IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 28th May 2019
Pronounced on: 1st July 2019

\+ **O.M.P.(I) (COMM.) 96/2019 & I.A. 4839/2019**

GVK AIRPORT HOLDINGS LIMITED ..... Petitioner

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Kartik Nayar, Advocate, Mr. Sarthak Malhotra and Mr. Rishab Kumar, Advocate.

versus

BID SERVICES DIVISION (MAURITIUS) LIMITED & ORS. ..... Respondents

Through: Mr. Amit Sibal, Senior Advocate with Mr. Saurabh Kirpal, Ms. Roopali Singh, Mr. Arvind Ramesh, Mr. Aditya Chatterjee and Mr. Mugeet Drabu, Advocates for Respondent No. 1.
Mr. Sujoy Dattar, Advocate for Respondent No.2.
Mr. AbinavVasisht, Senior Advocate with Mr. Digvijay Rai and Ms. Priya Singh, Advocate for Respondent No. 3.

CORAM: JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

1. The present Petition under Section 9 of the Arbitration and Conciliation Act, 1996 (the "Arbitration Act") has been filed, *inter alia* seeking grant of interim/ ad interim relief of temporary injunction against Respondent no. 1 from offering or selling its shareholding in Mumbai International Airport Limited ("**MIAL"**) to any person other than the Petitioner.

INTRODUCTION

2. The Petitioner and Respondents No. 1 to 3 (Respondent No. 1 = Bid Services Division (Mauritius) Ltd.; Respondent No. 2 = ACSA Global Ltd.; Respondent No. 3 = Airports Authority of India, hereinafter "AAI") (along with AAI Nominees)) are shareholders of MIAL in terms of Shareholders Agreement dated 4th April 2006 ("**SHA**").

3. Under Clause 3.7.1 of the SHA, the Petitioner has a right of first refusal ("**ROFR**") in respect of the shares of Respondent No. 1, if the same are desired to be sold by Respondent No. 1. The clauses which provide for Petitioner's right of first refusal and transfer restrictions are reproduced hereinbelow:

> "3**.6. Transfer restrictions**
> 3.6.1 Any shareholder may, subject to provisions of this Act and the OMDA, and in compliance with the applicable Law, transfer, either directly *or* indirectly, Ill or any of its/their Equity Shares to a Third Party Provided that:
> (a) The Shareholder is not in default of this Agreement;
> (b) The Third Party purchaser agrees and undertakes to be bound by the terms and conditions of this Agreement and executes a deed of adherence in the form and manner attached in Annexure 1 ("Deed of Adherence").
> (c) If the Shareholder is Private Participant, the consent of AAI (as required under the provisions of the OMDA) *is* obtained.
> (d) Such transfer does not result in the Foreign Entities Equity Cap and/or the Scheduled Airline Equity Cap being exceeded.
> (e) Considering the political sensitivities, GOI approves the buyer and its constitution.
> For abundant caution; it is hereby expressly clarified · that where Private Participant is a special purpose vehicle established primarily for the purposes of holding Equity Shares in the JVC

(such Private Participant being an "SPV PP"), a Transfer of any shareholding in such SPV PP shall constitute an indirect Transfer of Equity Shares by the SPY PP for the purposes of this Agreement and be subject to the restrictions on transfer of shares us set forth in this Agreement"

3.7 **Rights of First Refusal**

3.7.1 In addition to the requirements set out in Clause 3.6 and subject always to the lock-in provisions set out under Clause 2.5 of the OMDA, if at any time, a Private Participant desires to Transfer, whether directly or indirectly, any or all of its Equity Shares or voting interests therein owned by it (the "**Seller PP**"), then, it shall:

(i) make an offer for the sale of the PP Purchase Shares (as defined hereunder) to the other Private Participants (the "**Remaining Private Participants**") by a Notice mentioning therein:- (a) the total number of Equity Shares proposed to be offered for sale (the "**PP Purchase Shares**"), (b) the price at which the PP Purchase Shares are being offered for sale (the "**PP Offer Price**"; and (c) any other terms and conditions in connection therewith (the "**PP Offer Notice**"). A copy of the PP Offer Notice shall also be sent to AAI;

..

(iii) Transfer of all, but not less than all, of the PP Purchase Shares to the Remaining Private Participants shall take place at the same time and date at the registered office of the JVC within thirty (30) days from the date of the PP Offer Notice (the "**Remaining PP Purchase Period**");

(iv) If the Remaining Private Participants do not purchase all the PP Purchase Shares from the Seller PP within the Remaining PP Purchase Period then the Seller PP shall, within three (3) days of the expiry of the Remaining PP Purchase Period, make an offer by notice to AAI for the sale of the PP Purchase Shares at the PP Offer Price and on the same terms and conditions as contained in the PP Offer Notice (the "**Second PP Offer Notice**");"

4. To better understand the terminology used in the aforenoted clauses, it would be apt to refer to the provisions that define the expressions. The same read as under:-

> "Private Participants are members of a consortium, which had bid, were thereafter short listed and eventually selected by AAI (with the approval of the Government of India) as the joint venture partners for undertaking the Project.
> The Parties listed in Schedule I hereto (hereinafter individually referred to as "Private Participant" and collectively referred to as "**Private Participant**")
> (which expression shall, unless it be repugnant or contrary to the subject or context thereof, be deemed to mean and include their respective nominees, legal representatives and successors) of the second part.
> The Private Participants and AAI (along with the AAI Nominees) hereinafter collectively referred to as the "Shareholders" and individually as "Shareholder".
> "**OMDA**" means the Operation, Management and Development Agreement entered into, on or about the date hereof, between the AAI and the JVC;"

THE CONTROVERSY

5. In terms of the ROFR Clause, Respondent no. 1 offered its entire shareholding of 16,20,00,000 shares constituting 13.5% stake in the Company ("Shares") for sale to the Petitioner. The Petitioner contends that the offer was accepted and there is a binding agreement between the parties for the sale of shares. It is also *inter alia* contended that Respondent No. 1 is not ready and willing to fulfil its obligations and the shares are not in a deliverable state. Respondent No. 1 does not dispute that the Petitioner has ROFR in respect of the Shares, but contends that the right has expired/

lapsed since Petitioner has not completed the transaction within the period stipulated in the agreement and that the Shares now have to be offered to Respondent No. 3 in terms of Clause 3.7 of the SHA. It is also asserted that Petitioner does not have financial capacity to complete the transaction and is delaying the matter. Thus, the controversy revolves around the exercise of the Petitioner's **ROFR** under the Shareholders Agreement dated 4th April 2006.

FACTUAL BACKGROUND

6. In terms of the ROFR clause, Respondent No. 1 addressed a letter dated 26th January 2019 to Petitioner and Respondent No. 2 (with a copy to the Respondent No. 3) communicating that it is desirous of transferring the shares for an aggregate consideration of not less than INR 1248,75,00,000/- and offering to sell the same to the Petitioner and Respondent No. 2 on the above terms. The Petitioner thereafter addressed a letter dated 19th February 2019 to Respondent No. 1 (with copies to Respondent No. 2 and Respondent No. 3) stating that its letter dated 26th January 2019 is defective and cannot be considered as a valid offer notice under the SHA. Later, Petitioner addressed a letter dated 22nd February 2019 to Respondent No. 1 (with copies to Respondent No. 2 and Respondent No. 3) exercising its option to purchase Respondent No. 1's shares and mentioned that it still awaits all terms and conditions of the proposed transfer of shares by Respondent No. 1 as sought by the Petitioner vide its letter dated 19th February 2019. By the said letter, the Petitioner also invited Respondent No. 1 to discuss the modalities of closing the transaction at the earliest including but not limited to signing a share purchase agreement.

7. Respondent No. 1 then addressed a letter dated 4th March 2019 to the Petitioner stating that while it maintains that the letter dated 26th January 2019 was not defective, nevertheless a draft share purchase agreement ("**SPA**") setting out all the terms and conditions on which it is desirous of selling the Shares was enclosed. It was further stated in the letter that the timeline of 30 days would be considered from the date of this letter, i.e. 26th January 2019. Petitioner vide its letter dated 14th March 2019 then replied to another letter of Respondent No. 3 dated 7th March 2019 and asserted that since Petitioner has already exercised its option under the SHA to purchase Respondent No. 1's shares, the question of Respondent No. 1 making an offer to Respondent No. 3 for sale of the said shares under the SHA does not arise. Around the same time, the Petitioner also addressed a letter dated 16th March 2019 to the Respondent No. 1 enclosing Petitioner's proposed changes to the draft SPA, and called upon Respondent No. 1 to execute the SPA at a mutually agreed time and place. On 20th March 2019, Respondent No. 1 addressed a letter to the Petitioner stating that none of the changes proposed by the Petitioner to the draft share purchase agreement ("SPA") that was enclosed with the letter dated 4th March 2019 are acceptable to it. It was also reiterated that the sale and purchase of Respondent No. 1's shares has to be consummated within a period of 30 (thirty) days of the Respondent No. 1's letter dated 4th March 2019. Along with the said letter, Respondent No. 1 also enclosed a draft SPA, which included 4th April 2019 as the "Long Stop Date" for completion of the transaction. The Petitioner then addressed a letter dated 26th March 2019 to Respondent No. 1 enclosing a signed copy of the same SPA that was enclosed with Respondent No. 1's letter dated 4th

March 2019. The Petitioner addressed an email dated 26th March 2019 to Respondent No. 1 inter alia stating that the Petitioner has signed and sent the SPA to Respondent No. 1 as per Respondent No. 1's letter dated 4th March 2019. Post receipt of the signed SPA from Petitioner, Respondent No. 1 addressed a letter dated 27th March 2019 (i.e. very next day) to State Bank of India ("SBI") and SBICAP Trustee Company Limited. Respondent No. 1's lawyers addressed an email dated 27th March 2019 to Petitioner's lawyers inter alia stating that consummation of the sale/ purchase transaction on or before 4th April 2019 is one of the conditions on which Respondent No. 1 is desirous of selling its shares and that if the same is not acceptable to the Petitioner, then Respondent No. 1 is not in a position to execute the share purchase agreement. SBI (lender) by way of its letter dated 28th March 2019, replied to Respondent No. 1's letter dated 27th March 2019 inter alia stating that MIAL has to give 60 (sixty) days' prior notice to SBI for granting approval for the proposed transfer. Respondent No. 1 addressed a letter dated 29th March 2019 to MIAL inter alia stating that the Petitioner vide its letter dated 11th March 2019 has exercised its right of first refusal over the purchase of Shares and in connection therewith requested MIAL to seek approvals from its lenders. MIAL addressed a letter dated 30th March 2019 to Respondent No. 1 requesting for certain documents (i.e. a copy of the acceptance of the Petitioner along with term sheet for the stake purchase from Respondent No. 1). It was further stated that it will submit an application for approval for the transaction to SBI and other lenders on receipt of the said documents. MIAL addressed another letter dated 30th March 2019 to Respondent No. 1, informing them that MIAL will need its formal request together with the necessary supporting documents for

approvals for the transfer under OMDA. According to the Petitioner, Respondent No. 1 has neither responded to the two aforesaid letters from MIAL nor provided the supporting documents required to seek all the necessary approvals.

8. Petitioner then filed the present Petition on 1st April 2019 seeking interim reliefs against the Respondent No. 1. Petitioner has also invoked arbitration under Clause 9.4.3.1 of the SHA against the Respondent No. 1 by way of a notice dated 25th April 2019.

