



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**R/FIRST APPEAL NO. 1309 of 2024
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2024
In R/FIRST APPEAL NO. 1309 of 2024**

FOR APPROVAL AND SIGNATURE:

**HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL
and
HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | No |
| 2 | To be referred to the Reporter or not ? | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | No |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | No |

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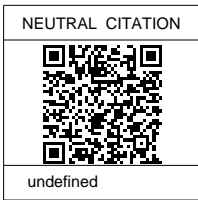
SDB DIAMOND BOURSE
Versus
PSP PROJECT LTD.

Appearance:

MR. KAMAL TRIVEDI, SR. ADV. WITH MR DHAVAL VYAS, SR. ADV. WITH TARAK DAMANI WITH MR. ZAKI SHEIKH, MR. ADITYA JOSHI, MR. VIJAY BAIRAGRA(6089) for the Appellant(s) No. 1
MS. MEENAKSHI ARORA, SR. ADV. WITH MR. DEVANG NANAVATI, SR. ADV. WITH MR. SUDHIR NANAVATI, SR. ADV. WITH CHITRAJIT UPADHYAY WITH MS. HETAL KOSAMBIA with BHAGIRATH N PATEL(9016) for the Defendant(s) No. 1

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**CORAM: HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE
SUNITA AGARWAL
and
HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE**

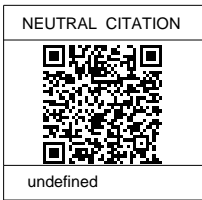


Date : 09/05/2024

CAV JUDGMENT
(PER : HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL)

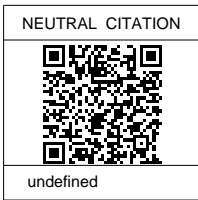
The instant Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is directed against the order dated 11.03.2024 passed by the Commercial Court, Surat in Commercial Civil Misc. Application No. 39 of 2023, whereby an application preferred by the respondent (PSP Projects Ltd.) under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act, 1996') has been partly allowed. By the impugned order, the appellant herein (SDB Diamond Bourse) has been directed to furnish irrevocable bank guarantee to the tune of Rs. 125 crores within a period of four weeks from the date of the order and further that the appellant has been restrained from auctioning, transferring or creating third party rights in the remaining portion of the Surat Diamond Bourse.

2. The order impugned is challenged on the ground that the directions contained in the order based on the observations therein are running against the agreed terms and conditions of the contract. There is a procedure prescribed for processing of the final bill as laid down in the



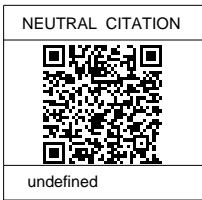
contract and as agreed upon by the parties, which is required to be followed. It was urged by Mr. Kamal Trivedi, the learned Senior Advocate appearing for the appellant that the Commercial Court has erred in taking into consideration the only fact that virtual completion certificate has been issued by the appellant on 21.10.2022. It may be noted that the virtual completion date stated therein is 30.06.2022 and in view thereof the defects liability period started from 01.07.2022 and the same is to end on 30.06.2024. The Commercial Court has, thus, completely ignored that though as per the virtual completion certificate, the defects liability period ends on 30.06.2024, but if by the said date all defects are not resolved/rectified, the said period automatically gets extended till the defects are resolved. It has further ignored that the virtual completion certificate issued by the appellant is subject to successful completion of all the snags and handing over the project. Out of the total 165 areas, only 155 areas have been handed over by the respondent to the appellant during the period from October, 2022 to March, 2023 and even as on the date of filing of the instant Appeal, handing over of 10 areas are still to be completed.

3. The submission is that the conditions of contract for construction as issued by the FIDIC (the International Federation of Consulting



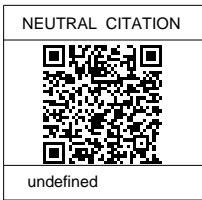
Engineers) as also the conditions stipulated under the head “particular conditions” of the contract agreement, have been ignored. The contract laid down the process, which is required to be followed for the purpose of disbursement of the final bill as stipulated in the aforesaid conditions.

