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

% ***Reserved on: 28.04.2020***
Pronounced on: 12.05.2020

\+ OMP (I) (COMM.) 90/2020

ASHWANI MINDA & ANR. ……APPLICANTS
Through: Mr. Ratan Kumar Singh & Ms. Gracious Timothy Dunna, Advocates

versus

U-SHIN LTD & ANR. …..RESPONDENTS
Through: Mr. K.V. Viswanathan, Senior Advocate with Mr. Sanjeev Kapoor, Ms. Saman Ahsan, Mr. Raj Panchmatia, Mr. Peshwan Jehangir, Ms. Savani Gupte & Mr. Nihar Thakkar, Advocates

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

J U D G M E N T

[Hearing had been conducted through video conferencing]

I.A. 3706/2020 (Exemption from filing legible documents)

1. Exemption allowed, subject to all just exceptions.

2. Application stands disposed of.

I.A. 3707/2020 (Exemption in filing Process/procedures due to COVID-19 Epidemic Lockdown)

3. In view of the reasons stated in the application, the same is disposed of with a direction to the applicants to file duly signed and

affirmed affidavits and pay the requisite court fee within a period of one week of lifting of the lockdown.

4. Application stands disposed of.

OMP (I) (COMM.) 90/2020

5. Present petition has been filed by the Applicants under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking interim reliefs on account of indirect/direct alleged breach of certain Clauses of the Joint Venture Agreement (hereinafter referred to as 'JVA') dated 30.05.1986 and License and Technical Assistance Agreement (hereinafter referred to as 'LTAA') dated 17.02.2014.

Case of the Applicants on facts:

6. Applicant No. 1 is son of Mr. J.P. Minda (hereinafter referred to as 'Minda'). A JVA was executed and signed on 30.05.1986 between Minda, for and on behalf of M/s Jay Industries, and Respondent No. 1 to establish a JV *i.e.* Applicant No. 2. By means of a Memorandum of Family Settlement dated 14.02.1988, Minda and Sons acquired all interests in M/s Jay industries, a partnership firm, in respect of the JVA and the JV. Transfer of interest was intimated to Respondent No. 1 and was acknowledged and assented to, by it.

7. Thereafter, Minda acquired the entire interest of M/s Jay industries in respect of the JV, through a Family Settlement executed on 21.02.2013 and finally, the said interest was transferred to Applicant No.1 through a Settlement Deed executed on 12.05.2019. Thus, Applicant No.1 now has

the entire interest of M/s Jay industries in respect of the JV i.e. M/s. Jay Ushin Ltd.

8. Applicant No. 2 is a JV with Applicant No.1 as its Managing Director. Respondent No.1 is a Corporation incorporated in Japan, with one of its main business concerns being development, designing, manufacturing, sales, etc. of control machines, mechanical and electrical systems and components for automotive. Respondent No. 2 is also a Corporation incorporated in Japan. Respondent No.1 at present, is a wholly owned subsidiary of Respondent No.2.

9. As per Clauses 5.1 and 5.2 of JVA, Applicant No. 1 was to have majority in the Board of Directors and Clause 3.2 contemplated that he would hold majority shareholding in the JV and thus Applicant No. 1 had complete control over the JV, through day-to-day management responsibilities as well as majority voting rights at the Directors' and Shareholders' meetings. JVA imposed important restrictions on the parties under Clause 4.1 which was the pre-emptive Clause, restricting transfer of shares and Clause 7.1 which was a Non-Assignment Clause. Clauses 4.1 and 7.1 read as under:

> *"ARTICLE-4 <u>TRANSFER OF SHARES</u>*
>
> *4.1 - Neither YUHSHIN nor JAY shall sell the shares of New Co to any third parties unless it will first offer the other party to purchase such shares at the price to be offered to a third party. Should the party offered refuse to purchase the shares at such proposed price, the offering party may sell such shares to such third party not below the offered price.*

ARTICLE 7 <u>NON-ASSIGNMENT OF THE AGREEMENT</u>
7.1 - The benefits and obligations under this Agreement shall not be directly or indirectly assigned or transferred by any of the parties hereto without a prior consent in writing of the other; provided that nothing herein contained shall be construed as restricting the right of either hereto to transfer or assign the benefits and obligations hereunder to any parent company or any company with which either party hereto has amalgamated or merged or the subsidiaries of such amalgamated or merged companies. Parent company or subsidiary company in this paragraph respectively shall mean a company which owns, controls or is owned or controlled the majority voting stocks of or by the either party hereof."

