Nirma Ltd. vs Lentjes Engergy (India) Pvt. Ltd. on 26 July, 2002

Author: M.C. Patel

Bench: M.C. Patel

JUDGMENT

R.K. Abichandani, J.

1. This appeal under section 37 of the Arbitration & Conciliation Act, 1996 is directed against the order dated 31st August 2001 made by the learned Judge, City Civil Court No. 11, Ahmedabad in Civil Miscellaneous Application No. 21 of 2001 filed by the appellant against these respondents under section 9 of the said Act. By that application, the appellant sought a direction on the respondents to preserve boilers Nos. 1, 2 and 3 contracted to be supplied by them under the agreements dated 12-12-1997, 12-12-1997 and 17-3-1998 at the appellant's plant in Bhavnagar by conducting the "Start-up" and "Performance Test Run" and further to achieve the agreed parameters as per Annexure VI of the contract dated 1-9-1997 between the appellant and the respondent No. 2 till the hearing and final disposal of the arbitral proceedings. In the alternative, the appellant sought a direction on the respondents to deposit Rs. 6.53 crores with the Court to be released to the appellant so as to enable it to conduct "Start-up" and "Performance Test Run" by engaging any other agency as may be deemed proper by the appellant. A further direction was sought on the respondents that, any payments made by them to any person will be subject to the rights and claims of the appellant for the amounts claimed and that may be ultimately awarded by the Arbitral Tribunal, and that the respondents should accordingly intimate to all those whom they made such payments. A security by way of bank guarantee was also sought from the respondents for a sum of Rs. 60,67,18,000=00 said to have been paid by the appellant to operate during the pendency of the arbitral proceedings. A direction was also sought on these respondents that they should not alienate their immovable assets and movables except in ordinary course of business pending the making of the award by the Arbitral Tribunal.

2. For the purpose of this appeal, the facts of the case would be in a narrow compass. The appellant entered into an agreement for purchase of three CFB Boilers of 100 tph each for the purpose of steam generation to be used in the appellant's Soda Ash Plant at Bhavnagar. The respondent No. 2 had know-how in respect of such boilers and the agreement dated 1st September 1997 was entered into between the appellant and the respondent No. 2, under which the respondent No. 2 agreed to provide to the appellant the know-how as was required to fabricate or get fabricated, assembled, erected and commissioned these boilers for power generation and process steam for Soda Ash and Pure Water for Site, as per the agreement. It was also agreed to provide supervision of fabrication, procurement and supply of equipments, components, spares, consumable etc. as may be required for fabrication, assembly, erection and commissioning of the boilers, and to undertake that the

boilers once assembled, erected and commissioned will operate in conformity of this agreement as well as other agreements as may be entered by appellant with Engineer, Contractor and Erection Contractor, which were defined in this agreement. The terms of payment were also agreed and certain warranties were given by the respondent No. 2, which included a guarantee (Article 7.1 (a) of the agreement), to the effect that the Contractor, Engineer and Erection Contractor shall duly and timely perform their respective obligations with the appellant, as may be provided in their respective contracts. The respondent No. 2 also guaranteed fulfillment of the warranties contained in those contracts. In Article 7.1 (c), the respondent No. 2 agreed that it would be "the principal guarantor for due performance of the CFB boilers as covered in this agreement and the said guarantee shall be in addition to any guarantees which NIRMA may have from the Contractor, Engineer and Erection Contractor". The respondent No. 2 also agreed as principal guarantor to accept the guarantee obligations as mentioned in Appendix VI of the agreement, as also to monetarily or otherwise compensate the appellant for all the obligations covered under Article 7.2. It undertook to demonstrate that the boiler was capable of operating in accordance with the technical specifications by conducting performance test, and it was stipulated that, in case the performance test run is not possible due to reasons not attributable to the respondent No. 2 within seven months after provisional acceptance of a boiler or such extended time as agreed upon between the parties, such boiler shall be considered as provisionally accepted and the acceptance certificate shall be issued by the appellant. Stipulation regarding liquidated damages was also made should the respondent fail to fulfill its performance warrantee and the liquidated damages were to be as specified in Annexures to the Agreement. The agreement was to be governed according to the laws of India as provided in Article 16. However, by arbitration clause in Article 15.1, it was agreed between the respondent No. 2 and the appellant that the disputes under this agreement will be finally settled by arbitration in accordance with the Rules of conciliation and arbitration of the International Chamber of Commerce and the place of arbitration shall be London. In Article 16.6, it was stipulated that the appellant shall have no claim or demands against the respondent No. 2 other than those specified in the Agreement, and that the liabilities of the respondent No. 2 to the appellant for all or any claim or demands of the appellant shall be limited to what is provided in the Agreement and shall in the aggregate limited to 15% of the total order value that may be paid to the appellant under the Agreement as well as 15% of the total order value of the agreements to be entered with the Engineer, Contractor and Erection Contractors and such limitation shall not be alterable by decision of arbitration or court. In Appendix VI, the performance guarantees were enumerated and if the guarantees were not complied with even after repairs and replacement, the appellant was entitled to the liquidated damages at the rates which were specifically mentioned. The appellant had a right not to accept the unit or parts thereof in the events enumerated in Appendix VI, which included the event where liquidated damages exceeded 10% of the contract price. In case of such non-acceptance, the appellant was entitled to further use of the unit or the parts under consideration until a suitable replacement is ready for operation, for a period of not longer than two years after written confirmation by the respondent No. 2 of non-acceptance and the conditions agreed upon mutually.

2.1 The respondent No. 2 founded a wholly owned subsidiary, namely the respondent No. 1, which entered into three agreements with the appellant in respect of detailed engineering, fabrication and procurement of components, equipments and apparatus required for the construction of the boilers and erection and commissioning of the boilers. The appellant had to appoint these contractors with

the approval of the respondent No. 2 and admittedly, the respondent No. 1 was appointed as Engineering, Supply and Erection Contractor under the three agreements.

2.2 Of these three agreements, "Agreement for Detailed Engineering" entered into on 12th December 1997 between the appellant and the respondent No. 1 and which recorded that the respondent No. 2 had approved the appointment of the respondent No. 1, was for the purpose of carrying out detailed engineering work on the basic engineering design and know-how of the respondent No. 2 required for fabrication, erection and commissioning of the said three boilers matching with the design and know-how of the respondent No. 2. In this agreement, the contract was defined so as to mean the agreement dated 1st September 1997 entered into between the appellant and the respondent No. 2 for supply of know-how and supervision for three boilers. The terms of consideration and payments were stipulated at various stages and the final payment was to be made against their performance bank guarantee and on completion of performance test of the boilers, as stipulated in para 4.4.8. Warranties and indemnities were stipulated in Article 8 and the arbitration clause was stipulated in Article 11 to the effect that the disputes between the respondent No. 1 and the appellant, if any, shall be referred to an arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996 for final settlement and that the arbitration shall be conducted in Ahmedabad (Article 11.1). In this agreement also there was a stipulation in Article 12.4 that the appellant and the respondent No. 1 shall not mutually advance claims and demands other than specified in the agreement, and that the compensation and liabilities of the respondent No. 2 for all damages etc. shall be limited to what was provided in the Agreement and shall, in the aggregate, limited to 15% of the total consideration of Rs. 180 lakhs and such limitation shall not be alterable by a decision of an arbitrator or a court.

2.3 The Agreement for Supply was also entered into on 12th December 1997 between the respondent No. 1 and the appellant in context of the main contract between the appellant and the respondent No. 2 and it was recorded therein that the respondent No. 2 had approved the appointment of respondent No. 1 as contractor for procurement, fabrication and supply of the equipment required for erection and commissioning of three boilers matching with the design and know-how of the respondent No. 2. Here again, the Contract was defined to mean the agreement dated 1st September 1997 entered into between the appellant and the respondent No. 2 for supply of know-how and supervision for three boilers as per the patented design of the respondent No. 2. The terms of payment were stipulated and the final payment of 10% of the value of the order was to be paid against Performance Bank Guarantee and on completion of performance test of the boilers by the respondent No. 2 (as provided in the Contract) and the Certificate issued by the appellant for successful completion of the Performance Test for Boilers, as stipulated in clause 3.5.9 of this Agreement. In para 8.5, it was stipulated that, as per the contract, parameters of the performance test were to be achieved by the respondent No. 2. If, because of defective / poor workmanship of the material delivered by the contractor, performance parameters are not achieved, the appellant was free to encash the Performance Bank Guarantee to be received from the contractor without any further reference / recourse to the contractor, and other suitable action as may be required to be taken by the appellant under the contract.

