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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO. 10089 OF 2020

Bay Capital Advisors Pvt Ltd …Petitioner
Versus
IL & FS Financial Services Ltd & Ors …Respondents

Mr Nikhil Sakhardande, Senior Advocate, *with Ravichandra S Hegde, Ashish Venugopal, Ankita Roy, & Yash Bajaj, i/b Parinam Law Associates, for the Petitioner.*
Dr Birendra Saraf, Senior Advocate, *with Rohan Sawant, & Chandrajit Das, i/b M/s. Manilal Kher Ambalal & Co., for Respondent No. 1.*
Mr Aman Vijay Dutta, *for Respondent No. 2.*
Mr Debopriya Maulik, *i/b Vishal Hegde, for Respondent No. 5.*

CORAM: G.S. PATEL, J
(Through Video Conferencing)
DATED: 9th April 2021

PC:-

1. Heard through video conferencing.

2. The Petition, under Section 9 of the Arbitration and Conciliation Act 1996, seeks interim protection pending arbitration to restrain the 1st Respondent, IL&FS Financial Services Ltd (**"IFIN"**) from acting on its Event of Default (**"EoD"**) notice of 23rd July 2019. The second prayer is for a temporary injunction

restraining IFIN from acting in furtherance of a pledge invocation notice of 20th August 2020.

3. The background to the Petition is this. The Petitioner (**"Bay Capital"**), IFIN, Respondent No. 2 (**"Mehta"**) and Respondent No. 5, Zon Investment Advisors Pvt Ltd (**"Zon"**) entered into agreements on 31st March 2017 to secure repayment of an earlier loan that Respondent No. 3 (**"Champion Agro World"**) took in the amount of Rs. 40 crores from IFIN. There was a previous loan agreement of 17th May 2014 (to be read with an offer letter dated 15th May 2014). By this, IFIN gave a finance facility of Rs. 40 crores to Champion Agro World. This facility was secured by a pledge of 52,86,679 shares — 60.7% of the share capital of Champion Agro Ltd ("**Champion Agro**"), Respondent No. 4 — held by its promoters, a first charge of mortgage of land at Palitana, an exclusive charge on the current assets of Champion Agro World, a pledge of the entire equity shares of Champion Agro World by its shareholders, and various personal guarantees. There was also a Comfort Letter of 19th May 2013 from Bay Capital undertaking to provide the necessary funds should there be any payment default by Champion Agro World.

4. In 2015, Champion Agro World defaulted. In 2016, IFIN filed Commercial Suit No. 469 of 2016 in this Court against Champion Agro World and the personal guarantors.

5. Meanwhile IFIN approached Bay Capital on the basis of this Comfort Letter and sought enforcement, that is to say, it called upon

Bay Capital to pay the amount of the default. A similar demand was made to Mehta, a promoter of Bay Capital. Mehta and Bay Capital did not have sufficient funds to meet this demand. This led to a restructuring of the original finance facility. IFIN was to assign Rs. 30 crores of the original Rs. 40 crores finance facility to Zon, together with the proportionate right, title and interest for a purchase consideration of Rs. 33.60 crores. Zon would, in turn, appoint IFIN as its collection agent to manage and recover the finance facilities to Champion Agro World. IFIN would subscribe to 44 Optionally Convertible Debentures ("**OCDs**") of Bay Capital aggregating to Rs. 44 crores by way of a private placement. The proceeds of these OCDs were to be used solely and exclusively to secure repayment of the amount due under the Champion Agro World loan facility. Of this amount of Rs. 44 crores, an amount of Rs. 34 crores was to be used by Bay Capital to subscribe to OCDs issued by Zon, and these were in turn to be used to repay the Champion Agro World facility. The remaining amount of Rs. 10 crores was to be deposited with IFIN. There is an amount of Rs. 10 crores with IFIN. Mr Sakhardande for Bay Capital maintains that this is the deposit under the restructuring arrangement. Dr Saraf for IFIN says the amount is deposited under another facility.

6. The OCDs clearly represented a repayable debt. The repayment was secured by creating a hypothecation and first charge of Zon's book debts and receivables; and secondly, by Mehta pledging his entire shareholding in Bay Capital.