SUBMISSIONS OF PETITIONER [IN BRIEF]

9. The learned counsel for the Petitioner, Mr. Rajiv Nayar, broadly made the following submissions:

a) The scope of powers exercised by this Court under section 9 at the stage of grant of injunction as interim relief is limited and the Court is not required to go into the questions relating to the aspect of grant of final relief. Mr. Nayar relied upon sub-clause (3) of section 9 to state that since the Arbitral Tribunal is vested with powers to grant relief similar to those provided for under section 9, the scope of powers under section 9 should be construed to be restricted. The injunction prayed for by the Petitioner ought to be granted because the present interim stage only requires preservation of the subject matter of the arbitration (i.e. the Shares) till the arbitral tribunal is constituted. During the arbitration proceedings, the parties can invoke Section 17 and seek appropriate reliefs including modification or variation of the orders passed under Section 9 of the Act.

b) The ROFR clause in a contract is a negative covenant which can be enforced separately to restrict sale of shares to a third party. The Petitioner is not seeking specific performance of the affirmative agreement in the present Petition. The injunction prayed for is for enforcement of a negative agreement not to do a certain act - not to create third party rights or offer to sell the subject shares to any other party. Such a negative covenant is capable of being enforced under Section 42 of Specific Relief Act and the other provisions (section 16 or 41) of the Specific Relief Act are not attracted. Therefore, the alleged requirement of having available funds for establishing that Petitioner is "ready and willing" is not applicable in the present case.

c) Petitioner has a preferential right to purchase the Shares offered by Respondent No. 1 and it has in fact exercised this right. There is a concluded contract between the Petitioner and Respondent No. 1 for the transfer of the Shares in terms of the SHA and the execution of the SPA by Respondent No. 1 is only a formality that is required to be completed in order to apply for and obtain various approvals/ permissions including approval from statutory authorities and lenders which are needed to complete the transaction. Relying upon the correspondence between the parties, he argued that Respondent no. 1 has conceded to the fact that there is a concluded contract between the parties as evidenced from the letters written seeking the approval of AAI and the lenders.

d) The conduct of Respondent No. 1 belies its stand that a Long Stop Date of 4th April 2019 was a key/ material term of its offer. Further, in any event, the question of whether time was regarded by the parties to be of the essence can only be decided by the arbitral tribunal and at this stage, the conduct of the parties reflects that they never treated time to be of essence.On a true and proper construction of the SHA, the 30 (thirty) day time period under Clause 3.7.1(iii) of the SHA has to be computed by excluding the time taken to obtain all requisite approvals/ permissions for the transfer and for the seller to become capable of delivering the shares to the purchaser in a freely transferable form. This follows from the fact that any transfer of shares under the SHA to a Private Participant is subject to receipt of various approvals/permissions, which cannot be obtained within the period of 30 (thirty) days.

e) Respondent No. 1 has delayed completion of the transaction by not performing its reciprocal obligations and is still not in a position to deliver the shares to the Petitioner in a freely transferable form. Hence, the Respondent is not ready and willing to perform his part of the obligations under contract and whereas, the Petitioner has always been ready and willing to perform its part of the obligations.

f) The balance of convenience lies in favour of the Petitioner and irreparable injury would be caused to it if Respondent No. 1 is not restrained from offering its shares to a third party. If Respondent No. 1 is not restrained from offering and/or selling the Shares to any person other than the Petitioner, pending the conclusion of the arbitral proceedings and implementation of the

award therein, Respondent No. 1 will proceed to dispose of the Shares to a person other than the Petitioner. In such a situation, even if the arbitral tribunal accepts Petitioner's interpretation of what is the applicable time period under the SHA, it will be too late to restore Petitioner's rights since the person to whom Respondent No. 1 would have sold the Shares would not be bound by the arbitral award. It would create a situation where shares would never be available to the Petitioner as the same are held in a Private Company (MIAL) and are not available in the open market.

CASE OF THE RESPONDENT [IN BRIEF]

10. Learned Senior Counsel for the Respondent No. 1, Mr. Amit Sibal based his submissions on the following grounds:

a) The Petitioner cannot argue that it does not need to prove a *prima facie* case for obtaining a relief of specific performance before the arbitral tribunal. Petitioner has to necessarily establish a prima facie case by showing readiness and willingness to perform its obligations. These are requirements of law that cannot be contracted out of by the parties. Additionally, such requirements of law do not cease to apply merely because the Petitioner seeks relief by way of a petition under Section 9.

b) Section 41(e) of the Specific Relief Act, 1963 ("Specific Relief Act") provides that an injunction, as is being prayed for by the Petitioner before this Hon'ble Court, cannot be granted "*to prevent the breach of a contract the performance of which would not be specifically enforced*". Reliance was also placed on Section 16 of the Specific Relief Act (as amended by the

Specific Relief (Amendment) Act, 2018) which provides, under sub-section (b) that specific performance of a contract cannot be enforced in favor of a person who has become incapable of performing, or violates any essential term of the contract that remains to be performed on his part, or acts in fraud of the contract, or willfully acts at variance with or in subversion of the relation intended to be established by the contract. There is no negative covenant distinct from a positive covenant which is envisaged in Clause 3.7 of the SHA and for Section 42 to operate, a separate and distinct negative covenant must exist within the contractual framework and even if Clause 3.7 of the SHA were a negative covenant within the meaning of Section 42 Specific Relief Act, an injunction cannot be granted for the asking.

c) The Petitioner never accepted an essential term of the offer made by Respondent No. 1. In other words, there was no concluded contract with the Petitioner, it having rejected a key term of Respondent No. 1's offer.

d) By its very definition, a ROFR has to be a time-bound offer and can never be in perpetuity and in contracts for the sale of shares, time is inherently of the essence of the contract given that the value of the shares could widely fluctuate. Further, only the approval of Respondent No. 3 and the approval of lenders is required to be taken and approval of the Competition Commission of India (CCI) is not required. Pertinently, clause 3.6 is applicable to sale of shares to third parties and not to private participants and a separate 90 day timeline is provided in case of sale to third parties. Further, it is settled in law that the terms of a contract are to be interpreted as they are.

e) Respondent No. 1 has always been ready and willing to perform its part of the transaction whereas, Petitioner does not possess the financial means to complete the sale transaction and is hence, delaying the same.

f) Petitioner's case, even if taken at face value demonstrates that the balance of convenience does not lie in favour of the Petitioner. By the Petitioner's own case, a transfer to Respondent No. 3 would still require all the approvals required as with a transfer to the Petitioner (other than approval of Respondent No. 3 itself). Transfer to Respondent No. 3 would therefore, per Petitioner's admitted case, not happen instantaneously. Even if Respondent No. 3 were to decline the offer and a transfer had to be made to a third party, approval requirements would become even more onerous, and the consummation of the sale/purchase would not be instantaneous.

PROCEEDINGS IN THE PETITION

11. The petition first came up before this Court on 2nd April 2019. Notice was issued on 11th April 2019 and on the said date, Mr. Amit Sibal, learned counsel for Respondent No. 1, on instructions, made a statement to the effect that no adverse action shall be taken till the next date of hearing. Thereafter, the matter was heard on a day to day basis and the statement given to the Court was extended and continues to remain in operation. The possibility of settlement was explored by the parties on multiple dates, however it could not be materialized. On 8th May, 2019, this Court granted an opportunity to

the parties, to prove their *bona fides* in an attempt to facilitate settlement between the parties. The relevant portion of the said order reads as under:

> "2. …….On being enquired by the Court whether the Respondent No.l is still ready and willing to sell the shares in question to the Petitioner, Mr. Sibal on instructions states that without prejudice to the rights and contentions of the Respondent No.l and without conceding any of the contentions and objections raised in the reply, in order to show the bona fides. Respondent No.l is agreeable to transfer the shares in Mumbai International Airport Limited (MIAL) to the Petitioner, subject to the Petitioner itself or through MIAL furnishing the requisite documents that are necessary to obtain the requisite approvals and certain other conditions set out below. According to him, the documents, required for obtaining approvals are (a) request letter to Airports Authority of India (AAI), (b) request letter to the lenders acting through the State Bank of India as a lead bank and the security trustees, (c) term sheet.
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> 3. Mr. Sibal submits that besides the afore-noted documentation, it may also be necessary for the Court to issue directions including to MIAL and the lenders, in order to expedite the approval process. Mr. Sibal also submits that before the Court proceeds to issue such directions and Respondent no. 1 initiates the process of taking approvals, having regard to fact that the amount involved in the transaction is 1248,75,00,000/-, it is essential that the Petitioner should also exhibit its bona fide and show the readiness to complete the transaction. The Petitioner should thus be called upon to demonstrate to the satisfaction of the court and the Respondent no. 1 its financial means and capability including readily available funds to purchase the shares as of today. He assures that subject to the above, Respondent No.l expects that all the requisite approvals would be obtained within 20 days from the date of receipt of the necessary documentation from the Petitioner (itself or through MIAL) and the Respondent no. 1 will keep the shares in a deliverable state provided that such documentation is provided within two business days of the Petitioner showing readily available funds.

> 4. On the basis of the above statement, the court has enquired from Mr. Kartik Nayar, learned counsel for the Petitioner, whether the above proposal would be acceptable to the Petitioner, with the condition that on the approvals being obtained by Respondent No.l, Petitioner shall pay the consideration towards the purchase of the shares within 5 days from the date of the approval. Mr. Nayar seeks time to take instructions from his clients.
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> 5. Mr. Abhinav Vashist, learned senior counsel appearing on behalf of Respondent No.3 states that it is the stand of the AAI that the Petitioner has lost the right to avail the benefit of the ROFR Clause."

12. However, despite the above order, no compromise could be arrived at between the parties. Hence, the learned counsels for the parties have been heard at length.

ANALYSIS & FINDINGS

Scope of section 9 of the Act

13. Mr. Rajiv Nayar, learned senior counsel for the Petitioner has laid considerable emphasis on the scope of the present proceedings under Section 9 of the Act. He opened his arguments by saying that the Court should take into consideration the fact that Petitioner has already invoked the arbitration clause and appointed its nominee Arbitrator on 25th April 2019 and Respondent No. 1 in response thereto has also appointed his nominee. The two nominee Arbitrators are now in the process of appointing the Presiding Arbitrator as per the mandate of the Arbitration Clause. The arbitration proceedings are likely to commence shortly between the parties. He then contended that in view of the impending arbitration, the subject matter of

the arbitration agreement should be preserved, failing which the Petitioner would be left with no remedy in the event the Petitioner were to succeed in the Arbitration Proceedings. Mr. Nayar also referred to the amendment in Section 9 introduced by the amending Act of 2015 and urged that Section 9 (3) of the Act mandates that the Court shall not entertain an application under Sub Section (1) of Section 9, unless exceptional circumstances exist that may render the remedy provided under Section 17 inefficacious. He submitted that pursuant to the amendment introduced under Section 17 of the Act, the Arbitral Tribunal has now been bestowed with the power to grant interim measures and when the Arbitral Tribunal is so constituted, the Courts would ordinarily refrain from entertaining the petition under Sub-Section (1) of Section 9 of the Act. In essence, his submission is that the Tribunal is in a better position to gauge the scope of the arbitration proceedings. This visibility is not there before the Court while deciding a petition under Sub Section (1) of Section 9 of the Act, at a stage prior to the initiation of the arbitration proceedings. It was further argued that the questions relating to the interpretation of the terms and conditions of the Contract are to be decided in the arbitration proceedings and not by the Court in a petition under Section 9 of the Act and the Court should grant interim relief so that the arbitration proceedings are not rendered infructuous. It was also stressed that the shares in question are not freely available in the market and therefore in the instant case, Petitioner would not be in a position to estimate the damages or losses on account of the breach committed by the Respondent No. 1 in not transferring the shares to the Petitioner as mandated under Clause 3.7.1 of SHA. He also argued that at this stage, the requisite tests that are applicable to an injunction application

in a suit for Specific performance should not be applied and court should focus on preserving the subject matter of the arbitration. He also relied upon ***Adhunik Steels*** (supra) and several other decisions of this Court such as ***National Highways Authority of India v. Elsamex-Tws-Snc Joint Venture*** **150 (2008) DLT 215** to buttress the submission that the Court is empowered to pass an interim order in the nature of an interim measure for preservation of the subject matter of the arbitration till the disposal of the dispute before an Arbitral Tribunal.