4. It was urged that as per the contractual conditions pertaining to the defects liability clause, after all the obligations of the contract are completed, the Engineer is to issue performance certificate in favour of the contractor stating the date on which the contractor completed his obligation under the contract and the said certificate is to be issued within 28 days after the latest of expiry date of defects notification period or soon thereafter, once the contractor has supplied all the documents and completed the tests with regard to all the work including remedying any defect. As stipulated in the contract under Clause No. ‘14’ pertaining to the final payment within 56 days after receiving the performance certificate, the contractor shall have to submit to the Engineer six copies of the draft final statement, which is required to be then verified by the Engineer, but the said process of issuance of final payment is to be undertaken after issuance of performance certificate. The performance certificate, in turn, has to be issued only after the defects liability period is over and thereafter only, the final payment is required to be undertaken.

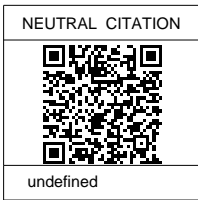


Admittedly, the defects liability period, in the instant case, is getting completed only on 30.06.2024 and in view thereof, the application preferred by the respondent under Section 9 of the Act, 1996 before the Commercial Court, was premature, as no amount was due or payable as on the date. No cause of action had arisen for the respondent and the claims raised by the respondent seeking for final payment, were premature.

5. It is further pointed out that as against the contract amount of Rs. 1858.5 crores, the appellant has already paid an amount of Rs. 2087 crores to the respondent. As against the last running bill, namely RA Bill No. 45, an additional amount of Rs. 14 crores (approximately) which were to be paid being due and payable to the respondent, has been paid. The final payment and return discharge is to be made in accordance with the Clauses Nos. '14.11' and '14.12' of the contract, stage for which has not been reached as yet. The anxiety shown by the respondent to seek interim relief was that the balancesheet of the appellant showed huge loss of Rs. 70 crores, which was unreasonable as the appellant has enough sources of income and assets to satisfy the claim of the respondents in its entirety, even if all the units are sold or transferred. The appellant has additional areas unsold, such as offices, jewelry mall, lease rental area,

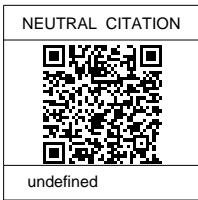


customer area, which also generate revenue. The appellant has intangible assets as well as bank balance to satisfy the claim of the respondent. The Commercial Court has erred in putting blame on the appellant for the engineer not having approved the final bill of the respondent, merely by holding that the engineers have to be appointed by the appellant and that the appellant did not want engineer to pass the bills, ignoring that till date the bills approved by the engineers to the tune of Rs. 2087 crores have already been paid to the respondent by the appellant. It has failed to consider the difference between disbursement of the bill amount against running amount bill and the final bill, which requires completion of stages under the contract. The entire work done and undertaken is required to be checked and verified. All snags and the defects, if any, are required to be cured and after the defects liability is over after adjustment of all the amounts paid and required to be recovered, the final bill amount, if any payable, is to be disbursed. The final bill payment is not to be made immediately after its submission, for which the issuance of performance certificate, as required under the contract, is necessary. With these facts, which were also agitated before the Commercial Court, it was vehemently argued by the learned senior advocate that the applicant/respondent herein was not entitled to any interim relief under Section 9 of the Act, 1996, as no *prima facie* case in favour of the



applicant/respondent herein could be shown.

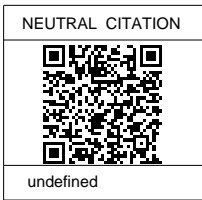
6. Mr. Devang Nanavati, the learned senior counsel for the respondent/original applicant, in rebuttal, harped on the scope of interference under Section 37 of the Act, 1996 and would submit that the Court will not act as a Court of appeal to test the validity of the order passed under Section 9 of the 1996 Act, primary consideration wherein was as to the existence of a *prima facie* case, balance of convenience and the possibility of irreparable loss or prejudice to one or the other party. It was urged that the grant of interim relief under Section 9 of the Act, 1996 is within the scope of discretionary jurisdiction conferred upon the Commercial Court under Section 9 of the Act, 1996. The Court while dealing with Section 9 application was required to balance the equities of the parties before it on even grounds and preserve the sanctity of arbitral process. The sustainability of the grant of the interim relief cannot be tested on a strict construction of the covenants of the contract. An appeal against exercise of discretion is an appeal on principle and the appellate court will not reassess the material and seek to reach at a conclusion different from one reached by the Commercial Court, if the opinion reached by it was reasonably possible on the material. The appellate court would normally would not justify in interfering with the exercise of



discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it would have come to a contrary conclusion. If the discretion exercised by the trial court is reasonable and is in a judicial manner, the fact that the trial court could have taken a different view may not justify interference with the trial court's exercise of discretion.

