and *Reliance UK* to make the payments under the Supply Contract, a notice of dispute dated 23.08.2019, under the Guarantee Letter was issued to Respondent- *Reliance Infrastructure* seeking, *inter alia,* compliance of its payment obligations under the Guarantee Letter and curing the breach of obligations of *Reliance UK*, and making a payment of sums owed by *Reliance UK* to *Shanghai Electric* within 60 days from the receipt of the notice.

14. On failure of *Reliance Infrastructure* to comply with the notice of dispute, Appellant*Shanghai Electric* on 13.12.2019 issued a notice invoking arbitration under the Guarantee Letter.The dispute was referred to the Arbitration Singapore International Arbitration Centre.

15. In the meantime, Appellant filed the subject Petition under Section 9 of the Arbitration Act *inter alia* seeking a direction to the Respondent*Reliance Infrastructure* to furnish security by depositing the claim amount of USD 135,320,728.42. It is contended in the Petition that Appellants apprehending and anticipate non-compliance and non-fulfilment of the Arbitral Award that was likely to be passed. It is contended that there is a hurried dissipation of the assets by the Respondent for the purpose of depriving the Appellant of the fruits of the Arbitral Award.

16. It is contended that Respondents have *inter alia*entered into a binding agreement on 28.07.2020 for sale of its entire 74% stake in its subsidiary *viz.* M/s. Parbati Koldam Transmission Company Limited; sold its 51% stake each in BSES Rajdhani Power Ltd. and BSES Yamuna Power Ltd.; is in

advance stages of completing the sale of its Delhi-Agra toll road to Singapore based Cube Highways and Infrastructure for INR. 3,600 Crores and *Reliance Infrastructure* Statutory Auditors have raised serious concerns regarding its fast deteriorating financial health and ability to continue as a "going concern".

17. As noticed hereinabove, learned Single Judge has dismissed the petition under Section 9 of the Arbitration Act *inter alia* holding that the concerns raised by the Appellant over Respondent‟s financial situation and resources, is a highly contentious issue. It was further held that in order to obtain the pleaded reliefs, Appellant must*inter alia*demonstrate a *prima facie* case or crystallization of debt due, supported by substantial evidence, and prove the suspicion that Respondent is trying to remove, sell or dissipate the assets with the objective of defeating the Arbitral Award that may be passed.

18. *Reliance Infrastructure* has also filed cross objections under Order XLI rule 22 (C.M. Appl. 38181 of 2022) impugning the Impugned Judgment dated 19.07.2022 whereby the objection raised by the Respondent with regard to jurisdiction was rejected.

19. In the Cross objections, Respondent has objected to the impugned judgment and raised the following objections:

"A. That this Hon‟ble Court does not have jurisdiction inasmuch as it is not the proper „court‟ under Section 2(1)(e) of the Act; no jurisdiction has been provided to this Hon‟ble Court under the purported Guarantee Letter; and no cause of action had arisen before this Hon‟ble Court.

B. That the Ld. Single Judge failed to appreciate that the Appellant has an efficacious remedy before the Arbitral Tribunal and therefore, the Petition was not maintainable in terms of Section9(3) of the Act.

C. The Ld. Single Judge‟s finding on the issue of applicability/exclusion of Section 9 of the Act in terms of proviso to Section 2(2)of the Act, is erroneous.

D. That the Ld. Single Judge failed to appreciate that the purported Guarantee Letter was liable to be impounded by this Hon‟ble Court"

20. We may note that pending these proceedings Final Award has been rendered by the Arbitral Tribunal constituted by the Singapore International Arbitration Centre on 08.12.2022 *inter alia* awarding a sum of USD 122,232,275.03

besides pre award interest of USD 20,401,706.29 and legal costs, expenses & disbursements of USD 3,675,257.95 in favour of the Appellant – *Shanghai Electric* against the Respondent – *Reliance Infrastructure*.

21. Respondent applied for setting aside of the Final Award dated 08.12.2022 before the Singapore International Commercial Court of the Republic of Singapore by filing the Originating Application 01 of 2023. Said application for setting aside of the award has been dismissed by Judgment dated 31.01.2024.

22. Before adverting to the merits of the Appeal, since cross objections have been raised by the Respondent relating to jurisdiction, we propose to deal with the cross objections first.

