$~J

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

Judgment reserved on: 30.04.2025
Judgment pronounced on: 01 .07.2025

\+ **O.M.P.(I) (COMM.) 397/2024, CRL.M.A. 9760/2025, I.A. 2377-78/2025**

BELVEDERE RESOURCES DMCC .....Petitioner

Through: Mr. Gauhar Mirza, Ms. Shivi Chola, Advs.

versus

OCL IRON AND STEEL LTD & ORS. .....Respondents

Through: Mr. Krishnaraj Thaker, Sr. Adv. with Mr. Anand Sukumar, Mr. S. Sukumaran, Mr. Bhupesh Kumar, Ms. Ruche Anand, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: JASMEET SINGH, J

1. This is a petition filed under section 9 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the **Act***) seeking the following prayers:-

> *" a. Pass an interim order or measure or direction directing the Respondents to furnish monetary security to the extent of USD 2,777,000/-[INR 23.34 Cr approximately], along with interest as applicable by law, by way of an unconditional*

and irrevocable bank guarantee/Fixed Deposit Receipt (FDR) in favour of the Petitioner or the Registrar General of this Hon'ble Court, to secure the Petitioner's payment pending the completion of arbitration proceedings and passing of the award;

b. Grant an order of temporary injunction restraining the Respondents and its directors, servants, officers and/or agents from taking any steps to divert/alienate/encumber or create and any charge, or otherwise diminish the financial resources and other securities held by them directly and/ or indirectly pending the hearing and final disposal of the Petition and during the arbitration completion of arbitration proceedings and making of the Award;

c. Restrain Resp on dents from entering into a merger, compromise, restructuring, change of control, scheme or any similar arrangement, which has a direct or indirect bearing on the assets, liabilities and cash flow of the any of the Respondents and maintain status quo with respect to the ownership of the Respondent entities;

d. Pass an order of attachment of the asset(s) of the Respondents to the extent of USD 2,777,000/- [INR 23.34 Cr approximately];

e. Pass an order directing the Respondents to disclose details of all their asset(s), moveable or immovable, tangible or intangible, and details of their respective bank account(s);"

BRIEF FACTS

2. Petitioner is a company incorporated in UAE and provides quality and bespoke services including selling of coal. OCL Iron and Steel Ltd., respondent No. 1 (*hereinafter referred to as **R1**)* is engaged in production of coal based direct reduced iron as well as making of steel.

3. Oriental Iron Casting Limited (OICL), respondent No. 2, (*hereinafter referred to as **R2***) is a wholly owned subsidiary of R1 and is engaged in manufacture of steel.

4. Aron Auto Limited, respondent No. 3 *(hereinafter referred to as **R3**)* is also a wholly owned subsidiary of R1, engaged in production of parts and accessories for motor vehicle and their engines.

5. The facts as per petitioner are, on 30 September 2022, a representative of S.M. Niryat Pvt. Ltd. (*hereinafter referred to as **SMN***) requested Ms. Nidhi Reddy, a representative of the petitioner to make an offer for sale of cargo of coal for November through WhatsApp communication. In response, the petitioner conveyed the prices and quantities.

6. Further, discussions took place via WhatsApp and on 01 October 2022, the petitioner formally offered to sell between 75,000MT to 150,000MT (+/-10%) of coal on a CFR basis two ports (Paradip and Sagar) at a price of USD 155.50 PMT or basis one port (Sandheads) at a price of USD 150 PMT dated (hereinafter referred to as ***Offer***). SMN accepted the said offer through WhatsApp on the same day. A binding contract was created between the parties.

