Shabnoor

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN IT'S COMMERCIAL DIVISION

COMM ARBITRATION PETITION NO. 17832 OF 2026

SHABNOOR AYUB PATHAN

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Date: 2026.06.15 14:17:54 +0530

Oil and Natural Gas Corporation Limited … Petitioner

V/s.

Swiber offshore Construction PTE Limited … Respondent

Mr. Zubin Behramkamdin, Senior Advocate with Shreya Gupta, Abhijeet Sadikale, Sanjana Kattoor i/b Shardul Amarchand Mangaldas & Co., for the petitioner.

Mr. Venkatesh Dhond, Senior Advocate with Vinodini Srinivasan, Ganesh Chandru, Siddhart Agrawal, Dharmesh S Jain, Shashwat Dhyani, & Arpita Tiwari i/b Anil T. Agarwal, for the respondent.

CORAM : AMIT BORKAR, J.

RESERVED ON : JUNE 11, 2026

PRONOUNCED ON : JUNE 15, 2026

JUDGMENT:

1. The present petition raises an issue concerning the scope of post award interim protection under Section 9 of the Arbitration and Conciliation Act, 1996. The petitioner, Oil and Natural Gas Corporation Limited (ONGC), seeks continuation and extension of a bank guarantee furnished by the respondent, Swiber Offshore Construction Pte. Limited (Swiber), pending adjudication of ONGC's challenge to the arbitral award dated 30 September 2025.

2. The petitioner, Oil and Natural Gas Corporation Limited (ONGC), is a Government company and also a Maharatna Public Sector Undertaking. It is doing work of finding, exploring and producing oil and natural gas at different places in India. The respondent, Swiber Offshore Construction Pte. Limited (Swiber), is a company incorporated in Singapore and was carrying on offshore construction activities. On 3 July 2010, ONGC and Swiber entered into a contract bearing No. MR/OW/MM/MHNRD-II/PL/08/2009 for execution of a project having value of USD 148,200,000. Under Clause 6.3.1 of the contract, the entire work was required to be completed on or before 30 April 2011. Clause 6.3.2 provided that if there was delay in completing the work, or if Swiber failed to perform its obligations under the contract, ONGC would get right to recover liquidated damages. As per this clause, Swiber was liable to pay liquidated damages at prescribed rate for every week of delay, subject to maximum limit of 10% of total contract value. The parties had already agreed between themselves that this amount was a genuine estimate of loss which ONGC may suffer because of delay and, therefore, ONGC would not be required to separately prove actual loss. Clause 6.3.4 further required Swiber to furnish a bank guarantee equal to the maximum amount of liquidated damages recoverable under the contract.

3. Before expiry of the original period of completion, Swiber requested ONGC to extend the time for finishing the project. By communication dated 5 May 2011, ONGC granted first extension and permitted completion of work up to 30 June 2011. While granting such extension, ONGC clearly kept open and reserved its

right to recover liquidated damages for the delay. Thereafter, Swiber again sought extension of time. By communication dated 17 June 2011, ONGC granted second extension up to 28 February 2012. Even while granting this extension, ONGC continued to reserve its right to levy liquidated damages in accordance with the terms of the contract.

4. On 3 October 2011, ANZ Banking Group issued a bank guarantee of USD 14,820,000 on behalf of Swiber as security towards possible liability of liquidated damages. Later on, this guarantee was replaced and continued through DBS Bank on 3 December 2015. On 22 February 2012, Swiber once again requested extension of time for completion of the project. By communication dated 14 March 2012, ONGC granted third extension up to 30 April 2012 and at the same time continued to reserve its right to recover liquidated damages. Thereafter, on 18 March 2012, Swiber sought one more extension. By communication dated 30 April 2012, ONGC granted what was described as the final extension and allowed time up to 31 May 2012 for completion of the project. Even at that stage also, ONGC expressly reserved its right to levy liquidated damages. Ultimately, the project came to be completed on 24 May 2012. After completion of the work, ONGC issued a Completion Certificate on 18 February 2013.

5. Subsequently, disputes arose between the parties in relation to the contract and claims arising therefrom. On 14 September 2015, Swiber invoked the arbitration clause by issuing a Notice of Arbitration. Thereafter, on 3 December 2015, Swiber furnished a

fresh bank guarantee bearing reference No. 811-02-0041188 through DBS Bank for an amount of USD 14,820,000 as security towards liquidated damages. The validity of this bank guarantee was extended from time to time and presently it remains valid up to 15 June 2026. During the period between July 2016 and September 2016, ONGC invoked the bank guarantee. Being dissatisfied with such invocation, Swiber approached this Court by filing proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 and sought restraint against encashment of the bank guarantee. Those proceedings were eventually disposed of on the basis of consent terms recorded by this Court on 8 September 2016. Shortly thereafter, on 6 October 2016, the Singapore High Court placed Swiber under judicial management and appointed judicial managers, including Mr. Bob Yap Cheng Ghee, for managing the affairs of the company.

6. On 15 July 2019, ONGC lodged claims aggregating to USD 156,346,000 before the Judicial Manager of Swiber in Singapore. According to ONGC, these claims represented additional costs and losses allegedly suffered by it because of failure on the part of Swiber to perform its obligations under various contracts. By communication dated 12 August 2022, the Judicial Manager informed ONGC that its claims had been examined and admitted to the extent of USD 51,224,353.74. Thereafter, by another communication dated 12 September 2022, ONGC was informed that the remaining part of its claim had been marked and kept aside for consideration and adjudication at a later stage. It was also stated that the total claim amount of USD 156,346,000 could

not be finally determined for the purpose of interim distributions because proceedings initiated by ONGC before the Singapore High Court were still pending. On 11 November 2022, the Singapore High Court passed an order directing winding up of Swiber and placed the company into liquidation. Liquidators, including Mr. Bob Yap Cheng Ghee, came to be appointed for conducting and administering the liquidation process. In the meantime, the arbitral proceedings continued. After completion of evidence and submissions, final arguments were heard and concluded, and in August 2023 the Arbitral Tribunal reserved the matter for passing its Award.

7. On 5 June 2025, Swiber extended the validity of the bank guarantee up to 15 June 2026. Thereafter, on 30 September 2025, the Arbitral Tribunal delivered its Award, which was received by ONGC on 9 October 2025. Under the Award, the Tribunal held that ONGC was not entitled to recover liquidated damages and consequently directed return of the bank guarantee to Swiber. The Tribunal also partly allowed certain claims made by Swiber and certain counterclaims raised by ONGC. After adjustment of the amounts found payable by either side, the Tribunal directed ONGC to pay Swiber a net amount of USD 4,113,200 together with interest at the rate of 5% per annum from the date of the Award till payment. The Tribunal further directed that each party shall bear its own costs. So far as claims made by Swiber were concerned, the Tribunal partly allowed claims relating to additional work and interface related issues. However, it rejected claims concerning delay mitigation expenses, standby charges,

insurance related claims, costs incurred towards extension of performance bank guarantee and various other claims for losses and expenses allegedly arising from delay. In relation to ONGC's counterclaims, the Tribunal rejected the claim for liquidated damages and directed return of the bank guarantee. The Tribunal also rejected ONGC's claims relating to customs duty and certain tax benefits. At the same time, it allowed limited counterclaims concerning use of ONGC facilities, crossing benefits and excess CENVAT credit.

