* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 22.05.2014

% Judgment delivered on: 20.08.2014

\+ **O.M.P. 1132/2013**

GATX INDIA PVT LD ..... Petitioner

Through: Mr. Neeraj Kishan Kaul, Sr. Advocate with Ms. Meenakshi Arora, Sr. Advocate, Ms. Pragya Ohri, Mr.Samar, Mr. Navin, Mr. Ranjit Prakash & Ms. Shubhi Sharma, Advocates.

versus

ARSHIYA RAIL INFRASTRUCTURE LIMITED & ANR ..... Respondents

Through: Mr. A.S.Chandhiok, Sr. Advocate with M/s Kirat Nagra, Pranav Vyas, Shankey Agrawal, Ritesh Kumar & Mayank Bamniyal, Advocates

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. This petition has been preferred under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') by the petitioner to seek the following interim reliefs:-

> *"(a) direct respondent No. 1 to forthwith return the first rake to the petitioner in accordance with the terms of the Master Wagon Lease Agreement;*

(b) *direct respondent No. 1 and respondent No. 2 to pay the outstanding rents for the first rake being due and payable to the petitioner amounting to Rs.1,95,79,589/- (Rupees One Crore Ninety Five Lakh Seventy Nine Thousand Five Hundred and Eighty Nine only) along with such amounts of lease rentals that may become due and payable till such time as the first rake is actually returned to the petitioner or direct the respondents to deposit the same with the Registrar of this Court to be maintained in a fixed deposit pending Arbitration and Award;*

(c) *direct the respondents to provide a Bank Guarantee in favour of the petitioner for an amount of Rs.14,03,60,453.00/- (Rupees Fourteen Crore, Three Lakh, Sixty Thousand, Four Hundred and Fifty Three) to secure the amounts that the Petitioner is entitled to under Section 10.3.1(A) of the Master Agreement in relation to the first rake, pending arbitration and award;*

(d) *direct respondent no. 1 and respondent No. 2 to provide a Bank Guarantee in favour of the petitioner for the sum of Rs.15,81,45,346.00 (Rupees Fifteen Crore, Eighty One Lakh, Forty Five Thousand, Three Hundred and Fourty Six only) being the amount already accrued under Section 2.1.3 of the Master Agreement as a result of the failure by respondent No. 1 to take delivery of the second rake from the petitioner;*

(e) *restrain respondent No. 1 from alienating or creating any third party rights or interest in the first rake leased to it by the petitioner.*

2. During the pendency of the petition, the first rake has been returned to the petitioner – though with a different brake van than the one supplied by the petitioner. Relief (a), therefore, does not survive. Relief (e) also does not survive, since there is no surviving apprehension of the respondents dealing with the first rake – which already stands returned to the petitioner. Relief

(b) cannot be granted by way of an interim relief and, therefore, the petitioner has not pressed the same. The petitioner has pressed the petition partially in respect of reliefs (c) and (d) aforesaid.

3. The petitioner claims to be a company engaged in the business of leasing equipment – particularly leasing of railway wagons and locomotives. Respondent no. 1 is a company apparently registered with the Indian Railways as a Container Train Operator. It is engaged in the business of setting up rail infrastructure/network including operations/movement of containers, goods, trains using Indian Railway network. It acquires on lease/licence or otherwise container trains, rakes, wagons bogies for its business. Respondent no. 2 company is the holding company of respondent no.1.

4. The case of the petitioner is that the petitioner entered into a Master Wagon Lease Agreement with respondent no. 1 on 21.05.2012 (Master Agreement), the Supplement No. 1 Agreement (Supplement No. 1) on the same day (collectively referred to as the 'Lease Agreement'), and the Lease Amendment dated 28.08.2012 (Lease Amendment). Under the Lease Agreement, respondent no. 1 agreed to take on lease ten rakes from the petitioner. To secure the discharge of obligations by respondent no. 1, respondent no. 2 executed a Deed of Guarantee dated 22.05.2012 (Guarantee). The case of the petitioner is that consequent to the aforesaid Lease Agreement, the petitioner executed a Wagon Purchase Agreement dated 23.05.2012 (Purchase Agreement) with Titagarh Wagons Limited (Manufacturer) for purchase of ten rakes that were to be manufactured specially for being given on lease to respondent no. 1. The petitioner states

that the delivery schedule of the newly manufactured rakes under the Purchase Agreement corresponded to/was in accordance with the delivery schedule – agreed between the petitioner and respondent no. 1, as set out in Supplement No.1. The petitioner states that the first rake was due to be delivered by the petitioner to respondent no. 1 on 20.08.2012 at the terminal of respondent no. 1 at Khurja, Uttar Pradesh. However, respondent no. 1 vide communication dated 16.07.2012 requested the petitioner to postpone the date of delivery of the first rake by a period of one month, i.e. to September, 2012 as respondent no. 1 had not obtained the necessary clearances and approvals for the said terminal from the Indian Railways. The petitioner agreed to the said postponement, and the parties amended the delivery schedule set out in Supplement No.1 vide the Lease Amendment. Thereafter, the delivery schedule under the Purchase Agreement was also amended on 14.09.2012. Unfortunately, there was a major fire at the facility of the Manufacturer. Hence, the delivery of the first rake was delayed, which was communicated by the petitioner to respondent no.1 vide letter dated 18.09.2012. The petitioner further states that vide letter dated 30.10.2012, it offered the delivery of the first rake to respondent no. 1 between 5th and 10th November, 2012. However, respondent no. 1 – still unable to take the delivery of the first rake, again requested the petitioner to change the delivery period of the first rake to the period between 20th and 25th November, 2012. The petitioner states that finally after several delays attributable to respondent no. 1, the delivery of the first rake (RK001) was made to respondent no. 1 on 27.11.2012. Thereafter, the petitioner called upon the respondent no. 1 to take steps for facilitating commissioning of the rake. However, the respondent no.1 delayed the commissioning. In any

event, the same was finally commissioned on 21.01.2013.

5. The petitioner states that in accordance with section 2.2 of the Master Agreement, the lease commenced from 21.01.2013, and the obligation of respondent no. 1 to pay the monthly lease rent commenced therefrom. The petitioner raised an invoice dated 01.01.2013 for Rs.6,56,319.72 – being the rent for the first rake for the period 21.01.2013 to 31.01.2013, which was paid by respondent no.1. The case of the petitioner is that, despite the fact that respondent no.1 had been operating the said rake since January, 2013 – for which the petitioner had been raising monthly invoices for lease rentals as and when they became due under the Lease Agreement, respondent no.1 has not made any payment whatsoever to the petitioner since February, 2013, and an amount of Rs.1,95,79,589/- had accrued at the time of filing of the petition towards unpaid lease rents for the first rake.

6. Further case of the petitioner is that despite repeated requests made to respondent no.1 to take delivery of the second rake – which had been ready for delivery since 01.02.2013, in terms of the Lease Agreement, respondent no.1 kept deferring the delivery of the second rake, and till date the said rake is lying with the petitioner who is incurring costs thereon. In this regard, reference is drawn to the petitioner's email communication dated 28.01.2013 – offering delivery of the second rake (RK 002) on 01.02.2013, and respondent no. 1's reply thereto – instructing the petitioner to hold on to the rake till further instructions. Pursuant to petitioner's subsequent communication dated 08.02.2013 – thereby offering delivery of the second rake on 13.02.2013, respondent no. 1, once again, asked the petitioner to wait for further communication.

7. It is submitted that petitioner vide letter dated 22.04.2013 – further followed by several reminders, called upon respondent no.1 to pay the outstanding amounts towards the first rake and to take delivery of the second rake. The petitioner submits that respondent no.1 vide letter dated 21.06.2013, for the very first time refuted its liability to pay the outstanding dues for the first rake and also terminated the Lease Agreement qua the balance rakes, on the ground that the petitioner had failed to adhere to the delivery schedule under the agreements. It is submitted that the said letter of 21.06.2013 is inconsistent with the requests sent by respondent no.1 to defer the delivery of the rakes in question, and a complete departure from its earlier stand of acknowledging its obligations under the Lease Agreement and assuring fulfilment thereof. In this regard, reference is made to the confirmation slip signed by respondent no.1 on 04.04.2013, whereby respondent no.1 confirmed/admitted an amount of Rs.37,12,384.16/- as due and payable to the petitioner as on 31.03.2013. Attention is also drawn to email dated 10.04.2013 whereby the Managing Director of respondent no.1 informed the petitioner that it was undergoing corporate debt restructuring (CDR), and committed to take delivery of five more rakes pending the CDR decision. It is further submitted that the inanity of respondent no.1's latter stand in the said letter is also evident from email dated 02.07.2013, whereby respondent no.1's management agreed to a meeting with the petitioner to discuss the timing of payment of overdue lease rentals, delivery date of the second rake, and delivery schedule for the balance rakes.

8. It is submitted that the petitioner invoked the dispute resolution provisions under section 13.4(a) of the Lease Agreement vide letter dated

17.07.2013, whereupon respondent no.1 vide email dated 23.08.2013 agreed for a meeting to resolve the disputes. However, no meeting was held with the senior officials of the management of the respondents. Subsequently, respondent no.1 issued notice dated 21.10.2013, alleging that the petitioner had delayed delivering the first rake, and that the payment for the said rake was contingent on petitioner sticking to the delivery schedule. Respondent no.1 disputed that it was liable to pay the lease rentals and other amounts towards the first rake, as claimed by the petitioner. Learned senior counsel for the petitioner submits that, in any event, petitioner cannot be blamed for delay in delivery of the first rake when respondent no.1 itself was not in a position to take the delivery of the rakes for want of necessary approvals from the railways with respect to the base depot.

9. Respondent no.1, in the said letter, had also raised the issue of alleged non-performance and defects in petitioner's rake, and also sought to justify the termination of Lease qua balance rakes due to the said defect and delay. Learned senior counsel for the petitioner submits that it was for the very first time that respondent no.1 had raised the issue of defect in the first rake, whereas it had been using the said rake continuously since January, 2013. He submits that the said rake had been duly inspected before commissioning, and any deficiencies found therein were corrected to the satisfaction of the railways. Fact of commissioning of the rake itself is indicative of it being fit in terms of quality and design to operate on the railways network. Attention is drawn to the joint note of commissioning of the first rake dated 21.01.2013. Further, he points out that in terms of section 2.1.1 of the Master Agreement, if there was any material non-compliance

with the agreed design of such rake as alleged by respondent no.1, it ought to have notified to the petitioner in writing about the nature and extent thereof within two days of commissioning of the said rake. Moreover, it is submitted that under the Lease Agreement, respondent no.1 does not have the right to terminate the Lease.

