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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 28.05.2025
Judgment pronounced on: 28 .08.2025

\+ **O.M.P. (I) (COMM.) 402/2024 & CCP(O) 5/2025, I.A. 582/2025, I.A. 4997/2025**

RESCOM MINERAL TRADING FZE .....Petitioner

Through: Mr. Anirudh Bhakru, Mr. Divyam Agarwal, Ms. Ananya Mago, Mr. Khitiz Jain, Mr. Rohan Chandra, Advs.

versus

RASHTRIYA ISPAT NIGAM LIMITED & ANR. ....Respondents

Through: Mr. Rajshekhar Rao, Sr. Adv. with Mr. Shravan Yammanur, Mr. Mangesh Krishna, Ms. Prachi Kaushik, Ms. Aashna Chawla, Mr. Zahid Hashmi, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

1. This is a petition filed under section 9 of the Arbitration and Conciliation Act, 1996 ("***1996 Act***") seeking the following prayers:-

"(i) Pass an order directing Respondent No. 1 to secure the Petitioner's claim by furnishing security in the form of a

cash deposit or an unconditional Bank Guarantee of a nationalized bank of an amount totaling USD 1,65,35,071.76 equivalent to INR 1,39,01,03,482.86 together with interest at 18% p.a. hereof till the realisation of its claim by the Petitioner; or

(ii) Pass an order directing status quo, attachment, preservation, interim custody, or sale of the stock of approximately 81,300 MT of freshly mined and washed blackwater soft coking coal belonging to Respondent No. I and lying/incoming at the port and harbour of Respondent No. 2; and/or

(iii) Pass an order of injunction against Respondent No. 2 and its servants and/ or agents and/ or assigns from giving delivery, physical or constructive, or causing delivery to be given, to Respondent No. 1, its servants and / or agents and / or assigns of the cargo to the tune of approximately 81,300 MT of freshly mined and washed blackwater soft coking coal lying/incoming at the premises of Respondent No. 2; and/or

(iv) Pass an order appointing a Court Receiver or Court Commissioner to take possession of approximately 81,300 MT of freshly mined and washed blackwater soft coking coal belonging to Respondent No. 1, and lying/incoming at the premises of Respondent No. 2; and Pass an order directing Respondent No. 1 to bear all costs, charges, expenses, and levies of any kind whatsoever in the exercise

of the cargo of the Respondent No. 1 being utilised as security towards unpaid amount; and

(vi) Pass an order permitting the Receiver/ Court Commissioner to sell cargo to the tune of approximately 81,300 MT of freshly mined and washed black water soft coking coal lying/incoming under custody thereof and belonging to Respondent No. 1 and lying at the premises of Respondent No. 2 in the event of nonpayment of sums to the Petitioner as set out in prayer clause (i) as mentioned above;

(vii) For ad interim reliefs in terms of prayer (i), (ii), (iii), (iv), (v), (vi), and (vii) therein above; and/or

(viii) Pass any other reliefs as this Hon'ble Court may deem fit in the interest of justice and equity"

2. Subsequently, the petitioner filed an application being I.A. No.582/2025, wherein the petitioner sought that respondent No. 1 be restrained from selling, dealing with or alienating any of its moveable assets without furnishing security to the tune of Rs. 139 crores.

FACTUAL BACKGROUND

3. The petitioner is a company, incorporated in the United Arab Emirates (UAE), involved in activities of mining, processing, trading and shipping of metals and minerals. It primarily engages in supplying minerals, metals, and commodities to various industries, like oil drilling, construction, steel, energy, manufacturing, and infrastructure.

4. Respondent No. 1 i.e., Rashtriya Ispat Nigam Limited (RINL), is a corporate entity of Visakhapatnam Steel Plant, incorporated under the

Companies Act, 1956, and is a Public Sector Enterprise. Respondent No. 2 i.e., Adani Gangavaram Port Ltd., is a Port Authority registered under the Major Port Authorities Act, 2021, who is only a *pro forma* party in the present petition.

5. The petitioner and respondent No. 1 entered into a long-term Agreement for Sale and Purchase of Tuhup Hard Coking Coal *vide* Agreement No. 22.17.0008/0212 ("***the Agreement***") dated 29.08.2023, which was effective from 01.10.2022. As per the Agreement, the petitioner was the "Seller" and the respondent No. 1 was the "Purchaser", and a total of about 4,75,000 MT of Tuhup Hard Coking Coal ("***THC Coal***") was to be supplied by the petitioner to the respondent No. 1.

6. The Agreement has an arbitration clause being Clause No. 18which reads as under:-

> *"PARA 18.0: ARBITRATION*
>
> *18.1 In the event of any dispute or differences between the Parties arising out of or in connection with this Agreement, including without any limitation any claims that a Party has breached any portion of this Agreement, the Parties shall promptly meet and discuss the dispute in an effort to resolve it.*
>
> *18.2 If no resolution is reached within 15 days following the date on which one Party first notifies in writing to the other of its request that such a meeting be held, then, the dispute shall be referred to and resolved by arbitration under the Rules framed by Singapore International Arbitration Centre*

("SIAC"), as may be amended from time to time. The venue and seat of arbitration shall be New Delhi and arbitration shall be conducted in English language. The arbitration shall be conducted before a sole arbitrator appointed in terms of the SIAC Rules, whose decision shall be final and binding on the Parties to this Agreement."

7. As per the Agreement, which was amended from time to time, the petitioner was required to deliver THC Coal to respondent No. 1 on a Freight on Board ("***FOB***") basis. As per clause 2.7 of the Agreement, the pricing mechanism and mode of payment was through Letter of Credit with 180 days usance period, as agreed upon.