8. Being aggrieved by certain findings and directions contained in the Award, ONGC filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 on 5 January 2026 seeking partial setting aside of the Award. Thereafter, on 16 January 2026, ONGC filed an application under Section 36(3) of the Arbitration and Conciliation Act, 1996 seeking, amongst other reliefs, stay of operation, execution and enforcement of the Award. The matter first appeared before this Court on 23 January 2026. At that stage, both sides agreed that the petition under Section 34 itself could be taken up for final hearing. This understanding was reached on the basis of an assurance given on behalf of Swiber that no steps for enforcement of the Award would be taken till the challenge proceedings were heard and decided.

9. In the meantime, since the bank guarantee was approaching its expiry date and the proceedings challenging the Award were still pending, ONGC filed the present proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 in May 2026. Through these proceedings, ONGC has sought various interim

reliefs, including continuation and extension of the bank guarantee.

10. On 1 June 2026, ONGC addressed a communication to the liquidators of Swiber requesting them to extend the validity of the bank guarantee beyond its scheduled expiry date.

11. Swiber filed its reply in the present proceedings on 9 June 2026. The bank guarantee is due to expire on 15 June 2026. According to ONGC, if the guarantee is allowed to expire while the challenge proceedings are still pending, ONGC would lose the contractual security furnished by Swiber and may suffer serious prejudice. ONGC contends that such prejudice would become more serious because Swiber is already under liquidation. It is in these circumstances that ONGC has filed the present petition seeking suitable interim protection, including continuation and extension of the bank guarantee till the proceedings challenging the Award are finally decided.

12. Mr. Behramkamdin, learned Senior Counsel appearing for the petitioner, submitted that ONGC has challenged the arbitral award dated 30 September 2025, which was received by it on 9 October 2025, by filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996. He submitted that ONGC has questioned those parts of the Award which contain findings against it, allow certain claims made by Swiber and reject, either wholly or partly, the counterclaims raised by ONGC. According to him, ONGC has specifically challenged the directions by which the Tribunal refused liquidated damages, directed return of the Bank

Guarantee and granted monetary reliefs in favour of Swiber.

13. Learned Senior Counsel submitted that, apart from filing the challenge petition, ONGC has also filed an application under Section 36(3) of the Arbitration and Conciliation Act seeking stay of operation and enforcement of the Award. According to him, ONGC has prayed for an unconditional stay of the Award, exemption from depositing any amount awarded under the Award and also a direction requiring Swiber to continue and keep alive the Bank Guarantee till final disposal of the Section 34 petition. He submitted that both the challenge petition and the stay application are presently pending before this Court and are yet to be finally decided.

14. Learned Senior Counsel submitted that the Bank Guarantee is now nearing its expiry and because of that ONGC was compelled to approach this Court by filing the present petition under Section 9 seeking urgent interim protection. According to him, ONGC has prayed that Swiber be directed to continue extending and maintaining the existing Bank Guarantee till final determination of the disputes concerning liquidated damages or at least till disposal of the Section 34 proceedings. He submitted that if for any reason the existing guarantee is not extended, then Swiber should be directed to furnish a fresh Bank Guarantee of equivalent value amounting to USD 14,820,000. According to him, these reliefs do not seek any final adjudication of rights but are only protective measures intended to preserve the existing security and avoid serious prejudice until the challenge proceedings are decided.

15. Learned Senior Counsel thereafter referred to the background of the dispute. He submitted that on 3 July 2010 the parties entered into Contract No. MR/OW/MM/MHNRD-II/PL/ 08/2009 having a total contract value of USD 148,200,000. Under the contract, Swiber was required to carry out extensive offshore works including laying approximately 75.5 kilometres of submarine pipelines and carrying out modification works on various offshore platforms and production facilities situated in the Bombay High region. According to him, the project was of substantial size and importance. It was not merely a routine construction activity but involved creation of offshore infrastructure and integration of such infrastructure with existing production systems used in oil and gas operations.

16. Learned Senior Counsel submitted that under the impugned Award the Tribunal held that ONGC was not entitled to recover liquidated damages and further directed return of the Bank Guarantee. He submitted that certain claims raised by Swiber and certain counterclaims raised by ONGC were partly allowed and after adjustment of accounts ONGC was directed to pay a net sum of USD 4,113,200 together with interest. He pointed out that ONGC's claim towards liquidated damages alone amounts to USD 12,480,504.60 and therefore the dispute regarding liquidated damages is of considerable financial significance. Learned Senior Counsel submitted that ONGC possesses a strong prima facie case in the challenge proceedings. According to him, the Award deserves to be set aside because the Tribunal granted reliefs without properly determining responsibility for delay. He

submitted that the Award reflects non application of mind, contains findings contrary to the express terms of the contract and also travels beyond the contractual arrangement agreed between the parties. According to him, the conclusions reached by the Tribunal are contrary to public policy of India, the fundamental policy of Indian law and the basic principles of justice. He submitted that rejection of ONGC's counterclaim for liquidated damages and the direction for return of the Bank Guarantee are contrary to settled legal principles and have caused serious prejudice to ONGC.

17. Learned Senior Counsel submitted that Clause 6.3.2 of the contract clearly provides that in the event of delay in completion of the work, ONGC would be entitled to recover liquidated damages from Swiber. According to him, the parties had specifically agreed that the liquidated damages represented a genuine pre-estimate of likely loss and that proof of actual loss was not necessary. He submitted that despite such a clear contractual arrangement, the Tribunal insisted upon proof of actual loss and thereby virtually rewrote the contract between the parties. According to him, such an approach is contrary to Section 28(3) of the Arbitration and Conciliation Act and contrary to settled principles governing contractual obligations. Learned Senior Counsel further submitted that the Tribunal failed to consistently apply the law laid down by the Supreme Court regarding liquidated damages. According to him, in large infrastructure projects where losses caused by delay are difficult to calculate with precision, parties are entitled to agree upon a genuine pre-estimate of loss and such stipulations

can be enforced without strict proof of actual damage. He submitted that the present project clearly falls within that category.

18. According to him, the Tribunal itself recognised that Clause 6.3.2 described liquidated damages as a genuine pre-estimate of loss and also accepted that proof of actual loss was not necessary. The Tribunal further referred to the principles laid down by the Supreme Court in ONGC v. Saw Pipes and other judgments. However, despite recording these principles, the Tribunal ultimately rejected ONGC's claim on the ground that actual loss was not proved. Learned Senior Counsel submitted that such reasoning is self-contradictory and legally unsustainable. He further submitted that the Tribunal failed to determine the most important issue in the dispute, namely, responsibility for delay. According to him, the findings on delay are internally inconsistent. He submitted that while the Tribunal rejected the delay analysis prepared by Swiber's own expert witness and also observed that responsibility for delay affecting the critical path could not be conclusively fixed upon either side, it nevertheless proceeded to deny liquidated damages altogether. According to him, the Tribunal itself accepted that Swiber had contributed towards delay and therefore the ultimate conclusion becomes difficult to reconcile with its own findings.

19. Learned Senior Counsel referred to various portions of the Award where the Tribunal observed that it was not possible to determine which party was responsible for critical delays, that both parties appeared to have contributed towards delay and that the available material was insufficient to conclusively establish

responsibility for delays affecting the critical path. According to him, once such findings were recorded, the Tribunal could not have rejected the claim for liquidated damages in the manner it eventually did. Learned Senior Counsel further submitted that the Award reflects non application of mind. He argued that the project concerned an important public utility undertaking connected with oil production and that the project was delayed by nearly one year. According to him, it is difficult to accept that such delay caused no loss whatsoever to ONGC. He submitted that the Supreme Court has repeatedly recognised that delay in commissioning important public utility projects itself gives rise to a presumption of loss and thereafter the burden shifts upon the defaulting party to establish that no loss was suffered.