23. The first objection raised in that this Court does not have jurisdiction as itis not the proper „court‟ under Section 2(1)(e) of the Arbitration Act and no cause of action had arisen before this Hon‟ble Court.

24. Appellants had filed the Petition under Section 9 seeking interim measures on the ground of location of assets of *Reliance* Infrastructure in Delhi.

25. The learned Single judge has rejected the objection by holding as under:

"74. SEGCL contends that the jurisdiction of this Court under Section 9 of the Act can be made out on the basis of the location of assets. ***RELIANCE*** *controverts this on the ground that the same is beyond the provisions of the Act. Even otherwise, it is only in very rare circumstances- where an award has already been passed and the intent under Section 9 is to secure its enforcement-that the location of assets has been considered.*

75. In the present case, neither has any arbitral award been passed, nor has the question of enforcement arisen; however, this does not mean that a party cannot invoke jurisdiction under Section 9 on the basis of the location of assets.

76. Further, the legislature has permitted a party holding a foreign award to invoke Section 9 as well as Sections 47 to 49 to enforce a foreign award.For such enforcement, in terms of the explanation to Section 47, a "Court" is defined as having „original jurisdiction to decide question(s) forming the subject-matter of an arbitral award, if the same had been the subject-matter ofa suit on its original civil jurisdiction The

Bombay High Court in ***Trammo DMCC v. Nagarjuna Fertilizers and Chemicals Ltd., 2017 SCC Online Bom 8676*** *examined the principle of contextual interpretation under Section 2(l)(e)(ii) to hold that "Court", as defined in the explanation to Section 47, would be the appropriate court when a petitioner is seeking interim relief(s) under Section 9, pending enforcement of a foreign award, the relevant portion of the said judgment reads as under:*

" 19. Now the question remains is „whether Section 2(1)(e)(ii) when itdefines "court" to mean the High Court having jurisdiction to decide the question forming the subject matter of the arbitration would create any impediment preventing the petitioner to invoke Section 9 before this Court. Inmy opinion, a cumulative reading of the amended provisions would not create such a hurdle for the petitioner to invoke the jurisdiction of this Court and maintain this petition. The reason being that Section 2 the definition clause begins with the words " In this Part, unless the context otherwise requires-The definition of "Court" as contained in Section 2(1)(e)(ii), in the present context would create a incongruity to enforce the provisions Section 9 of the Act as made applicable by the 2015 Amendment Act. This inasmuch as the petitioner would be prevented to seek interim measures in enforcing the money award, when the money is lying within the territorial jurisdiction of the Courts only for the reason that it is not the subject matter of arbitration.This is opposed to the plain and clear intention of the legislature as incorporated by the 2015 Amendment Act as noted above. It cannot be conceived that on the one hand the legislature permits a party holding a foreign award to invoke Section 9 of the Act and further permit invoking of the provisions of Sections 47 to 49 of the Act to enforce the foreign awards,and for that matter to approach the appropriate court having jurisdiction to decide the question forming the subject matter of arbitral award, as if the same had been the subject matter of the suit as the explanation to Section 47would provide. However, on the other hand at the same time, when it comes to adopting proceedings under Section 9 to secure the sums awarded being the money to secure the award is available within the jurisdiction of the Court, it would render the Court lacking such jurisdiction by application of Section 2(1)(e)(ii). This is surety not the intention of the

legislature. Any interpretation which would defeat the intention of the legislature is required to be avoided. Thus,in my opinion, considering the amended provisions and in the facts of the present case when the petitioner is holding a foreignaward and when the money is available within the jurisdiction of this Court as contained in the Bank accounts of the Respondent at Mumbai, the principles of "contextual interpretation" of Section 2(1)(e)(ii) would be required to be adopted considering the opening words of Section 2(1) "Inthis Part, unless the context otherwise requires—" and adverting to this principle of interpretation it would be required to be held that the "Court" as defined under the explanation to Section 47, would be the appropriate court when the petitioner is seeking interim reliefs under Section 9 of the Act pending the enforcement of the foreign award."[Emphasis Supplied]

Although in Trammo DMCC, the Section 9 application was filed post-award,its ratio would still be applicable even to a petition that has been filed seeking interim reliefs at the pre-award stage.