10. Learned senior counsel for the petitioner submits that respondent no.1 has committed fundamental breach of its material contractual obligations, and is now reneging from its liabilities on baseless and frivolous grounds of delay and defect, whereas the fact is that it is unable to meet its obligations owing to its dismal financial position. He submits that the lease rent payable per rake in terms of section 2.2 of the Master Agreement read with Supplement No. 1, was broadly Rs.16,30,077/- per month, plus applicable indirect taxes thereon from time to time. Under section 2.3, late payment of the lease rents attracted interest on the outstanding amount at the rate, per annum, equal to the base rate of the State Bank of India plus 350 basis point for each day from and including the first day following the due date, to and including the date the payment is received by the petitioner-lessor. He submits that section 10.1 enlists the events of default and the said events, inter alia, include the lessee's failure to pay any instalment of rent or any casualty value or any other amount due under the applicable supplement when due, when such failure continues for a period of 15 days. It also includes the lessee's failure to perform or observe any covenant, condition or agreement to be performed or observed by it under the Master Agreement or any Supplement Agreement within 30 days after written notice thereof to the lessee by the lessor. Section 10.3 provides the remedies available to the

lessor upon the occurrence of an event of default. The lessor is entitled to, inter alia, demand immediate payment of the total amount of the unpaid rent and other payments then due and, in addition, as liquidated damages and not as penalty, the present value, discounted at the rate per annum equal to base rate of the State Bank of India minus 200 basis points, of the remaining rents and other amounts to become due under the Master Wagon Lease Agreement and any supplements throughout the remaining term thereof in case of an event of default under Section 10.1, (other than under section 10.1(c) and 10.1(h) – with which we are not concerned). The lesser is also entitled to demand the return of any or all of the rakes in accordance with the Master Wagon Lease Agreement and any supplement.

11. Further case of the petitioner is that since respondent no. 1 failed to pay the amounts due and payable by it to the petitioner under the agreements, the petitioner invoked the Guarantee, and demanded from respondent no. 2 payment of Rs.150,69,94,651/- vide letter dated 01.11.2013. It is submitted that under the Guarantee, respondent no.2 has unconditionally, absolutely and irrevocably guaranteed to the petitioner – as a principal obligor and not merely as surety, the full performance and payment of all of respondent no.1's obligations, liabilities and monies, due and payable by respondent no.1 under the Lease agreement, actual or contingent, when due in accordance with the Lease Agreement. However, the said guarantee has not been honoured by respondent no. 2 and payments have not been made by respondent no.2 as well.

12. Learned senior counsel for the petitioner submits that financial position of respondent nos. 1 & 2 is extremely weak. It is submitted that as

of 31st March 2013, indebtedness of respondent no.1 was approximately Rs 7,07,26,86, 847/- whereas its paid up capital was only Rs 32,50,67,040. He points out that the financial statement pertaining to respondent no.1 – subsidiary of respondent no.2, showed a loss of Rs.48,27,28,020/- being suffered by respondent no.1 for the financial year ending 31st March, 2013. Similarly, debt obligations of respondent no.2 as of 31st march 2013 amounted to Rs 19,13,27,87,784 while its share capital was only Rs.12,37,58,944. He points out as per the directors' report 2012-2013 of respondent no.2, the loss after tax for the financial year ending 31st March, 2013 was Rs.14,00,50,000/-. The share price of respondent no.2, which is a public listed company, fell drastically from Rs.161.70 per share to Rs.33.45 between the period from April 2012 to March 2013, and is currently trading at approximately Rs.16.70 per share on BSE. Owing to the weak financial position and inability to service their debt obligations, lenders of both the respondents are restructuring the corporate debt of both the respondents. In this regard, the learned senior counsel draws attention to the auditor's report on the financial statements of respondent no.2 for the year 2012-2013 wherein it is, inter-alia, observed that "*The company is under severe financial stress which is due to and evident from increased trade receivables and payables and majority of them are overdue, full and final settlement dues of resigned employees of Rs.23,253,374 are in arrears, statutory dues i.e. income tax deducted at sources, service tax and value added tax of Rs.176,189,607 are in arrears, the dues (interest and repayment of borrowings) of banks and a financial institution and a non-banking finance company are delayed and Rs.2,385,428,587 are overdue, short-term funds are used for long-term purposes and certain lenders have filed court cases*

against the company and directors due to dishonour of cheques. To mitigate financial stress, the company has taken various steps including cost cutting exercise and opted for corporate debt restructuring (CDR) plan which is admitted and under consideration of the CDR cell.". Further, as per the auditor's report on the consolidated financial statements of respondent no.2 and its subsidiaries – including respondent no.1(the Group), for the year 2012-2013, "*The Group is under severe financial stress which is due to and evident from huge capital expenses financed by debt, increased trade receivables and payables and majority of them are overdue, full and final settlement dues of resigned employees of Rs.55,054,409 are in arrears, statutory dues i.e. income tax deducted at sources, service tax and value added tax of Rs.403,690,449 are in arrears, the dues (interest and repayment of borrowings) of banks and a financial institution and a non-banking finance company are delayed and Rs.3,149,942,069 are overdue, short-term funds are used for long-term purposes and certain lenders have filed court cases against the company and directors due to dishonour of cheques. To mitigate financial stress, the Group has taken various steps including cost cutting exercise and opted for corporate debt restructuring (CDR) plan which is admitted and under consideration of the CDR cell*". During the course of arguments, he has tendered in court a Public Auction notice for sale of certain assets of respondent no.2, issued by SICOM Ltd – mortgagor thereof, for recovery of its dues. He submits that there is a real likelihood that the respondents might go into liquidation before the completion of the arbitration proceedings, if they are unable to repay their outstanding to their respective lenders. Therefore, he submits that there is a reasonable apprehension on part of the petitioner that in the event of the

claims of the petitioner being upheld in arbitration, it would not be able to recover the same from the respondents, because the respondents would not be left with any available assets to satisfy the same as all the present and future movable and immovable assets of respondent no.1 have been charged in favour of its lenders, and there are other higher priority and statutory debts.

13. Next, it is submitted that since respondent no.1 could not take delivery of the remaining rakes as per the stipulated delivery schedule owing to its ongoing CDR process, the petitioner had to further amend its Purchase Agreement with the Manufacturer vide Amendment No.2 dated 11.07.2013. Referring to section 3 of the said Amendment No.2, learned senior counsel submits that since the Manufacturer had already purchased the raw material for manufacturing 10 rakes and delivering them to the petitioner by 31.03.2013, the petitioner had to make an advance payment of Rs 21 crores to the Manufacturer, and respondent no.1 is well aware of petitioner's position/agreement with the Manufacturer vis-a-vis purchase of the ten rakes pursuant to the Lease Agreement.

14. Learned senior counsel submits that the petitioner sent notice of arbitration dated 28.01.2014 – calling upon respondent no.1 to consent to the name suggested therein as the sole arbitrator, but no response has been forthcoming from respondent no.1. He submits that respondent no.1 is shying away from arbitration as it has not appointed the arbitrator till date.

15. Therefore, in view of the aforesaid submissions, he submits that the interest of the petitioner ought to be protected during the pendency of the

arbitration proceedings, by directing both the respondents to furnish the security as prayed for in the present petition.

16. On the other hand, respondents vehemently oppose the petition on the ground that the petitioner has not approached the court with clean hands – concealing material facts with respect to defects in petitioner's rakes. The case of the respondents is that it is the petitioner who has committed breach of the terms of the agreements, resulting into severe losses to respondent no.1, and ultimately, the termination of the Master Agreement. It is argued that respondent no.1 is not liable to make any payments to the petitioner in view of the fact that besides failure of the petitioner to adhere to the timelines provided in the agreements, the first rake had also failed to conform to contractual requirements and was not fit for the purpose it was leased. As a result, respondent no.1 is neither obliged to pay the future rent, nor was it under an obligation to take the delivery of the balance rakes because the petitioner had failed to demonstrate that the balance rakes would not suffer from the same defects as in the first rake – caused due to petitioner's design and technology. Without prejudice to respondents' contention that question of invoking the Guarantee against respondent no.2 does not arise as nothing is due and payable by respondent no.1 to the petitioner, learned senior counsel for the respondents submits that in any event, respondent no.2 is not a party to the arbitration agreement contained in the Master agreement, and there is no arbitration agreement between the petitioner and respondent no.2. Therefore, in the present proceedings under section 9 of the Act, respondent no.2 cannot be directed to furnish the security as prayed for by the petitioner.

17. The respondents submit that based on the petitioner's representations with regard to supply of superior quality rakes, respondent no.1 entered into MOU dated 25.10.2011 with the petitioner – with higher lease rent of Rs.18-19 lakhs per rake per month as compared to the normal market lease rent of Rs.8-10 lakhs per month. The MOU envisaged that the rakes shall be delivered to respondent no.1 on or before 31.12.2012, and the lease commencement date was to be the date of acceptance or deemed acceptance of such block rake at the delivery location. However, the petitioner failed to obtain the requisite license and conclude its agreement with the Indian Railways for manufacture of the rakes as per its design, in a timely manner. Consequently, Lease Agreement between the petitioner and respondent no.1 could be executed only on 21.05.2012, i.e. after lapse of a period of over 6 months. The delivery schedule for the first rake was thereafter changed twice at the behest of the petitioner. Respondents state that under section 2.1 of the Lease Agreement, it was petitioner's responsibility to deliver the said rake at the delivery location chosen by respondent no.1 and to commission it. Despite respondent no.1 being ready to take delivery of the first rake since 20th November, 2012, the petitioner commissioned the said rake only on 21.01.2013, i.e. after 15 months from date of signing of MOU, by which time respondent no.1 had lost almost all its major customers. Therefore, it is submitted that although respondent no.1 may have extended the schedule for delivery of the first rake from August, 2012 to November, 2012, but the original delay in executing the Lease Agreement, and also the subsequent delay from November, 2012 to commissioning of the said rake in January, 2013, was caused by the petitioner. Respondents submit that the petitioner also acknowledged the delay on its part, which is further

supported by the fact that the petitioner raised an invoice for the lease rental for the month of January commencing only from 21.01.2013.

18. Respondents submit that at the time of commissioning of the first rake itself it was observed/noted by the Indian Railway that there were manufacturing defects in the said rake, as a result of which, the Indian Railways did not provide respondent no.1 with the Closed Circuit Certification i.e. permission for plying 6000 Kms or 30 days as is the norm. Respondents submit that the petitioner was in constant contact with the employees of respondent no.1 and the Indian Railway, and was at all times informed and aware that the first rake was found to be defective. It is submitted that as respondent no.1 began operating the first rake, it continued to show manufacturing defects, such that, contrary to petitioner's representations, it turned out to be of an inferior quality as compared to respondent no.1's own rakes – purchased from the same Manufacturer.

