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

Reserved on : 27th May,2020
Pronounced on: 23rdOctober,2020

\+ O.M.P.(I) (COMM.) 112/2020

BIG CHARTER PRIVATE LIMITED ..... Petitioner

Through Mr. Gautaum Narayan, Ms. Asmita Singh and Mr. Aditya Nair, Advs.

versus

EZEN AVIATION PTY. LTD. & ORS. ..... Respondents

Through Mr. Arvind Kamath, Sr. Adv. With Mr. Pashant Popat, Mr. Nikit Bala, Ms. Karishma Naghnoor, Mr. Pai Amit, Mr. Rahat Bansal and Mr. Souvik Majumdar, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G E M E N T

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1. This petition, preferred under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") seeks certain pre-arbitration interim reliefs.

2. The consent, of learned Counsel appearing for the petitioner as well as the respondent, *ad idem*, to final disposal of the present OMP, on the basis of arguments advanced and written submissions filed,

without any further pleadings being brought on record, stands specifically noted. Accordingly, this judgement disposes of the OMP.

Factual Backdrop

3. The petitioner provides scheduled air operator services, under the name "Flybig". The respondents are engaged in the business and lease of aircrafts, and other associated activities. Respondent No. 1 is one of the group companies of Respondent No 2. Respondent No. 2 was running his business, in India, through Respondent No. 1.

4. The aircraft, forming subject matter of the present controversy – which was an ATR 72-500, bearing Manufacturer Serial Number (MSN) 688 – was owned by Respondent No 1.

5. The petitioner proposed to lease the aforesaid aircraft (hereinafter referred to as "the aircraft") from Respondent No 1. The following communications ensued, between the petitioner and the respondent, prior to issuance of the Letter of Intent:

(i) On 24th July, 2019, the respondent wrote, to the petitioner, acknowledging the desire, of the petitioner, to lease the MSN 688 aircraft, with effect from 1st October, 2019, for a period of 3 years. Lease rent was fixed at ₹ 37 lakhs per month, plus 5% GST, for the first 18 months, and ₹ 40 lakhs per month, plus 5% GST for the remaining 18 months. Additionally, the letter noted that the petitioner would have to

pay Maintenance Reserves, to the respondent, @ US $400 per flying cycle/flying hour.

(ii) On 19th August, 2019, the respondent wrote, to the petitioner, requiring the petitioner to communicate with the Directorate General of Civil Aviation (DGCA) and enquire regarding the progress of the application, submitted for import of the aforesaid aircraft.

(iii) The petitioner responded, on the same day, i.e. 19th August, 2019, stating that its main concern was regarding the issuance of a No Objection Certificate (NOC) by the DGCA.

(iv) To this, the respondent replied, again on the very same day, i.e. 19th August, 2019, stating that the aircraft would be issued with a valid Certificate of Airworthiness (CoA).

6. On 2nd September, 2019, a Letter of Intent (hereinafter referred to as "LOI") was issued by the respondent to the petitioner, containing, *inter alia*, the following covenants:

(i) The petitioner would accept the aircraft with a valid CoA issued by the Isle of Man Aircraft Registry (IOMAR).

(ii) It was the petitioner's responsibility to ensure that the aircraft was registered with the DGCA, showing the respondent as the owner/lessor, and the petitioner as its operator/lessee.

(iii) The term of lease was to commence with the delivery of the aircraft, and was to continue for 36 months.

(iv) The schedule of payment of lease rent was set out, along with the covenant that the petitioner would have to pay applicable Maintenance Reserves, as per the aircraft's monthly utilisation, for every flight hours/flight cycle of usage. The LOI also set out the deposits that were required to be made by the petitioner, and the stages at which they were required to be made.

(v) Failure, on the part of the petitioner, to lease the aircraft, after execution of the Lease Agreement (to be executed subsequently), would entitle the petitioner to refund of the Security Deposit, less three months' rent. If, however, failure to lease the aircraft was owing to any fault of the respondent, or owing to regulatory issues, the petitioner would be entitled to a complete refund of Security Deposit.

(vi) The aircraft was required to be maintained by the petitioner, at all times, as airworthy, in accordance with all applicable legislation/Airworthiness Directives and mandatory guidelines issued by the DGCA or by any other governmental authority.

(vii) The Final Lease Agreement, as and when executed between the petitioner and the respondent, would supersede the LOI.

7. Clause 20 of the LOI stipulated as under:

> "**20. Governing Law:**
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> This Proposal and the underlying documents for the contemplated transaction shall be governed by the laws of India without regard to conflict of laws principles. Lessee and Lessor agree to submit to the exclusive jurisdiction of the courts located in Singapore with regard to any claim of matter arising under or in connection with this Proposal or the Lease Documentation. The English-language shall be used in all documents and proceedings."

8. On 7th September, 2019, the respondent wrote to the petitioner, stating that it was confident of working with the DGCA to get the CoA issued for the aircraft.

9. On 12th November, 2019, a Lease Deed was executed, between the petitioner and the respondent. According to the petitioner, this Lease Deed was superseded by a subsequent Lease Deed, executed on 9th December, 2019. The respondent, however, refutes the submission, by pointing out that the Schedules to the Lease Deed dated 9th December, 2019, were not signed by the parties. For the purposes of this judgement, it would hardly matter whether one refers to the clauses of the first, or the second Lease Deed. Having said that, I am inclined to agree with the submission, of Mr. Gautam Narayan, learned Counsel for the petitioner, that the Lease Deed dated 9th December, 2019 did, in fact, supersede the Lease Deed dated 12th November, 2019, and that the absence of signatures on the schedules to the later Lease Deed cannot be regarded as fatal, especially as they

are identical to the Schedules of the Lease Deed dated 12th November, 2019, which were duly signed by both the parties.

10. On 23rd November, 2019, the Certificate of Registration (COR) of the aircraft, as issued by the IOMAR, was supplied, by the respondent to the petitioner.

11. On 1st December, 2019, the specifications of the aircraft were forwarded, by the respondent to the petitioner. The petitioner responded, on 3rd December 2019, pointing out that the aircraft did not have a Cockpit Door Surveillance System (CDSS) installed, and that this would obstruct obtaining of approval from the DGCA. It was, therefore, requested that CDSS be installed on the aircraft. The respondent replied, on 6th December, 2019, undertaking to deliver the aircraft as per the European Aviation Standards Authority (EASA) standards, with a valid COA.

12. NOC, for import of the aircraft, was granted, by the DGCA, on 9th December, 2019. It was, however, stipulated that the aircraft could not be used for commercial operations unless it was compliant with the requirements of the Civil Aviation Requirements (CAR) issued by the DGCA.

13. On 9th December, 2019, a second Lease Agreement (which, according to the petitioner, superseded the Lease Agreement dated 12th November, 2019 *supra*) was executed between the petitioner and respondent. The petition avers that, though the Schedules to the said second Lease Agreement, could not be signed by both parties, the

parties were *ad idem* that the Schedules to the Lease Deed dated 12th November, 2019 were to be treated as a part of the Lease Deed dated 9th December, 2019. The Lease Deed stipulated that the aircraft would be delivered, for a period of 36 months commencing 15th December, 2019. Clause 4.1 required the petitioner to ensure registration of the aircraft with the DGCA, with the respondent shown as owner/lessor and the petitioner as operator/lessee, for which the respondent undertook to provide all necessary documentation. Possession of the aircraft was to be with the petitioner, whereas right, title and interest in the aircraft was, as per Clause 5 of the Lease Deed, to vest with the respondent. Clause 6 required the respondent to deliver, and the petitioner to accept, the aircraft, with a current and valid COR, issued by the IOMAR. Acceptance of the aircraft was, as per Clause 6.2, to be by way of execution of a Delivery Acceptance Certificate, in accordance with Schedule II to the Lease Deed. Clause 7 provided for the modes of termination of the Lease Deed, whereas Clause 8 stipulated the rent payable, and the date from which it would be payable.

14. The petition avers that the petitioner had paid, to the respondent, US $ 336,000 towards Security Deposit, Lease Rent, till 15th March, 2020, totalling US $ 112,000, and US $ 26,000 towards the CDSS Kit.

15. On 4th March, 2020, the petitioner wrote to the respondent, requiring for confirmation of the final date, by which the aircraft would be delivered. The respondent replied, on 5th March, 2020,

alleging that delay in delivery of the aircraft was because of the delay, on the part of the petitioner, in finalising the painting, design, etc., for the livery of the aircraft. The petitioner responded, on 5th March, 2020 itself, stating that painting was the responsibility of the respondent, and pointing out that the painting vendor had never interacted with the petitioner. Certain defects, which remained in the aircraft, were also pointed out. The petitioner, additionally, submitted that it had paid for the CDSS, and sought the status of the installation thereof.

16. On 9th March, 2020, the respondent wrote to the petitioner, stating that, as the petitioner had "unilaterally terminated" the Lease Agreement, till further communication from the respondent, no modification/work on the aircraft was to be carried out by the petitioner. Chagrined at the said communication, the petitioner responded, on the same day, i.e. 9th March, 2020, categorically denying any termination, of the Lease Agreement, by it. Rather, it was submitted, the respondent had reneged on its commitments under the Lease Agreement, despite timely payments having been made by the petitioner. The request, for handing over, of the aircraft, with all necessary documents, was reiterated, emphasising, additionally, the fact that CDSS was required to be installed in the aircraft, and that the respondent was also required to provide necessary support towards acquiring of the COR and COA from the DGCA. The petitioner put the respondent on notice, further, that, if the DGCA were to reject the request for issuance of COA because of the age of the aircraft (as the policy of the DGCA did not allow import and utilisation, for carriage

of passengers, of an aircraft which was over 18 years of age), the respondent would be required to return, to the petitioner, all amounts paid by it, along with the cost for ferrying the aircraft. The aircraft was, it may be pointed out, manufactured in June 2002.

17. Further communications, largely to the same extent, followed, from the petitioner to the respondent, on 11th March 2020 and 22nd March, 2020. In the latter communication, the petitioner pointed out that, during oral discussions, the respondent had made it clear that it had no intention to deliver the aircraft to the petitioner. In the circumstances, the petitioner called on the respondent to refund, to the petitioner, an amount of ₹ 5,31,000/–, stated to be due from the respondent. This was followed by a reminder, on 1st April, 2020.

18. On 2nd April, 2020, the respondent addressed a detailed communication, to the petitioner, asserting that the aircraft had been ferried to Hyderabad on 29th November, 2019, and was ready for inspection and acceptance by the petitioner on 1st December, 2019, as per the terms of the Lease Agreement. Obtaining COR and COA, it was further asserted, was the responsibility of the petitioner, and not of the respondent. The communication alleged default, on the part of the petitioner, in payment of Security Deposit and Advance Lease Rent, as per the terms of the Lease Agreement. The delay in completion of the work, as desired by the petitioner, on the aircraft, it was further alleged, continued owing to the internal decision-making process of the petitioner. This delay, according to the communication, continued till March, 2020. The petitioner, it was alleged, became

liable to pay Maintenance Reserves, to the respondent, w.e.f. 1st February, 2020. Thereafter, *vide* email dated 5th March, 2020, it was alleged that the petitioner had unilaterally terminated the Lease Agreement, thereby obviating the necessity of any termination notice having to be issued by the respondent. In these circumstances, it was alleged that the petitioner was liable to pay ₹ 19,20,460/–, to the respondent.

19. *Vide* a reply email dated 10th April, 2020, the petitioner denied the assertion, of the respondent, that the Lease Deed had been terminated by the petitioner. On the other hand, it was alleged, the respondent had failed to perform its obligations under the Lease Deed, which included delivery of the aircraft with a valid CoA. The demand, for refund of US $ 5,30,000 was reiterated.

20. No response was received, from Respondent No.1 to the said email, resulting in a Notice of Dispute, under Clause 23.2 of the Lease Deed, being issued by the petitioner, calling on Respondent No.1 to resolve the dispute by negotiation, being issued by the petitioner. The respondent replied, *vide* letter dated 29th April, 2020, levying various allegations against the petitioner. The petitioner emphasises the fact that, even in this communication, the respondent did not seek to submit that it had, in fact, delivered the aircraft with requisite documentation.

21. Further communications, from the petitioner to the respondent on 12th May, 2020, and from Respondent No. 1 on 20th May, 2020, to the petitioner; the petitioner, however, avers that the conduct of the

respondent puts paid to any chance of the dispute, between the petitioner and the respondent, being amicably settled. Asserting that there has been a clear and undeniable breach, by Respondent No. 1 of the Lease Deed, the petitioner has moved this Court, under Section 9 of the 1996 Act.

22. The invocation of Section 9 has been sought to be justified on the ground that Respondent No. 1 is located in Australia and that, therefore, if the interests of the petitioner are not secured, it would become nearly impossible to enforce any award, even if the petitioner were to succeed in arbitral proceedings. Additionally, it is asserted that the website of Respondent No. 1 indicates that an ATR 72-500 aircraft, similar to the aircraft in issue, has been advertised for sale.

23. The petitioner asserts that the contention, of Respondent No. 1, that the petitioner had terminated the Lease Deed, is not borne out by the record, and is being used as a ploy to cover the breach of its contractual obligations and defend the withholding of amounts, paid by the petitioner, and which are, allegedly, refundable to it. The total amount of US $ 530,000, it is submitted, has become payable to the petitioner by the respondent. The petitioner asserts that it has a good *prima facie* case and that the balance of convenience and special equities are overwhelmingly in its favour. Denial of interim relief, as sought in the petition, it is further asserted, would result in irreparable injury to the petitioner.

24. The petition prays for

(i) a restraint, against the respondents creating any third party interest/right/title on the aircraft, or from selling, transferring or encumbering the aircraft in any manner,

(ii) a restraint, against the respondents, from taking the aircraft out of India, and

(iii) a direction, to the respondents, to deposit US $ 530,000 (equivalent to ₹ 4,01,05,736/–) in an escrow account.

25. I have heard Mr. Gautam Narayan, learned Counsel for the petitioner, and Mr. Arvind Kamath, learned Senior Counsel for the respondent, at length.

Rival Submissions and Findings

Re. Territorial Jurisdiction

26. A preliminary objection was raised, by Mr. Arvind Kamath, learned Senior Counsel for the respondents, to the effect that this Court did not have the territorial jurisdiction to deal with this petition. As the objection goes to the root of the competence, of this Court, to entertain the petition on merits, it is necessary to examine this objection, before proceeding further, if necessary.

27. Clauses 22 and sub-clauses 23.1 to 23.4 of the Lease Deed, which are relevant, may be reproduced as under:

"**22. GOVERNING LAW AND JURISDICTION**

22.1 This Deed shall be governed by and construed in accordance with the laws of Singapore without giving effect to its choice of laws. *The Parties shall submit to the exclusive jurisdiction of the courts of Singapore.*

23. DISPUTE RESOLUTION

23.1 The following provisions shall apply in the event of any dispute or differences between the Parties arising out of or relating to the lease of the Aircraft and this Deed (the "**Dispute"**).

23.2 A Dispute will be deemed to arise when one Party has any issue, difference, or demands action or alleges inaction, damage, injury or loss or serves on the other Party a notice stating the nature of such Dispute ("Notice of Dispute"). The Parties hereto agree that they will use all reasonable efforts to resolve between themselves, any Disputes through negotiations.

23.3 Any Disputes and differences whatsoever arising under or in connection with this Deed (including the enforcement of the rights, duties, powers and obligations conferred under this Deed) which are not settled by the Parties through negotiations, after the period of (15) fifteen days from the service of the Notice of Dispute, shall be referred to a sole arbitrator mutually appointed by the Parties.

23.4 *The arbitration proceedings shall be in accordance with the Arbitration Rules of the Singapore International Arbitration Centre or any statutory modification or re-enactment thereof for the time being in force.* All proceedings shall be conducted in English and the daily transcript of the proceedings shall be prepared in English. *The seat of arbitration shall be in Singapore.*"

(Emphasis supplied)

28. The contractual position that emerges, thus, is that (i) the petitioner and respondent have agreed to subject themselves to the jurisdiction of courts at Singapore, (ii) the seat of arbitration is Singapore, and (iii) the arbitration proceedings are to be in accordance

with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC).

29. Mr. Kamath submits that, the petitioner and the respondent having agreed to submit themselves to the jurisdiction of the courts at Singapore, this Court is proscribed from entertaining the present matter.

30. In this context, it is also appropriate to reproduce Section 2(2) and 20 of the 1996 Act, thus:

> "(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."

"International commercial arbitration" is defined, in clause (f) of Section 2 of the 1996 Act, thus:

> "(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least 1 of the parties is –
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> (i) an individual who is a national of, or habitually resident in, any country other than India; or
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> (ii) a body corporate which is incorporated in any country other than India; or

> (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or
>
> (iv) the Government of a foreign country;"

31. That the arbitration, to which the rival claims between the petitioner and the respondent may be subjected, conforms to the definition of "international commercial arbitration", is not in dispute.

32. The proviso to Section 2(2) is categorical and unequivocal. It provides that, irrespective of the location of the place of arbitration Part I of the 1996 Act – which includes Section 9 – would apply to all international commercial arbitrations, *subject to an agreement to the contrary*. In the present case, Clause 23.4 of the Lease Agreement fixes both the place, as well as the seat, of arbitration, as Singapore. The arbitration being an international commercial arbitration, the proviso to Section 2(2) would make Part I of the 1996 Act applicable, *subject to agreement to the contrary*. All that is to be seen is, therefore, whether, in the present case, there is any agreement, between the parties, which renders the proviso to Section 2(2) inapplicable.

33. Mr. Kamath submits that the second sentence, in Clause 22.1 of the Lease Agreement, constitutes such an "agreement to the contrary".

34. Mr. Kamath submits, further, that no part of the cause of action arose in Delhi. The Lease Deed dated 9th December, 2019, he points out, did not contain any Schedules and could not, therefore, be

regarded as a Lease Deed at all as, without the Schedules, it would be meaningless and incomplete. The Lease Deed dated 12th November, 2019 was executed at Vietnam. Mr. Kamath submits that the contention, of the petitioner, that there was consensus, *ad idem*, between the petitioner and the respondent, regarding the Schedules to the Lease Deed dated 12th November, 2019 having to be read as part of the Lease Deed dated 9th December, 2019, he submits, was a matter of evidence. Besides, points out Mr. Kamath, the petitioner and Respondent No. 2 were located in Mumbai, and Respondent No. 1 was located in Australia.

35. Expanding on his initial submission that Clause 22.1 of the Lease Agreement resulted in ouster of jurisdiction of this Court, to entertain the present petition, Mr. Kamath emphasises the omission of the word "express", in the proviso to Section 2(2) of the 1996 Act, denoting a departure by the legislature, to that extent, from the recommendation of the Law Commission. The ouster of jurisdiction, as contemplated by the proviso to Section 2(2) does not, therefore, he submits, need to be "express"; it can also be implied.

