***IN THE HIGH COURT OF JUDICATURE AT BOMBAY***
***ORDINARY ORIGINAL CIVIL JURISDICTION***
***IN ITS COMMERCIAL DIVISION***

***COMMERCIAL APPEAL (L) NO.7013 OF 2020***
***IN***
***COMM. ARBITRATION PETITION (L) NO.6973 OF 2020***
***ALONG WITH***
***INTERIM APPLICATION (L) NO.7017 OF 2020***

**Valentine Maritime Ltd,**
a company incorporated under the laws of Liberia, and having its registered office at 80, Borad Street, Monravia, Liberia and branch office at P.O. Box No. 53905 Abu Dhabi, UAE. … Appellant

***Versus***

1. **Kreuz Subsea Pte Limited**
A company incorporated under the laws of Singapore, having its office address at 10 Science Centre Road #01-12 Block 1 Bestway Centre, Singapore 609 079.

2. **Oil and Natural Gas Corporation Ltd.**, Mumbai Region, Offshore Engineering Services, 4th floor, 11-High, Bandra Station-Link Road, Mumbai-400017, India. … Respondents

***AND***
***COMMERCIAL APPEAL (L) NO.8386 OF 2020***
***IN***
***COMM. ARBITRATION PETITION (L) NO.6973 OF 2020***
***ALONG WITH***
***INTERIM APPLICATION (L) NO.8389 OF 2020***

**Oil and Natural Gas Corporation Ltd.**, Mumbai Region, Offshore

Engineering Services, 4th floor, 11-High, Bandra Station-Link Road, Mumbai-400017,India. … Appellant

***Versus***

1. **Kreuz Subsea Pte Limited**
   A company incorporated under the laws of Singapore, having its office address at 10 Science Centre Road #01-12 Block 1 Bestway Centre, Singapore 609 079.

2. **Valentine Maritime Ltd,**
   a company incorporated under the laws of Liberia, and having its registered office at 80, Borad Street, Monravia, Liberia and branch office at P.O. Box No. 53905 Abu Dhabi, UAE. … Respondents

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Mr. Rahul Narichania, Senior Advocate a/w. Mr. Prathamesh Kamat, Mr.Shivkumar Iyer, Ms.Ankita Sen and Ms. Aditi Maheshwari i/by M/s.Ganesh and Co., for the Appellant in Commercial Appeal (L) No.7013/2020 and Respondent No.2 in Commercial Appeal (L) No.8386/2020 and Applicant in IAL/7013/2020.

Mr. J. P. Cama, Senior Advocate a/w. Ms. Rajalakshmy Mohandas, Ms.Pratibha Mehta i/by M/s. Rajalakshmy Associates for the Appellant in Commercial Appeal (L) No.8386/2020 and Respondent No.2 in Commercial Appeal (L) No. 7013/2020 and Applicant in IAL/8389/2020.

Mr. Aspi Chinoy, Senior Advocate a/w. Mr. Prasad Shenoy, Mr. Prashant Asher, Ms. Bulbul Singh Rajpurohit, Mr. Nirav Shroff i/b M/s. Crawford Bayley & Co. for Respondent No.1 in both the Appeals.

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***CORAM: R. D. DHANUKA AND***
***V. G. BISHT, JJ.***
***RESERVE DATE : 13th JANUARY, 2021.***
***PRONOUNCE DATE : 22nd JANUARY, 2021.***

***Judgment (Per R.D. Dhanuka, J.) :-***

. By these two appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act"), both these appellants (original respondent no.1 and respondent no.2 respectively) have impugned the order passed by the learned Single Judge granting interim measures in favour of the respondent no.1 (original petitioner) under Section 9 of the Arbitration Act.

2. The appellant in Commercial Appeal (L) No.7013 of 2020 has impugned the entire order passed by the learned Single Judge whereas the appellant in Commercial Appeal (L) No.8386 of 2020 has impugned the directions issued by the learned Single Judge in paragraph 42(e)(i) to (vi) of the order dated 11th November 2020. By consent of parties, both these appeals were heard together and are being disposed of by common order. Some of the relevant facts for the purpose of deciding these two appeals are as under :-

3. On 21st August 2019, Oil and Natural Gas Corporation Limited (hereinafter referred to as "ONGC") entered into a contract with the appellant i.e. Valentine Maritime Limited (hereinafter referred to as "VML") for laying of 165.77 kms. subsea pipeline spread in 23 segments including associated subsea activities, Installation of 27 nos. riser, Modification of 18 nos. topside and Demolition of 86 nos. riser (redundant and replacement). On 30th October 2019, ONGC issued a Letter of Award in favour of VML. On 30th October 2019, VML issued a Letter of Acceptance appointing Kreuz Subsea Pte Limited (hereinafter

referred to as “KSS”) as a Sub-contractor for subsea installation work associated with the pipeline replacement project of ONGC i.e. part of the work under ONGC-VML contract.

4. It is the case of KSS that VML failed to establish letter of credit for 20% of the Sub Contract value i.e. US$ 5.4 million during the period between October 2019 and March 2020. Only in the month of February 2020, VML issued a conditional Letter of Credit for US $ 2 million. The KSS therefore did not issue performance bank guarantee (PBG) of 12.2% i.e. US$ 2.9 million. It is the case of KSS that KSS repeatedly offered/reiterated that on the VML establishing a contractually compliant irrevocable and unconditional Letter of Credit for US $ 5.4 million, they will immediately issue a contractually compliant PBG for US $ 2.9 million.

5. It is the case of KSS that till the end of 2020, there was no dispute between KSS and VML. The KSS had received the amount of their invoice approximately US $ 12.118 Million. However, after 24th March 2020, progress of the work was affected by the Nation Wide Lockdown. There was also delay by the VML in timely delivery/supply of materials. The KSS however preserved and almost managed to maintain the pace of the work. By letter dated 14th May 2020, VML recorded its appreciation for KSS. In the month of May 2020, the KSS submitted invoices for US $ 4765570 duly supported by completion certificates signed/issued by ONGC. It is the case of the KSS that VML did not raise any dispute within the five day period as stipulated.

6. By letter dated 27th May 2020, the VML alleged that there had been one weeks' delay by KSS in mobilisation of the Barge in February 2020 under Clause 11.2(a) and further it was entitled to provisionally withhold as liquidated damages an amount of 10% of the Contract value under Clause 11.2 (b) i.e. USD 2,567,346 until the KSS remobilised its marine spread and completed the same. entitled to provisionally withhold as liquidated damages an amount of 10% of the Contract value under Clause 11.2 (b) i.e. USD 2,567,346 until the KSS remobilised its marine spread and completed the same. In the said letter, it was alleged by VML that as the KSS had failed to furnish a Performance Bank Guarantee for 12.20%, the VML was entitled to withhold 12.20% of the contract value i.e. US $ 2,972,900. The VML further alleged that it was not liable to make payment of the April invoices of US $ 4.765 Million.

7. It is the case of the KSS that during the period between May 2020 and June 2020, disputes were ongoing between the parties regarding the VML's failure to make payment of amounts regrading another contract which had constrained the KSS to adopt proceedings in respect thereof against the VML. The VML was required to make payment of US $ 1.2 Million to KSS by order dated 8th May 2020 to secure release of their vessel DLB 1600. The VML failed to make payment under three awards of May 2018, requiring the KSS to adopt execution proceedings against the VML. By an order dated 26th June 2020, the VML agreed/undertook to pay US $ 5.50 Million in installments between July 2020 and February 2021 to KSS.

8. It is the case of the KSS that in respect of those arbitrations, the KSS was constrained to initiate proceedings against VML in 2017 under Section 9 of the Arbitration Act. Various interim measures were granted by the Court in favour of KSS by order dated 25th July 2017 similar to those sought in these proceedings requiring the KSS to deposit or provide bank guarantee for the amounts involved.

9. On 1st June 2020, the KSS by its letter pointed out that the claim of VML to withhold payment of US $ 2.567 Million as liquidated damages was unreasonable, as the balance work was only of three new risers and the demobilisation of 11 risers which at 10% value would not exceed 302,000 US $. The ONGC did not make any claim for liquidated damages upon VML and had in fact paid VML in full. The KSS reiterated their willingness to provide the PBG for US $ 2.9 Million as per the Contractual Format, subject to the VML furnishing Letter of Credit for US $ 5.4 Million as per the Contractual Format.

10. By letter dated 7th June 2020, the VML alleged that the furnishing of the PBG of US $ 2.9 Million by KSS could not be linked to VML's obligation to furnish the requisite Letter of Credit for US $ 5.4 Million. It was further alleged by VML that they had in February 2020 established an Letter of Credit for US $ 2 Million. On 4th June 2020, the KSS submitted further invoices 16 and 17 for US $ 2.4 Million for the work done in May 2020 duly supported by Completion certificates signed/issued by ONGC.

11. It is the case of the KSS that those invoices were submitted

after making alterations to the draft invoices as required by the VML. No dispute was raised by VML within the stipulated period of 5 days in terms of Clause 6.1.2(c) of the Letter of Award. The VML did not inform the KSS about receipt of amount from ONGC nor made any payment thereof to KSS. On 4th July 2020, the KSS filed a petition under Section 9 of the Arbitration Act against VML and ONGC in this Court. ONGC as well as VML filed affidavit-in-reply in the said writ petition opposing the grant of interim measures.

12. On 11th November 2020, the learned Single Judge disposed of the said Commercial Arbitration Petition (L) No.6973 of 2020 filed by the KSS. Learned Single Judge directed the VML to deposit with Prothonotary and Senior Master an amount of US $ 2,403,073 or the rupee equivalent at the then prevailing exchange rate, being the value of the invoices dated 2nd June 2020 by 4th December 2020 and further directed the Prothonotary and Senior Master to invest the said amount for a period of no more than four weeks initially. Learned Single Judge directed that the KSS must invoke arbitration before 1st December 2020 and thereafter take all steps to have the arbitral tribunal constituted as soon as the ICC Rules permit. It was made clear that if the KSS fail to invoke arbitration on or before 1st December 2020, the said order will cease to operate and the amount deposited is to be returned with any accrued interest to VML.

13. It was further provided in the said order that if VML fails to make the deposit within the time prescribed, the ONGC will deposit that amount out of the amounts, if any, due from it to VML by 11th December

2020 under the PRP-VI contract between ONGC and VML without prejudice to the rights of ONGC vis-a-vis VML and the making of that deposit by ONGC and a consequent reduction in the payment or payments by ONGC to VML will not, by virtue of compliance of the said order by ONGC, be claimed by VML in any forum or any proceeding to be breach of the PRP-VI contract.