7. To formalize the deal, the petitioner vide email dated 13 October 2022, circulated a globally accepted Standard Coal Trading

Agreement (*hereinafter referred to as* ***ScoTA***), inter alia incorporating important terms of quantity, shipping and dispute resolution, namely: -

> *"a. Quality: Typical 4800 NCV.*
>
> *b. Quantity: 80,000MT- 90,000MT (+/- 10%) at the Petitioner's option;*
>
> *c. FOB Price: USD 131.50 PMT, subject to adjustment based on actual NCV;*
>
> *d. CFR Price: USD 155.50, calculated as FOB price [USD 131.50] plus freight [USD 24];*
>
> *e. Laycan: 25 October 2022 - 15 November 2022;*
>
> *f. Loadport: Richards Bay DBT, South Africa;*
>
> *g. Disports: Paradip and Sagar, India;*
>
> *h. Payment Terms: As per the previous contract dated 5 September 2022, which provided two payment options, with 20% of the contractual value payable in advance of the start of laycan via bank transfer;*
>
> *i. Title: To pass from Petitioner to SMN in proportion to the quantum received; j. Risk: To pass from Petitioner to SMN as the coal traversed the ship's rail at Load port;*
>
> *k. Governing Law: English law;*
>
> *l. Dispute Resolution: SIAC arbitration, seated in Singapore."*

8. On 17 October 2022, SMN through WhatsApp requested the petitioner to nominate the performing vessel, thereby seeking performance of the contract and vessel nomination as given under Clause S of ScoTA.

9. Further, on 19 October 2022, the petitioner followed up for comments on the Transaction Summary (*hereinafter referred to as **TS**).* SMN replied via email dated 21 October 2022 with limited amendments to the TS. In the same email, SMN reiterated its request for the petitioner to nominate the performing vessel.

10. On 26 October 2022, the petitioner nominated the vessel 'MV GLYFADA' and provided SMN with all the supporting shipping certificates. *Vide* email dated 27 October 2022, SMN accepted the petitioner's vessel nomination for Haldia and Paradip. On 28 October 2022 SMN requested the petitioner to "*advise ETA at loadport"*.

11. On 31 October 2022, SMN accepted petitioner's amendments to the TS, making three additional strikethroughs of defunct language. SMN thereafter requested the petitioner to "*send the final contract"*. Through the said email, SMN confirmed the contract for the third time, thereby establishing 31 October 2022, as the latest date by which the terms of the contract were agreed between the parties and a binding agreement came into force.

12. *Vide* email dated 02 November 2022, the petitioner circulated the final contract (expressed as the *corrected contract*) and requested SMN to *"sign and send back if all are in order"*. Additionally, an update was requested by the petitioner on *"the status of the payment against the proforma invoice (15%)"* as the said payment was overdue by four days.

13. Further, vide email dated 03 November 2022, SMN sought updates on the vessel requesting an *"update ETA/ETB daily basis"*, in performance of the contract. The petitioner on the same day vide an email provided an update thus confirming that MV GLYFADA was

expected to arrive at Richards Bay DBT by '1800 hrs 10.11.2022 AGW' well within the contractual laycan of 1-15 November 2022 – but was expected to berth by '20.11.2022 AGW'.

14. From 03 November 2022 to 14 November 2022, the petitioner sent multiple reminders to SMN *via* WhatsApp and email requesting the signed contract and settlement in advance payment. On 14 November 2022 SMN responded to the petitioner's reminders by email and WhatsApp for signed contract and advance payment, SMN confirmed that it was "*Not getting any positive responses*" and asked the petitioner to "*Pls check if we can swap or change the month of delivery.*"

15. This request from SMN is said to have come after four days it had asked for an update on the MV GLYFADA's arrival at the loadport. Thus, in accordance with the terms of the contract, MV GLYFADA tendered its Notice of Readiness *(hereinafter referred to as **NOR**)* at Richards Bay at 1825 hours on 10 November 2022, within the contractual laycan of "1-15 November 2022".

16. Further, vide email dated 15 November 2022, the petitioner expressed it disappointment, that the signed copy of the contract and advance payment was not made, the vessel had arrived at loadport in accordance with the contract. On 15 November 2022, SMN replied with a notice purporting to cancel *"the deal*".