2.4 The "Agreement for Erection & Commissioning" was executed on 17th March 1998 between the appellant and the respondent No. 1 after it was approved by the respondent No. 2, for carrying out erection and commissioning of three CFB Boilers of 100 tph each matching with the design and know-how of the respondent No. 2 as well as detailed engineering and supplies as may be done by the respondent No. 1 (Clause (e) of the Preamble). Under this Agreement, the respondent No. 1 undertook and agreed that the services to be rendered by it constituted "the total services required for the Erection testing of the Plant" (Article 2.5). The obligation of the appellant enumerated in Article 3.1 included providing electricity at one point free of cost, and providing open and levelled area for fabrication. The terms of payment were stipulated and as per Article 4.4.4, final payment being 10% of consideration was to be paid against Performance Bank Guarantee and on completion of performance test and Certificate issued by NIRMA for the successful completion of the performance test for boilers. Specimen of performance guarantee is annexed at Annexure 3 to this agreement. Stipulations regarding Mechanical Completion Test after the erection of the Plant was completed, Start-Up and Performance Test Run were made in Articles 7.10, 7.11 and 7.12. If the guaranteed performance was achieved and a certificate was issued to that effect by the appellant (Performance Acceptance Certificate), the respondent No. 1 would stand discharged from the contractual obligations in respect of the boiler for which the certificate is issued (Article 7.12.2). Stipulation identical to the one contained in the other agreements by which the aggregate limit of liabilities was fixed to 15% of the total consideration was also adopted in this agreement in Article 11.4. In the arbitration clause in Article 10, it is provided that the arbitration shall be conducted in Ahmedabad.

3. It will be seen from the nature of the aforesaid four agreements that the respondent No. 2 had a know-how in respect of the boilers having patented design, and that it had undertaken to give that know-how to the appellant through the contractors of its choice, with whom the appellant entered into agreements after due approval from the respondent No. 2. The common element in all the four agreements was that the performance test run of the boilers was to be conducted and the final payment of 10% was to be made against the performance guarantee and a successful performance test. The respondent No. 2 had undertaken to carry out the obligations of the respondent No. 1 under the three agreements. The arbitration clause in the agreement with the respondent No. 2 named London as the place for arbitration, while in the three agreements executed by the respondent No. 1, the seat of arbitration was Ahmedabad.

4. The dispute arose between the parties leading to a reference being made before the Arbitral Tribunal at Ahmedabad in respect of the three arbitration agreements entered between the appellant and the respondent No. 1 and a reference made to the Arbitral Tribunal of the International Court of Commerce, at London in respect of the main agreement which is described as the Contract in the other agreements, between the appellant and the respondent No. 2.

5. In the Statement of Claim dated 12-11-2000 made by the appellant before the Arbitral Tribunal at Ahmedabad (a copy of which is at Volume III of the Paper Book of the appellant, at Annexure "ZE" at page 255 to 297), the appellant - claimant prayed for a declaration that the respondent No. 1 had failed to perform its obligations under the said three agreements, and that the claimant was entitled to be re-paid Rs. 60,67,18,000=00 paid to the respondent No. 1 under these agreements on account

of its failure to perform its obligations together with interest at 18% per annum from the date of payment till realisation of the amount. In the alternative, it was prayed that the claimant be awarded a sum of Rs. 8,20,50,000=00 which according to the appellant was paid in excess to the respondent No. 1 together with interest at 18% per annum. A further sum of Rs. 66,08,32,000=00 was claimed as the amount of "idle charges" on account of idle charges of labour, fixed cost, interest charges etc. for the period between 1-9-1999 till 29-2-2000, as stated in paragraph 68(3) of the statement. Other sums of Rs. 33,47,14,000=00 (on account of compensation for loss and damage caused by diverse breaches of contract), Rs. 14,65,84,000=00 (on account of insufficient boiler operation), Rs. 2,06,80,000=00 (on account of use of an incorrect primer, namely, red oxide primer instead of zinc silicate primer), Rs. 1,60,05,000=00 (towards reimbursement of material costs), Rs. 2,95,14,000=00 (towards reimbursement of services carried on behalf of the respondent No. 1) and Rs. 1,29,19,000=00 were claimed under various heads enumerated in the claims put up in paragraph 68 of the statement.

5.1 On the disputes arising between the parties, the appellant invoked the arbitration clause under each of the three agreements by issuing notice dated 29-7-2001 (Annexure "ZB") to the respondent No. 1. The respondent No. 1 refuted the claim made by the appellant by its letter (at Annexure "ZC"). On invocation of the arbitration clause, the Arbitral Tribunal was constituted and it entered upon the reference on 8-10-2000. The petitioner filed statement of claim and the respondents filed the written statement as per the directions of the Tribunal. Thereafter, the petitioner filed the application under section 9 of the said Act on 9th January 2001 for the reliefs referred to earlier.

6. The learned City Civil Judge noted that, though the Arbitral Tribunal had entered upon reference on 8-10-2000, the application under section 9 was made on 9-1-2001 and no interim relief was at any point of time sought from the Arbitral Tribunal. It was held that there was no concrete reason placed on record to point out as to what were the reasonable grounds requiring the court to exercise its powers for grant of interim measures, especially in view of the fact that both the sides have made allegations and counter allegations before the Arbitral Tribunal as well as the before the ICC, London. The trial Court observed that the issues regarding obligation to conduct "Start Up and Performance Test" in respect of these boilers were pending before the Arbitral Tribunal and the Court was not required to go into the merits of those disputes. Dealing with the contention that the Arbitral Tribunal did not enjoy wide powers of a court for granting interim measures, the court observed that it was not pointed out as to how the powers of Arbitral Tribunal under the Act were limited. It held that this submission was not acceptable in absence of any cogent reason for not moving the Arbitral Tribunal for any interim measure under section 17 of the Act. The Court held that there was absolutely no question of the maintainability of the application, because, that aspect was decided in M/s Sundaram Finance Ltd. v. M/s NEPC India Ltd., reported in JT 1999 (1) SC 49, in which it was held that the Court was empowered to pass interim order before or during the arbitral proceedings under section 9 of the Act. After holding that the Court had the power, under section 9 of the Act, to issue orders of interim measures, it was held that there was no justification in the appellant not moving the Arbitral Tribunal for getting interim measures, and therefore, it was not desirable to intervene and grant the interim relief.

6.1 On merits, it was held that, prima facie, in view of the annual report of the appellant regarding the completion of the commissioning of the boilers and the same being fully operational, there did not appear to be any defect or failures to have come on the record and all the suppositions or the possibilities of failures attempted to be the basis for getting the relief of specific performance appeared to be hypothetical apprehensions. It was held that the Arbitral Tribunal was going to decide as to whether the boilers supplied were defective, and whether the appellant had prevented the respondent from fulfilling its part of the contract. It was noted that the Arbitral Tribunal was also required to decide whether the respondent No. 1 proved that the boilers suffered damage after installation due to their being operated by the appellant, or whether the appellant was guilty of delay. The Court found that the appellant had not made out any prima facie case, and that the issues urged before the Court could not be decided by it at prima facie stage for granting interim measures like specific performance or attachment sought by the appellant. The Court also held that the appellant itself had quantified the compensation in terms of damages and therefore, no question arose for granting injunction. It was further held that the directions in form of specific performance would tantamount to the Court concluding, before the Arbitral Tribunal arbitrates, upon the facts in issue before it. Referring to the ratio of the decision of the Apex Court in Colgate Palmolive (India) Ltd. reported in (1999) 7 SCC 1, it was held that the appellant was not entitled to any interim relief on the basis of any of the criteria set out in the said decision. It was noted that there was a strong ground operating in favour of the respondent No. 1, having relevance on the aspect of balance of convenience, that the three boilers were in fact erected and commissioned and the completion of the project was shown in the annual report of Company ending on 31st March 2000, which stated that the project was completed ahead of time for the amount which was less than the stipulated amount and that self-sufficiency in generating steam for the Soda Ash plant of the appellant was achieved. It was also noted that the appellant had invoked the bank guarantee given by the respondent No. 1 and that there was also a counter-claim of the respondent to make good the outstanding dues being part of the consideration of the three agreements. It was also observed that there was no existing pecuniary liability, making it obligatory for the respondents to furnish a guarantee, and that the relief of recovery of damages in contract was not a debt or any outstanding pecuniary liability. Referring to the provisions of sections 40 and 41 of the Specific Relief Act, the Court held that it cannot grant injunction in a case where the non-performance can be duly compensated. It was held that the grant of interim relief prayed for by the appellant may amount to granting of specific performance of the contract which was not permissible in view of the damages sought for by the appellant. On the basis of the ratio of the decision of the Supreme Court in Cotton Corporation of India Ltd. v. United Industrial Bank Ltd., reported in AIR 1983 SC 1272, it was held that since no final relief in terms of specific performance was available, temporary relief of the same nature cannot be availed of by the appellant. Referring to the Commentaries on Russell on arbitration and Dr. Peter Binder, which were cited before it, the Court held that; " Even if interim measures against the parties not involved in arbitration can be enforced through legal judicial system as commented by Dr. Peter Binder and relied upon by the petitioner, no cause is made out to do so, in light of the facts and circumstances in the matter". It was held that though the Court had jurisdiction under section 9 to grant interim measures, there was no case made out either for the mandatory relief or for any other interim measure to enable to the petitioner to get the relief claimed and that there was no evidence to hold, prima facie, that the respondents were stripping itself of its assets so as to warrant grant of Mareva injunction. The Court, thus, by its detailed order, rejected the application

for interim measures under section 9 of the Act.