19. Respondents further submit that given the deficiencies in the first rake, respondent no.1 could not accept the delivery of the second rake until the condition of the first rake could be examined, since all rakes scheduled to be delivered were to be manufactured on the same specifications/design as the first rake. Respondents submit that while respondent no.1 was undergoing CDR, the defect in the petitioner's rake had negatively affected business plans/caused severe economic losses to respondent no.1, and under such circumstances, the banks expressed dissatisfaction towards accepting further rakes from the petitioner. It submits that respondent no.1's email dated 10.04.2013 did not constitute any assurance that it would take 5 rakes from the petitioner, rather the proposal made therein by respondent no.1 – as

per mutual understanding between the parties, was only a without prejudice settlement discussion. Respondents submit that respondent no.1 had been disputing the invoices raised by the petitioner at all times to the full knowledge of the petitioner. Respondents submit that respondent no.1 has not acknowledged its liability to pay the amount stated in the petitioner's letter dated 31.03.2013. It was merely a confirmation as to the invoices being raised by the petitioner, and was issued at the request of the petitioner's auditors. Despite being communicated about bleak performance of the said rake and defects therein, the petitioner continued to make wrongful demands for payment of rent. Respondent no.1 was therefore constrained to terminate the lease on 21.06.2013.

20. It is further submitted that despite the termination of the Lease Agreement, and repeated requests by respondent no.1 to take back the possession of the first rake, the petitioner failed to do so. Nevertheless, respondent no.1 – in good faith, continued to extend full co-operation to the petitioner's efforts to detect the problems in the rake, including operating the rake intermittently to identify the areas of concern. At the continuous requests by the petitioner, a meeting was also held for resolving the purported disputes, wherein respondent – in consultation with its banks, proposed 'without prejudice' solutions for renegotiating a contract to safeguard the interests of both the parties. However, no amicable solution could be arrived at. It is stated that since 01.10.2013, the first rake has been lying stationary at Arshiya Khurja Terminal. Referring to letter dated 29.10.2013 from the Northern Central Railway, respondents submit that respondent no.1's apprehension with respect to other rakes was further

fortified when 80 out of 160 wheel sets of the first rake were found to be defective during an inspection conducted by the Indian Railways in October, 2013, which is considerable, given that the rake was new and had not been used much. Attention is also drawn to respondent no.1's letter dated 10.12.2013 to Northern Central Railway, whereby – notwithstanding the termination of the Lease Agreement, respondent no.1 – at petitioner's behest and only in the capacity of the operator of the terminal where the first rake was standing, allowed the railways to undertake requisite repairs in the said rake.

21. Learned senior counsel for the respondents submits that section 1.1 stipulates execution of separate supplement in respect of each rake pursuant to the Master agreement. Under section 2.2, lessee's obligation to pay rent under the applicable lease for any rake commences on the date of lessee's acceptance of such rake, and continues until the end of the term of the lease for such rake as provided in the applicable supplement or until the obligation to pay the same is terminated pursuant to Section 10.1 or 10.3, and, in any case, until such rake has been returned. He submits, in terms of section 10.3, the lease was terminated on 21.06.2013, and the first rake stands returned to the petitioner on 20.02.2014 without the brake van, which was being used by respondent no.1 as common asset with Indian Railway, and had been returned to the common pool of Indian Railways on 21.01.2013. Consequently, respondent no.1 is under no obligation to pay any future rent thereon.

22. As far as the second rake is concerned, he submits that for liquidated damages to become payable in terms of section 2.1.3 – on account of alleged

delay/failure on part of the lessee/respondent no.1 to take the delivery of the said rake, it is imperative that petitioner/lessor has already taken delivery thereof from the Manufacturer. Referring to respondent no.1's intimation to the petitioner, to hold the delivery of the second rake till further instruction, he submits that the petitioner had not taken the delivery of the second rake from the Manufacturer so as to be entitled to claim liquidated damages thereon. He further submits that Amendment no.2 dated 11.07.2013 to the Purchase Agreement between the Manufacturer and the petitioner, indicating that the second rake has been delivered to the petitioner, is after termination of the Lease Agreement by respondent no.1 in June, 2013.

23. Respondents claim that the arrangement between the Manufacturer and the petitioner, and repercussions of the breach thereof is not within the knowledge of the respondents.

24. As far as the financial condition of the respondents is concerned, it is submitted that the respondent no.1 is a relatively young company – got its license to operate its rake on pan India basis for both on Domestic and Exim route on Indian Railway Network in May, 2008, and started operation from April, 2009. Respondent no.1 has been utilizing its assets only at approximately 70-80% occupancy and operating at a positive margin at an operational level, and is not a loss making company. The economic slowdown, coupled with the petitioner's breach of the Lease Agreement had an adverse impact on the revenues generated by respondent no.1 resulting in difficulties to recover its interest cost and depreciation from its operating margin. However, that does not make the respondent no.1 a financially unstable company. The economy has now began improving and the

introduction of changes to the Railway haulage policy – ensuring level playing field in tariff regulation for all operators including railways, will significantly improve the revenues of respondent no.1. Also, the correlation sought to be made by the petitioner between respondents' liabilities and their paid-up share capital is irrelevant to determine the financial health of the company. According to the audited financial statement of respondent no.1 as of 31.03.2013, it has net assets worth INR 6,72,14,83,665.78 and net liabilities of INR 3,93,12,34,305.81 (excluding the loan of Rs 173,51,21,618 given by the promoter company which will be converted into equity). Similarly, according to the audited financial statements of respondent no.2 as of 31.03.2013, its net assets exceed its net liabilities. Additionally, the promoters have brought in a contribution of Rs.199.53 crores which will be converted to equity. Thus, it is submitted that even though there is a charge on the assets of the respondents, since the value of the assets is greater than the total liabilities, the respondents will be able to meet the liabilities qua the petitioner by utilisation of assets, if, and when, a finding is returned in favour of the petitioner in the arbitration proceedings.

25. Learned senior counsel for the respondents further submits that the fact that CDR process has been initiated does not suggest that respondents are in a precarious financial position. On the contrary, CDR mechanism is an extensively regulated process under the aegis of the Reserve Bank of India, aimed at improving the financial position of the commercially viable companies. He submits that in furtherance of the said CDR, a majority of the respondents' lenders participated and appreciated the fact that the respondents have had a sound and robust substratum, and agreed to

restructure the debts. The scheme of CDR has been approved by the CDR Cell, and an agreement with the lenders in this regard has already been executed and repayment of loans has been restructured/deferred. It is submitted that the respondents have shown an improvement in the financial condition due the implementation of the debt restructuring. The indebtedness of respondent no. 1 has reduced significantly, i.e. by almost Rs.230 crores over the last financial year. Respondent No. 1 has also managed to pay its outstanding statutory dues to a certain extent and is committed to pay the current outstandings within the first financial quarter of the current Financial Year 2014-15. Consequently, he submits that the apprehension of the petitioner that the respondents are on verge of financial collapse, or that there is a likelihood of their liquidation, and it would not be able to recover the amount, if any, awarded in arbitration in its favour, is completely ill-founded, and is merely an attempt by the petitioner to impede the CDR process. It is submitted that upon successful implementation of the debt restructuring scheme, the respondents will be in a position to fulfil all their obligations, under any arbitral award, if so passed in favour of the petitioner. The petitioner will therefore not suffer any irreparable loss if the present reliefs are not granted.

26. Without prejudice to the submission that petitioner is not entitled to any of the amounts claimed as due and payable by respondent no.1, learned senior counsel for the respondents submits that one of the prime considerations for granting an interim relief under section 9 of the Act is balance of convenience/balancing the equities. In view of the facts of the case, at this stage, direction for furnishing of security – as prayed by the

petitioner would severally prejudice the ongoing CDR process – the efforts of respondent no.1 to revive its financial health, and the larger interests of all its creditors. In this regard, reliance is placed on the judgment of the Division Bench of this court in ***CPI India Ltd vs. BPTP Ltd. & Ors.***, in FAO(OS) 538/2012, pronounced on 09.11.2012.

27. Besides, learned senior counsel for the respondents submits that facts of the case do not warrant the drastic remedy of attachment before judgment. It is not the petitioner's case that the respondents are attempting to dispose of the whole or any part of their property in order to defeat the award that may be passed in its favour in arbitration. Therefore, petitioner has not made out a case under the principles of Order 38 Rule 5 of the Code of Civil Procedure (C.P.C.). Reliance is placed on the decision of the Bombay High Court in ***Nimbus Communications Limited vs. Board of Control for Cricket in India & Anr.***, in FAO (OS) 90/2012, decided on 27.02.2012.

28. Further, he submits that in any event the interim reliefs sought herein are beyond the scope of section 9 of the Act, in as much, as, the petitioner is trying to specifically enforce the terms of the agreements at the interim stage. He submits that bulk of the amount sought to be secured by the petitioner pertains to damages, which are to be determined on merits in arbitration. At this stage, the court shall not direct provision of security in relation to a speculative claim for damages, and any such relief granted by this court against the respondents, would severely prejudice respondent no.1's case in the arbitration proceedings. In this regard, reliance is placed on the decision of this court in ***Intertoll ICS Cecons O & M Co. Pvt. Ltd. vs. National Highways Authority of India***, 197 (2013) DLT 473.

29. I have heard learned senior counsels for the parties and proceed to dispose of the petition. At this stage the court has to see whether the petitioner has made out a prima facie case for the grant of interim relief, viz furnishing of security, as prayed for herein. Merits of the disputes between the parties, viz. fulfilment of respective obligations under the said agreements; alleged losses suffered due to delay/default on part of either party; termination of lease; return of brake van to common pool of assets of railways etc are to be examined in arbitration.

30. At the outset it is expedient to reproduce some of the relevant clauses of the Master Agreement, which read as follows:

> *"2.1.1 Acceptance of New Rakes. Lessee will notify Lessor of the base depot on the Indian Railways Network where such rake is to be commissioned (the Base Depot) by delivering to Lessor written notice in the form...With respect to a rake delivered to Lessee at the Delivery Location..**unless lessee informs Lessor in writing of the nature and extent of any material non-compliance with the agreed design of such Rake within two (2) days of commissioning thereof, then the commission of such Rake by the MoR (commissioning)shall be deemed to constitute acceptance of such Rake by lessee as of the date of Commissioning...***
>
> *2.1.3 Delivery. Lessor agrees to deliver the Rakes to lessee at the point(s) designated in the applicable Supplement or as otherwise mutually agreed in writing by Lessor and Lessee (the Delivery location)...*
>
> *In the event of any delay by lessor in the delivery of any Rake on or before the scheduled date of delivery of such Rake under the applicable Supplement (the Scheduled Delivery Date), the provisions set out in the clause in the supplement regarding Delayed Delivery of Newly manufactured Wagons shall be*

applicable.