14. Learned Single Judge made it clear that ONGC is required to make the deposit only if there were amounts due from it to VML after the date of the said order under PRP-VI contract between ONGC and VML. This Court further directed the ONGC to withold the amount of US $ 2,403,073 in whole or in parts/tranches until 1st December 2020 to be able to effect payment into Court under the said order to ensure the compliance of the said order. It was made clear that any such retention by ONGC will not affect VML's financial liabilities, if any, under the Sub-Contract with KSS. It was directed that if no amount is due from ONGC to VML between date of the said order and 11th December 2020 under the PRP-VI contract between ONGC and VML, ONGC will file an affidavit no later than by 11th December 2020 confirming that position.

15. This Court directed that upon the deposit being made either by VML or ONGC, as the case may be, and further conditional upon KSS invoking arbitration as required in the said order, the amount will be held by the Prothonotary and Senior Master in investment pending a decision/award by the arbitral tribunal. Neither side is precluded, by virtue only of the said order, from applying to the arbitral tribunal for relief in respect of the said deposit. Any such application will be decided

on its own merits uninfluenced by the said order. This Court also made it clear that all observations were prima facie and only for the purposes of the said order.

16. Mr.Narichania, learned senior counsel for the appellant (VML) invited our attention to some of the correspondence annexed to the compilation of documents and pleadings and would submit that till March 2020, there was no dispute between VML and KSS in respect of the invoices issued by KSS. All monies due and payable to KSS were paid by VML till then.

17. Learned senior counsel invited our attention to the averments made by KSS in arbitration petition filed under Section 9 in paragraph 4.7 and would submit that admittedly the KSS did not make any claim under April invoice in the said petition filed under Section 9. He submits that the contract between the VML and the KSS was not back to back contract i.e. contract awarded to VML by ONGC and in turn, by VML to KSS. He submits that KSS did not submit the PBG of 12.20 % and thus his client was withholding the amount of US $ 2.9 Million. The VML was also entitled to recover liquidated damages from KSS in view of the KSS not completing the mandatory scope of work within the time stipulated in Clause 7.0 which attracted liquidated damages up to US $ 2.5 Million.

18. It is submitted that the VML was also entitled to withhold a further amount of US $ 300,000 towards prorata discount against Kreuz Supporter as per the Letter of Award. The amount thus claimed by VML

exceeded the April 2020 invoice raised by the KSS on the VML by approximately US $ 1,074,677. The VML even otherwise was entitled to withhold sum of US $ 1,074,677 in the next invoice for the month of May 2020. He submits that the KSS had in fact abandoned the entire contract and thus the VML was entitled to perform the abandoned scope of work at the cost and risk of KSS as per Clause 13 of the Letter of Award. The VML was entitled to recover liquidated damages of 0.5% of the contract value per week (with maximum of 10% of the contract value) from KSS.

19. It is submitted by the learned senior counsel that even though the ONGC had already released the payment in respect of the work done to VML, since there was no back to back contract between the VML and the KSS and since the VML was entitled to recover substantial sum from KSS, the VML was not required to pay any amount to KSS for the said invoices of May 2020. He submits that though there was no dispute about the quantum of invoice in the month of May 2020, the VML is entitled to adjust the amount against invoices of KSS in respect of the claim of VML towards the liquidated damages in respect of PBG not submitted by the KSS and also in respect of prorata discount of US $ 300,000 against Kreuz Supporter.

20. Learned senior counsel placed reliance on Clause 17 of the Letter of Award dated 30th October 2019 issued by his client and would submit that the said Letter of Acceptance/sub-contract has to be interpreted, governed, construed and executed in accordance with laws of England and Wales. He also placed reliance on Clause 20 of Letter of

Acceptance and would submit that though it was clearly agreed under the said clause that notwithstanding any dispute or difference and unless the contract shall be terminated, both the parties were under an obligation to continue with the due performance of said contract, the KSS refused to perform their part of obligation under the contract and abandoned the contract. He submits that under English Law, the VML was not required to prove the actual loss suffered for making claim for liquidated damages.

21. It is submitted by the learned senior counsel that there would be a counter claim for substantial amount against KSS by his client in the arbitral proceedings and thus the learned Single Judge on that ground itself could not have passed an order in the nature of an order for attachment before judgment by directing his clients to deposit the entire amount under May invoice. In support of his submission that the VML was not required to prove liquidated damages under English Law, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Oil & Natural Gas Corporation Ltd. v/s. Saw Pipes Ltd., (2003) 5 SCC 705*** and in particular paragraph 51 and would submit that the Supreme Court has clearly culled out a distinction between Indian Law and English Law insofar as the requirement of proof of loss for recovery of liquidated damages is concerned. There is a clear departure under English Common Law from Indian Law on the issue of proof of liquidated damages in case of a claim for issue of liquidated damages. The VML was entitled to recover and/or appropriate the amount payable to KSS under May invoice by merely showing that the KSS has committed breach of its obligation under the contract between KSS and VML. The learned Single Judge however did not consider this crucial

aspect in the matter in the impugned order.

22. Learned senior counsel placed reliance on a passage from the commentary on law of contract by Anson in support of the submission that the VML was not required to prove damages for claiming liquidated damages. The VML was entitled to recover the stipulated sum of compensation from KSS and thus there was a clear entitlement of VML to recover/withhold the said amount due and payable, if any to KSS in any of the invoices. Learned senior counsel for VML submitted a statement showing the calculation which according to his client is entitled to recover a sum of US $ 3642023.5 after adjusting the amount due and payable to KSS under April invoices and May invoices. In view of such serious dispute raised by his client in the correspondence, the learned Single Judge could not have passed any order in the nature of attachment before judgment under Order 38 Rule 5 of the Code of Civil Procedure, 1908 in the petition filed by KSS under Section 9 of the Arbitration Act.

23. Learned senior counsel for VML made an attempt to distinguish the judgment delivered by a Single Judge of this Court, one of us R. D. Dhanuka, J. in case of ***Baker Huge Singapore Pte v/s. Shiv Vani Oil and Gas Exploration, 2014 SCC Online Bom 1663***. He invited our attention to paragraphs 53 to 58 and 62 of the said judgment and would submit that the facts before this Court in the said matter were totally different. That was not the case of contract where English Common Law was agreed to be applied by virtue of which one of the party entitled to recover liquidated damages without proving any actual loss or damage. In

that case, the claimant had made out a case for grant of relief of securing claim.

24. Learned senior counsel invited our attention to the averments made in paragraphs 5.5, 5.6, 5.7 and would submit that no case was made out by KSS for seeking relief in the nature of attachment before judgment. The learned Single Judge could not have converted an unsecured claim of KSS into a secured claim by directing his client to deposit the entire amount under May invoice and in the alternative against ONGC to deposit the said amount out of the amount due and payable by ONGC to his client.

25. Learned senior counsel strongly placed reliance on the judgment of Supreme Court in case of ***Raman Tech. & Process Engg. Co. and Anr. v/s. Solanki Traders, (2008) 2 SCC 302*** and in particular paragraph 4 in support of his submission that even if KSS had just or valid claim or made out a *prima-facie* case, that would not be sufficient to seek a relief in the nature of an order of attachment before judgment unless KSS would have established that VML was attempting to remove or dispose of its assets with the intention of defeating the decree that may be passed. He submits that no strong *prima-facie* case was made out by KSS against VML for grant of such drastic order before the learned Single Judge.

26. Learned senior counsel for VML placed reliance on the judgment of a Division Bench of this Court in case of ***National Shipping Company of Saudi Arabia v/s. Sentrans Industries Limited, Mumbai,***

***2004 (2) Mh.L.J. 696*** and in particular paragraph 14 in support of his submission that since the KSS had failed to even remotedly indicate that VML by its acts was intending to defeat the claim of the KSS, no interim protection could be granted by the learned Single Judge.

27. Learned senior counsel for VML strongly placed reliance on the judgment delivered by the learned Single Judge of this Court in case of ***Yusufkhan @ Dilip Kumar v/s. Prajita Developers Pvt. Ltd. and Anr.*** in Arbitration Petition No. 1012 of 2018, delivered on 25th March, 2019 and in particular paragraphs 25, 32 to 34 and would submit that the judgment delivered by R. D. Dhanuka, J. in case of ***Baker Huge Singapore Pte*** (supra), relied upon by the learned Single Judge has been clearly distinguished by the another learned Single Judge in the said judgment and has taken a different view.

28. Learned senior counsel for VML also relied upon the judgment delivered by a Division Bench of this Court in case of ***Nimbus Communications Ltd. v/s. Board of Control for Cricket in India, 2013(1) Mh.L.J. 39*** and in particular paragraphs 20 to 24 and would submit that this Court after adverting to the judgment of Division Bench of this Court in case of ***National Shipping Company of Saudi Arabia*** (supra) and judgment of Supreme Court in case of ***Adhunik Steel*** (supra) has held that a power under Section 9 is not totally independent of principles governing the grant of interim injunction. The powers of Court under Section 9 are acted by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908.

29. Learned Senior Counsel for the VML relied upon the Judgment of Delhi High Court in the case of ***Uppal Eng. Co. (P) Ltd. Vs. Cimmco Birla Ltd., ILR (2005) II Delhi 604*** and in particular paragraphs 13 and 14 and would submit that since the KSS has failed to establish in the proceedings filed under Section 9 of the Arbitration Act that the VML is likely to dispose of whole or any part of his property with intent to obstruct or delay the execution of the award if passed in favour of the KSS, the order of an attachment before Judgment being a drastic remedy, no such order could be passed by the learned Single Judge. The counter-claims proposed to be made by VML against KSS are yet to be adjudicated upon in the arbitral proceeding and thus no such order in the nature of attachment before Judgment could be passed by the learned Single Judge.

30. Learned Senior Counsel for VML made an attempt to distinguish the Judgment of this Court delivered by a Division Bench of this Court in the case of ***Jagdish Ahuja & Anr. Vs. Cupino Ltd.*** *in* ***Comap/12/2020 with IA/1/2020 decided on 3rd August, 2020*** on the ground that the facts before the Division Bench of this Court were totally different. The Respondents therein had though deducted the 'tax deducted at source' from the amount payable to original Petitioner did not deposit the said amount with the Government.

**Submissions of the Appellant in Commercial Appeal (L) 8386/20 filed by ONGC**

31. Mr. J. P. Cama, learned Senior Counsel for the ONGC (Appellant in Commercial Appeal (L) No. 8386/20) invited our attention

to the operative part of the impugned order and more particularly paragraphs 42 (e)(i) to (vi) and would submit that there was no arbitration agreement between ONGC and KSS. At the first instance the ONGC could not have been impleaded as a party-Respondent in the Petition filed by KSS under Section 9 of the Arbitration Act in view of there being no privity of contract between ONGC and KSS. Even otherwise no order in the nature of garnishee could be passed against ONGC by the learned Single Judge and that also at the interlocutory stage. No final arbitral award has been admittedly rendered by the Arbitral Tribunal allowing the claims made by the KSS against the VML. He submits that no order under Section 9 of the Arbitration Act could have been passed by the learned Single Judge against the ONGC.