10. In the year 1989, JV went public in order to increase the capital and offer liquidity to both the JV partners, but this had no effect on the terms and conditions of JVA, as regards the control/management and majority shareholding of Applicant No. 1. At present Applicant No. 1 and Respondent No. 1 are promoters of JV and the shareholding pattern is as under:

Shareholders in JV	*Shareholding %*	*Number of Equity Shares*
Applicant No. 1/Controlling Shareholder	*30.30%*	*1,171,106*
Respondent No. 1 (M/s U-Shi Ltd.)	*26%*	*10,04,645*
Public/ Body Corporates/ NRI/ Others	*43.70%*	*16,88,749*

11. Applicant No. 1 has been the "Controlling Shareholder" of the JV, holding and controlling the single largest Group of Shareholders and

Promoters i.e. 30.30% and has been the Managing Director since 15.04.1988 and a promoter. Respondent No. 1 has not had a nominee Director in the Board of JV since 2012.

12. Pursuant to Clause 6.2 of JVA, JV and Respondent No. 1 further executed Agreements for technical assistance, which primarily expanded the scope of their technical collaboration and this led to the transfer of technical know-how from Respondent No. 1 to JV and license rights to exercise industrial proprietorship. The most recent LTAA is dated 17.02.2014 by which Respondent No. 1 granted to the JV, non- exclusive, non-transferable and Royalty bearing License to use technical information and Patents to manufacture, assemble and sell agreed products. The LTAA imposed an important restriction by virtue of Clause 26.1 which reads as under:

> *"ARTICLE 26 <u>ASSIGNMENT</u>*
> *26.1 Neither Party hereto may assign or transfer to any third party all or any part of this Agreement(…….) without the prior written consent of the other Party."*

13. On 07.11.2018, Respondents announced a planned commencement of tender offer of shares for a mutual business integration between them ("Overseas Transaction"). This was the point of breach of the Clauses referred to above, which prohibited Respondent No. 1 from directly or indirectly transferring benefits and obligations under the JVA and LTAA, to any third party.

14. On 10.04.2019, Respondents announced to the Applicants that business integration was duly executed and Respondent No. 1 had become a Group Company of Respondent No. 2, which meant that Respondent No. 1 was now a wholly owned subsidiary of Respondent No. 2. On 05.08.2019, Respondent No. 1 was delisted from Tokyo Stock Exchange and major changes were brought about in the management of Respondent No. 1 by Respondent No. 2 largely extending its control.

15. On 16.12.2019, Respondents informed the Applicants that Respondent No.2 was obliged to give an open offer under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Code"). The obligation arose out of the Overseas Transaction. This, according to the Applicants, would lead to a situation where if Respondent No. 2, in the open offer purchases a minimum of 26% shares from the public sharing (which amounts to 43.70%), Respondents together would hold majority voting share capital, thus, changing the equation of Control-cum-Management and majority shareholding as per the JVA.

16. Negotiations between the parties having failed, Applicants invoked the Arbitration Agreement and requested constitution of the Arbitral Tribunal on 23.03.2020. Prior thereto, on 13.03.2020, Applicants invoked Emergency Arbitration (hereinafter referred to as the 'EA'). The Emergency Arbitrator passed a detailed order on 02.04.2020, rejecting the relief sought by the Applicants as an emergency measure. The reliefs sought in the EA were as under:

"82. Claimants seek the following interim reliefs against Respondents (including persons claiming through or under the Respondents):

a. to restrain Respondents from pursuing any actions or steps with respect, and in relation, to the open offer to purchase shares, in excess of its existing 26% voting share capital in Claimant No. 2, as per the India's Takeover Code;
b. in the alternative, to restrain Respondents from exercising their rights as shareholders, in respect of shares purchased via open offer which are in excess of its existing 26% voting share capital in Claimant No. 2, until the conclusion of the present dispute;

c. in the alternative, to grant an interim mandatory injunction to transfer the shares acquired via open offer, which are in excess of its existing 26% voting share capital in Claimant No. 2, to Claimant No. 1 at the prevailing market rate (in Aug. 2019) when it ought to have made the preemptive offer to Claimant No. 1 to comply with JVA and LTAA, and until such time restrain Respondents from exercising their rights as shareholders, in respect of shares purchased via open offer which are in excess of its existing 26% voting share capital in Claimant No. 2, from the date of said purchase to the date of said transfer.

d. an order directing the Respondents to pay the costs incurred (and to be incurred) by the Claimants in pursuing this Application for emergency measures.

e. an order of any other interim measure that the Emergency Arbitrator deems fit, in the interest of justice, fairness, and good conscience."