8. Subsequently, owing to respondent No. 1's financial conditions, parties mutually agreed to 10th Amendment Agreement dated 14.08.2024 to the Agreement, wherein respondent No. 1 was allowed the facility of Open Account Payment Terms requiring it to make payment "within credit period of 90 days from the date of the bill of lading", for the Shipment *vide* vessel-MV Stefanos T, and adjust the delivery terms to Cost and Freight basis.

9. Pursuant to the Agreement, the petitioner supplied 77,465 MT of THC Coal and the said supply was covered by five Bills of Lading dated 01.06.2024. Subsequently, the petitioner raised five invoices dated 05.06.2024, against the said supply of 77,465 MT of THC Coal and the total amount raised in these five invoices was USD 17,118,773.73. The due date for payment as mentioned in the invoices was 30.08.2024, being the 90th day from the date of the Bills of Lading, i.e., 01.06.2024.

10. The petitioner, before the vessel-MV Stefanos T carrying the said 77,465 MT of THC Coal departed from the load port, intimated the respondent No. 1 that it will not allow discharge of the vessel till the past dues as regards the payment of USD 8 million under invoices from the previous shipment were clear. Consequently, on 10.05.2024 the petitioner and respondent No. 1 arrived at a renegotiated settlement understanding.

11. On 01.06.2024 the vessel-MV Stefanos T, carrying the THC Coal, departed from the load port, i.e., Taboneo Anchorage, Indonesia and arrived at the discharge port, i.e., Adani Gangavaram Port, Visakhapatnam, of respondent No. 2, on 11.06.2024. However, the petitioner did not allow the vessel berthing, due to non-fulfilment of past dues by respondent No. 1, as regards the payment of USD 8 million under invoices from the previous shipment.

12. Thereafter, there was a chain of communications between the petitioner and respondent No. 1, regarding terms for berthing and discharge of the vessel-MV Stephanos T, carrying the THC Coal. Consequently, on 27.07.2024, the vessel-MV Stefanos T was finally berthed, and discharge of the THC Coal was complete on 29.07.2024. It is admitted fact that the respondent No. 1 has consumed the said THC Coal in entirety.

13. Due the delay in berthing the vessel the petitioner also incurred USD 110,000 towards hull cleaning charges, and USD 1,332,526 towards demurrage charges.

14. As per the petitioner the respondent No. 1 has till date made payment of USD 1,669,449.08 on 12.08.2024, USD 118,949.91 on 04.10.2024

and USD 237,899.82 on 07.10.2024 and another payment of USD 386,980.21 was made on 25.04.2025 against the outstanding Bills of Lading dated 01.06.2024.

15. It is admitted fact that the payment for 77,465 MT of THC Coal delivered was due on 30.08.2024 as per the invoices and that the respondent No. 1 has not made the entire payment towards the pending invoices, except for an amount of USD 2,413,279.03.

16. The reason given by respondent No. 1 for not discharging the entire amount due towards the pending invoices, apart from their precarious financial condition, is that the ash content found in the said 77,465 MT of THC Coal supplied by the petitioner exceeded the absolute maximum limit as per the terms of Annexure-II to the Agreement, which entitled respondent No. 1 to a rebate or diminution in price in respect of the said consignment.

17. Since there are disputes between the parties, the petitioner states that they are in the course of invoking arbitration, and it is due to the precarious and weak financial condition of respondent No. 1, that they have moved for pre-arbitral interim reliefs.

18. Hence, the present petition.

19. *Vide* order dated 28.02.2025, this Court secured the petitioner's interest to an amount of Rs. 69.50 crores by attaching TMT Steel bars of an equivalent amount.

20. Feeling aggrieved by the said order, the respondent No. 1 assailed the same by way of filing an appeal being FAO (OS) (COMM) 88/2025 wherein the Division Bench allowed the said appeal and remanded the matter to be considered afresh.

SUBMISSION ON BEHALF OF THE PETITIONER

Financial Condition of Respondent No. 1

21. At the outset, the learned counsel for the petitioner, submits that respondent No. 1 is in a precarious and volatile financial condition, owing to which the petitioner has concerns regarding its ability to fulfill its financial obligations towards the petitioner and states that in the absence of appropriate security the petitioner would be at the receiving end of a paper decree by the time the arbitration proceedings culminate.

22. He submits that precarious financial condition of respondent No. 1 is evident from their annual report for the financial year 2022-23, which shows that respondent No. 1 is running at a loss of approximately Rs. 2,900 crores and their current liabilities are Rs. 23,111.80 crores, which outweigh their current assets, which are Rs. 8,979.43 crores. It is further stated that even various news reports have covered the precarious financial status of respondent No. 1, and there also seems to be a plan to disinvest respondent No. 1 and give it to private parties. It is further stated that respondent No. 1's reply to the petition demonstrates that it suffered losses of more than Rs. 2300 crores between April 2024 and September 2024, categorically admitting to its precarious financial health.

23. Learned counsel for the petitioner further relies on various orders of this Court passed against the respondent No. 1 and states that therein this Court secured similar suppliers on the ground that the arbitration proceedings will result in a paper award if the petitioners therein are not protected give the deteriorating financial condition of the

respondent No. 1.

24. Further in reply to respondent No.1's plea that its financial condition has improved due to the Central Government's infusion of Rs. 1140 crores, the petitioner submits that the same is misconceived and the only document produced by the respondent No. 1 in this regard is a press release dated 17.01.2025, which cannot be the basis of determining financial condition in the presence of audited financial statements. Furthermore, it is stated that even post 17.01.2025, this Court has been constrained to pass adverse orders against the respondent No.1 due to its dishonest conduct in not paying its suppliers.