32. In support of these submissions, learned Senior Counsel placed reliance on the following Judgments:

(i) Judgment of Madras High Court in the case of ***Kris Heavy Engineering Vs. PNHB Lanco Khec, 2013 SCC OnLine MAD 1419;***

(ii) Judgment of Supreme Court in the case of ***Essar Oil Ltd. Vs. Hindustan Shipyard Ltd. & Ors., (2015) 10 SCC 642.***

(iii) Judgment of this Court in the case of ***Jai Neptune Co-op. Housing Society Ltd. Vs. Lotus Logistics & Developers Pvt. Ltd. & Anr., 2015 (6) Bom C.R. 106;***

(iv) Judgment of this Court in the case of ***Rakesh S. Kathotia & Anr. Vs. Milton Global Ltd. & Ors., 2014 (4) Bom C.R. 512.***

33. It is submitted by the learned Senior Counsel that even

otherwise since there was no irreparable injury caused to the KSS, no such drastic order of deposit against the ONGC by way of garnishee could be made by the learned Single Judge in the proceeding under Section 9 of the Arbitration Act. No notice was issued to ONGC by KSS in the nature of garnishee before filing Petition under Section 9 of the Arbitration Act. The learned Single Judge could have passed an order of interim measures only against the parties to the arbitration agreement. No case was made out by the KSS for passing such order in the nature of garnishee order.

34. In is submitted by the learned Senior Counsel that the ONGC was not claiming through VML who was party to the sub-contract between VML and KSS. It is submitted that since the Arbitral Tribunal itself could not have passed any interim order or final order against the ONGC in the proceeding between KSS and VML, no interim measures could have been granted by the learned Single Judge in the Petition filed under Section 9 of the Arbitration Act. Interim reliefs are in the aid of final reliefs. The entire order passed by the learned Single Judge against the ONGC was thus without jurisdiction.

35. Learned Senior Counsel for the ONGC submits that if ONGC is required to deposit the amount due and payable to VML under the ongoing contract between the ONGC and VML, the VML may sue to perform the agreement under the said contract which would jeopardize the said contract entered into between the ONGC and VML. The ONGC may be permitted to retain the said amount with it which is due and payable by VML to KSS out of the amount payable by ONGC to VML.

**Submissions of KSS in response to submissions made by VML and ONGC through their respective Senior Counsel**

36. Mr. Chinoy, learned Senior Counsel for the KSS tendered list of dates and events. He invited our attention to the Clauses 6.1 and 6.2(a), 6.1.2(b) and (c) and would submit that his client was required to issue invoice to VML at the end of each month of all progress earned based on completion certificate signed by ONGC and furnished by sub-contractor. The VML was to effect payment to KSS within 7 days after receipt of payment from ONGC by VML. The VML was required to inform KSS in writing once the payment was received by VML from ONGC. If VML wanted to raise any dispute in respect of invoice, such dispute was required to be notified by VML to KSS within 5 days after receipt of such invoices failing which the VML shall be deemed to have irrevocably accepted the invoice as correct and the amount stated therein was due in owing to KSS.

37. It is submitted that in this case no dispute of any nature whatsoever was raised by VML for the invoices submitted by KSS for the month of May, 2019. The VML had already received payment from ONGC in respect of that part of work done by KSS however did not make the payment to KSS by raising frivolous objections subsequently and not within the period of 5 days from the date of receipt of invoice issued by KSS upon VML. He submits that those invoices for the month of May, 2019 were issued by KSS based on completion certification signed by ONGC and furnished by KSS. Such amount under the invoices for the month of May, 2019 payable by VML to KSS thus could not have

been withheld by raising any dispute subsequently by VML. He submits that even otherwise so called dispute raised by VML so as to illegally withheld the amount payable to KSS by VML under the invoices for the month of May, 2019 are totally frivolous and untenable.

38. It is submitted by the learned Senior Counsel that under Clause 6.1.3 the VML was required to provide KSS an irrevocable Letter of Credit with amount 20% of Sub-Contract value as per terms in attachment Annexure VI so as to secure payment to KSS under the Letter of Acceptance issued to KSS. The KSS was to furnish a performance bank guarantee for 12.2% for Sub-Contract valued to VML within 14 days of the issuance of Letter of Acceptance. The VML however did not furnish any such irrevocably Letter of Credit for the amount equal to 20% of the Sub-Contract as per terms in Annexure VI to KSS. The VML only issued a conditional Letter of Credit for US $ 2 million in the month of February, 2020 with additional conditions which were not in accordance with contractual format i.e.Annexure VI as against the contractual stipulation of US $ 5.4 million. The KSS accordingly did not issue the performance bank guarantee of 12.2% i.e. US $ 2.9 million. The KSS had repeatedly offered to furnish performance bank guarantee on the VML establishing a contractual compliance irrevocably and unconditionally Letter of Credit for US $ 5.4 million immediately.

39. It is submitted by the learned Senior Counsel that till the end of March, 2020, there were no disputes between the parties. His client had duly received the amount of their invoice approximately US $ 12.118 million. Only after 24th March 2020 the progress of the work was affected

by the nationwide lockdown. There was delay on the part of VML in timely delivering materials to KSS. However the KSS almost managed to maintain the pace of work. He relied upon the letter dated 14th May, 2020 addressed by VML to KSS regarding its appreciation of work carried out by KSS.

40. Learned Senior Counsel for KSS submits that for the work done in the month of April, the KSS submitted invoice in the month of May, 2020 in US $ 4765570 duly supported by completion certificate issued of ONGC. No dispute of any nature whatsoever was raised by VML even in respect of said invoice within stipulated period of 5 days. The VML though received payment from ONGC for the said work carried out by KSS, VML wrongfully withheld the said payment due and payable to KSS by VML. Learned Senior Counsel invited our attention to letter dated 27th May, 2020 addressed by VML alleging one week's delay by KSS in mobilization of Barge in February, 2020 under Clause 11.1(a). For the first time the VML alleged that since the KSS had failed to complete the minimum mandatory scope of work, it was entitled provisionally to withhold as liquidated damage of amount 10% of contract value under Clause 11.2(b) i.e. US $ 2567346. In the said letter the VML alleged that the KSS had failed to furnish the performance bank guarantee of 12.2% and thus the VML was alleged to be entitled to withhold 12.2% of the contract value i.e. US $ 2972900.

41. The VML further alleged in the said letter that it was not liable to make payment of April invoice of US $ 4.765 million. It is submitted by the learned Senior Counsel that during the period between

May and June, 2020 the disputes were already going on between the parties regarding the failure of VML to make payment of amount in another contract between the same parties in respect of which the KSS was required to adopt proceeding against VML. By an order dated 8th May 2020 the VML was required to make payment @ US $ 1.2 million to KSS to secure the release of their vessel US $ 1600. The VML had also failed to make payment under those arbitration cases in May, 2018. The KSS was thus required to adopt execution proceeding against VML.

42. On 26th June, 2020 the VML agreed and undertook to pay US $ 5.50 million in installments between July, 2020 and February, 2021 as recorded in the said order dated 26th June, 2020. In those arbitration proceedings also the KSS had also constrained to initiate Section 9 proceeding against the VML in 2017. This Court had passed orders dated 25th July, 2017 similar to those sought by the KSS against the VML thereby requiring the VML to deposit or provide a bank guarantee in respect of amount involved and required the ONGC to encash one of the bank guarantee of VML to the extent of claim and to deposit the amount in Court.

43. Learned Senior Counsel invited our attention to letter dated 1st June, 2020 addressed by KSS to VML disputing the demand of VML to withhold the payment of US $ 2.567 million as liquidated damages was unreasonable. The balance work was only of 3 new Rises and de-mobilization of 11 Rises which had 10% value would not exceed US $ 302,000. He submits that ONGC did not make any demand for liquidated damages and had paid VML in full. The KSS raised an objection in

respect of amount withheld by the VML.

44. Learned Senior Counsel submits that even if the false claim of liquidated damages made by the VML would be considered, the VML could utmost withhold US $ 2567346 and was still liable to pay US $ 2.2 million to KSS against their invoice of US $ 4765570 for April, 2020. The learned Senior Counsel for the KSS submits that even in the affidavit-in-reply filed by VML in the month of August, 2020 before the learned Single Judge, the VML has categorically admitted that there was no dispute that the VML had received invoice for May, 2020 from the KSS and there was no dispute with regard to the said invoice. In the said affidavit the VML also clarified that the VML had not withheld the amount under the invoice for the month of May, 2020 on account of dispute under the said invoice.

45. It is submitted that the VML even otherwise illegally withheld the amount payable under May invoices i.e. Invoices 16 and 17 dated 4th June, 2019 for US $ 2.4 million against its alleged claim for liquidated damages in the tune of US $ 2.567 million which were also claimed on the basis of which it had withheld the payment of invoice of April of US $ 7.16 million i.e. US $ 4.76 + US $ 2.40 against their alleged maximum claim of liquidated damages in US $ 2.567 million which claim of liquidated damages is strongly disputed by KSS. Even if the said amount was adjusted, the VML has illegally withheld the sum of US $ 4.59 million. He submits that the said amount of US $ 7.16 million was covered by bills certified by ONGC which payment had already received by VML from ONGC but illegally withheld the amount of US $

4.59 million without any basis.

46. It is submitted by the learned Senior Counsel that the order passed by the learned Single Judge directing the VML to deposit US $ 2.4 million in Court by 4th December, 2020 constitutes part of US $ 7.1 million which have been already received by VML from ONGC for work done by the KSS and which US $ 2.4 million along with further sum of US $ 2 million from the invoice for the month of April, 2019 illegally withheld by VML without any basis.

47. It is submitted by the learned Senior Counsel that the claim made by the KSS upon VML is based on undisputed invoices whereas claims made by the VML are based on claims for damages which claims are seriously disputed by KSS. There is no dispute at least in respect of US $ 4.6 million payable by VML to KSS. The Court has to consider the special circumstances while granting relief under Section 9 of the Arbitration Act and also the conduct of the parties with a view to do equitable justice. The VML had taken the ships out of jurisdiction of this Court.

48. Learned Senior Counsel relied upon various averments made in the Petition filed under Section 9 of the Arbitration Act by his client and would submit that the KSS had clearly made out case for securing the undisputed claims of his client by issuing appropriate directions in that regard to VML and in the alternative against ONGC. No order in the nature of garnishee has been passed by the learned Single Judge against ONGC. Learned Senior Counsel for KSS relied upon the Judgment

delivered by the Division Bench of this Court on 15th October, 1992 in Appeal No. 704 of 1992 filed by ***Triangle Drilling Ltd. & Anr. Vs. Jagson International Ltd. & Anr. passed by Bombay High Court in Appeal No. 704 of 1992 dated 15th October, 1992*** and would submit that the power of Court under Section 9 of the Arbitration Act to grant interim measures are wider than powers of Civil Court.