7. The learned Senior Counsel for the appellant argued that the approach of the trial Court that the Court should not exercise its jurisdiction under section 9 of the said Act when the appellant can move the Arbitral tribunal for interim measures under section 17 of the Act, was erroneous and not warranted by the provisions of the said Act and the decisions of the Apex Court. It was further contended that the Court can issue orders under section 9 of the Act even against a third party and therefore, the fact that the respondent No. 2 as on today is struck off as a party from the arbitral proceedings on the ground that he had not agreed to the arbitral clause contained in the three agreements which were entered into between the appellant and the respondent No. 1, the Court can still issue interim orders binding the respondent No. 2 to preserve the outcome of the arbitral proceedings. The learned counsel argued that "Start Up" and "Performance Test Run" were the stipulations which were essential part of the contract with the respondent No. 2 and the three other agreements entered with the respondent No. 1 at the behest of the respondent No. 2 by the appellant. It was submitted that unless the parameters stipulated in the contract were achieved, by a positive performance test run, even the risk did not pass to the appellant. It was submitted that it was essential to order by way of interim measure that the performance test run should be conducted by the respondent No. 2, who had undertaken to demonstrate the performance of the boilers under the agreement, with a view to enable the appellant to decide finally whether to reject the boilers or not, and therefore, such an interim measure cannot be said to be for enforcing any relief of specific performance of the contract. It was submitted that, having regard to the nature of the claim before the Arbitral Tribunal made by the appellant, it was essential to insist upon such performance test run to be conducted by the respondents in aid of the outcome of the arbitral proceedings and therefore, the prayer of the appellant for such an interim measure cannot be brushed aside on a plea that interim specific performance cannot be ordered when it is not finally prayed for. It was submitted that this essential step of conducting the performance test run could be insisted upon even on equitable grounds having regard to the large investment made by the appellant under these contracts with a view to acquire three boilers which were supposed to achieve certain parameters which could be ascertained only by conducting the performance test run. It was argued that, even if the respondent No. 2 was to be treated as a third party to the arbitral proceedings, the Court was empowered to grant an interim relief under section 9 of the Act. It was argued that, under section 9 of the Act, the Court was empowered to make orders in the same manner "as it has for the purpose of, and in relation to, any proceedings before it", and that the rationale for the Court being so empowered was that the power of enforcement did not vest with the Arbitral Tribunal and that the Court could make orders even against third parties. It was submitted that the power under section 9 was required to be exercised by applying well accepted principles governing grant of injunction or interim relief, and such power should be exercised in connection with preservation of goods, their inspection or experimentation which would have relevance on the questions that may arise during the arbitral proceedings. It was submitted that the relief prayed for in the Statement of Claim before the Arbitral Tribunal and in the Counter-claim as well as the issues framed by the Tribunal would clearly encompass the prayers made in the application of the appellant under section 9 of the Act. It was also argued that the mandatory relief could be granted where the appellant has a strong case for trial and with a view to prevent irreparable or serious injury which cannot be compensated in terms of money. It was submitted that the trial Court had overlooked the scope of section 9 of the said Act

and the provisions of sections 23 and 40 of the Specific Relief Act, 1963 in context of which the appellant was entitled to claim the interim relief. It was also argued that the Court below failed to appreciate that there were three multiple boiler agreements containing entire contractual obligations and it did not appreciate the commercial uniqueness of the transaction, that such three boilers could not be readily obtained from the open market by the appellant.

7.1 In support of his contentions, the learned Senior Counsel relied upon the following extracts from the textbooks, and, the precedents.

[a] From Chitty on Contract (28th Edition), the learned Senior Counsel referred to paragraph 37-106, which reads thus :

> "Performance Obligations : Contracts for the provision of process plant and machinery are divided into an initial construction period, followed by a post completion period during which the plant must be operated and performance demonstrated. The provisions as to testing are usually accompanied by a detailed protocol involving stages, such as an initial period of operation followed by performance tests over a prescribed period. The contract may provided prescribed penalties or deductions as compensation in respect of failure to meet required performance. The detailed performance requirements will be specific to each item of plant or machinery, but standard forms exist which prescribe the basic contract structure. In addition to performance of obligations, the contract may require other services, such as training of operating personnel, the provision of spares for the plant, and detailed operating manuals and instructions."

[b] From Dr. Peter Binder's International Commercial Arbitration In UNCITRAL Model Law Jurisdictions (First Edition 2000 Published by Sweet & Maxwell), the following observations in para 2.056 were referred to;

> "Conclusion : In certain circumstances, especially where the arbitral tribunal has not yet been established, the issuance of interim measures by the court is the only way assets can be saved for a future arbitration. Otherwise, the claimant could end up with a worthless arbitral award due to the fact that the loosing party has moved his attachable assets to a "safe" jurisdiction where they are out of reach of the claimant's seizure. The importance of such a provision in an arbitration law is therefore evident, and a comparison of the adopting jurisdictions shows that all jurisdictions include some kind of provision on the issue, all granting the parties permission to seek court ordered interim measures."

[c] From Russel on Arbitration (21st Edition), reliance was placed on the following observations;

[d] Interim orders "5-095 Types and purposes of interim orders :

Consideration should also be given at a preliminary stage to whether interim orders should be made. The term "interim orders" is not issued in the 1996 Act, is adopted here to refer to orders or directions on such matters as security for court's, interim preservation orders and injunctions. These orders are often designed to protect the position of the parties and / or preserve the status quo pending the outcome of the reference. However, they may also be examples of the tribunal exercising its procedural powers in relation to evidential matters. "

"5-096 From whom to seek interim orders - The parties are free to agree what powers the tribunal is to have with regard to interim orders, but unless the parties have agreed otherwise in writing then the tribunal has the powers set out in sections 38(3) to (6) of the Arbitration Act, 1996. Interim orders may also be sought from the court, but in the ordinary course the parties would be expected to apply to the tribunal in those cases where the tribunal has the power to make them. Applications to court will also be appropriate where for example the order is sought against a third party over whom the tribunal has no jurisdiction, or where any order by the tribunal is likely to be ineffective."

"5-099 Preservation of property section - section 38(4) of the Arbitration Act 1996 provides that the tribunal may give directions in relation to property subject to two provisos. First, the property must be the subject-matter of the reference or property as to which a question arises in the proceedings. Secondly, the property must be owned by or in the possession of a party to the proceedings. This reflects the tribunal's inability to enforce its orders against third parties. Relief may be sought from the court if the provisos are not met or for some other reason the tribunal is unable to act or to act effectively."

"6.132 Third parties : Further, a tribunal does not have jurisdiction over a third party, even though the third party may hold the money, goods or property in dispute. The tribunal is therefore even less able to secure compliance by a third party with an injunction it may grant than it is to secure compliance by the parties to the arbitration."

[d] Excerpts from The Law and Practice of Commercial Arbitration in England (Second Edition) Sir Michael J. Mustill & Stewart C. Boyd, which was relied upon from pages 330 are re-produced hereunder :

"An injunction is a powerful weapon, since it is backed by the powers of the Court of Equity to act in personam and these include, in the last resort, orders for the committal of a recalcitrant defendant, or that attachment of his property. In the context of an arbitration, an interlocutory injunction will usually fulfill one or other of two functions. First, to protect the property in issue from abuse by one of the parties : for example, to prohibit the removal of property from the United Kingdom, the object being to ensure that any order which the arbitrator may ultimately make as

> to the disposition of the property will not be rendered academic by the previous removal of the property. Second, to bring about a kind of interim specific performance of the contract. For example, if the issue is whether a charterparty has been validly terminated by the respondent, the court may issue an injunction prohibiting the respondent from employing the vessel otherwise than in accordance with the charter : thus, in many cases, forcing him to keep the vessel in the service of the charterer pending the resolution of the dispute.
>
> The Court has power to grant an interlocutory injunction in respect of matters which are the subject of an arbitration. The making of an interlocutory injunction, or the pendency of an application for such an injunction, does not prevent the court from granting a stay of any action which is brought in respect of the substantive dispute, the only purpose of the injunction being to maintain the status quo pending the award. In general, the exercise of the discretion where there is a pending arbitration is likely to proceed on the same principles as in relation to an action in the High Court."

From the same book, the following excerpt was also referred which is at page 332 :

> "(iv) Securing the sum in dispute : Where the right of a party to a specific fund is in dispute in a reference, the court has power to order the fund to be paid into court or otherwise secured. The forms of security most likely to be ordered are the provision of a bank guarantee or the payment of the fund into a bank account in the joint names of the parties or their advisors. It is probable that the court alone, and not the arbitrator, has power to make such an order.

It will be noted that this power does not enable a party to recover sums on account of damages in advance of the hearing, even if liability is undisputed and it is clear that some monetary award will be met. The power exists only where an identified fund is in dispute - as where, for example, it is alleged that the respondent is trustee for the claimant in respect of a specific sum of money."

[e] The decision of the Supreme Court in case of Sundaram Finance Ltd. v. NEPC India Ltd., reported in (1999) 2 SCC 479 was cited for the proposition that though section 17 gives the Arbitral Tribunal the power to pass orders, the same cannot be enforced as orders of a court, and that it is for this reason that section 9 admittedly gives the court power to pass interim orders during the arbitration proceedings. It was held that interim orders can be passed by the Court under section 9 before or during the arbitral proceedings, and that, reading the section as a whole, it appears that the court has jurisdiction to entertain an application under section 9 either before arbitral proceedings or during arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with section 36 of the Act. The Court approved the observations in Russel on Arbitration that power to grant an interim injunction extends to granting of a Mareva injunction in appropriate cases although the court will be slow to grant an injunction which provides a remedy of essentially the same kind as is ultimately being sought from the Arbitral Tribunal.