Satisfies the Three-Prong Test for Application of Section 9: Prima Facie Case, Balance of Convenience and Irreparable Harm

25. Learned counsel for the petitioner submits that there is a *strong prima facie* case in favor of the petitioner, as the respondent No. 1 currently owes approximately Rs. 139 crores against the supply of 77,465 MT of THC Coal and it is undisputed fact that respondent No. 1 has consumed the entire supply of the THC Coal.

26. It is further submitted that in view of respondent No. 1's financial condition, as explained before, petitioner's concerns regarding securing its dues are *bonafide*.

27. It is further stated that the balance of convenience lies in favor of the petitioner. It is submitted that initially the petitioner prayed for attachment of 81,300 MT of freshly mined and washed blackwater soft coking coal, belonging to respondent No. 1, lying at port of respondent No. 2. However, it later came to the knowledge of the

petitioner that after the filing of the petition, respondent No. 1 dissipated the entire stock of coal out of 81,300 MT of freshly mined and washed blackwater soft coking coal.

28. It is further submitted that the petitioner has reasons to believe that respondent No. 1 is likely to alienate its assets and has time and again indicated that there are persistent issues with liquidity. It is asserted that an irreparable loss would be caused to the petitioner in case the interim reliefs sought in the present petition are not granted to the petitioner.

29. Hence, it is submitted that, in view of respondent No. 1's financial condition and inability to indicate its financial wherewithal to make the good on its dues, the petitioner has a strong *prima facie* case, and the balance of convenience lies in its favor. It is stated that the interim relief sought, if granted, would prevent irreparable loss/serious injury to the petitioner. Therefore, it is prayed the respondent No. 1 be retrained from selling, dealing with or alienating any of its moveable assets, without furnishing security to the tune of Rs. 139 crores.

Reply to Respondent No. 1's Contention Regarding Quality of Coal

30. Learned counsel for the petitioner submits that the respondent No. 1 for the first time *via* email dated 14.10.2024 i.e., 4 months after the transfer of the title of THC Coal, 1.5 months after the due date of the invoices and after consumption of the entire THC Coal, raised a dispute as to the quality of the coal supplied by the petitioner.

31. It is further stated that even though this plea of respondent No. 1 that it is entitled to a rebate/ reduction in the price of the coal that was supplied and consumed is *prima facie* misconceived, there is no denial

of its liability towards the petitioner.

Arbitration Agreement between the Parties

32. Lastly, learned counsel for the petitioner submits that the petitioner intends to invoke arbitration clause of the Agreement dated 29.08.2023 against respondent No. 1 in relation to the disputes arising from the Agreement within 90 days from any order passed by this Court in the present petition under Section 9 of the 1996 Act.

33. It is submitted that while the invocation of the arbitration clause and initiation of arbitral proceedings is still in process, the petitioner has come before this Court under section 9 petition seeking pre-arbitral interim relief in order to secure the outstanding dues against the respondent No. 1.

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO. 1

Improvement in Financial Condition of Respondent No. 1

34. Mr. Rao, learned senior counsel for the respondent No. 1 states that the only reason for preferring the present petition is the precarious financial condition of respondent No. 1. He further states that the weak financial condition, in any case, cannot by itself justify the grant of interim relief under Section 9 of the 1996 Act. Reliance is placed on ***Natrip Implementation Society vs. IVCRL Ltd., 2016 SCC OnLine Del 5023.***

35. The Central Government has significantly contributed to bringing respondent No. 1 back on its feet. In lieu of the same, on 19.09.2024, the Ministry of Steel sanctioned a substantial advance of Rs. 500 crores, specifically earmarked for equity infusion into respondent No. 1. Further, on 25.09.2024, the Government of India sanctioned an

advance of Rs. 1,140 crores as working capital to respondent No. 1, specifically to prevent it from being classified as a Non-Performing Asset. Further, most recently on 17.01.2025, the Cabinet approved an infusion of INR 11,440 crores into respondent No. 1, for supporting its revival. It is stated that these measures evidence substantial financial support to respondent No. 1 by the Government of India, effectively dispelling any concerns regarding its financial capacity to satisfy any Award.

36. It is further submitted that the allegation that respondent No. 1 is in financial distress is unsupported and is based solely on its annual report for financial year 2022–23, which does not reflect its current financial position. Hence it is submitted that the petitioner's assertion that the financial condition of respondent No. 1 is weak, unstable, and volatile is wholly misplaced.

Principles of Order XXXVIII Rule 5 of CPC must be satisfied to Issue Interim Measures under Section 9 of the 1996 Act

37. Learned senior counsel for respondent No. 1 submits that Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 ("***CPC***") apply with equal force to proceedings under Section 9 of the 1996 Act. It is stated that interim relief of attachment may be granted only when the pre-conditions under Order XXXVIII Rule 5 of CPC are satisfied, and where the Court is satisfied that there are specific allegations with cogent material and prima-facie case that the party is likely to defeat the decree/award that may be passed by the arbitrator by disposing of the properties and/or in any other manner. Reliance is placed on ***Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd.,***

(2007) 7 SCC 125 and ***Sanghi Industries Ltd. vs. Ravin Cables Ltd. &Anr, (2022) SCC OnLine SC 1329.***

38. It is submitted that 16 days before the judgment of ***Sanghi Industries (supra),*** the Hon'ble Supreme Court in ***Essar House (P) Ltd. vs. Arcellor Mittal Nippon Steel India Ltd, (2022) SCC OnLine SC 1219***, held that Court exercising power under Section 9 of the 1996 Act, should not withhold relief on the mere technicality of absence of averments. However, the learned senior counsel for the respondent states that it is the principle enunciated in ***Sanghi Industries (supra)*** that has been followed by this Court in several decisions such as ***Dr. Vivek Jain vs. Prepladder Pvt. Ltd., (2023) SCC OnLine Del 6370, Skypower Solar India (P) Ltd. vs. Sterling and Wilson International FZE, (2023) SCC OnLine Del 7240*** and ***Gail (India) Ltd. vs. Focus Energy Ltd. & Ors., (2025) SCC OnLine Del 5.***

39. Hence, it is submitted that the principles of Order XXXVIII Rule 5 of CPC continue to guide the exercise of jurisdiction of the Court for granting interim measures of attachment sought under Section 9 of the 1996 Act.

