IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction
Commercial Division

Present:

The Hon'ble Justice Shekhar B. Saraf

AP 707 of 2022

Chemex Oil Private Limited

VS

Seastarr International Private Limited & Ors.

For the Petitioner	:	Mr. Krishnaraj Thaker, Adv. Mr. Rupak Ghosh, Adv. Mr. Varun Kothari, Adv. Mr. Rajesh Upadhyay, Adv. Mr. B. Gupta, Adv. Mr. A. Shaw, Adv.
For the Respondent No.1	:	Mr. Jishnu Chowdhury, Adv. Mr. Aritra Basu, Adv. Mr. Shayak Mitra, Adv. Mr. Abhijit Sarkar, Adv. Mr. Abhik Chitta Kundu, Adv.
For the Respondent No. 2	:	Mr. Avishek Guha, Adv. Ms. Akansha Chopra, Adv.

Last heard on: November 21, 2022

Judgment on: November 30, 2022

Shekhar B. Saraf, J.:

1. The petitioner in the instant application [being A.P. No. 707 of 2022] under Section 9 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as 'the Act'] is a company incorporated as per the provisions of the Companies Act, 1956, engaged in the business of manufacturing, supplying and marketing refined glycerine.

2. The respondent No.1 is a company incorporated under the laws of the Republic of Singapore and is engaged in the business of selling crude glycerine. The Respondent No.2 is a company incorporated under the provisions of the Companies Act, 1956.

3. The petitioner has filed this application praying for interim relief in the form of either an (i) interim injunction restraining Respondent No.2 from honouring a Letter of Credit in favour of respondent No.1 till the completion of the arbitral proceedings, or (ii) an order directing respondent No.2 to furnish and deposit with this Hon'ble Court an irrevocable bank guarantee in favour of the Petitioner for a sum of US$190,000 till the completion of the arbitral proceedings, or (iii) an order directing the Respondent No. 1 to maintain a balance of US$190,000 in its bank accounts till the completion of the arbitral proceedings between the petitioner and respondent no.1.

Relevant Facts

4. The petitioner entered into a sales contract dated 31 May, 2022 being No. SC-2122-553 [hereinafter referred to as 'the contract'] with the respondent no.1 for purchase of two hundred metric tons of crude glycerine at the rate of US$950 per metric ton, for a total price of US$190,000. The specifications agreed upon were as follows:

Term	Specifications
GLYCEROL	85% minimum
WATER	BALANCE
METHANOL	1% (one per cent) maximum
ASH	6% (six per cent) maximum
SALT	Formic Acid
MONG	4% (four per cent)

5. The payment was to be made by way of an irrevocable letter of credit [hereinafter referred to as 'L.C.'] opened by the petitioner in favour of the respondent no.1 under which payment would be made within ninety days from the date of issuance of a bill of lading for the shipment of the contracted quantity of glycerine. The petitioner had to send the

petitioner a draft L.C. to the respondent no.1 for confirmation, prior to the opening of such an L.C. The port of loading was to be any port in the United States of America and the port of discharge was to be Mundra, India.

6. An L.C. for a sum of US$190,000 being No.0006MLC00025123 was opened on June 28, 2022 by the petitioner in favour of the respondent no.1 with the respondent no.2 bank, Rasoi Court branch, 20, Sir Rajendra Nath Mukherjee Road, Kolkata 700 001, as the issuing bank and one DBS Bank Private Limited as the advising and negotiating bank. The L.C. was to be honoured within 90 days from the date of issuance of the bill of lading.

7. The L.C. was opened after a draft L.C. was sent to the respondent no.1 by an electronic mail dated June 17, 2022, which in turn was sent back by the respondent no.1 with alterations by an electronic mail sent on June 20, 2022. Clause 7 of the draft L.C., which required submission of a certificate of analysis of the shipped glycerine in triplicate, was accepted by the respondent no.1 and remained unedited in the mail sent on June 20, 2022.

8. Consequently, Clause 6 of the L.C. dated June 28, 2022 sent to respondent no.1 as an attachment to an electronic mail required

submission of a certificate of analysis of the shipped glycerine in triplicate by the respondent no.1.

