

IN THE COURT OF Ms. NIRJA BHATIA
DISTRICT JUDGE (COMM-07), DIGITAL
SOUTH-EAST DISTRICT, SAKET COURT, NEW DELHI

CS (Comm) 46/2024

Shilpa Construction Vs. Telecommunication Consultants India Ltd.

17.02.2026

ORDER

1. This order shall decide the application filed under **Section 9 of Arbitration & Conciliation Act** (hereinafter to be referred as *the Act*).

2. Petitioner M/s Shilpa Construction through its proprietor has instituted the petition. The petitioner is having its registered office at D-59, Mahesh Marg, Babu Nagar, Jaipur.

3. M/s Telecommunication Consultants India Limited (TCIL) Through Chief Manager/ Director at TCIL Bhawan, Greater Kailash, New Delhi, has been impleaded as respondent.

4. Petitioner is aggrieved by retention of Performance Bank Guarantee (PBG) amounting to Rs. **42.50 lacs** by respondent. The petition is filed to seek a direction for its release and/ or in alternative to restrain the respondent to bar them from seeking any further extension or encashment of bank guarantee.

5. Petitioner claims that respondent (TCIL) was awarded a work contract dated **10.06.2013** for execution of work of IHSDP projects from Rajasthan Urban Infrastructure Finance and Development Corporation Limited (RUIFDCL). The project was situated at Rawat Bhata site under Rawat Bhata Municipality. As per the work awarded through letter dated **10.06.2013**, a relocation of 393 houses with staircase was projected. A 'tripartite' agreement dated **12.07.2013** was executed between the Municipality Rawat

Bhata, RUIFDCL and TCIL. The tender document No. TCIL/127/INRJCT 0022/RAWAT BHATA/2013 dated **04.07.2013** was issued for construction of building work at Rawat Bhata under IHSDP scheme. The successful bidder was to pay an amount of 5% of contract value as performance guarantee at the time of signing the agreement and another 5% of the contract value was to be deducted from running bills. The project completion was stipulated under eleven months. Petitioner as interested bidder applied in the process as was found qualified and eligible in financial bid. The tender was opened in petitioner's favour and award dated **09.12.2013** in petitioner's favour was issued. The contract value as per award dated **09.12.2013** was kept at Rs. **12,47,97,863/-**. The petitioner was to deposit 5% against PBG within 15 days. Petitioner claims that despite depositing the security deposit and showing readiness to commence the work, for which purpose petitioner had arranged required resources, could not be provided with site by respondent TCIL on which the work was to be done. Under constrain, petitioner wrote a letter dated **25.01.2014** to respondent TCIL to finalize the site and inform petitioner about the probable date on which petitioner can commence the work.

6. Petitioner impugns the act of respondent in not entering in an agreement separately with petitioner which the respondent is claimed obligated by letter dated **09.12.2013**. The agreement was entered finally on **11.06.2014**.

7. Petitioner finds fault with the attitude of the respondent and alleges that despite execution of agreement on **11.06.2014**, respondent's attitude towards its execution was *lackadaisical* as the timelines for payment were not being adhered nor the complete drawing, site and layout was provided to petitioner for completing

the work. Being aggrieved, petitioner wrote letter dated **03.11.2014**, however, during this period the manpower, machinery and equipment of petitioner remained idle.

8. Petitioner wrote another letter dated **03.05.2015** to respondent stating that till that date only 88 houses and one community center layout plan could be provided to petitioner, without there being clear directions regarding the execution of work on account of which work was delayed. On the said letter, petitioner claimed no heed was paid by respondent. Petitioner wrote further letters dated **23.06.2015**, **16.09.2015** and **16.11.2015**, repeating the same contentions, however, no progress could be achieved. Respondent issued a letter dated **23.12.2015** and informed the petitioner that for the remaining work no decision has been taken by RUIFDCL. Petitioner claims the said letter also did not disclose details. Petitioner alleges that respondent withheld the vital information on actual facts and position regarding the execution of work and stated to petitioner that the decision with respect to remaining work will be taken in a while. Petitioner learnt that ground reality was different and on certain inquiries made by petitioner itself, with respect to delay, it surfaced that RUIFDCL wrote a letter dated **02.02.2015** to respondent referring a letter dated **19.12.2014**, wherein the respondent was informed that the estimated cost of project has been reduced from Rs. **515.35 lacs** to Rs. **463.1 lacs** for 110 relocation houses, meaning thereby that a revised work order was issued to respondent TCIL. A revised work order was issued by Nagar Palika, Rawat Bhatta to RUIFDCL on **26.02.2015**, by which the estimated cost of work was reduced and the number of houses was reduced from **393** to only **110** houses. Subsequently, vide letter dated **15.04.2015**, issued by Nagar Palika