17. As a result of the above, the petitioner invoked arbitration under Clause Q of the TS – Appendix 5 ScoTA and commenced arbitration under the aegis of SIAC on 14 June 2024 seeking damages for wrongful termination of contract and costs of arbitration.

18. During the arbitration proceedings, OCL submitted a letter dated 11 July 2024 to SIAC, asserting SMN had ceased to exist following its amalgamation with OCL and denied the claims of the petitioner. The petitioner was made aware of the NCLT, Kolkata Bench's order dated 30 January 2024 sanctioning the amalgamation of SMN with R1 upon receiving the letter.

SUBMISSIONS ON BEHALF OF THE PETITIONER

19. Mr. Gauhar Mirza, learned counsel for the petitioner assisted by Ms. Shivi Chola submits that ScoTA was finalized after ample negotiations between the both the parties thus demonstrating both parties were *ad idem* on all terms of the contract. Only formal execution of the contract was pending, the position regarding the same as per English Law is that acceptance of a contract can be inferred from the conduct of the parties and a formal signature is not required in every case. Reliance is placed of ***Anotech International (UK) Limited v. Reveille Independent LLC A3/2015/1099***.

20. It is stated that the notice of cancellation dated 15 November 2022 not only constituted an express repudiation of contract but also amounted to an admission of its existence. The petitioner had already performed its obligations based on SMN's express assurances, making SMN's conduct a clear case of wrongful repudiation.

21. It is submitted that the losses suffered by the petitioner is an actual and direct loss. After SMN's repudiation of the contract, the petitioner was compelled to resell the same contractual cargo to a third party at a lower market price. The difference between the contract price with SMN and the resale price (at market value of that day) constituted a quantifiable loss which is a result of the breach of the contract and

cannot be termed as hypothetical or vague. Reliance is placed on ***Golden Strait Corp v. Nippon Yusen Kubhishika Kaisha (2007) UKHL 12***.

22. It is submitted that SMN was involved in amalgamation proceedings since April 2022, but this was concealed from the petitioner, at the time of contracting in October 2022. This concealment is stated to be deliberate.

23. It is submitted that a Section 9 petition was filed by the petitioner on 13 Nov, 2024 much prior to the constitution of the arbitral tribunal seeking interim measures to secure the disputed amount of USD 2,777,000 (approximately INR 23.34 Crores). This Court directed the respondent to file an affidavit of assets, both movable and immovable vide order dated 19 Dec 2024. The respondent refused to comply with the directions of the court. The respondent delayed the filing of affidavit of assets, the same was done by the respondent on 27 January 2025. It is further submitted that the respondent has sought repeated adjournments to delay the proceedings, which shows an attempt by the respondent to avoid substantive orders.

24. It is stated that vide order dated 03 February 2025 this Court disposed of the Section 9 application and had directed the petitioner to approach the arbitral tribunal for urgent relief. Thereafter, the petitioner filed an appeal under Section 37 of the Act (FAO)(OS)(COMM) No. 33/2025) challenging the order. The Hon'ble Division Bench disposed of the appeal by remitting the matter back to this Hon'ble Court for fresh consideration leaving all issues open and observing as under: -

"9. We are unable to express any opinion on this aspect one way or the other, as the order dated 3 February 2025 does not expressly set out the reason for relegating the parties to the Arbitral Tribunal on the aspect of interim relief. Nor does the order purport to be an order passed on consent.

10. In that view of the matter, we deem it appropriate to remit OMP (I) (Comm) 397/2024 to the learned Single Judge, for consideration afresh. It would be open to the parties to urge all, contentions before the learned Single Judge, including the aspect of territorial jurisdiction, merits, as well as availability of alternate remedy."