20. Learned Senior Counsel further submitted that the Tribunal failed to properly consider important evidence led by ONGC. According to him, the Tribunal proceeded on an incorrect assumption that ONGC's case was based only upon loss of revenue arising from delayed production of oil. He submitted that ONGC had produced evidence relating to several other categories of loss including overhead expenses, depreciation of capital assets, retention of manpower, retention of machinery and expenditure incurred towards certification agencies and third-party agencies. According to him, these matters were material and required proper examination while adjudicating the claim for liquidated damages.

21. Learned Senior Counsel submitted that ONGC reserves its right to make further submissions regarding other findings contained in the Award as well as the contentions raised by Swiber

in its reply, if such submissions become necessary during the hearing. He further submitted that the Award itself was delivered after an inordinate and unexplained delay. According to him, final arguments concluded before the Tribunal in August 2023, whereas the Award came to be pronounced almost two years thereafter. He submitted that under the contract the parties had contemplated that the Award would be delivered within twelve months from the first meeting of the Tribunal. According to him, such prolonged delay adversely affected proper appreciation of ONGC's submissions and evidence and therefore constitutes an additional ground of challenge.

22. Learned Senior Counsel submitted that unless the Bank Guarantee is continued, ONGC would suffer serious and irreversible prejudice. According to him, the loss which would result from expiry of the Bank Guarantee cannot be adequately compensated at a later stage. He pointed out that Swiber was first placed under judicial management by orders of the Singapore High Court and was thereafter ordered to be wound up and placed into liquidation. Liquidators have since been appointed. According to him, in view of this insolvency situation there is a real possibility that ONGC may not be able to recover amounts due to it even if it ultimately succeeds in the Section 34 proceedings.

23. Learned Senior Counsel submitted that if the Bank Guarantee is permitted to lapse, ONGC would lose valuable security worth approximately USD 14 million and would thereafter be required to stand alongside other creditors in the liquidation proceedings. According to him, recovery from a company already

under liquidation is uncertain and may ultimately yield only a limited recovery. Learned Senior Counsel further submitted that Swiber's former Judicial Manager had admitted claims lodged by ONGC to the extent of USD 51,224,353.74. According to him, this amount is substantially higher than the amount awarded in favour of Swiber under the impugned Award. He submitted that if the Bank Guarantee is allowed to lapse, ONGC's ability to recover amounts due to it may be seriously affected and this may ultimately result in loss to the public exchequer.

24. Learned Senior Counsel submitted that because Swiber is under liquidation, there exists every possibility that the Bank Guarantee may not be extended in future. According to him, if the guarantee expires before final disposal of the challenge proceedings, ONGC would permanently lose the contractual security available to it and would suffer irreparable harm which may never be adequately compensated. He submitted that the Bank Guarantee has remained alive for more than ten years and forms an integral part of the security arrangement contemplated under the contract. According to him, Clause 6.3.4 obliges Swiber to maintain such security till final settlement of disputes. He submitted that permitting the guarantee to lapse while challenge proceedings remain pending would defeat the very object for which the security was maintained and would result in serious injustice.

25. Learned Senior Counsel also submitted that Swiber's financial difficulties have resulted in claims being made by various subcontractors against ONGC. According to him, ONGC has

already suffered considerable hardship and is presently exposed to claims aggregating to approximately Rs.240 crores because of defaults allegedly committed by Swiber. He submitted that the balance of convenience lies overwhelmingly in favour of ONGC. According to him, the relief sought is purely protective and intended only to preserve the existing position till final adjudication of the Section 34 proceedings. He submitted that if relief is refused, the contractual security represented by the Bank Guarantee would disappear. On the other hand, if relief is granted, it would merely continue an arrangement which has remained in existence for many years.

26. Learned Senior Counsel submitted that no substantial prejudice would be caused to Swiber if continuation of the Bank Guarantee is directed. According to him, Swiber would merely be required to maintain a security which has already remained in force for more than a decade. He submitted that since Swiber is already under liquidation, continuation of the guarantee during pendency of the challenge proceedings would not materially affect its financial position. According to him, refusal of relief would create a wholly disproportionate result. ONGC would lose security equivalent to ten percent of the contract value whereas the burden upon Swiber would only be continuation of the existing Bank Guarantee. He submitted that if ONGC ultimately succeeds in the challenge proceedings, recovery may become practically impossible because of Swiber's liquidation. Learned Senior Counsel lastly submitted that ONGC is a Public Sector Undertaking and shall abide by any directions issued by this Court.

27. On the aspect of urgency, Learned Senior Counsel submitted that the Bank Guarantee, which forms part of the subject matter of the arbitration as well as the challenge proceedings, is due to expire on 15 June 2026. According to him, if the guarantee is not extended before that date, any amount which may ultimately become payable to ONGC towards liquidated damages may become incapable of recovery. He further submitted that when the stay application was taken up on 23 February 2026, both sides agreed that the Section 34 petition itself could be heard finally. According to him, this understanding was reached on the assurance given on behalf of Swiber that no steps would be taken for enforcement of the Award pending hearing of the challenge petition. He submitted that the Section 34 petition was thereafter listed on 1 April 2026, but due to paucity of time the matter could not be reached and came to be adjourned to 13 July 2026, which is after expiry of the Bank Guarantee. According to him, in view of this situation ONGC mentioned the stay application on 20 April 2026 and sought urgent circulation because the Bank Guarantee was approaching expiry. He submitted that the Court thereafter directed immediate circulation of the matter after reopening following the vacation.

28. Learned Senior Counsel submitted that thereafter the Supreme Court, in *Home Care Retail Marts (P) Ltd. v. Haresh N. Sanghavi*, 2026 SCC OnLine SC 670, clarified that even an unsuccessful party in arbitration can seek interim measures under Section 9 of the Arbitration and Conciliation Act. According to him, it was after this legal development that ONGC filed the

present Section 9 petition on 15 May 2026. He submitted that the Court vacation remained operative from 11 May 2026 till 7 June 2026 and therefore ONGC could not effectively move the present petition earlier.

29. Learned Senior Counsel further submitted that this Court has recently applied the principles laid down in Home Care Retail Marts while deciding *ONGC v. Larsen & Toubro, Ltd.*, 2026 SCC OnLine Bom 2861, wherein the successful party in arbitration was directed to continue the bank guarantee pending challenge to the Award. According to him, the facts of the present case are substantially similar and therefore ONGC is entitled to similar protection. Lastly, Learned Senior Counsel submitted that both the Section 34 petition and the stay application were heard on 10 June 2026 and the matter has been fixed on 24 June 2026 for final arguments in the challenge proceedings. According to him, till that time the Bank Guarantee deserves to be protected so that the challenge proceedings do not become meaningless.

30. Mr. Venkatesh Dhond, learned Senior Counsel appearing for the respondent, opposed the petition and submitted that the petitioner has not approached this Court with complete disclosure of all material facts. According to him, the petitioner has not placed before this Court the Consent Terms entered into between the parties and recorded by this Court while filing the present petition under Section 9. Learned Senior Counsel pointed out that the petitioner itself has relied upon those very Consent Terms in its application under Section 36(3), being IA (L) No. 1628 of 2026, and has even reproduced the relevant clauses therein while

seeking stay of the Award. However, in the present petition there is no reference to those Consent Terms. According to him, this omission is significant because the Consent Terms directly deal with the continuation of the Bank Guarantee. He submitted that under those Consent Terms the parties had agreed that the Bank Guarantee would remain alive only for a period of 120 days after issuance of the arbitral award. According to him, that period expired on 28 January 2026. Learned Senior Counsel therefore submitted that the petitioner cannot now seek extension of the Bank Guarantee beyond the period consciously agreed by the parties themselves.

