Bmw India Private Limited vs Libra Automotives Private Limited & ... on 9 July, 2019

Equivalent citations: AIRONLINE 2019 DEL 1087, (2019) 261 DLT 579 (2019) 5 ARBILR 118, (2019) 5 ARBILR 118

Author: Sanjeev Narula

Bench: Sanjeev Narula

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*      IN THE HIGH COURT OF DELHI AT NEW DELHI
                                                    Reserved on: 20th May, 2019
                                                   Pronounced on: 9th July, 2019
+      O.M.P. (I) (COMM.) 25/2019 and I.A. 3027 of 2019

BMW INDIA PRIVATE LIMITED                                          ..... Petitioner
                              Through:       Mr. Dayan Krishnan, Sr. Advocate
                                             with Mr. Diwakar Maheshwari,
                                             Mr. Karun Mehta and Mr. Yugam
                                             Taneja, Advocates.
                              versus

LIBRA AUTOMOTIVES PRIVATE LIMITED & ORS. ..... Respondents
                              Through:       Mr. Vinam Gupta and Mr. Arjit
                                             Oswal, Advocates.

+      O.M.P. (I) (COMM.) 9/2019 and I.A. 4988 of 2019

BMW INDIA FINANCIAL SERVICES PRIVATE LIMITED ..... Petitioner
                              Through:       Mr. Dayan Krishnan, Sr. Advocate
                                             with Mr. Diwakar Maheshwari,
                                             Mr. Karun Mehta and Mr. Yugam
                                             Taneja, Advocates.
                              versus

LIBRA AUTOMOTIVES PRIVATE LIMITED                                  ..... Respondent
                              Through:       Mr. Vinam Gupta and Mr. Arjit
                                             Oswal, Advocates.

CORAM: JUSTICE SANJEEV NARULA

                              JUDGMENT
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SANJEEV NARULA, J.

1. The present petitions under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as „the Act) have been filed seeking interim measures to secure the payment of the outstanding amounts alleged to be due and payable by the Respondents jointly and/or severally to

the Petitioners. The reliefs sought in both the petitions are against common Respondents. Furthermore, the transaction between the parties under the agreements is inter related and interconnected and gives rise to similar contentions on facts and identical question of law. Thus, both these petitions are being decided by a common judgment.

2. BMW India Pvt. Ltd. [Petitioner in OMP (I)(Comm) 25 of 2019, hereinafter referred to as „Petitioner No. 1] is engaged in the business of manufacturing, importing, assembling, wholesaling cars to its authorized dealers in India on Principal to Principal basis. BMW India financial services Pvt. Ltd. [Petitioner in OMP (I)(Comm.) 9 of 2019, hereinafter referred to as „Petitioner No. 2] is licensed as a Non-Banking Financial Corporation under Reserve Bank of India Act, 1934.

3. Libra Automotives Pvt. Ltd. (hereinafter referred to as „Respondent No. 1) is the erstwhile dealer of Petitioner No. 1. Mr. Manreet Singh Libra (hereinafter referred to as „Respondent No. 2) and Mrs. Parveen Kaur (hereinafter referred to as „Respondent No. 3) are the promoters of Respondent No. 1. They have been impleaded as co-respondents in the capacity of guarantors of Respondent No. 1.

4. Petitioner No. 1 appointed Respondent No. 1 as its interim dealer on 19th May 2016 and subsequently as a permanent dealer w.e.f from 16th June 2017. In this regard a Dealer Agreement (hereinafter referred to as „DA) was executed on 16th June 2017, which expired on 31st December 2017. Thereafter, a fresh DA was executed, effective from 1st January 2018 for a period of one year, which also expired by efflux of time on 31st December 2018. There is no renewal since then. Additionally, a Deferred Payment Facility Agreement (hereinafter referred to as „DPA) was executed on 21st June 2016 between Respondent No. 1 and Petitioner No. 1, which was co- terminus with the Dealer Agreement. The alleged dues under the DA and DPA are subject matter of OMP (I)(Comm) 25 of 2019. Respondent No. 1 also entered into two separate financial assistance agreements namely, Floor plan Financing Agreement dated 21st June 2016 ("Floor plan Agreement") and Spare Parts Financing Agreement dated 11th July 2016, ("Spare Parts Agreement") with Petitioner No. 2 (collectively referred to as "Financial Assistance Agreements"). The alleged liability under the said agreements is the subject matter of OMP (I)(Comm) 9 of 2019.

5. Respondent No. 1 used to purchase vehicles under the DA and was liable to pay the invoiced amounts. The terms of DPA permitted Petitioner No. 1 to defer the payment for the vehicles during the agreed credit period. Petitioner No. 1 extended the time for making the payment of vehicles, subject to a restriction that if the vehicles were sold before the expiry of the credit period, Respondent No. 1 would immediately transfer the sale proceeds. Failure to do so within the stipulated timeline was considered as a default and rendered Respondent No. 1 liable for Sold Out Trust penalty. („SOT penalty). To secure this financing facility, Petitioner No. 1 had a charge on vehicles against which payment was not made by Respondent No.

1. The sanction of the Deferred Payment Facility was further subject to the condition that Respondent No. 1 shall provide collateral/security to secure the payment of outstanding amount and also create a First and Exclusive Charge on its stock, book debts and other current assets of the Respondent No. 1 (both present and future) in favour of Petitioner No. 1. The amount sanctioned

was further secured by way of Deed of Hypothecation and Personal Guarantees of Respondent No. 2 and 3 who are promoters of Respondent No. 1. Additionally, the liability under DPA was also secured by a Bank Guarantee (BG) for an amount of INR 7 crore provided by Respondent No. 1, jointly in favour of Petitioner Nos. 1 and 2.

6. The „Financial Assistance Agreements were entered to facilitate Respondent No. 1 in purchasing BMW vehicles and BMW spare parts. In a situation where, Respondent No. 1 was not able to repay the invoiced amounts within the credit period under the DPA, Petitioner No. 2 was authorized to make payments for and on behalf of Respondent No. 1 towards the outstanding invoices raised by Petitioner No. 1, in accordance with the terms of the Floor plan Agreement. All such disbursements made to Petitioner No. 1 were deemed disbursements to Respondent No. 1 as per Clause 4.6 of the Floorplan Agreement. Respondent No. 1 was required to repay the disbursed amount under the Floorplan Financing Agreement to Petitioner No. 2 in accordance with Clause 10 of Schedule I therein. Similarly, under the Spare Parts Agreement, Petitioner No. 2 was authorized to make payments to Petitioner No. 1 for and on behalf of Respondent No. 1 towards the outstanding invoices for BMW spare parts. All such disbursements made to Petitioner No. 1 were deemed disbursements to Respondent No. 1, who was then required to repay the said dues within 60 days of the date of payment.