7. It is an admitted position that Mehta has never created this pledge. This is one of the components of the EoD invoked by IFIN.

8. There was then an assignment agreement of 31st March 2017 between IFIN and Zon, a collection agency agreement of 31st March 2017 and then a subscription agreement dated 31st March 2017 by which IFIN agreed to subscribe to Bay Capital's OCDs.

9. There was also a deed of hypothecation of 31st March 2017 executed by Zon, and a pledge agreement of the same date by which Mehta agreed to pledge 100% of his equity in Bay Capital (about 97% of Bay Capital's total equity and 100% preference shares of Bay Capital) as and by way of first exclusive charge in favour of Bay Capital. The pledge agreement does not seem to have been registered and, as I noted, the actual pledge has never been effected.

10. I am leaving aside for the moment the other narrative in the plaint. I come immediately to the EoD notice of 23rd July 2019, a copy of which is at Exhibit 'A' from page 39. This is addressed to Bay Capital, Mehta and Zon Software. It briefly sets out the background in paragraphs 1 to 3, with reference to the subscription agreement of 31st March 2017. Paragraph 4 sets out the distinct events of default that IFIN invoked. It claimed that, on 1st July 2019, an aggregate amount of Rs. 3,46,81,650/- was overdue and unpaid. It said that Bay Capital had failed to take IFIN's approval for a merger of the 1st Respondent with another entity. Certain necessary documents, including audited financial and statutory auditor certificates for the financial year 2018 were not produced. Lastly, it said that the hypothecation charge that was agreed to be created was not registered. In paragraph 5, IFIN then said that since Bay Capital had continuously failed and neglected to cure all events of default within the cure period, in accordance with clause 33 of the

annexure to the subscription agreement, the entire amount under that agreement had become due and payable. In short, it accelerated the repayment. The total amount claimed was Rs. 47,46,81,650/-. The note below that also said that other charges including penal interest will continue to run. IFIN called upon all the obligors to make payment of the outstanding amount within seven days.

11. Leaving aside for a moment the merits of this EoD notice, a material circumstance that intervened is an order made by the National Company Law Appellate Tribunal on 15th October 2018, i.e., before the EoD notice of 23rd July 2019. This was in a proceeding between the Union of India and IL&FS Ltd and some 348 other entities in the IL&FS group. There It seems to be an accepted position at present that IFIN is one of those group concerns. Invoking the provisions of Sections 241 and 242 of the Companies Act 1956, the NCLAT passed an order apparently in the larger public interest and 'economy of the nation' directing that there would be stay inter alia of *the institution or continuation of suits or any other proceedings by any party or person or bank or company etc against IL&FS and its 348 group companies in any court of law, tribunal, arbitration panel or arbitration authority*.

12. I address this immediately. It is one of the principal defences taken by IFIN in its Affidavit in Reply. IFIN says that, on account of the NCLAT 'stay', this Section 9 Petition is not maintainable.

13. Mr Sakhardande for the Petitioner, Bay Capital submits that the NCLAT could not have made any such order. It is not a Tribunal

or a judicial authority empowered to issue a high prerogative remedy. It is not a constitutional Court. Whatever be the wording of Sections 241 and 242 of the Companies Act 1956, they do not give the NCLAT a power of superintendence of other courts, and most emphatically not over Courts that are neither subordinate to the NCLAT nor subject to its superintendence. An order of this kind may be made by the Supreme Court, or by the High Court in regard to Courts over which the High Court has judicial superintendence, but certainly not the NCLAT. He submits that the order is in the teeth of the prohibition contained in Section 41(b) of the Specific Relief Act. This has been interpreted in a very similar context by the Supreme Court in *Cotton Corporation of India Ltd v United Industrial Bank Ltd & Ors*.[1] Section 41 of the Specific Relief Act reads thus:

> "**41. Injunction when refused**.— An injunction cannot be granted—
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> (a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
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> (b) **to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought**;
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> (c) to restrain any person from applying to any legislative body;
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> (d) To restrain any person from instituting or prosecuting any proceeding in a criminal matter;
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> (e) to prevent the breach of a contract the performance of which would not be specifically enforced;

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1 (1983) 4 SCC 625.