36. Mr. Kamath also submits that the petitioner is not without a remedy in Singapore, and invites attention, in this context, to Section 12A of the International Arbitration Act, which empowers the Court to order interim measures.

37. In response to the objection, of Mr. Kamath, to the territorial jurisdiction of this Court to adjudicate on the present petition, Mr. Gautam Narayan advanced the following submissions:

(i) The aircraft was located at Hyderabad. It was required to be registered with the DGCA, and operated in accordance with the Aircraft Act, 1934, Aircraft Rules, 1937 and the CAR issued by the DGCA. The most efficacious remedy, available to the petitioner was, therefore, by means of recourse to the jurisdiction of this Court under Section 9 of the 1996 Act.

(ii) The proviso to Section 2(2) conferred Section 9 jurisdiction on this Court, even in respect of foreign seated arbitrations. This proviso was introduced, pursuant to the recommendations of the 246th Report of the Law Commission, intended to prevent dissipation of assets located in India. Mr. Gautam Narayan took me through the relevant passages of the said Report.

(iii) Meaningful provisional relief, such as attachment of the defendant's properties, could be granted only by the Court within whose territorial jurisdiction the properties were located, and not by a foreign Court, which may have jurisdiction over the situs of the arbitral proceedings. For this purpose, Mr. Gautam Narayan referred to certain passages from "International Commercial Arbitration" by Gary Born.

(iv) Articles 9 and 17J of the UNCITRAL Model also vested jurisdiction, in Courts outside the seat of arbitration, to grant interim relief.

(v) Apropos Clause 22.1 of the Lease Agreement, Mr. Gautam Narayan submitted that the exclusive jurisdiction, vested with Courts at Singapore, by the said Clause, was with respect to the application of the governing law of the Lease Deed and adjudication of disputes pertaining to substantive rights and obligations of the parties under the Lease Deed, or proceedings ancillary thereto. In his submission, the clause had no application to grant of interim relief even before the constitution of the arbitral tribunal.

(vi) The jurisdiction of the Court, in such a case, would have to be decided on the basis of the curial law governing the conduct of the arbitral proceedings which, according to Clause 23.4 of the Lease Agreement, was the SIAC Rules, 2016. Rule 30.3 of the SIAC Rules permitted parties to approach any judicial authority for interim relief, before the constitution of the Tribunal, and not merely judicial authorities located in Singapore.

(vii) Singaporean law permitted interim measures to be granted by Courts only after commencement of the arbitration. For this purpose, Mr. Gautam Narayan drew my attention to Section 12A of the International Arbitration Act. Rule 3.1 of the SIAC Rules was also cited, in this context, which provides that an arbitration would commence only after service of a notice of arbitration. Accepting the contention of the respondent would, therefore, in Mr. Narayan's submission result in rendering the petitioner remediless, in that it would not

be able to seek, or obtain, a pre-arbitration injunction from any forum.

(viii) Courts in Singapore could not provide any efficacious alternative remedy. Mr. Gautam Narayan relied, in this context, on the judgement of the Singapore Court of Appeal in ***Maldives Airport Co. Ltd v. GMR Male International Airport Pte Ltd***[1] and ***SSL International plc v. TTK LIG Ltd***[2], which denied interim relief in cases in which an unacceptable degree of supervision in a foreign land would be involved.

(ix) Courts in Singapore exercised the jurisdiction, to secure assets located abroad only if they had *in personam* jurisdiction over the parties, i.e. where the parties had presented themselves before Courts in Singapore. For this purpose, Mr. Gautam Narayan relied on ***Five Ocean Corporation v. Cingler Ship Pte Ltd***[3]. As such, without first approaching the SIAC, it was not possible for the petitioner to petition the Courts at Singapore.

(x) Section 12A of the International Arbitration Act did not apply at the pre-arbitration stage. Mr. Gautam Narayan relies, for this purpose, on the decision in ***Maldives Airport Co. Ltd***[1]**.** He also placed reliance on the judgement, of a Division Bench

[1](2013) SGCA 16
[2](2011) EWCA Civ 1170
[3](2015) SGHC 311

of the High Court of Andhra Pradesh in ***National Aluminium Co Ltd v. Gerald Metals***[4].

Mr. Gautam Narayan also placed reliance on the judgements of this Court in ***Raffles Design International India Pvt Ltd v. Educomp Professional Education Ltd***[5] and ***Naval Gent Maritime Ltd v. Shivnath Rai Harnarain (I) Ltd***[6] and the judgement of the High Court of Bombay in ***Heligo Charters Pvt Ltd v. Aircon Feibars FZE***[7]**.**

38. Apropos the submission, of Mr. Kamath, that the Lease Deed, dated 9th December, 2019, was not valid, Mr. Gautam Narayan draws attention to Clause 32 thereof, which terminated all prior agreements or understandings, pertaining to matters covered by the said Lease Deed, except with regard to any accrued rights thereunder.

Analysis

39. In the first place, it is necessary to emphasise that the issue to be addressed does not really concern the ease, or difficulty, in prosecuting the present claim in Singapore though, to a limited extent, this aspect may have to be factored into consideration. Essentially, though, we are not concerned, here, with the availability of an alternative remedy. What is pleaded, by Mr. Kamath, and needs to be addressed, is the competence of this Court to adjudicate on the present

[4] (2004) 2 Arb LR 382 (DB)
[5] 234 (2 016) DLT 349
[6] 2000 (54) DRJ 639
[7] (2018) 5 AIR Bom R 317

petition. The respondent contends that this Court does not possess the jurisdiction to hear this matter and is, essentially, therefore, *coram non judice*. Jurisdiction is always a matter of competence, in that want of jurisdiction renders a judicial authority incompetent to adjudicate on a claim. A plea of alternate remedy, on the other hand, involves an element of discretion. Alternate remedy is never a bar to adjudication of the claim, especially in original civil jurisdiction. If this Court does not have jurisdiction to entertain this petition, it cannot assume such jurisdiction merely because the petitioner has no other remedy available with it. For this reason, the plea, of Mr. Gautam Narayan, that, were this Court to decline to entertain the present petition, the petitioner would be rendered remediless, insofar as its prayer for pre-arbitral interim relief is concerned, has necessarily to cede place to the fundamental question of whether this Court possesses, or does not possess, jurisdiction to deal with the matter.

40. Having said that, the submissions of Mr. Gautam Narayan, on the possibility of obtaining interim relief, from a Singaporean court, do assume some relevance, as the discussion hereinafter would reveal.

41. The fundamental issue to be addressed is, therefore, whether this Court has the jurisdiction to hear and decide the present case, and not whether the petitioner has any other alternate, or efficacious, remedy available with it. The plea of alternate remedy predicates the existence of jurisdiction and, consequently, the existence of a remedy before the Court which has been petitioned. There can be no question

of an *alternate* remedy, if the remedy that has been invoked itself does not exist, in the first place.

42. I do not deem it necessary, however, to refer to the commentary on "International Commercial Arbitration" by Gary Born, or to Articles 19 and 17J of the UNCITRAL Model. Arbitration law, in India, is codified, in the form of the 1996 Act. Jurisdiction, in a Court, to adjudicate a petition under Section 9 of the 1996 Act, must, therefore, emanate from the 1996 Act itself. Any reference to the UNCITRAL Model, or to any textual commentaries may, if at all, be justified only if there is any ambiguity in any of the provisions of the 1996 Act, which requires resolution.

43. The provision, in the 1996 Act, which most fundamentally impacts the issue at hand is, unquestionably, Section 2(2). One has, however, also to take note of the definition of "Court", as contained in clause (e) of Section 2(1), as the 1996 Act empowers "the Court" to pass orders of interim measure of protection. Section 2(1)(e) defines "Court" in the following words:

> "(e) "Court" means –
>
> (i) in the case of an arbitration other than an international commercial arbitration, the principal Civil Court of original jurisdiction in the district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration is the same had been the subject-matter of the suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

> (ii) *in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit*, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;"
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> (Emphasis supplied)

44. The issue of the situs of jurisdiction, concurrent jurisdiction, and exclusion of jurisdiction, in Courts, to entertain petitions under Sections 9, 11, 34 and 36, of the 1996 Act, have been the subject matter of consideration in numerous decisions of the Supreme Court. One of the most illuminating expositions, which traces the entire precedential history on the issue is, perhaps, to be found in the Keynote speech delivered by Hon'ble Mr. Justice Rohinton Fali Nariman, at the GAR Live India 2020 seminar, which, fortunately, is available in the virtual public domain, and makes for rewarding viewing, by any student of law, and for compulsory viewing by every student of arbitration law. The disciplinary protocols of judgement writing, however, inhibit me from relying on the said address, while penning this decision. Turning, therefore, to the black-and-white precedents, of the Supreme Court, on the issue, the entire law may, in my view, be comprehensively understood by the study of seven judgements, namely (in chronological order) ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.***[8] (hereinafter referred to as "***BALCO***"), ***Swastik Gases Pvt Ltd v. Indian Oil Corporation***

[8] **(2012) 9 SCC 552**

***Ltd*[9]*, B. E. Siomese Von Staraburg Niedenthal v. Chhatisgarh Investment Ltd*[10], *Indus Mobile Distribution Pvt Ltd v. Datawind Innovations Pvt Ltd*[11], *Brahmani River Pellets Ltd.v. Kamachi Industries Ltd*[12], *BGS SGS Soma JV v. NHPC Ltd*[13] and *Mankastu Impex Pvt. Ltd.v. Airvisual Ltd*[14].

Precedential Analysis and the 246th Report of the Law Commission of India

45. *BALCO*[8]*:*

45.1 ***BALCO***[8], rendered by a Constitution Bench, emanated from Section 2(2) of the 1996 Act, prior to the insertion, in the said sub-Rule, of the proviso thereto. Section 2(2), as it stood at that time, therefore, made the provisions of Part I of the 1996 Act applicable "where the place of arbitration is in India". There was a difference, in the views of the Hon'ble Judges constituting a two-Judge Bench, resulting in the appeals, before it, being directed to be placed before the Hon'ble Chief Justice, for being listed before another Bench[15].The appeal was placed before a 3-Judge bench which, *vide* its order dated 1st November, 2011[16], directed that the matter be placed before a Constitution Bench. Thus, came to be delivered the judgement in ***BALCO***[8].

[9](2013) 9 SCC 32
[10](2015) 12 SCC 225
[11](2017) 7 SCC 678
[12]2019 SCC OnLine SC 929
[13](2020) 4 SCC 234
[14]2020 SCC OnLine SC 301
[15]Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 649
[16]Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 648

45.2 The facts, in ***BALCO***[8], are only briefly noted in the judgement, as the issue referred to the Constitution Bench was purely legal. An agreement, dated 22nd April, 1993, was executed, between BALCO and Kaiser Aluminium Technical Services Inc., for installation of a computer-based system for shelter modernisation. The agreement contained the following clauses:

> "17.1 Any dispute or claim arising out of or relating to this Agreement shall be in the first instance, endeavour to be settled amicably by negotiation between the parties hereto and failing which the same will be settled by arbitration pursuant to the English Arbitration Law and subsequent amendments thereto.
>
> 17.2 The arbitration proceedings shall be carried out by two arbitrators, one appointed by BALCO and one by KATSI chosen freely and without any bias. The Court of Arbitration shall be held wholly in London, England and shall use the English language and the proceeding. The findings and award of the Court of Arbitration shall be final and binding upon the parties. …
>
> *****
>
> **22. Governing Law –** This agreement will be governed by the prevailing law of India and in case of Arbitration, the English law shall apply."

The above process, held the Supreme Court, made it apparent that the governing law, of the agreement, i.e. the substantive law, was the prevailing law of India, but the *lex fori* for the arbitration would be English law.

45.3 Disputes arose, between the parties, which were referred to arbitration, held in England. The Arbitral Tribunal rendered two

awards, dated 10th and 12th November, 2002. Applications, for setting aside the award, were preferred, by BALCO, under Section 34 of the 1996 Act, before the learned District Judge, Bilaspur. The learned District Judge dismissed the applications *vide* order dated 20th July, 2004. BALCO challenged the dismissal by way of appeals before the High Court of Chhattisgarh. The appeals were also dismissed, by a Division Bench of the High Court, *vide* order dated 10th August, 2005, holding that they were not maintainable. BALCO appealed to the Supreme Court.

45.4 Tagged, with the BALCO appeal, was the appeal in ***Bharti Shipyard Ltd v. Ferrostaal AG***[17] which, however, dealt with an application under Section 9 of the 1996 Act. The facts, in this case, also deserve to be noticed. Bharti Shipyard Ltd. (hereinafter referred to as "BSL") entered into to shipbuilding contracts with Ferrostaal AG (hereinafter referred to as "FAG"), whereunder BSL was to construct vessels and deliver them to FAG. BSL and FAG agreed to settlement of the dispute, by arbitration, under the Rules of the London Maritime Arbitrators Association (LMAA), in London. Two requests, for arbitration of the disputes which arose between them, were submitted by FAG, in accordance with the rules of the LMAA.

45.5 During the pendency thereof, FAG filed applications, under Section 9 of the 1996 Act, seeking injunction against encashment of bank guarantees, issued under the contracts. The learned District Judge, Mangalore, granted *ex parte ad interim* injunction, against

[17]**SLP (C) 27824/2011**

encashment of the bank guarantee and, later, *vide* judgement dated 14th January, 2011, allowed the application under Section 9. The judgement of the learned District Judge was, however, set aside by the High Court, *vide* judgement dated 9th September, 2011. BSL appealed to the Supreme Court.

45.6 Among the issues, framed by the Supreme Court as arising for its consideration, were the following:

> "10.1 What is meant by the place of arbitration as found in Sections 2(2) and 20 of the Arbitration Act, 1996?
>
> *****
>
> 10.3 Does Section 2(2) bar the application of Part I of the Arbitration Act, 1996 ("Part I" for brevity) to arbitrations where the place is outside India?"

45.7 The Supreme Court overruled, at the very outset, its earlier decisions in ***Bhatia International v. Bulk Trading S.A.***[18]and ***Venture Global Engineering v. Satyam Computer Services Ltd***[19] and, thereafter, proceeded to address the issues framed by it, thus:

> (i) The debate, before the Supreme Court, revolved around the absence of the word "only" in Section 2(2) of the 1996 Act. The provision stated that Part I "shall apply where the place of arbitration is in India", and not that Part I "shall apply *only* where the place of arbitration is in India". As the Supreme Court paraphrased the controversy (in para 63 of the report),

[18] **(2002) 4 SCC 105**
[19] **(2008) 4 SCC 190**

"the crucial difference between the views expressed by the appellants on the one hand and the respondents on the other hand is as to whether the absence of the word "only" in Section 2(2) clearly signifies that Part I of the Arbitration Act, 1996 would compulsorily apply in the case of arbitrations held in India, or would it signify that the Arbitration Act, 1996 would be applicable only in cases where the arbitration takes place in India." ***Bhatia International***[17] and ***Venture Global Engineering***[18] held that Part I would apply to all arbitrations held outside India, unless the parties, by agreement, excluded the applicability of any or all of the provisions of Part I. The Constitution Bench expressed its disagreement with the said enunciation, and held (in para 67 of the report) that "a plain reading of Section 2(2) makes it clear that Part I *is limited in its application to arbitrations which take place in India*".

(ii) The Supreme Court went on to hold, further, that the "seat of the arbitration" was the "centre of gravity" thereof. At the same time, it is clarified that the arbitral proceedings were not required, necessarily, to be conducted at the "seat of arbitration", as the arbitrators were at liberty to hold meetings at different, convenient, locations. The law governing the arbitration was, however, it was held, normally the "law of the seat or place where the arbitration is held" (in para-76 of the report). The Constitution Bench went on to approve the theory,

postulated in Redfern and Hunter on International Arbitration[20], that "the concept that an arbitration is governed by the law of the place in which it is held, which is the 'seat' (or 'forum' or *locus arbitri*) of the arbitration, is well established in both the theory and practice of international arbitration. Reliance was also placed on the Geneva Protocol, 1923, which stated that the arbitral procedure, including the Constitution of the Arbitral Tribunal, would be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

(iii) The omission of the word "only" in Section 2(2) of the 1996 Act, it was held, did not detract from the territorial scope of the application of Part I thereof. Accordingly, it was held (in para 78 of the report) that Part I would not apply to arbitrations which did not take place in India. To make matters clearer, the Constitution Bench went on to say, in para 79 of the report, "with the submission made by Mr. Aspi Chenoy that Section 2(2) is an express parliamentary declaration/recognition that Part I of the Arbitration Act, 1996 applies to arbitration having their place/seat in India and does not apply to arbitrations seated in foreign territories". Yet again, in paras 80 and 81 of the report, it was held that "the provisions have to be read as limiting the applicability of Part I to arbitrations which take

[20]Blackaby, Partasides, Redfern and Hunter (Eds.), Redfern and Hunter on International Arbitration (5thEdn,Oxford University Press, Oxford/New York 2009).

place in India" and "Section 2(2) merely reinforces the limits of operation of the Arbitration Act, 1996 to India".

(iv) The Constitution Bench also went on to examine Section 2(1)(e), and the impact, thereof, on the above position. Having extracted the clause, the Supreme Court went on, in para 97 of the report, to hold that "Section 2(1)(e) being purely jurisdictional in nature *can have no relevance to the question whether Part I applies to arbitrations which take place outside India*".

(v) The Constitution Bench went on, thereafter, to underscore the importance of the distinction between the "seat" and the "venue" of the arbitration, in the context of international commercial arbitration, in para 100 of the report, in the following words:

> "True, that in an international commercial arbitration, having a seat in India, hearings may be necessitated outside India. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but it would not have the effect of changing the seat of arbitration which would remain in India. The legal position in this regard is summed up by Redfern and Hunter, The Law and Practice of International Commercial Arbitration (1986) at p. 69 in the following passage under the heading "The Place of Arbitration":
>
> > "The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of the reference or the minutes of proceedings or in

> some other way as the place or "seat" of the arbitration. This does not mean, however, that the Arbitral Tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an Arbitral Tribunal to hold meetings – or even hearings – in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses…. It may be more convenient for an Arbitral Tribunal sitting in one country to conduct a hearing in another country – for instance, for the purpose of taking evidence…. In such circumstances, each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties."