77. Thus, in light of the original jurisdiction exercisable by the Court, the location of assets to satisfy the resultant foreign award, can indeed come into play when taking recourse to proceedings under Section 9."

26. The learned single judge relying upon the judgment in *Trammco DMCC (Supra)* has held that the location of the asset against which an enforcement is sought would confer jurisdiction to the court within whose territorial jurisdiction the asset is situated.

27. We are in complete agreement with the view taken by the learned single judge that the *situs* of the asset would be the determinative factor for maintain a petition under Section 9 of the Arbitration Act.

28. It may also be noted that at the time when the Impugned Judgment was passed, the Arbitration proceedings were still pending and the learned single judge noted the factual distinction that *Trammco DMCC (supra)* was a post-award case and the subject case was pre award. However, that distinction is no longer relevant as in the present case also the award has already been

rendered by the Arbitral Tribunal and even objections to the award have been dismissed.

29. The second objection raised in the Cross objections is that the Appellant has an efficacious remedy before the Arbitral Tribunal and therefore, the Petition was not maintainable in terms of Section 9(3) of the Act. This objection is premised on the ground that the Arbitral Tribunal had already been constituted.

30. The learned single judge has noticed that it would not be efficacious for the Appellant to obtain an order of interim protection from the Arbitral Tribunal as such an order, even if granted, would not be directly enforceable by the Courts in India and unlike Section 17(2), there was no corresponding provision under the Act for enforcement of interim orders passed by a foreign tribunal. The Act only contemplated enforcement of foreign awards and not foreign interim orders passed by the Arbitral Tribunal.

31. The learned single judge held and rightly so, that the jurisdiction of this court in not is not automatically ousted on the constitution of the Arbitral Tribunal. In such an event, the Court is required to examine whether the applicant demonstrates that it does not have an “efficacious remedy” before the Tribunal.

32. The learned single judge relied upon the decision in *Big Charter Private Limited v. Ezen Aviation Pty. Ltd. & Ors. (2020) SCC Online Del 1713* wherein relying upon the observations of the Law Commission, the court held that party seeking pre arbitral interim injunction, would have to obtain an interim order from the foreign Court, or the arbitral tribunal situated abroad, and, thereafter, to file a civil suit to enforce the right created by such interim order which,otherwise, would not be directly enforceable by way of an execution petition, as it would not qualify us a “judgment” or “decree”, for the purposes of Section 13 and 44A of the CPC. Similarly, disobedience, by the party against whom an injunction maybe obtained from a foreign Court, would also require the applicant seeking injunction to initiate contempt proceedings in the foreign Court and thereafter, enforce the judgment of the foreign Court under Section 13 and 44A of the CPC. These reliefsare likely to be more chimerical than substantial.

33. The learned single judge has thereafter referred to the fact that in the present case the Arbitral Tribunal was constituted and UNCITRAL rules applied and Rule 26 of UNCITRAL provides for a remedy to seek interim measures, including preserving of assets out of which a subsequent award may be satisfied.

34. The learned single judge has further held that foreign interim orders cannot be enforced directly and in the present case, the arbitration was based on UNCITRAL Law, which permitted parties to approach the Courts for interim relief – which meant courts other than those of Singapore. Further that the Appellants could not approach the seat court (in this case,Singapore), as there was no provision for execution of an interim order passed by a foreign court under the Code of Civil Procedure (which contemplates for execution of foreign decrees under Section 13 read with Section 44A). It has further been held that the attachment of the assets and properties, including Bank guarantees and directions to third-parties couldonly be granted by a court of competent jurisdiction in India, and not by the Arbitral Tribunal or a foreign court.

35. We are in agreement with the view taken by the learned single judge. The Asset against which enforcement is sought are situated in Delhi and the orders for preservation of the said assets can be passed by the Courts at Delhi. In any event the execution of the award can be sought before the court where the asset is situated and in the instant case, it is an admitted position that some of the assets of *Reliance Infrastructure* are situated in Delhi.

36. Though it was contended on behalf of the Respondent that Respondent merely held shares in BSES Yamuna Power Ltd. and BSES Rajdhani Power Ltd, and as such it could not be said that the assets were held in Delhi, however there is no merit in the said submission as admittedly both the companies have their registered offices in Delhi and even as per the Respondent its shareholding in the said companies is more that the arbitral claim amount.