If the Lessee extends the scheduled delivery Date without prior notice as specified in the supplement or ***delays or fails to accept delivery of a Rake at the Delivery location for whatever reason, all storage, stabling or other charges incurred in connection with such Rakes shall be for Lessee's account, and Lessee shall be responsible for either (a)all charges and penalties imposed on lessor by the manufacturer for failure to take delivery of such Rakes or (b) if Lessor takes delivery of such Rakes, liquidated damages in an amount equal to the Rent under the applicable lease prorated over the number of days elapsed from the last scheduled Delivery Date mutually agreed by Lessor and Lessee till the date the delivery is taken by the Lessee****...*"

2.2 *Payments*. ***Lessee's obligation to pay Rent and other amounts, if any, required under the applicable Lease for any Rake shall commence on the date of Lessee's acceptance*** *(determined pursuant to section 2.1.1 or 2.1.2, as applicable)of such Rake (the Lease Commencement Date)and shall continue until the end of the Term of the Lease for such rake as set forth in the applicable Supplement or* ***until the obligation to pay the same is terminated pursuant to Section 10.1 or 10.3, and, in any case, until such Rake has been returned*** *pursuant to and in the condition required by, the provisions of the applicable Lease, and Lessee agrees to pay Rent and all other amounts due in accordance with the terms of the applicable Lease...*

2.3 *Late Payments*. *If any Rent or other payment, if any, due under any Lease (an Outstanding Amount) is not paid within seven (7)business days after it is due, Lessee shall pay interest on the Outstanding Amount at a rate per annum equal to the base rate of the State Bank of India plus 350 basis points, for each day from and including the first day following the due date to and including the date payment is received by Lessor..."*

10.1 *Events of Default*. *The occurrence of any of the following events shall be an '****Event of default'****:*

(a) Lessee fails to pay when due any instalment of Rent..., or any other amount due under the applicable Supplement and such failure continues for a period of fifteen (15)days;

***

(e) Lessee fails to perform or observe any covenant, condition or agreement to be performed or observed by it in this Master agreement or any supplement within thirty (30)days after written notice thereof to Lessee by Lessor of such failure, if such failure is curable (as reasonably determined by Lessor), and provided that such cure period shall not be applicable to any Event of default specified in sections 10.1(a), (b),(c),(d),(f),(g), and(i);...

10.3 Remedies. Upon the occurrence of an Event of Default and at any time thereafter so long as such Event of Default is continuing, Lessor may, in its sole discretion, do any one or more of the following with respect to any or all of the Wagons subject to this Master Agreement and any Supplements: (i) ***demand immediate payment of the total amount of the unpaid Rent and other payments then due and, in addition, as liquidated damages and not as a penalty, the present value, discounted at a rate per annum equal to base rate of the State Bank of India minus 200 basis points, of the remaining Rents and other amounts to become due under this Master Agreement and any Supplements (A) in case of an Event of Default under section 10.1 (other than Sections 10.1(c) and 10.1(h)),throughout the remaining Term thereof****...;(ii)demand the return of any or all of the Rakes in accordance with this Master Agreement and any Supplements; (iii)take possession of any or all of the Rakes, without demand or notice; (iv)upon notice to Lessee, terminate this Master Agreement and/or any applicable Supplements as to any or all of the Wagons subject thereto;....In the event of any such Event of Default, any storage/stabling and maintenance of any Rakes subject to this Master agreement and any Supplements until such Rakes are re-leased or sold shall be for the Lessee's account, and Lessee shall, at the direction of the Lessor, promptly deliver the Rakes,*

at Lessee's expense and risk, to Lessor or its designee at such locations as Lessor shall designate, and shall pay Lessor for all costs and expenses...No remedy referred to in this Master Agreement is intended to be exclusive, but each shall be in addition to any other remedy referred to or otherwise available to Lessor at law or in equity..."

31. Relevant provisions of the Supplement No.1 read as follows:

"PAYMENT FREQUENCY:	*Monthly in advance on the seventh day of each month....*
RENT:	*INR 1,630,077 per Rake per month (the Rent) as on 1st July, 2011(the Base Date), plus any applicable Indirect Taxes thereon from time to time. Rent is valid only for the number and types of Wagons specified herein, and is subject to adjustment pursuant to the Rent Variation Clause, as specified in Schedule B.*
DELIVERY SCHEDULE:	*Rakes shall be delivered on or before 31st March 2013, as per the delivery schedule detailed hereinafter. In case of any change in the Scheduled Delivery Date, the Lessee shall give Lessor at least ninety (90) days' prior notice.*

Rake No.	*Scheduled Delivery Date*
1st Rake	*20th August 2012*
2nd Rake	*30th August 2012*
3rd Rake	*5th September 2012*

4th Rake	*5th October 2012*
5th Rake	*5th November 2012*
6th Rake	*5th December 2012*
7th Rake	*5th January 2013*
8th Rake	*5th February 2013*
9th Rake	*5th March 2013*
10th Rake	*15th March 2013"*

(Emphasis supplied)

32. Section 1.1 of the Master Agreement together with the provisions of the Supplement No.1 with respect to number of rakes and delivery schedule reveal that the Lease Agreement pertained to lease of 10 rakes, to be delivered according to the delivery schedule provided therein. Admittedly, the first rake out of the agreed 10 rakes was delivered to respondent no.1 in November, 2012, and commissioned on 21.01.2013. Thereafter, first invoice towards the lease rental for the said rake for the period of 21.01.2013-31.01.2013 was also paid by respondent no.1. Therefore, according to section 2.2 of the Master Agreement read with relevant provisions of Supplement No.1, with respect to the said rake the contractual obligation of respondent no.1 to pay rent of Rs.16,30,077/- per month plus applicable indirect taxes thereon – payable in advance on the seventh day of each month, commenced from the date of commissioning, i.e. 21.01.2013. Further, in terms of section 2.2 of the Master Agreement obligation to pay rent for a particular rake continues till expiry of the term of the lease for the said rake or termination thereof, as case may be, but, in any case until return

of the said rake. Notwithstanding the purported termination of the Lease on 21.06.2013 – which, in any event, was qua the balance rakes respondent no.1, admittedly, had been using the rake till October, 2013. As already observed in the Order 20.02.2014 under section 7.1, it was respondent no.1's obligation to return the rake at the location of the petitioner. It is a matter of record that the said rake was returned to the petitioner only pursuant to the said Order, and that too without the brake van. Consequently, prima facie, respondent no.1 appears to be obligated to pay lease rental towards the first rake till the return of the said rake in its original formation. Copy of the invoices raised by the petitioner towards the monthly rent of the said rake as and when it became due have been placed on record. It is not disputed that no rent for the said rake has been paid by respondent no.1 since February, 2013. In terms of section 2.3, late payment of the rent – due and payable by the respondent no.1 towards the first rake, also entitles the petitioner to interest on such outstanding amounts of rent, at the rate stipulated therein.

33. The petitioner has placed on record several letters calling upon respondent no.1 to pay the amounts due and payable by it towards the first rake. It seems that the respondents, on several occasions, have acknowledged respondent no.1's obligation to pay lease rentals for the first rake and also assured compliance thereof. Apparently, respondent no.1 vide confirmation dated 04.04.2013 affirmed the sum of Rs.37,12,384.16/- to be the total amount outstanding including TDS, on the relevant date. It is trite to point out that at this stage, the court is not appreciating the evidentiary value of the documents before it and, thus, it need not concern itself with respondent's contention that the said confirmation was merely an

acknowledgment of relevant invoices being raised by the petitioner, and not of respondent's liability to pay the same. Subsequently, Arshiya Group Chairman/MD, Mr. Mittal vide mail dated 10.04.2013 expressed respondent no.1's inability to lease further rakes on account of it being in CDR, but stated that it agreed to take 5 more rakes subject to the CDR decision. Thereafter, petitioner vide letter dated 22.04.2013 not only asked the respondent no.1 to pay the overdue amount towards the first rake; to immediately accept the second rake; and to provide the modified delivery schedule for remaining rakes, but also to share information on the CDR process. Again, Chairman of the Arshiya Group Mr. Mittal vide email dated 14.05.2013 assured the petitioner that all issues – including that of payment of outstanding rentals would be resolved by 23rd May, 2013. The relevant extract of the said email read:

> "*As discussed we have to wait till we get to the stage of signing of LOA with the banks through the CDR process. The next date of the CDR EG is 23rd May and we hope that all matters will be sorted out including payments on 23rd*."

34. When past due lease rentals for the first rake were not paid by respondent no.1 by 23rd May, 2013 despite its assurances, the petitioner vide letter dated 27.05.2013 called upon respondent no.1 to rectify the defaults vis-a-vis payments in respect of first rake and delivery of the second rake, lest the petitioner should, inter-alia, terminate the lease and repossess the first rake. Letter of even date was also sent to respondent no.2 to ensure compliance by respondent no.1of its obligations under the lease, lest the petitioner should invoke the Guarantee against respondent no.2. Thereafter, respondent no.1 vide letter dated 21.06.2013 – alleging that the petitioner

had failed to fulfil its obligation of delivering the rakes as per their respective scheduled dates of delivery, inter-alia, stated that:

> "*... it is well within GATX's knowledge that during several high level meetings that the Company had with GATX representatives/executives, it was clearly discussed and agreed that the Company would pay for the first rake only if GATX stuck to the scheduled delivery date. To the Company's dismay, GATX repeatedly failed to respect the delivery dates....*
>
> *In light of the above, the Company is constrained to exercise their rights to terminate the said Agreements qua the balance rakes and shall shortly notify GATX of the damages as would be payable by GATX to the Company for its egregious failure to adhere to the scheduled dates of delivery of the rakes ordered....*".

35. Pertinently, there is no communication on record prior to this letter dated 21.06.2013, whereby respondent no.1 had refuted/denied its liability to pay the lease rentals for the first rake, or raised the issue of alleged delay on part of the petitioner in delivery of rakes. Nevertheless, it is a matter of record that respondent no.1 continued using the first rake, and petitioner continued raising invoices towards the rent thereof.

