Shabnoor

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

IN IT'S COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 766 OF 2026

Ramakrishnan Krishnan,
Adult, Indian Inhabitant,
residing at B-44, II Floor,
Gulmohar Park, New Delhi 110 049 … **Petitioner**

V/s.

SHABNOOR AYUB PATHAN

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Date: 2026.07.22 11:35:31 +0530

1. **Gluhend India Private Limited**,
   A company incorporated under the Companies Act, 1996 and having its registered office at 23, Floor 2, Plot #59/61 Arsiwala Mansion, Nathalal Parikh Marg, Colaba, Mumbai – 400 005

2. **Sage Metals US HoldCo LLC**,
   A limited liability company formed under the Laws of State of Delware and having its registered office at 1209, Orange Street, Wilmington, New Castle, Delaware – 19801 United States of America … **Respondents**

Mr. Ashish Kamat, Sr. Advocate a/w Mr. Abhishek Kale, Mr. Aroon Menon, Mr. Aditya Khare, Mr. Shreyas Maheswari, Mr Atharva Bhilare i/b Naik Naik and Co., Advocates for the Petitioner.

Mr. Sharan Jagtiani, Sr. Advocate a/w Ms. Smiti Tewari, Mr. Paresh Lal, Mr. Shreyas Lele, Mr. Aditya Nair, Ms. Samridhi Lodha, Ms. Surabhi Agarwal i/b Khaitan Legal Associates, Advocates for the Respondent No. 1.

Mr. Shyam Kapadia a/w Ms. Smiti Tewari, Mr. Paresh Lal, Mr. Shreyas Lele, Mr. Aditya Nair, Ms. Nimisha Nagpal i/b Khaitan Legal Associates, Advocates for the Respondent No. 2.

CORAM	**: AMIT BORKAR, J.**
RESERVED ON	**: JULY 15, 2026.**
PRONOUNCED ON	**: JULY 22, 2026**

1. By this Petition, the Petitioner has asked this Court to grant interim protection under Section 9 of the Arbitration and Conciliation Act, 1996. According to the Petitioner, the Respondents are continuously not following the obligations accepted by them under the Third Framework Agreement dated 13 July 2022 and the earlier agreements made between the parties. The Petitioner says such protection is necessary till the arbitration proceedings are started.

2. The facts leading to this Petition are these. On 10 November 2017, a Share Purchase Agreement (SPA) was signed between Delos Sage HoldCo Cooperatief UA (DSHC), Sage Metals Limited (Sage), the Petitioner and others for purchase of Sage at an enterprise value of about ₹470 crores. Under Clause 2.1 of the SPA, DSHC agreed to form a special purpose company for purchasing 90% shares of Sage. Under Clause 1.1.26, the

Petitioner was described as the "Continuing Shareholder" and was to keep the remaining 10% shares. The other shareholders received their full sale consideration under the SPA. However, the Petitioner's payment was arranged in a different way. A large part of his consideration was postponed and was to be paid through Redeemable Optionally Convertible Preference Shares (ROCPS). Thereafter, GIPL was incorporated on 22 December 2017 by DSHC. On 23 February 2018, GIPL signed a Deed of Accession and accepted all the rights and obligations of DSHC under the SPA. Later, on 11 March 2018, DSHC, GIPL, Sage, AR2 LLC, Fortress Metals LLC and the Petitioner entered into a Framework Agreement deciding their respective rights and duties. Under this Agreement, Sage was to merge with GIPL within eighteen months from the Closing Date. After the merger, the Petitioner was to receive equity shares equal to 10% of the fully diluted share capital of GIPL and ROCPS for the remaining rolled over consideration. It was also agreed that the ROCPS would carry agreed returns and would be redeemed in stages so that the Petitioner received at least ₹5 crores every year along with accrued returns. The ROCPS were to be fully redeemed within the agreed time. DSHC also agreed that during the period of the ROCPS it would not charge any management fees from the Group Companies so that enough money remained available for making these payments. The parties further agreed that any dispute between them would be referred to arbitration before the Singapore International Arbitration Centre (SIAC), with India as the legal seat and Mumbai as the venue. The transactions under the SPA were completed on 13 March

2018, which became the Closing Date. Thereafter, on 18 December 2018, the parties signed a Supplemental Share Purchase Agreement by which the purchase price of Sage was increased by ₹27.5 crores. As a result, the Petitioner's share also increased by ₹2.75 crores. This additional amount was also to be paid through the ROCPS arrangement and the value of the ROCPS became about ₹28.60 crores. On 20 June 2019, the National Company Law Tribunal, Mumbai approved the Scheme of Amalgamation between Sage and GIPL. Because of this order, the obligations under the SPA and the Framework Agreement became effective. GIPL then became responsible for issuing the agreed equity shares and ROCPS to the Petitioner as part of the balance consideration. After the amalgamation was completed on 25 November 2019, the Petitioner received 3,08,93,134 ROCPS. Later, on 31 January 2020, the parties signed an Amended and Restated Framework Agreement, which is referred to as the Second Framework Agreement. Under this Agreement, some of the ROCPS were converted into Class D CCPS and the Petitioner's ROCPS holding came down to 2,80,35,419 ROCPS. The Agreement again stated that the ROCPS would earn returns at the rate of 15% per year with yearly compounding. It also provided that the Petitioner would receive yearly payments of not less than ₹5 crores together with accrued returns, along with a special dividend. DSHC also agreed to continue waiving management fees so that these payments could be made.

3. On 26 March 2021, GIPL's Company Secretary, Ms. Isha Gupta, sent an email to the Petitioner. In that email, it was accepted that because the ROCPS had been allotted late, the Special Return payable for the period from 13 March 2018 to 24 November 2019 had increased to ₹7,36,15,376. According to the Petitioner, this email clearly shows that GIPL admitted its liability towards him. During the financial years 2021 to 2022, GIPL went through restructuring with its lenders. As part of that process, Sage Metals US HoldCo LLC (US HoldCo) acquired 90% shareholding in GIPL. After this restructuring, only US HoldCo and the Petitioner remained as shareholders of GIPL. The Petitioner says that even though the agreements clearly required yearly payments under the ROCPS arrangement, the Respondents did not make any such payments. By an email dated 1 September 2021, the Petitioner requested the Respondents to perform their obligations. In reply, the Respondents stated that payment of the Petitioner's dues was "not on the radar" and explained that they were not making payment because they did not have sufficient funds. Thereafter, the parties made certain limited changes to the agreements during January and May 2022. After the restructuring, the Petitioner's securities were reorganised into equity shares, Class D CCPS and 2,43,33,349 Final ROCPS.

4. On 13 July 2022, the parties entered into the Third Framework Agreement. This Agreement replaced the earlier Framework Agreements but at the same time continued and confirmed the Petitioner's important contractual rights. It again provided that the Final ROCPS would carry annual returns at 15% compounded every year and that the Petitioner would also receive the Agreed Special Return. It further stated that the ROCPS would be redeemed in such a way that the Petitioner received at least ₹5 crores every year and that all obligations relating to the ROCPS would be completed on or before 30 June 2024. Clause 3.3.6 also required US HoldCo and the shareholders of GIPL, other than the Petitioner, either to provide enough funds to GIPL for meeting these obligations or themselves purchase the ROCPS if GIPL did not have enough money. According to the Petitioner, this created an independent and absolute liability on US HoldCo. Before the redemption date, the Petitioner, by letters dated 21 December 2023 and 28 May 2024, again reminded the Respondents about their obligations and requested them to redeem the ROCPS and pay the accrued annual returns together with the Agreed Special Return.

5. According to the Petitioner, it was only in June 2024 that the Respondents, for the first time, tried to explain their default by saying that approval of the lenders was required before any payment under the ROCPS could be made. The Petitioner repeatedly asked for copies of the alleged restrictions imposed by the lenders. However, no documents were supplied to show that the Respondents had honestly tried to obtain such approvals. On 20 August 2024, GIPL, through its authorised officer Mr. Sandeep Chotia, again informed the Petitioner that the outstanding principal amount under the ROCPS was about ₹24.3 crores and that the interest accrued up to June 2024 was about ₹38.2 crores. It was also stated that no deductions had been made from the accrued interest and that the earlier calculation error had been corrected. According to the Petitioner, this communication is another clear admission of liability by the Respondents. The Petitioner states that, acting in good faith and without giving up his legal rights, he agreed by a letter dated 29 August 2024 to extend the redemption period till 30 September 2025, subject to certain conditions. The Respondents neither accepted those conditions nor fulfilled their obligations. Therefore, the Petitioner withdrew the conditional extension on 5 November 2024. After this, although the Respondents had acknowledged the Petitioner's claim for several years, they, for the first time, disputed the calculation of interest by saying that the accrued returns had been overstated. The Petitioner immediately denied this allegation and maintained that the calculations were always made according to the agreement and were the same as those earlier accepted by the Respondents. Between February 2025 and September 2025, the Petitioner repeatedly requested the Respondents to pay the amounts which, according to him, were already admitted. However, the Respondents continued to avoid payment and only relied upon the alleged restrictions imposed by the lenders. The Petitioner says that during this period the Respondents never disputed his main contractual entitlement.