37. Accordingly, there is no merit in the said cross objection.

38. The third objection raised by the Respondent is that applicability of Section 9 of the Arbitration Act was excluded in terms of proviso to Section 2(2) of the Arbitration Act.

39. Reference may be had to Section 2(2) of the Arbitration Act which reads as under:

"(2) This Part shall apply where the place of arbitration is in India:

Provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and clause (a) of sub-Section (1) and sub-Section (3) of Section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act. "

40. Proviso to Section 2(2) of the Arbitration Act specifically provides that provision of Section 9 shall apply to International Commercial Arbitration unless there is a agreement to the contrary. The contention of the Objector is that having agreed to a foreign seated institutional arbitration and agreeing to applicability of English Law, the parties agreed to exclude applicability of Section 9.

41. This argument is to be rejected for the asking. The fact that the proviso specifically makes the provision of Section 9 applicable to international commercial arbitration presupposes that parties would have agreed to a foreign seated arbitration. If parties do not agree to a foreign seated arbitration, there would be no international commercial arbitration, the arbitration would be a domestic arbitration.

42. There is no express exclusion pleaded by the Respondent, the exclusion is pleaded on the ground that parties agreed to a foreign seated arbitration and the applicability of English Law. As noted above, a petition for enforcement would lie where the asset is situated and as such a petition for interim protection of the asset would also lie where the asset is situated.

43. The last cross objection raised in that the Guarantee Letter was liable to be impounded as it was not sufficiently stamped.

44. There is no merit in this objection also for the reason, that the Appellant are not seeking any action on the Guarantee Letter but are seeking interim measures for preservation of assets so that the award when pronounced can be enforced.

45. The guarantee letter is subject matter of the arbitral proceedings. As noticed hereinabove the Arbitral Tribunal has already passed an award in favour of the Appellants. Now the issue is with regard to the preservation of assets so that the assets are available for enforcement of the award.

46. For appreciating as to whether Appellant is entitled to an order of interim measure thereby directing Respondent *Reliance Infrastructure* to furnish security by depositing the claim amount of USD 135,320,728.42, it would be expedient to refer to some orders passed by the learned single judge as also by this court.

47. On 24.12.2020, when the Petition under Section 9 of the Arbitration Act was listed before the learned single judge and at the request of learned senior counsel for the Respondent case was adjourned to 19.01.2021.

48. On 19.01.2021 the Petition was adjourned to 27.01.2021 for arguments on maintainability. On 19.01.2021, learned single judge directed that till the next date Respondents shall maintain status quo regarding its shareholding in BSES Yamuna Limited and BSES Rajdhani Limited.

49. As per the Appellants an assurance was given by the counsel for the Respondents to the court on 24.12.2020 that it would not create any further third party rights in its assets valued at Rs. 995 Crores. This was disputed by the Respondents and as such the Petition was listed on 25.01.2021, before the court that had heard the Petition on 24.12.2020.

50. On 25.01.2021, learned single judge was pleased to pass the following order:

> *"Present petition has been listed before this Court pursuant to an order passed by the Roaster Bench on 15.01.2021, as it appears the that parties were at divergence in respect of the assurance given on behalf of the Respondent to this Court on 24.12.2020.*
>
> *Ld. Senior counsel for the Respondent reiterated that the Respondent had assured this Court on 24.12.2020 that till the next date, the Respondent will not create any further third party rights in its assets valued at Rs. 995 Crores, which assets will be available for appropriate orders being passed by this Court in case the need so arises*

In view of the aforesaid submissions of the Ld. Senior counsel for the Respondent, no further orders are called for…

List matter before Roaster Bench on the date already fixed, i.e., 27.01.2021"

51. On 27.01.2021, when the matter was listed before the Roster Bench, the learned Judge, referring to the order dated 25.01.2021*inter alia* directed as under:

" *******

Under these circumstances, let a responsible officer of the Respondent company file details of all its assets, whether incumbered or unincumbered, whether part of any litigation or not a part of any litigation with complete details of charge or hypothecation etc., at least two days before the next date of hearing with a copy to the other side. This is to be done without prejudice to the objections regarding jurisdiction and maintainability taken at the outset by the Respondent.