This, in our view, is the correct depiction of the practical considerations and the distinction between "seat" [Sections 20(1) and 20(2)] and "venue" [Section 20(3)]. We may point out here that the distinction between "seat" and "venue" would be quite crucial in the event, the arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and also select the Arbitration Act, 1996 as the curial law/law governing the arbitration proceedings. It would be a matter of construction of the individual agreement to decide whether:

> (i) The designated foreign "seat" would be read as in fact only providing for a "venue"/"place" where the hearings would be held, in view of the choice of the Arbitration Act, 1996 as being the *curial law*, OR
>
> (ii) Whether the specific designation of a foreign seat, necessarily carrying with it the choice of that country's arbitration/*curial law*,

would prevail over and subsume the conflicting selection choice by the parties of the Arbitration Act, 1996.

Only if the agreement of the parties is construed to provide for the "seat"/"place" of arbitration being in India – would Part I of the Arbitration Act, 1996 be applicable. If the agreement is held to provide for a "seat"/"place" outside India, Part I would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement purports to provide that the Arbitration Act, 1996 shall govern the arbitration proceedings."

(Underscoring supplied; Italics in original)

(vi) The resulting position was crystallised, in paras 116 and 117 of the report, thus:

"**116.** The legal position that emerges from a conspectus of all the decisions, seems to be, that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.

117. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat/place of arbitration outside India, then the provision that the Arbitration Act, 1996 would govern the arbitration proceedings, would not make Part I of the Arbitration Act, 1996 applicable or enable Indian Courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the *English Procedural Law/curial law*. This necessarily follows from the fact that Part I applies only to arbitrations having their seat/place in India."

(Underscoring supplied; Italics in original)

(vii) The Constitution Bench went on to hold, in para 123 of the report, that it was "clear that the regulation of conduct of arbitration and challenge to an award would have to be done by the courts of the country in which the arbitration is being conducted". Such a court, alone, it was held, was the "supervisory court possessed of the power to annul the award".

(viii) Thereafter, from para 155 of the report, the Supreme Court addressed, squarely, the issue of "interim measures, etc. by the Indian courts where the seat of arbitration is outside India" – precisely the issue which arises in the present case. The very first submission, advanced to support the existence of jurisdiction, in Indian courts, to grant interim relief, under Section 9, even where the seat of arbitration was outside India, was the precise submission urged by Mr. Gautam Narayan before me, i.e., "that in such circumstances, the parties would be left remediless" as "no application for interim relief would be available under Section 9 of the Arbitration Act, 1996, in an arbitration seated outside India". The Constitution Bench was, therefore, exhorted to hold that "courts in India have the jurisdiction to take necessary measures for preservation of assets and/or to prevent dissipation of assets", even in such cases. The enunciation of the law, to the said effect, in ***Bhatia International***[17] was, it was submitted, correct. Section 9, it was submitted, was required to be distinguished from Section 34, as grant of interim relief under Section 9 did not interfere with the final award. It was also contended that "annulment of the

award under Section 34 would have extra territorial operation whereas Section 9 being entirely asset focused, would be intrinsically territory focused and intra-territorial in its operation" (as recorded in para 155 of the report). The Constitution Bench, in clear, categorical in unmistakable terms, rejected the submission, holding (in para 156 of the report) that "it would be wholly undesirable for this Court to declare by process of interpretation that Section 9 is a provision which falls neither in Part I not Part II". Observing that "schematically, Section 9 was placed in Part I" of the 1996 Act, the Constitution Bench held that it could not be treated as *sui generis*, or granted a special status. Observing that Part I of the 1996 Act had already been held, by it, not to apply to foreign seated arbitrations, the Constitution Bench also observed that Part II did not contain any provision similar to Section 9. Thus, it was held, "on a logical and schematic construction of the Arbitration Act, 1996, the Indian courts do not have the power to grant interim measures when the seat of arbitration is outside India" (in para 157 of the report). The "arbitral proceedings", to which Section 9 refers, it was held, "cannot relate to arbitration which takes place outside India". The Constitution Bench went on to declare, unequivocally, in para 158 of the report, "that the provision contained in Section 9 is limited in its application to arbitrations which take place in India" and that holding otherwise "would be to do violence to the policy of the territoriality declared in Section 2(2) of the Arbitration Act, 1996".

(ix) The Constitution Bench also went on to address the grievance that exclusion, of Section 9, to foreign seated arbitrations, would result in great hardship to parties who were in need of interim measures, by tellingly observing thus (in paras 163 and 164 of the report):

> "**163.** In our opinion, the aforesaid judgment in ***Reliance Industries Ltd. [(2002) 1 All ER (Comm) 59 : (2002) 1 Lloyd's Rep 645]*** does not lead to the conclusion that the parties were left without any remedy. *Rather the remedy was pursued in England to its logical conclusion. Merely because the remedy in such circumstances may be more onerous from the viewpoint of one party is not the same as a party being left without a remedy. Similar would be the position in cases where parties seek interim relief with regard to the protection of the assets. Once the parties have chosen voluntarily that the seat of the arbitration shall be outside India, they are impliedly also understood to have chosen the necessary incidents and consequences of such choice. We, therefore, do not find any substance in the submissions made by the learned counsel for the appellants, that if applicability of Part I is limited to arbitrations which take place in India, it would leave many parties remediless.*
>
> **164.** *If that be so, it is a matter to be redressed by the legislature.*"
>
> (Emphasis supplied)

No consideration of sympathy, at the petitioner being rendered "remediless" can operate to confer jurisdiction, on this Court, if no such jurisdiction exists under the statutory dispensation in force. In deciding the sustainability of the objection, of Mr. Kamath, to the territorial jurisdiction of this Court to entertain the present proceedings, therefore, the difficulty in obtaining

relief from Singaporean courts cannot be the *determinative* factor, though it does play a role, as would become more apparent from the discussion hereinafter.

45.8 Thus, in ***BALCO***[8], the Constitution Bench of the Supreme Court held, in unmistakable terms, that Section 2(2) of the 1996 Act resulted in complete exclusion of jurisdiction, of courts in India, in respect of foreign seated arbitrations, even for the purpose of obtaining interim reliefs, whether at the pre-arbitral stage or otherwise, and also went on to clarify that this position was not affected by Section 2(1)(e).

46. *Swastik Gases*[9]:

46.1 This decision was concerned, essentially, with the scope of an "exclusive jurisdiction" clause, engrafted in the agreement between the parties. It did not involve any international commercial arbitration.

46.2 The dispute between the parties arose out of an agreement, dated 13th October, 2002, whereby Swastik Gases (hereinafter referred to as "Swastik") was appointed as the consignment agent of IOCL, for marketing lubricants at Jaipur. Disputes arose in November, 2003, which could not be amicably resolved. On 25th August, 2008, Swastik sent a notice, to IOCL, invoking the arbitration clause in the agreement, and naming a retired Judge of the High Court of Rajasthan as its arbitrator. IOCL was requested to nominate a corresponding

arbitrator, from its side. On failure, of IOCL, to do so, Swastik petitioned the High Court, under Section 11 of the 1996 Act.

46.3 IOCL contested the petition on the ground that the High Court of Rajasthan lacked territorial jurisdiction to adjudicate the *lis*, as the agreement was subject to jurisdiction of courts at Kolkata. The High Court agreed with IOCL and dismissed the petition, of Swastik, on the ground of jurisdiction. Swastik appealed to the Supreme Court.

46.4 Admittedly, Clause 18 in the agreement between Swastik and IOCL, which provided for "Jurisdiction", postulated that "the agreement shall be subject to jurisdiction of the courts at Kolkata". Even so, Swastik contended, before the Supreme Court, that the jurisdiction of courts at Jaipur was not ousted, as the major part of the cause of action had arisen within such jurisdiction.

46.5 The Supreme Court held that, in view of Section 2(1)(e) of the 1996 Act, read with Section 20 of the Code of Civil Procedure, 1908 (CPC), "there remains no doubt that the Chief Justice of the designated Judge of the Rajasthan High Court has jurisdiction in the matter". Even so, it noted (in para 31 of the report), "the question is, whether parties by virtue of Clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the jurisdiction of the Chief Justice of the Rajasthan High Court has been excluded". The Supreme Court proceeded to answer the question, thus (in para 22 of the report):

> "For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. *The intention of the parties – by having Clause 18 in the agreement – is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim expression unius est exclusion alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts.* A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner."
>
> (Emphasis supplied)

46.6 The Supreme Court, therefore, concurred with the judgement of the High Court of Rajasthan and dismissed the appeal, preserving liberty, with the appellant, to approach the High Court of Calcutta.

47. <u>The 246th Report of the Law Commission of India</u>

47.1 In the wake of ***BALCO***[8], and the concerns expressed therein, the Law Commission, in its 246th Report, tendered in August, 2014,

suggested extensive amendments to the 1996 Act. Paras 40 to 42 of the Report merit reproduction, thus:

> "40. The Supreme Court in ***BALCO*** decided that Parts I and II of the Act are mutually exclusive of each other. *The intention of Parliament that the Act is territorial in nature and sections 9 and 34 will apply only when the seat of arbitration is in India. The seat is the "centre of gravity" of arbitration,* and even where two foreign parties arbitrate in India, Part I would apply and, by virtue of Section 2(7), the award would be a "domestic award". The Supreme Court recognized the "seat" of arbitration to be the juridical seat; however, in line with international practice, it was observed that the arbitral hearings may take place at a location other than the seat of arbitration. The distinction between "seat" and "venue" was, therefore, recognized. *In such a scenario, only if the seat is determined to be India, Part I would be applicable. If the seat was foreign, Part I would be inapplicable.Even if Part I was expressly included "it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the [foreign] Procedural Law/Curial Law." The same cannot be used to confer jurisdiction on an Indian Court.* However, the decision in ***BALCO*** was expressly given prospective effect and applied to arbitration agreements executed after the date of the judgment.
>
> 41. *While the decision in* ***BALCO*** *is a step in the right direction* and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.
>
> > (i) *Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The*

interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of Sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it.

That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

(ii) While the decision in ***BALCO*** was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in ***Bhatia*** is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre-***BALCO***.

42. The above issues have been addressed by way of proposed Amendments to Sections 2(2), 2(2A), 20, 28 and 31."

47.2 The following amendments, suggested by the Law Commission Report, are significant:

(i) Section 2(1)(e) which, as it stood then, read as under:

"(e) "Court" means the principal Civil Court of original jurisdiction in the district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the

> same had been the subject-matter of the suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes".

The Law Commission Report recommended amendment of Section 2(1)(e), by the addition of the words "in the case of an arbitration other than international commercial arbitration", before the words "the principal Civil Court of original jurisdiction" in sub-section (i), and insertion of sub- section (ii), specific to international commercial arbitration. These changes would become apparent from the amended Section 2(1)(e), which already stands reproduced in para 43 *supra*.

(ii) The Law Commission Report also contains the following recommendations, for amendments in Section 2 of the 1996 Act:

> "(v) In sub-section (1), after clause (h), insert clause "(hh) "seat of the arbitration" means the juridical seat of the arbitration".
>
> [NOTE: This definition of "seat of arbitration" is incorporated so as to make it clear that "seat of arbitration" is different from the venue of arbitration. Section 20 has also been appropriately modified.]
>
> (vi) In sub-section (2), add the word "only" after the words "shall apply" and delete the word "place" and insert the word "seat" in its place.
>
> [NOTE: this amendment ensures that an Indian Court can only exercise jurisdiction under Part I where the seat of the arbitration is in India. To this extent, it overrules ***Bhatia International v. Bulk Trading S.A. and Anr., (2002) 4 SCC 105***, and re-enforce the "seat centricity" principle of ***Bharat Aluminium Company***

and Ors. etc. v. Kaiser Aluminium Technical Service, Inc., (2012) 9 SCC 552]

Also insert the following proviso "Provided that, subject to an express agreement to the contrary, the provisions of sections 9, 27, 37(1)(a) and 37 (3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India, if an award made, or that which might be made, in such place would be enforceable and recognised under Part II of this Act.

[NOTE: This proviso ensures that an Indian Court can exercise jurisdiction with respect to these provisions even where the seat of the arbitration is outside India.]"

(iii) Additionally, the Law Commission Report also suggested certain amendments, in Sections 20 and 31 of the 1996 Act:

"**Amendment of Section 20**

12. In Section 20, delete the word "Place" and add the words "Seat and Venue" before the words "of arbitration".

(i) In sub-section (1), after the words "agree on the" delete the word "place" and add words "seat and venue".

(ii) In sub-section (3), after the words "meet at any" delete the word "place" and add word "venue".

[NOTE: The departure from the existing phrase "place" of arbitration is proposed to make the wording of the Act consistent with the international usage of the concept of a "seat" of arbitration, to denote the legal home of the arbitration. The amendment further legislatively distinguishes between the "[legal] seat" from a, "[mere] venue" of arbitration.]

Amendment of Section 31

17. In Section 31

(i) In sub-section (4), after the words "its date and the" delete the word "place" and add the word "seat"."

These recommendations, for amendment of Sections 20 and 31 were, however, not accepted, and the provisions remained inviolate.

47.3 While the recommendation, *qua* Section 2(1)(e), was accepted and implemented, and the clause was amended accordingly, the amendments relating to Section 2(2) were not accepted *in toto*. While a proviso was added, to the said sub-section, the proposal to add, after the words "shall apply", the word "only", was not implemented. Similarly, the word "express", as contained in the proposed proviso to Section 2(2), did not figure in the proviso as it ultimately came to be inserted *vide* the Arbitration and Conciliation (Amendment) Act, 2016 (hereinafter referred to as "the 2016 Amendment Act"). What impact these deviations have, when compared with the original recommendations of the Law Commission, would become more apparent from the discussion that follows hereinafter.

48. ***B.E. Siomese Von Staraburg Niedenthal***[10]

48.1 In the context of the controversy before me, this judgement, though brief, assumes considerable importance. An agreement, for raising mines, located in Goa, was executed, between the appellant (hereinafter referred to as "BES") and the respondent (hereinafter

referred to as "CIL"), whereunder CIL was the exclusive purchaser of ore, mined by BES. Clause 13 of the raising agreement expressly stipulated that "the courts at Goa shall have exclusive jurisdiction". Disputes arose, resulting in CIL filing an application, under Section 9 of the 1996 Act, for interim protection, in the Court of the District Judge, Raipur. BES questioned the jurisdiction of the District Judge, Raipur, to adjudicate the *lis*, on the ground that the mines were located in Goa, the agreement was executed in Goa and the second respondent was residing at Goa. CIL contended, *per contra*, that the working of the company was at Raipur and that the cause of action also arose in Raipur. The District Judge, Raipur, rejected the objection of BES. Aggrieved thereby, BES appealed to the Chhattisgarh High Court. The High Court directed the District Judge to decide the Section 9 application, along with the objection regarding territorial jurisdiction, afresh. BES appealed to the Supreme Court.

48.2 Placing reliance on the passage, from ***Swastik Gases Pvt Ltd***[9], extracted in para 46.5 *supra*, the Supreme Court held that Clause 13 of the raising agreement ousted the jurisdiction of the District Judge, Raipur, and conferred exclusive jurisdiction on the courts at Goa. The judgement of the High Court was, therefore, set aside.

49. ***Indus Mobile Distribution Pvt Ltd***[11]

49.1 Datawind Innovations Pvt. Ltd. (hereinafter referred to as "DIPL"), the respondent in this case, was supplying goods to the appellant (who would be referred to, hereinafter, as "Indus"). DIPL

was located in New Delhi, and Indus was located at Chennai. An agreement, dated 25th October, 2014, was executed between them. Clause 18 of the agreement provided for resolution of disputes, which could not be settled amicably, by arbitration, to be conducted at Mumbai, in accordance with the 1996 Act. Clause 19 stipulated that "all disputes and differences of any kind whatever arising out of or in connection with (the) agreement shall be subject to the exclusive jurisdiction of courts of Mumbai only".

49.2 Disputes arose, resulting in the issuance of a notice, dated 25th September, 2015, from DIPL to Indus, invoking Clause 18 of the agreement and appointing Justice H.R. Malhotra, a retired Judge of this Court, as Sole arbitrator. Indus objected to the appointment of Justice Malhotra, *vide* its reply dated 15th October, 2015.

49.3 DIPL moved two petitions before this Court, one under Section 9, seeking certain pre-arbitral interim reliefs, and another under Section 11, for appointment of an arbitrator. Both the petitions were disposed of, *vide* judgement dated 3rd June, 2016[21]. An objection, raised by Indus, to the maintainability of the Section 9 petition before this Court, was rejected, holding that the "exclusive jurisdiction clause", i.e. Clause 19, in the agreement between the parties, would not apply on facts, as no part of the cause of action had arisen within the jurisdiction of any court in Mumbai. In other words, this Court was of the opinion that the parties could not, by an exclusive jurisdiction clause, confer jurisdiction on a court, within the

[21] **Datawind Innovations (P) Ltd v. Indus Mobile Distribution (P) Ltd, 2016 SCC OnLine Del 3744**

jurisdiction of which no part of the cause of action had arisen. This Court opined that only courts of Delhi, Chennai or Amritsar, would have jurisdiction in the matter and that, therefore, the petitioner had correctly filed the Section 9 petition in this Court. This Court proceeded to confirm the interim order dated 22nd September, 2015 and also disposed of the Section 11 petition, by appointing Justice S.N. Variava, a learned retired Judge of the Supreme Court, as the sole arbitrator.

49.4 Indus challenged this judgement, before the Supreme Court. The Supreme Court quoted extensively from ***BALCO***[8], and reproduced, with approval, the following passage from the judgement of the Court of Appeal, England, in ***A v. B***[22] (on which ***BALCO***[8], too, relied):

> "... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy ... as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration."

49.5 The Supreme Court endorsed the view, earlier expressed in ***Enercon (India) Ltd v. Enercon GmBH***[23], that "once the seat of arbitration has been fixed, it would be in the nature of an exclusive jurisdiction clause as to the courts which exercise supervisory powers over the arbitration".

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[22] **(2007) 1 All ER (Comm) 591**
[23] **(2014) 5 SCC 1**

49.6 The Supreme Court, thereafter, went on to note the recommendations, of the 246th Law Commission, and the amendments proposed by it. In para 18 of the report, the Supreme Court rationalised the decision, of the Legislature, not to amend Sections 20 and 31 of the 1996 Act, as proposed by the Law Commission, thus:

> "The amended Act, does not, however, contain the aforesaid amendments, presumably because the ***BALCO*** judgment in no uncertain terms has referred to "place" as "juridical seat" for the purpose of Section 2(2) of the Act. It further made it clear that Section 20(1) and 20 (2) where the word "place" is used, refers to "juridical seat", whereas in Section 20 (3), the word "place" is equivalent to "venue". This being the settled law, it was found unnecessary to expressly incorporate what the Constitution Bench of the Supreme Court has already done by way of construction of the Act."