7. Respondent No. 1 also executed Deed of Hypothecation dated 21st June 2016, that was subsequently revised by Deed of Hypothecation dated 11th July 2016 and 18th August 2017 under the terms of Floor plan Financing Agreement and Spare Parts Financing Agreement respectively. The deed inter-alia hypothecated by way of first charge in favour of Petitioner No. 2, the BMW products belonging to Respondent No. 1 and those that may be purchased by Respondent No. 1 during the subsistence of the deed. Pursuant to the Floor plan Agreement, a Commercial Finance Business update was issued by the Petitioner No. 2 on 30th August 2017, whereby Respondent No. 1 was required to deposit the sale proceeds within 2 business days of sale. In case, the sale proceeds were not deposited within the said timeline, such instance was to be termed as Sold Out of Trust ("SOT"). In such a event, Respondent No. 1 was liable to pay the SOT penalty as stipulated in Clause 11 of Schedule 1 of the Floor plan Agreement.

Facts leading to the present dispute in OMP (I)(Comm) 25 of 2019:

8. This Petition has been filed to secure the outstanding amount of INR 6,50,49,420 (Rupees Six Crores Fifty Lakhs Forty Nine Thousand and Four Hundred Twenty only, as on 31 December, 2018) alleged to be due and payable by the Respondent Nos. 1 to 3 jointly and/or severally to Petitioner No. 1 under DPA and respective Personal Guarantees issued by Respondent Nos. 2 and 3.

9. The case of Petitioner No. 1, as stated in the petition, is that Respondent No. 1 failed to adhere to the terms of the DPA and committed several defaults. On 29th August 2017, a caution notice was issued to Respondent No. 1 requesting it to abstain from committing defaults. There was no response to the said notice and the defaults continued. In addition to the above, Respondent No. 1 also committed several defaults under the DA for which Petitioner No. 1 issued notices/warning letters on 30th January 2018, 9th July 2018 and 21st August 2018. On 22nd August 2018, Petitioner

No. 1 suspended the DPA and called upon Respondent No. 1 to make the payment of INR 3,78,85,827 (Rupees Three Crores Seventy-Eight Lakhs Eighty Five Thousand Eight Hundred and Twenty Seven Only) and clear the interest overdue of INR 6,47,800 (Rupees Six Lakhs Forty Seven Thousand and Eight Hundred). Several reminders were also issued, but Respondent No. 1 failed to comply and instead gave false promises and assurances.

10. Respondent No. 1 also indulged in serious customer related delinquencies, by inter-alia (i) not registering the car of its customers inspite of taking money from them; (ii) not refunding booking amount (for cancelled booking); (iii) inordinately delaying handing over of Cars. As of today, more than 32 customer complaints have been raised which were remedied by Petitioner No. 1 at its own cost. Petitioner No. 1 has incurred substantial amount of loss owing to the illegal and mala-fide conduct of the Respondent. As on date, the DA and consequently the DPA have expired and there remains no contractual relationship between the parties. However, Respondent No. 1 has neither cleared the outstanding amount nor has it complied with the post closure activities. On 24th December 2018, Petitioner No. 1 issued public notice declaring that the DA of Respondent will expire on 31st December 2018.

11. It is also alleged that Respondent No. 1 is in breach of Section 92 of the Companies Act, 2013 and also does not have the requisite number of Directors on board. Petitioner No. 1 is under the apprehension that Respondent No. 1 would become defunct in the near future and Petitioner No.1 would not be able to recover its dues. It is stated that Respondent No. 1 is a chronic and habitual defaulter, its liabilities are growing and the same exceeds INR 20 (twenty) crores as is evident from the credit information report of Respondent No. 1. Petitioner No. 1 apprehends that Respondent No. 1 will not be in a position to honour the award that may be made against it in the arbitration proceedings and hence it should be directed to furnish a security or a Bank Guarantee to secure the outstanding amount.

Facts leading to the present dispute in OMP (I)(Comm) 9 of 2019:

12. This Petition has been filed to secure the outstanding amount of INR 6,07,57,493 (Rupees Six Crores Seven Lakhs Fifty Seven Thousand Four Hundred Ninety Three) (as on 31 December, 2018) allegedly payable by Respondent No. 1 to Petitioner No. 2 under the Financial Assistance Agreements executed between the parties.

13. The case of Petitioner No. 2 as stated in the Petition is that Respondent No. 1 failed to adhere to the terms of the Financial Assistance Agreements and committed several defaults under both the Agreements. On 23 November 2016, a show cause notice highlighting the defaults under the Floor Plan Financing Agreement and Deed of Hypothecation was issued to the Respondent No. 1. The defaults inter-alia included the SOT instances discovered during the stock audits. On 30th July, 2018, Respondent No. 1 was called upon to pay the outstanding amount under Clause 10 of Schedule 1 of the Floor Plan Financing Agreement and the Credit facility under the Floor plan facility agreement was suspended. Respondent did not respond to this communication. A meeting took place on 8th August 2018, wherein various issues including instances of SOT were discussed at length, and an email dated 9th August 2018, recording minutes of the meeting was sent to Petitioner

No. 1. In response thereto, Respondent No. 1 vide an email dated 15th August 2018 admitted the various SOT instances. A meeting was also organised by Petitioner No. 2 on 12th October 2018 where Respondent No. 1admitted to the Defaults and agreed to make an on-account interim payment of INR 10,00,00,000 (Rupees 10 Crores Only) by 31st October 2018 and the remaining amount by 15th November 2018. In view of the continuing defaults, Petitioner No. 2 was constrained to exercise remedial action and encashed the Bank Guarantee for an amount of INR 7,00,00,000 (Rupees Seven Crores) by letter dated 2nd November 2018. Having failed to pay the remaining outstanding dues, a final notice dated 13th November 2018 was issued by Petitioner No. 2 calling upon Respondent No. 1 to pay the remaining outstanding dues of INR 5,84,14,466 (Rupees Five Crore Eighty Four Lakhs Fourteen Thousand Four Hundred Sixty Six) by 15th November 2018. Respondent No. 1 did not reply to the said notice and till date it has not paid the remaining outstanding dues.

14. It is also alleged that, despite admitting the default, Respondent No. 1 has failed to clear the outstanding dues. As on date, Respondent No. 1 is in possession of 8 cars against which amounts are due under the Floor plan Financing Agreement. In this regard, it is submitted that even though one key of these cars is with the Petitioner No. 2, Respondent No. 1 has sold one out of 8 cars without informing Petitioner No. 2.

15. On the surmise of the facts narrated above, Petitioners claim that they have a strong prima facie case on merits and that the balance of convenience leans in their favour. There is a real likelihood that an award will be passed in favour of the Petitioners and such award will be rendered infructuous in case the admitted amount is not secured by a collateral in the form of a Bank Guarantee.