[f] Reliance was placed on the decision of the Supreme Court in Bhatia International v. Bulk Trading S.A. and another, reported in (2002) 4 SCC 105 for the proposition that an application for interim measure can be made to the Courts in India whether the arbitration takes place in India before or during the arbitral proceedings.

[g] The decision of the Madhya Pradesh High Court in case of Nepa Ltd. v. Manoj Kumar Agrawal, reported in AIR 1999 MP 57 was cited for the proposition that the provisions of section 9 empower the Civil Court to take interim measures for preservation and safe custody of the subject matter in arbitration agreement and for that purpose, to issue interim injunction. Existence of an arbitration clause and the necessity of taking interim measures alone are required to be considered for issuing necessary directions or orders. (See para 17 of the judgment).

[h] The decision of the Supreme Court in case of Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., reported in (1999) 7 SCC 1 was referred to point out the considerations which ought to weigh with the Court hearing an application for grant of injunction which are setout in paragraph 4 of the judgment. On the basis of these considerations, it was argued that the Court, while dealing with the matter, ought not to ignore the factum of strength of one party's case being stronger than the other, and that the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the party's case.

[i] The decision of the Delhi High Court in case of Satish Aggarwal v. Subhash Chand Aggarwal, reported in 2000 (55) DRJ was cited to point out that, in an application under section 9 for interim measures, an interim order in terms of section 37 of the Partnership Act was made. Reference was made to the decision of the Delhi High Court in case of Kanshi Ram v. Punjab National Bank, reported in 2000 (55) DRJ, for the proposition that in absence of guidelines as to grant of relief under section 9(ii)(b) of the Act, the Court has to apply the provisions of Order 38 Rule 5 of the Code of Civil Procedure.

[j] A decision of the Bombay High Court in case of Newage Fincorp (India) Ltd. v. Asia Corp. Securities Ltd., reported in 2000 (3) Arbitration Law Reporters 687 (Bombay) was cited for the proposition contained in paragraph 35 of the judgment that, in granting or refusing to grant interim measures, the Court has wide discretion under section 9 of the Act. In that case, the Court found that it was necessary to preserve the subject matter of arbitral dispute by granting interim measures in aid of final reliefs to which the petitioners may be entitled in the arbitration proceedings and the respondents were restrained from transferring the membership card of the Stock Exchange.

[k] The decision of the Delhi High Court in case of MMTC Ltd. v. Shyam Singh Chaudhary, reported in 2001 (57) DRJ 743 was cited in support of the argument that, all the deeds between the appellant and the respondents were intrinsically and integrally intertwined, and therefore, the question of territoriality should be view from the angle that the dispute may also arise within the jurisdiction of the Arbitral Tribunal in Ahmedabad even if it could arise under the arbitral clause 15 of the agreement with the respondent No. 2 before the ICC - London.

[n] The decision of the Madhya Pradesh High Court in case of Jabalpur Cable Network Pvt. Ltd. v. E.S.P.N. Software India Pvt. Ltd., reported in AIR 1999 MP 271 was cited to point out that, in respect of the articles which were of special value and the goods which were not easily obtainable in the market, it could be presumed that the breach of contract to transfer the goods cannot be relieved by payment of money in lieu thereof. It was held that it would be most inequitable not to grant relief to the appellant to transmit information which is of great value when it is live and looses its importance after the telecast is over.

[o] The decision of the Supreme Court in case of Dorab Cawasji Warden v. Coomi Sorab Warden, reported in AIR 1990 SC 867 was heavily relied upon for the proposition that the relief of interlocutory mandatory injunction would be granted generally to preserve or restore the status quo. The Supreme Court held that, being essentially an equitable relief, the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances of each case.

[p] The decision of the Rangoon High Court in case of L. Dawson v. Princess Rounac Zamani Begum, reported in AIR 1928 Rangoon 268 was cited for the proposition that a wrong doer cannot insist the person wronged to accept compensation in lieu of injunction, and that mandatory injunction is ordinarily granted unless the injury is small and capable of being compensated by small money payment.

[q] The decision of the Madras High Court in case of Veeramalai Chettiar v. Ramayee Ammal, reported in AIR 1962 MADRAS 437 was cited for the view that the provisions of the Civil Procedure Code will generally apply to the arbitration proceedings.

[r] The decision of the Delhi High Court in case of Olex Focas Pty. Ltd. v. Skodaexport Co. Ltd., reported in 1999 (Supp) Arbitration Law Reported 533 (Delhi) was cited to point out that the Court held in paragraph 64 of its judgment that, according to the provisions of the said Act, the Courts are vested with the jurisdiction and power to grant interim relief in appropriate cases, and that the court's power to grant interim relief would even strengthen the arbitration proceedings, otherwise, in some cases, the award may in fact be reduced to only a paper award.

[s] The decision of the Delhi High Court in case of Niko Resources Ltd. v. Union of India, reported in 2001(3) Arb. L.R. 196 (Delhi) (DB) was cited to point out from paragraph 28 of the judgment that it was held that, if it becomes necessary to protect the interests of any party and any interim measures of protection are required, appropriate directions can always be issued to the respondent to ensure the protection for the benefit of the appellant even though the measures may have an implication on GSPL, which was not a party before the Court.

[t] The decision of the Delhi High Court in case of CREF Finance Ltd. v. Puri Construction Ltd. & Ors. , reported in 2000(3) Arb. L.R. 331 (Delhi) was relied upon for the proposition contained in paragraph 10 of its judgment that the Court had jurisdiction to pass orders under section 9, until the award was submitted for enforcement under section 36 of the Act.

8. The learned counsel appearing for the respondent No. 1 contended that the appellant had issued mechanical completion and provisional acceptance certificates in respect of all the three boilers and thereafter, they are being used by the appellant for its Soda Ash Plant. It was argued that the performance test run was rendered redundant by the conduct of the appellant. We were taken through the pleadings in detail to point out the grounds on which, according to the respondent No. 1, the performance test run became redundant. It was further argued that the bank guarantee of Rs. 13 crores was invoked by the appellant, as against the "non-conduct" of the performance test run, on 28-7-2000, and that even though all the three boilers were commissioned and are being used by the appellant, 25% of the total consideration is yet to be paid by the appellant to the respondents. It was submitted that, as per the clauses contained in all the three agreements, maximum liability of the respondent No. 1 on any count was limited to 15% of the contracted value, as liquidating damages. It was also argued that no specific performance was sought in the arbitral proceedings and therefore, it could not be granted in the application for interim relief. It was further argued that no injunction could be issued where damages would be an adequate remedy. It was contended that the appellant was in possession of the boilers and it could not keep the boilers and claim the refund as well, of the price of these boilers which were not rejected by the appellant. It was submitted that the claim for damages made by the appellant was yet to be decided in the arbitration proceedings and since no liability for money was outstanding, there was no case made out for ordering any security deposit in favour of the appellant.

8.1 The learned Senior Counsel appearing for the respondent No. 2 adopted these contentions and further argued that the respondent No. 2 was not a party to the arbitration proceedings in Ahmedabad, and that it was not a party to any of the three agreements entered into between the appellant and the respondent No. 1, and that no interim orders could be made against the respondent No. 2, especially in view of the fact that the parties to the Contract i.e. the appellant and the respondent No. 2 had chosen the place of arbitration to be London as per Article 16 of their agreement, which arbitration proceeding was in fact pending before the International Court of Arbitration, ICC - London. It was further argued that the Arbitral Tribunal, at Ahmedabad, had already made orders dated 17-2-2001 and 4-3-2001 that it had no jurisdiction to entertain and decide any dispute between the appellant and the respondent No. 2. That order of the Tribunal dated 7-2-2001 was confirmed by the City Civil Court by its order dated 31-8-2001 and a Revision Application being No. 123 of 2002 was filed on 6-2-2002, which is pending in the High Court. Therefore, as on today, the respondent No. 2 was not even a party in the arbitral proceedings though initially impleaded. It was submitted that the Court could grant interim relief under section 9 of the said Act only against the parties to the arbitration proceedings and therefore, the respondent No. 2 cannot be made liable by any interim relief to conduct any performance test or to furnish any security for the claim made by the appellant. It was also pointed out that the appellant had initially made a counter-claim before the Arbitral Tribunal at London, which was withdrawn. It was submitted that, any interim direction given against the respondent No. 2 would amount to enforcing the liability of the respondent No. 2 under the agreement between it and the appellant, the disputes under which were required to be arbitrated upon by the ICC - London. It was also contended that the guarantee contained in the know-how agreement was no longer valid and / or enforceable, and that the guarantee was in respect of performance and not in respect of any pecuniary or other liability of respondent No. 1. Since the parties to the know-how agreement had consciously chosen

the forum of ICC, London for settling their disputes, the appellant cannot resile from that agreement by praying for reliefs in any other forum. It was argued that the liability of the guarantor was a separate and distinct from that of the principal debtor, and that the application for interim relief was wholly unconnected with the know-how agreement between the appellant and the respondent No. 2. It was also argued that the respondent No. 2 as a holding company cannot be made liable for any liabilities of its wholly owned subsidiary, the respondent No. 1 and no interim relief could be granted in favour of the appellant on that ground. Both the learned counsel for the respondents supported the reasoning of the trial Judge.