17. Learned counsel for the Applicants submits that there is a fundamental breach of the JVA and LTAA by the Respondents. First

breach is of the negative covenant in Clause 4.1 of JVA mandating pre-emptive offer to the Applicants before transfer of shares in the JV. Second breach is of negative covenant in Clause 7.1, restricting direct or indirect transfers without prior written consent and third breach is of Clause 1.1 which deals with "change of control" and finally of Clause 26.1 of LTAA, restricting assignment of all or any part of the Agreement without prior written consent. Applicants rely upon judgment in the case of ***Canoro Resources Ltd. v. Union of India, (2011) 179 DLT 72, 2011 SCC OnLine Del 1194***.

18. Respondent No. 1 currently holds 26% of the Shares, and has all along been seeking majority control over the JV. It has devised this entire scheme of being taken over by Respondent No. 2, in order to usurp control and majority shareholding of the JV to the serious detriment of the Applicants. Respondents themselves having entered into this business transaction, want to take shelter of the 'Takeover Code' and thus need to be restrained.

19. Learned counsel submits that the obligation to announce open offer is a result of an indirect acquisition covered by Regulation 5(1) of the 'Takeover Code' and as per Regulation 7 (1), the offer size must be at least 26% of the total shares of the JV. If this is permitted, Applicant No.1 is under an imminent threat of losing its control/management of the JV and its status as a controlling shareholder, which was the fundamental bargain made in favour of Applicant No. 1 under the JVA.

20. Learned counsel contends that this Court under Section 9 of the Act has the power to grant a prohibitory interim injunction, restraining the Respondents from pursuing any actions in relation to the open offer to purchase shares in excess of its existing 26% shares in the JV. A similar prohibitory interim injunction was granted by the Supreme Court in ***Vinay Prakash Singh v. Sameer Gehlaut & Ors., Conmt. Pet. (C) No. 2120/2018 in SLP (C) No. 20417/2017***. If the Respondents are allowed to publicly announce the open offer, it would lead to a chain of events and transactions, involving the public-at-large, which would be irreversible, resulting in grave consequences and setbacks to the Applicants as well as to the investors and the securities market. It would be impossible to ascertain the measure of loss and hence, damages would not be the appropriate compensation.

21. In the alternative, it is submitted that a prohibitory interim injunction be granted restraining the Respondents from alienating their Shares and exercising any rights in respect of the Shares purchased via open offer, in excess of 26% held by them, till the Arbitral Tribunal decides the matter finally. Reliance is placed on a decision of this Court in ***Ravi Mittal v. Kumkum Mittal, in Execution Petition No.137/2010, dated 28.10.2014*** to argue that such interim injunctions are common.

22. It is next contended that Clauses 4.1, 7.1 relied upon by the Applicants are negative covenants and Courts have time and again held that where there is a negative covenant, the party seeking interim relief is not required to establish *prima facie* case or balance of convenience and can seek specific performance of the negative covenant between the

parties. Reliance is placed on the judgement of the Supreme Court in ***Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545***.

23. Learned counsel for Applicants relies on the decision of this Court in ***Raffles Design Int'l India Pvt. Ltd. v. Educomp Professional Education Ltd. & Ors., (2016) 234 DLT 349 : 2016 SCC OnLine Del 5521*** to contend that despite the order having been passed by the Emergency Arbitrator, it is open to this Court under Section 9 of the Act to examine the issues independently and grant the relief, if warranted.

24. Learned counsel contends that there is an Arbitration Agreement both in the JVA and the LTAA, and therefore, present Petition be allowed and interim relief sought be granted, failing which irreparable harm will be caused to the Applicants, as they have a *prima facie* case and the balance of convenience is also in their favour.

Case of the Respondents:

25. Respondents have not disputed the facts and chronology of events narrated by the Applicants, except to the extent of locus of Applicant No.1 to file the Petition, but have raised preliminary objections on maintainability and without prejudice, argued on merits.

26. The first preliminary objection raised by learned senior counsel for the Respondents is that present Petition is barred by principles of Section 9(3) of the Act, as there is already an Arbitral Tribunal which has been constituted, at the instance of the Applicants, whose mandate continues till date. It is argued that prior to filing the present Petition, Applicants

had invoked the jurisdiction of an Emergency Arbitrator on 13.03.2020. On 19.03.2020, Emergency Arbitral Tribunal was constituted under the JCAA Rules in Japan, since under the applicable Arbitration Clause, the seat of arbitration is Japan and the procedure is to be governed by the JCAA Rules. Article 77(5) of the JCAA Rules makes it clear that emergency measures are deemed to be interim measures granted by the Tribunal and thus once the Applicants elected to approach the Emergency Arbitrator, they cannot file the instant Petition.