36. It appears from the subsequent correspondence exchanged between the parties that even post the alleged termination of the Lease vide letter dated 21.06.2013, respondents did not out rightly deny their obligation to pay rent for the first rake, but were rather keen on revision of the lease rentals, whereas the petitioner kept demanding the payments thereof and maintained that any negotiation was contingent on respondent duly fulfilling its liabilities already accrued under the Lease Agreement. While no amicable solution was forthcoming from the negotiation talks respondent no.1 vide

letter dated 21.10.2013 – reiterating the stand taken in its letter dated 21.06.2013, additionally raised the issue of alleged manufacturing defects in the first rake and disputed its obligations under the Lease Agreement. At this stage, I need not delve further into respondents' contention that the communication from their end – subsequent to the 21st June letter, were only 'without prejudice settlement negotiations'.

37. Coming to respondents' contention with respect to petitioner's failure to adhere to the timelines provided under the said agreements, it is discernible that although induction of the 10 rakes was to start from August, 2012 as per the delivery schedule provided in Supplement No.1, respondent no.1 vide letter dated 16.07.2012 requested the petitioner to defer the induction plan of all the 10 rakes by a month, since the C& W facility at Khurja – where admittedly all the 10 rakes were to be based, was being delayed due to specific clearances and approval of the facilities by the Indian railways. Consequently, the delivery schedule provided in the Supplement No. 1 was amended and replaced by new delivery schedule vide the Lease Amendment. Recitals of the said amendment, inter-alia, record that " *Lessee has requested that Lessor consent to a delay in the delivery dates of the ten Rakes to be leased by lessee pursuant to the Lease, and Lessor is willing to grant such consent on the terms and conditions set forth in this Amendment."* Accordingly, the new delivery schedule, as agreed by the parties read as follows:

> *"DELIVERY SCHEDULE:* *Rakes shall be delivered on or before 31st March 2013, as per the delivery schedule detailed hereinafter. In case of any change in the Scheduled*

Delivery Date, the Lessee shall give Lessor at least ninety (90) days' prior notice.

Rake No.	*Scheduled Delivery Date*
1st Rake	*15th September 2012*
2nd Rake	*10th October 2012*
3rd Rake	*1st November 2012*
4th Rake	*22nd November 2012*
5th Rake	*13th December 2012*
6th Rake	*3rd January 2013*
7th Rake	*24th January 2013*
8th Rake	*14th February 2013*
9th Rake	*7th March 2013*
10th Rake	*28th March 2013"*

38. Prima facie, it appears that the production operations at the manufacturing plant of Titagarh Wagon's limited were disrupted, as a result of which, apparently, the first rake could not be ready for delivery by the petitioner on the amended scheduled date for delivery and the fact of delay thereof was brought to the knowledge of respondent no.1. But at the same time, when subsequently the petitioner vide letter dated 30.10.2012

requested respondent no.1 to take delivery of the first rake between 5-10th November, 2012, the respondent no.1 vide even dated email asked the petitioner to push the delivery to 20-25th November, stating that it was yet to get formal approval for basing the rakes at Khurja – stipulated Base Depo. It seems that even if the first rake had been ready for delivery as per schedule, i.e. on or before 15th September, 2012, respondent no.1 would not have been able to take delivery thereof for the said reason. Therefore, prima facie the delay in delivery of the first rake cannot be said to be attributable to the petitioner.

39. Moreover, the Lease Agreement specifically provides that " *In the event that lessor is unable to provide for delivery of any newly manufactured Rake under this Supplement on or before the Scheduled Delivery Date,* ***Lessor shall endeavour to deliver the Rake to the lessee within 150 days of the applicable Scheduled Delivery Date; provided however, that the Rent in respect of such delayed Rake shall be determined as if such Rake had been delivered on the last agreed Scheduled Delivery Date prior to the delay.*** *Lessor shall have no liability or obligation to lessee (including, without limitation, any liability for loss of profits, cost or expenses in connection with such delay) for any delay in delivery;* ***provided , however, that if such delay extends beyond the 150th day following the Scheduled Delivery Date, either Lessor or Lessee, by written notice to the other, may terminate the Supplement to the extent applicable to such delayed Rake, without cost or penalty, and, following such termination, Lessee shall have the right to refuse such rake when tendered for delivery by Lessor;*** *provided, however, that the applicable supplement shall remain in full force*

and effect with respect to all Rakes covered thereby other than the delayed Rake." (emphasis supplied) Thus, in view of the facts of the case and the said provision of the Lease, obligation of respondent no.1 to pay rent for the first rake does not seem to be affected by alleged delay in delivery thereof.

40. Further, it appears from the email communications on record that after handing over of the rake to respondent no.1, the petitioner was promptly following up with respondent no.1 with regard to completion of formalities on part of respondent no. 1 with respect to requisite permissions for allotment of the base depot at Khurja. I may take note of one such communication dated 08.01.2013 from petitioner's representative to respondent no.1, which read as follows:

> "*The work of commissioning of our rake is still held up on account of the pending approval from North Central Railways. It is more than three weeks that the rake arrived here....*
>
> *We request you to take up the matter with North Central Railway in right earnest and get it resolved. The delay in commissioning is leading to unnecessary idling of the rake*."

41. Also, with regard to the second rake, it appears from the material placed on record that when the petitioner vide email dated 28.01.2013 offered delivery of the second rake on 01.02.2013, respondent no.1 in reply thereof asked the petitioner to hold on till further instructions, without giving any reason whatsoever for deferring the delivery. Again, replying to petitioner's subsequent request to take delivery of the second rake by 13.02.2013, respondent no.1 simply stated "*please wait for further communication from our side, we will intimate the delivery location and date.*" It appears from the emails exchanged between the representatives of

the parties on the 8/9th April, 2013, that respondent no.1 had agreed to take over the delivery of the said rake on 11.04.2013, and a team of the petitioner was dispatched to Kolkata to facilitate the handing over of delivery to the respondent, but what transpired thereafter – such that it could not take effect, cannot be said at this stage.

42. Here, I may reproduce an extract from respondent's email dated 10.04.2013, which read as follows:

> "*Firstly,* ***we are in CDR and are not allowed to proceed with any more leasing of rakes. We have however agreed to take delivery of (pending CDR decision) up to 5 rakes*** *provided that they come to Khurja (as Khurja is that base depot) and that they will be stabled at CIMCO till such time we have clarity on way forward from the CDR decision.* ***You will appreciate that we in this position that if we don't abide by the CDR our entire company will get into a permanent financial difficulty, which we will not allow at any cost***."
>
> (Emphasis supplied)

43. Thus, it appears from the contemporaneous communication between the parties herein that respondent no.1 was not in a position to take the timely delivery of the first two rakes due to problems at respondent no.1's end. Besides, perusal of the records, prima facie, shows that the issue of non compliance of delivery schedule on part of the petitioner was raised by respondent no.1 only as a ruse for the very first time vide letter dated 21.06.2013.

44. Also, on the aspect of the alleged manufacturing defects in the first rake, perusal of the relevant agreements indicates that the rakes in question

were to be designed in accordance with RDSO (Research Designs and Standard Organisation, Ministry of Railways) specifications, and were to be subjected to dual inspection/approval for operation by railways, i.e. before dispatch from the Manufacturer's factory and also at the time of the commissioning. Petitioner has placed on record despatch memo for 45 wagons and the brake van of the first rake, whereby the said wagons were duly inspected and passed by RDSO designated railways official. Further, it is borne out from the joint note of commissioning dated 21.01.2013 that before commissioning the first rake was duly inspected; wagon-wise defects found, if any, were notified; and almost all the notified defects/deficiencies were provided for/attended to. The Brake van attached to the rake was also examined and found fit to run. Consequently, the first rake was duly commissioned on 21.01.2013 with the remark '*allowed for one trip (Round)*'. Since no objection with respect to any material non-conformity with the contractual requirement (agreed design) seem to have been notified in writing by respondent no.1 within two days of commissioning thereof, as provided for under section 2.1.1, prima facie, it appears that the rake was accepted by respondent no.1 on 21.01.2013. Also, section 3.1,inter-alia, provides that acceptance of the rake by respondent no.1 in terms of section 2.1.1 shall amount to acknowledgement that "*the details of the size, design, capacity and manufacture of the Rakes being leased by the Lessee under each Lease are satisfactory..*". This is further supported by the fact that respondent no.1 thereafter also paid the prorate lease rent for the month of January for an amount of Rs.6,56,319.72.

45. Pertinently, there is nothing on record to show that after its

commissioning in January, 2013, any adverse observations/issues were noticed by the railways in respect of the said rake until October, 2013. Also, there is not a whisper of alleged manufacturing defects in the first rake in any of the communications prior to respondent no.1's letter dated 21.10.13, not even in the letter dated 21.06.13 – whereby it sought to terminate the lease only on the ground of alleged delay.

46. Based on these aforestated considerations, I am, prima facie, not impressed with respondents' contention that respondent no.1 is under no obligation to pay the lease rental, and other amounts due and payable towards the first rake, on account of delayed supply or defective rake.

47. Therefore, prima facie, it seems that the contractual obligation to pay rent for the first rake commenced from 21.01.2013. However, since February, 2013, respondent no.1 has not made any payment whatsoever towards the said rake – even for the period when respondent no.1 had been, admittedly, using it. Thus, in terms of clause 10.1 (a) of the Master Agreement, respondent no.1 seems to have committed an event of default which, prima facie, entitles the petitioner to the remedies enlisted under section 10.3 of the Master Agreement – which, inter-alia, provides for the demand of immediate payment of all unpaid rent and other payments then due, plus liquidated damages equivalent to the remaining rents (discounted to present value) for the remaining term for the said rake.