25. Further, it has been contended that R1 has consistently before the Hon'ble Division Bench and this Court held that the Court lacks territorial jurisdiction on the ground that R1 does not maintain an office or possess any assets in Delhi. However, it is stated that in its own fillings before the Bombay Stock Exchange and the National Stock Exchange R1 has used its official letterhead bearing the address: *"Corporate Office:3, LSC, Pamposh Enclave, Greater Kailash part-1, New Delhi - 110048, India, Ph: +91-11 42344422, email-ocliron@gmail.com".*

26. Thus, it is stated that this submission denying the existence of any office in Delhi is factually incorrect and amounts to a false statement on oath, attracting ingredients of perjury for which a separate application under Section 397 BNSS, 2023 (Crl. MA No. 9760/2025) has been filed.

27. Another affidavit filed by R1 shows that R1 holds shares worth INR 423.41 crores in Jai Balaji Industries Ltd., a listed company which also maintains an office in Delhi, among other cities.

28. It is submitted that the fixed and current assets including properties, plants and equipment disclosed by R1 are mortgaged to secure credit facilities for their steel plants and are encumbered with secured loans amounting to INR 1039.20 crores. This raise concerns about the creditworthiness of R1.

29. Further, R1 has emerged from the Corporate Insolvency Resolution Process (CIRP) following an NCLT Order (Orrisa) dated 20 March 2023. The same raises reasonable concerns regarding their financial health and ability to satisfy any arbitral award.

30. Additionally, the defense of R1 that it is not responsible for SMN's responsibility is misconceived in view of Section 232 of the Companies Act, 2013 as the transferee company assumes all liabilities of the transferor company, and the transferor ceases to exist. Reliance for the above is placed on ***Speedline Agencies v. T. Stanes and Co. Ltd. (2010) 6 SCC 257.***

31. It has further been submitted that R1's claim that it is unaware of SMN's liabilities and has not inherited is false. In a writ petition filed by R1 before this Court (*Ocl Iron And Steel Limited v. Union of India 2024 SCC OnLine Del 5095*), it has expressly been submitted that the company is now under the management of HI A MMT Pvt. Ltd. Public records confirm that both SMN and HI A MMT Pvt. Ltd. share two common directors – Manish Khemka and Suraj Kumar Singh. It is contended that Mr. Manish Khemka was directly involved in the negotiation of the contract and is marked on key correspondence

which includes both the execution and cancellation of the agreement. He was also actively engaged in discussions to acquire SMN in January 2023 culminating in the sanctioned amalgamation.

32. Further it is submitted that the petitioner has a *prima facie* case as there was a concluded ScoTA agreement between the respondent and the petitioner. SMN repudiated the contract and thus petitioner suffered losses. This loss was mitigated as the petitioner sold the coal at a lower market price.

33. Lastly, it is submitted that there is a real risk that even if the petitioner succeeds in arbitration, the award rendered be worthless due to the dissipation or unavailability of attachable assets in India.

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO. 1

34. Mr. Krishnaraj Thaker, learned senior advocate assisted by Mr. Anand Sukumar, Mr. S. Sukumaran, Mr. Bhupesh Kumar and Ms. Ruche Anand submits that there was no valid arbitration agreement between the petitioner and SMN in the absence of a binding, valid and concluded ScoTA.

35. It is stated that this Court lacks territorial jurisdiction as this Court is not the court as defined under Section 2(1) (e) (ii) of the Act. Neither the petitioner nor R1 have their offices within the jurisdiction of this Court. The defendant must have a pace of business or residence in the area of the court at the time of institution of proceedings and not historically.

36. It is stated that the petitioner has given incorrect addresses of the registered office and branch office of R1. Further, the petitioner knew that R1 did not have any office at Pamposh Enclave when the said application was filed in 2024. The reliance is placed on ***Patel***

Roadways Ltd. in (1991) 4 SCC 270, Rattan Singh Associates (P) Ltd. 136 (2007) DLT 629 and 2005 SCC OnLine Del 1041.