Case of the Respondents:

16. Learned counsel for the Respondents contends that the present petitions are not maintainable as Petitioners have failed to disclose or even plead the essential grounds for seeking the reliefs that are in the nature of attachment before judgment. Learned counsel submits that a prayer to secure the purported outstanding amount of INR 6,50,49,420 and 6,07,57,493 by way of a bank guarantee or other means, is totally untenable in law. Respondent No. l had furnished a security by way of a bank guarantee to the tune of INR 7 Crores, jointly in favour of the Petitioners. The said guarantee has already been illegally encashed by Petitioner No. 2. The present petition is nothing but an arm-twisting tactic against the Respondents and a mala fide attempt to obtain further security over and above the contractually agreed sum.

Granting the reliefs as sought would amount to re-writing the contract between the parties. He further submits that Respondent No. l has never admitted to the claims made by Petitioners and the reliance placed upon the email dated 16th October 2018, is misplaced. The purported admission of debt in the meeting dated 12th October 2018, was subject to certain condition. The parties had agreed to settle their past disputes and proceed forward towards new business opportunities. The meeting cannot be considered as an admission of debt as Petitioners terminated the agreements contrary to the assurance given. Further, Petitioners were already secured to the extent of INR 7

crores vide the bank guarantee that has already been encashed on 2nd November 2018 by Petitioner No. 2.

17. Petitioners have malafidely preferred these petitions by concealing several material facts in an attempt to re-write the contract by seeking additional security over and above the contractual security. The two groups of companies are indulging in forum shopping and attempting to mislead this Hon'ble Court into passing interim orders against the Respondents. He submits that since the nature of relief claimed under the present petition is akin to reliefs claimed under Order 38 Rule 5, CPC 1908, Petitioners are required to establish the crystallization/certification of debt due to them and also validate with cogent material the apprehension that the Respondents are attempting to remove or dispose of the assets with the intention of defeating the decree/award that may be passed. Respondent No. 1 is infact not attempting to defeat any future award and in absence of any material to the contrary, the petitions are not maintainable. Reliefs claimed are not based on any real facts and exhibit mala fide intention on the part of the Petitioner. The proceedings are a misuse of the process of law and the same merit dismissal.

18. On behalf of Respondent Nos. 2 and 3 specifically, he argued that Petitioner No. 1 cannot, at this stage, make any claim against them in their purported capacity of guarantors. He contends that, it is trite law, that for any liability to be imposed upon the Guarantors, there has to be a default of repayment of an ascertained liability amount by the principal debtor i.e. Respondent No. 1. In the present case, the alleged liability of Respondent No. 1 will be determined only once the arbitration is concluded. Hence, the question of imposing any liability on the guarantors, if at all, will arise only if Respondent No. 1 is unable to clear its liability under the future award, and not otherwise. The extent or quantum of such liability cannot be ascertained at this stage. As such, the current assets of Respondent Nos. 2 and 3 including their properties, bank balances etc, or any change thereto, have no bearing whatsoever for the purposes of the present proceedings. Nevertheless, Respondent Nos. 2 and 3 have in good faith, placed on record details of their personal assets as directed by this Hon ble Court.

Analysis and Findings:

19. The Court has given due consideration to the submissions advanced by the learned counsels for the parties. The scope of the petitions is limited in view of the nature of the reliefs sought therein, which reads as under:-

> OMP(I)(Comm) 25 of 2019:
>
> (a) Direct all the Respondents Jointly and/or severally) to secure the admitted outstanding amount of INR 6,50,49,420 (Rupees six crores fifty Lakh Forty Nine Thousand and Four Hundred Twenty only (as on 31 December, 2018) payable to the Petitioner, either by way of Bank Guarantee of the said amount or such other means as may be directed by this Hon'ble Court during the pendency of arbitral proceedings;

(b) pass any other Order(s) which this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

OMP(I)(Comm) 9 of 2019:

(a) Direct the Respondent to secure the admitted outstanding amount of INR 6,07,57,493 (Rupees Six Crores Seven Lakhs Fifty Seven Thousand Four Hundred Ninety Three (as on 31 December, 2018) payable by the Respondent to the Petitioner, by way of Bank Guarantee or such other means as may be deemed fit by this Hon'ble Court, during the pendency of arbitral proceedings;

(b) pass any other Order(s) which this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

20. Indisputably, the DPA dated 21st June 2016 stands terminated due to its non-renewal by Petitioner No. 1. Petitioners allege that Respondent No. 1 is in default and has failed to clear the outstanding dues. This Court on the first date of hearing i.e. 30th January 2019 directed Respondent Nos. 2 and 3 to file their affidavits disclosing their assets in Form-16A, Appendix E, under Order XXI Rule 41 (2) of CPC along with the copies of the bank statements. Thereafter, on 18th February 2019, Respondent Nos. 2 and 3 handed over their affidavits in the Court and the same were taken on record. On the basis of the averments made in the affidavit giving the details/status of the assets as on 30th September 2018, it was noted that the property bearing No. 55, Sukhdev Vihar, First Floor, New Delhi, was unencumbered and accordingly, the Court directed that Respondent Nos. 2 and 3 shall not change the status of the aforementioned property. The Court further directed Respondent Nos. 2 and 3 to file fresh affidavits specifying the particulars of the immovable properties along with their present market value. Thereafter, fresh affidavits were filed and, on that basis, Petitioner No. 1 alleges that Respondent Nos. 2 and 3 are selling assets of Respondent No. 1 and siphoning of the sale proceeds with the intention to frustrate the award that may be passed in favour of Petitioners.

21. Mr. Dayan Krishnan, learned Senior counsel for the Petitioners referred to the affidavits of assets of Respondent No.1 filed on 18th February 2019 and 29th March 2019 and highlighted the discrepancies shown below :

S.No.	Changes/Discrepancies/other changes in the Affidavit.	Filed on 18 February 2019 (Assets as on 30.09.2018)	Served on 29 March 2019 (Assets as on 30.09.2018 and 18.02.2019
1.	Para 6 - Annual Income	Consolidated loss of 1.9 Crores	Consolidated loss of 2.2 Crores
2.	Para 8 - Assets in possession of Respondent		
	(a) Bank Accounts	Account Balance not	Balance as on 30.09.2018 -

		disclosed	INR 26,01,636.72 on 18.02.2019- INR 4,48,364.72 Balance in inventory account not disclosed.
	(b) Stocks and Shares	3.93 Crores	2.54 Crores (This includes vehicles mortgaged to ICICI Bank worth INR 1.4 Crores)
	Motor Vehicles		
	Spare Parts and accessories	1.17 Crores	70 Lakhs
	(e) Other Property Vehicles (under Showroom)	2.61 Crores	(Not Disclosed)
	Immovable Property (under Showroom)	(Not Disclosed)	1.43 Crores
	(f) Other Securities		
	Fixed Deposit with YES Bank	4.5 Crores	1 Crores
	Rent Security	1.36 Crores	80 Lakhs
3.	Debts due to Libra	To be ascertained	To be ascertained
	Total	13.57 crores (approx.)	6.47 crores (approx.)