6. Since repeated demands did not result in payment, the Petitioner issued a final legal notice on 19 December 2025 asking the Respondents to clear the admitted liabilities under the Third Framework Agreement. By their reply dated 9 January 2026, the Respondents, for the first time, contended that redemption of the ROCPS was not permissible under Section 55 of the Companies Act, 2013 because there were no distributable profits. The

Petitioner says this stand is without merit, contrary to the obligations accepted by the Respondents and cannot relieve them from their separate obligation under Clause 3.3.6 of the Third Framework Agreement. The Petitioner submits that although the Respondents repeatedly admitted their liability, gave contractual assurances and received several demands for payment, they have still failed to perform their obligations. According to the Petitioner, the conduct of the Respondents shows that they intend to keep delaying the payment while continuing to enjoy the benefit of the Petitioner's investment. In these circumstances, the Petitioner states that he had no other option but to invoke the arbitration agreement and file the present Petition. By this Petition, he seeks urgent interim protection so that the subject matter of the arbitration is preserved, and his contractual claims are secured till the Arbitral Tribunal finally decides the dispute.

7. Mr. Kamat, learned Senior Advocate appearing for the petitioner, invited my attention to the Framework Agreement dated 11 March 2018. He submitted that under Clauses 3.3, 3.3.2 and 3.4 of the said Agreement, the petitioner was entitled to receive the returns agreed between the parties. He further submitted that the correspondence exchanged between the parties, especially the email dated 1 September 2021, clearly shows that the respondent itself accepted that the question of repayment had arisen after completion of forty two months from the date of the transactions, as provided under the Agreement. According to him, although it was agreed that the petitioner would receive ₹5 crore every year, the respondent admitted that such payment could not be made because of the conditions imposed under its loan agreements with the lenders and because the company did not have enough cash available. Learned counsel then invited my attention to the email dated 20 August 2024. He submitted that by this email the respondent admitted that an amount of ₹24.3 crore towards the principal value of the ROCPS and ₹38.2 crore towards accrued returns or interest up to June 2024 was payable to the petitioner. He also referred to the earlier email dated 11 June 2024 and submitted that even in that communication the respondent accepted that no payment could be made to the petitioner because the lenders had not granted their approval. According to him, the respondent itself stated that under Clauses 3.3.6 and 3.5 of the Framework Agreement it was not authorised to make any payment without such approval. The respondent further informed the petitioner that the company had defaulted in repayment of its loans and, unless that default was first resolved and the consent of the lenders was obtained, neither the company nor USHC would be in a position to arrange funds for making payment. The respondent also requested the petitioner to cooperate in extending the maturity of the loans so that the company could improve its position and protect the interests of all stakeholders, including the shareholders.

8. Learned Senior Advocate also relied upon the email dated 9 July 2025 and submitted that even by this communication the respondent again refused to make payment of the amounts claimed by the petitioner. He further referred to the balance sheets of the respondent company and pointed out that the amounts payable to the petitioner have been shown therein as borrowings. Referring to Paragraph 18 of the Indian Accounting Standards (Ind AS), he submitted that the real nature of a financial instrument is more important than the name given to it while deciding how it should be shown in the financial statements. According to him, where a preference share is required to be redeemed by the company for a fixed amount, or where the holder has a right to demand redemption on or after a fixed date for a fixed amount, such an instrument is treated as a financial liability. In support of this submission, learned Senior Advocate relied upon the judgment of the Supreme Court in *J.K. Industries Ltd. v. Union of India*, reported in (2007) 13 SCC 673, particularly paragraph 138. He submitted that under Section 211(3A) of the Companies Act, 1956, the Accounting Standards framed on the recommendation of the National Advisory Committee on Accounting Standards under Section 210A have been made compulsory. According to him, the purpose of making these standards mandatory is to ensure that the financial statements present the true financial position of the company and correctly reflect its income and profits.

9. Dealing with the respondent's reliance on Section 55 of the Companies Act, 2013, learned counsel submitted that the respondent cannot take advantage of that provision because it has itself shown the amounts payable to the petitioner as borrowings in its financial statements. According to him, once the liability has been treated in that manner, Section 55 would have no application. He further submitted that even if it is assumed that redemption of the ROCPS is governed by Section 55, the payment of the assured return and the special return under the Framework Agreement is a separate contractual obligation and is not controlled by the said provision. He lastly submitted that the financial statements of the respondent company show that its financial condition has continued to weaken and that it has been suffering losses. Therefore, according to him, the interim protection prayed for by the petitioner deserves to be granted.

10. Mr. Jagtiani, learned Senior Advocate appearing for the Respondents, opposed the Petition. At the beginning, he submitted that the entire case of the Petitioner proceeds on a wrong understanding of the Third Framework Agreement dated 13 July 2022 ("TFA"). According to him, the Petitioner assumes that immediately after the Redemption Period expired on 30 June 2024, all the amounts automatically became payable. He submitted that such interpretation is contrary to the plain language of the Agreement. Drawing attention to Clause 3.3.6 of the TFA, he pointed out that the clause itself starts with the words "Subject to Clause 3.5 below." According to him, these opening words are important because they make every obligation regarding redemption of the Final ROCPS, payment of the Agreed Annual Return and payment of the Agreed Special Return dependent upon Clause 3.5. He submitted that while interpreting a contract, the Court must read the agreement as a whole and give effect to every clause. In this regard, he relied upon the principles laid down by the Supreme Court in *Nabha Power Ltd. v. Punjab State Power Corporation Ltd.*, (2018) 11 SCC 508, and *Arnold v. Britton*, (2015) AC 1619, wherein it has been observed that contractual terms must ordinarily be understood in their plain and ordinary meaning and every part of the agreement must be given effect. Learned Senior Advocate then referred to Clause 3.5 of the TFA. According to him, the clause clearly provides that redemption, repurchase or conversion of the ROCPS, as well as payment of the Agreed Annual Return, Agreed Special Return or any other amount under the Agreement, can be made only in the manner decided by the Board. He submitted that such payment must also be in accordance with the Financing Documents and, till the Final Settlement Date arrives, can be made only after obtaining prior written consent of the lenders or with the approval of the Koi Director and the COII Director. He submitted that these conditions were consciously accepted by all parties while entering into the Agreement and cannot now be ignored. Proceeding further, learned Senior Advocate submitted that the Petitioner's rights under Clause 3.3 are not absolute. According to him, those rights become enforceable only after all the conditions mentioned in Clause 3.5 are fulfilled. Unless those conditions are first satisfied, no legal obligation to make payment can arise. He submitted that the Court cannot separate one clause from another and enforce only a part of the agreement while ignoring the remaining provisions. In support of this principle, reliance was placed upon *Nabha Power Ltd.*

11. Learned Senior Advocate further submitted that the Petitioner accepts that prior written consent of the lenders is a mandatory requirement under the Agreement. According to him, the Petitioner's own grievance is that the Respondents failed to obtain such consent. Having accepted that lender approval is a condition precedent, the Petitioner cannot at the same time argue that payment became automatically payable on 30 June 2024. He submitted that the Financing Documents also independently prohibit redemption of the ROCPS or any payment relating thereto without prior approval of the lenders. He pointed out that Clause 2.30 of the Second Amended and Restated Debenture Trust Deed prohibits payment of any dividend or other distribution on the ROCPS and also prohibits redemption without prior approval of the Debenture Trustee. Similarly, Clause 21.24 of the Second Amended SII Facility Agreement contains a similar restriction requiring prior approval of the Agent before any redemption or payment can be made. Learned Senior Advocate submitted that these restrictions were not introduced for the first time after execution of the TFA. According to him, Clause 1.1.33 of the TFA defines the expression "Financing Documents" in wide terms so as to include all documents relating to the Debentures and the SII Facility. He submitted that the documents executed in July 2023 merely amended and restated the earlier Financing Documents and, therefore, they continue to remain part of the contractual arrangement between the parties.