9. Pursuant to the contract, the respondent no.1 shipped the said quantity of crude glycerine via Scan Global Logistics as carrier from Houston, Texas, United States on July 31, 2022. A bill of lading of the same date, being no.SIN31101259, was also issued.

10. On September 5, 2022 the petitioner was informed vide an email by an officer of the respondent no.1, who relied upon a report, that instead of 85% purity, the crude glycerine had been found to be of 81.10% purity. It was also informed that the said glycerine contained NaCl or Sodium Chloride as the salt instead of Formic Acid. Essentially, both were not as per the contractual specifications. The petitioner replied vide email dated September 5, 2022 expressing its inability to accept the glycerine. Despite the petitioner's attempts to stop and return the crude glycerine in transit, the forwarder continued with the same.

11. Although the respondent no.1 was aware of the non-conformity of the crude glycerine to the contract, the petitioner received intimation from the respondent no.2 in or about the second or first week of September, 2022 that the respondent no.1 had furnished the forms and documents for invocation of the L.C. on or about September 1, 2022. When respondent no.2 forwarded the documents to the petitioner, it was

found that the certificate of analysis presented for invocation was falsified and untrue. It stated that the crude glycerine had met the contractual specifications.

12. Upon non-inclination of respondent no.2 to listen to the petitioner's pleas about the falsified nature of the documents submitted by respondent no.1 and respondent no.2's inclination to invoke the said L.C., the petitioner approached this court praying for injunctive relief.

13. This court, vide order dated September 30, 2022, directed the respondent no.2 to not encash the L.C. for a period of eight weeks from date. Since then the ad-interim relief has been extended from time to time vide various orders. The respondent no.1 has objected to the extension of the said ad-interim relief.

14. It is undisputed that the arbitration clause makes the settlement of disputes to be done in a foreign seated arbitration.

Submissions

15. It is pertinent now to mention the arguments put forth by counsels of both the parties.

16. Mr. Krishnaraj Thakker, learned counsel appearing on behalf of the petitioner made the following arguments:

a) The law relating to the proviso to Section 2(2) of the Act stands calibrated as such that it allows for granting interim relief even in foreign seated arbitrations, unless specifically excluded. Reliance was placed on the Calcutta High Court's judgements in ***Medica LLC v. Balasore Alloys Limited [AP/267/2021, Order dated August 3, 2021]*** and ***KSE Electricals Private Limited v. The Project Director and Anr. [AP 230 of 2021, Order dated May 10, 2021].***

b) The counsel further relied on ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. ([2012] 9 SCC 552)*** and ***Mankatsu Impex Private Limited v. Airvisual Limited ([2020] 5 SCC 399)*** to connote a difference between (i) provisions relating to arbitration proceedings and (ii) provisions in aid of arbitration proceedings. Section 9 relates to the latter category, included in proviso to Section 2(2) of the Act, which applies to even foreign seated arbitration, unless specifically excluded. Furthermore, he submitted that in relation to provisions in aid of arbitration proceedings, the concept of 'seat' and 'venue' are used interchangeably.

17. Mr. Jishnu Chowdhury, learned counsel appearing on behalf of the respondent no.1 submitted that the Apex Court in a plethora of

judgements has held that in circumstances wherein the arbitration is foreign seated, the applicability of Part I is excluded in totality, by express or implied waiver. The judgements relied upon were ***Bharat Aluminium Company (supra), Imax Corporation v. E-City Entertainment (India) Private Limited ([2017] 5 SCC 331), Noy Vallesina Engineering Spa v. Jindal Drugs Limited and Others ([2020] 1 SCC 382), Eitzen Bulk A/S v. Ashapura Minechem Limited and Another ([2016] 11 SCC 508), Reliance Industries Limited and Another v. Union of India ([2014] 7 SCC 603) and Union of India v. Reliance Industries and Others ([2015] 10 SCC 213).***