31. Learned Senior Counsel next submitted that there is in fact no genuine urgency in the present matter. According to him, the arbitral award was delivered on 30 September 2025 and was received by the petitioner shortly thereafter. The petitioner filed its challenge petition under Section 34 on 5 January 2026 and thereafter filed an application under Section 36(3) on 16 January 2026. He pointed out that even in that application the petitioner had specifically sought continuation of the Bank Guarantee. However, despite seeking such relief, the petitioner did not pursue the matter with any real urgency for several months. Learned Senior Counsel submitted that although some procedural steps were taken from time to time, no serious effort was made to obtain immediate orders from the Court. He further pointed out that the present petition under Section 9 came to be filed only on 15 May 2026 and was served upon the respondent on 1 June 2026, barely a few days before the Bank Guarantee was due to expire on 15

June 2026. According to him, the urgency now projected by the petitioner is therefore not entirely genuine.

32. Learned Senior Counsel submitted that this aspect becomes even more important because the petitioner was throughout aware that the agreed period of 120 days under the Consent Terms had already expired on 28 January 2026. According to him, if continuation of the Bank Guarantee was truly indispensable and urgent, the petitioner would have actively pursued the application under Section 36(3) immediately after filing it. Instead, according to him, the petitioner allowed considerable time to pass without obtaining any orders and has now approached the Court when the expiry date is almost at hand. Learned Senior Counsel submitted that a party which remains inactive for several months cannot subsequently create urgency and then seek extraordinary discretionary protection from the Court on that basis.

33. Learned Senior Counsel further submitted that the petitioner has failed to establish even a prima facie case on merits. According to him, the reliance placed upon the decision in Larsen & Toubro, is misplaced because the facts of that case were materially different. He submitted that in *Larsen & Toubro,* the Tribunal itself had recognised entitlement to a part of the liquidated damages and the dispute was largely regarding calculation and quantification of the amount. According to him, there existed a crystallised entitlement in favour of ONGC in that matter. The present case, according to him, stands on an entirely different footing. Here, the Arbitral Tribunal has categorically held that ONGC is not entitled to any liquidated damages whatsoever and

has further directed return of the Bank Guarantee. According to him, there is no admitted liability, no crystallised entitlement and no finding in favour of ONGC which can justify continuation of the security.

34. Learned Senior Counsel submitted that the findings challenged by ONGC are not clerical mistakes, computational errors or accidental omissions. According to him, the Tribunal arrived at those conclusions only after a detailed examination of the evidence placed before it. He submitted that the Tribunal specifically found that ONGC failed to establish that delays affecting the critical path of the project were solely attributable to Swiber. The Tribunal also found that ONGC had failed to establish the losses allegedly suffered by it. Learned Senior Counsel pointed out that the Tribunal further considered certain acts and omissions on the part of ONGC itself, including alleged delay in providing access and other relevant circumstances while examining the claim for liquidated damages. According to him, all these are findings of fact arrived at after appreciation of evidence. He submitted that the petitioner is in substance seeking re-appreciation of evidence, which is impermissible within the limited scope of challenge available under Section 34.

35. Learned Senior Counsel further submitted that the present arbitration is an International Commercial Arbitration since the respondent is a company incorporated in Singapore. According to him, in such arbitrations the ground of patent illegality is not available as a basis for challenging the Award. He submitted that ONGC is confined only to the limited grounds available under the

public policy provisions of Section 34. According to him, the statutory framework does not permit a review on merits. Therefore, the petitioner cannot seek a fresh examination of the evidence or invite the Court to substitute its own view for that of the Tribunal under the guise of challenging the Award.

36. Learned Senior Counsel further submitted that the petitioner is effectively abusing the process of the Court by pursuing substantially the same relief in two separate proceedings simultaneously. According to him, the reliance placed upon *Larsen & Toubro,* is again misplaced because that judgment does not permit a party to pursue identical reliefs in parallel proceedings. He submitted that while the Court in *Larsen & Toubro,* recognised that remedies under Sections 9 and 36(3) may be available in appropriate circumstances, it did not authorise a litigant to keep both proceedings alive simultaneously while seeking the same substantive protection. Learned Senior Counsel pointed out that the application under Section 36(3), being IA (L) No. 1628 of 2026, is still pending and continuation of the very same Bank Guarantee forms part of the relief sought therein. At the same time, ONGC has filed the present petition under Section 9 seeking substantially identical relief. According to him, such simultaneous pursuit of the same relief is impermissible and amounts to misuse of the judicial process.

37. Learned Senior Counsel submitted that no such situation existed in *Larsen & Toubro,*. According to him, that case did not involve any consent terms and there was no agreed outer limit governing continuation of the Bank Guarantee. He submitted that

the petitioner has disclosed certain facts before this Court in one proceeding but has chosen not to disclose equally important facts in the present proceeding. According to him, the petition deserves dismissal on this ground alone. Learned Senior Counsel further submitted that this Court cannot rewrite the Consent Terms voluntarily entered into by the parties by directing extension of the Bank Guarantee beyond the period specifically fixed therein. He pointed out that the *Larsen & Toubro,* decision did not concern a situation where parties had entered into consent terms expressly prescribing the maximum duration for which the guarantee would survive after the arbitral award. According to him, the continuation directed in *Larsen & Toubro,* was based upon contractual provisions and equitable considerations in the absence of any agreed outer limit. The facts of the present case, according to him, are fundamentally different. Learned Senior Counsel submitted that under the Consent Terms dated 5 September 2016, which were recorded by this Court on 8 September 2016, the parties expressly agreed that the liquidated damages Bank Guarantees would remain valid only for a period of 120 days after issuance of the arbitral award. According to him, the purpose of this arrangement was to provide sufficient time for either side to take appropriate legal recourse after the Award. By agreeing to such a clause, both parties consciously fixed the duration of the security and accepted the consequences flowing from it. Learned Senior Counsel submitted that the agreed period expired on 28 January 2026. Therefore, if this Court now directs continuation of the Bank Guarantee, it would not merely preserve an existing

arrangement pending adjudication. According to him, it would amount to altering and rewriting the Consent Terms which the parties voluntarily accepted and which were subsequently recorded by the Court. Learned Senior Counsel submitted that even the principles laid down in *Home Care Retail Marts* do not authorise the Court to ignore or override binding consent arrangements entered into by experienced commercial parties acting with legal advice.

38. Summarising his submissions, learned Senior Counsel contended that the principles emerging from *ONGC v. Larsen & Toubro,* only recognise that post-award relief under Section 9 may be granted in exceptional situations. According to him, the petitioner has failed to satisfy that standard on every material aspect. He submitted that the petitioner has failed to disclose the Consent Terms in the present proceedings despite relying upon them in another proceeding; the agreed 120-day period for continuation of the Bank Guarantee expired on 28 January 2026; this Court cannot rewrite the Consent Terms by extending the guarantee beyond the period fixed by the parties; the petitioner has approached the Court after considerable and unexplained delay; no prima facie case has been established because the Tribunal has completely rejected the claim for liquidated damages; the present arbitration being an International Commercial Arbitration, the scope of challenge remains extremely limited; and finally, the petitioner continues to pursue substantially identical reliefs in separate proceedings. On all these grounds, Learned Senior Counsel submitted that the petition is devoid of merit and

deserves to be dismissed.

REASONS AND ANALYSIS:

39. I have carefully considered the submissions made by both sides and have also gone through the documents and material placed on record.