49.7 The concluding paras 19 and 20 of the report, in ***Indus Mobile Distribution***[11], are of significance:

> "**19.** A conspectus of all the aforesaid provisions shows that *the moment the seat is designated, it is akin to an exclusive jurisdiction clause.On the facts of the present case, it is clear that the seat of arbitration is Mumbai and Clause 19 further makes it clear that jurisdiction exclusively vests in the Mumbai courts.* Under the Law of Arbitration, unlike the Code of Civil Procedure which applies to suits filed in courts, a reference to "seat" is a concept by which a neutral venue can be chosen by the parties to an arbitration clause. The neutral venue may not in the classical sense have jurisdiction – that is, *no part of the cause of action may have arisen at the neutral venue and neither would any of the provisions of Section 16 to 21 of the Code of Civil Procedure be attracted. In arbitration law however, as has been held above, the moment "seat" is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties.*

> **20.** *It is well settled that where more than one court has jurisdiction, it is open for parties to exclude all other courts.* For an exhaustive analysis of the case law, see ***Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32***. This was followed in a recent judgment in ***B.E. Simoese Von Staraburg Niedenthal v. Chhattisgarh Investment Ltd., (2015) 12 SCC 225.****Having regard to the above, it is clear that Mumbai courts alone have jurisdiction to the exclusion of all other courts in the country, as the juridical seat of arbitration is at Mumbai.* This being the case, the impugned judgment is set aside. The injunction confirmed by the impugned judgment will continue for a period of four weeks from the date of pronouncement of this judgment, so that the respondents may take necessary steps under Section 9 in the Mumbai Court. The appeals are disposed of accordingly."
>
> (Emphasis supplied)

50. ***Brahmani River Pellets***[12]

50.1 The Supreme Court was seized, in this case, with the question of whether an application for appointment of an arbitrator, under Section 11(6) of the 1996 Act, would lie before the Madras High Court, despite the venue of arbitration having been fixed as Bhubaneswar, in the agreement between the parties.

50.2 The agreement related to sale of 40,000 Wet Metric Tonne (WMT) of Iron ore pellets, by the appellant to the respondent. The pellets were to be loaded at Odisha and unloaded at Chennai. Clause 18 of the agreement provided for arbitration, of disputes, and specified that "the venue of arbitration shall be Bhubaneswar".

50.3 On 7th October, 2015, the respondent invoked the arbitration clause. The appellant opposed the appointment of an arbitrator,

whereupon the respondent filed a petition, under Section 11(6), before the High Court of Madras, for appointment of the sole arbitrator. The appellant challenged the jurisdiction of the High Court of Madras, to entertain the petitioner, on the ground that the seat of arbitration was Bhubaneswar. The High Court of Madras appointed a learned former Judge of the High Court as the sole arbitrator, holding that the mere designation of a "seat" of arbitration, did not result in ouster of the jurisdiction of all other courts to deal with the matter. An express clause, excluding jurisdiction of other courts was, in the opinion of the High Court, required, for such an ouster to take place.

50.4 Before the Supreme Court, the appellant contended that, once the parties had agreed for a place/venue for the arbitration, that place acquired the status of a "seat", which was the juridical seat of arbitration, resulting in confinement of jurisdiction to the Courts having jurisdiction over such juridical seat. The respondent contended, *per contra*, that, the cause of action having arisen both at Bhubaneswar and Chennai, both High Courts, i.e. the High Court of Orissa and the High Court of Madras, would have supervisory jurisdiction over the arbitral proceedings. Absent any specific exclusion of the jurisdiction of a court, in the agreement, it was contended that the mere designation of a "seat" of arbitration, did not result, *ipso facto*, in ouster of the jurisdiction of all courts, save and except the court having territorial jurisdiction over such seat.

50.5 Noting, in detail, the import of the decisions in ***BALCO***[8], ***Swastik Gases***[9] and ***Indus Mobile Distribution***[11], the Supreme Court concluded, in paras 18 and 19 of the report, thus:

> "**18.** *Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts*. In the present case, the parties have agreed that the "venue" of arbitration shall be at Bhubaneswar. *Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts.* As held in ***Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157***, *non-use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference.*
>
> **19.** When the parties have agreed to have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only the Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act, the impugned order is liable to be set aside."
>
> (Emphasis supplied)

51. ***BGS SGS Soma JV***[13]

51.1 This was a batch of three Civil Appeals, emanating from three petitions, under Section 34 and, thereafter, three appeals under Section 37, of the 1996 Act. Two issues arose before the Supreme Court, of which one, alone, is relevant for our purpose. These issues were (i) the maintainability of the appeals under Section 37, and (ii) whether the "seat of arbitration" was New Delhi or Faridabad, on which would depend the forum, before which the Section 34 petition could have been filed. We are not concerned with issue (i).

51.2 SLP (Civil) 25618/2018 dealt with the contract, awarded by NHPC to the petitioner (hereinafter referred to as "BGS") for construction of a project, touted as the largest hydropower project in India. The project was located in the Lower Subansiri Districts in Assam and Arunachal Pradesh. Clause 67.3 of the contract provided for arbitration, to resolve disputes between the parties. Sub-clause (vi) thereof provided that arbitration proceedings would be held in New Delhi/Faridabad.

51.3 Disputes arose. BGS issued a notice of arbitration, on 16th May, 2011, to NHPC. A three-member Arbitral Tribunal was constituted as per Clause 67.3. 71 sittings of the Arbitral Tribunal took place, following which, on 26th August, 2016, the Arbitral Tribunal delivered a unanimous award at New Delhi. NHPC challenged the award, by way of a petition under Section 34 of the 1996 Act, before the District and Sessions Judge, Faridabad. BGS moved an application, under Section 151 read with Order VII Rule 10 of the CPC and Section 2(1)(e)(i) of the 1996 Act, seeking that the petitioner be returned to NHPC for presentation before the appropriate court at New Delhi and/or the District Judge at Dhemaji, Assam. The case was, subsequently, transferred to the Special Commercial Court, Gurugram which, *vide* order dated 21st December, 2017, allowed the application of BGS and returned the Section 34 petition to NHPC, for presentation before the proper court having jurisdiction, in New Delhi. NHPC appealed, against the said decision, under Section 37 of the 1996 Act, before the High Court of Punjab and Haryana. *Vide* judgement dated 12th September, 2018, the High Court of Punjab and

Haryana allowed the appeal of NHPC, and held that Delhi was only a convenient venue, where the arbitral proceedings were held, and was not the seat of the arbitration proceedings. As such, part of the cause of action having arisen in Faridabad, the High Court held that the District Judge at Faridabad was possessed of jurisdiction to decide the petition of NHPC. BGS carried the matter to the Supreme Court.

51.4 Before the Supreme Court, BGS contended that, as the sittings of the Arbitral Tribunal had taken place at New Delhi, and the award was also posted in New Delhi, New Delhi was the "seat" of the arbitral proceedings between the parties. Even if it were to be assumed that both New Delhi and Faridabad had jurisdiction, it was contended that, New Delhi having been chosen by the parties, the Section 34 petition would necessarily have to be filed before the court at New Delhi. Once the venue of the arbitral proceedings had been fixed between the parties, such venue was liable to be regarded as the "seat" of arbitration, for which purpose reliance was placed on the judgement of the Constitution Bench in ***BALCO***[8]. The subsequent judgement of the Supreme Court in ***U.O.I. v. Hardy Exploration & Production (India) Inc.***[24], which suggested otherwise was, it was submitted, wrongly decided.

51.5 Similar submissions were advanced by learned counsel appearing on behalf of the appellant in the other two appeals.

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[24](2019) 13 SCC 472

51.6 NHPC contended, *per contra*, that the arbitration clause, in the contract between the parties, did not expressly state that New Delhi, or Faridabad, was the "seat" of the Arbitral Tribunal. It merely referred to a convenient venue and the fact that sittings were held at New Delhi did not render New Delhi the "seat of the arbitration", within the meaning of Section 20(1) of the 1996 Act. The agreements having been signed at Faridabad, and notices sent by BGS to the office of NHPC at Faridabad, it was submitted that part of the cause of action clearly arose in Faridabad, as a result of which the Faridabad courts possessed the jurisdiction to decide the Section 34 application. Even as per ***BALCO***[8], it was contended, both New Delhi and Faridabad would have concurrent jurisdiction. That being so, as no part of the cause of action arose in New Delhi, and a part of the cause of action having arisen at Faridabad, the Faridabad court alone had jurisdiction to adjudicate on the matter.

51.7 On this issue, the Supreme Court observed, at the outset (in para 21 of the report) that it was necessary to lay down the law on what constituted the "juridical seat" of the arbitral proceedings and whether, once the seat was delineated by the arbitration agreement, exclusive jurisdiction over the arbitral proceedings would vest in the courts at the place where such seat was located, alone. Thereafter, the Supreme Court traced the legislative history, behind the 1996 Act, and the various provisions thereof. The Supreme Court went on to observe that there was no distinction between the "place of arbitration" and "seat of arbitration" and that Sections 20 and 31(4) of the 1996 Act granted primacy of place to the juridical seat of the

arbitral proceedings. In para 32, the Supreme Court observed that "given the new concept of "juridical seat" of the arbitral proceedings, and the importance given by the Arbitration Act, 1996 to this "seat", the arbitral award is now not only to state its date, *but also the place of arbitration* as determined in accordance with Section 20." The Supreme Court went on to paraphrase, with reference to relevant passages, the law enunciated in ***BALCO***[8], including, *inter alia*, the following observations, from para-76 of the report in that case, which clearly synonymizes "place" and "seat" of the arbitration:

> "It must be pointed out that the law of *the seat or place where the arbitration is held*, is normally the law to govern that arbitration. The *territorial linkbetween the place of arbitration and the law governing that arbitration* is well established in the international instruments, namely the New York Convention of 1958 and the UNCITRAL Model Law of 1985. It is true that the terms "seat" and "place" are often used interchangeably. In Redfern and Hunter on International Arbitration (Para-3.51), the seat theory is defined thus: '*The concept that an arbitration is governed by the law of the place in which it is held, which is the "seat" (or "forum" or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration*. In fact, the Geneva Protocol, 1923 states:
>
> > '2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and *by the law of the country in whose territory the arbitration takes place.'*
>
> The New York Convention maintains the reference to 'the law of the country *where the arbitration took place*' [Article V(1)(d)] and, synonymously to 'the law of the country where the award is made' [Articles V(1)(a) and (e)]. The aforesaid observations clearly show that the New York Convention continues the clear territorial link between the place of arbitration and the law governing the arbitration."

Finally, in para 35, the Supreme Court noted the conclusion, drawn in para 116 of ***BALCO***[8], thus:

> "The legal position that emerges from a conspectus of all the decisions, seems to be, that *the choice of another country as the seat of arbitration inevitably imports and acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings*."
>
> (Emphasis supplied)

Additionally, the conclusion, in para-194 of ***BALCO***[8], that Part I of the 1996 Act would have no application to international commercial arbitration held outside India, was also endorsed.

51.8 In view of the law enunciated in ***BALCO***[8], the Supreme Court went on to hold (in para 38 of the report) that "where parties have selected the seat of arbitration in their agreement, such election would then amount to an exclusive jurisdiction clause, as the parties have now indicated that the courts at the "seat" would alone had jurisdiction to entertain challenges against the arbitral award which had been made at the seat."

51.9 Apropos Section 2(1)(e) of the 1996 Act, *vis-à-vis* Section 2(2) and Section 20, the Supreme Court went on, in paras 44, 45, 49, 50 and 53 of the report, to clarify that Section 2(1)(e) did not, in any manner, militate against the exclusive jurisdiction, vesting in the Courts, within whose territory the "seat" of arbitration was situate, in the following words:

> "**44.** If paras 75, 76, 96, 110, 116, 123 and 194 of ***BALCO*** are to be read together, what becomes clear is that Section 2(1)(e) has to be construed keeping in view Section 20 of the Arbitration Act, 1996, which gives recognition to party

autonomy – the Arbitration Act, 1996 having accepted the territoriality principle in Section 2(2), following the UNCITRAL Model Law. The narrow construction of Section 2(1)(*e*) was expressly rejected by the five-Judge Bench in ***BALCO***. This being so, what has then to be seen is what is the effect Section 20 would have on Section 2(1)(*e*) of the Arbitration Act, 1996.

45. It was not until this Court's judgment in ***Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760*** that the provisions of Section 20 were properly analysed in the light of the 246th Report of the Law Commission of India titled, "Amendments to the Arbitration and Conciliation Act, 1996" (August, 2014) (hereinafter referred to as "the Law Commission Report, 2014"), under which Sections 20(1) and (2) would refer to the "seat" of the arbitration, and Section 20(3) would refer only to the "venue" of the arbitration. Given the fact that when parties, either by agreement or, in default of there being an agreement, where the Arbitral Tribunal determines a particular place as the seat of the arbitration under Section 31(4) of the Arbitration Act, 1996, it becomes clear that the parties having chosen the seat, or the Arbitral Tribunal having determined the seat, have also chosen the courts at the seat **for the purpose of interim orders** and challenges to the award.

49. Take the consequence of the opposite conclusion, in the light of the facts of a given example, as follows. New Delhi is specifically designated to be the seat of the arbitration in the arbitration clause between the parties. Part of the cause of action, however, arises in several places, including where the contract is partially to be performed, let us say, in a remote part of Uttarakhand. If concurrent jurisdiction were to be the order of the day, despite the seat having been located and specifically chosen by the parties, party autonomy would suffer, which ***BALCO*** specifically states cannot be the case. Thus, if an application is made to a District Court in a remote corner of the Uttarakhand hills, which then becomes the court for the purposes of Section 42 of the Arbitration Act, 1996 where even Section 34 applications have then to be made, the result would be contrary to the stated intention of the parties – as even though the parties have contemplated that a neutral place be chosen

as the seat so that the courts of that place alone would have jurisdiction, yet, any one of five other courts in which a part of the cause of action arises, including courts in remote corners of the country, would also be clothed with jurisdiction. This obviously cannot be the case. If, therefore, the conflicting portion of the judgment of ***BALCO*** in para 96 is kept aside for a moment, the very fact that parties have chosen a place to be the seat would necessarily carry with it the decision of both parties that the courts at the seat would exclusively have jurisdiction over the entire arbitral process.

50. In fact, subsequent Division Benches of this Court have understood the law to be that once the seat of arbitration is chosen, it amounts to an exclusive jurisdiction clause, insofar as the courts at that seat are concerned.In ***Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59*** , this Court approved the dictum in ***Shashoua v. Sharma, 2009 EWHC 957 (Comm) : (2009) 2 Lloyd's Law Rep 376***] as follows : (SCC p. 55, para 126)

> "126. Examining the fact situation in the case, the Court in ***Shashoua case*** observed as follows:
>
> > 'The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the *seat* of the arbitration. *An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause*. **Not only was there agreement to the curial law of the *seat***, but also to the courts of the *seat* having supervisory jurisdiction over the arbitration, so that, by agreeing to the *seat*, *the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration*.
> >
> > Although, "*venue*" was not synonymous with "*seat*", in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that "the *venue* of arbitration shall be London,

United Kingdom" did amount to the designation of a juridical seat.…'

In para 54, it is further observed as follows:

'There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that Court, because it was best fitted to determine such issues under the Indian law. Whilst I found this idea attractive initially, we are persuaded that it would be wrong in principle to allow this and that *it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this Court to decide in the context of an anti-suit injunction*.'"

(emphasis in original)

53. In ***Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760***, after clearing the air on the meaning of Section 20 of the Arbitration Act, 1996, the Court in para 19 (which has already been set out hereinabove) made it clear that the moment a seat is designated by agreement between the parties, it is akin to an exclusive jurisdiction clause, which would then vest the courts at the "seat" with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties."

(Bold emphasis and underscoring supplied; italics in original)

51.10 In para 57 of the report, the Supreme Court drove home the point, yet again, by holding that "the choosing of a "seat" amounts to the choosing of the exclusive jurisdiction of the courts at which the "seat" is located."

51.11 Expatiating, thereafter, in detail, on the indicia distinguishing the "seat" of arbitral proceedings, the Supreme Court held, in para 61 of the report, that "wherever there is an express designation of a "venue", and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding". The distinction between the "seat" and "venue" was, thereby, considerably eviscerated, save and except for cases in which the agreement itself referred, separately, to the "seat" and "venue" of the arbitral process, all contained indicia, indicating to the contrary. It is not necessary to expand on this aspect, as the arbitration agreement between the petitioner and the respondent, in the present case, does not refer to any "venue" of the arbitral proceedings, as distinct from the "seat" thereof. Having said that, para 82 of the report lays down the law so authoritatively, that it necessarily merits reproduction, in extenso:

> "On a conspectus of the aforesaid judgments, it may be concluded that *whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings,* as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, *the fact that the arbitral proceedings "shall be held" at a particular venue would also*

> *indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a clause designates a "seat" of the arbitral proceedings. In an international context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings.* In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration."
>
> (Emphasis supplied)

51.12 To complete the recital – though it is not strictly relevant for the purposes of the present controversy – it may be noted that the Supreme Court went on to hold that the earlier decision in ***Hardy Exploration & Production***[24] was *per incuriam*, being contrary to the law laid down in ***BALCO***[8].

51.13 In conclusion, the Supreme Court held that the arbitration clause, in the agreement between BGS and NHPC clearly indicated that both New Delhi and Faridabad had been designated as the "seat" of the arbitration proceedings. Even so, as the proceedings had finally been held at New Delhi, and the awards signed at New Delhi, and not at Faridabad, it was held that the parties had consciously chosen New Delhi as the "seat" of arbitration, under Section 20(1) of the 1996 Act. That being so, the Supreme Court held that the parties had chosen the courts at New Delhi to alone have exclusive jurisdiction over the arbitral proceedings. The arising of a part of the cause of action at Faridabad did not, therefore, justify invocation of the jurisdiction of

the Faridabad courts, to challenge the award. Once the "seat" of the arbitration had been chosen, it was held that an exclusive jurisdiction clause had come into being, so far as courts of the "seat" were concerned. Resultantly, the Supreme Court set aside the judgement of the High Court of Punjab and Haryana and directed that the Section 34 petition be presented in the courts at New Delhi.

Had this been the position …

52. *The judgements, cited hereinabove, unquestionably support the premise that, once the "seat" of arbitration stood identified in the agreement or contract between the parties, and in the absence of any other "exclusive jurisdiction" clause in the contract, courts, having territorial jurisdiction over such seat would, alone, be competent to exercise supervisory control over the arbitral proceedings, which would include applications for grant of interim relief. These judgements, however, were rendered prior to the insertion, in Section 2(2), of the proviso thereto, by the 2016 Amendment Act. This proviso stipulated that, even if the place of arbitration – which, as per the aforesaid judgements, would also be the "seat of arbitration" – were outside India, the provisions in Part I of the 1996 Act would, nevertheless, continue to apply. The beneficial reach of this proviso was, however, conditioned by the caveat that there should be no "agreement to the contrary". It is in the awareness of this proviso that Mr. Kamath has, consciously, sought to contend that the second sentence in Clause 22.1 of the Lease Deed constituted such an*

"agreement to the contrary". Whether it does, or does not, is examined, in detail, hereinafter.