Rawat Bhata to TCIL, it was informed that since the beneficiaries were not interested in getting the possession of constructed houses, therefore, it had been decided that only **88** houses would be constructed. None of the aforementioned letters were addressed to petitioner. Petitioner learnt that in response to the above letters, respondent had written letter to RUIFDCL that as per revised work order, **65%** work amounting to Rs. **304.90** lacs had been completed and accordingly, the amount was requested to be released vide letter dated **03.11.2015**. On repeated letters of petitioner, respondent wrote a letter to Municipality, Rawat Bhata on **20.02.2016** and another letter dated **30.05.2016** to RUIFDCL for taking the possession of constructed houses and for release of the funds as the respondent felt that they were in cooperating with the same.

9. Petitioner claims that the work assigned had been completed long back, despite which the payments were not released. Petitioner claims grievances against retention of PBG and it not being refunded despite issuance of letter dated **12.08.2016**, **11.08.2017**, **10.04.2018** to the respondent.

10. Petitioner claims that the respondent on **25.05.2018** wrote another letter to Nagar Palika, Rawat Bhata stating that due to several issues such as shortage of funds, unavailability of beneficiary, encroachment etc., the number of houses originally to be constructed has been reduced drastically as against originally 393 houses to be constructed, only **88** houses have been structurally completed. The respondent requested Nagar Palika for release of the amounts and for taking the possession of the constructed houses. The respondent wrote another letter dated **23.06.2021** to petitioner admitting that the work was completed, however, claimed that the complete hand over of executed work has not been made.

Respondent alleged that the insurance company has denied petitioner any extension of project insurance policy as the work stands completed. Petitioner was asked to renew the insurance policy at his own expense as the work had not been handed over to the original client. Petitioner asserts that it was beyond its scope, however, a risk cover letter dated **07.07.2021** was issued by insurance company at petitioner's expense. Upon receipt of above, petitioner wrote a letter dated **07.08.2021** to the respondent for releasing the amount against the outstanding. Petitioner asserts that respondent has not paid any heed towards the grievances raised in the petitioner's representations for releasing its funds and bank guarantee, despite the contract period having been expired with which the defect liability period also expired long back.

11. Petitioner claims that in an illegal manner, respondent is continuously getting the bank guarantee and insurance policy extended against which the petitioner has to bear the charges unnecessarily. Petitioner claims it wrote a letter dated **15.03.2024** for extending bank guarantee for one more year, which was extended by petitioner for few months. However, again on **18.07.2024**, the respondent wrote a letter to petitioner to extend the bank guarantee again for next one year, which petitioner extended for three months. Petitioner asserts that respondent is not releasing the payment of petitioner and on the other hand, is demanding the bank guarantee extensions with renewal of insurance policies, for which petitioner is bearing the burden. Petitioner claims that a dispute has arisen, which can be resolved by arbitration.

12. Petitioner avers that non extension of performance bank guarantee after expiry of contract and completion of work does not amount to its breach and in given circumstances if PBG is not

extended, the non-applicant/ respondent has no right to encash it under the pretext of breach of main contract. Petitioner doubts the entitlement of respondent to invoke/ encash the bank guarantee and asserts irreparable damage/ irretrievable injury, special equities that would prick the conscience of the Court, and egregious fraud in invocation of performance bank guarantees as special equities, giving rise to peculiar facts and circumstances in the instant matter.