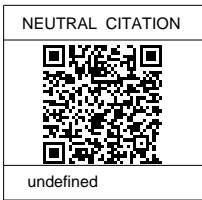
7. The above noted submissions have been made with reference to the decision of the Delhi High court in **L & T Finance Limited vs. DM South India Hospitality Private Limited and others (2021 SCC On-Line Del 5571)**. With reference to yet another decision of the Delhi High Court in **CRSC Research and Design Institute Group Co. Ltd. vs. Dedicated Freight Corridor Corporation of India Limited (2020 SCC On-Line Del 1526)**, it was submitted that it was certain that the scope of interference in the appeal under Section 37 of the Act, 1996 is much more limited in a challenge to the grant/non-grant of interim measures under Section 9 of the Act, 1996, as the grant / non-grant of the interim measures under the said section is essentially discretionary. The appellate court cannot substitute its own discretion for the discretion exercised by the trial court.

8. With these submissions, to highlight the scope of Section 37 of the



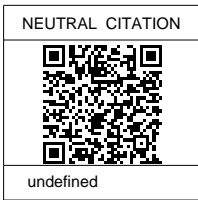
Act, 1996, it is further argued by the learned senior counsel appearing for the respondent that the Commercial Court cannot be said to have erred in considering the circumstances brought before it to draw a balance between the contentions of the rival parties and the relief granted by it. While allowing the application partly against the first claim of Rs. 65.752 crores, it was noted that the said claim was regarding the work done and certification given by the consultant namely PMC & Gleeds. No reason except non-following of the procedure has been given by the respondent for non-payment of the same. As far as the relief of retention of money, item No.2 of the claim, it was noted that the first half of 1.25% was to be released against virtual completion and other half at the end of defects liability period, which can also be released on submission of the bank guarantee. As regards the cost of built-up area variation, it was noted that it should not be in dispute, as variation in area is more than 2%. It was, thus, concluded that the respondent should have released atleast approximately Rs. 127 crores, though as regards other items of the claim, the respondent has raised dispute that they are not as per the terms and conditions of the contract.

9. The Commercial court has noted in the judgment impugned that there is no dispute regarding construction of the building by the applicant



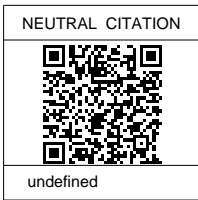
and the dispute is only regarding minor things, such as following procedure and whether some of the items in the bill are covered by the contractor or not. It was noted that in cases of the above noted three items, there was no dispute. The Commercial Court has, thus, reached at the conclusion that the applicant was successful in establishing a *prima facie* case in its favour.

10. It was noticed by the Commercial Court that more than 90% of the units have already been sold by the respondent. The virtual completion certificate has been issued by the respondent, which shows that only some minor snags were remaining and practically the work of the applicant was over. It was noted that the respondent though is entitled to deduct the amount spent by the respondent from the amount payable to the applicant, but huge amount is lying with the respondent as guarantee and such amount can be deducted from that also. The Commercial Court further observed that if the arguments of the respondent is accepted that the work as per the contract has not been completed, it is required to be seen that as to how the respondent is auctioning the different portions of the bourse and further that as per respondent's own admission, 6 rounds of auctioning has already been taken place and out of 4600 units, only 300 units remained to be auctioned, which establishes that the work of the



applicant is substantially completed.

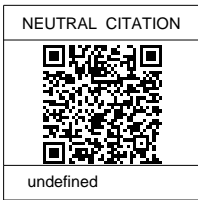
11. Moreover, the final bill was submitted by the applicant as per the directions of the respondent and it is now not open to the respondent to say that it was not the stage for submission of the final bill. The assertion of the respondent that there are many shortcomings in the work done by the applicant, was turned down noticing the above mentioned facts. Once the final bill was asked by the respondent, there was no reason not to complete the process of making of final payment for more than one year, when the performance certificate is to be issued by the Engineer. The Engineer and the consultant have been appointed by the respondent. They have been working under the direction and control of the respondent. Hence, it is not open for the respondent to say that the respondent is helpless, as the Engineer has not issued any completion certificate. In fact, it was required for the respondent to issue directions regarding the same to the Engineer. On one hand, the respondent says that the works have not been completed, and on the other hand, it has auctioned most of the units. This shows double standard of the respondent. The respondent cannot be allowed to blow hot and cold at the same time.