53. *Mankastu Impex*[14]

53.1 To a case covered by the proviso to Section 2(2) of the 1996 Act, this judgement assumes especial significance.

53.2 The Supreme Court was concerned, here, with a petition, under Section 11 (6) of the 1996 Act, seeking appointment of an arbitrator. A Memorandum of Understanding (MOU) was executed, between the petitioner Mankastu Impex Pvt. Ltd. (hereinafter referred to as "Mankastu") and the respondent Airvisual. Ltd. (hereinafter referred to as "Airvisual"), whereunder Airvisual agreed to sell, to Mankastu, air quality monitors, for onward sale. Mankastu was appointed as the exclusive distributor, for sale of the products within India. Disputes surfaced, leading to the filing, by Mankastu, before this Court, of a petition, under Section 9 of the 1996 Act, on 11th December, 2017. *Vide* interim order dated 28th February, 2018, this Court restrained Airvisual from selling any of its products in India.

53.3 In the meanwhile, Mankastu also invoked the arbitration clause, in the MOU, on 8th December, 2017. *Vide* reply dated 5th January, 2018, Airvisual contended that Clause 17 of the MOU provided for arbitration administered and seated in Hong Kong. Mankastu filed the petition, under Section 11 (6) of the 1996 Act, before this Court, for

appointment of a Sole Arbitrator, in terms of Clause 17 of the MOU. Clause 17 read thus:

> "**17. Governing law and dispute resolution**
>
> 17.1 This MoU is governed by the laws of India, without regard to its conflicts of laws provisions, and courts at New Delhi shall have the jurisdiction.
>
> 17.2 Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong.
>
> *The place of arbitration shall be Hong Kong.*
>
> The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language.
>
> 17.3 It is agreed that a party may seek provisional, injunctive or equitable remedies, including but not limited to preliminary injunctive relief, from a court having jurisdiction, before, during or after the pendency of any arbitration proceeding."

53.4 On the aspect of territorial jurisdiction, Airvisual, predictably, relied on the specification, in Clause 17.2 of the MOU, of the place of arbitration as Hong Kong, contending that, once the place of arbitration was outside India, Section 11 of the 1996 Act would not apply. Additionally, it was pointed out, Clause 17.2 also provided for reference, resolution and administration of all disputes, arising out of the MOU, in Hong Kong. The petitioner contended, *per contra*, that Clause 17.1 specifically conferred jurisdiction, on courts at New

Delhi, with the authority to decide disputes between the parties. The objection of Airvisual was, therefore, it was contended, misconceived.

53.5 The question arising before it for consideration was, therefore, specifically framed, by the Supreme Court (in para 15 of the report) as whether "in view of Clause 17.2 of the MOU ... The parties have agreed that the seat of arbitration is in Hong Kong and whether this Court lacks jurisdiction to entertain the present petition filed under Section 11 of the Arbitration and Conciliation Act, 1996". It appears that, while using the expression "this Court", the Supreme Court essentially intended to refer to the High Court of Delhi.

53.6 The Supreme Court observed, relying on ***Enercon India***[23], that the receipt of arbitration was a vital aspect of any arbitration proceedings, and that its significance was "that it determines the applicable law when deciding the arbitration proceedings and arbitration procedure as well as judicial review over the arbitration award". It was "all about which court would have the supervisory power over the arbitration proceedings". (in para 20 of the report)

53.7 While proceeding to hold that the expressions "seat of arbitration" and "venue of arbitration" were not interchangeable, the Supreme Court held that, on a plain reading of the arbitration agreement between Mankastu and Airvisual, it was "clear that the reference to Hong Kong as "place of arbitration" is not a simple reference as the "venue" for the arbitral proceedings; but a reference to Hong Kong for final resolution by arbitration administered in Hong

Kong". Clearly, therefore, held the Supreme Court, "the parties have agreed that the arbitration be seated at Hong Kong and that laws of Hong Kong shall govern the arbitration proceedings as well as have power of judicial review over the arbitration award". In these circumstances, the Supreme Court went on to hold, in para 23 of the report, that, once the parties had chosen Hong Kong as the place of arbitration, which was to be administered in Hong Kong, the laws of Hong Kong would govern the arbitration, and Indian courts would have no jurisdiction to appoint any arbitrator.

53.8 In the context of the dispute before me, paras 25 to 27 of the report are of some significance, and may be reproduced, consequently, thus:

> "**25.** Clause 17.1 of MoU stipulates that MoU is governed by the laws of India and the courts at New Delhi shall have jurisdiction. The interpretation to Clause 17.1 shows that the substantive law governing the substantive contract are the laws of India. The words in Clause 17.1, "*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*" has to be read along with Clause 17.3 of the agreement. As per Clause 17.3, the parties have agreed that the party may seek provisional, injunctive or equitable remedies from a court having jurisdiction before, during or after the pendency of any arbitral proceedings. In ***BALCO v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810***, this Court held that : (SCC p. 636, para 157)
>
> > "*157.* … on a logical and schematic construction of the Arbitration Act, 1996, the Indian courts do not have the power to grant interim measures when the seat of arbitration is outside India."
>
> If the arbitration agreement is found to have seat of arbitration outside India, then the Indian courts cannot

exercise supervisory jurisdiction over the award or pass interim orders. *It would have, therefore, been necessary for the parties to incorporate Clause 17.3 that parties have agreed that a party may seek interim relief for which the Delhi courts would have jurisdiction.*

26. In this regard, we may usefully refer to the insertion of proviso to Section 2(2) of the Arbitration Act, 1996 by the Amendment Act, 2015. By the Amendment Act, 2015 (w.e.f. 23-10-2015), a proviso has been added to Section 2(2) of the Act as per which, certain provisions of Part I of the Act i.e. Section 9 – interim relief, Section 27 – court's assistance for evidence, Section 37(1)(*a*) – appeal against the orders and Section 37(3) have been made applicable to "international commercial arbitrations" even if the place of arbitration is outside India. Proviso to Section 2(2) of the Act reads as under:

> "**2. *Definitions***.—(1)
>
> *****
>
> (2) **Scope**.—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."

It is pertinent to note that Section 11 is not included in the proviso and accordingly, Section 11 has no application to "international commercial arbitrations" seated outside India.

27. The words in Clause 17.1, "*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*" do not take away or dilute the intention of the parties in Clause 17.2 that the arbitration be administered in Hong Kong. The words in Clause 17.1 do not suggest that the seat of arbitration is in New Delhi. Since Part I is not applicable to "international commercial arbitrations",

> in order to enable the parties to avail the interim relief, Clause 17.3 appears to have been added. The words, "*without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction*" in Clause 17.1 is to be read in conjunction with Clause 17.3. Since the arbitration is seated at Hong Kong, the petition filed by the petitioner under Section 11(6) of the Act is not maintainable and the petition is liable to be dismissed."
>
> (Underscoring supplied; italics in original)

The takeaway

54. The objection, of Mr. Kamath, to the jurisdiction of this Court to entertain the present petition, has to be examined in the backdrop of the law, as set out hereinabove.

55. *De hors* the proviso to Section 2(2) of the 1996 Act, there can be little doubt that once the "seat of arbitration" has been fixed as Singapore, courts at Singapore would have exclusive jurisdiction to supervise the arbitral proceedings. Applying ***BALCO***[8], it is also clear that such supervision would extend not only to the arbitral proceedings, per se, culminating in the award, but would also include the power to grant interim reliefs, whether at pre-arbitral or post-arbitral stage. In other words, Section 9 jurisdiction would also stand divested, from this Court.

56. That, however, is the position *de hors* the proviso to Section 2(2). The proviso to Section 2(2), which came into effect on 23rd October, 2015, changes the goalpost. By operation of this proviso, Section 9 of the 1996 Act would also apply to international

commercial arbitration, where the place of arbitration is outside India. It is not in dispute that any arbitral award, issued by the SIAC, would be enforceable and recognised under Part II of the 1996 Act.

57. Though the proviso to Section 2(2) uses the expression "place of arbitration", the decisions, cited hereinabove, make it apparent that, in the absence of any indication to the contrary, the reference to "place of arbitration" may justifiably be treated as fixing Singapore as the "seat of arbitration".

58. With the introduction of this proviso, the fixation of Singapore as the "place" or the "seat" of arbitration would not, *ipso facto*, divest this Court of Section 9 jurisdiction. Such divestiture would occur only if there is any "agreement to the contrary". The submission of Mr. Kamath is that Clause 22.1, specifically the second sentence in the said Clause, which stipulates that "the parties shall submit to the exclusive jurisdiction of the courts of Singapore", constitutes "agreement to the contrary", within the meaning of the proviso to Section 2(2).

59. I must admit that, at first glance, I was inclined to accept this submission of Mr. Kamath. Presented as it was, it was undoubtedly attractive. A deeper analysis, however, convinced me to decide otherwise.

60. There is a qualitative, an unmistakable, difference, between the jurisdiction exercised by a Court under Section 9, and the jurisdiction exercised by the Court under other provisions of the 1996 Act, such as

Section 11, 34 and 36. Section 9 is available at the pre-arbitration stage, before any arbitral proceedings, and could be subject to supervision by any judicial forum, have commenced. The purpose in including, specifically, Section 9, in the proviso to Section 2(2), has to be appreciated in the backdrop of the recommendations of the 246th Law Commission, and the observations guiding the said recommendations. It is at this point that the difficulty, or impossibility, of the petitioner obtaining pre-arbitral interim relief from Singapore, becomes relevant. As has been correctly pointed out by Mr. Gautam Narayan, para 41(i) of the recommendations of the Law Commission indicate, unmistakably, that the decision to exclude, generally from the ambit of Section 2(2), applications seeking pre-arbitral interim reliefs, for securing the assets constituting subject matter of the arbitration, was that, where the assets were located in India and there is a likelihood of dissipation thereof, the party, seeking a restraint thereagainst, would "lack an efficacious remedy if the seat of the arbitration is abroad". As has been observed by the Law Commission, in such a situation, the 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 as a "judgement" or "decree", for the purposes of Section 13 and 44A of the CPC. Similarly, disobedience, by the party against whom an injunction may, if at all, be obtained from a foreign Court, would also require the applicant seeking injunction to initiate contempt proceedings in the foreign Court and,

thereafter, enforce the judgement of the foreign Court under Section 13 and 44A of the CPC. These reliefs, as the Law Commission has observed, are likely to be more chimerical than substantial.

61. In this context, the reliance, by Mr. Gautam Narayan, on the decision, of the Court of Appeal in Singapore, in ***Maldives Airport Co. Ltd[1]*** and ***Five Ocean Corporation[3]***, is, *ex facie*, apt. In ***Maldives Airport Co. Ltd[1]***, the Court of Appeal has held, relying on ***SSL International plc[2]***, that "interim injunctive relief should not be granted if it requires an unacceptable degree of supervision in a foreign land".

62. I am also inclined to agree with Mr. Gautam Narayan, in his submission that Section 12A of the International Arbitration Act would not readily enable the petitioner to seek interim relief, at the pre-arbitral stage, from Singapore courts. In the first place, Section 12A does not indicate, expressly or by necessary implication, that it would apply at the pre-arbitral stage. For ready reference, Section 12A may be reproduced as under:

> **"Court-orders interim measure**
> **12A.–**
>
> (1) This section shall apply in relation to an arbitration -
> (a) to which this Part applies; and
> (b) irrespective of whether the place of arbitration is in the territory of Singapore.
>
> (2) Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection (1), the High Court or a Judge thereof shall have the same power of making an order in respect of any of the

matters set out in section 12(1)(c) to (i) as it has for the purpose of and in relation to an action or a matter in the court.

(3) The High Court or a Judge thereof may refuse to make an order under subsection (2) if, in the opinion of the High Court or Judge, the fact that the place of arbitration is outside Singapore or likely to be outside Singapore when it is designated or determined makes it inappropriate to make such order.

(4) If the case is one of urgency, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as the High Court or Judge thinks necessary for the purpose of preserving evidence or assets.

(5) If the case is not one of urgency, the High Court or a Judge thereof shall make an order under subsection (2) only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the arbitral tribunal) made with the permission of the arbitral tribunal or the agreement in writing of the other parties.

(6) In every case, the High Court or a Judge thereof shall make an order under subsection (2) only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(7) An order made by the High Court or a Judge thereof under subsection (2) shall cease to have effect in whole or in part (as the case may be) if the arbitral tribunal, or any such arbitral or other institution or person having power to act in relation to the subject-matter of the order, makes an order which expressly relates to the whole or part of the order under subsection (2)."

63. A reading of Section 12A indicates that it applies "in relation to an arbitration", and can be invoked by "a party or proposed party to

the arbitral proceedings". Mr. Gautam Narayan submits that the very tenor of this provision indicates that it applies only to an existing arbitration, i.e. after the arbitral proceedings have commenced. This submission has not been discountenanced, by Mr. Kamath, by citing any instance, either during arguments or in the written submissions filed consequent to conclusion of hearing, in which courts in Singapore have entertained applications, for interim relief, under Section 12A of the International Arbitration Act, before arbitral proceedings have commenced. Rather, para 39 of the judgement of the High Court of Singapore, in ***Five Ocean Corporation***[3], which reads thus, seems to indicate otherwise:

> "39. The main legislative intention behind the enactment of s 12A was to give the court powers over assets and evidence situated in *Singapore* and to make orders in aid of arbitrations that were *seated in Singapore and overseas.* However, I agree with Ms. Ang that if the seat of the arbitration is in Singapore and the assets are overseas, the court would have the power to protect or preserve assets and evidence situated outside Singapore. Indeed, the language of s 12A is wide enough to confer such a power on the High Court. This exercise of power to grant interim measures is not unlike the exercise of the court's powers and jurisdiction in granting an injunction that covered assets outside Singapore provided the court has *in personam* jurisdiction over the parties to the local proceedings."

64. Accession, by this Court, to the submissions of Mr. Kamath, would, therefore, justify the apprehension, expressed by the Law Commission, regarding the deleterious consequences of excluding, in the case of foreign-seated arbitrations, the applicability of Section 9 of the 1996 Act.

65. There is yet another way of looking at the issue. What is required, by the proviso to Section 2(2) of the 1996 Act, in order to render the proviso inapplicable in a particular case, is an "agreement to the contrary". The agreement, which would exclude the application of the proviso to Section 2(2) *would, therefore, have to be contrary to the dispensation provided in the proviso*, i.e., it would have to be contrary to the applicability, to the proceedings, of Section 9 of the 1996 Act. Expressed otherwise, as the proviso makes Section 9 of the 1996 Act applicable even in the case of foreign seated arbitrations; *any "agreement to the contrary" would, therefore, have to expressly stipulate that Section 9 would not apply in that particular case. Absent such a specific stipulation, the beneficial dispensation, contained in the proviso, cannot stand excluded.*

66. Mr. Kamath would seek to submit that Clause 22.1 itself contains such an "agreement to the contrary", inasmuch as it stipulates that "the parties shall submit to the exclusive jurisdiction of the courts of Singapore". This argument cannot be accepted, for the simple reason that courts at Singapore cannot grant relief under Section 9 of the 1996 Act. The mere submission, by the parties, to the exclusive jurisdiction of courts in Singapore cannot, therefore, wish away the applicability of the proviso to Section 2(2). As already noted hereinabove, the statutory, and precedential, position that obtains, in Singapore, as highlighted by Mr. Gautam Narayan and noted hereinabove, indicates that it may be tremendously difficult, if not impossible, for the petitioner to prosecute any proceeding, for grant of pre-arbitral interim relief, before Singapore courts in the present case.

Mr. Kamath, despite having argued the matter persuasively and at length, has been unable to disabuse me of this belief.

67. In fact, the concern expressed by the Law Commission, which constituted the *raison d'etre* for the introduction of the proviso to Section 2(2), was precisely this. The main justification, for introducing the proviso, was that courts in the foreign country would not efficaciously be in a position to grant pre-arbitral interim relief, to secure assets which may be located in India. This, in fact, appears to be the position, at least insofar as the facts of the present case are concerned.

68. Mr. Kamath also sought to emphasise the fact that what was required, by the proviso to Section 2(2), was merely an "agreement to the contrary", and not an "express agreement to the contrary", as recommended by the Law Commission in its 246th Report. The argument essentially begs the issue. The question is not whether the agreement to the contrary is express or implied – indeed, it may be either – but whether there *is* an agreement to the contrary. The expression "subject to any agreement to the contrary" was understood, in ***Phonogram Ltd v. Lane***[25], as meaning "unless otherwise agreed". Read in the context of the proviso to Section 2(2), it would have to be seen whether, by Clause 22.1, the petitioner and the respondent had "otherwise agreed", i.e. agreed to exclude the applicability of Section 9 of the 1996 Act. *Ex facie*, I am unable to convince myself that the answer to this question can be in the affirmative.

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[25]**(1981) 3 All ER 182**

69. The Lease Deed, significantly, was executed much after the introduction of the proviso in Section 2(2) of the 1996 Act, in 2019. It cannot be reasonably assumed that the contract, of this magnitude, would have been executed without a thorough study of the law, the statutory provisions, and without obtaining appropriate legal advice. If the parties desired to contract themselves out of Section 9 of the 1996 Act, therefore, the Lease Deed ought, specifically, to have said so. There is, however, no such a recital in the Lease Deed. *In view of the fact that the sweep of Section 9 was extended, the foreign seated arbitrations, by plenary parliamentary legislation, was made "subject to agreement to the contrary" by the same legislative instrument, any such "agreement to the contrary" would have, specifically, to state that Section 9 of the 1996 Act would not apply. Mere submission, by the parties, to the jurisdiction of Singapore courts, in the "Governing Law" clause in the Lease Deed, cannot suffice to operate as "agreement to the contrary", excluding the applicability of Section 9 of the 1996 Act.*

70. Paras 27 to 29 of ***Mankastu Impex***[14] are also instructive, in this regard. The Supreme Court was concerned, there, with the issue of whether the application, under Section 11(6) of the 1996 Act, as filed by Mankastu before this Court, was maintainable. Mankastu did not have, for its benefit, any provision, akin to the proviso to Section 2(2). The Supreme Court observed, in the circumstances, that the fixation of Hong Kong as the "seat of arbitration" operated, consequently, to exclude the jurisdiction of this Court to adjudicate on the Section 11

application of Mankastu. Significantly, Mankastu chose to rely on Clause 17.1, of the MOU under consideration in that case, which stipulated that "courts at New Delhi shall have the jurisdiction". The Supreme Court repelled the submission, holding that, in order for such a contention to sustain, Clause 17.3 (in that case) would have had to specifically stipulate "that parties have agreed that a party may seek interim relief for which Delhi Court would have jurisdiction".