14. There is an apparent fallacy in the submissions advanced by Mr. Nayar on this issue. The Court while exercising its power under Section 9 of the Act for grant of interim measures cannot decide the petition *de hors* the context of the arbitration proceedings. Sub Section (3) of section 9 of the Act read along with amended Section 17 of the Act cannot be construed to mean that the Court's jurisdiction under Sub Section (1) of Section 9 is reduced or curbed. From the reading of the amended Section 9 and/or Section 17 it cannot be interpreted that the Court while deciding the petition under Section 9 of the Act should apply a different standard, only because the arbitral tribunal is now empowered to pass orders of interim nature that are enforceable as an order of the Court. Section 9 of the Act clearly provides that while passing an order under the aforesaid provision, 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".* Sub Section (3) of Section 9 does not limit or impede or interfere with the power of the Court to pass the order, as is being suggested by the learned counsel for the Petitioner. The scope of Section 9 cannot be limited only to the extent of preservation of the

subject matter. The Court should not ignore the ultimate relief in the instant case [specific performance of contract] that a party intends to seek in the arbitration proceedings and confine the enquiry only on the aspect of preserving the subject matter till the adjudication of the dispute, just because there are several disputed contentions between the parties that required adjudication. Preservation of the "subject matter" may be necessary, however, that cannot be granted on the asking of a party. Furthermore, the Court while exercising its jurisdiction is also required to take guidance from the relevant provisions of CPC, 1908. It would be apt to refer to the judgment of this Court in ***Modi Rubber ltd v. Guardian International Corp.* 2007 SCC OnLine Del 502**, where the Court has succinctly and correctly defined the scope of the proceedings under Section 9 of the Act in the following words:-

> "287. 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 (4) AD (Delhi) 618 : 2004 (75) DRJ 104, Rite Approach Group Ltd. v. Rosoboron Export***].
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> (ii) The scope of Section 9 of the Arbitration and Conciliation Act, 1996 is in parimeteria 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; 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, Global Co. v. National Fertilisers Ltd.; 2005 (2) AD (Delhi) 592, Mala Kumar Engineers Pvt. Ltd. (MKE) v. B. Seenaiah& 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. lid. v. Gillette India Ltd.; 2005 (81) DRJ 233, Techno Construction v. Kunj Vihar Co-operative 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 (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***.].

(vi) The scope and object of Section 9 of the statute is to grant such relief by way of interlocutory injunction so as to mitigate the risk or injustice to the petitioner during the period before that uncertainty can be resolved. Its object is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages which would be recoverable in the action if the uncertainty were resolved in his favour at the trial [Ref. ***(1995) 5 SCC 545 : AIR 1995 SC 2372, Gujarat Bottling Co. v. Coca Cola & Co.; 2006 (4) AD (Delhi) 38, Country Development & Management Services Pvt. Ltd. v. Brookeside Resorts Pvt. Ltd***.]. In ***2006 133 DLT 153, Shaw v. Him Neel Brewaries Ltd***., learned Single Judge of this Court held that the interim orders are calculated to ensure that the assets of the party are not dissipated or frittered away and that such orders do not fall within the moratorium of Section 22.

(vii) The application seeking interim measures of protection under Section 9 of the Arbitration and Conciliation Act, 1996 pertaining to the preservation, interim custody or sale of equipment which is the subject matter of the agreement would be covered under Section 9(ii)(a) as also under Sections 9(ii)(c),

9(ii)(d) and 9(ii)(e) of the Act [Ref. ***2006 (3) AD (Delhi) 168 : 2006 (87) DRJ 225 : AIR 2006 Delhi 134, National Highways Authority of India (NHAI) v. China Coal Construction Group Co.***].

(viii) The Court has the power to pass an order under Section 9 during the pendency of the arbitration or even after the arbitral award but before the award is enforced in accordance with Section 36. Such order can be passed for preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement or securing the amount in the dispute and the like [Ref. ***2006 (128) DLT 694, Sanrachna (India) Inc. v. AB Hotels Ltd.; 2000 (87) DLT 449, CREF Finance Ltd. v. Puri Construction***].

(ix) The power under Section 9 to grant interim relief is available to the Court while under Section 17, such powers to make interim measures are made available to the Arbitral Tribunal. Even though there may be some degree of overlap between the two provisions, however, the powers under Section 9 are much wider inasmuch as they extend to the pre and post award period as well as with regard to the subject matter and the nature of the orders which the Court is empowered to pass. Therefore, pendency of an application under Section 17 before the Arbitral Tribunal does not denude the Court of its power to make an order for interim measures under Section 9 of the statute [Ref. ***2006 (3) AD (Delhi) 168 : 2006 (87) DRJ 225 : AIR 2006 Delhi 134, National Highways Authority of India (NHAI) v. China Coal Construction Group Co***.]

(x) It has been held that though Section 9 enables a party, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced under Section 36 of the Act, may apply to the Court for an interim order under Section 9, however, without a substantive move for reference or declaration on the petitioner's stand on the substantive relief by

an appropriate forum, Section 9 cannot be invoked for grant of interim relief [Ref. ***(2004) 3 SCC 155, Firm Ashok Tralers v. Gurmukh Das; (1999) 2 SCC 479 : AIR 1999 SC 565, Sudarshan Finance Ltd. v. NEPC; 1998 (1) AD (Delhi) 513 : 1998 (44) DRJ 399, National Building Construction Corporation Ltd. (NBCC) v. Ircon International Ltd***.]."

15. No doubt the question as to whether the agreement between the parties was validly concluded or whether it was validly terminated has to be determined only in the arbitration proceedings and cannot be determined in a petition under Section 9 of the statute [Ref. ***2002 (8) AD (Delhi) 617 : 2003 (66) DRJ 239, S. Raminder Singh v. NCT of Delhi***]." Nonetheless, the Court is of the considered opinion that a party applying under Section 9 of the Act, has to establish the well known attributes that are necessary for grant of the equitable relief of injunction. The general rules that govern the Court while considering the grant of interim injunction, are equally applicable while dealing with a petition under Section 9 of the Act. The threshold of *prima facie* case has to be rigidly applied and should be shown to exist in favour of the Petitioner. Here, the *prima facie* case has to be understood in some context and cannot be decided in vacuum without referring to the facts and circumstances of the case. The Petitioner may be correct in saying that the potential claim today has not been crystallized, however the relief of interim measure has to be examined and evaluated keeping in mind the ultimate relief that the Petitioner is intending to seek in the arbitration proceedings which unmistakably *inter alia* includes relief of specific performance of the obligations of Respondent No. 1 under the SHA.

16. The Petitioner thus cannot be relieved of its burden to establish pre-requisite obligation to show readiness and willingness to perform its obligations for obtaining the relief of specific performance. The present petition is one under Section 9 of the Act but nevertheless the rigors of grant of interim relief in a case relating to specific performance would since apply in the same degree. The Supreme Court in ***Adhunik Steels Ltd v. Orissa Manganese and Minerals (P) Ltd. (2007) 7 SCC 125*** has held as under:-

> "10. 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.

> 14. In ***Nepa Limited Vs. Manoj Kumar Agrawal*** [**AIR 1999 MP 57**], a learned judge of the Madhya Pradesh High Court has suggested that when moved under Section 9 of the Act for interim protection, the provisions of the Specific Relief Act cannot be made applicable since in taking interim measures under Section 9 of the Act, the court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration clause and the necessity of taking interim measures for issuing necessary directions or orders. When the grant of relief by way of injunction is, in general, governed by the Specific Relief Act, and Section 9 of the Act provides for an approach to the court for an interim injunction, we wonder how the relevant provisions of the Specific Relief Act can be kept out of consideration. For, the grant of that interim injunction has necessarily to be based on the principles governing its grant emanating out of the relevant provisions of the Specific Relief Act and the law bearing on the subject."

17. The aforesaid decision has also been consistently followed and upheld in several other decisions. I am unable to see as to how the judgment in ***Adhunik Steel Ltd.*** (supra) is of any assistance to the Petitioner. On the contrary, in the said judgment as noted above, the Supreme Court has held that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of interim directions that generally govern the Courts in this direction. The other judgments relied upon by the Petitioner in ***Firm Ashok Traders and Anr. v. Gurumukh Das Saluja & Ors, (2004) 3 SCC 155*** and of this Court in ***National Highways Authority*** (supra) and the judgment of the Supreme Court in ***N. Srinivasa v Kuttukaran Machine Tools Ltd.*** **(2009) 5 SCC 162**, lay down a well settled proposition in law that the interpretation of the terms

and conditions of the Contract is to be decided in the arbitration proceedings and not by the Court in the petition under Section 9 of the Act. Although the Apex Court in ***Firm Ashok Traders*** (supra) has held that the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated, however, the same cannot be interpreted to mean that such interim relief has to be granted as a matter of fact *de hors* the final relief sought. In the case of ***Ajay Singh v Kal Airways Private Limited*** [2018]209CompCas154(Delhi) following ***Films Rover International Ltd. v. Cannon Film Sales Ltd.*** (1986) 3 All ER 772, it has been observed that the principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial and a fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice, *keeping in view the final relief sought in the trial* if it should turn out to have been 'wrong' in the sense described.

18. The above observations lay down fundamental principles to be applied when it comes to granting injunctions and from a reading of the several judgments relied upon by the Petitioner and the Respondent, it clearly emerges that the volley of allegations leveled by both the parties concerning their conduct, construction and interpretation of the Contract are within the realm of the arbitration proceedings. I do not intend to decide any of several

disputed questions of fact relating to the conduct, viz. existence of a concluded contract; whether time is the essence of the Contract etc. But it does not mean that the Court is denuded of its power to delve into the facts of the case to ascertain whether the Petitioner fulfills the criteria for grant of ad interim injunction. To this limited extent the Court has to necessarily form a *prima facie* view. While undertaking this exercise, the corresponding rights of the Respondent would also be required to be examined. The principle of balance of convenience would also have to be applied while arriving at the just conclusion. The Petitioner's argument that at this stage the test of specific performance and the attending attributes for grant of interim order need not be applied is not appealing and I reject the same. I would like to make it clear that the opinion expressed later in the judgment, is only a *prima facie* view of the matter and the same would not influence the proceedings before the Arbitrator. The examination and evaluation of the facts has been done only to the extent it was necessary to determine as to whether the Petitioner is entitled to grant of an interim injunction or order.