22. On the basis of the above tabulation, learned counsel for the Petitioner submits that Respondent No. 1 has sold vehicles and spare parts and the sale proceeds thereof have not been paid to Petitioner No. 1. It is also argued that Respondent No. 1 purchased an immovable property after 30th September 2018 and the same is stated to be worth about Rs. 1.43 crores.

Focusing on the comparative analysis and highlighting the discrepancies, the learned Senior Counsel argued that Respondent No. 1 is misleading this Court by filing false affidavits. Respondent No. 2 is siphoning off the money in his account and there is reduction in the value of fixed deposit with YES Bank and rent security deposit. Petitioners seriously apprehend that Respondent No. 1 would not be in a position to satisfy the future award if it is passed in favour of Petitioners and such an award would be rendered infructuous. Petitioners have similarly made comparison of the affidavit of Respondent No. 2 dated 18th February 2019 and 29th March 2019 to show that Respondent No. 2 has mortgaged all his properties held as on 18th February 2019 to one of his own

company Libra Finance Ltd., wherein he holds shares worth INR 10,97,900/- and has taken a loan against the same. It is further argued that it is highly possible that the entire loan taken against the said properties has been internally siphoned off by Respondent No. 2. Besides, it is also argued that post filing of the Section 9 petition (OMP (I) (COMM) 9/2019), Respondent No. 2 had sold his property at House No. 122, Tagore Park New Delhi for an amount of Rs. 3,10,50,693/-, but the balance in the account of Respondent No. 2 as on 18th February 2019, is showing a meagre amount of INR 4,83,737/-. For this reason it is contended that the sale proceeds of the property have been siphoned off.

23. Respondents have countered the allegations made by Petitioner No.1 and have made the following declarations:-

S.N Allegations Response Allegations Response Allegations Response raised on provided o raised on I provided by raised on I 05.04.2019 by Responden Response Respondent Response t Company 15.04.2019 Company 16.05.2019 on 5.04.2019 on 15.04.2019 & vide Additional and vide Affidavit Affidavit dated dated 11.04.2019 04.05.2019

1) Account Inventory Responden Agreements for Charge Details of balances of accounts t Company inventory created in first Inventory are not has not funding along favour of charges Accounts-not deposit provided with available HDFC Bank over assets disclosed accounts any bank statement over of the and are in agreement are placed on properties Responden the nature for the record hypothecate t is of a credit inventory d to the available facility. The funding Petitioner on said accounts the website accounts of Ministry therefore do of not have Corporate any Affairs.

"balance".

2)	Details of Motor Vehicles and Spare Parts-not disclosed	Details of cars and spare parts are within the knowledge of both parties being exclusively sourced from BMW.	Details of cars with Respondent Company have not been provided	Details of cars available with Respondent Company have placed on record.	None
3)	Hypothecation over stock, book debt and machinery in favour of BMW SF-not disclosed	First Charge of the Petitioner is registered in record of the Respondent Company	None	None	None
4)	Vehicle worth INR 140 Lacs (allegedly hypothecated to BWW SF) shown to be mortgaged to ICICI Bank Ltd. - details not provided.	Vehicle hypothecated to ICICI is registered in Respondent s name. It was imposed on Respondent in terms of a promotional scheme launched by BMW.	Loan Agreement with ICICI not provided.	Copy of loan agreement and the scheme under which the car was provided are placed on record.	Charge could not have been in favour of ICICI Bank.

5)	Details of "debts due to the Respondent" - mentioned as "to be ascertained"	Details could not be ascertained due to want of reconciliation of accounts and shortage of staff.	None	None	None
6)	Segregation of properties as leased or swelf-owned-not provided	Affidavit of assets doies not include leased properties. Details ot outgoing rent and security deposits disclosed.	None	Lease deeds/agreements placed on record.	None
7)	Details of property at Sukhdev Vihar - not disclosed	Property at Sukhdev Vihar was bought after 30.09.2018 and could not be disclosed in the first affidavit as that was upto 30.09.2018. In fact, the said property was voluntary disclosed before the Hon ble Court by the	Purchase of property amounts to siphoning of funds.	Siphoning of funds could have been alleged if the promoters would have diverted the funds of the Company to purchase personal properties. In the present case, the asset has been purchased in the name of the Company. The same does not amount to siphoning.	None

		Respondent Company.			
8)	Mentioning property at Sukhdev Vihar as under the head of „showroom is false.	It was acknowledged by the Counsel of the Respondent Company to be inadvertently mentioned as under the head „showrom - the value mentioned in the affidavit was same as orally disclosed before the Court.	None	None	None
9)	Value of assets has drastically reduced (between 30.09.2018 to 18.02.2019) in the following manner; while outstanding towards BMW has increased - thereby raising suspicion of siphoning:	It is a matter of record that October 2018 onwards, the Petit its supplies to the Respondent Company. The sales had also de as the Petitioner Group had retained keys of the vehicles. Ad since the showroom of the Respondent Company had been sealed, consequent losses and depletion was a natural consequence. Th Respondent Company also has counter claims against the BMW Gr its malpractices which caused huge losses to the Respondent C All the above factors, inter alia, coupled with the illegal e Respondent Company s Bank Guarantee led to the recurring loss Respondent Company.			
	Reduction in value of motor-vehicle and spare parts	The utilization of sale proceeds of the motor vehicle and spare	Supporting documents of alleged expenditure made from sale of vehicles and spare parts - not	Ledger entries documenting expenditure post October 2018 placed	None

parts has been duly explained in Affidavit dated 11.04.2019 filed in OMP (I) COMM 9 of 2019. The money has been used majorly in meeting operational requirements of Respondent Company There is no siphoning off. The payments are duly recorded	provided	on record

RESPONSE TO ALLEGATIONS OF SPHONING BY RESPONDENT NO. 2:

S.No.	Allegations raised on 15.04.2019	Response provided by Respondent No. 2 on 15.04.2019	Allegations vide Response raised on Affidavit dated 16.05.2019	04.05.2019
1.	The properties mentioned at first entries in para 8 (d) of the Affidavit of Assets were mortgaged to one of the his own company Libra Finance Limited wherein he holds shares worth INR 10,97,900 and has been placed on record	None	None	has mortgaged all his three properties held as on 18 February 2019 to Libra Finance Private Limited in the year 2010. The relevant bank account entries reflecting the receipt of loan amount on 11.06.2010 and 14.06.2010 have been taken loan against the

before this Hon ble Court.

same. It is highly Thus, the desperate allegation of possible that the entire malafide intention of the Petitioner to loan taken against the render a future award futile (totally un- said properties have contemplable at the time of creation of been internally siphoned mortgage), falls on its face.

	off by the Respondent No. 2. One such transaction is evident from above table, wherein between 30 September 2018 and 18 February 2019, the Respondent No. 2 has given a loan of an amount of INR 50 Lakh to his own company Libra Four Wheel.	The loan to Libra Four Wheel further strengthens the Respondent No. 2 s argument that he has sold his personal assets to support his companies.	
2.	On 22 January 2019, i.e. ,	The property mentioned at fourth entry	None

post filing of the Section in para 8 (d) of the Affidavit of Assets 9 petition by BMW had been transferred as per the Financial Services OMP registered sale deed dated 22.01.2019. (I) Comm 9 of 2019 (listed on 17 January The proceeds of the sale were, 2019), the Respondent however, received by the Respondent No. 1 sold his Property No. 2 in the month of October 2018 located at _ house No. and most of the said amount was 122, Tagore Park, New immediately used/invested to pay off Delhi, to Iqbal Singh liabilities of the Respondent No. 2 s Jakhar for an amount of companies to banks and other INR 3,10,50,693. companies. The sale deed and the The balance in all the details of the utilization of the sale accounts of the proceeds have been placed on record Respondent No. 2 as on before this Hon ble Court.