27. It is further contended that under Article 77(7) of the Rules, mandate of the Emergency Arbitrator terminates only on account of three reasons mentioned therein, which have not occurred in the present case. Moreover, despite passing the order on 02.04.2020, the Arbitrator's mandate continues and the Arbitrator has, in paragraph 15.2.1 of the order, specifically stated so. Thus, for all purposes, an Arbitral Tribunal, validly constituted, is in place and the jurisdiction of this Court under Section 9 of the Act cannot be invoked.

28. It is next contended that even assuming that the Emergency Arbitrator is not an "Arbitral Tribunal" within the meaning of Section 9(3) of the Act, Applicants have already elected their remedy and lost and have not even shown or pleaded any change in circumstances, since the passing of the Emergency Award. The Applicants cannot be permitted to have second bite at the cherry and resort to the present remedy. It is further contended that the Doctrine of Election postulates that when two remedies are available, the aggrieved party has the option to elect either, but not both. Having elected one of the two available remedies, by

approaching the Emergency Arbitrator, which according to the Applicants themselves was the efficacious remedy, when invoked, Applicants cannot now exercise any right under Section 9 of the Act.

29. Reliance is placed on the judgement of the Supreme Court in the case of ***National Insurance Co. Ltd. v. Mastan and Anr., (2006) 2 SCC 641***.

30. Without prejudice, it is further contended by the Respondents that under Article 77(1) read with Article 74 of the Rules, the Emergency Arbitrator continues to have the power to modify, suspend and terminate any emergency measures. Further, reading the said provision along with Article 78 of the Rules, the Arbitral Tribunal, once constituted may, on an application made by one of the parties, approve, modify, suspend or terminate the emergency measures in whole or in part. Thus, if the Applicants have any grievance, they may approach the Emergency Arbitrator but having lost before the Arbitrator, it is not open for them to seek the same relief in the garb of the present Petition.

31. Learned senior counsel further submits that perusal of the Petition shows that it is in the nature of an Appeal against the EA order, which is not permissible in law. Even otherwise, the EA order is a detailed and well-reasoned order, passed after considering detailed submissions of the parties. The Arbitrator has considered all the well-established tests for granting interim relief i.e. irreparable injury, balance of convenience and *prima facie* case and for cogent reasons, declined to grant the relief sought for.

32. Distinguishing the decision of this Court in ***Raffles*** (***supra***), learned senior counsel submits that the decision does not aid the Applicants as the Applicant in the said case was a party who had succeeded in obtaining a favourable order from the Emergency Arbitrator and was only seeking enforcement of the same by way of a petition under Section 9 of the Act. The entire decision centered around whether there can be enforcement of an Emergency Arbitrator's order under Section 9 of the Act and the observations regarding independently considering the relief was only in that context. In the present case, the Applicants have lost and cannot seek the same relief again in a second Forum.

33. Learned senior counsel submits that even otherwise the Petition is not maintainable as the Applicants have no *locus standi* to file the same. Applicant No.1 is not a signatory/party to the JVA or JV and there is no Arbitration Agreement between him and the Respondents. Applicant No.1 is wrongly asserting rights in the agreements *in praesenti* on the basis of the purported Settlement Deed dated 12.05.2019, whereas Clause 9 of the Deed provides that Shares of Applicant No. 2 would pass on to Applicant No.1 only after the death of the settlor, Minda. However, Minda is still alive and thus no interest/rights have passed on to Applicant No.1, as yet. Applicant No.1 claims to represent the entire 30.30% shareholding in JV belonging to the Minda Promoter Group, but the publicly available records of Applicant No.2 show that he is not even a shareholder of Applicant No.2 presently and does not form a part of the Minda Promoter Group. Insofar as Applicant No.2 is concerned, it is not a party to the JV as it was incorporated on 14.08.1986 and was, therefore,

not even in existence when the JVA was executed on 30.05.1986 and the EA order takes note of these submissions, in detail.

34. Learned Senior Counsel has also argued on the merits of the case by submitting that the relief sought by the Applicants is to injunct Respondents from complying with their obligations under the SEBI Regulations and an injunction of this nature cannot be granted. Detailed arguments have been addressed by drawing the attention of the Court to various provisions of the Regulations and the sum and substance of the argument is that on account of the Overseas Takeover, Respondents are statutorily obliged to make a public offer, failing which they would be liable to various penalties under the Regulations.