71. Extrapolating this reasoning to Clause 22.1 in the present case, read with the requirement of an "agreement to the contrary", for the proviso to Section 2(2) to be rendered inapplicable, the mere conferment of exclusive jurisdiction, on courts at Singapore, by Clause 22.1, would not suffice as an "agreement to the contrary", within the meaning of the proviso to Section 2(2). The agreement would be required to have a specific stipulation *that the parties had agreed to exclude the applicability of Section 9 of the 1996 Act* to the contract between them, and to disputes arising thereunder. Absent such a specific stipulation, the mere recital, in Clause 22.1, that the parties had agreed to submit themselves to the jurisdiction of Singapore courts, would not suffice as an "agreement to the contrary", within the meaning of the proviso to Section 2(2) of the 1996 Act.

72. The above view resonates with the opinion expressed by the Division Bench of the High Court of Bombay in ***Heligo Charters***[7], to the effect that "operation of provisions of Section 9 cannot be excluded in absence of a specific agreement to the contrary" (in para 16 of the report). I express my respectful agreement therewith.

73. Mr. Kamath also sought to submit that, in any event, this Court would have no jurisdiction to entertain the present petition, is no part of the cause of action has arisen within its jurisdiction. I am not inclined to accept this submission. The respondent having chosen not to traverse the averments, in the petition, by filing any counter affidavit, the Court has to proceed by treating the averments as unrebutted. It is specifically averred, in the petition, that the Lease Deed, dated 9th December, 2019, was executed at New Delhi. It is also averred (in para 4.4.15 of the petition), thus:

> "Proceeding on the basis of the promises and commitments given by the Respondents to the Petitioner, the Petitioner as the Lessee and Respondent No. 1 as the Lessor executed the Lease Deed on 09.12.2019. It is pertinent to note that initially the parties had executed the Lease Deed dated 12.11.2019 containing the same terms and rights and obligations as the Lease Deed ultimately executed on 09.12.2019. The Schedules to the Lease Deed dated 12.11.2019 were also signed between the parties. Since the parties were of the view that another Lease Deed should be executed closer to the date of delivery of the Aircraft, the Lease Deed dated 12.11.2019 was replaced by Lease Deed dated 09.12.2019. It is respectfully submitted that the schedules to the Lease Deed dated 09.12.2019 could not be signed by the parties inadvertently but *both parties were ad idem regarding the Schedules being a part of the Lease Deed*."
>
> (Emphasis supplied)

74. Significantly, on 9th December, 2019 itself, the following email was addressed, by the respondent to the petitioner:

> "Hello Raj,
>
> Thank you very much for the scanned copy. I would recommend we also signed the annexures and schedules tomorrow and complete the document.

What say?

Chenna Reddy, N."

"What" Raj "said", neither side is able to clarify, at this juncture. Even so, there is no traversal, either by way of counter affidavit, or even in the written submissions filed by the respondent, to the assertion, in para 4.4.15 of the petition, that the parties were *ad idem* to the Schedules, in the Lease Deed dated 12th November, 2019, being treated as Schedules to the Lease Deed dated 9th December, 2019. The afore extracted email, from the respondent also indicates, in any case, that the respondent was agreeable to this proposal. The respondent has, in its written submission, merely averred that "the issue of the object of entering into the second Lease Deed and as to why the schedules were not attached, and if there was consensus *ad idem* are matters of evidence." That may be so; however, if the petitioner desired to contest the jurisdiction of this Court, to entertain the present petition under Section 9 of the 1996 Act, the onus was on the respondent to, at the very least, deny the averment, contained in para 4.4.15 of the petition, on oath. To reiterate, the respondent has not, even in its written submissions, denied the assertion, in the petition, that the parties had agreed to the Schedules, to the Lease Deed dated 12th November, 2019, being treated as Schedules to the Lease Deed dated 9th December, 2019.

75. In any event, there being no dispute about the fact that the Lease Deed dated 9th December, 2019 was signed by the parties at New Delhi, it cannot, in my view, be justifiably contended, by the respondent, that no part of the cause of action arose within the

jurisdiction of this Court. This contention of Mr. Kamath, therefore, stands rejected.

76. For all these reasons, I am of the opinion that the present petition is maintainable before this Court, and reject, therefore, the objection of want of territorial jurisdiction, as advanced by Mr. Kamath.

On Merits

77. On merits, Mr. Gautam Narayan submits that, till date, the aircraft has not been delivered, by the respondents to the petitioner, in accordance with the covenants of the Lease Deed. He draws my attention to Clause 4.1 of the Lease Deed, read in conjunction with paras 3.1, 3.2 and 3.5 of the CAR dealing with Airworthiness, dated 10th September, 1998, which (to the extent relevant) read thus:

> Clause 4.1 of the Lease Deed
>
> "The Lessee shall be responsible to cause that the Aircraft is duly registered with Director General of Civil Aviation, India, in the Lessor's name as Owner and Lessor, and in Lessee's name, as Lessee and Operator. The Lessor shall provide all necessary documentation, as may be required by the Lessee, for such registration. Any costs and expenses incurred in connection with this registration will be borne by Lessee."
>
> Clause 3.1, 3.2 and 3.5, CAR
>
> "3.1 An aircraft may be registered in either of the following 2 categories, namely
>
> > **Category 'A'**, where the aircraft is wholly owned either –

*****

iv. by a company or corporation registered elsewhere than in India, provided that such company or corporation has given the said aircraft on lease to any person mentioned in para 3.1(i), (ii) or (iii) above;"

"3.2 No aircraft in respect of which the conditions required in 3.1 are not satisfied, *or which is already validly registered in another country*, shall be registered in India."

(Emphasis supplied)

"**3.5 Application for Registration of Aircraft**

The owner or his authorized representative may apply for registration of the aircraft in the prescribed form CA-28 (Appendix 'A') completed with the following documents at least five working days for aircraft on outright purchase and ten working days for aircraft on lease, before the expected date of issue of Certificate of Registration.

i. Customs clearance certificate / bill of entry of the aircraft.

ii. Certificate of deregistration from the previous registering authority.

iii. An evidence to the effect that the aircraft has been purchased for wholly owned by the applicant. For this purpose, a copy of invoice shall be accepted.

iv. For aircraft purchased from a previous owner, an affidavit as required.

v. In case the aircraft is taken on dry lease a copy of the lease agreement.

vi. In case the aircraft is owned by a company or corporation, a document of registration of the company and the names, addresses and nationalities of the Directors.

> vii. A copy of the import licence issued by Director General Foreign Trade or permission for import issued by the Ministry of Civil Aviation/DGCA. Where the aircraft is imported for private use, it will be registered in the name of the person or company to whom the import licence has been issued.
>
> viii. In cases where the aircraft has been mortgaged/hypothecated, the owner/operator shall submit his consent for the same and the papers to this effect. Such a mortgage/hypothecation shall be endorsed on the Certificate of Registration.
>
> ix. Fee for registration as prescribed in Rule 25 paid by web based online transaction system of DGCA (Bharatkosh)."
>
> (Emphasis supplied)

78. Mr. Gautam Narayan points out that, further, Clause 6.2 of the Lease Deed required the Lessor to deliver the Aircraft to the Lessee in accordance with the terms and conditions of the Lease Deed, whereupon the Lessee was to accept the Aircraft by execution of a Delivery Acceptance Certificate, in accordance with Schedule II to the Lease Deed. Execution of the Delivery Acceptance Certificate, therefore, submits Mr. Gautam Narayan, was conditional on delivery of the aircraft in accordance with the covenants of the Lease Deed. The Delivery Acceptance Certificate, in the format prescribed in Schedule II to the Lease Deed, required the petitioner to certify the "delivery of the Aircraft together with all fixed equipment, parts, components and accessories installed including but not limited to, all log books, documents and records related thereon".

79. In the absence of the Certificate of Deregistration, certifying that the Aircraft was no longer registered with any foreign authority, Mr. Gautam Narayan submits that no "delivery" of the Aircraft, within the meaning of the Lease Deed, could be said to have been effected. It was for this reason, he submits, that the petitioner did not execute any Delivery Acceptance Certificate, certifying delivery of the Aircraft, either.

80. By not delivering the Aircraft with all requisite documents, Mr. Gautam Narayan submits that the respondent has breached the Lease Deed. (I may note, here, that Mr. Gautam Narayan submitted, initially, that the respondent had not provided the COA issued by the IOMAR, but fairly acknowledged, later, that he was incorrect in the said submission.)

81. Mr. Gautam Narayan pointed out, further, that Clause 8.1 of the Lease Deed made events, in respect of the Aircraft, to be payable with effect from 15th December, 2019, which was specifically as the "Rent Commencement Date". As such, submits Mr. Gautam Narayan, the Aircraft ought to have been delivered to the petitioner by the said date. In the absence of such delivery, there would be no question of the petitioner having to pay any lease rental. For this purpose, Mr. Gautam Narayan also places reliance on Clause 8.2, which stipulates that "in consideration of the lease of the Aircraft, the Lessee shall, on and from the Rent Commencement Date pay regularly in advance on or before 15th day of the month during the Lease Term to the Lessor an amount equivalent to United States Dollars Fifty-six Thousand only as rent in respect of the Aircraft (Rent)." Mr. Gautam Narayan

submits that, without delivery of the Aircraft in accordance with the covenants of the Lease Deed, no liability, to pay rent, could be fastened on the petitioner. He also points out that there is no other clause, in the lease Deed, providing for delivery of the aircraft. Despite this fact, Mr. Gautam Narayan emphasises that the petitioner did pay lease rentals, to the respondent, till 15th March, 2020, the last rental having been paid for the month of February-March.

82. Thirdly, Mr. Gautam Narayan takes serious exception to the contention, of the respondent, that the petitioner had terminated the Lease Agreement. He has taken me through various correspondences, between the petitioner and respondent, to wit,

(i) email dated 5th March, 2020, from the respondent to the petitioner:

> "Dear Raj,
>
> About the delivery of the aircraft, we once again re-iterate the fact that we were ready to give you the delivery but the delay was from BCPL especially for the painting of your livery and the time taken to decide on the design of the paint spec.
>
> Let me also draw your attention to our decision to complete the aircraft painting (white paint only) & instructed GMR to slot it accordingly. BCPL at the time was also informed of our decision and only then BCPL finalized the livery pattern and the paint spec., not to mention, the 4K USD additional funds spent to procure the paint on priority.
>
> Man Power agreement – PFA the agreement which initially was for 3 months. However*we are fine to terminate the agreement right away* and also write off the services given from 15th Feb till date. We have

already handed over everything to Manisha and supporting her till date. Let me know your thoughts.

We see bulk upload mail being added to our mails. Whilst it is internal to you, we have no idea who that mail id belongs to and why are our mails directed to them. Please clarify.

Warm Regards
Chenna Reddy N.
Ezen Aviation"

(Emphasis supplied)

(ii) e-mail dated 9th March, 2020, from the respondent to the petitioner:

"Hello Manisha,

As of now Big Charters Private Limited (BCPL) has unilaterally terminated the lease agreement. The issue is being discussed by Ezen internally. Until a communication is issued by EAPL BCPL shall not carry out any modifications/work on the aircraft.

Warm Regards

Chenna Reddy N

Ezen Aviation"

(Emphasis supplied)

(iii) e-mail dated 9th March, 2020, from the petitioner to the respondent:

"Dear Chenna,

BCPL has not terminated current lease agreement, we have some issues with current agreement and EAPL has not maintain its commitments inspite of payments

made in time. Hence decision-making from EAPL to advice next plan of action to continue with operating lease beside note followings.

1. Hand over the aircraft to BCPL post our head of Eng inspection carried out.

2. Hand over require documents.

3. Decision to advice who will carry out work scope on CDSS and seats if needs to replace BCPL happy to carry out under its own scope however if EAPL finds under its approval will help BCPL has no issue keeping it under EAPL.

4. As per agreed terms seats replacement cost will be born by EAPL or EAPL installs balance 6 seats.

5. Support towards C of R and C of A.

6. If C of A does not get thru due to An age of an aircraft then EAPL return our money minus ferry cost which agreed between self and Channa.

7. Lease payment continues but MR applicable only from 15th May towards calendar due charges.

channa I am keeping all transparent here so our relation stays cordial rest is all your call as discussed.

Regards

Sanjay"

(Emphasis supplied)

(iv) e-mail dated 2nd April, 2020, from the respondent to the petitioner, in which it was stated, inter alia, thus:

"11. E-mail was received from BCPL on 05 Mar 2020 informing of their unilateral decision to seek refund from EZEN of all sums paid including Security

> Deposit and LR within 7 days. The e-mail also instructed CFO/CEO not to make any further payments to EZEN and directed EZEN to co-ordinate with BCPL CEO/CFO for CLOSING.
>
> 12. The Lessee (BCPL) thus unilaterally terminated the lease. As a result, EZEN it is not required to issue any further termination notice."

On the aspect of the purported "unilateral termination" of the Lease Agreement by the petitioner, Mr. Gautam Narayan submits that the aforesaid email correspondences, from the respondent, disclose a number of factual and legal infirmities. He points out that, in the email dated 5th March, 2020, the respondent had stated that it was "fine to terminate the agreement right away". As such, Mr. Gautam Narayan points out that the move, towards termination of the agreement – albeit illegally – was of the respondent, and not of the petitioner. He submits that the allegation that the petitioner had "unilaterally terminated" the Lease Agreement was not borne out either by the facts or the law. No such document of "unilateral termination", he points out, is forthcoming on the record. In each response, dated 9th March, 2020, Mr. Gautam Narayan points out that the petitioner categorically disabused the respondent of its contention that the petitioner had terminated the Lease Agreement. At this juncture, he submits, the respondent sought to raise a new contention, viz., that, by asking for refund, in its letter dated 5th March, 2020 (whereas, Mr. Gautam Narayan points out, refund was sought, by the petitioner, in its letter dated 22nd March, 2020, and not *vide* its letter dated 5thMarch, 2020), the petitioner had unilaterally terminated the agreement. This contention, submits Mr. Gautam Narayan, is directly

in the teeth of Clause 7 of the Lease Deed, which deals with termination thereof, and reads as under:

> **"7. TERMINATION OF THE LEASE DEED**
>
> **7.1. Early Termination**:
>
> i. The Lessee may terminate this Deed by providing notice in writing to the Lessor 6 (six) months prior to intended termination date and Lessee continues to pay the lease rent and applicable maintenance reserve during the notice period. The termination is subject to Lessee paying Early Termination Fee (ETF) of United State Dollars Three Hundred Thousand (USD 300,000.00) and all other outstanding due amounts. Upon fulfilling the aircraft redelivery condition as per Deed, the Security Deposit shall be refunded to the Lessee in accordance with the provisions of this Deed.
>
> ii. The Lessee may terminate this Deed by paying the Lessor 6 (six) month Rent at the rates stipulated under the Deed, in lieu of such 6 (six) month notice. Lessee must forthwith redeliver the aircraft to the Lessor. The termination is subject to Lessee paying Early Termination Fee (ETF) of United State Dollars Three Hundred Thousand (USD 300,000.00) and all other outstanding due amounts. Upon fulfilling the conditions for termination of lease, the Security Deposit shall be refunded to the Lessee in accordance with the provisions of this Deed.
>
> iii. Not contravening any of the terms in Clause 7.l.(i) or Clause 7.1.(ii) above, the Lessee is exempted from the payment of Early Termination Fee (ETF) of United State Dollars Three Hundred Thousand (USD 300,000.00) subject to completion of24 continuous months of lease.
>
> 7.2. **Termination by the Lessor for breach by the Lessee**:

Notwithstanding the generality of the foregoing, in the event the Lessee commits material breach of any of the terms and conditions expressed in this Deed, the Lessor shall be entitled to terminate this Deed, without any obligations towards the Lessee, and Lessor shall forfeit the Security Deposit of the Lessee. Provided further and notwithstanding any provision to the contrary, in the event the Lessee fails to pay any amount/s payable in terms of this Deed on or before the due date, for 2 (two) consecutive months (each a material breach), then the Lessor shall be entitled to terminate this Deed forthwith. Upon such termination of Deed, Lessee is obligated to forthwith redeliver the aircraft as per the conditions of the Deed and to pay the outstanding dues to the Lessor. Lessor shall forfeit the Security Deposit of the Lessee.

7.3, **Termination by the Lessee for breach by the Lessor**:

Notwithstanding the generality of the foregoing, in the event the Lessor commits a breach of its representations and warranties and covenants recorded hereunder, the Lessee shall be entitled to terminate this Deed, by giving notice in writing of the same to the Lessor and the Lessor shall have the right to remedy the breach within a period of 60 (Sixty) days (or such longer period as may be reasonably necessary to cure such breach) from the date of receipt of the written notice issued by the Lessee intimating Lessor of such breach.

7.4. **Procedure for Termination of Deed** -

Earlv Termination or End of Lease Term: The following procedure shall be followed for termination of Deed at the end of lease term or at early termination:

7.4.1. The Lessee shall permit representative/s appointed by the Lessor to inspect the Aircraft in order to assess condition of Aircraft, Aircraft records.

7.4.2. Upon redelivery of the Aircraft as per Deed by the Lessee to the Lessor, the Security Deposit shall be refunded by the Lessor to the Lessee after deducting any amounts due and receivable by Lessor towards:

(i) the arrears of Rent, and any other dues payable under the Deed (including any monies payable by Lessee (if applicable) in lieu of the notice period prescribed under Article 4.1 above) and

(ii) amounts, as being reasonably required to repair damages, jf any, to the Aircraft (reasonable wear and tear excepted), and

(iii) any unpaid statutory or other dues payable by the Lessee, during the Lease Term under this Deed, to any authorities or service providers with respect to the Aircraft.

7.4.3. If the Security Deposit is not refunded by the Lessor to Lessee within fourteen (14) days from the Aircraft redelivery by the Lessee in accordance with the terms of this Deed upon early termination or expiry of the Lease Term, then the Lessor shall be liable to refund the Security Deposit, after adjustments in terms of this Deed, to Lessee along with interest to be calculated at the rate of 18 % (eighteen percent) per annum for the period of delay. The liability of the Lessor to such refund to the Lessee under this Deed and the right of the Lessee to recover the same from the Lessor shall survive the termination or expiry of this Deed.