8.2 In support of their contentions, the learned counsel for the respondents have referred to the following decisions :

[a] The decision of the Supreme Court in case of Fateh Chand v. Balkishan Dass, reported in AIR 1963 SC 1405 was cited for the proposition that a claim for liquidated damages would not lie unless the plaintiff proves loss or legal injury.

[b] The decision of the Supreme Court in case of Cotton Corporation of India Ltd. v. United Industrial Bank Ltd., reported in AIR 1983 SC 1272 and a decision of this Court in case of Gujarat Electricity Board v. Maheshkumar & Co., reported in AIR 1982 Gujarat 289, were cited for the proposition that interim relief can be granted only in aid of the final relief.

[c] The decision of the Privy Council in Ardeshir H. Mama v. Flora Sasoon, reported in AIR 1928 P.C. 208, the decision of the Kerala High Court in Ayissabi v. Gopala Konar, reported in AIR 1989 KER 134 and the Madras High Court decision in K.S. Sundaramayyar v. K. Jagadeesan, reported in AIR 1985 MADRAS 85 were referred to for the proposition that once a party makes a claim for damages, he treats the contract as repudiated and thereafter, cannot seek a specific performance of a contract.

[d] The decision of the Allahabad High Court in Kashi Nath v. Municipal Board, reported in AIR 1989 ALh. 375 was cited for the proposition that the Court will not be justified in granting mandatory relief by which it is required that a party should undertake works of considerable extent by way of improvements and constructions requiring a good deal of engineering skill besides considerable amount of money to meet the expense, because, the Court is not capable of supervising the works and thus, enforcing the injunction and because award of damages is certainly an efficacious remedy in such a case.

[e] The decision of the Delhi High Court in case of M/s Magnum Films v. Golcha Properties Pvt. Ltd., reported in AIR 1983 DELHI 392 was cited for the proposition that the temporary mandatory injunction can be issued only in case of extreme hardship and compelling circumstances and mostly in those cases when status quo existing on the date of the institution of the suit is to be restored. For this

proposition, reliance was also placed on the decision of the Calcutta High Court in Nandan Pictures Ltd. v. Art Pictures Ltd., reported in AIR 1956 CAL. 428.

[f] The decision of the Delhi High Court in M/s Global Company Ltd. v. National Fertilizers Ltd., reported in AIR 1998 DELHI 397 was cited for the proposition that the principles of Order 39 Rule 5 of the CPC in respect of attachment and Order 39 of the CPC in respect of injunctions would apply to applications under section 9 of the Arbitration act.

[g] The decision in Union of India v. Raman Iron Foundry, reported in 1974 (2) SCC 231 was cited for the proposition that a claim for damages is not a liquidated sum.

[h] The decision of the Supreme Court in Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., reported in (1999) 7 SCC 1 was relied upon for the proposition that, in deciding whether an injunction should be issued, the Court should determine whether one party's case is stronger than the other.

9. The trial Court has observed that there was no satisfactory explanation coming forth from the appellant as to why it did not first approach the Arbitration Tribunal under section 17 of the Act before invoking the Court's discretion to order interim measures under section 9 of the said Act. sections 9 and 17 of the Act which fall for our consideration are re-produced hereunder:-

"section - 9 - Interim Measures etc. by Court A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court -

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

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

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

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

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

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

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

section - 17 - Interim Measures ordered by Arbitral Tribunal-

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)."

9. The expression "Arbitral award" includes an interim award under section 2(1)(c) of the Act, unless the context otherwise requires. The Arbitral Tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award, as provided by section 31(6) of the Act. The Arbitral Tribunal, at the request of a party, order a party under section 17 of the Act to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, unless otherwise agreed to by the parties. The provisions of section 17 are identically worded as Article 17 of the UNCITRAL Model Law.

9.1 Article 26(1) of the UNCITRAL Arbitration Rules, 1976 was a provision similar to the provisions of Article 17 of the Model Law enabling the Arbitral Tribunal to take any interim measures including measures of conservation of goods forming the subject matter of the dispute. Article 26(2) of the Rules of 1976 provided that such interim measures may be established in the form of an interim award. Under the said Act, however, an appeal lies under section 37(1) against the order of interim measure made under section 17 of the Act. It is, however, clear that even if the Arbitral Tribunal grants interim injunction, it cannot be enforced without resort to the Court. If an Arbitral Tribunal had the power to effectively order measures of interim relief that the Court can provide, there would hardly be any need to provide for court applications for interim measures. Since the Arbitral Tribunal's jurisdiction is limited, the assistance of Court is required.

9.2 The basic limitation on the power of the Arbitral Tribunal lies in the arbitration agreement which binds only the parties to the agreement. Arbitration clause cannot bind anyone who is not a party to it. Thus, the Arbitral Tribunal will have no power to issue interim orders which can bind third parties over whom it has no consensual jurisdiction. Moreover, Arbitral Tribunals have no coercive power to enforce their orders. An injunction ordered by Arbitral Tribunal would not be fortified with the threat of contempt of court, but would only have contractual effect between the parties. It is therefore evident that access to the court under section 9 of the said Act for certain kinds of interim relief in arbitration cases, would not only be expedient but necessary as a provisional remedy to ensure that a just outcome of the arbitral proceedings does not get defeated

and the Arbitral Tribunal can effectively resolve the disputes. The range of interim measures that can be issued under section 9 of the said Act is considerably wider than that under section 17. The provisions of sections 9 and 17 modelled on the UNCITRAL Model Law on International Commercial Arbitration (1985) give an option of free access to both the court and the arbitral tribunal for interim relief and give the parties a choice between Arbitral Tribunal or Court for interim reliefs. Furthermore, a party to an arbitration agreement could approach the Court for interim protection measures under section 9 before or during the arbitration proceedings, which indicates that the efficacy of court's power to grant interim relief remains the same even during the arbitration proceedings. It would therefore not be proper to relegate a party who approaches the court for interim relief under section 9, to the Arbitral Tribunal for an interim measure of protection under section 17. The view that the Court should not exercise its discretionary powers under section 9 when a party to the arbitration agreement can move the Arbitral Tribunal under section 17 cannot, therefore, be accepted.

10. The contention on behalf of the respondent No. 2 that the Court cannot consider the agreement between the appellant and the respondent No. 2, because, that would amount to enforcing liability of the respondent No. 2 which can be done only by the ICC - London, is misconceived. When the Arbitral Tribunal has jurisdiction only to decide disputes arising under one set of contracts, it does not preclude the Arbitral Tribunal from taking another related contract into consideration. There is a distinction between giving effect to another contract by deciding issues under it and taking that contract into consideration for the purposes of interpretation and application of the agreements falling within the jurisdiction of the Arbitral Tribunal. Therefore, there would be no lack of jurisdiction to consider the nature of the agreement of the appellant with the respondent No. 2 in context of three Agreements with the respondent No. 1 for a comprehensive understanding of the nature of the transaction. Such consideration may become necessary to ascertain the intention of the parties as to whether they conceived of various agreements as forming together one single economic transaction. The Court can, therefore, always take into consideration the related contracts to ascertain the nature of the transaction while deciding the question of interim measures under section 9, because, a truncated view of the transaction cannot guide the Court as to what interim measures are required. That would not amount to enforcing any liability under any contract for which the Arbitral Tribunal may have no jurisdiction.

11. Proceeding on the footing that a Court can issue orders of interim measures of protection as contemplated by the provision of section 9 of the said Act on the above reasoning, it would have to be now seen whether there is a case made out by the appellant for a mandatory order against the respondent No. 2 subject to whose control its wholly owned subsidiary, the respondent No. 1, which was created for the purpose of the contract in India (which appears to be the case from the letter of November 13, 1999, Volume II Page 1 of the appellant's paperbook, written by the respondent No. 2 - Lentges to the appellant in which the last sentence reads: "Our recommendation is to sign the outstanding contracts after foundation of our company in India"). The respondent No. 2 and its subsidiary, the respondent No. 1, had entered into the agreements forming a consortium as can be seen from the letter dated 11th July 1997 of the respondent No. 2 to the appellant (Annexure I collectively, Volume I of the Appellant's Paperbook, on page 196-197). The relevant portion of that letter, reads as follows :-

> "Lentjes and the companies A, B, C shall form a consortium and have a very clear legal agreement overseen by Lentjes, controlled by Lentjes and operated by Lentjes. It will be a separate office at Bombay, team of personnel and infrastructure for this specific job."