35. It is also contended that the JVA and LTAA are separate contracts between distinct entities, in relation to different subject matters and have distinct arbitration agreements. Even the dispute redressal mechanisms under the two Agreements are distinct and different. It is contended that Respondent No. 2 is neither a party to the JVA nor to the LTAA. Signing of JVA in 1986, execution of LTAA in 2014 and acquisition of majority shareholding of Respondent No. 1, by Respondent No.2 in 2019, is not a single composite transaction so as to implead Respondent No.2. Even the JCAA Rules do not permit a third party to be joined in the Arbitration, without its express consent, as is evident from Article 56 of the Rules.

36. Arguments have been addressed on the delay and the acquiescence on the part of the Applicants inasmuch as it is an admitted case that the overseas transactions were held on 07.11.2018 and the announcement

was communicated to Applicant No.2. Applicants were informed of the completion of the transaction on 11.04.2019 by Respondent No.2's accouchement. Even the open offer that was triggered due to the overseas transaction was admittedly known to the Applicants since 16.12.2019. Respondents denied breach of any of the provisions of the two Agreements as alleged by the Applicants and submitted that, in any case, this would be a matter for the Arbitral Tribunal to decide as this touches the merits of the case, provided the Applicants overcome the initial hurdle of locus therein.

37. Learned Senior Counsel has distinguished the judgment in the case of ***Canoro Resources (supra)*** on the ground that in the said case the relevant Clause of the Agreement expressly contemplated the requirement for consent in cases of material change in shareholdings of the company, while in the present case the JVA does not contemplate prior approval of the party, in the event of change in the shareholding pattern of the other party.

38. In rejoinder, learned counsel for the Applicants submits that the Doctrine of Election would not apply in the present case as the relief sought is an interim relief of protection while the Doctrine would apply in cases where alternative rights are available concerning the merits or are substantive rights. The judgement relied upon in the case of ***National Insurance (supra)*** is distinguished by arguing that the said case pertained to a right of appeal under two different Statutes and concerned the substantive rights.

39. Insofar as the locus of the Applicants is concerned, it is submitted, relying on ***P.K. Mohan Ram v. B.N. Ananthachary, (2010) 4 SCC 161***, that entire interest under the JVA has vested in Applicant No.1 and he is entitled to the usufructs. Settlement Deed clearly shows that Minda has made no provision reserving the right to revoke the Settlement Deed and thus a right is created *in praesenti* under Section 19 of the Transfer of Property Act, 1882.

40. It is next argued that present Petition is not by way of an appeal from the decision of the Emergency Arbitrator. Applicants have sought to invoke the jurisdiction of this Court for a decision independent of the decision of the Arbitrator in terms of the judgment of this Court in ***Raffles (supra)***. Moreover, there is no provision for appeal against the interim order of the Emergency Arbitrator under the Japanese Arbitration Act.

41. Insofar as Applicant No.2 is concerned, learned counsel contends that Applicant No. 2 is the beneficiary of the JVA and was created thereunder. It entered into a Technical Arrangement with Respondent No. 1 as a direct beneficiary of the JVA and the JVA is not feasible without the aid, execution and performance of Applicant 2. Reliance is placed on the judgment of the Supreme Court in ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Others, (2003) 1 SCC 641.*** JVA and LTAA are inextricably linked such that the JVA is not feasible without LTAA and, moreover, JVA itself contemplates LTAA. Reliance is placed on the judgment of the Supreme Court in ***Renusagar Power Co. Ltd. v. General Electric Co. & Anr., (1984) 4 SCC 679***.

42. On the objection of Respondent No.2 being non-party to the two Agreements, learned counsel for the Applicants argues that power of the Courts to injunct under Section 9 of the Act is not limited only to the parties to the Arbitration Agreement and a relief of interim measure can be sought even against a non-party and the present cause of action has arisen on account of takeover by Respondent No. 2, which triggered the open offer.

43. I have the heard learned counsels for the parties.

44. While elaborate arguments were made on the merits of the case but the necessity to deal with them would only arise if this Court holds that the present Petition is maintainable under Section 9 of the Act.

45. The first and the foremost issue that thus requires consideration by this Court is whether the present petition is maintainable under Section 9 of the Act.