Analysis

18. The Apex Court in ***Bhatia International v. Bulk Trading S.A. (supra)*** noted that Section 2(2) of the pre-2015 amendment Arbitration and Conciliation Act, 2015 (hereinafter referred to as 'the unamended Act') stated that Part I applies to arbitration in India. Amidst providing various reasons for rejecting the submissions in favour of the non-applicability of Part I to international commercial arbitration outside India, the Court observed that exclusion of Section 9 would leave a party remediless when the assets and/or properties are in India. The Court averred that unless that statute expressly states or by necessary inference leads to an ouster of jurisdiction, there is an assumption that

jurisdiction exists in courts. The Court expanded upon the same by stating no difference lies between international commercial arbitration seated within India or outside India. Ouster of jurisdiction has to be express with regards to either. The Court held that parties cannot consent to exclude application of Part I in domestic or international commercial arbitrations held in India. The Court inferred that by not specifically stating that Part I does not apply to international commercial arbitrations outside India, the legislature intended its applicability, unless the parties exclude it by agreement. The Court further held that Section 5 and 8 (of the unamended Act) provide that judicial authority should not intervene unless allowed by Part I. If exclusion of Part I was the legislative intent, the word 'court' would have been used. However, the Court clarified that by implied or explicit agreement of parties, some parts of Part I may be excluded. It concluded by holding that since the word 'only' was dropped in sub-section 2 of Section 2 (again, of the unamended Act) before 'apply where the place of arbitration is in India', in the adoption of the UNCITRAL Model to the Indian Act, Section 9 would apply in foreign seated arbitrations as well.

19. The Apex Court in ***Bharat Aluminium Company (supra)***, overruled ***Bhatia (supra)*** and placed an absolute embargo on the applicability of Part I of the Act to international commercial arbitrations seated outside

India. It was also dealing with the law relating to Section 2(2) of the unamended Act. Relevant portions are extracted below:

> *"**194.** In view of the above discussion, we are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the Uncitral Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in the Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.*
>
> ***195.** With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International [(2002) 4 SCC 105] and Venture Global Engg. [(2008) 4 SCC 190] In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of*

Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India."

20. The Law Commission in its 246th Report took note of the anomaly that could arise out of a complete exclusion of Part I of the Act and suggested changes to Section 2(2) of the Act. It would be pertinent now to discuss ***Medica LLC (supra)*** wherein my esteemed sister, Bhattacharya, J., has laid down a lucid exposition of the understanding of the law relating to the proviso to Section 2(2) of the Act, post the 2015 amendment. She has gone to great extents and exhaustively dealt with the materiality of the said proviso with respect to interim reliefs in foreign seated arbitrations and the effect of the amendment. At the outset, I must admit that I am ad idem with the ratio laid down therein. A few relevant paragraphs are extracted below:

"13. The caveat to the application of section 9 to international commercial arbitrations with a place outside India and an arbitral award made in such place is 'an agreement to the contrary'. This means that the contracting parties must evince and articulate an intention not to subject the arbitration agreement to the application of section 9 of the Act. The application of section 9 to an arbitration agreement and an award which is under Part II of the Act is a fallout of the Supreme Court decision in Bhatia which was prospectively

overruled in BALCO only to be reinstated by the recommendations of the Law Commission in August 2014 thereafter culminating in the insertion of the proviso to 2(2) with effect from 23rd October, 2015.

* * *

15. The argument that the deletion of the word 'express' in relation to 'agreement to the contrary', as recommended by the Law Commission to the proviso to 2(2) would indicate that an implied agreement is included in the proviso has to be seen through the same prism as the other sections of the Act which contemplate an agreement by the parties. In other words, dropping the word 'express' in the final cut means little; the structure of the proviso as it exists today is that there must be a clear, unequivocal and unambiguous articulation by the parties to exclude the application of section 9 from the arbitration which is to take place outside India. Simply put, there must be something more to an arbitration agreement governed by a foreign law and with a foreign seat; the agreement must indicate in clear and express terms that the parties intend to exclude the operation of section 9 from the purview of the said arbitration agreement (underlined for emphasis). Hence, an arbitration agreement.