18 February 2019, i.e. 27 days after the sale, is Note: The Affidavit filed by the still only INR 4,83,737 Respondent No. 2 on 18.02.2019 was (where has this money updated till that date (and not as on gone?) 30.09.2019). Only the affidavit of the As on 30 September Respondent No. 1 was as on 2018, this property was 30.09.2019.

within the possession of the Respondent No.2, Hence, it is obvious that once sold the however, the Respondent property (or the transaction) was not an lied on oath and has asset of the Respondent No. 2 to be neither disclosed this mentioned in the said affidavit.

property or this transaction in its affidavit Subsequently, when the Respondent dated 18 February 2019. No. 2 was directed to file an affidavit of assets as on 30.09.2018 and as on 18.09.2019, the property and the transaction was duly disclosed in the Affidavit dated 3.05.2019. Hence, contrary to the misconceived allegation, the Respondent No. 2 has neither lied on oath nor failed to disclose the asset or the transaction.

3. On 14 February 2019, i.e. The property mentioned at fifth The Mediation The 1/3rd share of 4 days before filing the entry in para. 8 (d) of the Affidavit of Award filed by property No. 121, affidavit

in the present Assets was gifted to the minor son of the Respondent Tagore Park, New petition, the Respondent the Respondent No. 2 pursuant to a No. 2 is a false Delhi has been filed No. 2 gifted his 1/3 share mediation award in Ct. Case No. document. under the aegis of a undivided share in 1942 of 2019 before Patiala House Respondent No. 2 court recognized property No. 121, Courts, New Delhi. The mediation has agreed to mediation order (and Tagore park, New Delhi, award has been duly placed before this transfer properties again not with an to his son Dilsher Singh Hon ble Court already intention to render under the guardianship mortgaged to any arbitral award of his wife Parveen some other entity. futile).

		Kaur. This transaction also was not disclosed in the affidavit dated 18 February 2019 or during the hearing held on 8 February 2019.	
4.	The net worth of the Respondent No. 2 as on 30.019.2015 was INR 105 Crores (approx.), whereas the net worth of the Respondent No. 2 as per the affidavit submitted on 18 February 2019 and 29 March 2019 is less than INR 2 Crores (approx)	No document has been produced before this Hon ble Court to support this contention. In any event, this contention is irrelevant for the purposes of the present proceedings as the Respondent No.2 is admittedly under financial stress, as claimed in the Petition.	None.

24. It is clear that there is a serious controversy and conflict in respect of the allegations leveled by Petitioners regarding the false affidavits and Respondents attempt to liquidate the assets of

Respondent No. 1 so as to frustrate the future award. However, Respondents have given a plausible explanation on the accusations made against them. It has been explained that the details of the motor vehicles supplied by the Petitioner is within their knowledge as the same have been exclusively sourced from BMW and therefore there cannot be any ground to allege concealment. The property at Sukhdev Vihar, was purchased after 30th September 2018 and the same could not be disclosed in the first affidavit which gave the status up to 30th September 2018. The details were then voluntarily disclosed before the Court in the subsequent affidavit. The Sukhdev Vihar property has been purchased in the name of Respondent No. 1 and not in the name of any third party or the promoters of the company. This does not manifest siphoning. Likewise the discrepancies identified in the affidavit of Respondent No. 2 have been explained by stating that the properties mentioned at first three entries in para 8 (d) of the affidavit of assets were mortgaged to Libra Finance Pvt. Ltd in the year 2010. The property mentioned at 4th entry in para 8 (g) is stated to have been transferred as per the registered sale deed dated 22nd January 2019, but the sale proceeds for the said property were received by Respondent No. 2 in the month of October 2018 and most of the amount was immediately used to pay off the liabilities of Respondent No. 1. Respondent No. 2 has given details of the utilization of these sale proceeds. The property mentioned at 5th entry in para 8 (d) of the affidavit is stated to have been gifted to the minor son of Respondent No. 2 pursuant to an award in Case No. 1942/2019 of Patiala House Courts, New Delhi.

A. Whether there is serious apprehension of Respondent not honouring the arbitral award?

25. Before further delving into these disputed and contested claims, it is first necessary to analyze the objection raised by the Respondent on the issue of maintainability of the Petitions having regard to the nature of relief sought. Respondents contend that in order to succeed in the present petitions, Petitioner No. 1 has to satisfy the threshold prescribed under Order 38 Rule 5 of the Code of Civil Procedure 1908. Mr. Dayan Krishnan on the contrary relies upon the judgment of the Division Bench of this Court in Ajay Singh v. Kal Airways Pvt. Ltd., FAO (OS) (Comm) 61/2016 decided on 3rd July 2017 and Huawei Technologies Company Ltd. Vs. Sterlite Technologies Ltd., (2016) SCC Online Del 604, to submit that Petitioners have a prima facie case in their favour and the court need not stringently enforce the principles regarding grant of injunction in the present case. This court in Kal Airways (supra), has examined the question regarding the applicability of the principles underlying Order 38 Rule 5 CPC while making an interim order. The Court after considering several judgments on this issue, has observed as under:-

> "25. Interestingly, in a previous decision, Firm Ashok Traders & Anr v Gurumukh Das Saluja & Ors (2004) SCC 155, the Supreme Court observed that:
>
> "13. ..The Relief sought for in an application under Section 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated....."

26. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles. In this regard, the observations of Lord Hoffman in Films Rover International Ltd. v. Cannon Film Sales Ltd.(1986) 3 All ER 772 are fitting:

> "But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as FAO(OS)(COMM) 61/16 & connected cases Page 21 of 25 'guidelines', i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

27. It was observed later, in the same judgment that:

> "The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.""

26. Similarly, in the case of Huawei Technologies Company Ltd. Vs. Sterlite Technologies Ltd., (2016) SCC Online Del 604, this Court held as under:-

> "As far as finding arrived by the Division Bench in C.V. Rao case [2014 SCC OnLine Del 4441 : (2015) 218 DLT 200] is concerned, this Court totally agrees that the said relief can only be granted in the exceptional cases when there is adequate material on

> record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceeding infructuous if the award is passed against them.
>
> I agree that the discretion should be exercised in those exceptional cases when there is adequate material on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous or there is an admitted liability."