46. At this stage, it would be apt to refer to the Dispute Resolution Mechanism as incorporated in the JVA:

> *ARTICLE 9 GENERAL*
> *9.4 All disputes, controversies or differences which may arise between the parties, out of or in relation to or in connection with this Agreement, shall be settled amicably through mutual consultation.*
>
> *9.5 In case of failure to reach a settlement, such disputes, controversies or differences shall be submitted to the arbitration under the Commercial Rules of the India Commercial Arbitration Association to be held in India if initiated by YUSHIN, or under the Rules of the Japan*

Commercial Arbitration Association to be held in Japan if initiated by JAY."

47. Perusal of the Arbitration Clause shows that the parties were *ad-idem* that in case Respondent No.1 initiated the Arbitration, then the Arbitration would be held in India and under the commercial Rules of India Commercial Arbitration Association. However, Arbitration would be held in Japan and under the Rules of Japan Commercial Arbitration Association (hereinafter referred to as JCAA), in case it was initiated by M/s Jay Industries. In the present case, it is undisputed that it is an International Commercial Arbitration and that the Emergency Arbitration and Regular Arbitration was invoked by the Indian entity. Hence, the seat of arbitration is Japan and the Rules applicable are those of the JCAA.

48. The controversy whether Part I of the Act would be applicable to International Arbitration came to be decided by the Supreme Court in ***Bhatia International v. Bulk Trading S.A. and Another, (2002) 4 SCC 105***. Relevant Paras of the said judgment are as under: –

32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

33. Faced with this situation Mr Sen submits that, in this case the parties had agreed that the arbitration be as per the Rules of ICC. He submits that thus by necessary implication Section 9 would not apply. In our view, in such cases the question would be whether Section 9 gets excluded by the ICC Rules of Arbitration. Article 23 of the ICC Rules reads as follows:

"*Conservatory and interim measures*

1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the Arbitral Tribunal considers appropriate.

2. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof."

34. Thus Article 23 of the ICC Rules permits parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application can be made under Section 9 of the said Act.

35. Lastly, it must be stated that the said Act does not appear to be a well-drafted legislation. Therefore the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. However, in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there are no lacunae in the said Act. This interpretation also does not leave a party remediless. Thus such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. It will therefore have to be held that the contrary view taken by these High Courts is not good law."

49. However, the Constitution Bench of Supreme Court in the case of ***Bharat Aluminum and Co. v. Kaiser Aluminium and Co., (2012) 9 SCC 552 (BALCO)***, prospectively overruled the decision in ***Bhatia International (supra)*** and held that Part I of the Act would not apply in cases of International Arbitration where the seat of Arbitration is outside India. Relevant paras of the judgment are as under: –

"Conclusion

194. In view of the above discussion, we are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to international commercial arbitration held outside India. Therefore, such

awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in the Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.

195. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International [(2002) 4 SCC 105] and Venture Global Engg. [(2008) 4 SCC 190] In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.

196. We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India.

197. The judgment in Bhatia International [(2002) 4 SCC 105] was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engg. [(2008) 4 SCC 190] has been rendered on 10-1-2008 in terms of the ratio of the decision in Bhatia International [(2002) 4 SCC 105] . Thus, in order to do complete justice, we hereby order, that

the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter."

50. Pursuant to the 246th Report of the Law Commission, the Arbitration and Conciliation (Amendment) Ordinance, 2015 was promulgated, which was published in the Gazette of India on 23rd October, 2015 and came into effect immediately. The Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the 'Amendment Act') brought about various amendments in the Act, one of them being enactment of Section 2(I) whereby Section 2(2) was amended by inserting a proviso. Provisions of Sections 9, 27 and 37 (1)(a) and 37 (3) of the Act were made applicable to International Commercial Arbitration where the place of Arbitration is outside India and the Arbitral Award is enforceable under the provisions of part II of the Act, subject, however, to an Agreement to the contrary. Thus, in effect, the position in law went back to the stage prior to the decision in the case of ***BALCO (supra***).

51. Amended Section 2 (2) of the Act reads as under: –

"*(2) This Part shall apply where the place of arbitration is in India.*
2 [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.]"

52. In view of the Amendment to Section 2(2), it is clear that Section 9 of the Act, with which the present Petition is concerned, is applicable even to International Commercial Arbitration held outside India, provided its applicability has not been excluded by the parties by an Agreement to the contrary. In the case of ***Raffle (supra)***, Court has in para 72 held that it is not necessary that the parties exclude the applicability of Section 9 by an express Agreement and the exclusion can be even inferred and implied.