Enforceability of ROFR as a negative covenant

19. Mr. Nayar has strenuously argued that ROFR under the SHA is in the nature of a negative covenant. He argued that Petitioner has exercised its ROFR under Clause 3.7 of the SHA and Respondent No. 1 is now bound to transfer the same to the Petitioner and Respondent No.1's understanding is based on an erroneous interpretation of the SHA, and at this stage since it has refused to comply with its obligations, Petitioner is entitled to enforce the negative covenant. Mr. Rajiv Nayar also argued that Section 42 of the Specific Relief Act, begins with the *non-obstante* clause "*notwithstanding*

anything contained in Clause (e) of Section 41" and the Court is not precluded to grant an injunction to perform the negative agreement even if there are circumstances that prevent the Court to compel specific performance of the affirmative agreement. In support of this contention, Mr. Nayar has relied upon several judgments including the decisions of the Supreme Court of Canada and several other foreign judgments in support of his contentions that a right of first refusal in essence is a negative covenant. The relevant portions of the said judgments read as under:-

(a) In ***Canadian Long Island Petroleums Ltd. et al. v. Irving Industries Ltd.,*** **[1975] 2 S.C.R. 715**, the Supreme Court of Canada held:

> *"In my opinion the right conferred by cl. 13 of the agreement in question here did not create property rights. Each party agreed that upon the occurrence of a certain event, which was within its own control, the other party would have a first right of purchase for a 30-day period. As mentioned previously, the clause is a part of an agreement between joint owners of a property, governing the operation and development of it. In essence it is a negative covenant whereby each party agrees not to substitute a third party as a joint owner with the other, without permitting the other party the opportunity, by meeting the proposed terms of sale, to acquire full ownership.*
>
> *As I have already indicated, the provisions of cl. 13 involve a negative covenant not to part with Sadim's interest in the land to any other person without giving a first right of refusal to the respondents. This was a restrictive covenant given to the respondents for the benefit of their undivided one-half interest in the land. In equity the covenant bound the appellant Long Island unless it could establish, as clearly on the evidence it could not, that it had obtained title without notice of the covenant."*

(b) In ***AstraZeneca UK Ltd v Albemarle International Corp & Anor.*,[2011] EWHC 1574 (Comm),** the Queen's Bench Division (Commercial Court) held

> "*24. However, I agree with Mr Odgers that a convenient starting point is the passage in Halsbury's Laws of England (4th edn), volume 9(1), Reissue, at paragraph 641:*
>
> *'641. First refusals*
> *Similar to the contract of option is the contract of "first refusal" or "pre-emption", whereby one person (A) enters into a contract with a second person (B) which provides that if A contemplates entering into a certain defined contract or type of contract with anyone, he will first offer to do so with B. That type of contract differs from the contract of option in that A has made no positive offer; his duty will usually be the purely negative one of not contracting with any third person (C) in the defined respect unless and until he has first offered to do so with B, though that offer may be conditional or assignable; but it is conceivable that his duty may merely be that, if he does so contract with C, he will make that contract subject to B's right of first refusal. Where A in breach of the first refusal contract sells to C, it may be that the first refusal becomes an option. There may be a contract of option and first refusal, whereby B is given an option and a right of first refusal; or where B is granted an option in return for his granting A a right of first refusal. Similarly, there may be a contract of double option where each grants the other an option on the happening of a certain event.*
>
> *A difficulty with contracts of first refusal is whether the parties have completed their negotiations and have reached an agreement; if not, there may be no binding contract, merely an agreement to negotiate. On the other hand, there may be a binding provisional or conditional agreement; or a binding collateral agreement not to negotiate with a third party (a "lock-out agreement"). Where the parties have not completed their negotiations, it seems that a binding "lockout" agreement cannot be created by implying a term that A will continue to*

negotiate with B in good faith; but it may be that an express agreement to use best endeavours to conclude a contract with B is binding, whereas there can be no contract on the basis of such an implied term."

(c) In ***Geoffrey John Dear v. Reginald Graham Reeves*** **[2001] EWCA Civ 277**, the Court of Appeal held:

"*38. I am in no doubt that the right of pre-emption conferred by the deed of 1 August 1988 is "property" within the definition in section 436 of the 1986 Act and that it is accordingly vested in the trustee. The judge was wrong in treating it as still vested in Mr Reeves.*

41. It is a "thing in action" in the sense that
i) there exists a negative obligation, which would not exist but for the Deed of pre-emption;
ii) it is binding on the grantor, who obliged not to sell the Property to anyone without first making an offer to the grantee;
iii) in the event of a decision of the grantor to sell the Property, the obligation is enforceable by legal action by the grantee or his assignee;
iv) in such an action the grantee could obtain an injunction to restrain sale of the Property to another person, until the grantor has first made an offer to the grantee and the grantee has failed or refused to take up the offer; and, if the grantor sells the Property to another person without first offering it to the grantee, he may be liable in damages to the grantee for breach of contract."

20. Per contra, Mr. Amit Sibal has sought to distinguish the said judgments on facts. He argued that Clause 3.7.1 of the SHA does not envisage any negative covenant whether express or implied. On the contrary, the ROFR casts upon the share holder, the obligation to offer its share to the other shareholders, which is a positive covenant. Petitioner's interpretation that the

ROFR is an implied negative covenant is erroneous. The positive obligation to offer the shares to existing shareholders before selling the shares to a third party, and the perceived negative covenant to not sell the shares to a third party during this offer period, are two sides of the same coin.

21. Before proceeding further, let us first examine the relevant provisions of the Specific Relief Act ("SRA") dealing with the concept of the negative covenant. The relevant Sections of the Act read as under:-

> "16. **Personal bars to relief**.—Specific performance of a contract cannot be enforced in favour of a person—
>
> [(a) who has obtained substituted performance of contract under section 20; or]
>
> (b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
>
> (c) [who fails to prove] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.
>
> Explanation.—For the purposes of clause (c),—
>
> (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;
>
> (ii) the plaintiff [must prove] performance of, or readiness and willingness to perform, the contract according to its true construction."

"41. **Injunction when refused**.—An injunction cannot be granted—

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

(c) to restrain any person from applying to any legislative body;

(d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;

(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

(f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(g) to prevent a continuing breach in which the plaintiff has acquiesced;

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;

(j) when the plaintiff has no personal interest in the matter."

"42. **Injunction to perform negative agreement**.—Notwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative

agreement shall not preclude it from granting an injunction to perform the negative agreement: Provided that the plaintiff has not failed to perform the contract so far as it is binding on him."

22. Section 16 (c) of SRA, specific performance of a contract cannot be enforced in favor of a person who fails to prove that he has performed or has always been "ready and willing" to perform the essential terms of the contract which are to be performed by him. This provision has to be read along with Section 41 (e) of SRA which enjoins the Court not to grant injunctions to prevent the breach of a contract, in case the performance whereof cannot be specifically enforced. Section 42 has been framed as a *non-obstante* clause, notwithstanding the embargo contained in Section 41 (e) of the Act. However, it does not mean that it is a mandate to the Court to grant an injunction for performance of a negative covenant in every case. The principle laid down by the Supreme Court in ***Gujarat Bottling Co. Ltd. V. Coca Cola*** **(1995) 5 SCC 545** enunciates the facets which must be borne in mind by the Court while granting injunction. Though in the facts and circumstances of the afore-noted case, an injunction was granted for enforcement of a negative covenant, it was observed that the Court must exercise its discretion and is not bound to grant an injunction wherever there exists a negative covenant. The Petitioner has to necessarily establish and base its case on the well known judicial principles relating to grant of interlocutory injunction i.e. (i). whether the Petitioner has made out a prima facie case; (ii). whether the balance of convenience is in favor of the Petitioner;(iii). whether the Petitioner would suffer irreparable loss or injury, if the prayer for interlocutory injunction were to be refused. The Supreme

Court in the said case has held as under:

> "42. In India section 42 of the Specific Relief Act, 1963 prescribes that notwithstanding anything contained in clause (e) of Section 41, where a contract comprises an affirmative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. This is subject to the proviso that the plaintiff has not failed to perform the contract so far as it is binding on him. The Court is, however, not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer. [See: ***Ethrman v. Bartholomew. (1927) W.N. 233; N.S.Golikari (supra) at p. 389***].
>
> 43. The grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising the discretion the court applies the following tests - (i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from

exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies. [see:Wander Ltd.&Anr. v,.Antox India P. Ltd., 1990 (suoo) Scc 727 at pp. 731-32]. In order to protect the Defendant while granting an interlocutory injunction in his favour the Court can require the plaintiff to furnish an undertaking so that the defendant can be adequately compensated if the uncertainty were resolved in his favour at the trial."

Whether there is a separate distinct negative covenant?

23. Now let's analyze the ROFR clause to see if it contains a negative covenant. A bare reading of Clause 3.7.1 of the SHA shows that this clause on its own does not restrict or prohibit Respondent No. 1 to sell its shares to a third party. It only gives the Petitioner a right of first refusal, prior to affecting a sale to a third party. The question that arises for consideration is whether such a right would constitute a negative covenant.

24. The situation in hand is quite similar to the one in ***Percept D'Mark India Pvt. v Zaheer Khan AIR 2006 SC 3426.*** In the said case, the Supreme Court has *inter alia* held as under:-

> "*"Clause 31(b) of the agreement merely provides for an obligation of respondent No. 1 to give an opportunity to the appellant to match the offer, if any, received by respondent No. 1 from the third party.* ***This clause does not per se restrict or prohibit respondent No. 1 to enter into any contract with a third party*** *but at best it provides the appellant with an opportunity to gain from the advertisements the appellant has made in the process of marketing and creation of the image of respondent No. 1 which was gradually built up by the appellant.* ***This clause does not restrict the right of respondent No. 1 to***

accept any offer for endorsement, promotion, advertising or other affiliation either on his own or through any party in the event of failure of the appellant to match the offer of the third party from whom respondent No. 1 would receive any offer, respondent No. 1 would be free to contract with such third party.*"*

(Emphasis supplied)

25. Mr. Amit Sibal is correct in saying that in the agreement there is no negative covenant distinct from a positive covenant as envisaged in section 42 of the Act. The said provision envisages the existence of a contract comprising of an affirmative agreement to do a certain act, coupled with a negative agreement, expressed or implied not to do a certain act. The covenant in the agreement not to sell or transfer the shares to a third party stems out of the requirement under the agreement to offer to the existing share holders prior to affecting the sale to a third party. The negative covenant does not exist independent of the positive covenant. Respondent No. 1 has the obligation to offer the shares to the Petitioner and this obligation correspondingly also restricts it from offering the shares to a third party during the ROFR period. Both the obligations go hand in hand and are not separable. I do not agree with the submission of the Petitioner that the negative obligation under the SHA is separate, distinct and severable from the positive obligation. If Petitioner's interpretation is allowed to be sustained, it would render the entire section meaningless. The enforcement of the so called negative covenant is necessarily and intrinsically linked to the fact that the Petitioner has a positive right to exercise its ROFR and is arising out of the positive obligation. There can be a connection between the

two, however the standard required for invocation of the negative covenant as provided under Section 42 is not fulfilled in the present case. This Court is not suggesting that the negative covenant has to be necessarily express. It can be implied as well, as stipulated in Section 42 of SRA. Nonetheless the contract must have an affirmative agreement coupled with an independent negative agreement. The ROFR clause cannot be construed as a negative agreement which can be performed by grant of an injunction. In ***Yogesh Radhakrishnan v. Media Networks & Distribution (India) Ltd. An Ors.*** **(2013) 135 DRJ 511** has held as under:-