49. It is submitted by the learned Senior Counsel that the said Judgment of Division Bench in the case of ***Triangle Drilling Ltd.*** (supra) has been followed in another Judgment by a Division Bench of this Court in the case of ***La-Fin Financial Services Pvt. Ltd. Vs. IL & FS Financial Services Pvt. Ltd. 2015 SCC Online Bom 4794*** in particularly paragraphs 19, 40, 42, 43 to 47. It is submitted that in any event powers to grant interim injunction against VML and ONGC by the Court under Section 9 cannot be disputed.

50. Insofar as the Appeal filed by ONGC against the impugned order is concerned, it is submitted by the learned Senior Counsel that there is no order for payment made by the learned Single Judge against the ONGC. If the amount as directed by the learned Single Judge is deposited in this Court, there will be full discharge against the ONGC from making payment of that part of the amount to VML. He submits that ONGC cannot refuse to deposit the amount which is admittedly payable by ONGC to VML under the contract entered into between ONGC and VML on the ground that the VML may refuse to perform their obligation under the contract entered into between the ONGC and VML. If any breaches are committed by the VML or their obligations to ONGC,

the bank guarantee of about Rs.120 crores furnished by VML in favour of the ONGC may be encashed by ONGC at any point of time. In case of such breaches, the ONGC would not be without a remedy in law against VML.

51. Learned Senior Counsel distinguished the Judgment in the case of ***Essar Oil Ltd.*** (supra) relied upon by Mr. Cama, learned Senior Counsel for the ONGC on the ground that in the said matter, ONGC was directed to pay the amount directly to Essar though there was dispute in respect of said payment between ONGC and another party Hindustan Shipyard Ltd. His client has not made any claim against the ONGC. He submits that this Court has been passing the orders day in day out by exercising powers under Section 9 of the Arbitration Act against the third party. He gave an illustration in case of injunction sought by party from encashing bank guarantee against the third party bank who is not a party to the arbitration agreement.

52. Learned Senior Counsel for KSS invited our attention to various prima facie observations made by the learned Single Judge in the impugned order and would submit that after considering the submission of both the parties in great detail and the pleadings, the learned Single Judge has passed a reasonable and equitable order under Section 9 of the Arbitration Act. The powers of Appellate Court under Section 37 of the Arbitration Act to interfere with prima facie observations made by the learned Single Judge in interlocutory order are very limited. No case is made out by ONGC or by VML to interfere with the impugned order passed by the learned Single Judge.

53. Mr. Narichania, learned Senior Counsel for the Appellant-VML in his rejoinder argument submits that the invoices for the month of April, 2019 were not the subject matter of the Petition filed by KSS under Section 9 of the Arbitration Act before the learned Single Judge. No argument based on the invoices for the month of April, 2019 can be advanced by the KSS before this Court in this Appeal. There was no abandonment of contract as on 27th May, 2020. He invited our attention to letter dated 31st May, 2020 from KSS to VML and would submit that the KSS had requested for waiver of liquidated damanges to VML. KSS had admitted delay of 45 days on their behalf. On 31st May, 2020 VML had asked KSS to mobilize the Barge which KSS refused to mobilize. He submits that the Clauses 11 and 2(a) would thus apply to the claims made by VML on 7th June, 2020. The VML had already called upon to KSS for compliance on their part and made it clear that VML would engage a new contractor. Similar letters were addressed by the VML to KSS on 7th April, 2020, 20th July, 2020 and 12th July, 2020. Since the KSS abandoned the contract, the VML is entitled to 10% liquidated damages against the KSS. He submits that subsequent correspondence after the month of May, 2020 would also entitle VML to make their claim against KSS.

54. It is submitted by the learned Senior Counsel that performance bank guarantee was to be submitted by the KSS to VML within the time limit prescribed under Clause 6.2 i.e. within 14 days whereas for submitting Letter of Acceptance, no time limit was prescribed for VML. The KSS however imposed condition against the VML to submit irrevocable Letters of Credit simultaneously with KSS

submitting performance bank guarantee to VML. He submits that KSS was fully aware that VML was a foreign company and still entered into a contract with VML and thus KSS could not have applied for such drastic relief against the VML on that ground.

55. Mr. Chinoy, learned Senior Counsel for KSS submits that when his client was issued invoice for the month of May, 2019, no claim was raised by VML under Clause 11.2(a) of the Contract. Such claims was raised only for the month of July, 2020 and not earlier.

**REASONS AND CONCLUSION :-**

56. The questions that arise for consideration of this Court in this Appeal filed under Section 37 of the Arbitration Act by VML and ONGC (original respondent nos.1 and 2 respectively) are (a) whether ONGC could have been impleaded as a party respondent to the petition filed under Section 9 of the Arbitration Act by KSS (original petitioner) though there was no Arbitration Agreement between KSS and ONGC; (b) whether the learned Single Judge could have passed any order of interim measures against ONGC including an order of deposit of the amount due and payable by ONGC to VML under PRP-VI contract between ONGC and VML so as to secure the claims in arbitration proposed to be made by KSS against VML by way of garnishee order; (c) whether KSS had made out a case for grant of interim measures against VML as well as ONGC or any of them to secure the claims proposed to be made by KSS against VML or not.

57. We shall first decide the issue whether ONGC could be

impleaded as a party respondent to the arbitration agreement between KSS and ONGC.

58. It is not in dispute that a contract was entered into between ONGC and VML on 21st August, 2019 for laying of 165.77 kms subsei pipeline spread in 23 segments including associated subsei activities and various other works. On 30th October, 2019 the VML had executed a Letter of Award in respect of the said work in favour of KSS. A perusal of the prayers in the arbitration petition filed by KSS against VML and ONGC indicates that the KSS had prayed for an order of deposit of a sum of US $ 2403073 towards payment of the principal sum under the undisputed invoices dated 2nd June, 2020 for the month of May 2020 issued by KSS. The KSS had also prayed for an order and direction against ONGC to deposit the amount due and payable to VML to the extent of US $ 2403073 in this Court. In the alternative to prayer clause (b), KSS had also prayed for an order and direction against ONGC to invoke and encash the bank guarantees furnished by VML in favour of ONGC to the extent of US $ 2403073 and to deposit the said amount in this Court. The KSS had prayed for injunction against VML from dealing with, assigning, discounting, encumbering, securitizing, disposing of, transferring and/or distributing the amounts received from ONGC and for other interim measures.

59. The averments made in the arbitration petition filed by KSS were that the KSS apprehend that VML was likely to immediately siphoned of the amount due and payable to KSS received from ONGC. The KSS will not be able to secure the payment of its invoices from

respondent no.1. The KSS had also averred in the petition that KSS had filed an Execution Application (LD-VC-GSP-3 of 2020) against VML and had impleaded ONGC as party respondent in the said Execution Application. ONGC had filed an affidavit in the said Execution Application on 22nd June, 2020 stating that ONGC had from time to time released the amounts as per invoices issued by VML in respect of the work done. It was the case of the KSS in the said petition under Section 9 before the learned Single Judge that though ONGC released payment to VML in respect of the work done, no corresponding payment were made to KSS *qua* the May invoice nor VML had provided any update to the KSS regarding the same as contemplated in the Letter of Award.

60. The impugned order passed by the learned Single Judge indicates that the invoices submitted by the KSS including the invoices for the month of May 2020 were backed with ONGC signed completion certificate. Under Clause 6.1.2 (c), the VML had agreed to notify KSS in writing of the VML submitting an invoice to ONGC and thereafter in writing of the invoice processing progress and all communications between VML and ONGC related to the invoice submitted. The VML had also agreed to immediately inform KSS in writing once the payment was received from ONGC by VML. Under Clause 6.1.2, the KSS was required to submit invoices at the end of each month, for all progress earned by KSS based on completion certificate signed by ONGC furnished by KSS. The VML was required to effect the payments, by wire transfer or as otherwise may be instructed by KSS in writing within 7 days after receipt by VML of payment from ONGC. It is not in dispute that ONGC was not a party to the sub-contract awarded by VML to KSS.

61. The Division Bench of this Court in case of ***Girish Mulchand Mehta and Anr. v/s. Mahesh S. Mehta and Anr., (2010) 1 Bom CR 31*** adverted to the judgment of Supreme Court in case of ***Firm Ashok Traders and Anr. v/s. Gurmukhdas Saluja and Ors., AIR 2004 SC 1433*** in which judgment the Supreme Court had considered the scheme of Section 9 of the Arbitration Act. The Supreme Court observed that the right conferred by Section 9 is on a party to an Arbitration Agreement. Section 9 has relevance to *locus-standi* as an applicant. A person not party to an Arbitration Agreement cannot enter the Court for protection under Section 9 of the Arbitration Act. The party to an Arbitration Agreement can invoke that jurisdiction under Section 9 of the Arbitration Act for securing relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9. This Court held that reliefs sought in Application under Section 9 is neither a suit nor a right arising from a contract. The Court under Section 9 only formulates interim measures so as to protect the right under adjudication before Arbitral Tribunal from being frustrated.

62. This Court in the said judgment held that the power of the Court under Section 9 is very wide and is not controlled by the provisions of the Code of Civil Procedure. The Court however has to be guided by the equitable consideration keeping in mind that the award to be passed by the Arbitral Tribunal is capable of enforcement. In paragraph 12 of the said judgment, this Court held that jurisdiction under Section 9 can be invoked only by a party to the Arbitration Agreement, Section 9 however does not limit the jurisdiction of the Court to pass order of interim measures only against party to an Arbitration Agreement or Arbitration

proceedings whereas the Court is free to exercise same powers in making appropriate order against the party to petition under Section 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to an Arbitration Agreement or Arbitration Proceedings does not affect the jurisdiction of the Court under Section 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the Arbitration Agreement.

63. The Division Bench of this Court held that Section 9 can be invoked even against a third party who is not a party to an Arbitration Agreement or Arbitration Proceedings, if he were to be person claiming under the party to the Arbitration Agreement and likely to be affected by the interim measures. This Court held that Court would certainly have jurisdiction to pass appropriate orders by way of interim measures even against the party, irrespective of the fact that they are not party to the arbitration agreement or arbitration proceedings. The Division Bench of this Court also adverted to Rule 803-E of the (Original Side) Rules which provides that notice of filing application to persons likely to be affected under the Arbitration and Conciliation Act, 1996 has to be issued to show-cause within the time specified in the notice as to why reliefs sought in the arbitration petition should not be granted. The third parties were accordingly impleaded i.e. party to the proceedings under Section 9 of the Act which was necessitated by virtue of Rule 803-E of the (Original Side) Rules.