27. A careful analysis of the judgment in Ajay Singh (supra), reveals that in the said case, the Division Bench has held that Section 9 of the Act grants wide powers to the Court in fashioning an appropriate interim order. It has also been held that Court should not find itself unduly bound by the text of those provisions and should rather follow the underlying principles. Essentially, the Division Bench has held that the discretion should be exercised appropriately while granting an interim order and such discretion must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection. Even in Huawei Technologies (supra), the Court has recognized that all the requisite conditions of Order 38 Rule 5, CPC are required to be satisfied for considering the prayer of securing the amount and the Court should exercise its discretion very carefully. It was also held that where it appears that there are exceptional circumstances, it has ample power to secure the amount, if it is just and convenient. However, the aforenoted judgments do not seem to suggest that while exercising power under Section 9 the necessary conditions and ingredients under Order 38 Rule 5 CPC, are not required to be insisted upon. The judgments relied upon by the Petitioner only stress that the power should be principled and premised on some known guidelines and hence the analogy of Order 38 and 39, CPC is certainly applicable. At this stage, the judgments relied upon by the learned counsel for the Respondents also need to be mentioned. Respondents have relied upon C.V. Rao & Ors v. Strategic Port Investment, (2015) 218 DLT 200, Lanco Infratech Ltd. v. HCC Ltd. (2016) 234 DLT 175, Intertoll ICS Cecons O&M v. NHAI, ILR (2013) II Delhi 1018, Raman Tech v. Solanki Traders, 2008 (2) SCC 302 and Kopastin Holding Ltd. v. Uday Bahadur & Ors, MANU/DE/2867/2018.

28. Besides the aforenoted judgments, there are several other judgments that deal with this issue. In Nimbus Communication Ltd. v. Board of Control for Cricket in India, 2012 SCC OnLine Bom 287, the Bombay High Court held as under:-

> "The judgment of the Supreme Court in Adhunik Steels has noted the earlier decision in Arvind Constructions which holds that since section 9 is a power which is conferred under a special statute, but which is exercisable by an ordinary Court without laying down a special condition for the exercise of the power or a special procedure, the general rules of procedure of the Court would apply. Consequently, where an injunction is sought under section 9 the power of the Court to grant that injunction cannot be exercised independent of the principles which have been laid down to govern the grant of interim injunctions particularly in the context of the Specific Relief Act, 1963. The Court, consequently would be obligated to consider as to whether there exists a prima facie case, the balance of convenience and irreparable injury in deciding whether it would be just and convenient to grant an order of

injunction. Section 9, specifically provides in sub-clause (d) of clause (ii) for the grant of an interim injunction or the appointment of a receiver. As regards sub-clause (b) of clause (ii) the interim measure of protection is to secure the amount in dispute in the arbitration. The underlying object of Order 38 Rule 5 is to confer upon the Court an enabling power to require a defendant to provide security of an extent and value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should be furnished is, however, preconditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be passed against him. In view of the decisions of the Supreme Court both in Arvind Constructions and Adhunik Steels, it would not be possible to subscribe to the position that the power to grant an interim measure of protection under section 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure 1908 or that the exercise of that power is untrammelled by the Code. The basic principle which emerges from both the judgments of the Supreme Court is that though the Arbitration and Conciliation Act, 1996 is a special statute, section 9 does not either attach a special condition for the exercise of the power nor does it embody a special form of procedure for the exercise of the power by the Court. The second aspect of the provision which has been noted by the Supreme Court is the concluding part of section 9 under which it has been specified that 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. This has been interpreted in both the judgments to mean that the normal rules that govern the Court in the grant of an interlocutory order are not jettisoned by the provision. The judgment of the Division Bench of this Court in National Shipping Company (supra) notes that though the power by section 9(ii)(b) is wide, it has to be governed by the paramount consideration that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award. The Division Bench noted that the power being of a drastic nature, a direction to secure the amount claimed in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought was regarded as being a material consideration. However, the view of the Division Bench of this Court that the exercise of power under section 9(ii)(b) is not controlled by the provisions of the Code of Civil Procedure 1908 cannot stand in view of the decision of the Supreme Court in Adhunik Steels"

(emphasis supplied)

29. All the above noted judgments listed above invariably echo the same principles. The imperative that emerges is that the court should not ignore the principles or the well known guidelines, but at the same time it should be unduly bound by the text . There is thus no perceptible difference in the views expressed by the Division Bench as sought to be highlighted by Mr. Krishnan. An order for

securing the amount claimed prior to an arbitral award is certainly comparable to the nature of relief provided for under Order 38 Rule 5, CPC. Keeping the well known principles in mind, I am of the view that it is necessary that Petitioner No. 1 satisfies the Court that (a) Petitioners have a reasonably strong prima facie case for succeeding in the arbitration proceedings and (b) that the Respondent is acting in a manner so as to defeat the realization of the future award that may ultimately be passed. Such orders cannot be passed mechanically as the exercise of power in the nature of Order 38 Rule 5, CPC is a drastic and extraordinary power. There is no doubt in my mind that the underlying basis of Order 38 Rule 5, CPC has to be borne in mind while deciding an application under Section 9

(ii) (b) of the Act.

30. The other thrust of the argument of Petitioners has been that the Respondents are in financial distress and would not be able to honour the award. However, the Court is of the view that this cannot be the sole ground for directing the Respondents to secure the claim of an amount which is highly disputed. It is well settled in law that while exercising power under Section 9 of the Act, the Court does not have the jurisdiction to decide disputed questions of fact. The disputed questions of fact would have to be considered by the Arbitrator after giving an opportunity to lead evidence. On this question, the judgment of the Supreme Court, in Modi Rubber Ltd. v. Guardian International Corp., 2007 SCC OnLine Del 502 is worth mentioning. The Court therein has held as under:-

> "This Court while considering the petition under Section 9 of the Arbitration and Conciliation Act, 1996, does not have the jurisdiction to return a finding on the merits of a claim made or a dispute raised by the parties before the arbitrator. However, there can be no dispute that this Court is required to examine the existence of a prima facie case on the assertions of the petitioner with regard to the termination of the agreement in the facts and law applicable and as to strength in the petitioner's case as to the bindingness and subsistence of the SHA."