16. The import of the proviso to section 2(2) can be better understood if each part thereof is placed in the larger framework of the Act. Sub-section (2) of 2 makes Part I of the Act applicable where the "place" of

arbitration is in India. The exception to this brought in by the proviso repeats the word "place of arbitration" in the proviso. The word "place" finds mention in Section 20 of the Act which gives free-reign to the parties to agree on the place where the arbitration shall be conducted and in Sections 28 and 31 of the Act which further roots the arbitration to a place and the laws of that place while Section 31 confers a place-identity to the arbitral award. The term "seat" on the other hand, despite being the more popular choice, does not find mention in respect of foreign arbitrations. The proposal of the Law Commission in its 246th Report to amend several sections of the Act to replace "place" with "seat" was not given effect to. The Supreme Court in BALCO referred to "place" as being equivalent to the juridical seat of arbitration which was referred to by the Supreme Court in Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovations Pvt. Ltd.; (2017) 7 SCC 678. In this decision, the Supreme Court referred to the inter-changeability of "place" and "seat" with reference to Section 2(2) of the Act. BGS SGS Soma JV v. NHPC Limited; (2020) 4 SCC 243 may also be referred to this context."

21. Mr. Thakker, counsel on behalf of the petitioner, vehemently placed a few paragraphs of ***Bharat Aluminium Company (supra)***, which are extracted below:

"122. *In Part I, Section 8 regulates the commencement of arbitration in India, Sections 3, 4, 5, 6, 10 to 26, 28 to 33 regulate the conduct of*

arbitration, Section 34 regulates the challenge to the award, Sections 35 and 36 regulate the recognition and enforcement of the award. Sections 1, 2, 7, 9, 27, 37, 38 to 43 are ancillary provisions that either support the arbitral process or are structurally necessary. Thus, it can be seen that Part I deals with all stages of the arbitrations which take place in India. In Part II, on the other hand, there are no provisions regulating the conduct of arbitration nor the challenge to the award. Section 45 only empowers the judicial authority to refer the parties to arbitration outside India in pending civil action. Sections 46 to 49 regulate the recognition and enforcement of the award. Sections 44, 50 to 52 are structurally necessary."

[Emphasis Added]

The intention of Mr. Thakker was to outline the difference between provisions relating to arbitration proceeding and provisions in aid of arbitration proceedings. Section 9 of the Act belongs to the latter category and has been legislatively mandated to apply to even foreign seated arbitrations. He further relied on ***Mankatsu Impex Private Limited (supra)*** for the same proposition, the relevant paragraph of which is cited below:

*'**26.** In this regard, we may usefully refer to the insertion of proviso to Section 2(2) of the Arbitration Act, 1996 by the Amendment Act, 2015. By the Amendment Act, 2015 (w.e.f. 23-10-2015), a proviso has been*

added to Section 2(2) of the Act as per which, certain provisions of Part I of the Act i.e. Section 9 — interim relief, Section 27 — court's assistance for evidence, Section 37(1)(a) — appeal against the orders and Section 37(3) have been made applicable to "international commercial arbitrations" even if the place of arbitration is outside India. Proviso to Section 2(2) of the Act reads as under:

*"**2. Definitions**.—(1) * * **

*(2) **Scope**.—This Part shall apply where the place of arbitration is in India:*

Provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.'

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

22. The Apex Court in ***Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovations Pvt. Ltd.; (2017) 7 SCC 678*** clarified that the term 'place'

means 'seat' in the proviso to Section 2(2) of the Act. The legislative history, having regard to the concerns displayed about non-availability of interim reliefs in foreign seated arbitration in the 246th Law Commission Report and the subsequent amendment to the proviso of the Act, suggests the same. Therefore, even if parties select the arbitration to be foreign seated, the intelligible comprehension cannot be that expressly or impliedly, merely by such selection, powers of Indian Courts under Section 9 of the Act are ousted.

23. The distilled stream of statutory interpretation and judicial pronouncements flow such that for ouster of powers of Indian Courts under Section 9 read with proviso to Section 2(2) of the Act, parties have to unequivocally agree to such deprivation. At the cost of repetition, Section 9 is amongst the provisions which act in aid of the arbitration proceedings and has been legislatively made applicable to international commercial arbitrations, even if foreign seated.