48. In ***Steel Authority of India Ltd vs. AMCI Pty Ltd. & Anr.,*** 2011(3)ARBLR502(Delhi), this court had the occasion to deal with a petition for securing the amounts awarded in arbitration in favour of the

petitioner therein pending the objections thereto. Although it was at the post-Award stage, but one of the main issues involved therein was the guiding principles that the Court would follow while considering a petition preferred under Section 9(ii)(b). After considering various decisions on the subject, this court, inter-alia, concluded that:

> *"45. In proceedings under Section 9 of the Act, at the highest what could be said is that the provisions of Order 38 Rule 5 Code of Civil Procedure would serve as the guiding principle for the Court to exercise its discretion while dealing with a petition requiring the Respondent to furnish security for the amount in dispute. Since the letter of the law per se is not applicable, the requirements set out in Order 38 Rule 5 Code of Civil Procedure need not strictly be satisfied, and so long as the ingredients of the said provision are generally present, the Court would not be unjustified in exercising its jurisdiction to require the Respondent to furnish security. The bottom line, in my view, is that the Court should be satisfied that the furnishing of security by the Respondent is essential to safeguard the interests of the Petitioner."*

49. Pertinently, the Division Bench in ***Nimbus Communications*** (supra) has also taken note of the aforesaid observation. The Division Bench in ***Nimbus Communications*** (supra), expressing disagreement with the observation of the co-ordinate bench of that Court in ***National Shipping Company Vs. Sentrans Industries Limited,*** 2004(1) Arb. LR 409 (Bom.) (DB) that the exercise of power under Section 9(ii)(b) was not controlled by the provisions of the C.P.C., concluded that:

"24. A close reading of the judgment of the Supreme Court in Adhunik Steels would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. ***The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under Section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case.*** *The principles laid down in the Code of Civil Procedure 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b).*"

(Emphasis supplied)

50. Therefore, the strict provision of Order 38 Rule 5 does not get bodily lifted and imported into Section 9(ii)(b) of the Act, but the underlying principle has be borne in mind while issuing direction for furnishing security pending arbitration. In view of the fact that respondents are apparently

running into heavy losses; undergoing CDR, which prima facie indicates that it would be difficult for them to honour their debts and financial obligations; their assets are charged in favour of lenders – some of whom seem to have already initiated proceedings to recover their dues against the security given therefor; there are statutory dues and other higher priority obligations; and winding up proceedings are pending against respondent no.2, the obstruction to the execution of the award that may be passed in favour of the petitioner is imminent. It does not matter whether the respondents have the 'intent' to obstruct or delay the execution of the award – in case it is passed in petitioner's favour. It is no solace to the petitioner, who may not be able to eventually enforce the award (in case passed in its favour) – because of the respondents becoming financially defunct, that the financial incapacity is not on account of any mal-intentions of the respondents, but on account of the respondents being highly indebted and going into losses, without intending to do so, so as to obstruct the execution of the award. The award, if eventually passed in favour of the petitioner, would be reduced to a paper award, in case the respondents go under.

51. Reliance placed on the decision in ***CPI Ltd.*** (supra) does not aide the respondents' case. Observation of the Court in any decision has to be seen in the context of the facts and circumstances of that particular case. In the said case, the appellant had invested certain sums in the respondent company, in return whereof it was entitled to a share in profits generated from certain projects, but respondent company was allegedly siphoning off funds. Learned single judge therein ,inter-alia, stayed the development and booking of flats in two of such ongoing projects, and also restrained the respondent

company from giving effect to a particular board resolution meant for raising certain loan. The Division Bench, observing that the interim order was "*likely to stop vital oxygen supply to BPTP Ltd. and if the company dies it would be prejudicial to the interest of CPI India Ltd.",* balancing the equities and sufficiently protecting interests of the appellant, modified the said interim order. Pertinently, the interim order passed in the said case restrained the respondent therein from carrying out certain business activities, which directly obstructed the inflow of funds and jeopardized the business of the respondent company, which would have been, in turn, detrimental to appellant's interest. A direction to furnish security cannot be equated to a direction which put a complete embargo on the fund raising activities of a company, in terms of the hardship likely to be suffered as a consequence thereof. Moreover, the consideration that weighed with the Division Bench was that the appellant therein could be well protected by directing the respondent company to deposit the balance amount realizable from the said two projects in an escrow account, whereas, in the present case, there is no such circumstance which affords adequate protection to the petitioner – whose dues are unsecured, and also, do not appear to figure in respondents' CDR scheme. Thus, equities are clearly in favour of the petitioner herein.

52. Reliance on the decision in ***Intertoll ICS*** (supra) is misplaced. The issue before the court therein was the ambit of power of the arbitrator under section 17 – to grant interim measures, viz. securing the amount in dispute in arbitration. Besides, the observations made therein were in context of a direction to provide security in form of a bank guarantee for a claim for

damages – which had no reasonable basis, nor was there any prima facie determination of the amount of the damages for which the claim was likely to succeed.

53. During the course of arguments, learned senior counsel for the respondents also sought to place reliance on the decision in ***Ratnagiri Gas and Power Pvt. Ltd. vs. Joint Venture of Whessoe Oil and Gas Ltd.***, 199(2013) DLT 212 (DB), with regard to the scope of power of court to grant interim relief under section 9. Reference to the said case is completely out of context here. The court therein had held that no interim relief under section 9 could be granted, unless there existed an arbitrable dispute between the parties, and interim relief in respect thereof was prayed for. It is not the respondents' case here that there is no arbitrable dispute in existence.

54. Looking to the circumstances of the case in their entirety, I am of the opinion that the balance of convenience is in favour of grant of the interim measure of protection, and the petitioner would suffer irreparable injury if the interests of the petitioner are not adequately protected.

55. Therefore, in view of the aforesaid discussion, the petitioner has made out a strong prima facie case for the grant of interim relief, viz furnishing of security for the lease rent for the first rake for the period from February, 2013 till the return of the complete rake. As far as securing the amounts claimed under section 10.3.1(A) towards liquidated damages is concerned, I am not inclined to issue direction in respect thereof for the reason that although the petitioner might be entitled to some damages for the alleged defaults on part of respondent no.1, that liability and the amount is yet to be

determined. The court cannot direct provision of security for the entire possible sum of damages claimed, i.e. equivalent to the remaining rents (discounted to present value) for the remaining lease term for the said rake, when there is no reasonable basis for determination of what that amount could be. There has to be a reasonable nexus between the damages claimed and the loss suffered by a party as a result of the alleged breach of contractual obligation by the other party. It is a settled legal position that damages are granted for the actual losses – proved to have been suffered by a party as a consequence of the alleged breach, with the exception that in some contracts, where it is impossible to assess the compensation arising from a breach, the sum named by the parties in the contract – if it be regarded as a genuine pre-estimate and is not in nature of a penalty, may be awarded as the measure of reasonable compensation. In view of the fact that respondents have disputed their liability to pay the amounts claimed by the petitioner – alleging breach of contractual obligations on part of the petitioner, and that the rake stands returned to the petitioner, which might be re-leased for rent equivalent to, or even higher than the rate stipulated under the Lease Agreement, the damages cannot be determined, even prima facie, by this court at this stage. What amount the petitioner is entitled to in respect of the future rents/damages, in the facts and circumstances herein, is a substantive issue requiring adjudication on merits, which should be left to be decided by the arbitral tribunal. Therefore, any direction in this regard is beyond the scope of the present proceedings, and uncalled for.

56. For the same reasons as discussed in the foregoing paragraph, prayer (d) – for securing the amount claimed to have accrued under section 2.1.3 of

the Master Agreement in respect of the second rake, is declined.

57. Section 2.1.3 provides that if the lessee fails to accept the delivery of a rake at the delivery location for whatever reason, all storage, stabling or other charges incurred in connection therewith shall be on lessee's account, and additionally, if lessor has taken delivery of the rake from the Manufacturer, lessee shall also be liable to pay liquidated damages equal to the rent under the applicable lease prorated over the number of days elapsed from the last scheduled delivery date (mutually agreed by the lessor and lessee) till the date the delivery is taken by the lessee. But, if the lessor has not taken the delivery from the Manufacturer, then lessee's liability is commensurate with the charges and penalties imposed on the lessor therefor by the Manufacturer.

58. As mentioned above, the petitioner vide letter dated 28.01.2013, had offered to deliver the second rake on 01.02.2013. However, respondent no.1 kept deferring the delivery thereof, and ultimately, failed to take the delivery of the said rake, which would prima facie entail consequences under section 2.1.3. But, in view of the dispute whether the petitioner had not taken the delivery of the second rake from the Manufacturer, several aspects would have to be examined before it could be said that the petitioner is entitled to the amounts sought to be secured herein in relation to the second rake, e.g. whether or not the petitioner had taken the delivery of the said rake from the Manufacturer; if the answer is in affirmative, then, what would be the quantum of damages in light of the purported termination of the Lease; and if not, then, what was the penalty imposed, if any, by the Manufacturer on the petitioner for its failure to take delivery thereof. These aspects need

adjudication on merits in arbitration, to determine the liability, if any, of respondent no.1 under section 2.1.3 vis-à-vis the second rake.

59. It would be beyond the purview of proceedings before this court under section 9(ii)(b) to sift and appreciate the documents placed on record in this context, and having regard to the facts of the case, I feel it would also be inappropriate for this court to record any specific finding, even prima facie, on petitioner's claim under section 2.1.3 with respect to the second rake. Thus, at this stage, the question of granting interim relief as prayed herein in relation to the second rake does not arise.

60. I now proceed to consider the submission of the respondents that respondent No.2 is not a party to the Lease Agreement and, therefore, not a party to the Arbitration Agreement. The submission of the respondents is that respondent No.2 has consciously not signed the lease agreement and is a party only to the guarantee. According to the respondents, this shows the intention of the parties not to embroil respondent No.2 in an arbitration with the petitioner in respect of the disputes arising under the lease agreement and to relegate the petitioner and respondent No.2 to the ordinary Civil Courts in respect of disputes arising under the guarantee. The submission is that the guarantee cannot be enforced and, no interim relief in respect thereof can be sought, in arbitration proceedings which may be initiated by the petitioner only against respondent No.1 – i.e. the second party to the lease agreement.

61. Under the Deed of Guarantee, respondent no.2 guaranteed to the petitioner the full performance and payment –when due under the Lease,

by respondent no.1 of the Guaranteed Obligations, which is defined as "*all obligations, liabilities and monies which are now or at any time hereafter may be due, owing or payable by Lessee, actually or contingently, on any account whatsoever pursuant to the Lease..., or as a consequence of any breach, non-performance, disclaimer or repudiation by Lessee...of any of Lessee's obligations under the Lease...*", and in the event of failure of respondent no.1 to make payment of any amount of the Guaranteed Obligations – due and payable in accordance with the Lease, it undertook to pay the same to the petitioner on demand. Pertinently, the undertaking under the Deed of Guarantee was given by respondent no.2 as *'a principle obligor, and not merely as a surety*'. Respondent no.2 guaranteed to the petitioner the fulfilment of all the obligations of respondent no.1 under the Lease, as respondent no.2's primary obligation under the Guarantee, and for enforcing the Guarantee in event of failure on part of respondent no.1, petitioner is not obliged to first make a demand, or take any proceedings or satisfy any other requirement, against respondent no.1. It is obvious that for ascertaining the obligation of respondent no.2 under the Guarantee, terms of the Lease would have to be looked into, because the obligations of the respondent no.2/ guarantor are co-extensive with the obligations of respondent no.1/lessee under the Lease. Against this backdrop, I may draw attention to clause 7.4 of the Deed of Guarantee, which read as follows:

> *"Entire Agreement-this Guarantee and the Lease constitute the entire agreement between the parties hereto with respect to the subject matter hereof and thereof and supersede all other*

discussions or agreements, written or oral, concerning such subject matter..."

wherein, "Lease" is defined under clause 1.2 to mean, collectively, the Master Agreement and Supplement no.1.