12. It was, thus, concluded by the Court that the respondent (appellant herein) is avoiding to make payment to applicant (the respondent herein) and is disposing off its assets. Moreover, it will not be practicable to recover anything from the common areas or ground-floor area or safe vault or the areas fetching rental income, in case any award is passed and that will severely affect the award, which may be passed against the respondent.

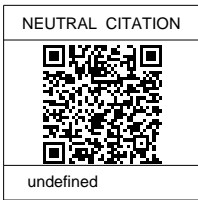
13. The stand of the respondent in mentioning common areas, the ground-floor area which is to be used by the buyers and other area which can fetch rent further show its intention not to pay any amount either before or during or after arbitration, even, if any, award is passed against the respondent. No asset will be left with the respondent in case any award is passed. The respondent seems to be auctioning the units with the intention of defeating any claim of the applicant in case of passing of any award.

14. On the abovenoted findings the submission is that they are not open for interference by this Court within the limited scope of Section 37 of the Act, 1996. The Commercial Court has directed for furnishing irrevocable bank guarantee to the tune of Rs. 125 crores, which are



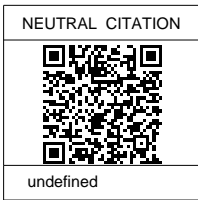
admitted claims put up by the respondent. The restraint from auctioning, transferring etc.. is only applicable during the time of the bank guarantee is not furnished. The interim relief granted by the Court is in operation only for a period of three months after the constitution of Arbitral Tribunal. No prejudice therefore, can be said to have been caused to the appellant as a result of the interim directions and the relief granted to the respondent. The submission is that the instant Appeal under Section 37 of the Act, 1996 is liable to be dismissed outrightly.

15. Heard the learned advocates for the respective parties and perused the material available on record. Before dealing with the rival submissions of the learned counsels for the parties, we may take note of certain decisions of the Apex Court outlining the scope and area of discretion under Section 9 of the Act, 1996 providing for grant of interim relief, even before the party/applicant initiates the process of arbitration. For the mere fact that the party invokes Section 9 of the Act, 1996, it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen, which is referable to the Arbitral Tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. When an application under Section 9 is filed before the commencement

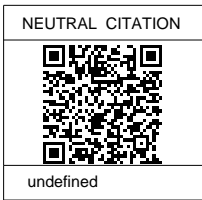


of the arbitral proceedings, there has to be manifest intention on the part of the party-applicant to take recourse to the arbitral proceedings if, at the time when the application under Section 9 is filed, the proceedings have not commenced under Section 21 of the Act, 1996. In order to give full effect to the words “before or during the arbitral proceedings” occurring in Section 9, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under Section 9 can be filed. The issuance of notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to the Arbitral Tribunal. But a situation may so demand that a party may choose to apply under Section 9 for interim measures even before the issuance of notice contemplated by Section 21 of the said Act. If an application is so made, the Court will first have to be satisfied that there exists a valid arbitration agreement and the party/applicant intends to take dispute to the arbitration. Once it is so satisfied, the Court will have the jurisdiction to pass orders under Section 9 of the Act, 1996 giving such interim measures, as the facts and circumstances warrant. (Reference **Sundram Finance Limited Ltd. vs. NEPC India Ltd. [(1999) 2 SCC 479]**).

16. Coming to the scope and extent of discretion under Section 9 of the



Act, 1996, we may note the recent decision of the Apex court in **Essar House Private Limited vs. Arcelor Mittal Nippon Steel India Limited (2022 SCC On-Line SC 1219)**, wherein it has been held that in deciding the petition under Section 9 of the Act, 1996, the Court cannot ignore the basic principles of the Code of Civil Procedure (CPC). At the same time, the power to grant relief is not curtailed by the rigorous of every procedural provision in the CPC. In exercise of its power to grant interim relief under Section 9 of the Act, 1996, the Court is not strictly bound by the provisions of the CPC. If a strong *prima facie* case is made out and the balance of convenience is in favour of interim relief being granted , the Court exercising power under Section 9 of the Act, 1996 should not withhold relief on the mere technicality of absence of averments incorporating ground for attachment before judgment under Order XXXVIII Rule 5, CPC. It was observed that while it is true that the power under Section 9 of the Act, 1996 should not ordinarily be exercised ignoring the basic principles of the procedural laws, as laid down in the CPC, the technicalities of the CPC cannot prevent the Court from securing the ends of justice. It is well settled that procedural safeguards meant to advance the cause of justice, cannot be interpreted in such a manner, as would defeat the justice.