Petitioner doesn't not satisfy the Three-Prong Test for application of Section 9 of 1996 Act

40. Learned senior counsel for respondent No. 1 submits that merely making a claim does not satisfy the requirements of a *prima facie* case.

41. It is stated that there exists a dispute regarding technical specifications of the THC Coal delivered by the petitioner being not as per the Agreement. It is submitted that as per Annexure II of the Agreement,

the ash content was guaranteed not to exceed 7.0%, with a maximum permissible limit of 9.0%. Any deviation beyond 7.0%, but within 9.0%, attracted para 3 of the General Conditions of Agreement ("***GCA***") of the Agreement, which results in a diminution or rebate in the price payable by respondent No. 1, or even termination of the Agreement at the option of respondent No. 1, at the risk and cost of the petitioner in case of adverse variance.

42. It is stated that the THC Coal remained unloaded at the discharge port for 48 days due to the petitioner's insistence on extracting payment from respondent No. 1 for an unrelated prior shipment. Upon unloading, respondent No. 1's analyst conducted an independent analysis on 05.08.2024, which revealed an ash content of 12.6%, which exceeds the maximum limit of 9% by 3.6%. Thus, the respondent No. 1 states that due to this adverse variance respondent No. 1 is contractually entitled to a diminution/rebate on the price of the THC Coal.

43. Hence, it is submitted that after calculating the diminution/rebate, the parties are to decide on the amount payable by the respondent No. 1. Accordingly, the petitioner's claim is premature as the amount claimed by the petitioner remains uncrystallized and unadjudicated.

44. It is further submitted that the petitioner's contention that the quality claim was raised almost 120 days after the date of the Bills of Lading, and the argument that such a delayed claim is repugnant, lacks merit, as the Agreement contains no clause mandating that issues concerning technical specifications must be raised within 120 days of the Bills of Lading.

45. Further, it is submitted that the petitioner has also raised frivolous claims of USD 110,000 for hull cleaning charges and USD 1,332,526 for demurrage charges, which are beyond the ambit of the Agreement. It is asserted that these amounts cannot be wholly attributed to respondent No. 1 and were in fact incurred due to petitioner's refusal to berth the vessel and discharge the coal. Hence, it is submitted that there exists another dispute between the parties concerning petitioner's claim for additional charges and accordingly, petitioner's claim is premature and unadjudicated.

46. It is submitted that it is trite law that unadjudicated claims cannot be secured merely because a party is in financial distress. Reliance is placed on ***Natrip Implementation Society (supra).***

47. Learned senior counsel for respondent No. 1, further submits that respondent No. 1 has already made a payment of USD 2,413,279.03 to the petitioner. Further, it is submitted that the respondent No. 1 had also issued steel worth Rs. 40.91 crores to the petitioner's wholly owned subsidiary. It is submitted that the payments, made up to April 2025, clearly establish the respondent No. 1's financial capability and willingness to meet its obligations, including any future award that may be passed in arbitration proceedings initiated under the Agreement. It is stated that this *bona fide* conduct demonstrates that respondent No. 1 has no intention of evading or defeating compliance with any Award that may be passed against it in the arbitration proceedings.

48. Further, it is stated that the petitioner has placed no material on record to show that respondent No. 1 is or has been dissipating its assets with

the intent to obstruct or delay the execution of any Award that may be passed against it.

49. Learned senior counsel for the respondent No. 1 states that the respondent No. 1 was facing significant financial and operational challenges, as explained before. However, with the active support of the Government of India, respondent No. 1 is on a recovery trajectory. It is stated that granting interim relief as sought by the petitioner at this stage would impose a disproportionate and unwarranted burden on respondent No. 1 and cause undue hardship, despite the existence of a *bona fide* dispute and an uncrystallised claim. Conversely, it is argued that the petitioner stands to suffer no such irreparable loss if its request for interim relief is denied.

50. Lastly, it is also stated that respondent No. 1 is a Central Public Sector Enterprise (PSE) with 100% of its shares held by the Government of India. Further, it is argued that the land and critical infrastructure of respondent No. 1 are registered in the name of the President of India, and no personal assets are registered in the name of respondent No. 1, and the operational land is technically owned by the President of India. Additionally, in matters involving public revenue, to grant interim relief a higher threshold must be met.

51. Hence, learned counsel for respondent No. 1 states that the petitioner has failed to establish a *prima facie* case, showing that balance of convenience lies its favor and that no irreparable injury or loss would be caused to the petitioner if the interim relief is not granted.

Court Orders relied upon by the petitioner are irrelevant

52. Learned senior counsel for the respondent No. 1 submits that the

petitioner's reliance on the orders of this Hon'ble Court granting interim relief against respondent No. 1, including orders of attachment of steel or coal are misplaced, as the facts and circumstances in those cases are entirely distinct. It is stated that in those matters, respondent No. 1 had admitted its liability and undertaken to make payments. In contrast, in the present case, there exists a bona fide dispute regarding the petitioner's claim, and there is no admission of liability by the respondent No. 1 *qua* the same.