*********"

52. On 22.02.2021, an affidavit was filed on behalf of the Respondent in terms of order dated 27.01.2021 stating that all the assets of the Respondent were already encumbered.

53. On 27.04.2021, an early hearing application was filed by the Appellants contending that the Respondents had sold its entire shareholding in three of its prime assets and that the same was in violation of the assurance given to the Court.

54. Thereafter, by the impugned judgment dated 19.07.2022, the Petition filed by the Appellants has been dismissed holding that

"84. There are intricate questions of fact in respect of the legality, validity and authenticity of the Guarantee Letter - which is being relied upon by SEGCL to contend that RELIANCE undertook to secure the obligations of Reliance UK under the Contract. Thus, given that the liability of Reliance UK and RELIANCE under the Guarantee Letter is highly disputed and contested,and further, since RELIANCE has raised counter-claims, the Court cannot consider the claim of SEGCL to be

„admitted" or only „superficially denied".The claims of SEGCL are presently being adjudicated and liability is yet to be ascertained, and thus, in view of contentious issues raised by RELIANCE, at this stage, no prima facie case is made out for proceeding against the assets of RELIANCE or grant such other interim injunctive relief to secure SEGCL"s claim, pending the decision of the Arbitral Tribunal.

85. *As regards the apprehensions expressed by SEGCL qua the financial status and wherewithal of RELIANCE, again, the Court finds the same to be a highly contentious issue.The nature of relief claimed by SEGCL (viz. an orderfor securing the amount claimed prior to the passing of an arbitral award), has been held to be analogous with the nature of relief provided under Order XXXVII Rule 5 of the Code of Civil Procedure (i.e., attachment before judgment). There is no material on record to conclude that any sale of assets is being done with the intent to deny the fruits of the award that SEGCL is pursuing. To obtain the reliefs sought, SEGCL must inter alia establish a prima facie case or crystallisation of debt due, validated with cogent material,to substantiate the apprehension that RELIANCE is attempting to remove or dispose of the assets "with the intention of defeating the decree/ award that may be passed."*

86. *That said, RELIANCE"S financial condition alone cannot be reason to justify a relief of attachment before judgment. Not every disposal of assets would justify the grant of interim measures under Section 9. In its reply, RELIANCE provided an explanation of every transaction carried out to "reduce debt", and not to "defeat any award", the sale proceeds whereof, are statedly being used to pay off the lenders.*

87. *There is another reason for declining the relief. Court had listed the matter for clarifications on 13th July, 2022, wherein it had inquired from the parties the status of arbitral proceedings. To this, Mr. Sandeep Sethi, Senior Counsel for RELIANCE, stated that submissions were filed 21st December,2021 and oral arguments stood completed on 21st January, 2022. Further, on 03rd May, 2022 the parties were intimated by the Arbitral Tribunal that it was at the final deliberation stage, which was progressing well. Parties were also asked to exchange submissions qua interest and costs, which stood*

complete as of 10th June, 2022. As it stands, only the award of the Arbitral Tribunal is awaited.

88. *All throughout the pendency of the proceedings, nothing has been shown to have transpired, which would compel the Court to grant the relief of restraint upon the dissipation of RELIANCE"S assets. Although Mr. Ketan Gaur,counsel for SEGCL, has submitted that RELIANCE has disposed of 100% of its shareholding in „Utility Infrastructure & Works Pvt. Ltd."; however, Mr. Sethi clarifies that the said company was not part of the restraining order. He further submits that RELIANCE still has its stakes in BSES Yamuna Power Ltd. AndBSES Rajdhani Power Ltd, which alone account for more than the arbitral claim amount, thereby reassuring the Court and SEGCL that it was in no way trying to fraudulently defeat/ frustrate the award. Further, prima facie, noclandestine alienation of assets (i.e., shareholding in companies) can be apprehended, considering the fact that sale of shares is normally under transparent transactions-which are well regulated and are in public domain.Moreover, SEGCL has not shown any cogent material to buttress its allegation as well.*

89. *For the foregoing reasons, no prima facie case, balance of convenience and irretrievable harm or injury has been demonstrated in favour of SEGCL. The Court is thus, not inclined to grant the reliefs prayed for."*

55. When the Appeal was listed before us on 16.11.2022, it was submitted on behalf of the Respondents, that it had sufficient assets to satisfy the award in case it was passed in favour of the Appellants. Respondents were accordingly directed to file an affidavit.