64. The Division Bench of this Court in the said judgment had also considered powers of Court under Section 9(1)(ii)(d) and (e) which

provides that Court has power to grant interim injunction or appoint a receiver and to pass such other interim measures of protection as may appear to the Court to be just and convenient. The Court shall have same power for making powers as it has for the purpose of, and in relation to, any proceeding before it. This Court considered the said provision and held that it is also open to the Court to confer upon the receiver of such powers for realization, management, protection, preservation and improvement of the property, collection of the rent and profits thereof or such other powers as the Court thinks fit on the satisfaction of the Court that it is just and convenient to do so. The interim measures can be for management, protection, preservation and improvement of the property which is the subject matter of Arbitration Agreement.

65. A perusal of Section 9(1)(ii)(c) clearly indicates that the Court may authorize any person to enter upon any land or building in the possession of the any party, authorizing any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence for the purpose of detention, preservation or inspection of any property which is subject matter of the dispute in Arbitration. For granting such relief under Section 9(1)(ii)(c), third parties who are not parties to the Arbitration Agreement may be affected. Such third parties who want to seek any interim measures under Section 9 would not be entitled to invoke the said provision for seeking interim measures against a party to the Arbitration Agreement. However, there is no bar against the Court from granting interim measures under Section 9 of the Arbitration Act against a party who is not a party to the Arbitration Agreement, if

those reliefs fall under any of the reliefs provided in Section 9(1)(i), (ii) (a) to (e) of the Arbitration Act.

66. This Court has been passing order day in day out against banks from releasing any payment under bank guarantees issued by banks in favour of one of the party to the Arbitration Agreement though such banks may not be a party to the Arbitration Agreement between the two parties including the beneficiary of such bank guarantee or at whose instance such bank guarantee has been issued by such bank. In addition to the specific interim measures prescribed under Section 9(1)(i),(ii)(a) to (d), Court has also power to grant such other interim measures and protection as may appear to the Court to be just and convenient. In our view, there is thus no substance in the submission made by Mr. J. P. Cama, learned senior counsel for ONGC that ONGC could not have been impleaded as a party respondent to the petition under Section 9 of the Arbitration Act filed by KSS on the ground that there was no privity of contract between KSS and ONGC or on the ground that ONGC was not a party to the Arbitration Agreement between KSS and VML or that no interim measures can be granted against a third party.

67. Since, in this case, the KSS (original petitioner) wanted to seek interim measures so as to secure the claims of KSS against VML who was entitled to receive certain payments from ONGC, KSS had rightly impleaded ONGC as respondent no.2 in the said petition filed under Section 9 of the Arbitration Act before the learned Single Judge. Since ONGC was likely to be affected by the said order, ONGC had been rightly impleaded as a party respondent. In view of the principles laid

down by Division Bench of this Court in case of ***Girish Mulchand Mehta and Anr.*** (supra), impleadment of the ONGC was necessitated by virtue of Rule 803-E of the (Original Side) Rules. The principles laid down by the Division Bench of this Court in case of ***Girish Mulchand Mehta and Anr.*** (supra) apply to the facts of this case. Though ONGC was not a party to the Arbitration Agreement between KSS and VML, to secure the claim of the KSS against VML under Section 9(1)(ii)(b) of the Arbitration Act, it was necessary for the original petitioner i.e. KSS to implead ONGC as a respondent to the said petition under Section 9.

68. In so far as the judgment of this Court in the case of ***Jai Neptune Co-operative Housing Society Ltd. Vs.Lotus Logistics & Developers Pvt. Ltd. (supra)*** relied upon by the learned Senior Counsel for ONGC is concerned, the learned Single Judge of this court in the said judgment has held that under Section 9 of the Arbitration Act, this Court has no power to quash and set aside the sanctions granted by the Town Planning Authority. The Town Planning Authority was not a party to the development agreement entered into between the petitioner and the respondent no.1. The petitioner may have an independent remedy available in law against the Town Planning Authority for impugning the order and sanctions granted by the Town Planning Authority who was impleaded as a party respondent no.2 to the said arbitration petition filed under Section 9 by one of the parties to the arbitration agreement. In this case, there is no such issue involved as was raised in the matter before the learned Single Judge of this Court in the said judgment. The KSS (original petitioner) has not sought any adjudication of claims of the ONGC against VML or the claim of KSS against ONGC under the

contract entered into between the ONGC and VML. The said judgment was thus not at all applicable to this case.

69. In so far as the judgment of this Court in the case of ***Rakesh S. Kathotia & Anr. Vs. Miltone Global Ltd. and Ors. (supra)*** delivered by the learned Single Judge of this Court is concerned, the learned Single Judge in the said judgment has adverted to the judgment of a Division Bench of this Court in the case of ***Girish Mulchand Mehta and Anr. v/s. Mahesh S. Mehta and Anr.(supra)*** in which it has been held by the Division Bench that Section 9 can be invoked even against a third party if he were to be person claiming under the party to the arbitration agreement and likely to be affected by the interim measures. The said judgment would assist the case of the KSS and not the ONGC.

70. In so far as the judgment of the Hon'ble Supreme Court in the case of ***Essar Oil Ltd. Vs. Hindustan Shipyard Ltd. & Ors. (supra)*** relied upon by the learned senior counsel for the ONGC is concerned, it is held by the Supreme Court that simply because some payments were made by the ONGC to Essar Oil Ltd. i.e. one of the parties to the arbitration agreement, it would not be established that there was a privity of contract between the ONGC and the Essar Oil Ltd. and only for that reason, the ONGC cannot be saddled with a liability to pay the amount payable to the said Essar Oil Ltd. by Hindustan Shipyard Ltd. The proceedings before the Hon'ble Supreme Court were arising out of the order passed by the High Court of Andhra Pradesh by which the Andhra Pradesh High Court had set aside the arbitral award and the order passed by the Principal District Judge, Visakhapatnam dismissing the petition

challenging the arbitral award. The arbitral tribunal had rejected the contention of the original claimant that the ONGC was liable to make payment to the original claimant on behalf of the respondent who was awarded the contract by the ONGC.

71. In that context, the Hon'ble Supreme Court held that though the ONGC had made payment to the sub-contractor directly on several occasions, it could not be established that there was a privity of contract between the ONGC and the Sub-Contractor. The facts before this Court are totally different. The KSS had not prayed for any order and direction against the ONGC to make payment to the appellant but had prayed for an order and direction against the ONGC to deposit the amount in Court in the event of the VML not depositing the amount as prayed in the arbitration petition under one of the invoices. The said proceedings were not arising out of the order passed under Section 9 of the Arbitration Act. There was no issue before the Hon'ble Supreme Court in the said judgment whether the ONGC could be impleaded as a party before the arbitral tribunal or before the learned Principal District Judge or in the High Court. The said judgment is not even remotedly applicable to the facts of this case and would not assist the case of ONGC.

72. We shall now decide the issue whether the KSS has made out a case for order of deposit against the VML and in the alternative, against the ONGC so as to secure the claims of the KSS against the VML or not. We shall also decide the issue whether under Section 9 of the Arbitration Act, the learned Single Judge could have passed an order directing the VML at the first instance to deposit an amount of US $

2,403,073 or the rupee equivalent at the then prevailing exchange rate and in case of the VML failing to make the said deposit by the date prescribed, could direct the ONGC to deposit the said amount out of the amount, if any, due from the ONGC to VML by 11th December 2020 under the PRP-VI contract between ONGC and VML or not.

73. A perusal of Clause 6.1.1 of the Letter of Award dated 30th October 2019 issued by the VML to the KSS indicates that the VML had undertaken to make all payments in timely manner as per annexure-VII to the said Letter of Award. The KSS was under an obligation to invoice the VML at the end of each month, for all progress earned by the KSS based on completion certificates signed by the ONGC furnished by the KSS. The VML was under an obligation to effect payments, by wire transfer or otherwise as may be instructed by the KSS in writing within 7 days after receipt by VML of payment from ONGC. It was also an obligation of VML to notify the KSS in writing of the day the VML submitting an invoice to the ONGC, thereafter the KSS in writing of invoice processing progress and all communications between the VML and the ONGC related to the invoice submitted.

74. Under clause 6.1.1 of the Letter of Award, it is provided that for just cause and good faith, the VML was permitted to dispute an item invoiced, however, the VML shall within 5 days after receipt of the invoice, notify the KSS of the amount disputed and specify the reason therefor, failing which, the VML shall be deemed to have irrevocably accepted the invoice as correct and that the amount stated therein as due and owning to the KSS. The said clause further provides that in the event

an amount is disputed, notwithstanding such dispute, the VML shall pay the KSS undisputed amount within the time limit applicable to the relevant invoice.

75. A perusal of the record, prima facie, indicates that till the end of March 2020, there were no disputes between the KSS and the VML. The KSS had duly received the amount of their invoice approximately US $ 12.118 Million at the end of March 2020. In the month of May 2020, the KSS had submitted the invoices for the work done for the month of April 2020 of US $ 4765570 duly supported by completion certificates signed/issued by ONGC. The VML, however, did not raise any dispute in respect of the said invoice for the month of April 2020 within the five day period as stipulated under Clause 6.1.2(c) of the Letter of Award.

76. The alleged delay on the part of the KSS in mobilization of the Barge in February 2020 under Clause 11.2(a) was raised on 27th May 2020. The alleged entitlement of VML to provisionally withhold as liquidated damages an amount of 10% of the Contract value under Clause 11.2 (b) i.e. USD 2,567,346 until the KSS remobilised its marine spread and completed the same was also raised only on 27th May 2020. By the said letter, the VML alleged that it was not liable to make payment of the April invoices of US $ 4.765 Million. On 4th June 2020, the KSS had submitted further invoices 16 and 17 for US $ 2.4 Million for the work done in May 2020 duly supported by Completion certificates signed/ issued by ONGC. It is the case of the KSS that those invoices were submitted after making alterations to the draft invoices as required by

the VML. It is not in dispute that the VML did not raise any dispute in respect of the invoice for the month of May 2020 within the stipulated period of 5 days as contemplated under Clause 6.1.2(c) of the Letter of Award.

77. The KSS had prayed for various interim measures in the said petition filed under Section 9 of the Arbitration Act against the VML and the ONGC in respect of the invoice for the month of May 2020 which were for US $ 2,403,073 and did not press for deposit of amount in respect of the invoices for the month of April 2020. In our view, under Clause 6.1.2(b), the VML was under an obligation to effect the payment to the KSS within 7 days after receipt by VML of payment from ONGC. It is not disputed by the VML that it had received payment in respect of the said invoices submitted by the KSS upon VML for the month of May 2020. The submission made across the bar by the learned senior counsel for the VML that though the payment for the work done by the KSS covered by the invoices by May 2020 was received by the VML from ONGC, since the contract between the KSS and the VML was not on back to back basis, the VML was not liable to make payment to the KSS is totally untenable.