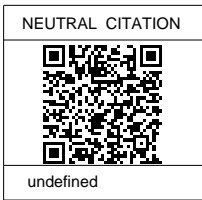


17. In **Sanghi Industries Ltd. vs. Ravin Cables Ltd. (2022 SCC On-Line SC 1329)**, the Apex Court held :-

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

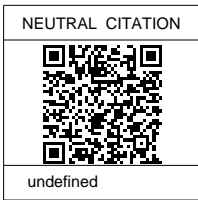
18. It was, thus, held therein that unless and until the conditions mentioned in the Order XXXVIII Rule 5 of the CPC, are satisfied, meaning thereby the Commercial Court is satisfied on the conduct of the opposite party that it is trying to sell its properties to defeat the award as may be passed, it could not have passed such an order in exercise of powers under Section 9 of the Act, 1996. It was noted that there was serious disputes on the amount claimed by the rival parties, which are to be adjudicated upon in the proceedings before the Arbitral Tribunal.

19. In light of the above noted decisions, it is evident that the Court



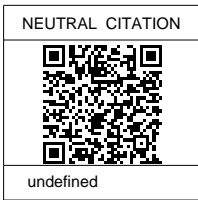
has to keep in mind the concept of balance of convenience, *prima facie* case, irreparable injury and the concept of just and convenient, while passing interim measures under Section 9 of the Act, 1996 in the form of specific relief. When the Court does choose to exercise its discretionary powers, it must do so guided by the principles accepted as relevant and germane for that power being wielded. A balance has to be drawn between the two considerations. Exercise of powers under Section 9 cannot be carried out ignoring the basic principles of the procedural law contained in the CPC and that reference of every procedural provision in the CPC, cannot be put into place to defend the grant of relief, which would sub-serve the paramount interest of justice in the facts of each case.

20. In light of the above guiding principles, when we look to the facts and circumstances of the instant case, it may be noted that the respondent herein approached the Commercial Court at the stage of the agreement, when virtual completion certificate was issued by the appellant on 21.10.2022 as per the terms of the contract. The case of the applicant/respondent herein was that it had handed over different portions of the project to the appellant from October, 2022 to March, 2023 and taking over certificate in respect of 155 areas out of 165 areas were



issued. A dispute was raised by the respondent before the Commercial Court that though possession of the remaining 10 areas was taken by the appellant, they choose not to issue taking over certificate for the said areas. It was noted that the respondent submitted last running account bill being RA No. 46 on 30.06.2022. A meeting was held on 21.10.2022 between the respondent and the authorised representatives of the appellant, wherein the appellant had assured to look into the issues of price escalation amongst other issues. It was submitted by the respondent before the Commercial Court, as noted in the order impugned, that as per the discussion in the aforesaid meeting, written representation by E-mail dated 15.12.2022 was sent to the appellant requesting to arrange for a meeting to discuss the said issue further, however, no heed was paid by the appellant.

21. Much emphasis has been laid on the communication dated 15.12.2022 sent by the appellant through E-mail, to submit that the appellant therein asked for submission of the final bill and pursuant thereof, the respondent had submitted the final bill. The contention was that inspite of submission of the final bill, the appellant did not clear the same and proceeded for auctioning of the units with the 6th round of auction held on 2.9.2023, whereafter 321 units remained to be sold. At

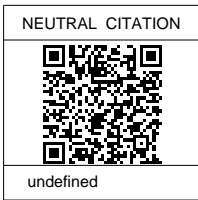


this stage, the respondent addressed a letter dated 19.10.2023 demanding its dues in respect of only Rs. 65.06 crores towards the work done and Rs. 41.74 crores towards release of the retention monies while requesting for deliberations and reconciliation for the remaining claims. Relevant at this stage is to extract the assertions made in the said communication in paragraph Nos. '8' and '9' of the interim application:-