13. Petitioner asserts that in absence of any case/ breach/ condition of invocation being made out, forcing the petitioner to extend PBG endlessly and attempting to encash the bank guarantee on failure to extend it, tantamounts to an illegality and in complete violation to applicable law. Petitioner claims that in above circumstances, it was forced to serve a notice dated **21.07.2024** to respondent. As respondent did not pay heed to above, a legal notice dated **31.07.2024** for appointment of Arbitrator in terms of **clause 6** of **Article 15** was sent, which notice was served. Petitioner served another notice dated **10.08.2024** for appointment of arbitrator upon respondent under **Section 21 of the Act of 1996**. **Petitioner claims that the proceedings of arbitration has commenced. Petitioner claims that in order to get an immediate relief, petitioner is pressing the present petition.**

14. Respondent (TCIL) through AR Sh. Sunil Kumar (General Manager, Civil), responded to the assertions made in the petition. Respondent admitted extension of award of work favouring respondent vide order dated **10.06.2013**, for construction and relocation of **393** Houses under Integrated Housing and Slum Development Programme Scheme (IHSDPS) by Rajasthan Urban Infrastructure Finance and Development Corporation Limited (RUIFSCCL), pursuant to which tender document No.

TCIL/127/INRJCT0022/RAWATBHATA/2013 dated **04.07.2013** was issued and a tripartite agreement dated **12.07.2013** was executed between Municipality, Rawat Bhata; RIUFDCL and TCIL. The tender was awarded to petitioner as a consequence and the letter of award was issued on **09.12.2013**.

15. Respondent alleges that petitioner stood in default and despite the time frame for completion of construction and relocation being mentioned as **11 months** starting from **09.12.2013**, the work was not concluded.

16. Respondent disputes the amount of bank guarantee and states that as the contract was valued for Rs. **12,47,97,863/-**, petitioner deposited a sum of Rs. **62,40,000/-** as PBG with respondent as per the tender document dated **04.07.2013**. However, as subsequently, a revised work order letter bearing No. RUIFDCL/IHSDP/2014-15/8920 dated **02.02.2015** was issued by RUIFDCL, the valuation was reduced to Rs. **4,67,79,000/-** for 110 to PBG to Rs. **42,50,000/-**.

17. Respondent points to **clause 6** of letter RUIFDCL/IHSDP/2013-14/2285 issued by RUIFDCL to invite the petitioner's attention to the clause that the amounts can be refunded, by executing agencies after the approval is received from RUIFDCL. Respondent claimed itself as merely an executing agent of RUIFDCL and Municipality, Rawat Bhata, however, in addition, submits that respondent through letters dated **17.02.2017**, **25.05.2018** and **25.06.2021** itself has requested the Municipality of Rawat Bhata to take possession of 88 houses on "**as is where is**" basis and clear the dues of the project.

18. In addition, respondent points that PBG submitted in relation to project is part of contractual obligation which may only

released upon successful completion of project to the satisfaction of owner RUIFDCL and claims that the petitioner regretfully has failed to fulfill the direct requirements as stipulated by RUIFDCL and Rawat Bhata Municipality, despite numerous correspondences and communication to the petitioner through the respondent. Respondent's asserts that the project is not completed by the petitioner and handing over formality of project are in abeyance. In which circumstances, the reliefs are 'futile' and accordingly the petition is liable to be dismissed being not maintainable.

19. Respondent invites petitioner's attention to letter dated **25.05.2018** directed by respondent asking the petitioner to complete the pending work as conveyed in accompanying letter dated **08.05.2018** sent by Rawat Bhata Municipality for completion of project. Reliance on the said letter is made in the reply. Respondent reiterates that despite being provided with multiple opportunities to complete the project till the date of filing of petition, the plaintiff has failed to show project completion. A letter dated **31.08.2024** allegedly was sent as a measured last opportunity to petitioner wherein respondent directed the petitioner to carry out the requisite rectifications in the constructed structure of 88 houses as per the instruction issued by RUIFDCL and Municipal Corporation of Rawat Bhata through letter dated **30.12.2021** bearing No. 2021-22/4571 before handing over is made to the respondent. An additional time frame of 15 days was given to petitioner to do necessary changes, despite which petitioner miserably failed to deliver. Respondent relies on the above letter in reply.