53. Legislative intent of making certain provisions of Part I of the Act applicable to International Commercial Arbitration held outside India, subject to an agreement to the contrary, is clearly in keeping with the ethos and annals of 'party autonomy' which is the foundation of the pyramid of Arbitration. Therefore, if the parties, by an agreement, expressly or impliedly exclude the applicability of Sections 9 or 27 or 37 in Part I of the Act, then the said provisions cannot be invoked by either party to the Agreement.

54. The Dispute Resolution Mechanism agreed to, in the present case envisages conduct of Arbitration in Japan and regulated by the JCAA Rules. JCAA Rules provide a detailed mechanism for seeking interim and emergency measures and was known to the parties when entering into the Agreement. Reading of the Arbitration clauses clearly evinces the intention of the parties to exclude the applicability of part I of the Act. There is another important facet of this case. Article 77 (5) of the JCAA Rules makes it clear that the emergency measures are deemed to be interim measures granted by the Arbitral Tribunal, when it is constituted.

In fact, the provision further stipulates that the parties shall be bound by, and carry out, the emergency measures ordered by the Emergency Arbitrator and that the Emergency Measures shall remain in effect till suspended, modified or terminated under Article 78.2. Article 77 is extracted herein under:

> *"Article 77 - Mandate of Emergency Arbitrator*
>
> *1. The emergency arbitrator may order, modify, suspend or terminate Emergency Measures in accordance with Articles 71 through 74*
>
> *2. The emergency arbitrator shall make a procedural schedule for Emergency Measures immediately after his or her appointment.*
>
> *3. The emergency arbitrator, if he or she considers a hearing necessary in order to make a determination on the Emergency Measures, may hold such hearing for one day only.*
>
> *4. The emergency arbitrator shall make reasonable efforts to decide on the Emergency Measures within two weeks from his or her appointment.*
>
> *5. The Parties shall be bound by, and carry out, the Emergency Measures ordered by the emergency arbitrator. The Emergency Measures shall be deemed to be Interim Measures granted by the arbitral tribunal when it is constituted or when a substitute arbitrator is confirmed or appointed by the JCAA. The Emergency Measures shall remain in effect until the arbitral tribunal modifies, suspends or terminates such Emergency Measures under Article 78.2.*
>
> *6. The Emergency Measures shall no longer be effective, if:*
>
> *(1) the arbitral tribunal is not constituted or a substitute arbitrator is not confirmed or appointed by the JCAA within three months from the grant of the Emergency Measures;*
> *(2) the arbitral proceedings are terminated under Article 61.1; or*

(3) the JCAA receives no request for arbitration within ten days from the date of the application, where the JCAA has not received such request at the time of or before receiving the application for Emergency Measures.

7 The mandate of the emergency arbitrator shall be terminated: (1) in the case that the JCAA receives no request for arbitration within ten days from the date of the application, where the JCAA has not received such request at the time of or before receiving the application for Emergency Measures;

(2) on the constitution of the Arbitral Tribunal; or

(3) on the confirmation or appointment of the substitute arbitrator by the JCAA.

The JCAA may extend the mandate, if it considers it necessary.

8. The emergency arbitrator shall not be appointed as an arbitrator for the same dispute, unless otherwise agreed in writing by the Parties."

55. Correctly understanding and perceiving that appropriate remedy to seek interim measures was by invoking the jurisdiction of the Emergency Arbitrator under JCAA Rules, Applicants on 13.03.2020 filed an application for emergency measures and on 19.03.2020 the Emergency Arbitrator was appointed. On 23.03.2020, the Applicants invoked Regular Arbitration by submitting a request for Arbitration with the JCA. Applicants had raised all issues before the said Forum, as are being raised here and even the relief was identical. After hearing the parties, the Emergency Arbitrator passed a very detailed and reasoned order on 02.04.2020, declining to grant relief to the Applicants. Respondents, in my view, are right in their contention that having invoked the mechanism of the Emergency Arbitrator and invited a detailed and reasoned order, it is not open for the Applicants to take a second bite at the cherry. There

has been no change of circumstance after the said order as none has been pleaded or even argued. Having excluded the applicability of Part I of the Act and agreeing to be governed by different Rules and procedures, binding on the parties and having invoked the same, jurisdiction of this Court under Section 9 of the Act cannot be invoked and the petition is not maintainable.