40. The dispute between the parties has passed through several stages over a period of more than fifteen years. The matter began with a contract entered into between ONGC and Swiber on 3 July 2010 for carrying out offshore works in the Bombay High area. The contract value was USD 148,200,000, which shows that the project involved substantial public money. Under Clause 6.3.2 of the contract, the parties had agreed that if there was delay in completion of the work, liquidated damages could be recovered, subject to a maximum limit of ten percent of the contract value. Clause 6.3.4 further provided that instead of immediate deduction of such amount, the contractor could furnish a bank guarantee as security towards possible liability for liquidated damages. The material placed before the Court shows that the project was not completed within the contractual period. Swiber sought extension of time on more than one occasion and those extensions were granted by ONGC. However, while granting such extensions, ONGC reserved its right to recover liquidated damages. Ultimately, the work was completed on 24 May 2012 and thereafter a completion certificate came to be issued on 18 February 2013.

41. Even after completion of the project, the disputes between the parties continued regarding delays arising out of the contract.

These disputes were referred to arbitration and remained pending for several years. After recording evidence and hearing both sides, the Arbitral Tribunal delivered its Award on 30 September 2025, which was received by ONGC on 9 October 2025. Under the Award, the Tribunal rejected ONGC's claim for liquidated damages, directed return of the bank guarantee and awarded a net amount of USD 4,113,200 in favour of Swiber. Being dissatisfied with these findings, ONGC filed proceedings under Section 34 of the Arbitration and Conciliation Act challenging the Award. ONGC also filed an application seeking stay of operation and enforcement of the Award. During pendency of those proceedings, the present petition under Section 9 has been filed seeking continuation of the bank guarantee until the challenge proceedings are decided.

42. The next aspect which requires consideration is the parameters within which the present petition is required to be examined. Here, a arbitral award has already been rendered after detailed proceedings, consideration of evidence and hearing of arguments. Therefore, the principles applicable to a post-award petition stand on a different footing. The Supreme Court in *Home Care Retail Marts* has clarified that even a party which has not succeeded before the Arbitral Tribunal is not barred from invoking Section 9 after the award. At the same time, the Supreme Court has also made it clear that such power cannot be exercised in a routine manner. The Court has observed that where the applicant is faced with an adverse award, the threshold for obtaining interim protection becomes much higher. The reason behind such an approach is that once an arbitral award has been delivered, the

findings recorded by the Tribunal continue to operate unless they are set aside. Therefore, an unsuccessful party cannot point out that a petition under Section 34 has been filed and seek continuation of interim arrangement. If such a principle is accepted, every unsuccessful party would become entitled to interim protection merely because it has challenged the award. That is not what the Supreme Court has held. Something more is required. Apart from establishing a prima facie case, balance of convenience and likelihood of irreparable injury, the applicant must demonstrate existence of exceptional circumstances which are capable of justifying departure from the normal rule. The language used by the Supreme Court is important. The real question is whether the circumstances are so extraordinary that refusal of interim protection would result in a situation which cannot later be corrected even if the challenge succeeds. Thus, the inquiry before this Court is whether the present case crosses the higher threshold contemplated by the Supreme Court.

43. ONGC has attempted to demonstrate that such exceptional circumstances do exist in the present case. Learned Senior Counsel appearing on behalf of ONGC submitted that the Award suffers from legal infirmities and that the challenge raised by ONGC is not frivolous. According to ONGC, Clause 6.3.2 of the contract treated liquidated damages as a genuine pre-estimate of loss and specifically dispensed with the necessity of proving actual loss. ONGC submits that this arrangement was agreed between the parties while entering into the contract. Therefore, according to ONGC, once delay stood established and the contractual conditions

were satisfied, the Tribunal ought not to have insisted upon proof of actual loss. ONGC points out that the Tribunal noticed the contractual provision and also referred to the law laid down by the Supreme Court regarding liquidated damages. Yet, according to ONGC, the Tribunal rejected the claim because actual loss was not proved. It is argued that such an approach changes the agreement entered into by the parties.

44. ONGC has further submitted that the findings recorded by the Tribunal on the issue of delay do not appear to be consistent with each other. According to ONGC, the Tribunal itself observed that it was difficult to conclusively determine which party alone was responsible for delays affecting the critical path of the project. The Tribunal also noticed that responsibility for delay could not be fixed upon one side. However the Tribunal rejected the claim for liquidated damages. According to ONGC, these findings do not stand together. ONGC argues that if the Tribunal itself found it difficult to identify one party as responsible for delay, then the rejection of liquidated damages required further explanation. It is also contended that the Tribunal did not consider evidence relating to categories of loss apart from delayed production revenue. Reference has been made to overhead expenses, depreciation of assets, retention of manpower, retention of machinery and expenditure incurred towards certification and third party agencies. According to ONGC, these were important aspects having bearing on the question of loss and they deserved detailed consideration. ONGC therefore submits that these issues are substantial in nature and raise questions which require

examination in the pending proceedings under Section 34 of the Arbitration and Conciliation Act.

45. ONGC has also placed emphasis on the financial condition of Swiber. It has been pointed out that Swiber has been placed under liquidation pursuant to orders passed by the Singapore Court and that liquidation proceedings are continuing. It has further been pointed out that claims lodged by ONGC have been admitted in those proceedings. According to ONGC, if the bank guarantee is allowed to expire while the challenge proceedings remain pending, the security presently available to ONGC would disappear. ONGC submits that recovery from a company which is already under liquidation may become impossible. According to ONGC, once the guarantee expires, even if it ultimately succeeds in the challenge proceedings, there may remain no security against which recovery can be made. Therefore, ONGC contends that continuation of the bank guarantee is necessary to preserve the existing position until the challenge proceedings are decided.

46. These submissions made on behalf of ONGC cannot be said to be without merit. Some of the concerns raised by ONGC certainly require consideration. However, when the matter is examined in the context of the present petition under Section 9, the submissions advanced on behalf of the respondent appear to carry weight. The respondent has pointed out a circumstance which goes to the root of the discretionary relief sought before this Court. According to the respondent, ONGC has not disclosed in the present petition the Consent Terms dated 5 September 2016, though those Consent Terms have been specifically relied upon by

ONGC in its application filed under Section 36(3). The record further shows that the said Consent Terms were recorded by this Court on 8 September 2016. According to the respondent, these Consent Terms directly concern continuation of the bank guarantee and therefore have a connection with the relief presently sought by ONGC. The respondent submits that when the Court is called upon to decide whether the bank guarantee should continue or not, any earlier arrangement entered into by the parties regarding the continuation of that guarantee becomes a matter of importance.

47. According to the respondent, the Consent Terms provide that the bank guarantee would remain alive only for a period of 120 days after the arbitral award was issued. The award having been delivered on 30 September 2025, the said period expired on 28 January 2026. If this arrangement is accepted, then the present request seeking continuation of the bank guarantee till disposal of the Section 34 proceedings extends beyond what was consciously agreed by the parties themselves. This aspect assumes importance because the parties were not ordinary individuals entering into an arrangement without understanding its implications. They were commercial entities engaged in a high value project and were represented by legal advisors. They were fully aware of the consequences flowing from the arrangement they accepted. The Consent Terms were reduced into writing after discussions and thereafter recorded by order. Prima facie, therefore, they reflect a conscious acceptance of responsibilities by both sides.

48. Viewed from this perspective, the respondent's submission is that ONGC is not merely seeking preservation of an existing arrangement. According to the respondent, ONGC is seeking enlargement of its rights beyond the period agreed in the Consent Terms. The object of Section 9 is to preserve existing securities so that the subject matter of the dispute remains protected pending adjudication. It is not intended to extend existing rights beyond limits agreed upon by the parties. Therefore, once parties have agreed that the bank guarantee would remain alive only for a specified period after the award, the Court would necessarily be required to exercise caution before directing continuation beyond that agreed period. Such a direction may, at least prima facie, alter the agreement. The existence of these Consent Terms therefore introduces feature which distinguishes the present case from situations where no agreed outer limit exists regarding continuation of security. For this reason, the objection raised by the respondent cannot be treated as a mere technical defence. It touches the foundation of the relief sought by ONGC and therefore deserves weight while considering the present petition.