12. Under the "Know-how supervision agreement" dated 1st September 1997 between the appellant and the respondent No. 2, the respondent No. 2 agreed that, "It will undertake to supervise Engineering / Procurement, Fabrication, Supply of Erection to be undertaken in a manner that the boilers meet the guarantees stipulated in this agreement as if the supply, erection and commissioning has been done by Lentges (i.e. the respondent No. 2) itself and shall guarantee their performance", as declared in clause (e) of the Preamble of the Agreement. The respondent No. 2 undertook full responsibility for the workmanship of the Erection contractor, Engineer, and Engineering supply contractor as stipulated in para 1.6, 1.8 and 1.11 of its agreement. The respondent No. 2 undertook in clause 2.1(c) of the agreement that, "Boilers once assembled, erected and commissioned will operate in conformity of this agreement as well as other agreements as may be entered by NIRMA with Engineer, Contractor & Erection Contractor." The Contractor / Engineer / Erection Contractor were to be appointed as per the approval of the respondent No. 2 and the terms and conditions of contract with them (excepting the commercial and financial terms) were to be previously approved in writing by the respondent No. 2 and then not to be altered or amended without its previous approval. This was actually done, because, in each of the three agreements with the respondent No. 1, it was mentioned that the terms thereof were approved by the respondent No. 2. The respondent No. 2 was to depute a Project Manager to supervise all the stages upto the erection and commissioning of the plant, as stated in Article VI(1) of the agreement. The respondent No. 2, in Article VII of the agreement, gave guarantees to the appellant in the following terms :

> "ARTICLE VII : WARRANTIES :
>
> 7.1 LENTJES guarantees to NIRMA :-
>
> (a) that the CONTRACTOR, ENGINEER and ERECTION CONTRACTOR shall duly and timely perform their respective obligations with NIRMA as may be provided in their respective contracts.
>
> (b) the fulfillment of the warranties contained in the respective contracts with the CONTRACTOR, ENGINEER and ERECTION CONTRACTOR.
>
> (c) LENTJES shall be the principal guarantor for due performance of the CFB boilers as covered in this agreement and the said guarantee shall be in addition to ay guarantee(s) which NIRMA may have from the CONTRACTOR, ENGINEER and ERECTION CONTRACTOR. For due fulfillment of guarantee obligation of LENTJES under this clause, if need be, NIRMA agrees to assign guarantee(s) of CONTRACTOR, ENGINEER and ERECTION CONTRACTOR in favour of LENTJES.

7.2 LENTJES agrees as principal guarantor to accept the guarantee obligation as mentioned in Annexure 6 of this agreement and also agrees to monetarily or otherwise compensate NIRMA for all the obligations covered herein.

7.3 LENTJES' liability under this Article VII shall, however, not exceed the liabilities and the respective liabilities of the ENGINEER, the CONTRACTOR and / or the ERECTION CONTRACTOR under this agreement and also under their respective contracts with NIRMA."

12.1 The above clauses of the agreement show that the respondent No. 2 had guaranteed, as a principal guarantor, the due performance of CFB boilers and the obligations under the respective contracts of the Contractor, Engineer and Erection Contractor, with the appellant. The respondent No. 2 agreed to compensate the appellant for all obligations of the Contractor, Engineer and Erection Contractor under their respective contracts to the extent of their liabilities. Thus, the respondent No. 2 stood as a guarantor to the appellant for due performance of the obligations of the respondent No. 1 towards the appellant under its three agreements on the basis of which the arbitration disputes have been referred to the Domestic Arbitral Tribunal.

12.2 The guarantee obligations mentioned in Appendix VI of the agreement with the respondent No. 2 were in terms undertaken by the respondent No. 2 under Article 7.2 of the agreement. As per these guarantee obligations, the respondent No. 2 had guaranteed "execution of the order with good workmanship according to the technical specifications and performance requirements, as handed over to him". The guarantee period "started with the day of preliminary passing of title and risk, after successful completion of test operation", and was for "10000 operating hours with in a max of 2 years", as per the guarantee stipulation. If the respondent No. 2 did not comply with the performance guarantees even after repairs and replacement, the appellant was entitled to the liquidated damages per boiler unit (percentage of contract price per boiler unit), as stipulated in the guarantee obligations under the agreement of the respondent No. 2 (See page 347 of Volume I of the appellant's paperbook in its Appendix VI).

12.3 Apart from the guarantee rights, the appellant had a right not to accept the unit or part thereof in the events enumerated in the guarantee obligations, which included event of liquidated damages exceeding 10% of the contract price. The agreement with the respondent No. 2 was to be governed according to the laws of India, as stipulated by Article 16.2 and 16.4. By clause 5 of Article 16, it was agreed between the respondent No. 2 and the appellant that the appellant "shall have no claim or demands against LENTJES (i.e. the respondent No. 2) other than those specified in the Agreement", and that the liabilities of LENTJES to the appellant "shall be limited to what is provided in the agreement and shall in the aggregate be limited to 15% of the total order value ..... under this Agreement" as well as "15% of the total order value of the agreements to be entered with the Engineer, Contractor and Erection Contractor and such limitation shall not be alterable by decision of arbitration or court".

12.4 From the agreement executed by the respondent No. 2, it appears that the respondent No. 2 had guaranteed successful execution of the Work Order retaining its complete control at all stages of the work to be done through the respondent No. 1 on the terms of the three agreements executed by

the respondent No. 1, which was wholly owned subsidiary of the respondent No. 2 specially founded in India for executing the Work Order, obligations under which were guaranteed in no uncertain terms by the respondent No. 2. All the four agreements read together spell out a pattern showing the dominance of the respondent No. 2 who undertook the successful execution of all the agreements. It would be difficult for such a principal guarantor to say that he is a stranger to the three agreements entered into by its wholly owned subsidiary in furtherance of the main contract that it entered with the appellant to provide three Boilers to the appellant.

13. However, the fact remains that the arbitration clause contained in Article 15 of the agreement with the respondent No. 2 stipulated that if at any time any question / dispute or difference whatsoever shall arise between the respondent No. 2 and the appellant out of or in connection with this Agreement, the same shall be finally settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The place of arbitration shall be London and arbitration proceedings shall be carried out in England. On the strength of this clause, the respondent No. 2 has taken up a stand that the Domestic Arbitral Tribunal will have no jurisdiction over the respondent No. 2 and therefore, the interim relief cannot be issued either by the Arbitral Tribunal or by the Court under sections 9 and 17 of the Act, even if the respondent No. 2 was to be treated as a guarantor for the obligations of the respondent No. 1 under the three agreements including the obligation to conduct the performance tests.

13.1 It was urged in the above background, on behalf of the appellant that, having regard to the nature of the transaction, the Court will have power to issue interim relief even against the respondent No. 2 though not a party to the arbitration proceeding, as on today, and therefore, the respondent No. 2 can be compelled to do performance test on the three boilers in order to demonstrate "that the boiler is capable of operating in accordance with the technical specifications", as was stipulated by the respondent No. 2 under Article 8.2.1 of the contract. It was argued that the respondent No. 1 was only a "shell" company founded by the respondent No. 2 for the purpose of the contract and the respondent No. 1 had no means to satisfy the claim of the appellant and therefore, the respondent No. 2 should also be asked to furnish a bank guarantee in the sum claimed by the appellant who was entitled to get back the entire amount paid under the contracts from the respondents Nos. 1 and 2, as per the Statement of Claim.

13.2 The respondent No. 2 had moved the Tribunal for holding that it had no jurisdiction over the respondent No. 2 in view of the arbitration clause in Article 15 of the Agreement, which stipulated that the seat of arbitration will be at London. This order was confirmed by the Court in Appeal and a Revision Application is pending with the High Court, as noted above. Therefore, as on today, the respondent No. 2 is held to be not amenable to the jurisdiction of the Arbitral tribunal since it was not a signatory to the arbitral clause contained in any of the three agreements with the respondent No. 1. However, that aspect is quite distinct from the power of the court to grant interim measures under section 9 of the Act, which may extend even against the third party. These powers are same as those exercisale for the purpose of and in relation to any proceeding before it. A surety will not be a stranger to contract of guarantee since it is a triparte contract which makes the liability of a surety co-extensive with that of the principal debtor, though indeed a separate liability. In contrast to section 17 under which the interim measures that can be issued by the Arbitral Tribunal only against

the parties to the arbitration agreement, the Court can in a given case issue interim measures against the parties not involved in the arbitration and such measures would be enforceable through the local judicial system, (See paragraph 4.038 at page 120 of "International Commercial Arbitration in UNCITRAL Model Law Jurisdiction" by Dr. Peter Binder, First Edition (2000) published by Sweet & Maxwell). The applications under section 9 to Court will be appropriate where the order is sought against the third party over whom the Tribunal had no jurisdiction or where any order by the Tribunal is likely to be ineffective. (See para 5.096 at page 205 of Russel on Arbitration, 21st Edition).

13.3 The Supreme Court in Sundaram Finance Ltd. (supra) has held that, for construing the provisions of the said Act, it is more relevant to refer the UNCITRAL Model Law rather than the Act of 1940. In context of the powers of the Arbitral Tribunal under section 17 and of the Court under section 9, it observed in paragraph 11 of the judgment that, though section 17 gives the Arbitral Tribunal power to pass orders, the same cannot be enforced as orders of a Court. It is for this reason that section 9 gives the Court power to pass interim orders during arbitration proceedings. It was held that reading the provisions of section 9 as a whole, it appears that the Court has jurisdiction to entertain an application under section 9 either before arbitral proceedings or during the arbitral proceedings or after making of the arbitral award but before it is enforced in accordance with section 36 of the Act.