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

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

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

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

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

(*Emphasis added*)

14. In paragraph 8 of *Cotton Corporation*, the Supreme Court unravelled the underlying intendment of Section 41(b) in these words:

"8. It is, therefore, necessary to unravel the underlying intendment of the provision contained in Section 41 (*b*). It must at once be conceded that Section 41 deals with perpetual injunction and it may as well be conceded that it has nothing to do with interim or temporary injunction which as provided by Section 37 are dealt with by the Code of Civil Procedure. **To begin with, it can be said without feat of contradiction that anyone having a right that is a legally protected interest complains of its infringement and seeks relief through court must have an unhindered, uninterrupted access to law courts. The expression 'court' here is used in its widest amplitude comprehending every forum, where relief can be obtained in accordance with law. Access to justice must**

> **not be hampered even at the hands of judiciary.** Power to grant injunction vests in the court unless the Legislature confers specifically such power on some other forum. **Now access to court in search of justice according to law is the right of a person who complains of infringement of his legally protected interest and a fortiori therefore, no other court can by its action impede access to justice. This principle is deducible from the Constitution which seeks to set up a society governed by rule of law. As a corollary, it must yield to another principle that the superior court can injunct a person by restraining him from instituting or prosecuting a proceeding before a subordinate court. Save this specific carving out of the area where access to justice may be impeded by an injunction of the court, the Legislature desired that the courts ordinarily should not impede access to justice through court. This appears to us to be the equitable principle underlying Section 41 (*b*). Accordingly, it must receive such interpretation as would advance the intendment, and thwart the mischief it was enacted to suppress, and to keep the path of access to justice through court unobstructed.**"
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> (*Emphasis added*)

15. In paragraph 10, the *Cotton Corporation* court went on to consider the argument that these considerations as enunciated in paragraph 8 do not apply to temporary injunctions. That submission was also negative by the Supreme Court in these words:

> "10. **Mr Sen, learned counsel for the respondent-Bank, contended that Section 41 (*b*) is not at all attracted because it deals with perpetual injunction and the temporary or interim injunction is regulated by the Code of Civil Procedure specially so provided in Section 37 of**

the Act. Expression 'injunction' in Section 41 (*b*) is not qualified by an adjective and therefore, it would comprehend both interim and perpetual injunction. It is, however, true that Section 37 specifically provides that temporary injunctions which have to continue until a specified time or until further order of the court are regulated by the Code of Civil Procedure, But if a dichotomy is introduced by confining Section 41 to perpetual injunction only and Section 37 read with Order 39 of the Code of Civil procedure being confined to temporary injunction, an unnecessary grey area will develop. It is indisputable that temporary injunction is granted during the pendency of the proceeding so that while granting final relief the court is not faced with a situation that the relief becomes infructuous or that during the pendency of the proceeding an unfair advantage is not taken by the party in default or against whom temporary injunction is sought. But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted. In *State of Orissa v. Madan Gopal Rungta (1952) SCR 28 : AIR 1952 12 : 1951 SCJ 764,* a Constitution Bench of this Court clearly spelt out the contours within which interim relief can be granted. The Court said that 'an interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceeding'. If this be the purpose to achieve which power to grant temporary relief is conferred, it is inconceivable that where the final relief cannot be granted in the terms sought for because the statute bars granting such a relief ipso facto the temporary relief of the same nature cannot be granted. To illustrate this point, let us take the relief which the Bank

seeks in its suit. **The prayer is that the Corporation be restrained by an injunction of the Court from presenting a winding-up petition under the Companies Act, 1956 or under the Banking Regulation Act, 1949. In other words, the Bank seeks to restrain the Corporation by an injunction of the court from instituting a proceeding for winding-up of the Bank. There is a clear bar in Section 41 (*b*) against granting this relief. The court has no jurisdiction to grant a perpetual injunction restraining a person from instituting a proceeding in a court not subordinate to it, as a relief, ipso facto temporary relief cannot be granted in the same terms.** The interim relief can obviously be not granted also because the object behind granting interim relief is to maintain status quo ante so that the final relief can be appropriately moulded without the party's position being altered during the pendency of the proceedings."