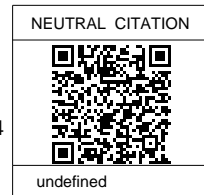
“8. Accordingly, our Interim dues for Rs. 65.06 Crores alongwith release of the Retention Money of Rs. 41.75 Crores, i.e. an amount of Rs. 106.63 Crores be cleared and paid unto us at the earliest. You would please note that as the 'Take-Over Certificate' has been issued, it is imperative that the amounts as have already been approved, alongwith the Retention Money be paid unto us at the earliest without any further delay or demur.”

9. Further, in respect of the claims which require deliberation and reconciliation, we are willing to proceed for and commence conciliation proceedings at the earliest to amicably resolve the issue at hand, which intent we have conveyed even in our earlier correspondences. It is only prudent that the claims and matters at hand be resolved at the earliest and the commercial interests of all parties be amicably reconciled through conciliation proceedings without any further delay or demur.”

22. The Commercial Civil Misc. Application Suit no. 39 of 2023 under Section 9 the Act, 1996 had been filed on 6.12.2023 before the Commercial Court at Surat seeking for an order directing the appellant to deposit the entire outstanding amount of Rs. 538.59 crores plus interest (totalling to the tune of Rs. 631.32 crores). The claim put up by the respondent before the Commercial Court are extracted in a table in the

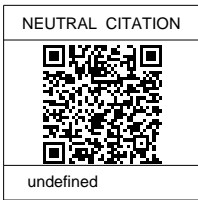


order impugned passed by the Commercial Court. The Commercial court while issuing above noted directions has simply proceeded by noting that the delay in referring the matter to the arbitration is not a fetter to the case of the respondent (applicant therein) and further that the first claim of Rs. 65.752 crores is regarding the work done and certification done by the PMC & Gleeds. However, no reason has been given for non-following the procedure by the appellant for non-payment of the same. It has further proceeded to note that the first half of 1.25% of the retention money was to be released against virtual completion and other half at the end of defects liability period, but the same could also be released on the submission of the bank guarantee. It is further noted that the cost of built-up area variation should not be in dispute, as variation area is more than 2%. With these observations, it was opined by the Commercial Court that the appellant should have released atleast approximately Rs. 127 crores, though regarding rest of the items, the appellant has raised dispute that they are not as per the terms and conditions. It has proceeded to observe that the dispute is only regarding minor things such as following procedure and whether some of the items in the bill are covered by the contract or not. However, in case of the above noted three items, there was no dispute and as such, the respondent has a *prima facie* case, as a genuine dispute was existing. It is observed that if the assets are



disposed of by the appellant, the respondent will not be left with any remedy in case of passing of an award, and hence will suffer irreparable loss and injury. While considering whether balance of convenience lies in favour of the respondent, it was observed that the appellant has two options, one is to accept the claim made by the respondent, or second to get the bill prepared on its own and to make the payment as per that bill. However, the appellant did not exercise any of the above two options and hence, the balance of convenience also lies in favour of the applicant. With these, it was observed by the Commercial Court that in case the interim relief is not granted in favour of the respondent, it will suffer greater hardships.

23. Noticing the above reasonings given by the Commercial Court, the grant of interim relief in favour of the respondent in three paragraphs (78, 79 and 80) of a long drawn judgment, we may note that it has completely ignored the principles laid down by the Apex court in the above noted decisions [**Essar House Private Limited (supra)** and **Sanghi Industries Ltd. (supra)**]. It has ignored the stage at which the respondent rushed to the Court for grant of interim relief. The Commercial Court has simply swayed away by the fact of the E-mail communication dated 15.12.2022 sent by the appellant, whereby the respondent had been called upon to

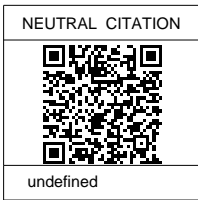


submit their final bill with all supporting documents in 15 days, and state that or else final bill will be prepared by the consultant of the appellant. It is an admitted fact of the matter that after the said communication was sent by the appellant, the respondent had submitted a bill vide letter dated 21.12.2022 purported to be the final bill for the total value of the project amounting to Rs. 2247 crores. In response thereto, the appellant sent communication dated 28.12.2022 clarifying that :-

*“We fail to appreciate your response to our E-mail dated 15.12.2022. Please do appreciate all details mentioned by you are part of administration process and cannot be concluded as final decision. As the project is virtually completed, contract closure process needs to be followed. We requested you to submit the Final Bill as against the bill no. 46 as submitted by you. **Please follow contractual provision for submission of final bill and submit the same.**”*

We once again request you to submit the final bill in totality with all supporting documents for us to start the process of closing the contract.”