49. In these circumstances, the Court is required to balance the considerations placed before it. The Court is faced with two considerations. One concerns preservation of security pending challenge proceedings. The other concerns respect for a arrangement entered into by the parties. It therefore becomes necessary to examine whether the present matter falls within the category of those rare and compelling cases contemplated by the Supreme Court in *Home Care Retail Marts* and whether the higher

threshold prescribed therein has been satisfied.

50. I am also of the view that the non-disclosure pointed out by the respondent cannot be treated as a minor omission which may be overlooked while considering a prayer for discretionary relief under Section 9 of the Arbitration Act. A reading of the petition shows that reference has been made to the clauses, particularly Clauses 6.3.2 and 6.3.4. Detailed submissions have been advanced regarding the contractual right to liquidated damages, the purpose of the bank guarantee and the manner in which ONGC claims protection under the contractual arrangement. However, what attracts attention is that the Consent Terms dated 5 September 2016, which were recorded by this Court on 8 September 2016, have not been placed before the Court with the same degree of emphasis. This circumstance assumes significance because the material on record indicates that ONGC itself has relied upon those Consent Terms in its application under Section 36(3). Therefore, it becomes difficult to accept that the document was either unknown to ONGC. On the contrary, ONGC's own conduct in the connected proceedings indicates that the document was considered important for supporting its case. In such circumstances, absence of similar disclosure in the present proceedings assumes importance.

51. It is in this background that the respondent contends that the omission was deliberate. Whether the omission amounts to suppression or whether it should merely be described as non-disclosure is not the central issue. The Court is not concerned with labels. What matters is the effect of the omission. The fact remains that the Court was not informed in the present petition that there

existed an arrangement between the parties governing continuation of the bank guarantee after the Award. The relief presently sought concerns continuation of that bank guarantee. Therefore, any document having a bearing upon its expiry assumes importance. In matters involving discretionary jurisdiction, a party approaching the Court is expected to place before the Court all material facts, including facts which may not support its own case. Such obligation becomes even more important when the party seeks extraordinary protection against the consequences of an arbitral award which operates against it. Viewed from this angle, the omission assumes significance and cannot be brushed aside as a mere procedural lapse.

52. The importance of this omission becomes even more apparent when the contents of the Consent Terms are examined. According to the respondent the parties had agreed that the bank guarantee would continue only for a period of 120 days after issuance of the arbitral award. This was incorporated into Consent Terms and accepted by order. Consequently, the arrangement ceased to remain acquired a degree of sanctity. If the parties had fixed an outer limit for continuation of the guarantee, then that arrangement necessarily has a bearing upon the relief sought by ONGC. The Court cannot ignore such a circumstance while deciding whether continuation beyond that period should be directed.

53. In such circumstances, fairness required that the Court should have been informed about the existence of this arrangement. A litigant seeking discretionary relief is expected to

approach the Court with openness. The Court exercises discretionary powers not only on the basis of legal rights but also on the point of fairnes. Where a party seeks continuation of a security beyond the period which it had itself agreed upon in proceedings, failure to disclose that agreement becomes a relevant factor. Such omission may not be sufficient to non suit the applicant in every case. However, it certainly affects the Court's assessment of the overall equities. The Court cannot overlook that the respondent has opposed petitioners claim on the basis of an arrangement which the petitioner had accepted. Therefore, considering whether extraordinary post-award protection should be granted, this omission goes against ONGC.

54. The next aspect relates to urgency, which ONGC has relied upon while seeking interference from this Court. According to ONGC, the bank guarantee is due to expire on 15 June 2026 and if it is not extended before that date, the security would come to an end. ONGC submits that once the guarantee expires, it may not be possible to bring back the same position. However, the issue of urgency cannot be looked at separately without examining the conduct of the party seeking relief. While considering a request for urgent protection, the Court is required to see not only the nature of the apprehended injury but also the promptness shown by the applicant. Normally, a party seeking urgent orders must demonstrate that it acted with reasonable speed once the necessity for protection became known. Delay and urgency do not move together. If a litigant is aware of the facts and consequences, yet allows time to pass before approaching the Court, the Court is

entitled to examine whether the urgency is genuine or whether it has arisen because of the litigant's own conduct. It is a settled principle that equitable relief is granted in favour of a vigilant litigant.

55. The Award was received by ONGC on 9 October 2025. Thereafter, ONGC instituted its petition under Section 34 on 5 January 2026. The application under Section 36(3) followed on 16 January 2026. Significantly, even in that application ONGC had sought continuation of the bank guarantee. Therefore, the issue regarding continuation of the guarantee was within the knowledge of ONGC from the beginning. Thereafter, on 23 February 2026, the parties agreed that the Section 34 petition itself could be taken up for final hearing. The matter was listed on 1 April 2026 but could not be reached. It is true that the proceedings did not progress in the manner expected. However, even after that stage, the record does not indicate any immediate effort for obtaining urgent orders concerning continuation of the bank guarantee for a considerable period. The present petition under Section 9 came to be filed only on 15 May 2026 and was served upon the respondent on 1 June 2026, that is only a short time before expiry of the guarantee on 15 June 2026. ONGC has attempted to explain this by relying upon the judgment of the Supreme Court in *Home Care Retail Marts Pvt. Ltd.,* which was delivered on 24 April 2026. According to ONGC, it was only after the Supreme Court clarified that even an unsuccessful party in arbitration could seek post-award protection under Section 9 that the present petition came to be filed. This explanation cannot be brushed aside altogether. At the same time,

it is important that long before *Home Care Retail Marts* was delivered, ONGC had sought continuation of the same bank guarantee in its application under Section 36(3) filed on 16 January 2026. Therefore, the concern regarding preservation of the guarantee did not arise for the first time after the Supreme Court judgment. The decision in *Home Care Retail Marts* may explain the remedy chosen by ONGC, but it does not explain why effective steps were not pursued earlier.

56. These dates become important because ONGC was aware throughout this period about the expiry date of the guarantee. It was also aware of the respondent's position regarding extension of the same. If continuation of the guarantee was of urgency, one would expect immediate steps to get protection from the Court. Instead, there appears to have been a substantial period during which no interim relief was secured. Therefore, it becomes difficult to accept that the urgency arose because of circumstances beyond the control of ONGC. To some extent, the urgency appears to have developed because available remedies were not pursued with urgency. The law certainly protects a diligent litigant. However, where a party allows valuable time to pass and approaches the Court only when the deadline is about to expire, the Court is entitled to consider such conduct while exercising discretionary jurisdiction. Consequently, the respondent's submission that the urgency is partly self-created deserves due consideration.