20. Respondent draws petitioner's attention to email dated **02.09.2024** wherein petitioner was apprised of the letter dated **29.08.2024** received from Rawat Bhata Municipality directing to

complete the work of the project at the earliest in order. Petitioner was reminded for above, however, did not pay any heed to any of the direction or request made by the respondent. Respondent claims that it is also suffering loss on account of non-completion of project, which is at '*stand still*'.

21. Respondent claims that the requisite release of pending payments and approvals/ authorization for release of PBG to petitioner could only be made after the satisfaction of final corrections/ amendments is recorded by RUIFDCL and Municipality, Rawat Bhata, which directions have been issued to petitioner. Respondent re-asserts that PBG cannot be released until the project has been completed fully to the satisfaction of the owner of the project. Respondent challenged the petitioner for non-disclosure regarding the project incompleteness and states that no completion certificate has been issued by RUIFDCL and the site after completion of work is still not handed over by the petitioner to respondent or to RUIFDCL. Due to which lack, respondent is unable to release the PBG.

22. Respondent invokes the agency principle and relies on *Yewen Vs. Noakes in 1880* which test respondent asserts is relied in *Bharti Cellular Ltd Vs. Assistant CIT, (2024) SCC OnLine SC 198*. Respondent claims itself under the control of RUIFDCL and states that the exercise of control is illustrated vide letter dated **21.08.2024**. Submitting that responsibility for settling the outstanding dues rest with the principal i.e. RUIFDCL, respondent states that it shall disburse the funds as directed by RUIFDCL. Claiming that RUIFDCL is the real authority, which is binding upon the respondent, respondent cannot be imputed for withholding the PBG.

23. The respondent asserts that since the project is incomplete and handing over of the project is pending, the release of bank guarantee would cause irretrievable injury to respondent. Relying on *Zillion Infra Projects (P) Ltd. Vs. Fab-tech Works & Construction Pvt. Ltd., 2015 SCC OnLine Del 13163*, that invocation of bank guarantee cannot be restrained unless fraud, irretrievable injury, injustice or special equities is proved. Respondent claimed that no ground of above nature is raised by petitioner to seek an order of restraint under the present petition. On similar lines, reliance is placed *M/s Transtonelstroy Ltd. Vs. M/s Chennai Metro Rail Ltd. & Ors., (Civil Miscellan Petition 8772 of 2020)* and *Radhakrishnan Raghavan Nair Vs. M/s Consul Consolidated Pvt. Ltd. and ors, (2015) 3 Law Weekly 882*.

24. Repeating its assertion that RUIFDCL has not issued a completion certificate due to project incompleteness, respondent stressed that bank guarantee cannot be released to the petitioner. It claimed that the release sought under the present petition are subject matter of dispute which cannot be determined under the present petition and must be dismissed.

25. Ld. Counsels appearing from both sides have made their respective submissions. A brief note of the submissions made is taken below:

Petitioner's Written Submissions

26. Ld. Sh. Abhisar Bhanu appearing for petitioner challenged the acts of respondent claiming them arbitrary, illegal and inequitable. He alleged that the respondent is continuing to withhold the bank guarantee and is also threatening for its encashment. Petitioner avers that while the letter of award was

issued on **09.12.2013**, due to failure of respondent in not handing over the clear site; absence of layout and community center drawing; repeated downward revision of scope of work and administrative indecision and financial constraint, the project suffered delays. Petitioner though admits that it was required to be completed within 11 months from the date of agreement of **11.06.2014**.

27. Petitioner claims that the work was completed as is admittedly reflected from the letter of **25.06.2021** of respondent despite which the respondent has failed to release the final bills and clear outstanding dues. Respondent is withholding the PBG and compelling the petitioner to repeatedly extend the bank guarantee as well as insurance policy at petitioner's cost, even after the contractual period.

28. Petitioner stressed on the maintainability of the petition claiming that the disputes are live, arbitrable and substantial while the relief prayed in the application is claimed as protective in nature, intending to preserve the subject matter of the arbitration and prevent an irreparable harm to petitioner, pending adjudication.