ANALYSIS AND FINDINGS

53. I have heard learned counsels for the parties and perused the materials available on record.

54. In a nutshell, the petitioner's prayer for pre-arbitral interim relief under Section 9 of the 1996 Act arises in order to secure the outstanding amount not paid by the respondent No. 1 towards the invoices raised for the supply of 77,465 MT of THC Coal. The petitioner has raised concerns regarding the precarious financial condition of respondent No. 1, owning to which it fears that in the absence of appropriate security provided by the respondent No. 1, the petitioner would be at the receiving end of a paper decree by the time the arbitration proceedings culminate.

Section 9 Petition Governed by Underlying Principles of Order XXXVIII Rule 5 of CPC

55. Section 9 of the 1996 Act reads 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-

***

(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;

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(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…."

56. First, turning to the question of application of the principles of Order XXXVIII Rule 5 of CPC, learned counsel for petitioner states that the same is well defined by the Hon'ble Supreme Court in ***Essar House (supra)***, wherein it was held as under:-

"41. *Section 9 of the Arbitration Act provides that a party may apply to a Court for an interim measure or protection inter alia to (i) secure the amount in dispute in the arbitration; or (ii) 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.*

***

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."

(Emphasis added)

57. However, as rightly stated by the learned senior counsel for respondent No. 1, 16 days after pronouncing ***Essar House (supra)***, the Hon'ble Supreme Court passed the judgment of ***Sanghi Industries (supra)***, wherein it observed as under:-

"4. ...we are of the opinion that unless and until the pre-conditions under Order XXXVIII Rule 5 of the CPC are satisfied and unless there are specific allegations with cogent material and unless prima-facie the Court is satisfied that the appellant is likely to defeat the decree/award that may be passed by the arbitrator by disposing of the properties and/or in any other manner, the Commercial Court could not have passed such an order in exercise of powers under Section 9 of the Arbitration Act, 1996. At this stage, it is required to be noted that even otherwise there are very serious disputes on the amount claimed by the rival parties, which are to be adjudicated upon in the proceedings before the arbitral tribunal.

5. 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 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, …"

(Emphasis added)

58. The contradictory views provided by the Hon'ble Supreme Court in these two judgments i.e., ***Essar House (supra)*** and ***Sanghi Industries (supra)***, on application of principles of Order XXXVIII Rule 5 of the CPC while granting interim reliefs under section 9 of the 1996 Act was discussed by this Court in ***Dr. Vivek Jain (supra),*** as under:-

*"**33.** This Court however notes that in the subsequent decision which was rendered by the Supreme Court in Sanghi Industries, the Supreme Court has taken a view which may not be completely in accord with what was expressed by it in Essar House. The Court enters the aforesaid observation in light of the Supreme Court in*

Sanghi Industries having held that in the absence of specific allegations duly supported by cogent material and the Court being satisfied on the basis of the above that a respondent is likely to defeat the Award, no order akin to attachment before judgment should be passed in exercise of powers under Section 9 of the Act. In Sanghi Industries, the Supreme Court further observed that the Section 9 power is mainly concerned with the grant of interim measures. It further went on to hold that unless and until conditions which inform and guide the exercise of power under Order XXXVIII Rule 5 of the Code are found to be satisfied, no such interim measure should be formulated.

34.*It is significant to note that both Essar House as well as Sanghi Industries are judgments rendered by Benches comprising of an equal coram. It would thus be the latter view as enunciated in Sanghi Industries which the Court would be obliged to follow. Sanghi Industries urges us to bear in mind the classical exposition of an attachment before judgment and that direction being guided and informed by factors such as a clear foundation in the pleadings of parties supported by cogent evidence, the existence of a strong prima facie case and most importantly the court being convinced that a party was actively engaging in activities such as removal or dissipation of assets or where it is found that it is seeking to defeat any judgment or award that may be ultimately rendered…."*

(Emphasis added)

59. Further, the learned counsel for the respondent No. 1 has referred to a Division Bench decision of this Court in ***Skypower Solar (supra)***, and contended that the same upholds the views provided in ***Sanghi Industries (supra)*** i.e., the provisions of the CPC are strictly applicable to grant of interim relief in arbitral proceedings also. However, as observed by this Court in ***Lava International Limited vs. Mintellectuals LLP, 2024:DHC:7707***, the Division Bench in ***Skypower Solar (supra)*** observed that the Court is not strictly bound by the principles of the CPC, although guided by the same principles in determination of the appropriate interim measures of protection. The relevant paragraphs of ***Skypower Solar (supra)*** read as follows:-

> *"**63.** The principle for granting orders under Order 38 Rule 5CPC are now well-settled. In Raman Tech. & Process Engg. Co. v. Solanki Traders [Raman Tech. & Process Engg. Co. v. Solanki Traders, (2008) 2 SCC 302 : (2008) 1 SCC (Civ) 539], the Supreme Court had observed that the power under Order 38 Rule 5 are drastic and extraordinary powers and are required to be used sparingly and in accordance with the rule. The Supreme Court also observed that the purpose of Order 38 Rule 5 was not to convert an unsecured debt as a secured one.The object of Order 38 Rule 5 was to prevent any defendant from defeating the realisation of a decree that may ultimately be passed in favour of the plaintiff...*
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"65. In Essar House (P) Ltd. v. Arcellor Mittal Nippon Steel India Ltd. [Essar House (P) Ltd. v. Arcellor Mittal Nippon Steel India Ltd,. MANU/SC/1165/2022 :2022:INSC:957], the Supreme Court had approved the view of this Court in Ajay Singh case [Ajay Singh v. Kal Airways (P) Ltd., MANU/DE/1820/2017 :2017:DHC:3208-DB : (2018) 209 Comp Cas 154] that Section 9 of the A&C Act grants wide powers to the courts in fashioning an appropriate interim order. However, it is material to note that in Ajay Singh v. Kal Airways (P) Ltd. [Ajay Singh v. Kal Airways (P) Ltd., MANU/DE/1820/2017 :2017:DHC:3208-DB : (2018) 209 Comp Cas 154] , this Court had also stressed that the exercise of such power should be "principled, premised on some known guidelines." The reference to Orders 38 and 39 CPC was in the aforesaid context. However, the court was not bound by the text of those provisions but had to follow the underlying principles. The decision of the Bombay High Court in Jagdish Ahuja v. Cupino Ltd. [Jagdish Ahuja v. Cupino Ltd., MANU/MH/0925/2020] is not materially different. The reading of the said decision indicates that the court had followed its earlier decision in Nimbus Communications Ltd. v. BCCI [Nimbus Communications Ltd. v. BCCI, MANU/MH/0247/2012] and emphasised that the court while exercising the powers under Section 9 of the A&C Act has the discretion to grant a wide range of interim measures of protection. However, the court was required to