12. He further submitted that even before the amendments made in July 2023, the earlier Financing Documents, which were already in existence when the TFA was signed, contained substantially similar restrictions requiring lender approval before redemption or payment. According to him, copies of those documents have now been supplied to the Petitioner. Therefore, the contention raised for the first time in the Rejoinder that the amended Financing Documents are not binding upon the Petitioner is, according to him, without any basis and deserves to be rejected. Learned Senior Advocate further submitted that none of the conditions required under Clause 3.5 has yet been fulfilled. According to him, there is no decision of the Board approving payment, no written consent from the lenders and no compliance clearance under the Financing Documents. He also submitted that the Final Settlement Date, as defined in Clause 1.1.30 of the TFA, has admittedly not yet occurred. Under that definition, the Final Settlement Date will arise only when the Debentures are fully redeemed and the SII Facility is completely repaid to the satisfaction of the lenders. Since both those financial arrangements are still continuing, Clause 3.5, according to him, continues to govern every payment relating to the ROCPS.

13. Learned Senior Advocate also relied upon the audited financial statements of Respondent No.1, which have been produced by the Petitioner itself. Referring to Note 16(D) of the Consolidated Financial Statements, he submitted that the management, acting on legal advice, has specifically recorded that Clauses 3.3.6 and 3.5 continue to govern repayment of the ROCPS even after 30 June 2024. According to him, therefore, the Petitioner's own documents show that the contractual obligations did not become unconditional merely because the Redemption Period expired. Learned Senior Advocate submitted that before the Redemption Date itself, Respondent No.1 had written letters dated 24 June 2024, 26 June 2024 and 28 June 2024 to the nominees of the lenders requesting approval for redemption of the ROCPS. Thereafter, according to him, the Debenture Trustee and the Loan Agent, by their letters dated 25 June 2026, informed Respondent No.1 that the Debenture Lenders as well as the Facility Lenders were not granting consent for redemption of the ROCPS or for making any payment relating to it. According to learned Senior Advocate, these communications only formally record the same stand consistently taken by the Respondents since June 2024. He submitted that once lender approval has been expressly refused, the Respondents cannot lawfully proceed with redemption or payment. According to him, no Court can direct a party to commit breach of an express contractual condition knowingly accepted by all parties.

14. Without prejudice to the above submissions, learned Senior Advocate argued that the Petitioner's claim is independently barred by Section 55 of the Companies Act, 2013. He submitted that Section 55(2) specifically provides that redeemable preference shares can be redeemed only out of profits available for dividend or from the proceeds of a fresh issue of shares made for that purpose. According to him, Respondent No.1 satisfies neither of these statutory requirements. Referring to the audited financial statements, he submitted that the company had accumulated losses exceeding Rs.6,832.56 million as on 31 March 2026 and had no distributable profits available. He also submitted that there had been no fresh issue of shares for redemption. Therefore, according to him, even if all contractual conditions were assumed to have been fulfilled, redemption itself would still be prohibited by law.

Learned Senior Advocate then relied upon the judgment of the Supreme Court in *EPC Constructions India Limited v. Matix Fertilizers and Chemicals Limited*, 2025 SCC OnLine SC 2293 and submitted that the Supreme Court has held that preference shares form part of the share capital of a company and do not amount to a loan or debt. According to him, the Supreme Court has also held that merely because the redemption date has arrived, the holder of preference shares does not become a creditor of the company. He further submitted that the Supreme Court has clarified that the accounting treatment under Ind AS 32 cannot change the legal nature of the relationship between the parties. On the strength of the said judgment, learned Senior Advocate submitted that the Petitioner's reliance upon the description of the ROCPS as "borrowings" or "financial liabilities" in the balance sheets is misplaced. According to him, accounting entries cannot override either the provisions of the Companies Act or the contractual terms agreed between the parties. In this regard, he also relied upon *J.K. Industries Ltd.*, to submit that Accounting Standards are meant for proper financial disclosure and cannot alter substantive legal rights created by statute or contract.

15. Learned Senior Advocate further submitted that the Agreed Annual Return and the Agreed Special Return are also not independent debt obligations. Referring to Clause 3.3.1, he pointed out that the Agreed Annual Return itself is described as an annual dividend or similar return on the Final ROCPS. Likewise, Clause 3.3.2 provides for the Agreed Special Return in relation to the Final ROCPS. According to him, both these payments are in the nature of returns on preference share capital and, therefore, continue to remain governed by Sections 55 and 123 of the Companies Act, 2013. In the absence of distributable profits, such payments, according to him, cannot legally be made. Learned Senior Advocate also submitted that the Petitioner's reliance upon the order of the National Company Law Tribunal approving the Scheme of Amalgamation is misplaced. According to him, that order only records the allotment of ROCPS pursuant to the Scheme and does not determine or modify the contractual conditions governing redemption. He submitted that the relevant contractual obligations were separately negotiated and finally incorporated under the Third Framework Agreement executed nearly three years later.

16. Learned Senior Advocate submitted that the Respondents have throughout acted honestly and in accordance with the contractual arrangement. According to him, before the Redemption Date Respondent No.1 approached the lenders for approval, placed the matter before its Board and consistently maintained that payment relating to the ROCPS could be made only after obtaining lender consent and complying with the Financing Documents. Therefore, according to him, there has been no breach or default on the part of the Respondents. In these circumstances, learned Senior Advocate submitted that there is presently no enforceable debt or crystallised liability in favour of the Petitioner. According to him, the reliefs sought under Section 9 are, in substance, in the nature of attachment before an arbitral award or securing a money claim in advance. Such relief, according to him, cannot be granted unless there exists a clear and presently enforceable claim. In support of this submission, reliance was placed upon *Raman Tech. & Process Engg. Co. v. Solanki Traders*, (2008) 2 SCC 302, wherein the Supreme Court explained that orders securing money claims cannot be granted merely because a claim has been made. He therefore submitted that the present Petition is premature, misconceived and deserves dismissal.

17. Learned Senior Advocate further submitted that after filing of the present Petition, Respondent No.1 again addressed letters dated 24 June 2026 to the Debenture Trustee and the Loan Agent seeking their written stand regarding redemption of the ROCPS. According to him, these communications were issued only to formally place the matter on record and obtain written confirmation from the lenders. He submitted that Respondent No.1 had already sought lender approval before the Redemption Date itself and, therefore, the letters issued in 2026 were only a continuation of the earlier correspondence and not a fresh attempt to obtain consent. Learned Senior Advocate submitted that by their respective letters dated 25 June 2026, both the Debenture Trustee and the Loan Agent declined to grant approval for redemption of the ROCPS or for making any payment relating to it. According to him, this clearly shows that the contractual pre-condition contained in Clause 3.5 of the TFA still remains unfulfilled.Learned Senior Advocate then dealt with the interpretation of the Third Framework Agreement. He submitted that apart from ignoring Clause 3.5, the Petitioner has also wrongly calculated the Agreed

Special Return at Rs.7,36,15,376 instead of the crystallised contractual amount of Rs.6,71,39,249. According to him, the Petitioner wrongly relies upon the email dated 20 August 2024 stating that an accounting difference of about Rs.64 lakhs had been corrected. He submitted that a correction made for accounting purposes cannot change the contractual rights and liabilities agreed between the parties. Learned Senior Advocate pointed out that Clause 3.3.2 of the TFA specifically provides that the Agreed Special Return of Rs.6,71,39,249 payable for the period from 13 March 2018 till 25 November 2019 is not subject to any further change and shall remain crystallised throughout the duration of the Agreement until full redemption of the ROCPS. According to him, the contract itself fixes the amount finally. He therefore submitted that once the parties themselves have fixed the amount under the contract, neither subsequent accounting entries nor later correspondence can increase or alter that amount. According to him, the Petitioner's claim for Rs.7,36,15,376 is directly contrary to Clause 3.3.2 and is therefore unsustainable.