> *"The negative covenant, enforcement whereof is provided for in section 42 of the Specific Relief Act has to be distinct from the Agreement which is found to be not enforceable. Section 42 of the Specific Relief Act provides for a situation where even though the agreement may be found to be specifically not enforceable but the defendant has separately agreed not to do a certain act and permits grant of an injunction restraining the defendant from doing that act. It cannot be interpreted as making the agreement which is non-enforceable, enforceable."*

26. In my considered opinion, the ROFR under the SHA is not in the nature of a negative covenant. It is at best a restriction that arises correspondent to the obligation on the Respondent No. 1 to offer the shares to the Petitioner in terms of the ROFR Clause. I have carefully examined the judgments relied upon by the Petitioner. The said judgments are distinguishable on facts and do not relate to specific performance or injunction in support of specific performance. For this Court, the views expressed by the Apex Court in ***Percept D' Mark*** (supra) and the other judgments referred above are more apt. Petitioner has also relied upon other judgments of this Court in support

of the contention relating to enforceability of the negative covenant being ***Vijaya Minerals Pvt. Ltd. v. Bikash Chandra Deb*** **1995 SCC OnLine Cal 181**;***Image Advertisingv. Anand Prakash*****176 (2011) DLT 97**;***Modi Rubber Ltd.v. Guardian International Corp*****. 2007 SCC OnLine Del 502**;***Indian Charge Chrome Ltd.v. Tata Iron and Steel Co. Ltd***., **1995 SCC OnLine Cal 28**; and ***Rajasthan Breweries Ltd.v. Stroh Brewery Co***.,**2000 (55) DRJ (DB)**.

27. It is also to be noted that the judgment in ***Vijaya Minerals Pvt. Ltd. V. Bikash Chandra Deb*** (supra), has been held to be not good law in another decision of same strength in ***SVF Entertainment Pvt. Ltd v Anupriyo Sen Gupta*** **(2018) 3 Cal LT 115**. All the aforenoted judgments are also distinguishable on facts, as the negative covenant involved in the said cases is distinct and stand alone. In ***Modi Rubber Ltd.*** (supra), the negative covenant on the basis whereof injunction was granted was a non-compete clause of the SHA. The Court, however need not detain itself by discussing and distinguishing each case, as there is no quarrel on the principles enunciated in the said decisions. The Courts have been granting injunctions on the basis of a negative covenant contained in a contract and there is no dispute on this. However, each case would turn on its own facts and the Courts would be required to critically analyze the Clause which has been done as discussed above and the result is against the Petitioner.

Whether the provisions of Specific Relief Act are not attracted when a party is seeking enforcement of a negative covenant?

28. As noted above, the considered opinion of this Court, there is no negative covenant and even for the sake of arguments, if it is assumed that there one, it does not mean that the Court while examining the facts of the case would not be required to look into the aspects for granting the equitable relief of injunction. The Court is not prevented from examining the Petitioner's financial means to conclude the transaction and whether it is ready and willing to perform its obligations in terms of Section 16 (e) of the SRA. This is more so because the ultimate relief of the Petitioner in the arbitration proceedings would be enforcement of Petitioner's preferential shares. It would be incumbent upon the Court to look into the aspects of whether the bar under Sections 16 and 41 (e) of the SRA are attracted or not. Petitioner has sought to delink the present case with the ultimate claim in the arbitration proceedings by contending that the present petition is only for maintaining status quo and preservation of the subject matter till the final adjudication between the parties. As already discussed above, I find this contention to be meritless.

29. Before parting with the discussion on the plea of negative covenant, it would also be relevant to note that Section 42 of the Act also contains a proviso which requires the Petitioner to perform its part of the obligation in order to seek the relief of injunction which is otherwise prohibited by virtue of Section 41 (e) of SRA. Thus, in case the Court were to come to a conclusion that the Petitioner has failed to perform the contract in so far as it is binding on it, then notwithstanding the fact that there is a negative covenant, the Court would still be entitled to decline the relief for injunction. Granting an injunction under Section 42 of the Specific Relief Act is not

mandatory merely because there is a negative covenant. The Court would exercise its discretion in granting the equitable relief of injunction, having regard to the elements of *prima facie* case, balance of convenience and irreparable injury.

Whether the Petitioner has established the ingredients for grant of injunction?

1. Prima facie case

A) WHETHER THERE IS A CONCLUDED CONTRACT? WHETHER THE LONG STOP DATE OF 30 DAYS IS A MANDATORY CLAUSE AND WHETHER TIME IS OF ESSENCE ? WHETHER THE RESPONDENT NO. 1 HAS WAIVED THE ENFORCEMENT THEREOF? IF YES, WHETHER THE 30 DAY TIME PERIOD IS TO BE CALCULATED FROM THE DATE ON WHICH APPROVALS ARE OBTAINED?

30. Mr. Nayar contended that there is a concluded contract between the Petitioner and Respondent No. 1 for the transfer of the shares in terms of the SHA and the execution of the SPA by Respondent No. 1 is only a formality that is required in order to apply for and obtain the various approvals/ permissions including from statutory authorities and lenders which are needed to complete the transaction. It was contended that the petitioner has exercised its option vide its letter dated 19th February 2019, even though the first PP Offer Notice did not mention the terms and conditions, and reconfirmed such exercise vide its letter dated 11th March 2019. Respondent No. 1 is bound and liable to abide by the terms of said concluded contract, which is in terms of the SHA and complete in all material aspects. In this regard, the Petitioner relied on the judgments of the Supreme Court in

Trimex International FZE Limited Dubai v. Vedanta Aluminium India (2010) 3 SCC 1 @ Para 49, 50, 58-60, 63, 64, Old World Hospitality Private Limited v. India Habitat Centre 1996 SCC Online Del 580 @ Para 64-67, 69-70, 73, 94-95

31. Mr. Nayar further argued that as per the Respondent No. 1's interpretation/ stand that the entire transaction had to be consummated within 30 (thirty) days from the date of the offer notice (though denied by the Petitioner), the period of 30 (thirty) days expired long time back on 25th February 2019. However, Respondent No. 1 vide its letter dated 4th March 2019 immediately allowed the Petitioner 30 (thirty) more days after making its purported offer dated 26th January 2019 and along with the said letter sent the SPA which was accepted and signed by the Petitioner. The above is further evident inter alia from Respondent No. 1's letter dated 25th April 2019 (which it wrote after filing its Reply to the Petition) vide which it wrote to the Company's lenders and inter alia stated that furnishing a term sheet is not required under the relevant agreements and once again requested the lenders to provide their consent. As such, Respondent No. 1's conduct also belies its alternative position that the 30 days period expired on 4th April 2019. Apart from the fact that Respondent No. 1 has delayed the process of applying for approvals even though it now continues to treat the agreement between the parties as subsisting despite the period of 30 days having been purportedly expired on 25th February 2019. Respondent No. 1's aforesaid position is also contrary to its conduct as well as the documents on record. For instance, it wrote to the lenders for the first time only on 27th March 2019 asking for the requisite approvals. Respondent No. 1's letters were

conspicuously silent about the fact that the period in which the sale transaction is to be consummated would expire on 4th April 2019. Thus, if Respondent No. 1 genuinely treated time as being of the essence, it ought to have treated Petitioner's right as having expired/ lapsed immediately after the expiry of the 30 days' period on 25th February 2019 (or alternatively on 4th April 2019).Reliance was placed on the following cases ***Keshavlal Lallubhai Patel v. LalbhaiTrikum Mills Ltd, AIR 1958 SC 512 ,S. Brahmanand v. K Muthugopal, (2005) 12 SCC 764*** to contend that it is settled law that under the Indian Contract Act, 1872 extension of time for performance of a contract may be inferred from the conduct of the parties. Thus, even if the time is regarded as of essence, Respondent No. 1, by its own conduct has acquiesced to the extension of the 30-day time period.

32. On the question of interpretation, it is the case of the Petitioner that on a true construction of terms of the SHA, the period of 30 (thirty) days as set out under Clause 3.7.1 (iii) of the SHA has to be computed by excluding the time taken to obtain all requisite approvals/permissions for the transfer and for the seller to become capable of delivering the shares to the purchaser in a freely transferable form. This follows from the fact that any transfer of shares under the SHA to a Private Participant is subject to receipt of various approvals/permissions, which cannot be obtained within the period of 30 (thirty) days. Even as per the timelines prescribed in the SPA sent by Respondent No. 1 on 4th March 2019, all requisite approvals/permissions cannot be obtained in a period of 30 days. For instance, as per Clause 3.1(e), the applications for permissions/approvals prescribed therein will have to be filed within 7 and 2 days (as prescribed therein); as per Clause 4.1, Closing

shall take place within 14 days from completion of the steps prescribed in Clause 3.1; as per Clause 4.2 and 5.5.10 of SHA, a minimum of 14 days notice shall have to be given for a Board Meeting to approve the transfer of Shares. As such, even as per Respondent No. 1's own draft SPA, the transaction cannot be consummated within 30 days. In any event, in terms of Facility Agreements read with Clause 3 of the draft SPA, the seller is required to give at least a 60 days' prior notice to lenders to seek their approval.

33. Further, the Company is required to give a 60 (sixty) days' prior written notice to its lenders under Clause 10.23.3 of the Facility Agreements. In terms of Clause 3.7.1(i) of the SHA, both the Remaining Private Participants have the preferential right to purchase the Seller's offered shares in proportion to their shareholding. If one of the Remaining Private Participants does not want to purchase the offered shares, then the other Remaining Private Participant has to purchase all the offered shares. In such a situation, such other Remaining Private Participant cannot possibly complete the purchase of offered shares within 30 (thirty) days since the other Remaining Private Participant has 30 (thirty) days to decide whether to purchase its proportion of the offered shares or not. Mr. Neeraj Kishan Kaul, learned senior counsel who initially appeared in the matter had also argued that the principle of "business efficacy" is normally invoked to read a term in the agreement or contract so as to achieve the result or the consequences intended by the parties. He further argued that in business transactions, the law desires to give business efficacy to the transaction, intended by the parties and not impose peril on the same. Reference was also made to

several judgments including ***Boothalinga Agencies v. V.T.C. Poriaswanmi Nadar, (1969) 1 SCR 65, Satya Jain (Dead) Through LRs &Ors v. Anis Ahmed Rushdie (Dead) Through Lrs, (2013) 8 SCC 131, Novartis Vaccines and Diagnostics Inc. v. Aventis Pharma Limited*** Decided on 18.12.2009 in Arbitration Petition No. 763 of 2009 and ***Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Another, (2018) 11 SCC 508.*** He also argued that Respondent No. 1's interpretation of 30 days is absurd and contrary to the SPA and SHA.