78. In our prima facie view, the VML was liable to pay the said amount under the invoices within 7 days from the date of receipt of such payment by the VML from ONGC relating to the invoices submitted by the KSS to the VML under Clause 6.1.2(c). The VML having failed to raise any issue within 5 days after receipt of invoices from KSS with reason or otherwise, in just cause and in good faith, VML cannot be

permitted to raise any such dispute subsequently. Even during the course of arguments, Mr.Narichania, learned senior counsel for the VML did not dispute the invoices for the month of May 2020 issued by the KSS upon VML but sought adjustment of various amounts towards the liquidated damages under Clause 11.2, claim arising out of the KSS not submitting performance bank guarantee as contemplated under Clause 6.2 of the Letter of Award and US $ 300,000 towards prorata discount against Kreuz Supporter as per the Letter of Award.

79. The VML having received the payment from ONGC in respect of the same work which was carried out by the KSS, the VML could not have withheld the payment after expiry of 5 days from the date of receipt of invoices from the KSS and more particularly in this case for the invoice in the month of May 2020. In our prima facie view, the disputes subsequently raised by the VML are not maintainable. The claim made by the KSS under the invoices for the month of May 2020 is thus crystallized and could not have been withheld.

80. Mr.Chinoy, learned senior counsel for the KSS is right in his submission that the VML in its affidavit-in-reply had admitted that there was no dispute that the VML had received the invoices for the month of May 2020 from the KSS and there was no dispute with regard to the said invoices. The VML had sought to withhold the amount payable under the May invoices i.e. invoices 16 & 17 dated 4th June for US $ 2.4 Million against its alleged claim for liquidated damages in the sum of US $ 2.567 Million and its alleged claim for non furnishing of the performance bank guarantee in the sum of US $ 2.9 Million and

also the invoices for April 2020 in the sum of US $ 4.1 Million also on the same ground.

81. In so far as the demand raised by the VML that the claim allegedly arising out of the said performance bank guarantee not submitted by the KSS as contemplated under Clause 6.2 of the Letter of Award and the VML not submitting the Letter of Credit as contemplated under Clause 6.1.3 of the Letter of Award, those allegations will b e tried in the arbitral proceedings. In our prima facie view, on the basis of such allegations and counter allegations made by the parties against each other, the VML could not have withheld any amount due and payable by the VML to the KSS under a crystallized claim and under undisputed invoice for the month of May 2020. The demand for adjustment of the amount alleged to be due to the VML in view of the alleged non compliance of Clause 6.2 by the KSS was not a crystallized claim or undisputed amount. The said claim is in the nature of damages payable depending upon the facts whether the KSS had failed to comply with the said obligations or not due to reciprocal obligation of the VML not having been complied with by the VML or not.

82. In so far as the amount under the invoices for the month of May 2020 sought to be withheld on the ground that the VML is entitled to recover prorata discount against Kreuz Supporter as per Letter of Award or not is concerned, the said alleged entitlement of the VML is also disputed by the KSS and will have to be adjudicated upon by the arbitral tribunal. In our view, the amount payable to the KSS under invoice for the month of May 2020 thus could not have been withheld

on such ground.

83. In so far as the case of the VML that there was delay on the part of the KSS in not mobilizing the Barge Kreuz Supporter and in view of the KSS not completing the mandatory scope of work and thus the VML is entitled to recover liquidated damages quantified by the VML at US $ 2,567,346.59 is concerned, a perusal of the Clause 11.2 (b) of the Letter of Award indicates that the said clause shall not be applicable in the event of non completion of scope of works due to reasons not attributable to the KSS. In our prima facie view, whether non completion of scope of work by the KSS or delay was due to reason not attributable to the KSS or not or the KSS could not complete the work within the time specified due to the reason attributable to the VML or not will have to be decided by the arbitral tribunal finally. The VML admittedly neither terminated the said contract awarded to KSS nor claimed liquidated damages issued by the VML within the time contemplated under the contract. It is the case of the VML that the KSS had abandoned the contract. All these issues will have to be decided by the arbitral tribunal.

84. In our view, there is no merit in the submission of Mr.Narichania, learned senior counsel for the VML that the VML was not required to prove any actual damages suffered by the VML or not due to the breaches alleged to have been committed by the KSS but the VML was only required to show that such breaches were committed by the KSS. The KSS has seriously disputed the breaches alleged to have been committed by KSS under any of the provisions of the Letter of

Award.

85. Mr.Narichania, learned senior counsel for the VML failed to demonstrate that under the laws of England and Wales, the VML was not required to prove any acutal loss due to the breaches alleged to have been committed by the KSS for making any recovery of the amount towards liquidated damages against the crystallized claim of the KSS under undisputed invoices for the month of May 2020. The judgment of the Supreme Court in the case of ***Oil & Natural Gas Corporation Ltd. v/s. Saw Pipes Ltd. (supra)*** relied upon by the learned senior counsel for the VML thus would not advance the case of the VML on this issue. The passage from the commentary from ANSON's Law of Contract on this issue also would not assist the case of the VML.

86. We shall now decide the issue whether the KSS had made out a case for grant of any interim measures as allowed by the learned Single Judge against the VML or ONGC or both.

87. Mr.Narichania, learned senior counsel vehemently urged that in the arbitration petition filed by the KSS against the VML and ONGC, there were no averments that the VML has already removed its assets or is likely to remove its assets with an intent to defeat the claim of the KSS and if no interim measures as prayed would be granted, the KSS would be deprived of the fruits of the award. In support of this submission, learned senior counsel invited our attention to the averments made in paragraph 5.5 of the arbitration petition. Learned senior counsel made an attempt to distinguish the judgment delivered by a learned

Single Judge of this Court in the case of ***Baker Huge Singapore Pte v/s. Shiv Vani Oil and Gas Exploration (supra)*** and the judgment delivered by this Court in the case of ***Jagdish Ahuja & Anr. Vs. Cupino Ltd. (supra).***

88. The Division Bench of this court in case of ***Tringle Drilling Limited and Another*** (supra) has held that the learned Single Judge was not right in taking the view that he had no power or jurisdiction to grant the prohibitory reliefs claimed, even assuming that there was no substance in the defence raised by the 1st defendant. The order passed by the trial court refusing to grant interim relief was set aside by the Division Bench of this court in the said judgment. The Division Bench of this court in case of ***La-Fin Financial Services Pvt. Ltd.*** (supra) adverted to the said unreported judgment in case of ***Tringle Drilling Limited and Another*** (supra) and held that the grant of relief under Order 38 Rule 5 is on different considerations from the grant of relief of temporary injunctions. It is now a well settled legal position, that atleast with respect to Chartered High Courts, the power to grant temporary injunctions are not confined to the statutory provisions alone. The Chartered High Courts had an inherent power under the general equity jurisdiction to grant temporary injunctions independently of the provisions of the Code of Civil Procedure, 1908. The principles laid down by this Court in the case of ***Tringle Drilling Limited and Another*** (supra) and in case of ***La-Fin Financial Services Pvt. Ltd.*** (supra) would apply to the facts of this case and would assist the case of the KSS.

89. A perusal of the averments made by the KSS in the

arbitration petition filed under section 9 of the Arbitration Act on this aspect indicates that it was the case of the KSS that the VML has already received payment against the invoices raised by its from ONGC for the work done in the year 2020. VML however avoided making payment under the invoices for the month of May, 2020 on one ground or the other after expirty of the time contemplated in the Letter of Award. In respect of another sub-contract between the same parties, KSS was constrained to approach this Court under Arbitration Petition (L) Nos. 319 of 2017, 320 of 2017 and 321 of 2017. The parties entered into a settlement agreement dated 11th February, 2018 under which the KSS agreed to accept an amount of US $ 12.5 million instead of its claim of US $ 23.13 million. The VML however failed and avoided making payment of the agreed amounts on some pretext or the other. KSS was thus required to file execution application against VML in this Court. VML agreed to make payment to KSS during the pendency of the said execution application. VML thereafter undertook to abide by the payment schedule prescribed in the agreement entered into between the parties in the said execution application.

90. It is further averred by the KSS in the arbitration petition that in the month of May 2020, the vessel owned by the VML was the subject matter of the dispute in the Commercial Admiralty Suit No. LD-VC 53 of 2020. This court had granted an order of arrest dated 2nd May, 2020. KSS had filed a caveat in the said suit. It is averred that the VML habitually defers and avoids making payment of legitimate outstanding dues until the intervention of this court. In paragraph 5.5, it is averred that the petitioner apprehends that in order to defeat the ability of the

petitioner to recover the amounts legitimately due and payable to it, the VML may siphon off or divert the funds available with it as well as those to be received from ONGC or third parties. Since the VML is likely to immediately siphon off the said amounts received from the ONGC, the petitioner was desirous of seeking urgent interim/ad-interim reliefs against the VML. Unless the reliefs as prayed by the petitioner would be granted, the petitioner would not be able to secure the payment of his monies from VML.

91. In paragraph 5.6, it was averred by the KSS that in the affidavit in reply filed by the ONGC in the execution application filed by the KSS against VML, it was clear that the ONGC had made payment to the VML and thus it was possible that VML had already taken steps to siphon off or transfer or has otherwise dealt with the monies it had already received by ONGC. KSS accordingly averred that it was entitled to seek from this court an order directing the ONGC to deposit in this court a sum of US $ 2,403,073.00 in its capacity as a garnishee, pending the initiation and conclusion of arbitration proceedings.

92. In paragraph 5.7(a), KSS averred that the VML is a foreign company, incorporated in Liberia. The KSS is not aware if VML has any properties or assets in India. It is further averred that to the knowledge of the KSS, VML has already removed all of its vessels from within the jurisdiction of this Court. In the affidavit in reply filed by the VML, it is admitted that VML is based in United Arab Emirates and is admittedly a foreign incorporation which is carrying on its business in Abu Dhabi, UAE. The VML has not disputed in the affidavit in reply that in respect

of another sub-contract entered into between the same parties, VML had committed default in making payment of dues payable to the KSS and did not pay inspite of filing consent terms. The KSS was thus required to file execution proceedings against VML and has impleaded ONGC as a party to the said execution proceedings. In our view, there are sufficient averments made by the KSS in the arbitration petition filed under section 9 of the Arbitration Act for seeking interim measures in the nature of attachment before judgment. In our *prima facie* view, there was no valid defence of VML to withhold the amount due and payable to the KSS by VML for the invoices for the month of May 2020. The VML admittedly has no assets in India.