18. Learned Senior Advocate further submitted that the interpretation placed by the Petitioner in the Rejoinder on Clause 3.3.6 is completely incorrect. According to him, the Petitioner argues that if Respondent No.1 had no funds, the shareholders were bound either to provide funds or themselves purchase the ROCPS. The Petitioner also argues that Clause 3.5 only controls payment by Respondent No.1 and does not affect the obligations of the other shareholders, and that Clause 3.3.6(ii) creates an independent obligation on Respondent No.2. Learned Senior

Advocate submitted that none of these interpretations can be accepted. According to him, Clause 3.3.6 itself begins with the words "Subject to Clause 3.5 below", thereby making the entire clause subordinate to the conditions contained in Clause 3.5. He pointed out that similar words are also used in Clauses 3.3.2, 3.3.3 and 3.3.4. Therefore, according to him, the intention of the parties is clear that every payment, redemption obligation and return under Clause 3.3 is controlled by Clause 3.5. Learned Senior Advocate submitted that the provisions of a contract must be understood according to their plain and ordinary meaning. The Court cannot insert words which the parties themselves have not used or create exceptions which do not exist. In support of this principle, reliance was placed upon *Nabha Power Ltd.*. According to him, even if Clause 3.3.6 is read separately, the qualifying words "Subject to Clause 3.5 below" govern the entire clause including sub-clauses (i) and (ii). Therefore, according to him, no distinction can be made between the obligations of Respondent No.1 and Respondent No.2.

19. Learned Senior Advocate next submitted that the Petitioner has failed to satisfy the settled principles governing grant of interim protection under Section 9 of the Arbitration and Conciliation Act, 1996. He submitted that the party seeking interim protection must establish a strong prima facie case and must also show that the opposite party is attempting to remove or dissipate its assets with an intention to defeat the arbitral award. He further submitted that merely expressing an apprehension regarding the financial condition of the Respondents is not sufficient for grant of injunction or attachment.

20. Learned Senior Advocate submitted that the judgment of the Supreme Court in *Essar House Private Limited v. ArcelorMittal Nippon Steel India Limited*, (2022) 20 SCC 178, relied upon by the Petitioner, has no application to the present case. According to him, in that case there was no substantial defence to the claim, whereas in the present matter the Respondents have raised several contractual, statutory and factual disputes requiring detailed adjudication. Learned Senior Advocate submitted that the Petitioner's request for deposit of about Rs.79.77 crores is, in reality, nothing more than enforcement of a money claim. He argued that it is well settled that where the dispute relates only to payment of money and the claim itself is disputed, the requirement of irreparable injury is ordinarily not satisfied because the dispute can be finally decided in arbitration.

21. Learned Senior Advocate also submitted that the Petitioner's apprehension regarding a possible future sale of the shareholding of Respondent No.1 has no connection with the contractual dispute under the TFA. According to him, such apprehension cannot be used for seeking restraint orders against genuine corporate transactions or for asking wide disclosure regarding the Respondents' assets and liabilities.

22. Learned Senior Advocate further submitted that the SIAC Rules, 2025, particularly Rule 12 read with Schedule I, provide an effective remedy through appointment of an Emergency Arbitrator for urgent interim relief. According to him, when the parties themselves have agreed to such a mechanism, the Petitioner ought to pursue that remedy instead of seeking extraordinary relief from this Court.

23. Learned Senior Advocate submitted that even if the Petitioner ultimately succeeds before the Arbitral Tribunal, its claim remains adequately protected because Respondent No.1 continues to be solvent, and the lenders have also furnished the necessary undertakings. On the other hand, directing deposit of money at this stage would seriously prejudice the Respondents because it would compel them to violate their contractual obligations towards secured lenders and divert funds meant for repayment of secured debts.

24. Learned Senior Advocate lastly submitted that the conduct of the Petitioner shows that there was no real urgency requiring exercise of powers under Section 9. According to him, although the Redemption Date was 30 June 2024 and the Petitioner admittedly knew on 29 June 2024 that lender approval had not been obtained, the legal notice was issued only on 19 December 2025, almost eighteen months later. He further pointed out that although the Petition was electronically filed on 30 April 2026, no immediate steps were taken for circulation and the praecipe seeking circulation was filed only on 8 June 2026, after which the matter came to be circulated on 18 June 2026.

25. Learned Senior Advocate submitted that this sequence of events is inconsistent with the Petitioner's present contention that immediate protection was necessary. According to him, the chronology itself shows that the present Petition is an afterthought filed after considerable delay and only with a view to enforce claims which, according to the Respondents, remain contractually conditional and are also barred by the Companies Act, 2013. He therefore submitted that no case has been made out for grant of either ad interim or interim relief under Section 9 of the Arbitration and Conciliation Act, 1996 and that the Petition deserves to be dismissed.

REASONS AND ANALYSIS:

Whether the amounts under the Third Framework Agreement became payable on expiry of the Redemption Period. Effect of Clauses 3.3, 3.3.6 and 3.5. Effect of Financing Documents and lender consent.

26. I have carefully seen the pleadings, Third Framework Agreement dated 13 July 2022, earlier Framework Agreements, emails and other correspondence between parties, Financing Documents produced before this Court and also submissions made by both learned counsel. At this stage, this Court is not finally deciding who is right or wrong. Still, while considering petition under Section 9 of the Arbitration and Conciliation Act, 1996, the Court cannot avoid looking whether petitioner has shown basis for making its claim.

27. At present, there is no dispute that the Third Framework Agreement was executed. Both parties accept that this Agreement governs their relationship. The dispute is about what Clauses 3.3, 3.3.6 and 3.5 mean. Petitioner says that after 30 June 2024, every obligation under the Agreement became enforceable and respondents were bound to make payment. Respondents say this is not correct because only expiry of Redemption Period does not make payment due, as every payment is controlled by Clause 3.5. Therefore, first thing which needs consideration is how these clauses should be read together.

28. Mr. Kamat argued that Clause 3.3 gives clear rights to the petitioner. According to him, petitioner became entitled to redemption of Final ROCPS, along with Agreed Annual Return and Agreed Special Return. He submitted that the correspondence exchanged after execution of the Agreement, respondents never denied these obligations. In many emails they mentioned principal amount outstanding, returns which had accumulated and explained why payment was not being made. According to him, this shows that liability had come into existence and only actual payment got delayed because respondents were facing financial problems.

29. On the other side, Mr. Jagtiani submitted that petitioner is reading Clause 3.3 and ignoring rest of the Agreement. According to him, Clause 3.3.6 starts with words *"Subject to Clause 3.5 below."* Therefore, every obligation mentioned after these words becomes conditional and cannot be treated as absolute. He submitted that once parties themselves have used such language, the Court cannot treat them as if they have no purpose. According to him, entire Agreement has to be read together as one document.

30. In my opinion, submission of the respondents that whole Agreement has to be read together deserves acceptance. It is now settled that while interpreting a commercial contract, one sentence cannot be picked up by leaving remaining provisions aside. Every clause has to be read with other clauses so that all parts of the Agreement are given some meaning. The Supreme Court in *Nabha Power Ltd. v. Punjab State Power Corporation Ltd.*, (2018) 11 SCC 508 has observed that intention of parties has to be gathered from words they have used and every clause should be harmoniously understood. Therefore, Clause 3.3 cannot be looked at by forgetting the opening qualification contained in Clause 3.3.6. But only because Clause 3.3.6 starts with words *"Subject to Clause 3.5 below"* it cannot mean that no contractual obligation came into existence unless lender consent was first received. These words show that performance or working of one obligation is controlled by another clause. They do not mean that obligation is not created. Whether such words postpone the liability or only regulate when and how that liability is to be performed depends on reading the whole Agreement. Clause 3.3 says that petitioner shall receive redemption of Final ROCPS together with Agreed Annual Return and Agreed Special Return. These are not shown as optional benefits depending upon wish of respondents. They form part of commercial understanding accepted by all parties. Throughout the Third Framework Agreement mandatory words are used while describing these entitlements. Therefore, it is difficult to say that Clause 3.3 creates no obligation at all.

31. Real question is whether this obligation became enforceable on 30 June 2024 without looking at Clause 3.5. Here, Clause 3.5 becomes important. Reading this clause shows that redemption, repurchase or conversion of ROCPS and payment of Annual Return, Special Return or any other amount is to be made in manner decided by the Board, shall remain subject to Financing Documents and, till Final Settlement Date, shall also require prior written consent of lenders or other approvals mentioned there. These conditions are not disputed by either side. Petitioner tried to argue that Clause 3.5 controls the manner of payment by Respondent No.1 and does not reduce the obligation created against Respondent No.2 under Clause 3.3.6(ii). According to petitioner, even if Respondent No.1 did not have sufficient funds, Respondent No.2 had an duty either to bring funds into Respondent No.1 or itself purchase the ROCPS. Therefore, according to petitioner, lender approval could not defeat this contractual promise.