56. An affidavit dated 28.11.2022 was filed by the Respondent pursuant to order dated 16.11.2022, wherein it was stated as under:

"2. That as on the date of filing of the present Affidavit, all assets of the Respondent are encumbered, and lenders hold first paripasu charge on the assets of the Respondent.

3. Previously, the Charge IDs of all the charges had been disclosed in the Affidavit filed before the Ld. Single Judge[refer:

Annexure A-53@pg. 1726 of the Appeal]. From the List of Assets attached to the said Affidavit, it is evident that a under a particular Charge ID, multiple assets are covered.

4. That as per the audited financial statements for the year 2021-2022, as on 31.03.2022 the cumulative value of borrowing from secured creditors (who hold the charge against the assets of the Respondent) stood at only INR 3214 crore approx. [refer: Annexure A-63 at Note 17, pg. 2545 of Documents filed with Appeal]. Further, the Total Assets of the Respondent as on 31.03.2022 were around INR20,039 crore,while the Total Liabilities were around INR 9898 crore and the Net Worth was around INR 9493 crore. [refer: AnnexureA-63,Pg. 2577 of Documents filed with Appeal].

5. That as per the Statement of Unaudited Financial Results as on 30.09.2022 of the Respondent, which have been recently submitted to National Stock Exchange and Bombay Stock Exchange on 11.11.2022, following are some of the key financial indicators:

i. the standalone Total Assets of the Respondent area around INR 20,029 crore; while the standalone Total Liabilities of the Respondent are around INR 10,087crore [refer: Annexure B page 16];

ii. the standalone Net Worth of the Respondent (i.e., value of assets reduced by the value of liabilities, which is calculated after some adjustments) is around INR 9285crore [refer: Annexure B page 20]; and

iii. the value of consolidated Total Assets of the Respondent"s Group is around INR 64,207 crore; while the consolidated Total Liabilities of the Group is around INR 47,845 crore [refer: Annexure B page 32]."

57. On 29.11.2022, it was noticed that in the affidavit that there was once again no commitment given by the Respondents that in case an award was passed in favour of the Appellants, there would be assets available for execution of the award.Learned Senior Counsel for the Respondent took time to take instruction.

58. Thereafter when the appeal was listed on 21.12.2022, it was pointed out by learned counsel for the Appellant that the Arbitral Tribunal had rendered the award in favour of the Appellants. Learned Senior Counsel for the Appellant, without prejudice,submitted that *"in view of the fact that Respondent has contended that all its assets were encumbered with Bank/Financial Institution, in case of sale of any assets the sale proceeds left, after discharge of the liability to the secured creditor, be secured towards the discharge of the awarded amount."*

59. Learned Senior Counsel for the Respondents took time to take instructions. However, the offer of the Appellants for creation of a second charge for satisfaction of the decree was not accepted.

60. As noticed hereinabove, the Learned Single Judge by the impugned order dated 19.07.2022 has declined the grant of interim protection. The rationale given by the learned single judge in the impugned order for not directing the Respondents to furnish a security is primarily that there are intricate questions of fact in respect of the legality, validity and authenticity of the Guarantee Letter and that the liability of *Reliance UK* and *Reliance Infrastructure* under the Guarantee Letter is highly disputed and contested, and further that *Reliance Infrastructure* had raised counter-claims and as such the claims of the Appellant, could not be considered to be „admitted" or only „superficially denied". The Claims of the Appellant were yet to be ascertained and in view of contentious issues raised by *Reliance Infrastructure*, no prima facie case was made out.

61. Further, learned single judge opined that the apprehensions expressed by Appellant qua the financial status and wherewithal of *Reliance Infrastructure*, was a highly contentious issue. There was no material on record to conclude that any sale of assets was being done with the intent to deny the fruits of the award that Appellant was pursuing.