31. Petitioner's contention that Respondent No. 1 is in default, is strongly disputed. Respondent No. 1 argues that the email dated 16th October 2018, purportedly records the discussion during the meeting dated 12th October 2018. In the said meeting the parties mutually agreed that, Respondent No. 1 shall generate revenue from its continued operations and discharge the purported liability. The said email, reads as under:

> "NSC and SF shared with Libra, their latest outstanding balances in various credit limits as per main details below:
>
> Libra Autohaus - Overdue Status (as on October 12, 2018) Total Stock 36 166,613,102 Facility Units Amount Curtailment (excluding SOT) 8 11,798,508 SOT 19 82,731,722 Spare Parts (BMW SF) 4,41 4,154 Spare Parts (BMW 3,635,047 India) Interest (BMW India) 1,977,647 (including GST) Interest (BMW SF) 2,750,9 10 Total 107,307 ,988 BMW Financial Services (SF):

I. Libra acknowledged and confirmed the above presented outstanding & overdue status.

1. Mr. Manreet Libra confirmed that they had committed to clear the outstanding by September 17, 2018 but have failed to do so due to other banks becoming strict in providing further loans.

Libra is trying to repay NSC and SF by further taking loans from other banks.

2. In recent meeting with another bank Libra presented to them the way forward for business recovery and offered owned property as a collateral. One of the bank has in-principle assured 10 crore CC funding. Libra has assured that this money will be rotated and repaid to the bank within 1.5 years to prevent much additional interest burden on Libra's financials.

3. Libra committed that the 10 cr. funding will be received from another bank by the end of the month and the same will be used to clear all SOTs and outstanding nearing NPA stage.

4. The payments will be done to NSC and SF by October 31, 2018.

5. Further, outstanding over and above INR 10 cr. will be cleared by November 15, 2018.

6. Libra expressed that key management process of stock cars by SF should continue as it helps them in operations and control of stock.

7. The above payment plan was acknowledged by SF. The restoration of financing facility will be discussed based on Libra successfully meeting these commitments by October 31, 2018.

8. Libra acknowledged that if it fails to fulfill its commitments by that date incompleteness, SF reserves the right to take appropriate remedial measures as per the contractual arrangements with Libra.

9. It was agreed that the resolution plan for remaining open points as per the agenda will be provided by Libra in the first week of November 2018.

10. Libra requested for wholesale of 10 cars upto October 31, 2018, to help operations during festive season. NSC and SF will consider the request and revert on the decision.

11. It has since been decided by SF that considering the overall overdue situation and other breaches under the existing financing facilities, it will not in a position extend further credit to Libra.

BMW India (NSC):

I. Mr. Manreet Libra confirmed that they had committed to clear the outstanding by September 17, 2018 but have failed to do so due to other banks becoming strict in

providing further loans. Libra is trying to repay NSC and SF by further taking loans from other banks.

2. Mr. Libra confirmed that all the outstanding pertaining to NSC and SF will be cleared by October 31, 2018. Further, all outstanding over and above that to NSC and SF will be cleared by November 15, 2018.

3. Libra requested for wholesale of 10 cars (total wholesale amount upto 5cr.) upto October 31 , 2018, to help operations during festive season.

Considering DPA has been suspended for Libra and SF is not in a position to extend further credit to Libra- any further possibility to be explored by NSC.

4. It was informed in the meeting that the Libra's showroom is likely to de-sealed and resume operations by first week of January 2019. However, further clarity will be obtained on next court hearing which is scheduled in first week of December 2018.

5. Since unavailability of sales facility as per BMW standards is in clear violation of Dealership Agreement, BMW India reiterated that Libra should be ready with backup plan once all financial related topics are resolved and financing facility from SF is restored.

6. It was agreed that once financing facility and normal wholesale operation is restored, Libra will be required to comply with all other contractual non-compliance and breaches including Retail Standards for Sales and After sales, submission on financials etc and the confirmation of the same will be shared with NSC in writing.

7. It was highlighted that customer complaints against Libra have been growing and need to be addressed at DP level also now, depending on the complaint, since Business Head is already involved in these. Libra agreed to address all existing complaints and put measures in place to prevent further increase in complaints.

8. Libra acknowledged all other contractual breaches for NSC and SF and agreed to respond to all topics by first week of November.

9. The above was accepted by NSC and SF. The restoration of financing facility will be decided based on Libra successfully meeting these commitments by October 31, 2018.

10. If Libra fails to fulfill its commitments by October 31, 2018, BMW India reserves the right to take appropriate remedial measures as per the contractual arrangements with Libra.

Libra Action points :

1. Libra discussed the way forward for business recovery with other banks and offered owned property as a collateral.

2. One of the bank has in-principle assured 10 crore CC funding.

Libra has assured that this money will be rotated and repaid to the bank within 1.5 years to prevent much additional interest burden on Libra's financials.

3. Mr. Libra confirmed that key management by BMW India should continue to support in business operations and overall control of stock.

4. It was agreed that after complying with all financials related topics, Libra will do the following by November 30, 2018:

5. Libra will scout for alternate sites for showroom and an appropriate site will be selected with approval from BMW India Libra will confirm to BMW India that same site is available for start of work for setting up the new showroom on-site.

6. Confirm availability of sufficient customer parking for workshop.

Timeline for start of setting up of new showroom:

> In case the court does not pass judgement to de-seal by 6 January 2019, immediate start to setting up of new showroom. If there is sufficient reason to believe that the court will not rule in favour of de-sealing in the hearing in first week of December, immediate start of setting up of new showroom."
>
> 32. Whether this constitutes an admission of debt or not, is a question that is not required to be decided in the present petition. Having said that, even if Respondent No. 1 is in default that does not necessarily mean that the court should direct furnishing of a bank guarantee to secure the alleged admitted amount. The Court also has to be satisfied that Respondents are attempting to remove/dispose off/alienate their assets to defeat any future award that may be passed in favour of the Petitioners. It needs to be reinforced that the law requires that even if the Petitioner has a prima facie case in its favour, the same itself would not be sufficient to entitle it to seek an interim measure or protection in the nature of direction to furnish security of the disputed amount. Petitioner should also establish that the Respondents are intending to defeat the rights of the Petitioners to enforce the arbitral award that may be passed in their favour. The aspect of balance of convenience is also to be weighed upon. It is necessary for the Court to satisfy itself that the assets which are subject matter of arbitration are about to be alienated or removed beyond the limits of the Court with an intent to obstruct or delay the execution of awards. Petitioner has alleged that there is admission of debt and has placed reliance on a letter dated 15th October 2018 wherein it has claimed that an amount of INR 6.47 crores is outstanding as on 12th October 2018. This was followed by the email dated 16th October 2018, the extract whereof has been reproduced above. A perusal of the email indicates that apparently there was an understanding between the parties that

> Respondent No. 1 would be allowed to continue its operations. Respondent No. 1 contends that pursuant to the aforesaid discussion, Petitioner provided cars worth Rs. 5 crores and out of the 8 cars so provided, Respondent No. 1 sold one car on 1st November 2018, the sale proceeds whereof have been received by Petitioner No. 1. Six cars thereafter have been returned to Petitioner No. 1, leaving one car with Respondent No. 1. Prima facie the understanding recorded in the email indicates that Petitioners were to continue to support the Respondents in its business operations. Petitioners did not insist for additional BG and accepted Respondent owned property as a collateral. Be that as it may, concededly, Petitioner Nos. 1 and 2 thereafter encashed the Bank Guarantee worth Rs. 7 crores on 2nd November 2018.