32. I am not able to accept this submission. Clause 3.3.6 begins with qualifying words *"Subject to Clause 3.5 below."* These words appear to control the whole clause. If parties wanted only Respondent No.1 to remain governed by Clause 3.5 and intended Respondent No.2 to stand outside that clause, appropriate words could have been inserted in the Agreement. No such distinction is seen from the language used by parties. At the same time, respondents' submission that no obligation came into existence until lender consent was obtained appears stated too broadly. If such interpretation is accepted, then large part of Clause 3.3

would become useless. Normally commercial parties do not execute detailed agreements creating rights which may never become enforceable because one outside approval is not received. Such interpretation should not be accepted unless language of Agreement forces the Court to take that view. One distinction needs to be kept in mind between existence of contractual liability and right to recover payment. In commercial agreements, these two ideas are not same. A party may accept an obligation under the contract, but actual performance of that obligation may depend upon happening of certain events. Therefore, merely because payment could not be made, it cannot be said that no liability had ever arisen.

33. Conduct of parties after signing the Agreement gives guidance on this issue. From material placed before the Court, especially emails dated 1 September 2021, 11 June 2024 and 20 August 2024, it appears that respondents informed petitioner that payment could not be made because lender approval had not been received or because financial difficulties were continuing. It is important that these communications did not say petitioner had no contractual rights. Explanation given was that payment could not be made because contractual conditions and financing restrictions were standing in the way. In email dated 20 August 2024 Respondent No.1 recorded outstanding principal amount of around Rs.24.3 crores and accrued returns of around Rs.38.2 crores till June 2024. Respondents say this was only an accounting exercise. Petitioner says this email acknowledges liability under the Agreement.

34. Prima facie, this communication cannot be brushed aside. Language used in that email does show that respondents had calculated amounts payable under contractual formula. At the same time, respondents continued saying that payment required lender approval. Therefore, when correspondence is read together, it supports both sides to some extent. It supports petitioner's case regarding calculation of contractual dues. It also supports respondents' stand that payment was considered by them as contractually restricted.

35. Learned Senior Advocate for respondent relied upon Financing Documents. According to him, Clause 2.30 of the Debenture Trust Deed and Clause 21.24 of the SII Facility Agreement prohibited redemption or payment relating to ROCPS without prior lender approval. He further submitted that these documents were existing before execution of Third Framework Agreement and amendments made in July 2023 restated those earlier documents.

36. On looking at contractual definition of *"Financing Documents"*, it appears that this expression has been given a wide meaning. Prima facie, it is not easy to accept petitioner's argument that amended Financing Documents fall outside this definition. If later documents restate earlier Financing Documents without changing their basic character, then they would continue to remain covered within contractual definition. To this extent, submission made by respondents deserves prima facie acceptance. But at the same time, respondents cannot say that these Financing Documents answer every contractual obligation arising under the

Third Framework Agreement. Financing Documents govern relationship between company and its lenders. Third Framework Agreement governs contractual relationship between petitioner and respondents. One cannot wipe out the other. Lender restrictions may explain why payment was delayed, but they do not destroy petitioner's contractual rights.

37. Respondents submitted that before Redemption Period expired they had approached lenders seeking approval and such approval was refused. Communications exchanged during June 2024 and June 2026 have been relied upon for this purpose. Prima facie, these documents show that requests for lender consent were in fact made. Therefore, petitioner's submission that respondents made no effort to obtain lender approval does not appear correct. At the same time, whether respondents acted with diligence while pursuing lender approval cannot finally be decided on present material. Petitioner says respondents did not make any effort and continued using lender restrictions as an excuse. Respondents deny this allegation. Such disputed factual issues would require evidence before the learned Arbitral Tribunal.

38. Mr. Kamat, learned Senior Advocate relied upon Note 16(D) forming part of audited financial statements, where reference is made to legal opinion stating that Clauses 3.3.6 and 3.5 continue to govern repayment even after 30 June 2024. In my opinion, this note shows how respondents understood the Agreement. But such accounting note cannot decide correct interpretation of the contract. Interpretation of contractual terms is a matter for the Court to decide.

39. Therefore, after considering rival submissions, this Court is of prima facie opinion that Clause 3.5 cannot be ignored. Requirement of lender approval and compliance with Financing Documents forms part of contractual arrangement accepted by parties. To that extent, respondents' submission deserves acceptance. But I am unable to accept their argument that no contractual liability came into existence until lender consent was obtained. Clause 3.3 creates substantive rights in favour of petitioner, whereas Clause 3.5 regulates the manner in which those rights can be performed. Therefore, expiry of Redemption Period did not make every amount immediately recoverable without considering Clause 3.5. At the same time, non-receipt of lender approval does not wipe away petitioner's entitlement under the Agreement. What is the effect of refusal of lender consen and what remedies flow from such situation are matters requiring examination before the learned Arbitral Tribunal after evidence is recorded.

<u>Whether Section 55 of the Companies Act, 2013 stops the petitioner's claim. Nature of ROCPS. Effect of accounting treatment. Whether Agreed Annual Return and Agreed Special Return are separate contractual obligations.</u>

40. The next question which needs consideration is what effect Section 55 of the Companies Act, 2013 has on the petitioner's claim. Respondents argued that even if everything stated by the petitioner under the Third Framework Agreement is accepted, redemption of the Final ROCPS still cannot take place because Section 55 permits redemption only in the manner provided under that provision. According to them, Respondent No.1 has no profits and no fresh issue of shares has been made for redemption. Therefore, they submit that this restriction comes in between and because of that the petitioner's claim cannot be enforced. Petitioner has taken different stand. According to him, either Section 55 does not apply to the present transaction or, even if it applies, it does not affect the separate promise regarding payment of the Agreed Annual Return and Agreed Special Return.

41. Before considering these rival submissions, it is necessary to understand the scheme of Section 55. This provision permits a company to issue redeemable preference shares but at the same time lays down conditions regarding redemption. It provides that such shares can be redeemed from profits available for dividend or from proceeds of a fresh issue of shares made for that purpose. Therefore, unlike an loan or debt, redemption of preference share capital is not left to agreement between parties but is regulated by the provisions of the Companies Act.

42. Learned Senior Advocate appearing for the respondents placed reliance upon the recent judgment of the Supreme Court in *EPC Constructions India Ltd.* According to him, principles laid down in that judgment answer the controversy arising in the present proceedings. Because of this submission, it becomes necessary to examine that judgment closely.

43. In paragraph 25 of *EPC Constructions*, the Supreme Court observed that Section 55 of the Companies Act requires redeemable preference shares to be redeemed only from profits available for dividend or from proceeds of a fresh issue of shares made for such redemption. Thus, the Supreme Court recognised that redemption of preference shares is not governed only by contract between parties but also remains subject to restrictions imposed by the Companies Act. Thereafter, the Supreme Court referred to the observations in *Lalchand Surana v. Hyderabad Vanaspathy Ltd.*, (1990) 68 Comp Cas 415 (AP), and approved the legal principle stated therein. Paragraphs 26 and 27 of *EPC Constructions* explain that even after the date fixed for redemption has passed, holder of redeemable preference shares does not become creditor of the company. Such holder still continues as shareholder because redemption remains controlled by conditions contained in Section 55. The Supreme Court accepted the view that merely because redemption has not taken place, preference share capital does not become debt recoverable from the company. In paragraph 28, the Supreme Court explained the distinction between debt and equity by referring to *Gower's Principles of Modern Company Law*. It observed that although preference shareholders enjoy certain preferential rights, they continue to remain members of the company. A person holding debt gets an enforceable right to receive payment irrespective of profits, whereas payment relating to preference share capital still governed by restrictions applicable to dividend and redemption. Therefore, accounting practice or commercial description cannot remove the distinction between debt and equity.

44. Respondents thereafter relied upon paragraphs 43 to 45 of *EPC Constructions* and submitted that accounting treatment adopted by the company has no legal consequence. According to them, ROCPS have been shown as borrowings because *Ind AS 32* requires such classification. Therefore, petitioner cannot claim any right because those entries appear in financial statements. This submission requires consideration. Paragraph 43 of *EPC Constructions* records that Accounting Standard Ind AS 32 requires certain redeemable preference shares to be shown as liabilities in financial statements. However, at the same time, the Supreme Court observed that such accounting treatment does not decide the relationship between the parties. The real nature of the transaction has to be gathered from contractual documents and the statute.

45. The Supreme Court referred to *State Bank of India v. Commissioner of Income Tax*, (1985) 4 SCC 585, wherein it was held that entries in books of account do not determine the nature of a transaction. Similar observations were also made in *Union of India v. Association of Unified Telecom Service Providers of India*, (2020) 3 SCC 525, where it was held that accounting standards merely provide a uniform system for maintaining accounts and cannot override contractual definitions or statutory provisions.