7.4.4. In the event of the Lessee's failure to return the Aircraft and deliver possession thereof to the Lessor, in accordance with the terms of this Deed, or upon the earlier termination or expiry of this Deed and upon the Lessor being ready to take possession of the Aircraft and refund the Security Deposit to the Lessee in terms of this Deed, the Lessee shall, without prejudice to any other remedy which may be available to the Lessor in law, be liable to pay an amount equal to two times the per day Rent (computed on a proportionate basis) or two (2) times the prevailing market value of the Rent (computed on a proportionate basis), whichever is higher, for every day of delay in handing over the Aircraft from the date of termination or expiry of this Deed, in addition to the Lessee making payment of all other charges and payments under this Deed. It is hereby clarified that the payment of the amounts as aforesaid shall not entitle or grant right to the Lessee to continue in possession and operation of the Aircraft and the Lessee shall be construed to

> be an 'illegal occupant' of the Aircraft. The Parties hereby agree and confirm that the amount specified herein before is not by way of penalty and that the aforesaid amount is reasonable and a genuine pre-estimate, as the minimum compensation payable by the Lessee to the Lessor.
>
> 7.4.5. Without prejudice to any other right or remedy that may be available to the Lessor, if Lessee fails to return the Aircraft thereof to the Lessor as per the terms of this Lease Deed, the Lessor shall be entitled to take all steps as may be available to it to take possession of the Aircraft."

There could, therefore, submits Mr. Gautam Narayan, be no question of any "unilateral termination", far less "implied unilateral termination", by the petitioner, of the Lease Deed. Termination had, necessarily, to be by way of a written notice. In this context, Mr. Gautam Narayan also invited attention to Clause 26.1 of the Lease Deed, which stipulated thus:

> "Any notice required or otherwise given pursuant to this Deed shall be in writing and mailed, certified return receipt requested, postage prepaid, or delivered by overnight delivery service…"

Mr. Gautam Narayan submits, therefore, that the plea of "unilateral termination", by the petitioner, of the Lease Agreement, was merely by way of a smokescreen, created by the respondent to wriggle out of its obligations under the Lease Agreement.

83. Mr. Gautam Narayan submits, fourthly, that the plea, of the respondent, that the petitioner had defaulted in paying Maintenance Reserves, was completely false. He submits that Maintenance Reserves were payable, under the Lease Deed, only against actual number of hours flown. When the aircraft itself had not been

delivered, in accordance with the governance of the Lease Deed, Mr. Gautam Narayan submits that there could be no question of flying of the aircraft and, consequently, no question of any liability, of the petitioner, to pay Maintenance Reserves, either.

84. The fifth issue urged by Mr. Gautam Narayan relates to the non-fitment, in the Aircraft, of the CDSS. He drew attention to e-mail, dated 16th February, 2020, from the respondent to the petitioner, in which the respondent had categorically acknowledged the requirement of installation of the CDSS, in order to have the Aircraft registered in India. The said communication reads as under:

> "Subject: INSTALLATION OF CDSS ON MSN 688
>
> Good Afternoon Dharani,
>
> *As part of induction into Indian DGCA registry we need to install the CDSS on the aircraft*. The kit is ordered and is expected to be in hand by early-mid next week.
>
> I have looped Ms. Manish (Engineering Head) into this mail for discussion on the agreement for installation. Work will be carried out under flybig GTA.
>
> Deba& Raman will co-ordinate for the issuance of SB/Workpack etc.
>
> Manisha,
>
> Please co-ordinate with Dharani and take it forward.
>
> Warm Regards
>
> Chenna Reddy N.
> Ezen Aviation"
>
> (Emphasis supplied)

Pointing out that the respondent had undertaken to provide the Aircraft, compliant with DGCA and EASA standards, Mr. Gautam Narayan referred to EASA Standard ORO.SEC.100A(a) and (c)(2), which reads thus:

> "**ORO.SEC.100.A Flight crew compartment security**
>
> (a) In an aeroplane which is equipped with a flight crew compartment door, this door shall be capable of being locked, and means shall be provided by which the cabin crew can notify the flight crew in the event of suspicious activity or security breaches in the cabin.
>
> *****
>
> (c) In all aeroplanes which are equipped with a flight crew compartment door in accordance with point (b) above:
>
> (2) means shall be provided for monitoring from either pilot's station the entire door area outside the flight crew compartment to identify persons requesting entry and to detect suspicious behaviour or potential threat."

85. Parallelly, points out Mr. Gautam Narayan, the CAR Section 8 – Aircraft Operations, dated 30th October, 2018, which dealt with "Operation of Commercial Air Transport – Aeroplanes" stipulated, in Clause 13.2.3(b), thus:

> "13.2.3 In all aeroplanes which are equipped with a flight crew compartment door in accordance with 13.2.2:
>
> (b) mean shall be provided for monitoring from either pilot's station the entire door area outside the flight crew compartment to identify persons requesting entry and to detect suspicious behavior or potential threat. *All new aircraft to be imported after 1st of Jan, 2008 should have cockpit door surveillance system (CDSS) installed at the time of import. Aircraft*

already importing should comply with this requirement during their next 'C' check falling after 1st Jan, 2008."
(Emphasis supplied)

86. Delivery of an aircraft, without CDSS fitted, submits Mr. Gautam Narayan could not, therefore, be regarded as "delivery", within the meaning of the Lease Agreement.

87. Contending that, therefore, there had been clear breach of the Lease Deed by the respondent, Mr. Gautam Narayan submits that the petitioner has succeeded in establishing a *prima facie* case. Additionally, the respondent being located outside India, permitting the respondents to alienate the corpus of the arbitral proceeding, i.e. the aircraft, would render the arbitral proceedings futile. The balance of convenience, too, he submits, would be in favour of grant of interim reliefs, as sought in the petition.

88. Responding to the submissions of Mr. Gautam Narayan, Mr. Arvind Kamath, learned Senior Counsel for the respondent submitted, initially, that the Lease Deed dated 9th December, 2019, was invalid and unenforceable, as it contained no Schedules. He disputes the submission, of Mr. Gautam Narayan, that there was an implicit agreement, between the petitioner and the respondent, to the effect that the Schedules, to the Lease Deed dated 12th November, 2019, were to be read as part of the Lease Deed dated 9th December, 2019 and submits that, in any case, this would be a matter of evidence, to be established during the arbitral proceedings, and could not be said to be established, *prima facie*, in favour of the petitioner.

89. Apropos the submission, of Mr. Gautam Narayan, that the petitioner had never terminated the contract, Mr. Kamath submits that, in email dated 5th March, 2020, addressed to the respondent, the petitioner had, as the concluding remark, stated "Demand full refund and close." This, according to Mr. Kamath (and as contended in the written submissions filed after conclusion of hearing) "clearly indicates an intention to sever the relationship of lessor and lessee and restore the status of the parties prior to entering into the lease" and "also implies an 'undeclared termination' of the Lease Deed." The contention, of Mr. Gautam Narayan, that his client had not terminated the Lease Deed unilaterally was, therefore, submits Mr. Kamath, incorrect.

90. Mr. Kamath sought to submit, further, that the aircraft had been imported, into India, by the petitioner, and had landed on 29th November, 2019, but that, as no Bill of Entry had been filed, the "import" of the aircraft was yet not complete, from the Customs perspective. Sans any valid import, submits Mr. Kamath, the question of the registration of the Aircraft, from the IOMAR, would not arise. He points out that, even as per the CAR, dated 10th November, 1998, filing of a Bill of Entry was mandatory, before registration of the aircraft in India. E-mail, dated 22nd March, 2020, from the petitioner to the respondent, it is submitted, confirmed that the petitioner had applied for permission to import the aircraft into India. The fact of non-completion of the import formalities, which was an obligation on the petitioner, he submits, has been suppressed by the petitioner, and defeats the prayers made in the petition. This suppression of facts, he

submits, also disentitled the petitioner to any equitable relief from this Court.

91. Delay in securing registration of the aircraft in India, Mr. Kamath submits, is attributable to the non-completion of import formalities by the petitioner. In the written submissions filed by the respondent, after conclusion of hearing, it has been averred thus:

> "The registration of the aircraft in India is the responsibility of the Petitioner. The Petitioner claims to have taken steps for registration before the DGCA. Section 3.5 of the CAR dated 10/09/1998 lists out documents required for registration. The very first document is the customs clearance certificate/ BoE of the aircraft. Obtaining the certificate / BoE is the responsibility of the Petitioner. The Petitioner has failed to obtain the certificate of Customs clearance/BoE. *The second document is the certificate of de-registration from the previous registering authority. Although the certificate of de-registration has to be obtained by the Respondent, the Respondent cannot apply for de-registration in another country, until the Petitioner completes the import process in India. The rest of the documents are already available with the Petitioner.*"
>
> (Emphasis supplied)

92. Mr. Kamath submits that the respondent had furnished, to the petitioner, all necessary documentation for operating the aircraft. There were, he submits, only two documents, necessary for this purpose, namely the CoR and the CoA. Both these documents had been provided, by the respondent to the petitioner. He points out that the petitioner had not sought, from the respondent, any other specific document, in its communications and that, even in the Notice of Dispute, dated 24thApril, 2020, the petitioner had not alleged failure,

on the part of the respondent, to provide required documents. This allegation, he submits, figures for the first time in the present petition.

93. Apropos the requirement of installation of the CDSS, Mr. Kamath draws attention to Clause 6.3 of the Lease Deed, which stipulated that "the Aircraft to be leased hereunder shall be delivered to the Lessee in "AS IS" condition and subject to each and every disclaimer of warranty and representation as set forth herein". Installation of the CDSS, he submits, was not a mandatory requirement in Vietnam, from where the aircraft was being imported. Nor did the Lease Deed, he points out, obligate the respondent to provide the CDSS. The mere fact that, in certain separate e-mail communications, the respondent may have agreed to provide the CDSS, according to Mr. Kamath, does not make out a case of breach of the covenants of the Lease Deed, merely because the Aircraft was not equipped with the CDSS. In fact, he points out, the first communication, in which the requirement of the CDSS found mention, was in the e-mail dated 3rd December, 2019, from the petitioner to the respondent, in which the petitioner stated that it "(understood) that MSN 688 Aircraft do not have the CDSS in it" and that "as per DGCA CAR we cannot import Aircraft without CDSS". Installation of the CDSS, therefore, reiterates Mr. Kamath, was not an essential covenant of the Lease Deed. This obligation, if at all, he submits, arose from email correspondences between the petitioner and the respondent, and non-fulfilment thereof could not be regarded as infraction of any of the terms of the Lease Deed. He also points out, in this context, that Clause 32.1 of the Lease Deed specifically stated

that prior agreements or understandings stood terminated, and that the Lease Deed was a self-contained document. The Clause read thus:

> "32.1 This Deed contains all of the terms and conditions agreed by and between the Parties hereto with respect to lease of the Aircraft and on and from the Lease Commencement Date, the prior agreements or understandings pertaining to any such matters (including the Letter of Intent) shall stand terminated except with regard to any accrued rights thereunder. No provision of this Deed may be amended or added to except by an Addendum in writing to be duly signed by the Parties herein."

Breach of any obligation, by the respondent, unrelated to the Lease Deed, submits Mr. Kamath, cannot be agitated in proceedings under Section 9 of the 1996 Act. This issue is, therefore, according to him, entirely irrelevant to these proceedings.

94. Mr. Kamath also disputes the contention, of Mr. Gautam Narayan, that there had been no "delivery" of the aircraft, within the terms of the Lease Deed, by the respondent. He submits that, under Clause 6.2 of the Lease Deed, delivery of the Aircraft commenced with issuance of the Delivery Acceptance Certificate by the petitioner. Any delay, in delivery of the aircraft, he submits, was attributable only to insistence, by the petitioner, on compliance, by the respondent, with conditions, which the respondent was not obligated to perform in terms of the Lease Deed. Mr. Kamath has referred me to e-mail communications, dated 4th March, 2020 and 5th March, 2020, from the respondent to the petitioner, and the reply, of the petitioner, to the respondent, dated 5th March, 2020, to submit that the insistence, by the petitioner, was relating to requirements foreign to the Lease Deed.

95. In response to the submission, of Mr. Gautam Narayan, that the respondent had not provided, to the petitioner, all documents necessary for registration of the Aircraft, Mr. Kamath draws attention to Clause 3.5 of the CAR, dated 10th September, 1998, regarding "Airworthiness", which already stands extracted in para 77 *supra*. He submits that the very first document, in the list of documents necessary for registering the Aircraft, was the Customs clearance certificate/Bill of Entry which, according to him, was required to be filed by the petitioner, and in which respect the petitioner was in default. He submits that the Certificate of Deregistration from the IOMAR, though also stipulated as a necessary document for registering the Aircraft in India, could be provided only on production of evidence, by the respondent, before the IOMAR, to the effect that the aircraft had been imported into another country. The factum of import having not taken place (owing to non-filing of the Bill of Entry by the petitioner), Mr. Kamath submits that it was not possible for him to secure a Certificate of Deregistration from the IOMAR.

96. Mr. Kamath referred me, thereafter, to Clause 2.2 of the CAR, dealing with "Airworthiness", issued on 25th November, 2014, specifically Clause 2.2.1, which entitled the owner, or his authorised representative, to apply to the DGCA, together with necessary fees, for issuance of CoA, "after the aircraft has been registered". As the Aircraft had not yet been registered in India, he submits that the plea, of Mr. Gautam Narayan, that his client was unable to obtain CoA, from the DGCA, was untenable and premature. In any event, he

submits, the existing CoA, of the aircraft, was valid till November, 2020, and could, therefore, be got validated, by the DGCA, under Clause 3.1 of the CAR dated 25th November, 2014, at any time.

97. Adverting, thereafter, to Schedule II to the Lease Deed, Mr. Kamath submits that the documents, stipulated in the said Schedule, were required to be in the Aircraft, and were available in the Aircraft at the time of its landing in India. As such, he submits, without taking delivery of the Aircraft, the petitioner could not, very well, contend that there was failure, on the part of the respondent, in providing the documents, to which Schedule II, to the Lease Deed, referred.

98. As such, submits Mr. Kamath, no *prima facie* case of breach, by the respondent, of any of the covenants of the Lease Deed, existed, as could maintain this petition, under Section 9 of the 1996 Act.

99. Arguing in rejoinder, Mr. Gautam Narayan submitted that, in its e-mail dated 24th January, 2020, the respondent had acknowledged the fact that Bill of Entry, in respect of the Aircraft, was in existence. Drawing my attention to e-mails, dated 4th March, 2020, 5th March 2020, 2nd April, 2020 and 29th April, 2020, from the respondent, Mr. Gautam Narayan points out that the issue of Customs clearance had never been raised by the respondent, in any of these communications. The plea that there was failure, on the part of the petitioner, to file a Bill of Entry, therefore, he submits, was by way of a red herring, raised for the first time before this Court, in order to divert attention from the failure, on the part of the respondent, to perform its obligations under the CAR and the Lease Deed.

100. Non-furnishing of the Certificate of Deregistration, from the IOMAR, Mr. Gautam Narayan reiterates, was fatal to the contention, of the respondent, that delivery of the Aircraft, in terms of the Lease Deed, had taken place. Mr. Gautam Narayan invited my attention, in this context, to Appendix 'D' to the CAR, dated 25th November, 2014, dealing with "Airworthiness", titled "Delivery of Aircraft", Clause II whereof read thus:

> "The aircraft which is being exported to India other than via flyaway, the following documents should accompany the Aircraft and be delivered to DGCA:
>
> a. Standard Certificate of Airworthiness issued by the country of Export,
>
> b. Export Certificate of Airworthiness
>
> c. *Certificate of Deregistration or a written statement that the Aircraft is not registered in the country of export."*
>
> (Emphasis supplied)

101. Mr. Gautam Narayan emphasises that the respondent was aware, at all points of time, that the aircraft was being imported, by the petitioner, in order to fly it, as commercial carrier, in India. It was for this reason, he submits, that the Lease Deed specifically required the respondent to provide, to the petitioner, all documents, as would enable the petitioner to obtain registration of the aircraft in India, from the DGCA. Supplying of the aircraft, sans the necessary documentation, therefore, was useless, according to Mr. Gautam Narayan. Mr. Gautam Narayan also invited my attention to emails,

dated 24th July, 2019, 19th August, 2019 and 7th September, 2019, which preceded the execution of the Lease Deed, to emphasise his contention that the respondent could not legally shy away from its obligations towards the petitioner.

102. Drawing my attention, once again, to the communications between the petitioner and the respondent, Mr. Gautam Narayan reiterates that his client never signified any intention to terminate the agreement, in terms of Clause 7 of the Lease Deed.

103. Mr. Gautam Narayan submits, finally, that, in the circumstances, the balance of convenience was clearly in favour of his client, to whom the respondent had held out solemn assurances, on which it reneged.

Analysis

104. While proceeding to examine the rival contentions of learned counsel, I am required to be mindful of the fact that the present proceedings are under Section 9 of the 1996 Act.

105. Section 9 has its own distinct indicia and, while it is fundamentally guided by the three considerations of existence of a *prima facie* case, balance of convenience and irreparable loss, which guide the exercise of discretion under Order XXXIX CPC, there is a fundamental difference between the two provisions.

106. Interim relief, under Order XXXIX, is in the nature of an

interlocutory order pending disposal of a suit. Pre-arbitral interim relief under Section 9 of the 1996 Act, on the other hand, is primarily aimed at securing the corpus of the dispute so that arbitral proceedings are not rendered a futility before they commence. It is for this reason that, apart from the aforesaid three criteria, of *prima facie* case, balance of convenience and irreparable loss, a Section 9 petitioner is also required to demonstrate that, were urgent interim reliefs not granted, there is a chance of the arbitral proceedings being frustrated, even before they take off, and of the award, if any, which may come to be passed, being rendered futile. For this reason, the principles governing Order XXXVIII Rule 5 CPC have, for that reason, also been held to be applicable, while directing the furnishing of security, under Section 9(1)(ii)(b).

107. A Section 9 court has also to be circumspect and should not take care not to entrench on the jurisdiction vested in the arbitrator by Section 17. The 1996 Act, it has to be remembered, is an Act dealing with arbitration and conciliation, and not with proceedings before a civil court. The base provision, for seeking interim relief in arbitral proceedings, is, therefore, Section 17, and not Section 9. Section 9 is, in fact, in the nature of an emergency clause, inserted to circumvent the possibility of either party, to the proposed arbitral proceedings, taking steps to render the proceedings futile, even before they commence. The court has been conferred power, to grant pre-arbitral interim relief, under Section 9 only in order to counter any attempt, by either party, to frustrate the arbitral proceedings, between the stage of arising of the dispute and, the moving the arbitrator under Section 17

of the 1996 Act. Section 9, at the pre-arbitral stage, is, therefore, a provision in aid of the arbitral proceedings, intended to provide *ad hoc* protection, till Section 17 could be invoked.