13.4 In Bhatia International (supra), the Supreme Court has held that an application for interim measure can be made to Courts in India, whether or not the arbitration takes place in India before or during the arbitral proceedings (see paragraph 28 of the judgment). It was held that the provisions of Part I of the Act would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India, the provisions of Part I would compulsorily apply and the parties are free to deviate only to the extent permitted by the derogative provision of Part I. In case of international commercial arbitrations, held out of India, provisions of Part I would apply unless the parties by agreement express or implied, exclude all or any of the provisions. In that case, laws or rules chosen by the parties would prevail. Any provision in Part I, which is contrary or excluded by that law or rules, will not apply.

13.5 In the present case, under Articles 16.2 and 16.4 of the agreement between the appellant and the respondent No. 2, the agreement was to be governed according to the laws of India which will include the said Act. The provisions of section 9 of the said Act are not excluded under that agreement. This Court will, therefore, have powers under section 9 of the said Act to issue interim injunction against the respondent No. 2 even if arbitration proceedings on the basis of that agreement are pending before the ICC, London, while the arbitration proceedings on the basis of the three agreements of its subsidiary, the respondent No. 1, in respect of which the obligations have been guaranteed by the respondent No. 2 under the contract is pending in the Arbitral Tribunal, at Ahmedabad.

14. We may therefore now examine whether any case is made out by the appellant for grant of any interim relief under section 9 of the said Act against the respondents. In paragraph 69 of the application made under section 9 of the said Act before the Court, the appellant seeks, "an

appropriate order of interim measure of protection against the respondents directing them to preserve boilers Nos. 1, 2 and 3 contracted to be supplied by them under agreements dated 12-12-97, 12-12-97 and 17-3-98 at the petitioner's plant in Bhavnagar by conducting the "Start-Up" and "Performance Test Run" and further achieve the agreed parameters as per Annexure VI of the contract dated 1-9-1997 between the petitioner and respondent No. 2 till the hearing and final disposal of the main petition".

14.1 According to the appellant, it has a prima facie case and balance of convenience is in its favour, and that if the interim reliefs are not granted, the appellant will suffer irreparable loss and injury "which can never be assessed or compensated in terms of money".

14.2 The contract of supply of boilers in respect of which the respondent No. 2 had intellectual property rights was not a contract to buy goods freely available across the counter. The nature of the four agreements and the details given in the Annexures to the agreement dated 1-9-1997 between the appellant and the respondent No. 2 would show that these Boilers were unique goods, the installation and operation of which was possible only with the special know-how of the respondent No. 2. This is why it has been argued by the learned Senior Counsel appearing for the appellant that the essential part of the contract, namely, of conducting "Performance Test Run", which admittedly was not conducted by the respondents as stipulated in the contract, should be ordered to be performed with a view to preserve these three boilers since the special know-how was available only with the respondent No. 2 and the appellant was under an obligation not to disclose any secrets of the design and operation of the boilers to any outside agency for getting the performance test conducted. It was argued that until such test was done, there was no legal entrustment of the boilers to the appellant and the risk remained with the respondents who continued to be bound under the contract to preserve these boilers. It was argued that the performance guarantee period of two years or 10000 operative hours would run only after the performance test was conducted by the respondents. Relying on the provisions of section 23 of the Specific Relief Act, the learned Senior Counsel argued that the liquidation of damages was by itself not a bar to specific performance in the present case.

14.3 The specific performance of a contract can be enforced when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done or when the act agreed to be done is such that compensation in money for its non-performance would not afford an adequate relief. In case of contract of transfer of movable property which is not an article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market, there would be a presumption by the Court that the breach of such contract cannot be adequately relieved by compensation in money. This is borne out from the provisions of section 10 of the Specific Relief Act. Such presumption would, however, be a rebuttable presumption. section 23 of the Specific Relief Act, provides that liquidation of damages named in the contract is not a bar to specific performance, if such contract is otherwise proper to be specifically enforced. Therefore, if a contract is of the type which cannot be specifically enforced, the provisions of section 23 cannot be pressed into service. In a contract for building or engineering works since a Court has no means of supervising, it will not usually grant remedy of specific performance. Moreover, remedy of specific performance has to be sought by the plaintiff to enable

the Court to consider whether it may be granted. If the plaintiff does not, as in the instant case, pray for specific performance, but instead claims damages for breach of contract, the plaintiff disentitles itself, on account of his own election to treat the contract as breached, from claiming specific performance of the same contract. The appellant has admittedly not prayed for specific performance of the terms of contract under which the respondent No. 2 was expected to conduct the performance test run. This is evident from the prayer clauses 73(A) and (B) of the Statement of Claim dated 12-11-2000 filed by the appellant before the Arbitral Tribunal (a copy of which is at Volume III of the appellant's paperbook, Annexure ZE, page 255 to 297), in which a declaration is sought that, "the respondent No. 1 has failed to perform its obligations under the Agreements dated 12-12-1997, 12-12-1997 and 17-3-1998", and repayment of Rs. 60,67,18,000=00 is claimed from the first respondent on account of its failure to perform its obligations". It was prayed in clause (m) that the "declarations as prayed for above be directed to be passed against the respondents 1 and 2 jointly and severally."

14.4 In none of the prayers made by the appellant in the Statement of Claim before the Arbitral Tribunal, did the appellant claim specific performance of any part of the contract. There was no request made for any direction on the respondents to conduct performance test. The claim of the appellant was on the footing that there was a breach of contract committed by the respondents and it was made "on account of failure on the part of the respondents to supply boilers of agreed parameters" (See para 68(1) of the Statement of Claim). Since the appellant did not pray for specific performance of the terms of contract which required the respondents to conduct performance test run, but claimed for a declaration of breach of contract and repayment of amounts paid to the respondent No. 1 and made other money claims for damages for breach of contract, the appellant disentitled itself, on account of its own election of the remedy of claiming compensation for breach allegedly committed by the respondents, to claim specific performance. The appellant did not even claim, "specific performance with compensation". Therefore, the prayer in the application under section 9 claiming specific performance of the terms of contract requiring performance test run to be conducted by the respondents is not at all warranted and cannot be granted as an interim measure of protection.

15. That takes us to the alternative prayer in para 69(b) of the application, in which the appellant seeks an interim measure of protection directing the respondents to deposit a sum of Rs. 6,53,00,000=00 to be released to the appellant so as to enable the appellant "to conduct the Start-Up and Performance Test Run by engaging any other agency, as may be deemed appropriate" by the appellant till the final disposal of the petition. A direction is also sought in para 69(d) on the respondents to secure by way of a bank guarantee a sum of Rs. 60,67,18,000=00 paid by the appellant, subject to the award that may be passed by the Arbitration Tribunal.

15.1 The learned Senior Counsel for the appellant, in support of these prayers submitted that the appellant was entitled to reject the boiler units and claim the entire amount paid, because, the boilers were not as per the parameters agreed. He argued that since the appellant cannot be expected to bring the entire Soda Ash Plant to a standstill, it was as per the Contract entitled to continue to use these boilers, till it could procure "suitable replacement" as contemplated by the terms of guarantee obligations mentioned in Appendix VI of the contract dated 1-9-1997 executed by

the respondent No. 2. He also submitted that since the respondent No. 1 was only a "shell" company, wholly owned by the respondent No. 2 in order to ensure that the award that may be made in favour of the appellant may not be frustrated, the respondents should be ordered to furnish security as prayed for in the application.

15.2 There is no dispute over the fact that the Appellant has not paid the last 10% of the total consideration, being the final amount payable under the contracts on "completion of Performance Test Run" as contemplated by all the agreements. There is also no dispute over the fact that the Performance Test Run was not conducted; but the rival parties have blamed each other for the test not being conducted.

15.3 We have been taken through a mass of documentary evidence with a fervour of original side advocacy by the learned counsel appearing for both the sides in their tug of war to show the respective strength of their cases for and against the grant of an interim relief. The fact that emerges without much dispute is that the appellant has not till now rejected any of the boilers and has been in fact using them for its Soda Ash Plant after being handed over the boilers, and that it has not paid the final payment of 10% of the total consideration under any of the contracts which was payable against performance bank guarantee as well as on completion of the performance test run and further that the appellant invoked the bank guarantee of Rs. 13 crores which were advanced to the respondent No. 1 due to "the default in commissioning the three boilers in accordance with the agreed schedule", as stated in para 6 of the appellant's letter dated July 29, 2000 addressed to the respondent No. 1 (Copy at Annexure ZB in Volume II of the appellant's paperbook at page 241 - 246).

15.4 Certificate of mechanical completion was to be given in respect of each boiler in respect of which positive result was achieved at the conclusion of the mechanical completion, as contemplated by Article 7.10.3 of the Agreement for Erection and Commissioning, reproduced hereunder :

> "7.10.3 If at the conclusion of Mechanical Completion test of each Boiler, positive result is achieved, then in that event ERECTION CONTRACTOR shall prepare and NIRMA shall sign the Provisional Acceptance Certificate for that Boiler. The issue of Acceptance Certificate shall not absolve ERECTION CONTRACTOR from rectifying minor or unsubstantial defects in the boiler.
>
> 7.10.4 In case a successful Mechanical Completion Test should not be possible due to reasons not attributable to ERECTION CONTRACTOR within 7 months after the Mechanical Completion date, or such extended time as agreed upon between the parties, such boiler shall be considered as accepted and a Provisional Acceptance Certificate shall be issued by NIRMA.
>
> 7.10.5 During the Mechanical Completion Test if it is observed that some minor rectifications are required or unsubstantial defects are noticed, ERECTION CONTRACTOR shall rectify the same as its own cost."