62. Learned Single Judge held that to obtain the reliefs"Appellant must establish a *prima facie* case or crystallisation of debt due and it must substantiate the apprehension that Respondent was attempting to remove or dispose of the assets *"with the intention of defeating the decree/ award that may be passed."*

63. Learned Single Judge further held that Respondent‟s financial condition alone could not be reason to justify a relief of attachment before judgment. Not every disposal of assets would justify the grant of interim measures under Section 9. Learned Single Judge was of the opinion that Respondent had provided an explanation of every transaction carried out to “reduce debt”, and not to “defeat any award”, the sale proceeds whereof, are statedly being used to pay off the lenders.

64. As noticed hereinabove, learned Single Judge has dismissed the

Petition under Section 9 of the Arbitration Act holding that the concerns raised by Appellant over Respondent‟s financial situation and resources, was a highly contentious issue and there was nothing to support the assertion that any asset sales were being made with the aim of keeping Appellant from receiving the benefits of the award it was pursuing. Further that Appellants had to *inter alia* demonstrate a *prima facie* case or crystallization of debt due, supported by substantial evidence, and prove the suspicion that Respondent was trying to remove, sell or dissipate the assets with the objective of defeating the Arbitral Award that may be passed.

65. The need to demonstrate a prima facie or crystallization of debt due does not arise any further because Final Award has been rendered by the Arbitral Tribunal constituted by the Singapore International Arbitration Centre on 08.12.2022 *inter alia* awarding a sum of USD 122,232,275.03 besides pre award interest of USD 20,401,706.29 and legal costs, expenses & disbursements of USD 3,675,257.95 in favour of the Appellant – *Shanghai Electric* against the Respondent – *Reliance Infrastructure*. Further, the application filed by the

Respondent for setting aside of the Final Award before the Singapore International Commercial Court of the Republic of Singapore by filing the Originating Application 01 of 2023has been dismissed by Judgment dated 31.01.2024.

66. The prime reason given by the learned single judge in the impugned order for declining relief to the Appellants that they had to *inter alia* demonstrate a *prima facie* case or crystallization of debt due does not survive any further.

67. The other ground for declining relief i.e. that the Appellants had to prove the suspicion that Respondent was trying to remove, sell or dissipate the assets

is also not sustainable in the facts of the present case. Respondents gave an undertaking to the Court that they will not create an encumbrance over assets worth INR 995 Crores and said assets would be available. However, Respondents dissipated assets worth several hundred crores without the leave of the court. Further, assets were sought to be transferred.

68. Before this Court in the Appeal, on 16.11.2022, Respondents had submitted that they had sufficient assets to satisfy the award in case it was passed. Despite several opportunities to file an affidavit to affirm the above statement, the affidavit was never filed. On the contrary and affidavit was filed dated 28.11.2022 stating that all the assets of the Respondent were encumbered and the lenders held first *paripasu* charge on the assets. The affidavit further, stated that as on *"31.03.2022 the cumulative value of borrowing from secured creditors (who hold the charge against the assets of the Respondent) stood at only INR 3214 crore approx. [refer: Annexure A-63 at Note 17, pg. 2545 of Documents filed with Appeal]. Further, the Total Assets of the Respondent as on 31.03.2022 were around INR 20,039 crore, while the Total Liabilities were around INR 9898 crore and the* Net Worth was around INR 9493 crore"

69. Said affidavit further stated that *"the standalone Net Worth of the Respondent (i.e., value of assets reduced by the value of liabilities, which is calculated after some adjustments) is around INR 9285crore"*

70. In the affidavit no commitment was given by the Respondents that in case an award was passed in favour of the Appellants, there would be assets available for execution of the award. Thereafter, on 21.12.2022, a proposal was given by the Appellants that since all the assets of the Appellant were encumbered with Bank/Financial Institution, they should undertake that in case of sale of any assets the sale proceeds left, after discharge of the liability to the secured creditor, be secured towards the discharge of the awarded amount. Even, this proposal was not accepted by the Respondents.

71. Reference may be had to the Independent Auditor"s report on the standalone Financial Results of *Reliance Infrastructure* for the quarter and year ending March 31, 2021 has *inter alia* reported as under:

"Material Uncertainty related to Going Concern

We draw attention to Note 4 to the standalone financial results, wherein the Company has outstanding obligations to lenders and the Company is also a guarantor for its subsidiaries and associates whose loans have also fallen due which indicate that material uncertainty exists that may cast significant doubt on the Company"s ability continue as a going concern. However, for the reasons more fully described in the aforesaid note the accounts of the Company have been prepared as a Going Concern.