57. ONGC has urged its plea of urgency by referring to the liquidation of Swiber and by pointing out that claims aggregating to approximately USD 51.22 million have been admitted in the

proceedings pending before the Singapore Court. Whenever a company enters liquidation, questions arise regarding recoverability of claims. Therefore, the apprehension expressed by ONGC cannot be said to be without basis. The Court cannot ignore the fact that Swiber is under liquidation and that ONGC has lodged claims in those proceedings. The possibility that recovery may become more difficult in future because of liquidation is certainly a factor which deserves consideration. At the same time, the issue which this Court is required to decide is narrower than what ONGC seeks to project. The scope of the present petition is focused on the relief which has been claimed and the foundation on which that relief rests. Merely because ONGC may have claims against Swiber in other proceedings, that by itself cannot enlarge the scope of the present petition. The controversy before the Court has to be examined within its own boundaries. The bank guarantee in question was furnished in a particular contract. It was not security created for all future disputes between the parties. The material on record shows that the guarantee was furnished in connection with the contract relating to liquidated damages under Clauses 6.3.2 and 6.3.4. Its purpose was linked to the issue of delay and liability towards liquidated damages. It was never intended to operate as a blanket security covering every financial claim which ONGC may raise against Swiber. Therefore, although the fact of liquidation may increase ONGC's apprehensions regarding recovery, that circumstance cannot alter the purpose for which the guarantee was furnished. The respondent is therefore justified in contending that the guarantee cannot now be

transformed into a general security securing the entire financial exposure which ONGC claims to face in the liquidation proceedings.

58. Once the matter is viewed from this angle, the focus shifts from the financial condition of Swiber to a legal question. The real issue is not whether Swiber is in liquidation. The real issue is whether ONGC presently possesses a legally enforceable right to insist that this particular bank guarantee should continue beyond the period which had been agreed between the parties. The fact of liquidation may strengthen ONGC's apprehension regarding recoverability. However, apprehension alone cannot create a legal right. Therefore, although the liquidation proceedings lend support to ONGC's concerns, they do not answer the question before the Court. The fact of liquidation, standing alone, is insufficient to elevate the present matter to the category of a compelling case contemplated by the Supreme Court in *Home Care Retail Marts*.

59. The merits of the challenge also do not provide ONGC assistance necessary for obtaining relief under Section 9. It is true that ONGC has challanged the Award. ONGC has contended that the Tribunal misunderstood the law relating to liquidated damages, failed to appreciate the contractual provisions, did not evaluate the evidence and ecorded findings which are inconsistent with each other. These submissions can be argued in Section 34 proceedings. They cannot be dismissed as frivolous. However, this Court is not sitting as an appellate authority over the Award. Nor is the Court presently called upon to conclusively determine whether the conclusions reached by the Tribunal are correct or incorrect.

Those questions fall for consideration in the proceedings under Section 34.

60. The Award does not appear to be founded upon any clerical mistake, computational error or accidental omission which can be identified on the face of the record. The respondent has pointed out that the Tribunal undertook an examination of the material concerning delays, analysed the rival evidence and thereafter arrived at the conclusion that ONGC had failed to establish that delays affecting the critical path of the project were attributable to Swiber. The Tribunal further held that ONGC had not established the loss claimed by it. The Tribunal also appears to have taken into account certain acts and omissions on the part of ONGC. Whether those findings are sustainable or whether they suffer from legal infirmities is a matter which will have to be determined in the Section 34 proceedings. As matters presently stand, however, those findings continue to form part of arbitral award. Until the Award is set aside, it cannot be ignored while considering a prayer for post-award interim protection. This circumstance limits the extent to which the Court can interfere at the present stage.

61. This aspect assumes importance because the relief sought by ONGC is continuation of the bank guarantee even though the Arbitral Tribunal has rejected ONGC's claim for liquidated damages and has directed return of that guarantee. In substance, ONGC seeks continuation of a arrangement despite findings recorded against it in the Award and despite the subsequent arrangement reflected in the Consent Terms. Such a relief can be granted only when the applicant is able to demonstrate an exceptionally strong

prima facie case coupled with circumstances of a compelling nature. At this stage, I am unable to conclude that the challenge raised by ONGC is so strong that the Award can almost be ignored while considering interim protection. The challenge undoubtedly raises arguable issues. Some of the contentions advanced by ONGC may require examination in the Section 34 proceedings. However, an arguable challenge is not enough. The judgment in *Home Care Retail Marts* requires something much more. It requires existence of circumstances which are truly exceptional. Tested on that standard, the merits presently shown by ONGC do not appear to reach the level necessary for grant of the extraordinary protection sought in the present proceedings.

62. The submission advanced by the respondent regarding the nature of the arbitration also deserves consideration. It is not disputed that Swiber is a company incorporated in Singapore. Consequently, the arbitration falls within the category of an international commercial arbitration. According to the respondent, in such matters the ground of patent illegality is not available as a basis for setting aside an arbitral award. Whether that contention succeeds or fails is an issue which will have to be examined in the Section 34 proceedings. I do not propose to express any final opinion on that aspect. Nevertheless, the submission draws attention to an important limitation governing challenges to international commercial awards and therefore cannot be ignored.

63. The relevance of this aspect lies in the narrow scope of judicial interference available in relation to international commercial arbitral awards. Courts are not expected to reassess

evidence, reappreciate factual material or undertake a detailed review on merits while exercising supervisory jurisdiction. The legislative policy under the Arbitration Act is to minimise judicial intervention. Therefore, where the challenge is governed by restricted statutory parameters, the Court must proceed with caution before granting interim protection founded upon submissions directed against the merits of the Award. If broad interim protection is granted merely because the unsuccessful party asserts that the Tribunal reached an incorrect conclusion, the distinction drawn by law between a challenge proceeding and an appeal may become insignificant. For this reason also, the petitioner's request for extensive post-award protection becomes less acceptable.

64. It is true that the Supreme Court in *Home Care Retail Marts* has held that Sections 9, 34 and 36 operate in distinct fields. The Supreme Court has further observed that the mere availability of a remedy under Section 34 or a stay application under Section 36 cannot by itself prevent a party from invoking Section 9. Therefore, the present petition cannot be rejected merely because ONGC has approached the Court under Sections 34 and 36. At the same time, the respondent's objection is not confined only to maintainability. The respondent points out that substantially similar protection regarding continuation of the bank guarantee was being pursued in more than one proceeding. It is also relevant to note that during the course of hearing, ONGC clarified that if this Court examines the present petition on merits, it is willing not to press the prayer regarding continuation of the bank guarantee

in the pending Section 36(3) application. This statement reduces the force of the objection. Therefore, the parallel proceedings cannot by itself become a ground for rejecting the petition. Therefore, the existence of parallel proceedings is not a bar in view of *Home Care Retail Marts*.

65. The Supreme Court in *Home Care Retail Marts* has made it clear that while considering a petition under Section 9, the Court must examine whether a prima facie case exists, whether the balance of convenience lies in favour of the applicant and whether refusal of protection is likely to result in irreparable prejudice. At the same time, where the applicant is a party who has suffered an award, the Supreme Court has held that a higher standard is required and the case must disclose circumstances of a rare and compelling nature. So far as the question of prima facie case is concerned, ONGC has undoubtedly raised several grounds in its challenge to the Award. However, *Home Care Retail Marts* makes it equally clear that an arguable challenge by itself is not sufficient when interim protection is sought by an unsuccessful party after the Award. Therefore, although ONGC may have shown that its challenge is arguable, it cannot presently be said that ONGC has demonstrated such a strong prima facie case that the Award can virtually be put aside while considering a request for interim protection. The prima facie case shown is therefore not exceptional as contemplated by *Home Care Retail Marts*.

66. The second requirement concerns the balance of convenience. ONGC has argued that if the bank guarantee is permitted to expire, a valuable security which has remained in

existence for several years would be lost. Yet, the balance of convenience cannot be examined only from the standpoint of ONGC. The Court must also consider the position arising from the Award. The material on record prima facie indicates that under the Consent Terms the parties agreed that the bank guarantee would continue only for a period of 120 days. That agreed period has already expired. Therefore, continuation of the guarantee would effectively extend security beyond the period which the parties have agreed. Consequently, the balance of convenience does not tilt in favour of ONGC.