15.5 The expression "Mechanical Completion" and "Mechanical Completion Certificate" are defined in Articles 1.8 and 1.9 as follows :

> "1.8 "Mechanical Completion" shall mean that an individual boiler has been completed in all respect to enable preparation for start up under normal conditions without danger to the personnel and equipment according to the provisions of Article 7.
>
> 1.9 "Mechanical Completion Certificate" shall mean certificate certifying that all items required for normal operation of an individual boiler has been duly assembled, erected and commissioned in accordance with the technical specification."

15.6 Admittedly, "Mechanical Completion Certificate and Provisional Acceptance Certificate" were issued in respect of all the three boilers by the appellant subject to the "punch list" attached to them (See Annexure ZE of Volume III of the appellant's paperbook on pages 255-297).

15.7 The performance test run was to be conducted as contemplated by clause 7.12 of the Agreement for Erection and Commissioning to find out whether at the conclusion of such test, the guarantee performance as setout in the contract with the respondent No. 2 was achieved for the boiler. If it was so achieved, the appellant was required to sign the performance acceptance certificate for that boiler, as per clause 7.12.2, reproduced below :

> "7.12.2 At the conclusion of performance test of each Boiler, the guaranteed performance as set out in CONTRACT hereto are achieved for that Boiler then in that event ERECTION CONTRACTOR shall prepare and NIRMA shall sign the Performance Acceptance Certificate for that Boiler. Such certificate shall state that ERECTION CONTRACTOR has duly fulfilled its contractual obligations and is discharged there from in respect of that boiler. The issue of Acceptance Certificate shall not absolve ERECTION CONTRACTOR from rectifying minor or unsubstantial defects in the boiler."

15.8 The performance bank guarantee given by the respondent No. 1 could be encashed if parameters of the performance test were not achieved because of defective / poor workmanship. However, the maximum liability on account of non-performance was stipulated to be 10% of the order value as agreed under Article 7.12.3 of the Agreement for Erection and Commissioning, and clause 4(b) of the specific conditions of Work Order annexed thereto, which read as under :

> "7.12.3 As per the CONTRACT, parameters of the performance test are to be achieved. Because of defective/poor workmanship delivered by the ERECTION CONTRACTOR, performance parameters negatively deviate from the guaranteed figure, ERECTION CONTRACTOR shall be liable for liquidated damages and, NIRMA shall be free to encash the Performance Bank Guarantee to be received from the ERECTION CONTRACTOR, without any further reference/recourse to the ERECTION CONTRACTOR, and other suitable action as may be required to be taken

> by NIRMA under the Agreement as well as the CONTRACT. However, the maximum liability on account of non-performance shall be 10% of the Order Value."
>
> "4(b). FOR NON PERFORMANCE:
>
> The 3 Nos. of CFB Boilers of 100 tph each after their erection and commissioning shall perform as per the guarantee parameters. Because of the defective poor workmanship delivered by LENTJES ENERGY (INDIA) LTD. performance parameters negatively deviate from the guaranteed figure, you shall be liable for liquidated damages and Nirma shall be free to encash the Performance Bank Guarantee to be received from you without any further recourse to you. However the maximum liability of non-performance shall be 10% of the total order value."

Thus, a ceiling of liability was fixed for failure of performance test run at 10% of the total order value.

15.9 Admittedly, since no performance test was carried out for the blames attributed by the parties to each other, final payment of 10% of consideration stipulated in the terms of payment in all the agreements to be paid against a performance bank guarantee and completion of performance test and certificate issued by the appellant, was in fact not paid, and on that count, the appellant, therefore, has withheld final payment of 10% of the entire consideration payable under all the agreements. (See Article 3.2.3, 3.2.6 and 3.2.10 of the contract executed by the respondent No. 2, and Article 4.4.8 of the Engineering Contract, Article 3.5.9 of the Supply Contract and Article 4.4.4 of the Erection and Commissioning Contract).

16. Apart from withholding 10% of the total consideration due to the respondent No. 2 not conducting the performance test, the appellant had invoked the performance bank guarantee which was stipulated in Article 4.4.4 of the Agreement for Erection and Commissioning. The appellant had by letter dated 28-7-2000 (at Annexure ZA in Volume II of the appellant's paperbook on page 240) invoked the bank guarantee dated 22-9-1999 for a sum of Rs. 13 crores. In paragraphs 6 and 7, reproduced below, of its letter dated 29-7-2000 (Annexure ZB of the said Volume II) addressed to the respondent No. 1, the appellant informed the respondent No. 1 that it had invoked the bank guarantee owing to "defaults and a history of failure".

> "6. You had repeatedly requested us to bail you out of your purported financial difficulties. Pursuant to such request, with a view to maintain a cordial business relationship, we agreed to advance you a sum of Rs. 13,00,00,000/(Rupees thirteen crores only) contingent on your promise that you would meet the revised schedule for full and formal commissioning of the three boilers. In order to secure the aforesaid advance of Rs. 13 crores, you had executed an irrevocable and unconditional bank guarantee for the said sum of Rs. 13 crores. It was also mutually agreed between us in the event of any failure, or default in commissioning the three boilers in accordance with our agreed schedules, Nirma would be free to invoke the bank guarantee and take back the said advance of Rs. 13 crores.

> 7. This is to inform you that owing to repeated defaults and a chronic history of failure in meeting contracted deadline, Nirma has now been constrained to invoke the aforesaid bank guarantee in order to protect its interests of its shareholders. "

16.1 The above guarantee, a copy of which was mutually made available by the learned counsel to the Court on inquiring about it during the arguments, referred to the fact that the respondents Nos. 1 and 2 were required under the boiler agreement to provide the appellant "with performance guarantees for the performance of all the three CFB Boilers, after each of the three boilers is installed and commissioned". It also mentions; "The value of performance guarantees of Lentjes India amounting to Rs. 65,332,356/- [Rupees sixty five million three hundred thirty two thousand three hundred fifty six only], for these three CFB Boilers is included in this value of Bank Guarantee of Rs. 130,000,000/- [Rupees one hundred and thirty million only]". It further records that, "Lentjes (i.e. the respondent No. 2) has requested the Bank to provide the Bank Guarantee as required, and the Bank has agreed to do so .....". The relevant covenant showing that the guarantee was in respect of the performance guarantees of both the respondents Nos. 1 and 2 contained in the said deed reads as follows :

> "AND THE BANK DOES FURTHER COVENANT AND DECLARE that this Guarantee is absolute, unconditional and irrevocable and shall remain in force upto 31.03.2000 or upto and inclusive of the date on which Lentjes and Lentjes India execute all the Performance Guarantees in favour of Nirma as required of them in terms of their respective agreements with Nirma, whichever is earlier. The Bank shall be discharged from its liabilities arising out of this Deed of Guarantee only when Nirma or Lentjes or Lentjes India submits to the Bank Performance Guarantee Certificates signed by Nirma's duly authorised official confirming successful completion of Performance Test as per the Performance Guarantee Parameters provided in the Boiler Agreements and receipt of the said Performance Guarantees. If Nirma is not able to submit to the Bank both these Certificates before 31.03.2000, then this Bank Guarantee shall automatically be renewed on the same terms and conditions for a period upto 31.12.2000."

16.3 When the said bank guarantee was invoked by the appellant, the effect was that the appellant received thirteen crores of rupees from the bank since performance test run was not done and consequential performance guarantee certificate which would have been issued by the appellant, had the test been duly conducted with positive result, could not be submitted by the respondent No. 1 to the bank for the discharge of the bank's liability. This amount of Rs. 13 crores included the value of the performance guarantees of the respondent No. 1 amounting to Rs. 65,332,356/- as stated in the deed of guarantee. Over and above getting the amount of Rs. 13 crores by invoking the bank guarantee which included the value of the performance guarantees of the respondent No. 1, the appellant also had admittedly withheld 10% of the total consideration payable under the agreements as final payment against the performance bank guarantees and the performance test run.

17. Thus, in sum, the result is that -

[a] The appellant is in possession of the three boilers in respect of which it had issued mechanical completion and provisional acceptance certificates.

[b] These boilers are admittedly being put to actual commercial use by the appellant.

[c] The final payment amount which was 10% of the total consideration i.e. Rs. 6.53 crores was withheld by the appellant since the performance test against which the said final payment was to be made, was not conducted.

[d] The appellant has already invoked the performance bank guarantee of Rs. 13 crores on the ground that the performance test was not done and the boilers were faulty.

18. On the above facts, we are of the opinion that no further security is called for by issuing any interim measure under section 9 of the Act, and that the appellant has already taken steps to substantially safeguard its own interest. Having regard to the aggregate ceiling of all damages stipulated between the parties in para 11.4 of the agreement also, there is no need for any interim measure to be ordered by the Court under section 9 of the Act. Denial of interim relief by the trial Court was, therefore, perfectly justified in the facts of the case. The appeal is, therefore, dismissed with costs.