29. Petitioner added legal submissions and claimed that the respondent admitted final completion and asserted that completion is documented date-wise by way of admissions of respondent. In furtherance, reliance on letters dated **20.09.2016**, **17.02.2017** and **25.06.2021** is placed. It is claimed that none of the above letters reserve respondent's right to treat the contract as incomplete. It is claimed that the respondent never raised in dispute plaintiff's entitlement to raise final bills. Petitioner claims on the contrary the tenure of correspondence '*unmistakably*' shows that the contract has entered its final billing and closure stage.

30. Respondent's withholding the PBG is challenged on the ground that bank guarantee is a security instrument '*co-terminus*' with performance of contractual obligation and since work stands completed, the '*substratum*' for continuation or invocation of PBG ceases to exist. Petitioner reiterates that as the completion is admitted by respondent, final bills are raised, no breach is alleged, no risk or loss is demonstrated and no bank liability is invoked. The retention of bank guarantee and threat of its encashment tantamounts to illegality.

31. Petitioner states the institution of present petition within time and claims that cause of action is continuing and reoccurring, due to unequivocal denial of petitioner's right for release of security and payments. Respondent's claim that the petitioner is not entitled to claim of relief against invocation of bank guarantee being outside the scope of law, is proposed to be met by petitioner who claims that there are exceptions to the autonomy of bank guarantees and specially where such acts are causing egregious injustice. The non-invocation of defect liability or damages is alleged as fatal to the respondent's claim. Petitioner claims balance of convenience and irreparable injury and invokes, in addition, the conduct of the respondent as a ground for relevant consideration. Reliance is made on *KSE Electricals Pvt. Ltd. Vs. Project Director, Bangladesh Rural Electrification Board and anr., 2021 SCC OnLine Cal 2986*; and *Gangotri Enterprises Limited Vs. Union of India and ors., (2016) 11 SCC 720*.

Respondent's Written Submissions

32. Respondent raised objection of petition being barred by limitation and alleged that it is vitiated by unexplained delay, which

respondent reckoned from the date of alleged last date of cause of action. Respondent claimed that the relief emanated originally in the year 2013, however, petitioner approached the Court only in the year 2024, after an inordinate lapse of **10 years**. Respondent alleged that had there been a genuine cause, petitioner ought to have approached the Court within prescribed period of three years from the expiry of initial claimed period. Respondent disputes the competence of reliefs prayed under Section 9 of the Act and asserts that relief being of final nature, its grant is impermissible in proceedings of **Section 9 of the Act**. Respondent challenged the petitioner's claim on the ground that Court in view of *Rattanindia Nasik Power Ltd. Vs. Bharat Heavy Electricals Ltd., 2016 SCC OnLine Del 4875*, could not exercise interference in bank guarantee matters. It is argued that the reliefs are vague and since the reliefs out of PBG is contingent upon contractual compliance, completion of work, rectification of defects etc., and as the petitioner has defaulted in compliance of **clause 4.5 of Section 2** of tender, petitioner remains liable against the PBG as its release is contractually impermissible.

33. Respondent submits the petitioner has failed to reflect existence of prima face case, balance of convenience and irreparable injury behind the relief in absence of which no cause is made out for its grant.

34. Before adverting further to discuss the merits of the submissions and record the reasons, at this stage, it is appropriate to take note of the provisions invoked under the petitioner.

“9. Interim measures, etc., by Court.—

1[(1)]A party may, before or during arbitral proceedings or at any time after the making of the

arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising 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;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

35. While taking note of the above provision, it is requisited to observe that the provision of **Section 9** are detailed at par with the intent of the expressions made in provisions under **Order XXXIX Rule 1 and 2**, applicable to reliefs of temporary ad interim injunctions under the Special Reliefs Act.