be guided by the principles which the civil courts ordinarily employ for considering interim relief, particularly, under Order 39 Rules 1 and 2 and Order 38 Rule 5CPC. However, the court reiterated the view that, in exercise of powers under Section 9 of the A&C Act, the court is "not unduly bound by their texts". This is, essentially, the same view as expressed by this Court in Ajay Singh case [Ajay Singh v. Kal Airways (P) Ltd,. MANU/DE/1820/2017 :2017:DHC:3208-DB : (2018) 209 Comp Cas 154].”

(Emphasis added)

60. In view of the above discussion, the law is well settled. Though the Court is not strictly bound by the provisions of CPC, it cannot completely disregard its underlying principles. Hence, for an interim order akin to attachment before an Award, the Court needs to satisfy itself that the conditions underlying Order XXXVIII Rule 5 of CPC are met. This includes a clear strong *prima facie* case and convincing evidence that the other party is actively trying to dissipate its assets to defeat the outcome of the award. Ultimately, the grant of such relief is an exercise of judicial discretion of the Court, in light of the facts and circumstances of each case. ***[See: Paragraph 47 of Gail (India) Ltd. (supra)]***

61. Additionally, the three-prong test espouses from the above mentioned judgments of the Hon’ble Supreme Court and this Court, that is to be satisfied before granting interim relief under section 9 of the 1996 Act: a) whether the petitioner has a strong *prima facie* case; b) whether the balance of convenience lies in favour of the petitioner for

an interim relief (i.e. the consequence of the grant of relief as opposed to its refusal); and c) whether the relief prevents an irreparable loss/serious injury which cannot be compensated for in terms of money. The Court should also consider whether the petitioner has approached it with reasonable expedition.

62. Before I address the arguments put forth by both the parties in the said regard, it is relevant to mention that the dispute in the present case primarily revolves around whether the petitioner is entitled to the whole payment towards the supply of 77,465 MT of THC Coal, including the hull cleaning and demurrage charges, or whether the respondent No. 1 is entitled to rebate as alleged by it owing to the high ash percentage in the said THC Coal supplied by the petitioner.

63. The parties are at variance about whether it was because of the petitioner's refusal or whether it is was due to respondent No. 1's unpaid dues in respect of previous invoices, which caused delay in the berthing of the vessel, ultimately leading to additional charges of hull cleaning and demurrage charges.

64. The parties are also at variance about the ash content of the supplied THC coal, and whether respondent No. 1 is consequently entitled to rebate as per the terms of the Agreement. There is also an issue of estoppel i.e., whether respondent No. 1 can almost after 120 days of the date of Bills of Lading object to the quality of the THC coal.

65. All these issues between the parties are to be decided during the arbitral proceedings. In a case of this nature where the dispute between the parties is highly reliant upon the interpretation of the terms of the Agreement and the facts and circumstances surrounding

it, which will be decided in the arbitral proceedings ultimately, this Court refrains from making any observations on the merits of the case, so as to avoid influencing the arbitral proceedings. As also observed by the Hon'ble Supreme Court in ***Adhunik Steels (supra)*** and more particular paragraph No. 17, which reads as under:-

> *"17….since in taking interim measures under Section 9 of the Act, the court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration clause and the necessity of taking interim measures for issuing necessary directions or orders….."*

66. This Court in ***National Highways Authority of India vs. Bhubaneswar Expressway Private Limited, (2021) SCC OnLine Del 2421*** has also observed as under:-

> *"**35.** Arbitration Act does not envisage adjudication in two stages i.e. summary adjudication by the Court under Section 9 and final adjudication by the Arbitral Tribunal under Chapter VI of Part I of the Act.*
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> ***44**. If the Courts, in exercise of powers under Section 9, start enforcing the terms of the contract, it would do extreme disservice to the very concept of arbitration, where the parties choose to have their disputes adjudicated, instead of by the Courts, by Arbitrators of their choice. In the present case, the appellant NHAI has disputed its liability for termination payment on diverse grounds, as can*

be understood from the narrative hereinabove of the arguments of the senior counsel for NHAI. If this Court, while exercising jurisdiction under Section 9, were to adjudicate whether there is any legal merit in the said grounds or not, this Court would be adjudicating the disputes, which the parties have agreed to be adjudicated by arbitration and in fact there would be nothing left for the Arbitral Tribunal to decide, as far as the claim of BEPL for the termination payment directed to be made is concerned. In fact, after reading the impugned judgment, we have also wondered what remains for the Arbitral Tribunal to decide, as far as the claim of BEPL for termination payment on a demurer, believing the breach to be on the part of BEPL, is concerned. It is a hard reality that once there is judicial order on the merits of the dispute and which judicial order is not granting any interim measure but granting the final relief claimed in the arbitration proceeding, the Arbitral Tribunal would hesitate from deciding contrary to the findings returned by the Court on interpretation of terms of the Concession Agreement and of admission, and to which Court, an application under Section 34 of the Act would lie against the award of the Arbitral Tribunal."