The amount alleged to be due as mentioned in the email recording the discussion of the meeting dated 12th October 2018 is INR 10.73 crores. Against the said amount, Petitioner has recovered INR 7 crores. Petitioners assert that its further outstanding is around 12 Crores (Rs. 6,50,49,420 + Rs. 6,07,57,493). Respondents submit that the aforesaid figure is grossly inflated and is not on the basis of any admitted document but self serving letters issued by the Petitioners and therefore the claim is neither crystallized nor admitted by Respondent No. 1. In view of the disputed facts, at this stage where law requires the exercise of the power under Order 38 Rule 5, CPC to be done in extraordinary circumstances, directing Respondent No. 1 to furnish a BG would amount to converting an unsecured debt into a secured one. The Petitioner admittedly had a Bank Guarantee of INR 7 crores and not more and it exposed itself allegedly for a larger amount. The Court cannot, at this stage, in view of the hotly contested inter se claims, determine the possible extent of the claim that is likely to be awarded by exercising jurisdiction under Section 9 of the Act. Directing the provision of a security by way of a Bank Guarantee in relation to a speculative claim in the facts of the present case is certainly not within the scope of Section 9 of the Act. Without there being any certification about the amounts due, there cannot be said to be an admitted liability of Respondent No. 1. There is no material before the Court, which can convincingly prove that the apprehension of the Petitioner is correct. Having perused the affidavits placed on record, it prima facie appears that Respondents have justified the statements made in their affidavits and explained the discrepancies pointed out by the Petitioner. The Court cannot on the basis of the material placed on record come to the conclusion that Respondents have liquidated their assets or siphoned off the sale proceeds of such assets with the intent to frustrate the future award. Further, in Raman Tech and Process Engg. Co. v. Solanki Traders, (2008) 2 SCC 302 the Supreme Court has held that merely having a zest or valid claim or a prima facie case, will not entitle the Plaintiff to an order of attachment before judgment, unless it has also established that the Defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. The relevant portion of the said judgment reads as under:

> "4. The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5, CPC in particular, is to prevent any defendant from defeating the realisation of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The scheme of

> Order 38 and the use of the words "to obstruct or delay the execution of any decree that may be passed against him" in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case."

33. In view of the facts and circumstances discussed herein above and considering the nature of claims of the Petitioners, the Court does not find any ground to grant the relief of directing Respondent No. 1 to furnish the BG to secure the amount that is alleged to be due towards Petitioner Nos. 1 and 2.

B. Whether the Petition is maintainable against Respondent Nos. 2 and 3?

34. Respondent Nos. 2 and 3 have alleged that the deeds of guarantee signed by them for the purpose of guaranteeing the DPA have since expired with efflux of time. It is also alleged that the DA was never extended beyond 15th June 2017. Respondent Nos. 2 and 3 never executed fresh deeds of guarantee for DA dated 16th June 2017 and 28th May 2018. The Deeds of Guarantee have never been invoked by Petitioners and hence no relief can be granted against them in the present petition. Respondent Nos. 2 and 3 also seriously dispute that there is an arbitration agreement between them and Petitioner No. 1. It is contended that the deeds of guarantee contain a separate Dispute Resolution Clause that does not contain any reference to arbitration. The Arbitration Agreement contained in the DPA is only between Petitioner No.1 and Respondent No. 1 to settle the disputes arising therefrom. Petitioner Nos. 1 and 2 have no right to invoke the same for adjudication of a dispute under the Deeds of Guarantee and they cannot seek an appointment of an Arbitrator. Reliance in support of the above contention has been placed on M.R. Engineers & Contractors Pvt. Ltd v. SomDatt Builders Ltd. 2009 (7) SCC 696, U Can Fly Limited v. AVA SPA Holidays (I) Pvt. Ltd and Ors. 2017 (161) DRJ 617 and STCI Finance Limited v. Sukhmani Technologies Pvt. Ltd and Ors, 235 (2016) DLT 150. the Apex Court in the cases of State of Gujarat v. Renusagar Power Co. [(1988) 4 SCC 59], and Vodafone International Holdings B.V. v. Union of India, [MANU/SC/0051/2012 : (2012) 6 SCC 613].

35. The Supreme Court in Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, observed that in a given set of circumstances, even a non-signatory to an arbitral agreement can be subjected to arbitration proceedings and it would be futile to argue that in no case

a non-signatory to arbitral agreement can be compelled to submit to the jurisdiction of the Arbitral Tribunal so validly constituted. However, in doing so, the Court has to be mindful of the nature of relief that is sought against such party with whom there is no arbitration agreement. The Supreme Court in Chloro Control (supra), further observed that a non- signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject- matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non- signatory parties would fall within the exception afore-discussed. In OMP (I) (COMM) 25/2019, Respondent Nos. 2 and 3 have been impleaded in the capacity of guarantors. The petition is devoid of the necessary pleadings to show that there is an apprehension that Respondent Nos. 2 and 3 may remove, dispose of/alienate their assets to defeat any future award that may be passed in favour of the Petitioners. Thus the Petitioner has failed to present a case that would entitle him to the extraordinary relief in the nature of attachment before judgment. Besides there is no arbitration agreement between the Petitioners and Respondent Nos. 2 and 3 under the deed of guarantees. The Arbitration Agreement contained in the DPA is only between Petitioner No. 1 and Respondent No. 1 for adjudication of the disputes and differences arising therefrom. The question whether the disputes under the deeds of guarantee can be agitated in an arbitration proceedings, is not the subject matter of the present petitions and the Court refrains from adjudicating the said question. However, looking at the nature of relief sought in the present petition and in absence of an arbitration agreement the petition cannot be allowed against Respondents Nos. 2 and 3, because the petition lacks the necessary ingredients for the Petitioners to be entitled to such a relief.

36. I therefore, decline to direct the Respondents to furnish a Bank Guarantee or security for the alleged claim amount. However, it is made clear that the undertaking given by Respondent Nos. 2 and 3, as recorded in the order dated 18th February 2019 will continue to remain in force. Respondents shall not change the status of the un-encumbered flat bearing No. 55, Sukhdev Vihar (third floor), New Delhi. Respondents shall also not sale/dispose of/transfer or create any third party interest over the BMW products and BMW cars in its custody, over which the Petitioners will continue to have the first charge in terms of the hypothecation deeds and the deeds of guarantee, till constitution of the arbitral tribunal.

37. The Arbitral Tribunal, as and when constituted, would be at liberty to consider the application of the parties under section 17 of the Act, if so filed, without being influenced by anything stated hereinabove. In view of the foregoing discussion, the present petitions along with the pending applications are disposed of in the above terms, with no order as to costs.

SANJEEV NARULA, J.

July 09, 2019 nk/ss