108. The sequitur is that the degree of satisfaction, of the Section 9 court, at the pre-arbitral stage, is not the same as the degree of satisfaction of the arbitrator, while exercising jurisdiction under Section 17 of the 1996 Act. The Section 9 court is essentially concerned with the issue of whether an arbitrable dispute, deserving of resolution by arbitral proceedings, exists, or not. If the case set up by the Section 9 petitioner is devoid of merit altogether, so that no dispute, worthy of arbitration, exists, the Section 9 court would be justified in declining relief. If, on the other hand, an arguable case is found to exist, which deserves resolution by arbitration, and the court finds that, were interim protection, under Section 9, not granted, there is a likelihood of frustration of the arbitral proceedings, the court would proceed to grant relief under Section 9.

109. This aspect is underscored by a comparison of the words used in Order XXXIX of the CPC, *vis-a-vis* those employed in Section 9 of the 1996 Act. Order XXXIX of the CPC empowers the court to "grant a temporary injunction", till the disposal of the suit, or till further orders. Section 9 of the 1996 Act, *per contra*, empowers the court to grant "an interim measure of protection". The word "protection", as used in Section 9(1)(ii), underscores, as it were, the *raison d'etre* of the provision.

110. A section 9 court is, therefore, concerned with *protecting* the corpus of the arbitral dispute, so that the arbitration can take off and fructify. Once a dispute, amenable to, and deserving of, resolution by arbitration, is found to exist, and the apprehension, of dissipation of the assets forming the corpus of the dispute, is found to be real and subsisting, or where the circumstances indicate that enforcement of the award, as and when delivered, would otherwise be hindered, a Section 9 can grant "interim measures of protection".

111. For a comprehensive discussion of this aspect, reference may be made to the recent decisions of this Court in ***CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corporation of India Ltd***[26]and ***Avantha Holdings Limited v. Vistra ITCL India Limited***[27], which have considered most of the earlier decisions on the point.

112. In this backdrop, as learned counsel have proceeded systematically, point by point, it would be advantageous to deal with the rival contentions in *seriatim*.

Re: Contention of petitioner that no delivery of the aircraft, within the meaning of the Lease Deed, as taken place

113. Mr. Gautam Narayan, arguing for the petitioner, has submitted that there has been no delivery of the aircraft, as contemplated by the

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Lease Deed. He submits that the aircraft was required to be delivered accompanied by all requisite documentation, so as to ensure that it could be registered with the DGCA in India, and could be utilised, in commercial operations, by the petitioner. He has emphasised the fact that both parties were aware, throughout, that the petitioner intended to engage the aircraft in commercial flying operations.

114. Apart from Clause 3.5 of the CAR, dated 10th September, 1998, dealing with airworthiness, the requirement of production of a certificate of de-registration, from the previous registering authority, in order for an aircraft to be registered in India, is also spelt out, in so many words, in Clause 2 under the head "Delivery of Aircraft" in the CAR dated 25th November, 2014, which is also on record. Additionally, Clause 3.2 of the CAR also stipulates that no aircraft, which is already validly registered in any country, shall be registered in India.

115. As against this, Mr. Kamath sought to submit that all requisite documents had been provided to the petitioner, and that the contention, of Mr. Gautam Narayan, to the contrary, was devoid of substance.

116. To my mind, the submission of Mr. Gautam Narayan, *prima facie*, has merit.

117. Clause 4.1 of the Lease Deed specifically required the lessor, i.e. the respondent, to provide all necessary documentation, as may be

required by the lessee, for registering the aircraft, with the DGCA, in India. Clause 3.5 of the CAR, dealing with airworthiness, dated 10th September, 1998, specifically includes a certificate of de-registration, from the previous registering authority, as one of the documents to be presented to the DGCA, in order for the aircraft to be registered in India for commercial operations.

118. It is not in dispute that, till date, no certificate of de-registration of the aircraft, issued by the IOMAR, or any other document, to the effect that the aircraft was no longer registered with the IOMAR, was provided to the petitioner by the respondent.

119. As such, the respondent cannot be said to have supplied, to the petitioner, all requisite documentation, on the basis of which the petitioner could obtain registration of the aircraft in India.

120. Mr. Kamath did not, either in his oral or in his written submissions, dispute the fact that the certificate of de-registration was a mandatory document, for registering the aircraft in India, though it was submitted that the relevant documents were the certificate of CoR and CoA. The applicability of Clause 3.5 of the CAR, of 10th September, 1998, dealing with the airworthiness, has also not been questioned.

121. Rather, the written submissions of the respondent, as reproduced in para 84 hereinabove, also acknowledges that the certificate of de-registration, from the previous registering authority,

was one of the documents required, for obtaining registration of the aircraft with the DGCA.

122. The only response of Mr. Kamath, to this contention of Mr. Gautam Narayan, is that the respondent was unable to obtain a certificate of de-registration from the IOMAR, till filing of the Bill of Entry by the petitioner. Much, in fact, has been made, by Mr. Kamath, on the fact that filing of the Bill of Entry was also a mandatory requirement for registering the aircraft with the DGCA and that the petitioner has not, till date, filed the Bill of Entry.

123. I am not inclined to agree, *prima facie*, with Mr. Kamath.

124. No material, whatsoever, was placed on record, or even adverted to, by Mr. Kamath, to support his submission that, till a Bill of Entry was filed in India, no certificate of de-registration could be obtained from IOMAR. The written submissions, filed by the respondent, after conclusion of hearing, too, do not refer to any material, to support this submission. The record does not disclose, either, a single communication, from the respondent, to the petitioner, stating that certificate of de-registration could not be obtained from the IOMAR owing to non-filing of Bill of Entry by the petitioner. Indeed, the repeated emphasis, by Mr. Kamath, that the import of the aircraft was not complete as no Bill of Entry had been filed by the petitioner, does not find reflection in any communication addressed by the respondent to the petitioner.

125. The repeated emphasis, by Mr. Kamath, on the non-filing of bill of entry by the petitioner, in my view, essentially obfuscates the issue in controversy.

126. The question before the court is whether, there had, *prima facie*, been a breach, on the part of the respondent, of the covenants of the Lease Deed.

127. Clause 4.1 of the Lease Deed, which required the respondent to provide all necessary documentation for registration of the aircraft, with the DGCA, *prima facie*, has been breached. The issue of whether, without filing of Bill of Entry, the petitioner would be able to obtain registration of the aircraft, has nothing to do with the covenants of Lease Deed.

128. The obligation of the respondent, under the Lease Deed, was to provide all documentation necessary, for the petitioner to obtain registration of the aircraft in India. Having defaulted in that regard, the respondent cannot be heard to contend, in defence, that the petitioner had also defaulted in filing the Bill of Entry, without which the aircraft could not be registered.

129. The arbitral tribunal, if and when constituted, is not required to opine on the registration of the aircraft, or how such registration could be obtained. It would be required to examine whether there has, or has not, been a breach, by the respondent, of the covenants of the Lease Deed, as alleged by the petitioner. That, *prima facie*, has taken place.

130. *Prima facie*, therefore, there is merit in the submission of Mr. Gautam Narayan that the plea of non-filing of the Bill of Entry has been advanced, by the respondent, only to cover up the default, on the part of the respondent, in providing the certificate of de-registration of the aircraft. In view thereof, I am not inclined to enter, for the purposes of the present order, into the factual dispute of whether the petitioner has, or has not, filed the Bill of Entry.

Re: Alleged unilateral termination of the Lease Deed

131. Mr. Gautam Narayan has also disputed the stand, of the respondent, that there had been a "unilateral" termination of the Lease Deed, by the petitioner, and, on this aspect, too, I am inclined to agree with him. There is no e-mail, from the petitioner, to the respondent, terminating the Lease Deed. Rather, it was the respondent who, in its e-mail dated 5th March, 2020, to the petitioner, stated that it was "fine to terminate the agreement right away". Thereafter, commencing the email dated 9th March, 2020, addressed to the petitioner, the respondent consistently adopted a stance that the petitioner had unilaterally terminated the Lease Deed.

132. I do not find this stance to be supported by any of the communications addressed by the petitioner to the respondent.

133. The oblique reliance, by Mr. Kamath, on the concluding remark, in the email dated 5th March, 2020, from the petitioner to the respondent, stating "demand full refund *and close*", can hardly

amount to a "unilateral termination" of the Lease Deed by the petitioner.

134. This contention of the respondent is, in fact, in the teeth of Clause 7 of the Lease Deed, read with Clause 26.1 thereof.

135. All circumstances, in which the Lease Deed could be terminated stand exhaustively delineated in the various sub-clauses of Clause 7. Clause 7.1 provides for "Early Termination" of the Lease Deed. For this purpose, the lessee has to issue a six months' notice, and pay early termination fee of US $ 300,000. The Early Termination fee of US $ 300,000 is exempt only if 24 continuous months of lease have been completed. Clause 7.2 deals with termination by the lessor, for breach by the lessee and is, therefore, of no application. Clause 7.3 deals with the termination of the lessee, for breach of the Lease Deed by the lessor. This Clause would apply where a notice, in writing, is issued by the lessee to the lessor, setting out the breaches on the part of the lessor, and the lessor would, in that case, have the right to remedy the breach within 60 days from the date of receipt of such notice.

136. The respondent does not contend that, by following the discipline and the rigor of any of the sub-clauses of Clause 7, the Lease Deed had been terminated by the petitioner.

137. No "unilateral termination", as is stated to have been effected by the petitioner, is contemplated by the Lease Deed. As such, *prima facie*, there is merit in the contention of Mr. Gautam Narayan that the

respondent is using the argument of "unilateral termination" as a pretext to avoid its obligations under the Lease Deed.

138. No termination of the Lease Deed has, therefore, taken place.

Re: Non-installation of CDSS

139. Mr. Kamath has sought to contend that the Lease Deed did not require installation of CDSS on the aircraft and that, therefore, even assuming the aircraft had been supplied without pre-installed CDSS, no breach of the Lease Deed could be alleged to have taken place on that count. He has also sought to draw sustenance from Clause 6.3 of the Lease Deed, which required the aircraft to be delivered to the lessee, i.e. the petitioner in "as is" condition. Mr. Kamath seeks to contend, by relying on this clause, that the petitioner had covenanted to receive the aircraft in the condition in which it had left Vietnam. In Vietnam, he submits, installation of CDSS was not a mandatory requirement. As such, according to Mr. Kamath, the respondent was not required to install the CDSS in the aircraft, before delivering it to the petitioner.

140. I am not inclined to agree with Mr. Kamath. The fact that the CDSS was required to be installed on the aircraft, in order for the aircraft to be registered with the DGCA in India, stands recognized and acknowledged by the respondent itself, in its email dated 16th February, 2020, to the petitioner (reproduced in para 84 *supra*). Clause 32.1 of the Lease Deed cannot wish away this acknowledgement, or reduce the effect thereof. Having accepted, in

the email dated 16th February, 2020, that installation of the CDSS was mandatory for registration of the aircraft by the DGCA in India, it can hardly lie in the mouth of the respondent to contend, now, that the CDSS was not required to be installed on the aircraft.

141. Even otherwise, Clause 13.2.3 (b) of the CAR dated 30th October, 2018, dealing with "aircraft operations" specifically stated that all new aircrafts, imported after 1st January, 2008, were required to have CDSS installed at the time of import. The requirement of having CDSS installed also stands expressly spelt out in EASA Standard ORO.SEC.100.A(a) and (c)(2), which stands reproduced in para 84 *supra*. The respondent had, in its email dated 6th December, 2019, specifically undertaken to supply the aircraft duly compliant with EASA standards.

142. The reliance, by Mr. Kamath, on Clause 6.3 of the Lease Deed, is also, therefore, in my *prima facie* opinion, facile.

143. Moreover, Clause 6 of the Lease Deed, which deals with the delivery of the aircraft, reads thus:

> "6. DELIVERY OF AIRCRAFT
>
> 6.1. Lessor shall deliver the Aircraft to the Lessee at GMR Aerospace facility located in the Special Economic Zone (SEZ) at Hyderabad Airport, India. Lessor shall deliver and Lessee shall accept the Aircraft with current and valid Certificate of Airworthiness (COA) issued by Isle of Man Aircraft Registry (IOMAR).
>
> 6.2. Notwithstanding anything contained herein to the contrary, the Lessor shall deliver the Aircraft to Lessee in accordance with the terms and conditions of this Deed and

> Lessee will accept the Aircraft by execution of the Delivery Acceptance Certificate, as set forth herein in attached Schedule - II. ("Delivery Acceptance Certificate").
>
> 6.3. Subject to the generality of the foregoing, the Aircraft to be leased hereunder shall be delivered to the Lessee in "AS IS" conditions and subject to each and every disclaimer of warranty and representation as set forth herein. The Lessee hereby covenants that it is familiar with the type of Aircraft, its characteristics, qualities, equipment and condition so far as reasonable, practicable and provided herein."

144. Clause 6.3 starts with the words "subject to the generality of the foregoing". "The foregoing" would include Clause 6.2, which commences with a non-obstante clause, and required the respondent to deliver, to the petitioner, the aircraft in accordance with the terms and conditions of the Lease Deed. It was only thereafter that the petitioner was required, as lessee, to accept the aircraft by execution of the delivery acceptance certificate. The terms and conditions of the Lease Deed included Clause 4.1, which required the lessor to provide all necessary documentation, required by the lessee for registering the aircraft with the DGCA. Evidence of installation of the CDSS in the imported aircraft would also, therefore, be one of the requirements, in order for the aircraft to be registered with the DGCA in India. On this count, too, therefore, the submission of Mr. Gautam Narayan, that the respondent was in breach of the covenants of the Lease Deed, merits acceptance.

Re: Liability to pay maintenance reserves

145. There is also, *prima facie*, substance in the contention, of Mr. Gautam Narayan, that no liability on the petitioner, to pay

maintenance reserves, existed. Clause 10.6 of the Lease Deed specifically obligated the lessee, to pay to the lessor, maintenance reserves on a monthly basis, "for every flight hour or flight cycle, as the case may be of usage". The Clause also stipulated that the maintenance reserves were to be paid in accordance with Schedule III to the Lease Deed, which specifically stipulated that maintenance reserves were payable "in respect of hours flown on the aircraft", and were "payable on the 10th day of each month in respect of hours flown in the previous calendar month". As the aircraft had never been flown, there could be no question of the petitioner being required to pay any maintenance reserves.

The fallout

146. As a result, I am of the opinion that a *prima facie* case, meriting consideration and resolution by the arbitral process, has been made out by the petitioner. It remains to be considered, then, whether, in order to secure the corpus of the arbitration, any interim measure of protection, under Section 9 of the 1996 Act, deserves to be granted.

147. The prayer clause in this petition, reads thus :

> "In the facts and circumstances mentioned above, it is respectfully prayed thatthis Hon'ble Court may be pleased to:
>
> a. Pass an order restraining the Respondents from creating any third party interest / right / title on the Aircraft either directly or indirectly or from selling, transferring or creating encumbrance in any way; and
>
> b. Pass an order restraining the Respondents from taking the Aircraft out of India; or, in the alternative,

c. Pass an order directing the Respondents to deposit the amount of USD 530,000 [INR 4,01,05,736/- as on 20.5.2020] which corresponds to the amount paid by the Petitioner as per the Lease Deed along with interest into an escrow account under this Hon'ble Court's directions;

d. Pass any other orders as this Hon'ble Court may deem fit in the facts and circumstances of the present case, in the interest of justice."

148. After orders were reserved, in these proceedings, the attention of this Court was invited to the fact that the respondent was making efforts to dispose of the aircraft, or parts thereof, with a view to render ~~in~~ these proceedings infructuous. Opining that this amounted to an attempt at interfering with the administration of justice, especially as these attempts were made without the consent of this Court, notice was issued, to the respondent, to show cause as to why action for contempt be not initiated against it. Further orders were passed by this bench, resulting in the respondent appealing, before the Division Bench of this Court, by way of FAO (OS) (COMM) 124/2020 (***Ezen Aviation Pvt Ltd v. Big Charter Pvt Ltd***). Notice was issued, in the said appeal, on 12th October, 2020, and the order, of this Court, was modified, by allowing the respondent to dismantle and shift the landing gears and other accessories of the aircraft to the warehouse of M/s GMR Air Cargo and Aerospace Engineering Ltd., donate the bare shell of the aircraft, without any accessories of landing gears to the National Institute of Technology, Warangal, sell the landing gears and other spare parts and raise an amount of ₹ 4,30,00,000/-, which was to be deposited with the Registry of this Court. This arrangement, it was clarified, would be subject to the outcome of these proceedings.

149. In view of these supervening developments, after orders were reserved, prayers (a) and (b) in the petition do not survive for consideration.

150. Prayer (c) in the petition is for directing the respondent to deposit ₹ 4,01,05,736/-, being the amount paid by the petitioner to the respondent under the Lease Deed, in an escrow account, to be administered by this Court. This Court has been alive to the fact that, during the currency of arguments in this petition, and even after orders were reserved thereon, the respondent has shipped, out of the country, various parts of the aircraft. That apart, Respondent No. 1 is a private limited company, registered in Australia, and Mr. Chenna Reddy, who is the director of Respondent No.1 as well as Respondent No.2, is also residing in Australia. In case the respondent is allowed to withdraw, from the Registry of this Court, the amount of ₹ 4,30,00,000/-, deposited as per the direction of the Division Bench, there is every likelihood of recovery of the said amount, from the respondents, being rendered a formidably uphill task, in the event of an award being returned, in arbitration, in favour of the petitioner.

151. Drawing analogy from the judgment of the Supreme Court in ***Raman Tech and Process Engg. Co. v. Solanki Traders***[28] and of the Coordinate Bench of this Court in ***Tata Advance Systems Ltd. v. Telexcell Information Systems Ltd.***[29]**,** and on the basis of the

[28] **(2008) 2 SCC 302**
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principles applicable to Order XXXVIII Rule 5 of the CPC, I am of the opinion that, in the interests of justice, the amount of ₹4,30,00,000/-, should remain deposited with the Registry of this Court, pending further orders. The deposit would remain subject to the final award, if any, to be rendered in the arbitral proceedings between the parties. The amount shall be retained in an interest bearing fixed deposit, and shall remain subject to further orders to be passed by this Court.

152. The petition stands allowed to the aforesaid extent.

153. It is clarified that all observations, and findings, in this judgement, are intended only for the purpose of disposing of the present petition under Section 9 of the 1996 Act, and should not be treated as a final expression of opinion, by this Court, on the various issues in controversy, the merits of which would have to be determined by the Arbitral Tribunal which would be constituted in the matter.

154. There shall be no order as to costs.

C. HARI SHANKAR, J.

OCTOBER 23, 2020
HJ