(Emphasis added)

67. Thus, this Court at the stage of section 9 proceedings will not be delving into the merits of the case, but will take a bird's eye view of the issue in question i.e., how the subject matter of the arbitral dispute

is to be protected. The Court is not to interpret clauses of the Agreement or give findings on which party is in breach of the terms of the Agreement.

Order XXXVIII Rule 5 of CPC and the Three-Prong Test: Prima Facie Case, Balance of Convenience and Irreparable Harm

68. The petitioner has prayed for an interim relief against the respondent No. 1 in form a security for an amount of Rs. 139 crores, which includes the outstanding dues against the supply of 77,465 MT of THC Coal to the respondent No.1 and the additional charges incurred by the petitioner due to the delay in berthing of the vessel carrying the said THC Coal.

69. The petitioner primarily ground for seeking such interim relief is based on the contention that respondent No. 1 is in a precarious financial condition. To prove the same, the petitioner has relied upon respondent No. 1's financial report of assessment year 2022-23, which shows that respondent No. 1 incurred a loss of about Rs. 2859 crores. There is nothing on record to show a contradictory trend. Hence, the fact that respondent No. 1 is running losses is an undisputable fact.

70. Further, the petitioner also brought to this Court's attention various press releases commenting on the precarious financial condition of respondent No. 1 and even the respondent No.1 in its reply to the present petition has explained in detail about the financial and operational challenges it has been facing since 2023.

71. However, the respondent No. 1 has contested such allegations regarding its precarious financial condition and stated that its financial condition has improved with the financial aid of the Central

Government.

72. The issue that needs to be addressed at this stage is whether respondent No. 1 can be directed to secure the amount in dispute only on the ground that it is in financial distress and consequently the Arbitral Award that might eventually be passed against it could become infructuous?

73. The respondent No. 1 in reply to the said issue has relied on the judgment of ***Natrip Implementation Society (supra),*** wherein it was categorically held that unadjudicated claims cannot be secured through interim relief merely because a party is in financial distress. The operative paragraphs of the said judgment are reproduced below:-

> *"21. In the present case, there is no allegation that IVRCL is dispersing its assets or acting in a manner so as to frustrate the enforcement of the award that may be passed. Thus, on the application of principles as embodied in Order XXXVIII Rule 5 of the CPC, no order for securing NATRIP can be passed.*
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> *22. Further, if the financial state of IVRCL, as pleaded by NATRIP is accepted to be correct, it is apparent that IVRCL would also be unable to provide the security as prayed for by NATRIP. NATRIP claims that three winding up petitions have been admitted against IVRCL as IVRCL has been unable to pay its debts. If the same is correct, then it is obvious that IVRCL would be unable to provide security or bank guarantee for the sums claimed by NATRIP. It follows from the above, that it is almost certain that IVRCL would*

not be in a position to comply with an order to provide security for the counter claims preferred by NATRIP. In the given facts, such an order would debilitate IVRCL's ability to pursue its claims against NATRIP. An interim protection for one party cannot be granted at the cost of imposing an onerous condition on the other and thus, rendering the other party in a hapless condition.

23. It is relevant to bear in mind that if IVRCL is liable to be wound up as is urged by Mr. Jain, then NATRIP would have to stand as one amongst other unsecured creditors of IVRCL for recovery of its dues; NATRIP cannot by obtaining an order under section 17 of the Act seek to place itself in a better position than the other creditors.

24. The contention that financial distress of a party can be a sole ground for directing that party to secure a claim of unadjudicated damages as claimed by the other party is, in my view, bereft of any merit."

(Emphasis added)

74. This Court in ***Noida Toll Bridge Company Limited vs. Nidhi Sharma and Ors., 2023:DHC:8690***, while relying on ***Natrip Implementation Society (supra)***, held as under:-

"16 . It is an admitted fact that IL&FS Group, to which the Appellant belongs, is undergoing insolvency proceedings. This situation has led to a presumption that, should the final award favour the Respondents, they may be unable to effectively enforce it to reap its fruits. Consequently, the

question that arises is whether the Appellant can be compelled to provide security pending the final judgment, solely based on their financial difficulties potentially affecting award enforcement, especially in the absence of a prima facie case being established.

17. In Natrip Implementation Society (Supra), a Coordinate Bench of this Court was faced with a similar scenario, wherein a party requested for securing the claimed amount, citing crippling financial condition of the opposite party. The Court held that the principles applicable to Order XXXVIII Rule 5 of CPC must be followed while deciding interim applications under Section 9 of the Arbitration Act, and rejected the plea as there were no allegations to indicate that the Respondent (therein) was attempting to defeat the potential award. Similarly, in the instant case, the Respondents have not alleged that the Appellant is disposing of assets or engaging in activities that would obstruct the enforcement of the final award. The request for securing such a significant amount was not even part of the Respondents' original application under Section 17 of the Arbitration Act. This absence of any assertion or evidence suggesting the Appellant's intent to frustrate the award's enforcement, further weakens the justification for the Learned Arbitrator's direction to provide security, deviating from the established legal standards and principles."

(Emphasis added)

75. Hence, in view of the settled principle that unadjudicated claims cannot be secured through interim relief merely because a party is in financial distress, even if the contentions of the petitioner that respondent No. 1 is facing financial distress is for sake believed, the same alone doesn't make a strong *prima facie* case in favour of the petitioner. The claims of the petitioner are yet to be crystallised and will convert to a debt once the liability of the respondent No. 1 is adjudicated upon.

76. It is tritę law that in the absence of any allegation that the party in question is dissipating its assets or acting in a manner to frustrate the enforcement of a potential Award, the principles embodied in Order XXXVIII Rule 5 of CPC are not met and in such circumstances an order of attachment cannot be granted.