(*Emphasis added*)

16. Sections 241 and 242 of the Companies Act 1956 read thus:

"**241. Application to Tribunal for relief in cases of oppression, etc.**—(1) Any member of a company who complains that—

(*a*) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or

(*b*) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by

an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

(2) The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter:

Provided that the applications under this sub-section, in respect of such company or class of companies, as may be prescribed, shall be made before the Principal Bench of the Tribunal which shall be dealt with by such Bench.

(3) Where in the opinion of the Central Government there exist circumstances suggesting that —

(*a*) any person concerned in the conduct and management of the affairs of a company is or has been in connection therewith guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law or of breach of trust;

(*b*) the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices;

(*c*) a company is or has been conducted and managed by such person in a manner which is likely to cause, or has caused, serious injury or damage to

the interest of the trade, industry or business to which such company pertains; or

(*d*) the business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest,

the Central Government may initiate a case against such person and refer the same to the Tribunal with a request that the Tribunal may inquire into the case and record a decision as to whether or not such person is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.

(4) The person against whom a case is referred to the Tribunal under sub-section (3), shall be joined as a respondent to the application.

(5) Every application under sub-section (3) -

(*a*) shall contain a concise statement of such circumstances and materials as the Central Government may consider necessary for the purposes of the inquiry; and

(*b*) shall be signed and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908), for the signature and verification of a plaint in a suit by the Central Government.

242. Powers of Tribunal.— (1), if, on any application made under section 241, the Tribunal is of the opinion—

(*a*) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and

(*b*) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making a winding-up order on the ground that it was just and equitable that the company should be wound up,

the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

(2) Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for—

(*a*) the regulation of conduct of affairs of the company in future;

(*b*) the purchase of shares or interests of any members of the company by other members thereof or by the company;

(*c*) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

(*d*) restrictions on the transfer or allotment of the shares of the company;

(*e*) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;

(*f*) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (*e*):

Provided that no such agreement shall be terminated, set aside or modified except after due

notice and after obtaining the consent of the party concerned;

(*g*) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(*h*) removal of the managing director, manager or any of the directors of the company;

(*i*) recovery of undue gains made by any managing director, manager or director during the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;

(*j*) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (*h*);

(*k*) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;

(*l*) imposition of costs as may be deemed fit by the Tribunal;

(*m*) **any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made**.

(3) A certified copy of the order of the Tribunal under sub-section (1) shall be filed by the company with the Registrar within thirty days of the order of the Tribunal.

(4) **The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable**.

(4-A) At the conclusion of the hearing of the case in respect of sub-section (3) of section 241, the Tribunal shall record its decision stating therein specifically as to whether or not the respondent is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.

(5) Where an order of the Tribunal under sub-section (1) makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

(6) Subject to the provisions of sub-section (1), the alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered.

(7) A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within thirty days after the making thereof, be filed by the company with the Registrar who shall register the same.

> (8) If a company contravenes the provisions of sub-section (5), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both."
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> (*Emphasis added*)

17. It is true that these sections, especially the portions emphasized above in Sections 242(2)(m) and 242(4) confer a wide discretion on the NCLT and NCLAT, but can that discretion extend in this manner to passing an order that is ex facie in the teeth of the statutory prohibition contained in Section 41 of the Specific Relief Act as interpreted and explained by *Cotton Corporation*? That is the question Mr Sakhardande poses.

18. Mr Sakhardande would have me hold that the order of the NCLAT is per incuriam. The law on this is well-settled. He invites attention to my recent decision (in the context of a copyright infringement action) in *Sanjay Soya Pvt Ltd v Narayani Trading Company*,[2] for its review of the decisions on the jurisprudence regarding decisions rendered per incuriam, and also for the proposition (as I held in paragraph 61 of *Sanjay Soya*) that there is no law that a declaration that a previous decision is per incuriam can only be done by a hierarchically superior court.

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2 Interim Application (L) No 5011 of 2020 in Commercial IP Suit No. 2 of 2021, decided on 9th March 2021.