46. In my prima facie opinion, respondents are correct to the extent they submit that accounting entries cannot determine the character of ROCPS. Balance sheet may classify the instrument as liability because accounting standards require such treatment. However, merely because such classification has been made, preference share capital does not become loan if documents and provisions of the Companies Act indicate otherwise. At the same time, I am unable to accept the respondents' submission that accounting treatment has no relevance. The Supreme Court in *EPC Constructions* has nowhere held that accounting entries possess no evidentiary value. What it has said is that such entries are not conclusive. Balance sheet may be one relevant piece of evidence showing how the company recorded the transaction. But it cannot alter rights created under statute or contract. Therefore, although balance sheet cannot override Section 55 or the Third Framework Agreement, it may be looked into for the limited purpose of examining admissions or understanding how the parties reflected the transaction.

47. Learned counsel appearing for the petitioner relied upon *J.K. Industries Ltd.* and submitted that Accounting Standards have been made mandatory under the Companies Act. Therefore, respondents cannot ignore the classification adopted in their audited financial statements. There can be no dispute that compliance with Accounting Standards is mandatory. The Supreme Court in *J.K. Industries* explained that these standards are intended to ensure that financial statements present a true and fair picture of the affairs of the company. However, *J.K. Industries* does not lay down that Accounting Standards alter substantive rights between parties. On the contrary, *EPC Constructions* held that accounting classification cannot determine the legal character of the relationship between the parties. Therefore, both judgments can stand together. Accounting Standards regulate preparation of financial statements. They do not amend rights nor can they override statute.

48. Learned Senior Advocate for the respondents relied upon paragraph 47 of *EPC Constructions*. There, the Supreme Court observed that before any liability can qualify as a debt under the Insolvency and Bankruptcy Code, there must first exist a debt recognised in law. It observed that amounts invested towards preference shares do not possess the character of debt and mere expiry of the redemption date does not alter this position. These observations support the respondents' contention that ROCPS cannot be treated as debt merely because redemption has become due. Petitioner submitted that the dispute does not arise under the Insolvency and Bankruptcy Code. According to him, the claim is founded upon separate promises contained in the Third Framework Agreement. Therefore, it is argued that observations made in *EPC Constructions* while interpreting Sections 5(7) and 5(8) of the Insolvency and Bankruptcy Code cannot decide the controversy arising in these proceedings.

49. It is true that *EPC Constructions* arose under the Insolvency and Bankruptcy Code and the question before the Supreme Court was whether holder of redeemable preference shares could be treated as a financial creditor. That question was answered in the negative. Therefore, ratio of that judgment has to be understood in the factual background in which it was delivered. At the same time, while deciding that issue, the Supreme Court explained principles regarding the nature of redeemable preference shares and operation of Section 55 of the Companies Act. Those principles cannot be ignored merely because the present proceedings arise under Section 9 of the Arbitration and

Conciliation Act. Consequently, I am of the prima facie opinion that respondents are justified in contending that redemption of ROCPS continues to remain governed by Section 55 of the Companies Act. Petitioner cannot treat ROCPS as unsecured loan or contend that on expiry of the Redemption Date the shares became recoverable debt. To that extent, submission made by respondents deserves acceptance.

50. The next question is what is the real nature of the Agreed Annual Return and the Agreed Special Return. In my opinion, this question cannot be answered by seeing the names given by the parties. Merely because the Agreement calls one payment as "Annual Return" or "Special Return", or even says it is dividend or similar return, that does not decide its character. In commercial matters, the Court is required to see what is the substance of the arrangement and not merely the words chosen while drafting the Agreement. Therefore, the entire Agreement has to be read together, and its overall purpose cannot be ignored. The petitioner submitted that the Agreed Annual Return and the Agreed Special Return do not arise only because Final ROCPS were issued. According to him, these payments were separately agreed when the parties restructured their relationship. It is his case that petitioner agreed to continue the investment and not to ask for its money, and these returns were agreed as consideration for such arrangement. Therefore, these payments flow from promises contained in the Agreement and are not merely dividend payable because of the Companies Act. On the other hand, learned Senior Advocate for respondent invited my attention to Clauses 3.3.1 and

3.3.2, where Agreed Annual Return has been described as dividend or return carried by the Final ROCPS and Agreed Special Return has been referred to with the Final ROCPS. According to him, when parties have connected both these returns with the preference shares, the Court cannot separate them from the ROCPS and treat them as independent obligations. According to the respondents, these payments go together with the preference shares and cannot continue after separating them from the ROCPS.

51. In my opinion, respondents are correct to some extent. The language used in the Third Framework Agreement shows a connection between these returns and the Final ROCPS. Reading Clauses 3.3.1 and 3.3.2 does not show that parties intended these payments to stand away from the preference shares. On the contrary, in the Agreement both returns are connected with the Final ROCPS. Therefore, prima facie, these payments take their source from the preference shares and cannot be treated as independent obligations. However, this does not answer the controversy. Commercial agreements sometimes create obligations which are connected with one instrument but still have effect than the incidents attached to that instrument. Merely because a payment is calculated with reference to preference shares, it does not follow that every part of such payment must have the same character as preference share capital. Much depends upon the intention of the parties gathered after reading the Agreement as a whole. It is necessary to notice that the Third Framework Agreement was not executed at the stage when the investment was first made. It came after execution of earlier Framework

Agreements and appears to have formed part of a restructuring between the parties. The object appears to have been to redefine their rights and obligations after changes had taken place in the earlier arrangement. Therefore, every clause of this Agreement cannot be treated as merely repeating rights available to a preference shareholder. If that alone had been the intention, there would hardly have been any necessity for parties to negotiate provisions relating to Annual Return, Special Return and several other obligations.

52. At the same time, I find it difficult to accept the petitioner's submission that these returns have no connection with Section 55 of the Companies Act. The Agreement does not describe these payments as damages for breach of contract, interest payable on a loan or consideration arising under separate arrangement. Instead, these payments are described by making reference to the Final ROCPS. Therefore, separating these returns from the preference shares would also not appear to be consistent with the language chosen by the parties while drafting the Agreement.

53. Learned counsel for the petitioner submitted that Section 55 regulates redemption of preference share capital and does not deal with consideration. According to him, even if redemption cannot take place because statutory conditions are not fulfilled, nothing contained in Section 55 prevents enforcement of the independent obligation regarding payment of the Agreed Annual Return and Agreed Special Return. This submission deserves consideration because Section 55 deals with redemption of redeemable preference shares and does not refer to every obligation which parties may undertake between themselves. However, the difficulty in accepting this submission is that the contractual language does not separate these payments from the Final ROCPS. If the Agreement had provided that these returns would remain payable irrespective of redemption, irrespective of restrictions relating to dividend and irrespective of Section 55, perhaps the matter might have stood on a different footing. No such provision appears in the Agreement. The Court cannot rewrite a contract by supplying words which parties have not inserted.

54. Learned Senior Advocate for Respondent submitted that if the petitioner's interpretation is accepted, Section 55 would become ineffective. According to him, parties would describe dividend or redemption amount by giving it another name and thereby avoid the statutory restrictions imposed by the Companies Act. In my opinion, this submission carries force. Statutory provisions enacted for protection of company capital cannot be permitted to be defeated by adopting different labels for the same payment. At the same time, respondents' submission proceeds on the assumption that because these returns are connected with the Final ROCPS, every obligation disappears whenever redemption cannot take place under Section 55. Such interpretation does not appear consistent with the structure of the Agreement. Parties have devoted separate provisions to these returns and have treated them as important benefits forming restructuring arrangement. Such provisions cannot be treated as having no significance.