Our opinion on the standalone financial results is not modified in respect of this matter."

72. In view of the above noted facts and conduct of the Respondent not only before the learned Single Judge as also before this court, it is apparent that the statement of the Respondents that they have sufficient assets to satisfy the award if passed is not acceptable as sufficient for declining relief under Section 9 of the Arbitration Act.

73. There is also no merit in the contention of learned senior counsel for the Respondent, that in view of the Arbitral award being rendered, the Petition has become infructuous and the only remedy of the Appellant would be to purse for recognition and enforcement of the award and since the Appellant has already such a petition the appeal would not survive.

74. Reference may be had to the wording of Section 9 of the Arbitration Act, which readds as under:

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

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

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

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

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

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

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

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

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

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

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

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

75. Section 9, of the Arbitration Act permits a Party apply to a court for interim measures before, during or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Arbitration Act.

76. By virtue of proviso to Section 2(2) of the Arbitration Act, Section 9 applies to International Commercial Arbitration. Thus any party can apply to

a Court for interim measures before, during or after the making of the arbitral award.

77. The contention on behalf of the Respondents is that post the making of the award, a Petition under Section 9 of the Arbitration Act can be made till the award is enforced in accordance with Section 36 of the Arbitration Act.

78. There is no merit in the said contention. Firstly, a foreign award is not enforced in accordance with Section 36 of the Arbitration Act but is enforced in accordance with Sections 44 to 49 of the Arbitration Act.

79. Section 36 of the Arbitration Act provides for enforcement of the award in accordance with the provisions of the Code of Civil Procedure as if it were a decree of the court.

80. However, in respect of a foreign award, first there has to be a satisfaction recorded by the court that the foreign award is enforceable and then the award is deemed to be a decree of that court and then it is enforceable under Section 49 of the Arbitration Act.

81. Since Section 36 of the Arbitration Act is not applicable to foreign awards the outer limit provided by Section 9 of the Arbitration Act of *"before it is enforced in accordance with Section 36"* would not be applicable.

82. Secondly, even if one were to assume that the outer limit prescribed by Section 9 of the Arbitration Act were to apply even to proceedings seeking enforcement of foreign awards, the outer limit cannot be read as *"before filing an application seeking enforcement"*. The expression used is *"before it is enforced*". This would clearly imply till the award is fully satisfied.The word *"enforced"* is past tense of the word *"enforce"*which would implythat the enforcement has already happened and is complete.

83. If one were to give a restricted meaning as proposed by the Respondents, it would frustrate the very purpose of the foreign award. For the reason that the holder of the foreign award has to first approach the court for a recording of satisfaction that the award is enforceable and then the award would be enforced and if during this period there was no power of the court to grant interim measures, the party against whom the award is sought to be invoked, could deal with the assets to defeat the award.

84. Thus it is held that the outer limit for seeking interim measures under Section 9 of the Arbitration Act would not become applicable on mere filing of the Application seeking enforcement. There is thus no merit in the said argument raised on behalf of the Respondent, the same is accordingly rejected.

85. In view of the above, the Impugned Judgment dated 19.07.2022 is set aside to the extent that it dismisses the Petition filed by the Appellant under Section 9 of the Arbitration Act. The appeal is allowed and the Respondent *Reliance Infrastructure Ltd.* is restrained from selling, alienating, transferring or encumbering its assets, amounting to US$ 135,320,728.42. Though the awarded amount along with interest and costs works out to more than the above amount, however the order is restricted to the amount prayed for in the Petition under Section 9 of the Arbitration Act.

86. It is clarified that this restraint would be subject to any charge on the assets already created in favour of a Bank or a Financial Institution. In case of sale of an already encumbered asset by a Bank or Financial Institution, the balance, if any left, after satisfaction of the charge shall be kept in a designated account and shall not be utilized by the Respondent for any purpose and shall be subject to the outcome of the Enforcement Petition filed by the Appellant.

87. Further, in view of the above discussion, the Cross objections (C.M. Appl. 38181 of 2022)filed by the Respondents are dismissed.