34. Per contra, Mr. Sibal submitted that a ROFR is always triggered by a desire to ultimately sell to a third party, with the offer to the ROFR-holder being a condition precedent to the sale to the third party. With regard to contracts for the sale of shares, time is inherently of the essence of the contract given that the value of the shares could widely fluctuate. If one were to assume that the ROFR was in fact perpetual, then both an underlying decrease in the value of the shares (causing a re-negotiation with the third party and a re-trigger of the ROFR) and an increase in the value of the shares (causing a loss in consideration received since the ROFR-holder would buy at lower than fair market value) will effectively turn value destructive to the seller. Therefore, this can never be the true or meaningful construction of any pre-emptive right, including a ROFR. In support of this submission, learned counsel placed reliance on the decisions in ***Hare v. Nicoll [1966] 2 Q.B. 130,*** *In* ***Re Schwabacher ((1908) 98 L.T. 127).***

35. Mr. Sibal further submitted that the interpretation given by the learned counsel for the Petitioner to the ROFR clause in 3.7.1 is incorrect. It was argued that the actual approvals required for the transaction to proceed are

not the same as contended by the Petitioner and clause 3.6 of the SHA is not applicable to a sale of shares to a private participant. Under Clause 3.7 of the SHA, the only approvals required for a transfer from Respondent No. 1 to the Petitioner are approvals from Respondent No. 3 (required under Clause 2.5 of the Operation Management & Development Agreement ("**OMDA**"), and consent from the security trustee (and accordingly, the lenders) under the Share Pledge Agreement. Approval from the Competition Commission of India ("**CCI**") is not required for a transfer of the PP Purchase Shares from Respondent No. 1 to the Petitioner, and accordingly, no prior notice needs to be provided to the CCI. Under Regulation 4 read with Item 2 of Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, an acquisition of shares is exempt from approval where an acquirer prior to the acquisition has 50% or more shares in the target and the transaction does not result in a transfer from joint to sole control, which is the case herein. Further, it was submitted that procuring approval prior to issuance of a PP Offer Notice to the other shareholders is not within the framework of the SHA and any averment to the contrary leads to a preposterous conclusion.

36. With respect to the interpretation of the ROFR clause and the 30-day timeline, it was argued that the interpretation sought to be given by the learned counsel for the Petitioner is flawed as the 30-day period set out in Clause 3.7.1(iii) of the SHA was the result of a negotiation between sophisticated commercial entities in 2006, and reflects the bargain struck by the parties. This balanced the risks for the proposed seller (who would not want an extended ROFR period), and the buyer (who would want to ensure

that enough time is available for the purchase to be consummated). Moreover, clause 3.7.1(vii) of the SHA contemplates a 90-day period for the sale of shares to a Third Party, thereby affording what can clearly be perceived as sufficient time for obtaining requisite regulatory and third party approvals. Under Clause 3.7.2 of the SHA, Respondent No. 3 has been granted the very same 30-day period for sale of its shares to a Private Participant in furtherance of a Private Participant's ROFR. In fact, even if Respondent 3 were a seller, the very same 30 day ROFR construct, and 90 day Third Party sale construct, have been envisaged in the SHA.

37. Further, with respect to interpretation, it was argued that a "*business sense*" driven interpretation cannot be applied only when it benefits the Petitioner. The decision in ***Satya Jain****(supra)* in fact affirms the position adopted by Respondent No. 1, in that, absent manifest ambiguity in Clause 3.7.1(iii) of the SHA it has to be interpreted as per its plain terms, without any implied terms being read into it. To support the proposition that Clause 3.7.1 of the SHA is to be read as is (which is the bargain arrived at by parties to the SHA), without supplying any further words as is being suggested by the Petitioner, Respondent No. 1 relied on the following judgments: ***City Alliance Ltd v Oxford Forecasting Services Ltd [2001] 1 All ER (Comm) 233, CA, Central Bank of India Ltd. v. Hartford Fire Insurance Co. Ltd. – AIR 1965 SC 1288, Novartis Vaccines and Diagnostics Inc. vs. Aventis Pharma Limited [2010 (2) BomCR 317] citing the Supreme Court in M.O.H. Uduman and Ors. v. M.O.H. Aslum (AIR 1991 SC 1020).***

38. It was further argued by the learned counsel for Respondent No.1 that the 30-day timeline set out in Clause 3.7 of the SHA cannot be deemed to be

extended on account of events subsequent to execution of the SHA in 2006, being: (i) the relevant provisions of the Competition Act, 2002 coming into force in 2011; and (ii) the agreement being entered into by lenders with MIAL in 2017 and 2018 and if the parties (being sophisticated commercial entities) thought that the ROFR timelines needed to be amended once competition laws came into force and/or lender agreements were executed, nothing prevented them from doing so. However, the parties did not.

39. The Court has given a thoughtful consideration to the arguments raised by both the parties. First and foremost, as noted above, the court reiterates that it is for the Arbitrator to determine whether there is a concluded contract between the parties or not. The other related questions such as whether the time is the essence of the contract; whether the long stop date was envisaged under the contract between the parties etc. would require oral evidence to be led by the parties. Thus, at this stage, bearing in mind the scope of the present proceedings, the Court would like to refrain itself from giving its finding on such questions. Nevertheless, the contentions of the parties have been noted and are also being discussed only to determine whether there is a prima facie case made out for the grant of injunction as prayed for.

40. At this preliminary stage, the Court would have to first construe whether the terms of the contract convey the sense that the parties intended, by a plain reading of the words actually used therein. Thus it will be apt to note the wordings of the clauses which are the fulcrum of the disputes between the parties. The said Clauses have been reproduced in para 3 above.

41. Clause 3.7.1 (iii) of the SHA provides for the sale of PP purchase shares

to be completed within 30 days of the PP Offer Notice being issued. The interpretation of the aforesaid Clause, proffered by the Petitioner is that the same has to be given a meaningful construction.

42. There is no quarrel on the proposition in law advanced by Mr. Neeraj Kishan Kaul as to the application of the "business efficacy" test. The effort of the Court should no doubt to give a meaning to the contract and not reject the same to be meaningless. The meaning of a contract must be gathered by adopting a sensible commercial approach. Before interpreting the terms of a Commercial Contract, it has to be borne in mind that an unexpressed term can be implied if and only if it is found by the reading of the contract that parties intended such a term to form part of the contract. From the plain reading of the Contract, it should bear that at the time of making of the Agreement, the parties intended such a term would apply. The Court would not substitute its own views, if the terms are explicit and clear. To put it differently, as held in ***City Alliance Limited v. Oxford Forecasting Services and Ltd*. 2001 All ER (Comm) 233**, *"Before the Court can introduce words which the parties have not used, it is necessary to be satisfied (i) that the words actually used produce a result which is so commercially nonsensical that the parties could not have intended it....."*. Petitioner contended that Clause 3.7.1 should be interpreted to give a meaningful construction to the Contract, as the transfer of shares is permissible only if the requisite approvals are in place. Such regulatory approvals are provided in Clause 3.6 and 3.7 of the SHA. A reading of the aforesaid provision as reproduced above, clearly shows that approvals prescribed under Clause 3.6 are applicable in case the shares are to be transferred to a third party. Mr. Kaul

initially argued that as such approvals are also applicable on the transfer to the Petitioner who is admittedly a private participant. This contention also finds mention in the pleadings. However, much later Mr. Rajiv Nayar, during the rejoinder arguments, clarified that Clause 3.6 is not applicable. Thus the only approvals envisaged in the Contract that are applicable to the Petitioner are those provided in Clause 3.7.1. I am of the prima facie view that the wordings of the said Clause do not indicate the exposition given by the learned Senior Counsels appearing on behalf of the Petitioner. There cannot be any doubt that both the parties are commercial entities having expertise in the field and the agreement was a result of negotiations between them. There can be a plausible view that the Contract does not expressly stipulate that the 30 days ROFR period would apply after the last date of the approvals. Prima facie, Clause 3.7.1 (c) of SHA reflects the final understanding between the parties. The Contract between the parties also does bring out a distinction between the ROFR period that is applicable for a private participant and that is applicable to a third party. This is discernible from Clause 3.7.1 (vii) of SHA which contemplates a 90 day period for the sale of shares to a third party, because in case of sale to third party, there are regulatory and third party approvals as prescribed under Clause 3.6 of SHA. Under Clause 3.7.2 of the SHA, Respondent No. 3 has been granted the very same 30 day period for sale of its shares to private participant in furtherance of private participant's ROFR. At this stage, for the purpose of the present petition, the Court is of the *prima facie* view that allowing the Petitioner to interpret Clause 3.7 in the manner it desires, would amount to re-writing the terms and conditions of the Contract. The terms are express and clear and unambiguous. In this regard, the Court would rely upon the judgment of the

Supreme Court in ***Novartis Vaccines and Diagnostics Inc. vs. Aventis Pharma Limited [2010 (2) BomCR 317] citing the Supreme Court in M.O.H. Uduman and Ors. v. M.O.H. Aslum (AIR 1991 SC 1020),*** relating to the construction of the Commercial Contracts:

> *"It is settled canon of construction that a contract of partnership must be read as a whole and the intention of the parties must be gathered from the language used in the contract by adopting harmonious construction of all the clauses contained therein. The cardinal principle is to ascertain the intention of the parties to the contract through the words they have used, which are key to open the mind of the makers. It is seldom that any technical or pedantic rule of construction can be brought to bear on their construction. The guiding rule really is to ascertain the natural and ordinary sensible meaning to the language through which the parties have expressed themselves, unless the meaning leads to absurdity."*

Thus, prima facie there is no merit in the contention of the Petitioner and the court cannot interpret the clause as suggested by the Petitioner.

Controversy surrounding the requirement of obtaining approvals for transfer of shares

43. Mr. Rajiv Nayar has argued that there are certain pre-requisite approvals necessary in order to complete the transaction, such as 1) under relevant provisions of the Competition Act, 2002; 2) the approval from the Banks/ lenders on account of an agreement between lenders and MIAL. Both the above-noted approvals, that may be necessary, arose on account of subsequent events. The necessity of approval, if any, under the provisions of Competition Act, 2002, became necessary in 2011 and the agreement

between the lenders and MIAL was executed in 2017 and 2018. However, the parties did not incorporate any such extension of timelines on account of the above. Another approval that has been envisaged under Clause 3.7 is the approval from Airport Authority of India in terms of Clause 2.5 of OMDA. On the question of necessity of taking approval from AAI, Mr. Abhinav Vashisht, learned Senior Counsel appearing on behalf of AAI, has drawn the attention of this Court to letters dated 22nd March 2019 written by AAI to MIAL and response thereto. The said two letters read as under:-

> "**Subject: AAI approval in terms of OMDA and Shareholder's Agreement.**
> This is with reference to your letter dated 18th March 2018 in response to AAI mail dated l5th March 2018 on the subject stating that the permission of AAI need to be obtained by the Prime members and the evaluated entities for the transfer of the shares of MIAL from ACSA and Bid vest to GVK Airport Holdings. Ltd. and not MIAL
> *2.* In this regard, reference is made to Article 2.5(c) and 2.5(h) of. OMDA as per which the permission of AAI needs to be obtained by the JVC which would be given subject to AAl ensuring that the capabilities of the JVC are not inferior pursuant to the share transfer of the JVC than prior to the transfer .
> 3. Keeping in view tile above, it is MIAL whose shares are being transferred and whose various capabilities are assessed pursuant to the' transfer to obtain permission of AAI.
> 4. MIAL is requested to comply with the OMDA provisions and seek AAI approval to ensure that the transfer takes place with the specified timelines.
> 5. This issues with the approval of the competent authority."