24. The Delhi High Court in ***Raffles Design International v. Educomp Professional Education (SCC Online Del 5521),*** while elaborating upon a similar line of thought, held:

> *"**58.** That, however, is the position de hors the proviso to Section 2(2). The proviso to Section 2(2), which came into effect on 23rd October, 2015, changes the goalpost. By operation of this proviso, Section 9 of the 1996 Act would also apply to international commercial arbitration,*

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

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

* * *

60. *With the introduction of this proviso, the fixation of Singapore as the "place" or the "seat" of arbitration would not, ipso facto, divest this Court of Section 9 jurisdiction. Such divestiture would occur only if there is any "agreement to the contrary".*

* * *

62. *There is a qualitative, an unmistakable, difference, between the jurisdiction exercised by a Court under Section 9, and the jurisdiction exercised by the Court under other provisions of the 1996 Act, such as Section 11, 34 and 36. Section 9 is available at the pre-arbitration stage, before any arbitral proceedings, and could be subject to supervision by any judicial forum, have commenced. The purpose in including, specifically, Section 9, in the proviso to Section 2(2), has to be appreciated in the backdrop of the recommendations of the 246th*

Law Commission, and the observations guiding the said recommendations. It is at this point that the difficulty, or impossibility, of the petitioner obtaining pre-arbitral interim relief from Singapore, becomes relevant. As has been correctly pointed out by Mr. Gautam Narayan, para 41 (i) of the recommendations of the Law Commission indicate, unmistakably, that the decision to exclude, generally from the ambit of Section 2(2), applications seeking prearbitral interim reliefs, for securing the assets constituting subject matter of the arbitration, was that, where the assets were located in India and there is a likelihood of dissipation thereof, the party, seeking a restraint there against, would "lack an efficacious remedy if the seat of the arbitration is abroad".

* * *

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

such a specific stipulation, the beneficial dispensation, contained in the proviso, cannot stand excluded."

[Emphasis Added]

25. I must now allude to the judgements cited by Mr. Chowdhury, counsel appearing on behalf of respondent no.1. The Apex Court in ***Noy Vallesina Engineering Spa (supra), Eitzen Bulk (supra), Imax Corporation (supra)*** and ***Union of India (supra)*** has dealt with general applicability of Part I and Section 34 of the Act. They are distinguishable as they do not adjudicate upon the applicability of interim relief in terms of the proviso to Section 2(2) of the Act. The Apex Court's decision in ***Reliance Industries (supra)*** is also distinguishable as it (i) was passed pre-amendment and (ii) deals with general applicability of Part I and Section 14's exclusion.

26. Upon a careful perusal of the judgements and statutory interpretations discussed above, the following principles emerge:

a) There is a stark difference between (i) provisions relating to arbitration proceedings and (ii) provisions in aid of arbitration proceedings, in relation to their applicability to foreign seated arbitrations.

b) Section 9 of the Act is a provision in aid of arbitration proceedings and has been legislatively mandated to apply to international commercial arbitrations, even if seated outside India.

c) In proviso to Section 2(2) of the Act, the terms 'seat' and 'venue' are interchangeable.

d) For exclusion of Section 9 of the Act, parties have to specifically agree to the same.

Conclusion

27. The arbitration in the present case is seated in Singapore. This position is undisputed. However, the records nowhere reflect an express exclusion of Section 9 of the Act. Therefore, this Court reserves the power to grant interim relief.

28. An officer of the respondent no.1 had admitted, by a report shared with the petitioner vide an email dated September 5, 2022, that the crude glycerine and salt used did not align with the contractual specifications. Prima facie, it is clear that the documents furnished to respondent no.1 in an attempt to invoke the L.C. are forged. If an injunction is not granted against invocation of the L.C., irreparable loss

would occur to the petitioner. The balance of convenience lies in favour of the petitioner. Therefore, the ad-interim relief granted in the form of a direction upon the respondent no.2 to not encash the L.C. till December 16, 2022 vide order dated 21 November, 2022, is extended for a further period of twelve weeks or until further orders, whichever is earlier.

29. Accordingly, affidavit-in-opposition is to be filed within a period of five weeks from the date of this order and affidavit-in-reply, if any, two weeks thereafter.

30. The respondent no.1 shall be at liberty to file a vacating application, if so advised.

31. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Shekhar B. Saraf, J.)