55. In my opinion, it is necessary to maintain distinction between existence of a contractual obligation and the stage when obligation becomes enforceable. Parties may undertake contractual obligations even though performance of those obligations remains regulated by statutory provisions. Merely because performance is controlled by statute, it does not mean that the promise ceases to exist. Thus, in my view, Section 55 cannot be interpreted as wiping away every obligation connected with the Final ROCPS. What Section 55 regulates is the manner in which redemption of redeemable preference shares can take place. Whether parties have also created additional rights which continue when redemption is temporarily not possible depends upon interpretation of the Agreement. Prima facie, the Agreed Annual Return and the Agreed Special Return appear to occupy a middle position. They are not the same as redemption amount at the same time, they cannot be treated as independent payments having no connection with the Final ROCPS. Their character appears to be associated with the preference shares, at the same time they appear to form part of the arrangement negotiated between the parties while entering into the restructuring. The Court cannot ignore that acceptance of either submission may produce consequences which the parties never intended. If the petitioner's submission is accepted completely, safeguards contained in Section 55 may become capable of being avoided by careful drafting of language. On the other hand, if respondents' submission is accepted entirely, parties may lose rights which they negotiated while entering into a restructuring. Neither of these consequences appears consistent with principles governing interpretation of contracts. Therefore, at this stage, I am of the prima facie opinion that the Agreed Annual Return and the Agreed Special Return cannot be characterised either as dividend governed by the Companies Act or as independent payments standing outside the statutory framework. Their character appears to be composite. They arise from the arrangement in the Third Framework Agreement, but that arrangement has been structured around the Final ROCPS. Consequently, their enforceability cannot be examined by ignoring Section 55, nor can Section 55 provide complete answer to the controversy without examining the arrangement as a whole.

56. Thus, following prima facie conclusions emerge. Firstly, redemption of the Final ROCPS continues to remain governed by Section 55 of the Companies Act, 2013. Secondly, mere expiry of the Redemption Date does not convert the petitioner into creditor of the company. Thirdly, accounting treatment showing ROCPS as borrowings or financial liabilities is not conclusive and cannot override either the Companies Act or the contractual terms, though such accounting treatment may possess limited evidentiary value depending upon facts established in the case. Fourthly, the Agreed Annual Return and the Agreed Special Return cannot be characterised either as dividend governed by the Companies Act or as independent payments standing outside the statutory framework. Their character appears to be composite and shall remain open for adjudication before the learned Arbitral Tribunal.

<u>Scope of jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996. Whether petitioner has made a prima facie case for interim protection. Nature of relief under Section 9.</u>

<u>Consideration of *Essar House*.</u>

57. After considering the issues arising under the Third Framework Agreement and the objections based on Section 55 of the Companies Act, the next question is whether the petitioner has made out a case for grant of interim protection under Section 9 of the Arbitration and Conciliation Act, 1996. Both sides have made detailed submissions regarding the scope of powers available under Section 9. It is now well settled that jurisdiction under Section 9 is equitable in nature. Though the provision gives wide powers to the Court, the Court has to examine whether the applicant has shown a prima facie case, whether refusal of protection is likely to make the arbitral proceedings ineffective, and whether balance of convenience along with possibility of irreparable prejudice justify exercise of discretionary jurisdiction. At the same time, the expression "interim measure of protection" shows that the intention of the legislature is to ensure that arbitration does not become meaningless because, during pendency of the arbitral proceedings, the subject matter becomes incapable of enforcement. Therefore, while considering relief under Section 9, the Court is required to see the substance of the relief claimed.

58. Learned Senior Advocate appearing for the petitioner submitted that respondents are trying to treat every claim as if it were a money suit. According to him, the amounts claimed represent obligations which have been acknowledged by the respondents. It is further submitted that there exists a real apprehension that financial position of Respondent No.1 may deteriorate to such an extent that even if an arbitral award is passed, the award may not be capable of enforcement. Therefore, according to the petitioner, this Court should preserve the effectiveness of arbitration. Learned Senior Advocate appearing for the respondents submitted that this argument overlooks the distinction between securing a claim and granting the final relief. According to him, petitioner is seeking recovery of the entire amount even before the learned Arbitral Tribunal has examined the merits. It is submitted that Section 9 cannot be converted into an execution proceeding.

59. There can not be dispute regarding the proposition advanced by the respondents. Interim measures cannot be used as a method for granting the final relief. This principle does not mean that every monetary claim stands outside the scope of Section 9. The statute contemplates securing the amount in dispute wherever facts justify such protection. Therefore, the real question is whether the facts of the present case disclose circumstances which justify exercise of that jurisdiction.

60. Learned Senior Advocate for the petitioner placed reliance upon the judgment of the Supreme Court in *Essar House Private Limited v. ArcelorMittal Nippon Steel India Limited*, (2022) 20 SCC 178. According to him, the Supreme Court has held that powers available under Section 9 are wider than those contained in Order XXXVIII Rule 5 of the Code of Civil Procedure. He submitted that although the principles underlying Order XXXVIII Rule 5 may provide guidance, they cannot be imported so as to reduce the scope of Section 9.

61. Section 9 is meant for preventing a problem before it reaches a stage where nothing much can be done. The idea behind this provision is that the Court should step in before the situation goes out of hand. If the Court waits till the respondent has parted with all the assets, then granting interim protection may not serve any purpose. Since dishonest intention is not capable of being proved by direct evidence, the Court can look into the surrounding circumstances and see whether there exists a real possibility that the assets of the respondent may reduce before the arbitral award becomes capable of being enforced. The words "strong possibility" mean something more than only a suspicion. At the same time, they do not mean that absolute proof is required at this stage. The Court has to satisfy from the material placed before it that there is a reasonable possibility that the assets of the respondent may materially reduce before the arbitral award can be enforced. Such satisfaction should come from the material available on record. At the same time, Section 9 cannot be invoked merely because arbitration proceedings are pending. If the respondent is financially sound, possesses sufficient assets and there is no material showing that its assets are reducing or are likely to disappear, then interim protection should not be granted.

62. Learned Senior Advocate for the respondents submitted that the petitioner is reading *Essar House* partly. According to him, even after that judgment, the applicant must establish circumstances showing necessity for grant of interim protection. Mere apprehension, existence of a dispute cannot justify freezing assets worth several hundred crores. This submission carries force.

Section 9 cannot be invoked merely because one party believes that recovery may become difficult. Commercial entities undergo financial ups and downs during the course of business. Every allegation regarding financial difficulty cannot invite judicial interference with commercial operations.

63. Having considered the rival submissions, this Court is of the prima facie opinion that the petitioner has raised substantial questions requiring adjudication before the learned Arbitral Tribunal. The interpretation advanced by the petitioner cannot be described as untenable. Equally, the defence founded upon Section 55 of the Companies Act together with the principles laid down in *EPC Constructions* raises arguable questions. Therefore, at this stage neither side can contend that the controversy admits only one conclusion. Consequently, existence of a prima facie case cannot decide the present petition. The real enquiry under Section 9 is whether surrounding circumstances disclose a necessity for grant of interim protection so that the arbitral proceedings do not become ineffective. Therefore, the material relating to financial position of the respondents, allegations regarding dissipation of assets, the plea of delay, the effect of the Emergency Arbitrator proceedings and the balance of convenience assume importance.

<u>Whether interim protection is necessary in the facts of the present case. Delay, Emergency Arbitrator proceedings, financial condition of the respondents, alleged dissipation of assets, balance of convenience and irreparable injury.</u>

64. Having held that both parties have raised arguable issues which require adjudication before the learned Arbitral Tribunal, it now becomes necessary to see whether the petitioner has shown the further circumstances required for grant of interim protection under Section 9. Learned Senior Advocate appearing for the petitioner submitted that respondents are trying to present the dispute as if it is only disagreement. According to him, the facts disclose a much serious situation. It is submitted that financial position of Respondent No.1 has become weaker, its liabilities have increased, lenders have refused permission for redemption and, therefore, there exists a real apprehension that by the time an arbitral award is passed, no assets may be available for enforcing it. According to him, unless protective orders are passed, the arbitral proceedings may become meaningless. Learned Senior Advocate appearing for the respondents submitted that the petitioner has proceeded upon assumptions. According to him, there is no material showing that respondents are disposing of assets or acting with intention of defeating arbitral award. Mere financial difficulty cannot become a ground for freezing assets of a running company. It is submitted that companies often pass through periods of financial stress and such circumstances cannot justify invoking jurisdiction under Section 9.

65. In my opinion, respondents are correct to the extent that financial stress alone cannot justify grant of interim protection. Commercial disputes arise because parties face financial difficulties. If every allegation regarding weakening financial condition is accepted, then orders securing the entire claim would become a rule. Such an approach would interfere with ordinary business and would not be consistent with the nature of jurisdiction under Section 9. At the same time, the Court also cannot ignore the circumstances relied upon by the petitioner. Material placed on record prima facie shows that Respondent No.1 informed the petitioner that it was unable to redeem the ROCPS because lender approvals were not available and financing restrictions continued to remain. Correspondence shows that substantial liabilities continued after expiry of the Redemption Period. These circumstances may not establish immediate dissipation of assets, but they also cannot ignored. The petitioner has relied upon financial statements to show that liabilities of Respondent No.1 have increased and its overall financial position has weakened. Respondents answered by contending that audited financial statements merely reflect realities of the business and cannot establish any intention to defeat award.