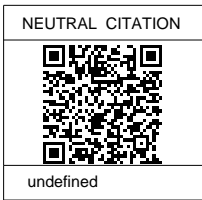
24. It was brought before us by the learned senior counsel appearing for the appellant that the purported final bill dated 12.7.2023 for a total amount of Rs.2286 crores was submitted without following the mandatory contractual provisions. It may be noted here that the said alleged final bill was the bone of contention of the respondent before the Commercial Court, that as there was reluctance on the part of the appellant making the payment and since they are proceeding to sell the



units constructed by the respondent, the respondent has a *prima facie* case, or else, the award, if any, in favour of the respondent in an arbitration proceedings, would be frustrated.

25. It seems to us that the Commercial Court has preempted the whole issue while arriving at the finding of *prima facie* case and balance of convenience. In its long drawn judgment, it has completely ignored the principles that a balance has to be drawn between the competing parties in the facts of each case, and while exercising the discretionary powers under Section 9 of the Act, 1996. It has completely overlooked the principles laid down in **Sanghi Industries Ltd. (supra)** that until and unless preconditions under Order XXXVIII Rule 5, CPC are satisfied and until the Court is satisfied that the opponent is likely to defeat the award that may be passed by the Arbitrator by disposing off the property, the Commercial Court cannot grant interim relief in exercise of powers under Section 9 of the Act.

26. The Commercial Court has completely ignored that the parties have to follow the contractual provisions for submission of the final bill and processing thereof. It has completely ignored various clauses of the contract such as sub-clause 9.5 dealing with “Pre-Completion Inspection”



of the clause pertaining to “Particular Conditions”; sub-clause 10.1 dealing with “Taking Over of the Works and Sections”; sub-clause 14.10 relating to “Statement of Completion”; sub-clause 1.1.3.7 dealing with definition of “Defect Notification Period” of the “Particular Conditions” as set out in the contract. It has also ignored clause 11.9 relating to “Performance Certificate” of “FIDIC” as set out in the contract, which reads as under :-

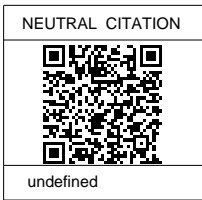
“11.9 Performance of the Contractor’s obligations shall not be considered to have been completed until the Engineer has issued the Performance Certificate to the Contractor, stating the date on which the Contractor completed his obligations under the Contract.

The Engineer shall issue the Performance Certificate within 28 days after the latest of the expiry dates of the Defects Notification Periods, or as soon thereafter as the Contractor has supplied all the Contractor’s Documents and completed and tested all the Works, including remedying any defects. A copy of the Performance Certificate shall be issued to the Employer.

Only the Performance Certificate shall be deemed to constitute acceptance of the Works.”

27. It has further ignored sub-clause 14.11, 14.13 and 14.7 pertaining to “Application for Final Payment Certificate”; “Issue of Final Payment Certificate”; “Payment” as set out in the FIDIC.

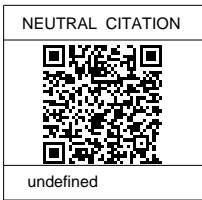
28. The clause 61 of the Work Order dealing with “Retention” is also relevant to be noted herein,



“2.5% of the amount stated in the relevant-Interim Payment Certificate for the Works performed directly by the Contractor (and any Subcontractors employed by the Contractor for performing the Works from each bill shall be retained as cash retention. At the virtual completion, first half of the retention (1.25%) shall be released, and remaining half of the retention (1.25%) shall be held till the defects liability period.

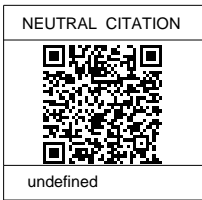
Release of balance cash retention (1.25%) in lieu of approved bank guarantee at commencements of defects liability period may be conditionally acceptable provided contractor’s performance during the contract period is found satisfactorily in attending quality issues, snags and approved by Employer / Employer’s representative. The decision of Employer shall be considered as final in these regards.”