> "**Subject: AAI Approval in terms of OMDA and Shareholders Agreement**
> **Ref: 1) Your email dated 15th March, 2019**
> **2) MIAL letter No. MIAL/CE0/104 dated 181h March, 2019**

3) AAI Letter No. AAI/MC/MIAL-07 /EC/2019 dated 22nd March, 2019

With reference to subject above and further to correspondences exchanged between AAI and MIAL so far, we would like to mention as follows:

1) MIAL was first intimated about the PP Offer Notices of Bid Services Division (Mauritius)Ltd and ACSA Global Ltd by AAI vide its letters No. AAI/MC/MIAL-07/EC/2019 dated 7th March.

2) After your email of 15th March, 2019, we had responded that approval is to be obtained by Prime Member(s).

3) We are in receipt of your letter no. AAI/MC/MIAL-07/EC/2019 dated 22nd March 2019stating that approval under the OMDA is to be sought by JVC only. We have not received any request from the Prime Member for seeking AAI approval. Upon receipt of such request, along with all supporting documentation, we are agreeable to make a request for such approval to the AAI. Please note that we making such a request does not dilute the obligation of the Prime Members (Private Participant(s)) under the Shareholders Agreement.

4) We stand committed to comply with all applicable provisions *of* OMDA, Shareholders Agreement and Article of Association of MIAL in this respect."

44. Mr. Vashisht has further informed that in furtherance to the said letter, MIAL never made a request to AAI for the requisite approval under the provisions of OMDA. Since the question of approvals is being discussed, it would also be apt to take note of the fact that Mr. Rajiv Nayar has strenuously argued that such approval from SBI is a prerequisite and the same has not been obtained it indicates that the Respondent No. 1 is not in a position to transfer the shares and the same are not in a deliverable state. Strong emphasis is also placed on a letter dated 28th March 2019, written by SBI to MIAL, wherein the Bank has indicated that MIAL should give 60 days prior notice to SBI for the Bank to take a view in the matter. The said

letter reads as under:-

> "MUMBAI INTERNATIONAL AIRPORT LIMITED (MIAL):
>
> Date: 28 .03 .2019
>
> PROPOSED TRANSFER OR EQUITY SHAR.E HELD BY BID SERVICES DIVISION (MAURITIUS LIMITED)
>
> With reference to your letter dated March 27, 2019 (received by us through email) on the captioned subject, while we have taken note of the contents of your letter, we have to advise as under:-
>
> l. As per the existing terms of sanction, such request should come from the borrowing Company
>
> i.e., MIAL Therefore, we cannot treat .your said letter as formal request for approval or notice as per provisions of existing loan documents.
>
> li. Please note that as per the existing terms of sanction, MIAL has to give 60 days prior notice to State Bank of India ("SBI" or "Bank") for undertaking such activity to enable the Bank to take a view. If, in the opinion of the Bank, the move contemplated by the borrower Company is not in the interest of the Bank, the Bank will have the right of veto for the activity.
>
> 111. Please also note that MIAL has to take approval of all lenders as well as other share holders/AAI/Regulators as per the provision of OMDA/Loan Documents.
>
> iv. Please provide us the copy of acceptance of GVK Airport Holding limited along with term sheet for the stake purchase from Bid Service Division (Mauritius) limited."

45. Mr. Nayar also referred to a letter dated 25th April 2019 written by Respondent No. 1 to SBI, requesting for consent to transfer the entire shareholding of Respondent No. 1. It was argued that the aforesaid letter shows that Respondent No. 1 admits that it is not in a position to transfer the shares pending the approval of the lender, with whom the shares in question are pledged. In absence of this approval, the 30 day ROFR period should be applied only after all the approvals have been obtained.

46. The approval from SBI does not find mention in Clause 3.7 of the SHA in question. Moreover, this requirement arose subsequent to the execution of the SHA. Pertinently, the request for approval had to be initiated by MIAL. The approval is in the nature of the consent of SBI that the shares in MIAL that would be acquired from Respondent No.1, would be pledged with the Bank in accordance with Clause 2.7 of the Share Pledge Agreement. In this background, Respondent No. 1 wrote the letter to SBI asking them to reconsider the request for seeking a term sheet setting forth the terms and conditions of the proposed sale. The said letter was written by Respondent No. 1 after the filing of the present petition and was also issued without prejudice to its rights [Para 6 of the said letter]. Thus, the said letter cannot be construed to mean that Respondent No. 1 took upon itself the obligation to obtain the consent of SBI. Be that as it may, it was for MIAL to have obtained the consent, as was mentioned in the SBI letter dated 28th March 2019. Concededly, such a request has not been sent till date. There is also no such request to AAI, pursuant to the letters reproduced in the foregoing paras. The parties have just been playing blame game on this issue.

47. Mr. Sibal has rightly argued that ROFR is always triggered by a desire to ultimately sell the shares to a third party, with the preemptory ROFR condition for such sale. ROFR, by its very definition, has to be a time bound offer and can never be in perpetuity. Extending the ROFR Clause, would defeat the purpose and the intent of the Clause itself. In such matters, time is inherently of the essence of the Contract. The value of shares can

skyrocket or nosedive in a short span of time and in case the sale is not matured within the short span of time envisaged in the agreement, the transaction would be frustrated. In case the timelines are not adhered and there is increase in the value of the shares, it can cause/incur depreciation/loss in consideration, since the ROFR holder would buy the shares at lower than fair market value. Likewise, decrease in the value of the shares can cause re-negotiations with the third party requiring the ROFR process to be initiated all over again. Respondent No. 1's right to sell the shares would be defeated, in case ROFR is not exercised in a time bound manner. Court can also not lose sight of the fact that after the ROFR period, the right of the other share holder gets crystallized and they can then acquire the underlying shares on the same terms. ROFR is the privilege given to a party and in the present case, the Petitioner, ought to have exercised its right strictly in accordance to the conditions stipulated in the agreement. It is critically important that this contract should be strictly and rigidly enforced within the time frame provided for under the Agreement as the subject matter of dispute relates to 'shares', which by its nature, is susceptible to continual variation unlike other contracts. The approvals prior to the issuance of the PP Offer Notice have not been recorded in the terms and conditions of the SHA. The Petitioner's contention that such prerequisite approvals ought to have been obtained prior to the PP Offer Notice is thus not correct. The Court also does not find merit in the submission of the Respondent that the Respondent's interpretation of 30 days ROFR period is absurd. What would be the correct interpretation of the time period mentioned in 3.7.1 of SHA and the conduct of the parties evidencing their understanding of this Clause would have to be decided by the Arbitral

Tribunal after considering the evidence that could be led before it.

Long Stop Date

48. The controversy has also been raised with respect to "long stop date". It is Petitioner's contention that there was no such long stop date specified in the shareholder's agreement. This issue also relates to another bone of contention between the parties as to whether there is concluded contract or not between the parties. According to the Petitioner, Respondent No. 1 had affirmed that there is a concluded Contract. On the other hand, Respondent No. 1 had contended that the Petitioner did not accept the offer notice dated 4th March 2019 but rather sent a counter offer in response to the same. When Respondent No. 1 issued the notice dated 4th March 2019, the Petitioner did not accept the same and instead stated that it would shortly send its revision to the draft agreement. It was, however, stated that the Petitioner was re-confirming exercise of its option to purchase Respondent No. 1's shares. This was replied by Respondent No. 1 vide letter dated 15th March 2019 pointing out that Petitioner was not entitled to make counter-proposals or suggests or negotiate amendments. On 16th March 2019, Petitioner addressed a letter to Respondent No. 1 annexing therewith changes to the terms offered. The suggested changes read as under:-

(i) "Deleting, in its entirety, Clause 1.3(k) of the SPA (Interpretation Clause), which read: "*time is of the essence in the performance of the Parties' respective obligations under this Agreement. To the extent that any such time periods stand extended, the extended time periods shall also be of essence.*"

(ii) Amending Clause 4.1 of the draft SPA to read "*Closing shall not occur after the expiry of the applicable time period within which the Transfer of the Sale Shares is required to take place as set forth in Clause 3.7 of the [SHA]…* ***as extended by the time period required to obtain all approvals and consents from any Government Authority and third party as may be required for the Transaction****…* " *(Text in bold being the addition suggested by the Petitioner to the version shared by Respondent No. 1 on March 4, 2019)*

(iii) Amending Clause 4.3 of the draft SPA to read that the long stop date would be "*the ~~earlier~~ **later** of (i) ~~[•]~~ the applicable time period within which the Transfer of the Sale Shares is required to take place as set forth in Clause 3.7 **read with Clause 3.6** of the [SHA]…* ***or (ii) the date falling 14 (fourteen) days after the date on which all approvals and consents as are required from Government Authorities and third parties for the Transaction have been obtained****…*" *(Text in bold being the addition suggested by the Petitioner and strikethrough being the deletions to the version shared by Respondent No. 1 on March 4, 2019)*"

49. A perusal of the aforementioned communication exchanged between the parties and the terms of the contract suggests that the offer of sale of shareholding had to be accepted without terms and conditions and a concluded contract could only come into existence by fulfillment of obligations on the part of both the parties. The Petitioner ceaselessly tried

that Respondent No. 1 agrees to the changes in the SPA. However, when the Respondent did not relent, the Petitioner signed the unamended draft of the SPA to seemingly convey that the offer was accepted and the contract stood concluded. It is a fact that the terms offered by Respondent No. 1 were not accepted. Thus prima facie there appears to be no consensus on certain key terms of the agreement and it is doubtful that the contract stood concluded.

B) WHETHER THE PETITIONER IS AND HAS BEEN READY AND WILLING TO PERFORM THEIR PART OF THE OBLIGATION?

50. To determine this question, the Court will have to assess the contentions of the parties from the stand point of a case relating to specific performance of the contract, as essentially in the arbitration proceedings, the Petitioner would be seeking enforcement of its preferential right to purchase the shares offered by the Respondent No. 1 by way of specific performance of the contract. It is also the stated stand of the Petitioner in the pleadings that the Petitioner is and has always been ready and willing to perform his obligation to purchase the shares and it cannot escape from showing that it is ready and willing to perform its obligations under the agreement.

51. Petitioner contends that Respondent No. 1 has delayed completion of the transaction by not performing its reciprocal obligations and is still not in a position to deliver the shares to the Petitioner in a freely transferable form. It is further argued that Respondent has deliberately delayed in applying and / or assisting MIAL in applying for approvals from the third Respondent and the lenders. In matters relating to Specific Performance, the question of readiness has been defined by the Supreme Court in innumerable decisions.

One such decision which requires to be noted here is ***Kalawati v Rakesh Kumar*****(2018) 3 SCC 658** wherein the Supreme Court has recently held as under:-

> *"18. The law on the subject of specific performance of contracts is quite clear and it is not necessary to cite the dozens of judgments delivered by this Court on the issue. However, it is necessary to refer to two decisions which are quite apposite to the facts of the case before us.*
>
> *19. In* ***His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar*** *MANU/SC/0522/1996 : (1996) 4 SCC 526 this Court drew a distinction between readiness to perform the contract and willingness to perform the contract. It was observed that by readiness it may be meant the capacity of the Plaintiff to perform the contract which would include the financial position to pay the purchase price. As far as the willingness to perform the contract is concerned, the conduct of the Plaintiff has to be properly scrutinised along with attendant circumstances. On the facts available, the Court may infer whether or not the Plaintiff was always ready and willing to perform his part of the contract. It was held in paragraph 2 of the Report:*
>
> *"There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the Plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised.....*
> *The factum of readiness and willingness to perform Plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the Plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the Petitioner/Plaintiff was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bide for the time which disentitles him as time is of the essence of the contract."*
>
> *20. In I.S. Sikandar (Dead) by L.Rs. v. K. Subramani and Ors. MANU/SC/1093/2013 : (2013) 15 SCC 27 this Court noted that*

the Plaintiff is required to prove that from the date of execution of the agreement of sale till the date of the decree, he was always ready and willing to perform his part of the contract. In this case, looking the attendant facts and circumstances, the Court upheld the view of the Trial Judge that the Plaintiff had no money to pay the balance sale consideration and was apparently not capable of making necessary arrangements for payment of the balance consideration. It was held in paragraph 45 and paragraph 47 of the Report:

"45.....Further, the Plaintiff is required to prove the fact that right from the date of execution of the agreement of sale till the date of passing the decree he must prove that he is ready and has always been willing to perform his part of the contract as per the agreement.....