66. Financial statements disclose financial condition of a company. Ordinarily they do not reveal the intention with which the company is dealing with its assets. Therefore, deterioration shown in accounts may create concern, but without supporting material it cannot justify a finding that the company intends to avoid enforcement of an award.

67. Learned Senior Advocate for the petitioner submitted that refusal of lenders to permit redemption shows that recovery has become uncertain. According to him, if the company is unable to secure lender consent for making payment of agreed obligations, there is every possibility that any award passed may remain on paper.

68. Refusal of lender consent affects the ability of respondents to make payment. However, inability to perform obligations is not the same thing as intention to defeat enforcement of a award. The distinction between commercial inability and dissipation of assets must be maintained.

69. Learned Senior Advocate for petitioner relied upon communications exchanged after June 2024 and submitted that respondents acknowledged their liability but postponed the payment. According to him, assurances followed by non-payment show that contractual remedies are ineffective.

70. Prima facie, the correspondence indicates that negotiations between the parties continued for some time. It shows that respondents showed their inability to make payment by referring to financing restrictions and lender approvals. However, these communications do not disclose any intention on the part of respondents to transfer assets beyond the reach of the petitioner.

71. Learned Senior Advocate appearing for the respondents relied upon conduct of the petitioner. According to him, the Redemption Period expired on 30 June 2024. Even thereafter the petitioner continued corresponding with respondents for several months and invoked arbitration later. According to him, such conduct shows that there was no urgency requiring immediate intervention by the Court.

72. Delay by itself may not defeat a petition under Section 9. Commercial parties continue negotiations in the hope that disputes may be resolved amicably before commencing arbitration. Such conduct deserves encouragement rather than criticism. Therefore, merely participating in settlement negotiations cannot amount to waiving remedies. At the same time, chronology of events also cannot be ignored. If the petitioner continued negotiations for a considerable period without asserting that immediate protection from the Court was necessary, such conduct becomes relevant circumstance while considering whether the prejudice was immediate. This circumstance may not defeat the petition, but it has bearing while considering the balance of convenience.

73. Another submission advanced by respondents relates to proceedings before the Emergency Arbitrator. Learned Senior Advocate submitted that the petitioner had approached the Emergency Arbitrator and appropriate proceedings had taken place. According to him, after not obtaining complete relief, the petitioner has attempted to reopen the same controversy before this Court. The petitioner contended that jurisdiction of this Court under Section 9 remains independent of emergency arbitral proceedings. According to the petitioner, the statute preserves jurisdiction of the Court and the present petition cannot be rejected merely because proceedings before the Emergency Arbitrator were pursued.

74. The submission of the petitioner deserves acceptance to a limited extent. Mere availability of an Emergency Arbitrator does not take away the jurisdiction conferred upon this Court under Section 9. The Court continues to possess jurisdiction wherever circumstances justify exercise of power. However, proceedings before the Emergency Arbitrator cannot be treated as irrelevant.

Nature of relief sought, findings recorded therein and surrounding circumstances may provide material while this Court exercises its discretion under Section 9.

75. Respondents submitted that the petitioner has failed to point out any transaction showing diversion of funds, alienation of assets or fraudulent conduct. According to them, the petition proceeds upon apprehensions regarding possible recovery.

76. Courts ordinarily grant interim measures such as disclosure of assets, injunction against alienation or securing amounts where material indicates a real possibility that enforcement may become ineffective. Mere suspicion cannot take the place of evidence. Having examined the material available, I am unable to record a prima facie finding that respondents have siphoned assets or transferred properties with intention of frustrating arbitral proceedings. The petitioner has relied upon financial indicators, correspondence regarding inability to make payment and lender restrictions. These circumstances create commercial concern. However, they do not establish dissipation of assets. At the same time, the admitted inability to redeem the ROCPS, dependence upon lender approvals, financial constraints and the substantial amount involved together show that the apprehension expressed by the petitioner cannot be described as baseless. Therefore, the Court cannot accept either of the positions suggested by the parties.

77. The balance of convenience requires examination. Granting the entire relief sought by the petitioner may interfere with functioning of Respondent No.1 and may indirectly affect lenders whose rights are connected with the Financing Documents. On the other hand, refusal of every protective measure may expose the petitioner to the possibility that any arbitral award passed in future may become difficult to enforce. While exercising equitable jurisdiction, the Court is required to balance these considerations instead of accepting one side. Interim measures should preserve effectiveness of arbitration without affecting commercial activities.

78. Learned Senior Advocate for the petitioner submitted that irreparable prejudice would be caused because the petitioner has waited beyond the Redemption Period and any delay would increase the prejudice suffered by it. Learned Senior Advocate for the respondents answered by submitting that the dispute is compensatory in nature and any arbitral award can be satisfied if the petitioner succeeds before the Arbitral Tribunal.

79. The submission that irreparable prejudice can never arise in a monetary dispute is stated too widely. Commercial arbitrations involve monetary claims where recovery may become uncertain. In appropriate cases, Courts have recognised that interim protection may also be granted even in disputes involving money. At the same time, petitioner cannot succeed merely by pointing out that the amount involved is substantial. Necessity for protection must emerge from the overall facts and surrounding circumstances of the case. On an overall assessment of the rival submissions, this Court is of the prima facie opinion that the petitioner has shown that serious disputes exist, substantial amounts are claimed under the Third Framework Agreement and financial restrictions affecting payment are genuine. These circumstances justify examination under Section 9. Respondents cannot avoid interim protection merely by relying upon Section 55 of the Companies Act, lender restrictions or pendency of arbitration. Contractual obligations undertaken under the Third Framework Agreement continue to remain the subject matter of adjudication before the learned Arbitral Tribunal, and this Court must ensure that such adjudication does not become ineffective. Therefore, the extent of interim protection must be shaped by keeping in view these consideration. Therefore, the Court finds a prima facie case requiring limited protection but declines to completely stall the redevelopment.

80. In view of the foregoing discussion, and upon overall assessment of the material record, the following order is passed:

(i) The Arbitration Petition is partly allowed;

(ii) The relief sought in prayer clause (a) and (c) is declined at this stage;

(iii) However, Respondent Nos.1 and 2 shall, within four weeks from today, file an affidavit disclosing:

(a) the assets and liabilities of Respondent No.2 together with particulars of all existing charges and encumbrances thereon;

(b) the present status of the proposed third-party sale process, or any other process relating to transfer of GIPL's shareholding;

(c) the steps taken by GIPL for obtaining lender approvals or consents for redemption of the Petitioners' Final ROCPS;

(d) the financial statements, audited balance sheets, profit and loss accounts and other relevant financial records of GIPL from March 2024 till the date of filing of the affidavit.

(v) Respondent Nos.1 and 2 shall further disclose in the said affidavit whether, after filing of the present petition, any material asset or shareholding has been transferred, encumbered or otherwise dealt with otherwise than in the ordinary course of business and, if so, shall furnish complete particulars thereof;

(vi) Until the learned Arbitral Tribunal considers any application under Section 17 of the Arbitration and Conciliation Act, 1996, Respondent Nos.1 and 2 shall maintain complete accounts of any sale, transfer or encumbrance of their material assets or shareholding undertaken in the ordinary course of business and shall preserve all records relating thereto;

(vii) Respondent Nos.1 and 2 shall not undertake any transaction outside the ordinary course of business having the effect of materially reducing their asset base or rendering enforcement of any arbitral award nugatory, without giving the petitioners at least two weeks' prior written notice of such proposed transaction;

(viii) The disclosures directed hereinabove are without prejudice to the rights and contentions of all parties and shall not be construed as an admission of liability;

(ix) The observations contained in this order are prima facie and confined to adjudication of the present petition under Section 9 of the Arbitration and Conciliation Act, 1996. The learned Arbitral Tribunal shall decide all issues independently and uninfluenced by any observations made herein;

(x) Upon constitution of the learned Arbitral Tribunal, it shall be open to either party to apply under Section 17 of the Arbitration and Conciliation Act, 1996, for continuation, modification, variation or vacation of the directions contained in this order. The present directions shall continue to operate for a period of four weeks after constitution of the Arbitral Tribunal or until any application under Section 17 is decided, whichever is earlier;

(xi) The Arbitration Petition is disposed of in the aforesaid terms. There shall be no order as to costs.

81. At this stage, learned Advocates for the respondents seek stay of the judgment. However, considering the reasons assigned herein, the request for stay is rejected.

(AMIT BORKAR, J.)