93. Insofar as judgment of Supreme Court in case of ***Raman Tech. & Process Engg.Co.*** (supra) relied upon by Mr. Narichania, learned senior counsel for the VML is concerned, it is held by the Hon'ble Supreme Court that merely having a just or valid claim or a *prima facie* case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. The Hon'ble Supreme Court has further held that the purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. The said judgment of the Hon'ble Supreme Court was not in respect of the powers of court under section 9 of the Arbitration and Conciliation Act, 1996 but was in respect of power under Order 38 Rule 5 of the Code of Civil Procedure, 1908 in a suit. Even otherwise, the said judgment is distinguishable in the facts of this case. The VML has not paid the undisputed invoices for the month of

May 2020 to KSS though had recovered the amount from ONGC for that part of the work done admittedly. Even in past the VML had committed several defaults of making payment to KSS under another sub-contract in respect of which KSS was required to file execution proceedings against VML.

94. Insofar the judgment of the Division Bench of this court in case of ***National Shipping Company of Saudi Arabia*** (supra) relied upon by Mr. Narichania, learned senior counsel for the VML is concerned, the Division Bench of this Court observed that no material has been placed by the appellant to indicate even remotely that respondent by its acts was intending to defeat the claim of the appellant and if no interim protection order is passed by the Court, in the event of appellant succeeding before Arbitral Tribunal, it would not be possible for the appellant to derive fruits of the Award. In these circumstances, the Division Bench of this Court held that since there was counter claim by the respondent in the facts and circumstances of that case, it did not seem to the Division Bench in the interest of justice to direct the respondent to deposit the amount. In our view, in this case, the KSS has clearly made out a case for grant of reliefs before attachment of judgment by directing the VML to deposit the undisputed amount. The judgment delivered by the Division Bench of this Court in case of ***National Shipping Company of Saudi Arabia*** (supra) is clearly distinguishable in the facts of this case and would not assist the case of the VML.

95. Insofar as judgment of this Court delivered by the Division Bench of this court in case of ***Nimbus Communications Limited vs.***

***Board of Control for Cricket in India & Anr.*** (supra) relied upon by the learned senior counsel for the VML is concerned, this Court adverted to the judgment of Hon'ble Supreme Court in case of ***Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd. (2007) 7 SCC 125*** and held that in view of the decision of the Supreme Court in case of ***Adhunik Steels Ltd.***, (supra) the view of the Division Bench in case of ***National Shipping Company of Saudi Arabia*** (supra) that the exercise of power under section 9(ii)(b) is not controlled by the provisions of the Code of Civil Procedure, 1908 cannot stand. This court in the said judgment of ***Nimbus Communications Limited*** (supra) held that the exercise of the power under section 9 of the Arbitration Act cannot be totally independent of the basic principles governing grant of interim injunction by the civil Court, at the same time, the Court when it decides the petition under section 9, must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution.

96. This court held that just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure, 1908, the rigors of every procedural provision in the Code of Civil Procedure, 1908 cannot be put into place to defeat the grant of relief which would sub-serve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and

Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii) (b) of the Arbitration Act.

97. In the said Judgment, the Division bench of this court in the appeal arising out of the order passed by the learned Single Judge in the arbitration petition filed under section 9 of the Arbitration Act directing the appellant to furnish security in respect of the claim of the original petitioner in the amount of Rs.305 Crores was modified by directing the appellant to furnish solvent security in the form of bank guarantee of the nationalized bank of the said amount to the satisfaction of the Prothonotary and Senior Master of this court. In our view, the said judgment of the Division Bench in case of ***Nimbus Communications Limited*** (supra) would assist the case of the KSS and not VML.

98. Insofar as judgment of Delhi High Court in case of ***Uppal Eng. Co. (P) Ltd.*** (supra) relied upon by the learned senior counsel for the VML is concerned, Delhi High Court held that the Court must act with utmost circumspection before issuing an order of attachment and unless it is clearly established that the defendant, with intent to obstruct or delay the execution of the decree that may be passed against him, is about to dispose of whole or any part of his property. In this case, we are of the *prima facie* view that the VML has no defence to the invoices issued by the KSS for the month of May 2020. The VML also has admitted in the affidavit in reply that there is no dispute about the said invoice however made an attempt to adjust the disputed claim against the undisputed invoice for the month of May 2020 issued by the KSS. In our

*prima facie* view, the KSS has good chances of succeeding in the arbitral proceedings in respect of the said invoices for the month of May 2020 which are not disputed by the VML. The judgment of Delhi High Court in case of ***Uppal Eng. Co. (P) Ltd.*** (supra) would even otherwise is clearly distinguishable and would not advance the case of the VML.

99. Learned senior counsel for the VML could not distinguish the judgment of the Division Bench of this Court in case of ***Jagdish Ahuja & Anr.*** (supra). The Division Bench of this Court in the said judgment has clearly held that in an appropriate case, where the Court is of the view that there is practically no defence to the payability of the amount and where it is in the interest of justice to secure the amount, which forms part of the subject matter of the proposed arbitration reference, even if no case strictly within the letter of Order 38 Rule 1 or 2 is made out, though there are serious allegations concerning such case, it is certainly within the power of the Court to order a suitable interim measure of protection. The principles laid down by this Court in the said judgment applies to the fact of this case.

100. Learned senior counsel for the VML made an attempt to distinguish the judgment delivered by the learned Single Judge of this court in case of ***Baker Hughes Singapore Pte.*** (supra) on the ground that the facts before the learned Single Judge in the said matter were totally different. This court in the said judgment after adverting to the judgment of the Supreme Court in case of ***Adhunik Steels Ltd.*** (supra), judgment of the Division Bench of this court in case of ***Nimbus Communications Limited*** (supra) and considered similar clause in the contract requiring

the respondent to pay undisputed invoices within 60 days from the date of submission of such invoices to the contractor. Even in that matter, none of the invoices were disputed by the respondent in the correspondence exchanged between the parties. This Court in the said judgment held that even if the counter claim made by the respondent was higher than the claim made by the petitioner, the fact remains that the said counter claim was for damages whereas the claim made by the Petitioner therein was under undisputed invoices which claim was admitted and liability was acknowledged. This Court accordingly held that the arbitral tribunal could not have compared the claim made by the petitioner under undisputed invoices with the counter claim for damages.

101. This Court held that since the arbitral tribunal is also empowered to make an interim award and to grant money claim on the basis of the admitted claim and/or acknowledge liability, the arbitral tribunal has also power to grant interim measures so as to secure the claim which is the subject matter of the dispute before the arbitral tribunal if such case is made out by the applicant. The provisions under sections 9 and 17 of the Arbitration and Conciliation Act are meant for the purpose of protecting the subject matter of the dispute till the arbitration proceedings culminates into an award. This Court also held that the Court also considers whether a denial of such order would result in a grave injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought is also regarded as a material consideration. In our view, the principles laid down by this court in the said judgment in case of ***Baker Hughes Singapore Pte.***(supra) would apply to the facts of this case. We do not

propose to take a different view than the view taken by the learned Single Judge of this court in the said judgment in case of ***Baker Hughes Singapore Pte.***(supra).

102. Insofar as unreported judgment of the learned Single Judge of this Court in case of ***Yusufkhan @ Dilip Kumar*** (supra) relied upon by the learned senior counsel for the VML is concerned, learned Single Judge had considered an appeal under section 37 of the Arbitration Act against the order passed by the arbitral tribunal directing the petitioner to furnish an undertaking to the effect that he will not alienate or encumber or part with possession of the property which was the subject matter of the arbitration to the extent of Rs.25 crores till the arbitration proceedings were concluded. Learned Single Judge in the said judgment considered the situation where the Hon'ble Supreme Court in the dispute between the same parties arising out of the same cause of action where respondent before the learned Single Judge (original claimant) had filed a suit for specific performance.

103. The Hon'ble Supreme Court had directed the petitioner before the learned Single Judge to deposit a sum of Rs.20 crores in the Registry of the Supreme Court and allowed the claimant to withdraw the said amount subject to them handing over possession of the said property to the petitioner before the learned Single Judge. The possession of the property was accordingly handed over by the respondent before the learned Single Judge to the petitioner. The dispute was referred to the arbitration. The learned arbitrator however though such facts at hand, directed the petitioner to furnish security in favour of the respondent

before the learned Single Judge. The fact before the learned Single Judge in the said judgment were totally different. In our view, the said judgment is clearly distinguishable in the facts of this case and would not assist the case of the VML.

104. The Division Bench of this court in case of ***Deccan Chronicle Holdings Limited vs. L & T Finance Ltd. 2013 SCC OnLine Bom 1005*** after adverting to the judgment of Supreme Court in case of ***Adhunik Steel Ltd.***(supra), judgment of the Division Bench of this court in case of ***Nimbus Communications Ltd. and Another***(supra) held that the rigors of every procedural provision of the Code of Civil Procedure cannot be put into place to defeat the grant of relief which would sub-serve the paramount interests of the justice. The object of preserving the efficacy of arbitration as an effective form of dispute resolution must be duly fulfilled. This would necessarily mean that in deciding an application under Section 9, the Court would while bearing in mind the fundamental principles underlying the provisions of the Code of Civil Procedure, at the same time, have the discretion to mould the relief in appropriate cases to secure the ends of justice and to preserve the sanctity of the arbitral process. The Division Bench of this Court in the said judgment did not interfere with the order passed by the learned Single Judge directing the parties to furnish security so as to secure the claim of the original petitioner in arbitration by applying principles of Order 38 Rule 5 of the Code of Civil Procedure. The principles laid down by the Division Bench of this court in the said judgment would apply to the facts of this case.

105. Learned Single Judge in the impugned order has dealt with the pleadings filed by the parties and also the judgment relied upon by the parties in great detail. The learned Single Judge has rightly made *prima facie* observation that the invoices for the month of May 2020 submitted by the KSS were backed with the ONGC signed completion certificate and were not disputed by the VML within the five days period allowed for raising such dispute. The learned Single Judge also rightly made *prima facie* observation that the VML was unable to demonstrate as to how or why VML was within its contractual rights to not issue the full Letter of Credit or to issue one for only part of the amount, or to add to it conditions apparently beyond the contract. There was no complaint made by the VML in respect of the invoice issued in the month of May 2020 by KSS. Similarly no dispute was raised within the period of 5 days also in respect of invoice for the month of April 2020.

106. Learned Single Judge has rightly made *prima facie* observation that the invoices thus issued by the KSS were deemed to have been accepted in full. All the invoices issued by the KSS were backed by ONGC certifications of work actually done. KSS has made no claim for compensation for damages. This is a claim purely on invoices and nothing else. In our *prima facie view*, learned Single Judge is right in observing that the VML could not refuse to pay the invoices in these circumstances abruptly invoking liquidated damages and the failure to furnish the performance bank guarantee notwithstanding its own default in not issuing the full Letter of Credit.