36. It is undisputed that remedy under **Section 9 of the Act** is placed upon the same platform and is governed by the same trinity principles of **(i) irreparable loss; (ii) balance of convenience; and (iii) prima facie case in favour of plaintiff as**

provided for decision under **Specific Relief Act** and under **Order XXXIX Rule 1 & 2 CPC**, the rigors of which must be shown existing. Reliance for above purpose is being made on *M/s Shin Satellite Public Company Limited Vs. M/s Jain Studios Limited, AIR OnLine 2008 Del 2*, wherein Hon'blde Delhi High Court held the following conditions for assessment of availability of jurisdiction in cases under **Section 9** also to be upon principle application to **Specific Relief Act**. The observations material are referenced below:

“34. It is no more res integra that the principles applicable to the exercise of the general power to grant interim relief, including specific injunctive relief, under Order XXXIX of Code of Civil Procedure and the Specific Relief Act would be applicable while exercising the powers under Section 9 of Arbitration & Conciliation Act, 1996.

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35. The Supreme Court in Adhunik Steels Limited (supra) had considered the scope of power of court to pass interim orders and had held that the well recognized principles applicable to the exercise of general power to grant interim relief including specific injunctive relief under Order XXXIX of Code of Civil Procedure and the Specific Relief Act would be applicable to exercise of power under Section 9 of Arbitration & Conciliation Act. The Apex Court had held that at the initial stage mere consideration of existence of arbitration clause is not justified as no special condition is contained in Section 9 of the Act and no special procedure is indicated. It was held that the grant of relief by way of injunction is, in general, governed by the Specific Relief Act and, therefore, the provisions of Specific Relief Act cannot be kept out of consideration. In para 11 at pages 132-133

of the judgment, the Apex Court had held as under:-

11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of “just and convenient” while speaking of passing any interim measure of protection.

The concluding words of the section, “and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it” also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

37. The assessment of the statements in the present petition hence are requisited to be made from the glance of the above

principles. While making the present plea, at the outset, petitioner prayed for a relief seeking an order for release of bank guarantee of petitioner, which, in essence, tantamounts to final relief. Though, in alternative, a direction against the respondent was asked against encashment of the PBG and also a restrain to defendant from taking any coercive action against the petitioner is prayed. Except the prayer for grant of an order for restrain, prohibiting the respondent from encashing the bank guarantee, the other two prayers do not prima facie show the substance for being observed as interim reliefs. In which context the observation in *Shin Satellite (supra)* are material and are noted below:

36.
Another Learned single Judge of this Court in Modi Rubber Limited v. Guardian International Corp, 141 (2007) DLT 822 had held that the proceedings under Section 9 are concerned only with preservation of property and to prevent violation of claimed rights of the parties so that no irreparable loss and damage inures to the parties till the arbitration results in a dispute redressal. It was also held that the issues which are to be decided in the substantive arbitration proceedings cannot be gone into in a petition under Section 9 of the Arbitration & Conciliation Act, 1996. In the said judgment relying on various other judgments, the principle, manner and limitation of exercise of discretion while appointing a receiver or an injunction has been culled out in paragraph 209, as also the effect of suppression of material facts and delay. The relevant paras 209 and 210 enumerating the principle for exercise of discretion are as under:-
“209. It is also necessary to examine the parameters within which the Court shall exercise

such power. The manner and limits of exercise of such discretion have fallen for consideration in several judicial pronouncements and the principles laid down can be usefully called out thus: (i) Even though Section 9 does not embody the ingredients of Order 38 Rule 5 of the Code of Civil Procedure, 1908 nor the conditions of the Order 38 Rule 5 can be read into it, however for the exercise of discretion thereunder, the Court can take guidance from the provisions of Order 39 as well as Order 38 of the Code of Civil Procedure, 1908 [Ref. 2004 (111) DLT 816 : 2004 (4) AD (Delhi) 618 : 2004 (75) DRJ 104, Rite Approach Group Ltd. v. Rosoboron Export].

(ii) The scope of Section 9 of the Arbitration and Conciliation Act, 1996 is in pari materia with the provisions of Order 39 of the Code of Civil Procedure, 1908. The power vested in the Court by virtue of Section 9 must be exercised in consonance with equity which tempers the grant of discretionary relief as the relief of interim injunction is wholly equitable in nature. [Ref. (1995) 5 SCC 545, Gujarat Bottling Co. Ltd. v. Coca Cola & Ors.; 2004 (115) DLT 219=2004 (8) AD (Delhi) 361, Reliance Infocomm Ltd. v. Bharat Sanchar Nigam Ltd.]