19. Incidentally, on the second proposition (that it is not only a hierarchically superior court that can declare a previous decision as one rendered per incuriam), reference can profitably be made to the incisive discussion by Kathawalla J in *Gautam Landscapes v Shailesh S Shah*.[3] The learned single Judge was told that the decision of a Division Bench in *Universals Enterprises v Deluxe Laboratories Pvt Ltd*.[4] was binding (on the question of whether Section 9 relief could be granted on an unstamped or insufficiently stamped document). The respondent argued that it was per incuriam. Leaving aside the merits of that debate (now brought to conclusion by the Supreme Court in *NN Global Mercantile Pvt Ltd v Indo Unique Flame Ltd & Ors*[5]), in *Gautam Landscapes*, the learned single Judge held the Division Bench decision in *Universals Enterprises* to be per incuriam. For our purposes, it makes little difference that the Division Bench's view is now apparently the correct position in law; the point is that a declaration that a particular decision is rendered per incuriam is not the sole province of a superior court.

20. While I do not think I need to go quite that far with the NCLAT order, it seems to me plain that when the NCLAT passed such an order it did something it could not possibly have done. When it used the words 'any court of law' this could conceivably mean the High Court as well. The NCLAT has absolutely no jurisdiction over this Court, even on its Original Side, given that this is a Chartered High Court. The High Court is in no way subject to

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3 2018 SCC OnLine Bom 14613. This is the decision that requested the Hon'ble the Chief Justice to constitute a larger bench to decide the question of stamping of documents in arbitration matters.

4 2016 (5) Mh LJ 623.

5 2021 SCC OnLine SC 13.

the NCLAT's jurisdiction or superintendence. I do not see how the words 'court of law' can be 'read down', because other than the NCLT, there is no other judicial authority over which the NCLAT exercises such superintending power. But if we leave that aside and focus on the words 'arbitration panel and arbitration authority', and even assuming for a moment that the NCLAT has the power to stay arbitrations, it certainly does not have the authority to stay the hands of this Court in hearing a petition under Section 9 or any other petition that properly comes before this Court under the Arbitration and Conciliation Act 1996. Indeed, I do not even see how the NCLAT has such control over arbitral tribunals. The NCLAT can make no order under Section 9, Section 11, Section 34, Section 37 or any of the other provisions of the Arbitration and Conciliation Act 1996. Notably, Section 9 of the Arbitration Act — and indeed no provision of that Act — is made subject to the provisions of the Companies Act 2013. This in itself is a telling circumstance.

21. For the present purposes, I need not go further into this question. It is enough for the present order to hold that the NCLAT order cannot and does not come in the way of this Court making an appropriate order under Section 9 of the Arbitration and Conciliation Act 1996. When and how that arbitration is to be commenced is another matter, one with which I am not presently concerned.

22. The objection, therefore, at the threshold by Dr Saraf that the arbitration being stayed and the NCLAT having stayed all

proceedings in all Courts, the Petition is not maintainable is rejected.

23. The only question therefore is this: Is there a justification made out by Mr Sakhardande for the grant of interim relief? The total claim today is about Rs. 47.46 crores under the EoD notice. Delayed interest is about Rs. 3 crores, AND future interest is Rs. 1 crore. The pledge of shares by Mehta has not been created and, as I noted, there is now a dispute regarding THE Rs. 10 crores deposit. According to Mr Sakhardande, the default in interest was only for two quarters, i.e. Q4 of 2019 and Q1 of 2020. He also claims that the provision for penal interest invoked by IFIN is in the nature of liquidated damages. This provision is in Annexure-1 of the offer letter dated 31st January 2017. That contains a tabulation of various clauses and item 12 is the provision for penal interest which is pegged at 1% over and above the prevailing interest rate on overdue amounts. This penal interest begins to operate if Bay Capital defaults in payment of interest or redemption of the OCDs according to their terms. The submission that this is in the nature of liquidated damages seems to me to be prima facie extremely doubtful.

24. At page 357 in the Rejoinder is a copy of letter of 1st November 2019 from IFIN. This gives the details of the outstanding amounts as of 30th September 2019. The outstanding are computed under two steams, so to speak. One is under the facility of Rs. 30 crores and the second outstanding is under the OCD facility of Rs. 44 crores. This yields IFIN's total claim of Rs. 47,53,78,882/- and there is a stipulation of further interest of Rs. 16,63,562/-.