77. The petitioner, relying on ***Essar House (supra***), has contended that proof of actual attempt to remove or dispose of the assets with a view to defeat or delay the realisation of an impending Arbitral Award is not imperative. However, the Hon'ble Supreme Court in the said judgment also held that there should be a strong possibility of diminution of assets. ***[See: Paragraph 50 of Essar House (supra)]***

78. In the present case, the petitioner has stated that it has reasons to believe that respondent No. 1 is likely to alienate its assets. However, there is no material evidence brought forward by the petitioner to substantially prove the same. Mere averment that there are various news reports that comment on precarious financial status of respondent No. 1 and plan to disinvest it, is no proof of attempt to remove or dispose of the assets with an intent to defeat the realisation

of an impending Arbitral Award. Further, there is no allegation that respondent No. 1 has acted in a manner so as to frustrate the enforcement of the Arbitral Award that may be eventually passed against it.

79. *Per contra*, the respondent No. 1 has brought on record the evidences to the fact that there have been consistent and continuous efforts towards its revival, led and propelled by the Government of India.

80. Further, it is admitted fact that respondent No. 1 has made payments of USD 1,669,449.08 on 12.08.2024, USD 118,949.91 on 04.10.2024, USD 237,899.82 on 07.10.2024 and USD 386,980.21 on 25.04.2025, totalling to USD 2,413,279.03, against the outstanding Bills of Lading dated 01.06.2024. To my mind these consistent payments made by respondent No. 1, establishes its willingness to meet its financial obligations towards the petitioner. Hence, it cannot be said that the petitioner has established a *prima facie* case that the respondent No. 1 is acting with a *malafide* intention to defeat the eventual Arbitral Award.

81. Moreover, in the present case, the petitioner has claimed Rs. 139 crores towards outstanding dues against the supply of the THC Coal and the additional charges incurred by it due to the delay in berthing of the vessel. However, the respondent No. 1 has disputed the amount claimed against the supply of THC Coal on the ground that it is entitled to rebate or diminution in the price of the coal supplied by the petitioner, in light of the ash content of the coal being beyond the maximum limits, as per the terms of the Agreement. Also, there is dispute as to who is liable to pay the additional charges incurred due

to delay in berthing of the vessel carrying the 77,465 MT of THC Coal.

82. The respondent No. 1's dispute is pertaining to the quantum of outstanding dues, which does not completely deny the existence of some outstanding liability. However, the calculation of any permissible rebate and the resolution of quality-based objections require factual findings and interpretation of the terms of the Agreement, which is an exercise to be carried out in the arbitration. Hence, the amounts claimed by the petitioner at this stage are unadjudicated claims, which cannot be secured through interim relief merely because respondent No. 1 is in financial distress, as observed in ***Natrip Implementation Society (supra)*** and ***Noida Toll Bridge Company Limited (supra).***

83. Hence, while it cannot be denied that the petitioner has a claim against respondent No. 1 for unpaid dues arising from the supply of 77,465 MT of THC Coal, however at the same time it also cannot be said that the petitioner has a strong *prima facie* case. Respondent No.1 has disputed the amount claimed on the ground of alleged deficiencies in the quality of the coal supplied, the examination of which is an exercise which will have to be carried out by the arbitral tribunal. Hence, the claims of the petitioner are yet to be established, the amount is yet to be quantified, and there is no evidence of any *malafide* attempt to dispose of assets by respondent No. 1.

84. At this stage, it is important to address the previous orders of this Court relied upon by the petitioner in support of its prayer for interim relief. In the considered opinion of this Court, these orders are not

directly relevant in the present matter, as they are factually distinguishable. In each of those cases, respondent No. 1 admitted to the outstanding amounts and undertook to clear them. However, in the present matter the outstanding amounts are disputed, and no admission to make the whole of the alleged payments has been made by respondent No. 1. Hence, due to the differences in facts and circumstances, such orders are not relevant in the present matter.

85. Hence, facts relevant at the present stage of Section 9 petition are as following: a) petitioner has a claim of Rs. 139 crores, however, the same is premature and require adjudication by way of arbitration; b) respondent No. 1 has been consistently making payments towards the outstanding dues and has paid a total of USD 2,413,279.03; c) respondent No. 1's precarious financial condition alone doesn't establish a *prima facie* case; and d) there is nothing on record to show that respondent No. 1 intends to obstruct or delay the execution of the Award that may be passed against it.

86. Further, the respondent No. 1 is a Public Sector Enterprise and when dealing with public revenue there is a higher threshold that is required to be met before an interim relief could be granted against a Public Sector Enterprise, as also observed by the Hon'ble Supreme Court in ***CCE v. Dunlop India Ltd., (1985) 1 SCC 260,*** as under:-

> *"7. ... We consider that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an*

interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest…."

CONCLUSION

87. For the foregoing reasons, the petitioner has not made out the principles of Order XXXVIII Rule 5 of CPC. Additionally, the petitioner has also failed to meet the three-prong test, as the petitioner does not have a strong *prima facie* case, the balance of convenience does not lie in its favor, and no irreparable harm will be caused to the petitioner which cannot be compensated in terms of money.

88. For the said reasons, the petition is dismissed.

89. Needless to say, the observations made herein are solely for the purpose of deciding the present petition and shall not be construed as expressing any opinion on the merits of the dispute that may be referred to the Arbitral Tribunal, or on the merits of any application that either party may bring before the Arbitral Tribunal.

90. It is clarified that once the Arbitral Tribunal is constituted, either party shall be at liberty to seek appropriate interim measures under section 17 of the 1996 Act.

91. The petition is disposed of along with pending applications, if any.

JASMEET SINGH, J

AUGUST 28,2025/(HG)