62. Clause 7.4 of the guarantee in plain and simple terms states as to what constitutes *"entire agreement between the parties"*. It states that the guarantee and the lease agreement constitute *"the entire agreement between the parties hereto with respect to the subject matter hereto and thereto"*. Therefore, clearly the parties intended that the guarantee and the lease agreement be read as one agreement with respect to the subject matter of both the guarantee and the lease agreement. It is well-settled that an arbitration agreement may either be contained in the body of the agreement itself, or it may be contained in a separate agreement/ instrument. When the arbitration agreement is contained in the body of the agreement to which it relates, the subject matter of that agreement would not only mean the subject matter in respect of which the agreement has been entered into, as for instance, in the present case the subject matter of the lease agreement is the lease of the ten rakes, but the subject matter would also include arbitration agreement. In the present case, the parties namely the petitioner and respondent No.2 have agreed that their entire agreement is contained in the guarantee and the lease agreement in respect of the subject matter of both the instruments. Therefore, in my view, respondent No.2 cannot escape from its obligation to go to arbitration in respect of disputes arising under the lease agreement and the guarantee.

63. If the submission of the respondents that respondent no.2 is not a

party to the arbitration agreement is accepted, and respondent No.2 is not represented in arbitration between the petitioner and respondent No.1, it is possible that an award is rendered against respondent No.1. In that eventuality, respondent No.2 would also become liable to honour the said award – though not in enforcement of the arbitration award, but on account of the obligation undertaken by respondent No.2 under the deed of guarantee. Consequently, clause 7.4 of the deed of guarantee can only be interpreted to mean that the arbitration agreement in the lease agreement binds respondent no.2 as well.

64. Even if it were to be accepted that respondent No.2 is not bound by the Arbitration Agreement contained in the Lease Agreement, an analysis of the law, as interpreted and applied in several decisions leads to the conclusion that in the facts of this case there is sufficient justification to issue interim directions in respect of respondent no.2. I may examine the legal position as regards the power of court under section 9 of the Act to issue interim orders against third parties to arbitration.

65. Section 9 of the Act provides that:

> "*9. Interim measures, etc. by Court.—A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—*
>
> *(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or*
>
> *(ii) for an interim measure of protection in respect of any of the following matters, namely:—*

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

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

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

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

(e) such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

66. While the section explicitly provides that only a party to the arbitration agreement can apply to the court for interim measures, it does not say against whom any such relief can be claimed. Unlike section 17 – which specifically allows for measures to be directed only against parties to arbitration, there is nothing in section 9 which expressly restricts a court from passing orders against non-signatories to arbitration agreement. Pertinently, there has been a divergence of opinion in this Court on the aspect of maintainability of a petition under section 9 of the Act against a third party. On one hand, there are cases where the learned single judges of this court have endorsed the view that section 9 of the Act is applicable only inter se/between the parties to the arbitration

agreement. [see: ***National highways Authority of India vs. China Coal Construction Group Corp***, AIR 2006 Delhi 134; ***Mikuni Corporation vs. UCAL Fuel Systems Ltd***, (2008) 1 ALR 503 (Del); ***Smt. Kanta Vashist vs. Shri Ashwani Khurana,*** MANU/DE/0380/2008; ***National agriculture Co-operative Marketing federation of India Ltd vs. Earthtech enterprises ltd***., OMP no. 558/2007 decided on 23.04.2009]. On the other hand, the court in several cases has recognised the existence of power of the court to issue interim orders with respect to third parties under section 9 of the Act. [see: ***CREF vs. Puri Construction Ltd***., (2000) 3 ALR 331 (Del); ***Arun Kapur vs. Vikram Kapur***, AIR 2002 Del 420; ***Goyal Mg Gases (p) Ltd. vs. Air Liquide Deutschland GmbH***, OMP no.361 /2004 decided on 31.01.2005, ***Sri Krishan v Anand,*** *OMP no. 597/2008 decided on 18.08.2009]*.

67. In ***Value Advisory Services v. ZTE Corporation and Ors,*** OMP no. 65/2008 decided on 15.07.2009, learned single judge after considering numerous conflicting judgments of single-judge benches of the High Court, inter-alia, concluded that:

> *"13. A conspectus of the judgments aforesaid on Section 9 would show that the court in each case has made the observation with regard to maintainability/applicability of Section 9 qua third parties depending upon facts of each case and depending upon feasibility of the order sought/required therein.* ***In my view, no general principle of maintainability/applicability or non-maintainability/non-applicability can be laid down. It will have to be determined by the court in the facts of each case whether for the purpose of interim measure of protection, preservation, sale of any goods,***

securing the amount in dispute, an order affecting a third party can be made or not.

14. In my view, ***if as a general rule it is laid down that in exercise of power under Section 9, no direction can be issued to parties not parties to agreement containing an arbitration clause or not parties to arbitration proceedings, the same will hamper the efficacy of the said provision****. Under Clause (i) thereof, the guardian to be appointed may not be such a party; similarly the goods under Clause (ii) (a) may be or may be required to be in custody of or delivered to or sold to such third parties - further orders against such third parties may also be required in connection with such sale; under Clause (ii)(b) the amount to be secured may be in the form of money payable or property in hands of such third party - the scope cannot / ought not to be restricted to securing possible with orders against parties to arbitration only. Similar examples can be given with respect to other clauses also."*

(Emphasis supplied*)*

68. In the aforesaid case, the court was dealing with a petition under section 9 of the Act for direction to respondent no.3 – owing certain money to respondent no.1&2, to deposit the same in the court in order to secure the monetary claim that the petitioner had against respondent nos. 1&2 therein. The learned single judge held that, notwithstanding the fact that respondent no.3 was not a party to the arbitration agreement between the petitioner & the other two respondents, and was not concerned with the dispute between them, it was within the ambit of Court's power under section 9 to issue such a direction to respondent no.3. Observing that section 9 provides that "*the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it*", and referring to provisions under CPC, such as sections 47, 60

and Order 21 Rules 46 and 46A-F, Order 38 Rules 6-11A of CPC, learned single judge reasoned that the practice of issuing interim orders including pre-decretal ones against third parties was well-accepted under the C.P.C., and therefore, it would be illogical not to extend the same powers to the Court under section 9 of the Act. On the question of – possibility of the third party contesting such an application, or setting up a defense thereto, calling for an adjudication on trial, the Court, inter-alia, observed that "*The court, in such cases in its discretion can on a prima facie view of the matter, either refuse to exercise powers under Section 9 or pass other appropriate order to protect the interest of all parties concerned*." However, in the facts of that case, the court refused to order respondent no. 3 to deposit the monies in Court.

69. The observations made in ***Value Advisory Services*** (supra) with respect to power of the court under section 9 being analogous to power of a civil court to pass an order qua a third party – for attachment of property/deposit of money in court, at a pre-decretal stage, were made in the context of an interim relief in nature of a garnishee order. The observations were made with respect to power of the court to order attachment of property/monies of a defendant, which may be in possession of third party-in trust, for or on behalf of the defendant.

70. I find myself in respectful agreement with the learned single judge that no hard and fast rule can be laid down as to issuance of interim orders qua third parties, and the same depends on the facts of each case. I may point out that subsequently, the court – taking note of the said observation made in ***Value Advisory Services*** (supra), in the specific

facts of the respective cases, refused to exercise its power under section 9 against a non-signatory to arbitration agreement in ***Ajay Makhija v. Dollarmine Exports Pvt. Lt. & Ors***, MANU/DE/1906/2009, whereas, it passed interim orders with respect to a third party in ***Dorling Kindersley (India) Pvt. Ltd. vs. Sanguine Technical Publishers & Ors.***, 2013 (3) ARB LR 52 (Del).

71. Undoubtedly, section 9 provides that the court shall have the same powers for making interim orders under section 9 as a civil court has for the purpose of, and in relation to, any proceedings before it, and the powers of a civil court in this regard are very wide. The civil courts – as and when required, and deemed appropriate in the facts and circumstances of a particular case have been making interim orders in respect of third parties, such as: interim injunction restraining third party-banks from honouring bank guarantees; attaching defendant's monies/property in hands of third party-trustee, debtor, agent etc; restraining third party-subsequent transferee/person claiming rights in suit property from disposing of the same, and the like. As a corollary, the power of the court to issue interim orders under section 9 cannot be confined only to the parties to arbitration agreement. However, a significant parameter – inherent in section 9, for exercise of this power against a non-signatory to arbitration agreement, is that the purpose of section 9 is to aid arbitration between the parties thereto, and the interim orders thereunder have to be with regard to subject matter of arbitration/in connection with the arbitral proceedings. In this context, it is relevant to draw a distinction between orders granting interim relief

against a party to the arbitration agreement – which incidentally affects a third party, on one hand, and orders granting relief directed against a third party, on the other. While the former is ordinarily acceptable as being within the scope of section 9, the power with respect to the latter should be exercised sparingly. For instance, an order appointing a third party as a receiver or guardian of a minor/person of unsound mind is not an order against the third party, or detrimental to its rights as such. Rather, it is a relief granted to the petitioner in support of the arbitral proceedings, and affects the party to the arbitration agreement. Similarly, when a subsequent transferee, or a person claiming title under a party to arbitration is ordered to maintain status quo, or not to dispose of property – which is subject matter of arbitration, it is again ancillary to arbitral proceedings in as much, as, it is for protection of the subject matter of arbitration that the order is passed. An injunction, or order of attachment with respect to the properties belonging to/monies owed to a party to arbitration, but in hands of a third party for/on behalf of the said party, is effectively a relief against the said party, which incidentally affects the third party. Pertinently, it is expressly provided in the C.P.C. that attachment before judgment shall not affect the prior existing rights of third parties in the property of the defendant sought to be attached. Injunction against a third party – bank from honouring a bank guarantee is consequential to interim relief of restraining a party from encashing the same against the petitioner. To sum up, the court may issue interim orders against the third parties to arbitration only in exceptional circumstances – which are such that denial thereof might frustrate the petitioner's rights in arbitration; defeat the very object of arbitration

between the parties thereto; render the arbitration proceedings infructuous; lead to gross injustice; and/or, leave the petitioner remediless, depending on facts of each case.