47. Further, there is nothing on record to show that the Plaintiff could have made arrangement for payment of the balance consideration amount to them. But, on the other hand the trial court has recorded the finding of fact to the effect that the correspondence between the parties and other circumstances would establish the fact that the Plaintiff had no money for payment of balance sale consideration....."

21. In so far as the present appeal is concerned, the material on record clearly indicates that Rakesh Kumar did not have the necessary funds available with him to pay the balance consideration. His low income and low bank balance indicated his incapacity to make the balance payment. As far as his capacity to arrange for funds is concerned, it has come on record that Rakesh Kumar did take a loan from his cousin but that was only for his business and not for paying the balance consideration for the land in dispute. There is nothing on record to indicate that Rakesh Kumar could have not only repaid the loan taken from his cousin, but additionally, could have arranged sufficient funds to pay the balance consideration. It is very doubtful, and it is easy and reasonable to infer this, that Rakesh Kumar was incapable of meeting both liabilities."

52. Mr. Nayar had argued that there is no requirement under the SHA or the PP Offer Notice for the Petitioner to show the financial capacity. Petitioner

is only required to remit the purchase consideration within 14 days after all the necessary approvals have been obtained. On acceptance of the PP Offer Letter, a right has accrued in its favour to purchase the shares and the Court should now preserve the same by granting an injunction. There are obvious and glaring inconsistencies in these propositions. A party desirous of specific performance of a Contract for purchase cannot merely on the strength of an agreement and purported breach, seek an order of injunction. The entire case law relating to specific performance of contract ubiquitously holds that readiness and willingness is a key feature that is required to be met in order to succeed in such action. The Petitioner has remained conspicuously silent on this issue in its correspondence and also before this Court. Petitioner's statement that it is ready to fulfill its obligations is not enough. The same has to be substantiated by its conduct and by establishing the same by means of documentary evidence. This is a pre-requisite for a claim for Specific Performance and also for seeking the equitable relief of injunction. The failings of the Petitioner to prove and exhibit its readiness ends up showing that it was never in a position to fulfill its obligations. The Supreme Court has held that the readiness to complete the transaction means that the party has the capacity to perform the contract which includes the financial position to pay the purchase price. Readiness and willingness to perform the Contract has to be scrutinized on the basis of the conduct of the parties with attendant circumstances. The party seeking specific performance is required to prove that from the date of execution of the agreement till the final decision, it was always ready and willing to perform his part of the Contract. Mr. Amit Sibal, has all throughout in his arguments cast serious doubt on the Petitioner's financial capacity to fulfill its

obligations. At the initial stage, the Court nudged the parties to explore the possibilities of resolution. There were several rounds of negotiation between the parties, however, nothing fructified. In this regard, on 8th May 2019, the Court, during hearing of the arguments, queried from the Respondent about his willingness to complete the transaction, and pursuant thereto, an order was passed recording the stand of the parties. The text of the order has been reproduced in the preliminary paragraphs. In response thereto, Petitioner did not show any genuine inclination to complete the transaction. During the subsequent hearing, Petitioner sought to present certain documents in a sealed cover to show its financial capability to perform the Contract. Thereafter, as desired by the parties, a Chamber hearing was also held in the presence of learned Senior Counsels. In chamber hearing, a general discussion took place regarding the manner in which the Petitioner proposed to make a payment for the shares, but the same was not acceptable to Respondent No. 1. Be that as it may, the Petitioner has chosen not to place on record any material to show its financial means and capacity to complete the transaction. The Petitioner has in fact circumvented the issue of readiness by firstly contending that this question cannot be examined in the present petition, being beyond the scope of Section 9 of the Act and secondly, on the ground that Petitioner is only seeking an injunction to perform the negative covenant and for which the Court has not to examine the aspect of readiness and willingness. These arguments are nothing but disjointed attempts to avoid scrutiny of the court on this question. This exposes the Petitioner and the court can firmly say that Petitioner is not ready to go forward with the transaction. There is undeniably no genuine exhibition of readiness which could show that the

Petitioner is serious in completing the transaction. There is not even an iota of evidence before the Court to substantiate the plea of readiness. Mr. Sibal repeatedly asserted throughout the arguments that the Petitioner should be called upon to prove its genuine readiness. Petitioner maintained resolute silence on this issue. The facts as they have been unfolded, come across to the Court to show that the Petitioner has merely inflated the expectation of its readiness. Perhaps, the Petitioner is still struggling to get the ready funds. This is the blatant truth of the matter. Petitioner may be extremely ambitious to purchase the shares, but the enormity of the transaction amount requires the Court to be satisfied that the Petitioner has sufficient funds. There may be constraints to show the entire transaction amount of INR 1248,75,00,000 in its bank account and the court is mindful of this fact. But the Petitioner has not even cared to place any material on record to show that the funds will be readily available in case there arises a situation to make the payments to Respondent No. 1. Petitioner has also not shown any inclination to erase the doubts about its financial capacity and means to complete the transaction. Even if arguably, it is assumed there is a concluded contract between the parties, and that Petitioner has exhibited its willingness to complete the transaction, in order to seek an injunction, it would still entail the Petitioner to show readiness. The conduct of the Petitioner appears to validate the apprehension expressed by Mr. Sibal regarding the financial distress of the Petitioner. Thus, even if the Court were to gloss over all the disputed aspects such as whether there is a concluded contract between the parties or whether the Respondent is in breach of the agreement, the underlying factor remains that readiness has not been proved before the Court. The transfer of shares has to be instantaneous

with the payment. It is highly improbable that if the Petitioner is genuinely desirous of purchasing the shares, it would not have the readily available funds with it. It is rather obscure that the Petitioner who still had the option to purchase the shares as recorded in the order dated 8th May 2019, did not deem it necessary to present to the Court material that could convincingly show that it had the financial means to complete the transaction. It is incomprehensible as to why the Petitioner who is purportedly earnest to purchase the shares, has chosen not to show to the Court its financial capability. At this stage, granting an order of injunction in its favour and against the Respondent would amount to incentivizing the Petitioner's speculative interest to purchase the shares. In this regard, the principles as laid down in ***Wander Ltd. Vs. Antox India P. Ltd*, 1990 (SUPP) SCC 727** become relevant. In the said case, the Supreme Court held as under:-

> "*"9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.* ***The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated.*** *The court must weigh one need against another and determine where the "balance of convenience lies". The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie.*"

53. Mr. Nayar's reliance on Clause 9.3.1 of the SHA to impress upon the Court that it is entitled to an injunctive relief, is also misplaced. The said Clause reads as under:-

> "9.3.1 The Parties to this Agreement agree that. to the extent permitted under ApplicableLaw, the rights and obligations of the Parties under this Agreement shall besubject to the right of specific performance and may be specifically enforcedagainst a Defaulting Party. The Parties acknowledge that any breach of the provisions of this Agreement will cause immediate irreparable harm to the adversely affected Party ("Affected Party") for which any compensation payable in damages shall not be an adequate remedy. Accordingly, the Parties agree that the Affected Party still be entitled to immediate and permanent injunctive relief, specific performance or any other equitable relief from a court of competent jurisdiction in the event of any such breach or threatened breach by any other Party. The Parties agree and stipulate that the Affected Party shall be entitled to such injunctive relief, specific performance or other equitable relief without (i) the necessity of proving actual damages; or (ii) posting a bond or other security.
> Nothing contained herein shall limit the Affected Parties right to any remedies at law or in equity, including without limitation the recovery of damages from thedefaulting Party."

54. The aforesaid Clause only emphasizes that the effective party is entitled to specific performance or equitable relief without proving actual damages or posting a bond or other security. This Clause cannot be interpreted to mean that the Petitioner does not have the obligation to meet the criteria of exhibiting its readiness to fulfill the transaction. Significantly, the Clause contains an expression *"to the extent permitted by applicable law"* in the opening sentence of Clause 9.3. Moreover, the Court while deciding the

entitlement to the relief would have the jurisdiction to apply the basic test for grant of injunction, irrespective of what is stated in the Clause. Notwithstanding the said provision, the Petitioner is still required to demonstrate availability of funds to satisfy that it is ready and willing to perform its obligations under Section 16 (c) of SHA, which it has not done. Posting a bond or other security is not the same thing as demonstration of availability of funds. The Court's jurisdiction cannot be impinged or affected by the understanding of the parties. It would always remain a discretion of the Court when it comes to matters relating to grant of injunction, which has to be exercised in accordance with law and judicial precedents.

2. <u>Balance of Convenience and Irreparable injury</u>

55. Mr. Nayar's further arguments that in case the first Respondent is not restrained from offering or selling the shares to any person other than the Petitioner, would render its claim infructuous and present the Petitioner with "*fait accompli*" which would result in defeating Petitioner's preferential right to purchase the shares is also misconceived. The basic tenets for grant of interlocutory injunction require the Court to also examine the question of balance of convenience and the question of irreparable loss. In ***Kashimath Samsthan vs. Shri Madsudhindra Thirtha Swamy (2010) 1 SCC 689***, the Supreme Court holds as under:-

> *"13. It is well settled that in order to obtain an order of injunction, the party who seeks for grant of such injunction has to prove that he has made out a prima facie case to go for trial, the balance of convenience is also in his favour and he will suffer irreparable loss and injury if injunction is not granted. But it is equally well settled that when a party fails to prove prima facie*

case to go for trial, question of considering the balance of convenience or irreparable loss and injury to the party concerned would not be material at all, that is to say, if that party fails to prove prima facie case to go for trial, it is not open to the Court to grant injunction in his favour even if, he has made out a case of balance of convenience being in his favour and would suffer irreparable loss and injury if no injunction order is granted."

56. Bearing in mind the noted principles, the Court notes that the balance of convenience would not lie in favour of the Petitioner as granting an injunction can lead to a situation where the value of the property/subject matter would be altered. On the other hand even if the shares are not freely tradeable, the Petitioner would still have the remedy in the form of the damages and it is not that the Petitioner would be rendered remediless. More importantly, its conduct disentitles it to inequitable relief of injunction as it has not exhibited that it possesses adequate financial capacity to complete the acquisition of the shares.

57. In view of the aforesaid discussion, the Court does not find any merit in the present petition. Accordingly, the petition is dismissed with no order as to costs.

58. The opinion expressed by the Court is only a *prima facie* view. Needless to say that the same shall not be binding on the Arbitral Tribunal and contentions of the parties and merits of the claims and/or counterclaims shall be examined uninfluenced by the observations made in the this judgment.

The interim order stands vacated.

SANJEEV NARULA, J.

JULY 01, 2019/*ss/nk*