107. The learned Single Judge has not granted the entire relief as

prayed for by KSS in the petition filed under section 9 but has passed the balance and equitable order. The learned Single Judge has directed the VML only to deposit amount of US$ 2,403,073 or the rupee equivalent at the then prevailing exchange rate, being the value of the invoices dated 2nd June 2020 in the month of May 2020. The learned Single Judge has not permitted the KSS to withdraw the said amount in the impugned order but has granted liberty to KSS to apply to the arbitral tribunal for relief in respect of the said deposit making it clear that if any such application would be made, the same would be decided on its own merits uninfluenced by the said order. The learned Single Judge made it clear in paragraph (44) of the impugned order that all the observations were *prima facie*, and only for the purposes of the said order.

108. Insofar as the grievance of ONGC that no such order in the nature of garnishee could be passed by the learned Single Judge is concerned, in paragraph (7) of the impugned order, learned Single Judge has recorded that its contractual rights vis-a-vis VML ought not to be allowed to be compromised in the least by any order this Court makes. As long as ONGC's rights vis-a-vis VML are safeguarded, ONGC is not concerned with this dispute and will of course be bound by orders of this Court.

109. Learned Single Judge in the impugned order has directed the ONGC to deposit the said amount out of the amounts, if any, due from it to VML by 11th December 2020 under the PRP-VI Contract between ONGC and VML. If VML fails to make the deposit by 4th December 2020 without prejudice to the rights of the ONGC vis-a-vis VML and the

making of that deposit by ONGC and a consequent reduction in the payment or payments by ONGC to VML will not, by virtue of compliance of this order by ONGC, be claimed by VML in any forum or any proceeding to be breach of the PRP-VI Contract.

110. Learned Single Judge made it clear that the ONGC is required to make the said deposit only if there were amounts due from it to VML after the date of the said order under the PRP-VI Contract between ONGC and VML. Consequently, to ensure compliance with the said order, ONGC was directed to withhold the sum of US$ 2,403,073 in whole or in parts/tranches until 1st December, 2020 to be able to effect payment into Court under that order. Learned Single Judge made it clear that if no amount was due from ONGC to VML between the date of the said order and 11th December, 2020 under the PRP-VI Contract between ONGC and VML, ONGC will file an affidavit not later than by 11th December, 2020 confirming this position.

111. The ONGC has filed an affidavit before the Division Bench in this proceeding notarized on 1st January, 2021. In the said affidavit, it is stated that the VML has raised an invoices in the month of October 2020 and November 2020 under the PRP-VI Contract and has not issued any invoices raised for the milestone work done in the month of December 2020 so far. According to the said affidavit, an amount certified and payable by the ONGC for the invoices for October 2020 and November 2020 are US $ 4,029628.62 and US $ 153,480303.27. It is thus clear that ONGC does not dispute that certain amounts are due and payable by the ONGC to VML. By a separate order passed by this Court

on 13th January, 2021, this Court has clarified the order dated 8th December, 2020 passed by the Division Bench of this Court in this appeal that the ONGC is not required to withheld the entire amount referred in the said affidavit notarized on 1st January, 2021 and directed to withheld 2.4 million dollars only in compliance with the order passed by the learned Single Judge subject to the outcome of this Appeal.

112. Insofar as submission of Mr.Cama, learned senior counsel for the ONGC regarding the order directing the ONGC to deposit the said sum as demanded by the KSS against VML under invoices for the month of may, 2020 is concerned, learned senior counsel made a suggestion before this court that the said amount to the tune of US $ 2.4 million dollars directed to be deposited by the learned Single Judge would be retained by the ONGC till arbitral award is made and would not part with the said amount to the VML. In our view under section 9(i)(ii)(b), the court is empowered to pass interim measures to secure amount in dispute in arbitration which may be in the form of the bank guarantee or deposit of the money in Court. The said power of the court under section 9(i)(ii)(b) can be exercised not only in the hands of the parties to the arbitration agreement but also in the hands of the third party who has to admittedly pay any amount to the party to the arbitration agreement by directing the said third party to deposit the amount on behalf of the party to arbitration agreement in Court or by way of an injunction against such third party not to part with that amount in favour of the party to the arbitration agreement. ONGC has not raised any dispute that the said amount was not payable to VML.

113. The Court while passing such order against third party does not adjudicate the dispute between the third party and the party to the arbitration agreement but is empowered to pass such order only to secure the claim of the parties to the arbitration agreement. There is thus no merit in the submission of Mr.Cama, learned senior counsel for the ONGC that no such order could be passed by the learned Single Judge directing the ONGC to deposit the amount due and payable by the ONGC to VML under the agreement entered into between those two parties. The learned Single Judge has made it clear in the impugned order that the ONGC will deposit the said amount without prejudice to the rights of the ONGC vis-a-vis VML and the making of that deposit by ONGC and a consequent reduction in the payment or payments by ONGC to VML will not, by virtue of compliance of that order by ONGC, be claimed by VML in any forum or any proceeding to be breach of the PRP-VI Contract. ONGC in the affidavit in reply in these proceedings has admitted that a large sum of amount is due and payable by the ONGC to the VML under PRP-VI Contract between them.

114. Insofar as judgment of Madras High Court in case of ***Kris Heavy Engineering*** (supra) relied upon by the learned senior counsel for the ONGC is concerned, it is held by the Madras High Court that the reading of Order 21 Rules 46A, 46B and 46C of the Code of Civil Procedure shows that the words used is ‘judgment debtor’ and not a party to the litigation. The provisions for invoking the relief against garnishee therefore can only be after passing of the decree and not during the pendency of the proceedings. The security pending proceedings can be ordered under the provisions of Order 38 Rule 5 of the Code of Civil

Procedure. In our view, the said judgment of Madras High Court would not assist the case of the ONGC.

115. The reliefs sought by the KSS against ONGC was not under Order 21 Rules 46A, 46B and 46C of the Code of Civil Procedure but was under section 9 of the Arbitration Act. Section 9 of the Arbitration Act can be invoked by a party before or during the arbitral proceedings or at any time after making the arbitral award but before it is enforced in accordance with section 36 by making an application before the Court or the reliefs setout in the said provisions which includes the relief of securing amount in dispute in the arbitration. There is no substance in the submission of the learned senior counsel for the ONGC that the reliefs sought by the KSS against the ONGC were under Order 21 Rules 46A, 46B and 46C which could be invoked only after final decree is passed. The remedy of seeking interim measures under section 9 is not only after making of the arbitral award but before it is enforced in accordance with section 36 but is available to a party even before or during the arbitral proceedings.

116. The garnishee proceedings under Order 21 Rules 46A, 46B and 46C after passing of the final decree are different then the proceedings under section 9 for interim measures. However the stage of seeking interim measures after making of the arbitral award in this case has not arisen. The KSS had applied for interim measures during the arbitral proceedings which are already commenced by virtue of the KSS having issued notice of appointment of the arbitrator.

117. This Court has repeatedly held in *catena* of decisions that the Court has discretion while exercising the power under section 9 which is to mould the relief in appropriate cases to secure the ends of justice and to preserve the sensitivity of the arbitral process. The Court has to pass appropriate order by passing equitable order so as to promote the efficacy of the arbitration. The Court when decides the petition under section 9 of the Arbitration Act, must have due regard to the underline purpose of conferment of the power under the Court which is to promote the arbitration in the form of dispute resolution. If the relief as granted by the learned Single Judge would not have been granted in case of KSS, the KSS if succeeding in the arbitral proceedings, would not be able to fetch the fruits of the arbitral award which may be rendered in its favour.

118. Insofar as the submission of Mr.Cama, learned senior counsel for the ONGC that his client should not be asked to deposit the amount in Court and be permitted to retain the said amount under invoices for the month of May 2020 is concerned, in our *prima facie* view, since VML has wrongfully withheld the admitted invoices for the month of May 2020 by raising false and untenable contentions, we are not inclined to accept the suggestions made by the learned senior counsel for the ONGC. The ONGC has admitted that in the month of May 2020, the work was carried out by KSS and had submitted the invoice with certificate of ONGC and did not dispute that the ONGC has already released the payment in favour of VML for the said work. The ONGC in this case has already admitted that a large sum of payment was payable by the ONGC to VML for the subsequent work done. The ONGC is not a total outsider for the work awarded to KSS. In the Letter of Award issued

by VML in favour of KSS thereby awarding sub-contract to KSS and more particularly clauses 6.1.2 (A)(C) refers to the completion certificate to be signed by the ONGC for the purpose of issuing invoices and the obligation on the part of the VML to release the payment within seven days from the date of receipt of the payment from VML to ONGC. It is not in dispute that the ONGC has submitted such completion certificate which were submitted along with invoices submitted by the KSS upon VML. In our view, considering the conduct of VML in illegally withholding the payment of undisputed invoice after receiving payment from ONGC, if this Court denies the protective order to KSS, it would result in justice to KSS. If VML or ONGC does not deposit the crystallized amount, KSS would not be able to apply for withdrawal of the said undisputed amount.

119. During the course of argument, VML agreed with the suggestion of ONGC that amount under the invoices of May 2020 be retained with ONGC and not to be deposited in this Court. On one hand, ONGC contended that deposit of the amount payable by ONGC to VML may happen the work awarded by ONGC to VML and on the other hand, contends that amount equivalent to May invoices would be retained with it from the amount payable to VML and shall not be ordered to be deposited in Court. In our view, this submission of the learned senior counsel for ONGC is inconsistent and self destructing. By this order, independent rights of ONGC against VML are not taken away.

120. In our view no case is made out by VML or ONGC to

interfere with the impugned order passed by the learned Single Judge under section 9 of the Arbitration Act.

121. We, therefore, pass the following Order :-

(a) Time to comply with the order passed by the learned Single Judge to Valentine Maritime Ltd. is extended till 15th February, 2021. It is made clear that if the Valentine Maritime Ltd. does not deposit the said amount of US $ 2,403,073 or the rupee equivalent at the then prevailing exchange rate, i.e. on the day of deposit i.e. the value of the invoices dated 2nd June, 2020 within the time prescribed in this order, the ONGC shall deposit the sum of US $ 2,403,073 or the rupee equivalent at the prevailing exchange rate, i.e. on the day of deposit on or before 31st March, 2021 in this Court without fail.

(b) It is made clear that all the observations made by the learned Single Judge in the impugned order and made by this Court against VML are *prima facie* and are made only for the passing the impugned order passed by the learned Single Judge and by this Court in this appeal respectively.

(c) Commercial Appeal (L) No.7013 of 2020 filed by the Valentine Maritime Ltd. against Kreuz Subsea Pte Limited and Oil and Natural Gas Corporation and Commercial Appeal (L) No.8386 of 2020 filed by the Oil and Natural Gas Corporation against Kreuz Subsea Pte Limited and Valentine Maritime Ltd. are dismissed. All pending Interim Applications are also dismissed.

(d) There shall be no order as to costs.

***V.G. BISHT, J.*** ***R.D. DHANUKA, J.***