72. Even assuming that respondent no. 2 is not a party to arbitration agreement, it is not a total stranger to the covenants of the Lease Agreement. Apparently, respondent no.2 has been in the picture throughout: at the stage of execution of the Lease Agreement between the lessor and the lessee, and also during the subsistence of the Lease – when respondent no.1 allegedly defaulted in performance of its obligations thereunder. Pertinently, Supplement no.1 expressly provides for furnishing of a guarantee by respondent no.2 for performance of all of respondent no.1's stipulated obligations. Also, the recital (B) in the Deed of Guarantee, inter-alia, records that "...*execution and delivery of this Guarantee is a condition precedent to Lessor leasing the Rake(s) to Lessee pursuant to the Lease*...". Further, when the disputes arose under the Lease Agreement – which are subject matter of arbitration between the lessor and the lessee, respondent no.2 seems to have been actively involved in the efforts/ negotiations to resolve the disputes, and to arrive at an amicable solution. Reference may also be made to communications dated 27.05.2013 and 17.07.2013, wherein the petitioner has specifically mentioned about the discussions between the petitioner and respondent no.2, and assurances given by respondent no.2, on behalf of respondent no.1. Relevant extracts are reproduced hereunder.

73. Petitioner's letter dated 27.05.2013, inter-alia, stating that:

> "*...During discussions between GIPL and Arshiya and* ***based on assurances made by the Chairman, Arshiya International***

Limited, on behalf of Arshiya, GIPL expected the past due Rent payments for the first rake to be paid by Arshiya by May 23, 2013; *however, this was not done....*"

(Emphasis supplied)

74. Petitioner's notice dated 17.07.2013for dispute resolution, inter-alia, stating that:

"*… GIPL has had frequent discussions with Arshiya to attempt to resolve the foregoing issues*. ***Despite assurances from the Chairman of Arshiya International, on behalf of Arshiya, that all past due amounts on Rake No.1 would be paid after the CDR process was completed. The Empowered Group of CDR forum approved Arshiya group's corporate debt restructuring on June 24,*** *but still no payment has been received and Arshiya has not indicated when the payment will be made..."*

(Emphasis supplied)

75. Respondent no.1 is a wholly owned subsidiary of respondent no.2. It is not uncommon that in cases where group companies substantially constitute one economic entity, the courts – instead of going by the separate legal entities of the companies, have lifted the corporate veil, and looked at the common economic entity of the group to which they belong. In view of the facts of the case, and the conduct of the parties as reflected from the material on record, it does, prima facie, appear that the respondents conducted their affairs as constituents of the Arshiya Group. Also, in as much, as, respondent no.2 has undertaken to honour respondent no.1's obligations towards the petitioner as its own primary obligations, and the petitioner has a right to claim from respondent no.2 the amounts allegedly due and payable by respondent no.1 under the lease, there is a commonality of interest between respondent No.1 and respondent no.2. Moreover,

looking at the dismal financial condition of respondent no.1 – as discussed hereinafter, a direction only to respondent no. 1 to furnish the required security might not afford adequate protection to the petitioner. Therefore, I am of the opinion that the facts of the instant case are such that orders under section 9 ought to be passed against respondent no.2.

76. As far as petitioner's averments in respect of the financial position of the respondents are concerned, it is noticeable from the financial reports placed on record and admissions of the respondents that they are indeed in a tight spot. Financial statement of respondent no.1 for the year ending 31st March, 2013 shows losses to the tune of Rs 48,27,28,020/-. It is submitted by the petitioner that as per the Standalone balance sheet of respondent no.1 for the period 01.04.2012 to 31.03.2013, net worth of respondent no.1 has eroded by almost 40% and its secured liabilities are five times its net worth. It is also submitted that 25% to 30 % of the revenues of respondent no.1 go towards servicing the interest costs on its borrowings, and it has also defaulted in payment of its statutory liabilities amounting to approximately Rs.6 Crores.

77. In this regard, I may draw attention to an observation recorded in the auditor's report on the financial statements of respondent no.1 as on 31.03.2013, which read as follows:

> *" The company is under severe financial stress which is reflected by increased trade receivables and payables and majority of them are overdue, the workforces downsized and full and final settlement of resigned employees is in arrears of Rs. 68,92,900/- delayed and non-payment of dues (interest and repayment of borrowings) of Banks and Financial Institution of Rs.22,74,14,578/-, and statutory dues i.e. income tax deducted*

at source and Works contract tax for Rs.4,42,55,171/-. The company has filed Corporate Debt Restructuring plan with the lending bankers which is under consideration."

78. Under the Deed of Guarantee respondent no.2 guaranteed to the petitioner payment in full of any amount due and payable to it by respondent no.1 – a wholly owned subsidiary of respondent no.2 in respect of the obligations of respondent no.1 under the Lease Agreement. However, financial reports of respondent no.2 also do not inspire much confidence about the soundness of its financial health. It is borne out from the records that it incurred losses (after tax) to the tune of Rs.14,00,50,000/- for the financial year ending 31st March, 2013. Respondent no.2 in it notes to Standalone financial Results for the quarter and half year ending 30th September, 2013 has, inter-alia, stated as follows:

"The company is under severe financial stress which is reflected by increased trade receivables and payables and majority of them are overdue, the workforce downsized and full & final settlement of resigned employees is provided for and is in arrears to the extent of Rs.394.04 lacs, its delayed and non-payment of dues (interest and repayment of borrowings) of banks and a financial institution and a non-banking finance company of Rs.21,264.74 lacs(including interest), short-term funds are used for long-term purpose, statutory dues i.e. income tax deducted at source and value added tax are in arrears to the extent of Rs.2,238.58 lacs and certain lenders have filed court cases against the company and directors due to dishonour of cheques. The corporate debt restructuring (CDR) scheme of the company has been approved by the CDR cell and Master Restructuring Agreement (MRA) with all banks except one bank. The company is confident that it will comply with all the conditions of the CDR scheme and shall continue as a viable unit."

79. Further, I may refer to the auditor's report on the consolidated financial statements of respondent no.2 and its subsidiaries-including respondent no.1 (the Group), for the year 2012-2013, wherein it is, inter-alia, observed that:

> "*The Group is under severe financial stress which is due to and evident from huge capital expenses financed by debt, increased trade receivables and payables and majority of them are overdue, full and final settlement dues of resigned employees of Rs.55,054,409 are in arrears, statutory dues i.e. income tax deducted at sources, service tax and value added tax of Rs.403,690,449 are in arrears, the dues (interest and repayment of borrowings) of banks and a financial institution and a non-banking finance company are delayed and Rs.3,149,942,069 are overdue, short-term funds are used for long-term purposes and certain lenders have filed court cases against the company and directors due to dishonour of cheques. To mitigate financial stress, the Group has taken various steps including cost cutting exercise and opted for corporate debt restructuring (CDR) plan which is admitted and under consideration of the CDR cell.*"

80. Thus, it can be seen that there are various risk factors disclosed in the aforementioned reports, viz increased and overdue trade receivables, arrears due to employees, outstanding statutory dues, legal proceedings by lenders etc. Admittedly, the respondents are undergoing CDR. As per respondents' submission the scheme of CDR has been approved by the CDR Cell, and an agreement with the lenders in this regard has already been executed and repayment of loans has been deferred. It is submitted that upon successful implementation of the debt restructuring scheme, the respondents will be in a position to fulfil all their obligations, under any arbitral award, if so passed in favour of the petitioner. It is claimed that the respondents have shown an

improvement in the financial condition due to implementation of CDR, and indebtedness of respondent no. 1 has reduced significantly. Further it is stated that respondent no. 1 has also managed to pay its outstanding statutory dues to a certain extent, and is committed to pay the current outstandings within the first financial quarter of the current Financial Year 2014-15.

81. Pertinently, respondents have not filed any document which would indicate that pursuant to implementation of CDR, there has been any significant improvement in their financial health as claimed, or it is likely to revive in the future. I may point out that from perusal of some of the correspondence on record (emails dated 22.04.2013, 14.05.2013, 27.05.2013, 17.07.2013, 23.08.2013, 30.08.2013, 31.08.2013, 05.09.2013, 12.09.2013), it seems that the petitioner had been constantly asking the respondents to share information on the CDR process – its projected financial implication on respondents' business and credit profile and also how the obligations under the Lease were expected to be fulfilled, but the concern of the petitioner does not seem to have been addressed cogently. It appears from the said correspondences that while on one hand, respondents had been projecting that respondent no.1 was committed to fulfilling its obligations under the Lease – once the CDR was implemented, on the other hand, taking a completely different stand, respondent no.1 denied its liabilities altogether and terminated the Lease on seemingly feeble grounds. Besides, when it was put to the counsel for the respondents as to whether the amounts due towards the rent of the first rake were reflected in the financial statements of respondent no.1 as outstandings for the relevant period, and

the liability under the Lease forms part of the CDR process/taken into consideration while formulating the scheme for restructuring of debts, no satisfactory answer was forthcoming.

82. Also, I am not impressed with respondents' submission that since the value of their assets is greater than the total liabilities, they would be able to meet the liabilities qua the petitioner by utilisation of assets, if, and when, a finding is returned in favour of the petitioner in the arbitration proceedings. As per respondents' own admission, their assets are charged in favour of their lenders. My attention was drawn to the Public Auction notice – issued by SICOM Ltd, with respect to one such mortgaged property of respondent no.2. It is discernible from the material before me that there are outstanding statutory dues, and other higher priority obligations of the respondents. In the sur-rejoinder, the respondents have also conceded that various winding up petitions have been instituted against respondent no.2 before the Bombay High Court. Thus, looking at the financial position of the respondents, the apprehension of the petitioner that it may not be able to effectively enforce the award, in case its claims are upheld in arbitration, seems to be reasonable/justified.

83. I may clarify that expression of opinion herein is a prima facie view, without prejudice to the rights and contentions of parties – to be adjudicated on merits by the arbitral tribunal.

84. Therefore, for the aforementioned reasons, the present petition is allowed partially, and the respondents are, accordingly, directed to furnish solvent security to the satisfaction of this Court for an amount representing

the outstanding rent in respect of the first rake for the period from 01.02.2013 till the breakvan of the first rake was returned to the petitioner. The security be furnished jointly and severally by respondents No.1 & 2 within four weeks to the satisfaction of the Registrar General of this Court.

85. List the matter before the Registrar General on 23.09.2014 for verification and scrutiny of the security.

(VIPIN SANGHI)
JUDGE

AUGUST 20, 2014