(iii) The intention of the defendant is a sine qua non for invoking Section 9 where the claim is to secure the amount in dispute in arbitration. The Court can take guidance from Order 38 Rule 5 of the CPC and Sections 18 and 41 of the Arbitration Act, 1940 for considering whether such a relief as has been prayed for in the petition under Section 9 deserves to be granted [Ref. AIR 1998 Delhi 397=1998 (3) RAJ, M/s. Global Co. v. M/s. National Fertilisers Ltd.; 2005 (117) DLT 183 : 2005 (2) AD (Delhi) 592, Mala Kumar Engineers Pvt. Ltd. (MKE) v. B. Seenaiiah & Co. (Projects) Ltd.]

(iv) Protection under Section 9 can be granted only when a prima facie case is made out and balance

of convenience and possibility of irreparable loss and injury to the petitioner is made out. Section 23 of the Specific Relief Act, 1963 provides that the provision of liquidated damages is not a bar to the specific performance of the contract. The general rule of equity is also that if a thing is agreed to be done, though there is a penalty attached thereto to secure its performance, yet the Court in its discretion enforces specific performance thereof. The jurisdiction of the Court is discretionary and must be exercised on such judicial principles when balance of convenience and possibility of irreparable loss and injury is shown to the plaintiff [Ref. 2005 (120) DLT 387, Geep Batteries (India) Pvt. Ltd. v. Gillette India Ltd.; 2005 (118) DLT 591 : 2005 (81) DRJ 233, Techno Construction v. Kunj Vihar Co- perative Group Housing Society].

(v) The discretionary power of the Court under Section 9 has to be exercised by the Court sparingly and cautiously, bearing in mind that the objective of the Court is to create an alternative dispute redressal mechanism and, consequently, the interference by the Court is not required at every stage [Ref. 2006 (128) DLT 694 DB, Sanrachna (India) Inc. v. AB Hotels Ltd.].

Whenever the powers of the Courts are invoked under Section 9 with the objective of supporting the arbitration, the Court must act with alacrity. However, this would not justify grant of interim orders and relief on the mere asking [Ref. 2000 (87) DLT 449 : 2000 (6) AD (Delhi) 509 : 2000 (55) DRJ 750, CREF Finance Ltd. v. Puri Construction Ltd.; 2006 (91) DRJ 83, Sea Transport Contractors Ltd. v. Indian Farmers Fertilizers Co- operative Ltd.].

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38. I now propose to test the requisites of the relief prayed for grant of ad interim order of prohibition against the respondent from encashing the bank guarantee under the the prevalent law.

At the cost of repetition, it is noted that while making the plea of above nature, petitioner was duty bound to show the existence of satisfaction to the trinity test, as detailed above. From the facts on record, petitioner admits an order of award of work vide letter dated **09.12.2013** from respondent. Petitioner affirms that consequent to the letter which initially stipulated the period of completion as **11 months**, no compliance in spirit could be made, though for non-compliance, the blame is attributed to respondent and its ancillaries (RUIFDCL and Municipality, Rawat Bhata). The petitioner as per the letters subsequently written affirmed the scope of the contract was reduced. It is claimed that vide letter dated **17.02.2017**, **25.05.2018** and **25.06.2021** petitioner offered the handing over of constructed 88 houses to the respondent. However, while reflecting on the above, petitioner sought refuge under the letters of respondent to show project completion. However, petitioner did not propose to place on record the subsequent letters dated **30.12.2021** and **22.06.2021** written by respondent which are relied upon by the respondent with the reply.

39. The letters are self-explanatory and the petitioner is reminded of the incompleteness of the project, against which the demand of release of bank guarantee is not accepted. In circumstances above, while petitioner despite being duty bound under **Order XI Rule 6 CPC** to disclose all facts and communication under domain, avoided to make disclosure of all facts, relevant for determination, which is contrary to the statutory intent. The failure of disclosure itself bars the petitioner from claiming an equitable relief.