67. The third requirement is irreparable injury. ONGC has submitted that if the guarantee is allowed to lapse and if ONGC ultimately succeeds in the Section 34 proceedings, serious prejudice may result because Swiber is already in liquidation. This apprehension cannot be dismissed as imaginary. Therefore, the concern expressed by ONGC deserves consideration. At the same time, the question is whether such prejudice reaches the level contemplated by the Supreme Court while describing rare and compelling cases. The bank guarantee in question was furnished as security connected with liquidated damages under Clauses 6.3.2 and 6.3.4. It was not intended to function as a general security for every claim which ONGC may have against Swiber. Therefore, the mere existence of liquidation proceedings does not justify continuation of guarantee. The possibility that recovery may become difficult is a relevant factor, but that circumstance alone cannot elevate the matter into a rare and compelling case within the meaning of *Home Care Retail Marts*. If liquidation by itself

were treated as sufficient, the higher threshold prescribed by the Supreme Court would lose its significance. Therefore, even when the principles stated in paragraphs 59 and 60 of *Home Care Retail Marts* are applied, the present matter does not appear to cross the higher threshold prescribed for an unsuccessful party seeking post-award protection under Section 9.

68. The judgment in *Larsen & Toubro,* can be distinguished on facts and therefore may not provide assistance to ONGC in the present matter, though some observations made support ONGC's contention that a post-award petition under Section 9 is maintainable at the instance of a party against whom the award operates. The first point of distinction arises from the nature of the arbitral award itself. In *Larsen & Toubro*, the Arbitral Tribunal had not rejected ONGC's claim for liquidated damages in its entirety. On the contrary, the Tribunal had accepted ONGC's entitlement to 35% of the liquidated damages, which amounted to approximately Rs.42.95 crores. Thus, at least a part of ONGC's claim already stood crystallised under the Award itself. The real dispute before the Court was whether ONGC was entitled to the remaining 65% liquidated damages which had been denied by the Tribunal. Therefore, the Court was dealing with a situation where a substantial portion of ONGC's claim had already received recognition in the Award. The position before this Court is different. Here, the Tribunal has completely rejected ONGC's claim for liquidated damages. The Award directs return of the Bank Guarantee and records findings against ONGC on the issue of liquidated damages. Therefore there is presently no adjudicated

entitlement in favour of ONGC under the Award itself. This distinction goes to the root of the matter.

69. A second distinguishing feature relates to the reason for which continuation of the Bank Guarantee was directed in *Larsen & Toubro,*. The Court found that ONGC had already become entitled under the Award to recover approximately Rs.42.95 crores towards liquidated damages. The Court further found that this amount represented money which ONGC could have deducted from the contractor's bills but had refrained from deducting because a Bank Guarantee had been furnished in its place. In that context, the Bank Guarantee was viewed as continuing security for an amount which already stood awarded in favour of ONGC. No such situation exists in the present case. Therefore, continuation of the Bank Guarantee cannot be justified on the basis that it merely secures an amount already awarded in favour of ONGC.

70. The third distinction assumes even greater significance. In *Larsen & Toubro*, there were no Consent Terms and no subsequent arrangement between the parties prescribing any outer limit for continuation of the Bank Guarantee after the Award. Therefore, directing continuation of the guarantee did not conflict with any arrangement entered into by the parties. In the present case, however, the respondent places considerable reliance upon the Consent Terms dated 5 September 2016 which were recorded by this Court on 8 September 2016. According to the respondent, those Consent Terms specifically provided that the Bank Guarantee would remain alive only for a period of 120 days after the Award. Prima facie, therefore, the parties themselves appear to have fixed

a outer limit for continuation of the security. If that position is accepted, extension of the Bank Guarantee beyond that period would involve considerations which simply did not arise before the Court in *Larsen & Toubro*.

71. The fourth distinguishing feature relates to the application of the principles laid down in *Home Care Retail Marts*. In *Larsen & Toubro,* the Court found the existence of several compelling circumstances. The Tribunal had partly upheld ONGC's claim for liquidated damages. The original Award directed payment of 35% liquidated damages before return of the Bank Guarantee. Subsequently, an Additional Award altered that position. The Court found that ONGC had demonstrated a strong prima facie challenge to the Additional Award and that exceptional circumstances existed warranting protection. It was in those peculiar facts that the Court concluded that the higher threshold contemplated in *Home Care Retail Marts* stood satisfied. The present case stands on a different footing. Here, the Tribunal has completely rejected the claim for liquidated damages. No part of the claim has been awarded in favour of ONGC. The challenge raised by ONGC may be arguable and may require examination in the Section 34 proceedings. The circumstances which persuaded the Court in *Larsen & Toubro,* are therefore not available in the present case.

72. The fifth distinction concerns the nature of the prejudice alleged by ONGC. In *Larsen & Toubro*, the Court emphasised that continuation of the Bank Guarantee would amount to a non-prejudicial interim measure of the kind contemplated in paragraph 50 of *Home Care Retail Marts*. The Court found that renewal of the

guarantee would not obstruct enforcement of the Award and would merely preserve ancillary rights pending adjudication of the challenge proceedings. Although ONGC seeks to invoke the same principle here, according to the respondent, continuation of the Bank Guarantee in the present case would operate not only against the findings recorded in the Award but also against the subsequent Consent Terms allegedly agreed between the parties. Therefore, the relief sought is not merely preservation of an existing right. It seeks continuation of a security which was required to come to an end under the parties' arrangement.

73. At the same time, it must be recognised that *Larsen & Toubro*, does lend some support to ONGC on limited aspects. The judgment clearly recognises that an unsuccessful party is not barred from invoking Section 9 after the decision in Home Care Retail Marts. It also recognises that continuation of a Bank Guarantee may, in an appropriate case, constitute a permissible post-award interim measure. The judgment further accepts that non-prejudicial interim protection can be granted even where the Award substantially operates against the applicant and that liquidation or financial uncertainty of the opposite party may be a relevant consideration while assessing irreparable prejudice.

74. For all these reasons, I am of the view that ONGC has failed to establish entitlement to the exceptional interim protection sought in the present petition.

75. In view of the foregoing discussion and for the reasons recorded hereinabove, the following order is passed:

ORDER

(i) The Petition is dismissed;

(ii) The prayer seeking a direction to the respondent to continue, renew, extend or keep alive Bank Guarantee No. 811-02-0041188 issued through DBS Bank, or to furnish any fresh or substitute bank guarantee in lieu thereof, is rejected;

(iii) It is held that the petitioner has failed to establish the existence of such exceptional and compelling circumstances as would justify grant of post-award interim protection under Section 9 of the Arbitration and Conciliation Act, 1996 in terms of the principles laid down by the Supreme Court in *Home Care Retail Marts Pvt. Ltd.*;

(iv) It is clarified that the observations made in this order are confined to adjudication of the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 and shall not be construed as an expression of opinion on the merits of the pending proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 or the application filed under Section 36(3) thereof. All questions arising therein are expressly kept open for consideration in accordance with law;

(v) The respondent and its liquidators shall be at liberty to act in accordance with the terms of the Arbitral Award dated 30 September 2025, subject to any order that may be passed by the Court in the pending proceedings under Sections 34 and 36 of the Arbitration and Conciliation Act, 1996;

(vi) There shall be no order as to costs.

76. At this stage, learned Senior Advocate for the petitioner requested that the respondent be directed to continue the bank guarantee and that the interim protection granting during the pendency of the present petition be continued.

77. Considering the said request, grant of such relief would, in effect, amount to granting final relief sought in the present petition. For the detailed reasons recorded herein above in this judgment, the request for issuance of directions to continue the bank guarantee stands rejected.

(AMIT BORKAR, J.)