25. What Mr Sakhardande in essence seeks, and I do not think there is any other way to look at it, is virtually a re-writing of the terms of the commercial contract between the parties at the time of Section 9 Petition. I am asked to waive or ignore a breach of the obligation to pay interest on schedule. I am asked to turn a blind eye to the failure to create a hypothecation and the pledge of shares. All these breaches and defaults are to count for nothing; and in the meantime, IL&FS is to be restrained from enforcing its contractual obligations against Bay Capital. I do not see why Bay Capital should not be held to the bargain that it struck. This agreement has never been avoided. Nobody has ever said that any of its terms are fraudulent or barred by any of the provisions of the Contract Act.

26. In a commercial Court these pleas are of very little persuasive value. They will only carry heft if it is shown that there is no breach on the part of the Petitioner, and the invocation by the Respondent is totally unlawful. Merely claiming it to be undesirable is useless. Section 9 is not meant to aid parties clearly in breach of their contracts. Everything in the Arbitration Act is founded on a contract; and this necessarily means that to claim an equitable and discretionary relief, a Section 9 petition is not to be handled like a regular civil suit invoking a non-contractual civil remedy. The Respondent must be shown to be in wrongful conduct. Its actions must be shown to ones in violation of the contract. A respondent seeking to enforce its contractual rights will suffer no injunction unless it is shown that the Respondent itself is in breach or has acted contrary to the contract. Once a breach by the Petitioner is not only demonstrated but is accepted, equity will not operate in its favour. Conversely, where there is a demonstration of a breach by the

Respondent, the Petitioner may be entitled to seek an equitable relief in the court's discretion.

27. In this context, one must have regard even while deciding a Petition under Section 9 to what is likely to happen and what is permissible and what is not in an ensuing arbitration. It is true that Section 9 is both equitable and discretionary. I do not mean to suggest that a Section 9 Court is constrained by the other limitations that may be placed on an arbitral tribunal itself. The remit of an arbitral tribunal is certainly more confined than that of a Section 9 court. But a look at Section 28(2) of the Arbitration and Conciliation Act 1996 is instructive while assessing a commercial contract. This says that an arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so. Absent any such express conferring of power in the contract on an arbitral tribunal, could the arbitral tribunal possibly have made the kind of order that Mr Sakhardande wants me to make today? The reason I believe this question is important is that even I was to make some sort of order today, whether on terms or otherwise, it would clearly operate only until the disposal of a Section 17 Application for interim relief by the arbitral tribunal. But if the entire argument before the arbitral tribunal in Section 17 was to be founded only on a question of equity and seeking a decision *ex aequo et bono*, and that is impermissible for the arbitral tribunal to do absent a specific provision in the agreement itself, then it is clearly not possible for that arbitral tribunal to confirm the kind of order that is being sought from me today. As I said earlier, I do not see Section 28(2) as constraining or limiting the power of a Section 9 Court. But it must certainly inform the nature of the relief that the

Section 9 Court moulds. The relief must be one that the arbitral tribunal can legitimately confirm if and when called upon to do so.

28. I do not see any merit in the case presented by Bay Capital. Its offer made today to deposit certain amounts and for Mehta to pledge his shareholding in Bay Capital is, I think, far too little too late.

29. There is no merit in the Petition. It is dismissed.

30. In view of the provisions of Section 35 of the Code of Civil Procedure 1908 as amended by the Commercial Courts Act 2015 there will have be an order of costs. The mandate is that costs follow the event, unless the Court decides otherwise for the reasons to be recorded. Dr Saraf submits that the costs payable to the 1st Respondent are in the amount of Rs. 7.5 lakhs. I find the figure reasonable. There will be an order of costs against the Petitioner in the amount of Rs. 7.5 lakhs. The amount is payable within two weeks from today. If not paid, it will carry interest at the rate of 9% per annum (interest on costs also being permitted by amended Section 35). The order of costs will be enforceable as an order of this Court. Drawn up order dispensed with.

31. All concerned will act on production of an ordinary copy of this order.

(G. S. PATEL, J)