29. Having noted the terms and conditions agreed between the parties, we find substance in the submissions of the learned senior counsel appearing for the appellant that the stage of payment towards alleged final bill submitted on 12.07.2023 had not been reached when the respondent had approached the Commercial Court by moving an application on 6.12.2023 under Section 9 of the Act, 1996. It is evident that the performance certificate has been issued to the respondent by the concerned Engineer, which require completion of certain formalities, as set out in the sub-clause 14.10 relating to “State of Completion” on the part of the respondent. As per the terms and conditions of the contract, more particularly as per sub-clause 11.9 noted hereinabove, it is evident that the performance of contractor’s obligation shall not be considered to have been completed until the Engineer has issued the performance



certificate to the contractor, stating the date on which the contractor has completed his obligations under the contract. The performance certificate shall have to be issued within 28 days after the latest of the expiry dates of the defects notification periods, which is 30.06.2024, in the instant case. The issuance of performance certificate is subject to the contractor's supplying all the contractor's documents and completed and tested all the works, including remedying any defect. Only the performance certificate shall be deemed to constitute acceptance of the works.

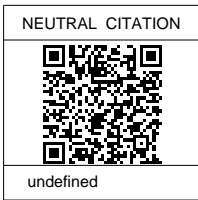
30. Having noted the above, it may further be pertinent to record that once the Commercial Court reached at the opinion that there exists a dispute regarding certain items in the alleged final bill submitted by the respondent on 12.7.2023, it was not open for it to proceed to issue further directions in the nature of interim relief as granted to the respondent. The Commercial Court having noted that the alleged final bill dated 12.7.2023 has not been settled between the parties, could not have proceeded to record that the respondent has *prima facie* case and balance of convenience lies in its favour. It may not be out of place to mention here that the respondent has approached the Commercial Court within a period of three months of submission of alleged final bill on 12.07.2023, in an



anxiety that the appellant was selling the units constructed by it, without complying with its part of completion of process for final payment as mentioned in the terms and conditions of the contract. It is evident that in the facts and circumstances of the case, the pre-conditions under Order XXXVIII Rule 5, CPC are not satisfied, inasmuch as, the stage for payment towards the final bill submitted on 12.7.2023 had not reached when the respondent approached the Commercial Court.

31. It is not one of those cases where payment has not been made to the respondent. As demonstrated before us, against the final offer of Rs. 1858.50 crores, total amount of Rs. 2087 crores has already been paid by the appellant against the recurring bills submitted by the respondent upto RA Bill 45. The fact that the virtual completion certificate has been issued to the respondent on 21.10.2022, cannot be a guiding factor to hold that the satisfaction with regard to the completion of the work done by the respondent has been recorded by the appellant and the performance of contractor's obligation (respondent herein) has been completed.

32. In light of the dispute between the parties, in the facts and circumstances of the instant case, we are of the considered view that the Commercial Court has utterly failed to exercise the discretionary



jurisdiction conferred upon it within the scope of Section 9 of the Act, 1996, wherein it was required to balance the equities between the parties, in the facts of the case itself.

33. The judgment and order dated 11.03.2024 passed by the Commercial Court, Surat in Commercial Civil Misc. Application No. 39 of 2023 being in ignorance of the principles of law applied in the relevant facts and circumstances of the case, is liable to be set aside. It is accordingly, quashed. Consequentially, the appeal stands allowed.

34. Before parting with this case, it is clarified that none of the observations made by us hereinabove would come in the way of the parties in any future proceedings, which may be drawn by any of them pertaining to the contract-in-question.

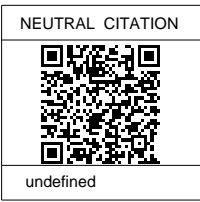
35. The Civil Application for stay stands disposed of.

(SUNITA AGARWAL, CJ)

(ANIRUDDHA P. MAYEE, J.)

FURTHER ORDER

At this stage, learned senior counsel for the respondent requested



for stay of the present order. For the reasons recorded while allowing the appeal, the prayer is rejected.

(SUNITA AGARWAL, CJ)

(ANIRUDDHA P. MAYEE, J.)

C.M. JOSHI/PPS