56. Even on the anvil of Doctrine of Election, Applicants have to fail. Applicants had consciously chosen to tread on a path and cannot turn around only because they were unsuccessful. It also needs a mention that the pleadings in the petition are really in the nature of an appeal pointing out flaws and infirmities in the order of the Emergency Arbitrator. Respondents are right that this Court in a petition under Section 9 of the Act cannot sit as a Court of Appeal to examine the order of the Emergency Arbitrator.

57. During the hearing, Court was informed that both parties have nominated their respective nominee Arbitrators and the two Arbitrators are likely to appoint the Third Arbitrator on or before 15.05.2020. As per Rule 77 of JCAA Rules, the mandate of the Emergency Arbitrator is continuing and it is open to the Applicants to seek appropriate relief of modification etc., if so advised.

58. Insofar as the reliance on the judgment of this Court in the case of ***Raffle Design (supra***) by the Applicants is concerned, the said judgement, in my view, would not come to the aid of the Applicants. In the said judgment, the Court in para 105 has held that under Section 9 of

the Act, Court can independently apply its mind and grant interim relief in cases where it is warranted, though there may be an order already passed by an Emergency Arbitral Tribunal. However, the judgment cannot be seen bereft of the facts of the case and the context. Court in the said case traced out the history and rationale of the Amendment Act and the intent of the Legislature in amending Section 9, which was to enable parties to approach the Courts in India to seek interim orders in aid of the arbitration proceedings. Having examined the position of law and the Proviso, including the exception thereto, the Court specifically examined the Dispute Resolution Mechanism between the parties and relevant clauses are as under:

> *"15. Governing Law and Dispute Resolution*
>
> *15.1 This Agreement shall be governed by and construed in accordance with the laws of Singapore.*
>
> *15.2 Any dispute, controversy, claims or disagreement of any kind whatsoever between or among the Parties in connection with or arising out of this Agreement or the breach, termination or invalidity thereof shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) for the time being in force, which rules are deemed to be incorporated by reference in this clause. This Agreement and the rights and obligations of the Parties shall remain in full force and effect pending the award in such arbitration proceedings which award, if appropriate, shall determine whether and when any termination shall become effective.*
>
> *15.3 The Arbitral Tribunal shall consist of one arbitrator to be appointed by the Chairman of SIAC.*
>
> *15.4 Language of Arbitration. The language of the arbitration shall be in English.*

15.5 Survival: The provisions contained in this Clause 15 shall survive the termination of this Agreement."

59. Clause 15.2 postulated that any dispute, controversy, claim or disagreement of any kind whatsoever, between the parties, would be resolved by arbitration in Singapore, in accordance with Arbitration Rules of Singapore International Arbitration Centre (SIAC Rules). Examining this Clause, the Court held as under:

"100. The SIAC Rules are clearly in conformity with the UNCITRAL Model Law and permit the parties to approach the Court for interim relief. As pointed out earlier, UNCITRAL Model Law expressly provides for courts to grant interim orders in aid to proceedings held outside the State. And, the proviso to Section 2(2) of the Act also enables a party to have recourse to Section 9 of the Act notwithstanding that the seat of arbitration is outside India. Thus, the inescapable conclusion is that since the parties had agreed that the arbitration be conducted as per SIAC Rules, they had impliedly agreed that it would not be incompatible for them to approach the Courts for interim relief. This would also include the Courts other than Singapore. It is relevant to mention that IAA is based on UNCITRAL Model Law and SIAC Rules are also complimentary to IAA/UNCITRAL Model law.

101. In the circumstances, the contention that the parties by agreeing that the proper law applicable to arbitration would be the law in Singapore have excluded the applicability of Section 9 of the Act cannot be accepted."

60. It is in this background that the observation was made by the Court in para 105, which is being so heavily relied upon by the learned counsel for the Applicants and reads as:

> *"105. However, in my view, a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. Needless to state that the question whether the interim orders should be granted under section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal. Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted."*

61. Therefore, two factors distinguish the said case from the present one. Firstly, in that case, there was no Clause in the Dispute Resolution Mechanism by which the parties had excluded the applicability of Section 9 of the Act and secondly, unlike in the present case, the Rules governing the Arbitration were SIAC Rules, which permit the parties to approach the Courts for interim relief. Parties had agreed that it would not be incompatible for them to approach the Courts for interim relief.

62. Petition is not maintainable in this Court and is accordingly dismissed.

63. It is made clear that nothing in this judgement is an expression on merits of the case, including locus of the Applicants to raise claims against the Respondents. The Arbitral Tribunal will decide the matter uninfluenced by this order.

JYOTI SINGH, J

MAY 12th , 2020
rd/srb