40. Moreover, there is no material cited on record whereby respondent had threatened and/ or have made any communication to the bank behind petitioner's back for revocation of bank guarantee and/ or have initiated steps for its realization to respondent's credit. In absence of any such material, petitioner has not shown existence even of a prima facie case, least a likelihood of an irreparable loss.

41. It is noted that even before commencement of proceedings on the present petition, petitioner extended the bank guarantee lastly vide letter dated **23.07.2024** up till **28.09.2024**, whereafter the exact status of bank guarantee is not made known during the entire course of proceedings, spanning to years. Petitioner has made no disclosure as what transpired after the lapse of the tenure for which the letter of extension to the bank was made on the alleged instance of the respondent. As the status itself is not detailed, any prayer in petitioner's favour for maintaining any status quo as in intent is being asked for, is not shown possible.

42. Petitioner admitted that prior to initiating the process of filing the present petition under **Section 9** seeking recourse to interim measures, a notice under **Section 21 of the Act** was sent to the respondent. The copy of the notice is placed and in synopsis to the petition itself, it is stated that the arbitration proceedings since have commenced. The reference to the statement of petitioner in para below is specifically made:

“Therefore, the petitioner was compelled to serve a notice dated 21.07.2024 to the respondent, however, no heed was paid to it. Thereafter, petitioner again issued a legal notice dated

31.07.2024 to the respondent for appointment of Arbitrator in terms of Clause 6 of Article 15 of the agreement executed between the parties. It is submitted that again a notice was served by the petitioner for appointment of arbitrator on 10.08.2024. Hence in view of section 21 of the act of 1996, **the proceedings of arbitration has been commenced.**”

43. It is noted that while the fine print of synopsis discloses the existence of proceedings having been commenced, the petitioner who was duty bound to disclose the exact status of appointment of arbitral tribunal, fell completely silent during present proceedings which were filed on **25.09.2024** and have been continuing for almost two years in absence of exact disclosure of pendency of arbitral proceedings, which relief was amenable under **Section 11 of the Act**. Petitioner cannot take advantage of its maintaining silence and approach the Courts for grant of equitable relief.

44. While making a plea of above nature, petitioner should have been guided by provision of **Section 9(3)** deterring the invocation of such provisions before the Court in cases where the arbitral tribunal has already been constituted. The submissions of petitioner that the arbitration proceedings have commenced itself tantamounts to an admission that a dispute between the parties is presented for adjudication before an arbitral tribunal. In which wake, as per the provisions of **Section 9(3)**, the merits in seeking an action contrary to the above provisions are not shown.

45. Before proceedings further, it is imperative to note that the prayer made by the petitioner seeking release of PBG, at the

outset, would be read as a plea of mandatory injunction. Such reliefs are recognized under the domain of **Order XXXVIII Rule 5 CPC**. While seeking a plea of such nature, petitioner is burdened to reflect the existence of circumstances commanding such relief. The Courts cannot be compelled to secure at an *interim* stage a relief which a party could be held entitled to after the rigors of trial are made. The above also is noted in *Shin Satellite (supra)*.

46. The substance of the above discussions, also leads to note that prayer of petitioner for seeking an order of restrain against bank guarantee must satisfy existence of circumstances as laid by Hon'ble Courts above in *Zillion Infra (supra)* as well as *TRF Ltd. Vs. The Indure Pvt. Ltd. and anr., OMP(I) (Comm) 371/2021, DOD 16.11.2021*. Though there is some force in submission of petitioner regarding existence of exceptions in cases of egregious fraud etc., petitioner must be reminded that no plea of the nature disclosing circumstances alleging fraud etc. are raised. It is noted that in cases emanating from assertions of fraud, the principles of arbitration cannot be put to course as is the settled law.

47. In substance as such, the petitioner has failed to show much merits in the pleas and hence the petition is rejected. File be consigned to Record Room after completion of necessary formalities.

Announced in open Court
today on 17th February, 2026

(Nirja Bhatia)
District Judge
(Comm. Court) (Digital-07)
South-East, Saket Court, New Delhi