37. It is stated that the notice dated 16.12.2022 is not a notice invoking arbitration as it is described as "*Letter Before Commencement of Arbitration Proceedings"* and is a final demand notice issued prior to invocation of arbitration. The arbitration was invoked by notice dated 14.06.2024**.**

38. It is stated that no part of the cause of action as alleged by the petitioner in the petition arose within the jurisdiction of this Court. The allegations stated by the petitioner do not constitute cause of action in an action for damages arising out of breach of contract.

39. It is stated that the arbitral reference is for recovery of damages for purported breach of a contract entered into between the petitioner and SMN. The test in terms of Section 2 (1) (e) (ii) is whether this Court could have entertained a suit for damages filed by petitioner against R1 in this regard. Reliance is placed on ***A.B.C Laminart Pvt. Ltd. (1989) 2 SCC 163.***

40. Learned Senior Counsel further submits that the jurisdiction of the court to receive an application under Section 9 or Section 11 of the Act must be determined in terms of Section 16 to Section 20 of the Code of Civil Procedure, 1908 (*hereinafter referred to as* ***CPC***), considering the principle of *forum conveniens.* Reliance is placed on ***Rattan Singh Associates (P) Ltd. 136 (2007) DLT 629, Rites Limited 2009 SCC OnLine Del 2527, Sri Ganesh Research Institute 2004 SCC OnLine Del 525, Capital Fire Engineers 2005 SCC OnLine Del 1041.*** The presence of assets within the jurisdiction in a claim for money will not determine place for suing as given under Section 20 of

the CPC which only provides for the place of residence or business or where the cause of action has arisen.

41. It is stated that the presence of assets does not constitute cause of action for institution of a suit unless the asset concerned itself is the subject matter of the arbitral reference. In this case, it is stated that the shares held by R1 are not subject matter of the arbitral reference which has been instituted for damages arising out of breach of contract. Presence of assets is only relevant for institution of execution proceedings.

42. Further, it is stated that the claim for damages in this case is unliquidated and is not debt and therefore cannot be secured. It is stated that claim is not a debt *in praesenti* and does not take the character of debt until the same is adjudicated and determined by this Court. Therefore, no security can be given. Reliance for this placed on ***Union of India v. Raman Iron Foundry (1974) 2 SCC 231, Bharat Heavy Electricals Limited v. ABB India Ltd. FAO (COMM) 19/20022.***

43. It is stated that no case of Order XXXVIII Rule 5 of CPC has been made out for attachment under Section 9. The CIRP of R1 has been successfully resolved. Unless dissipation of assets is established, test of Order XXXVIII Rule 5 is not satisfied, and no security can be directed under Section 9. Reliance is placed on ***Sanghi Industries Ltd. 2022 SCC OnLine SC 1329.***

44. Additionally, it is stated no *prima facie* case is made out as no document has been given in the petition in support of the losses suffered on re-sale of the goods when SMN repudiated the contract. A copy of the resale contract between the petitioner and a third party was

handed over at the Bar during the hearing. It is said a document handed over without an affidavit does not hold merit. Even if considered it would be clear that it cannot be the re-sale contract for the goods shipped under the ScoTA with SMN inter alia as (i) port of delivery (ii) period of delivery (iii) chemical properties rejection parameters do not match.

45. Further, it has been stated that there is a delay in filing the application which itself defeats the prayer for security as the loss was suffered in November 2022 when the contract was breached. No change of circumstances since November 2022 is shown to warrant grant of security.

46. Lastly, it has been submitted that no cause is shown why the alternate remedy provided in Rule 30 SIAC Rules 2016 which provides for interim award/order akin to Section 17 of the Act has not been availed. The application is thus barred by Section 9(3) of the Act as the arbitral tribunal has been constituted.

ANALYSIS AND FINDIGNS

47. I have heard learned counsel for the parties.

48. From the aforesaid facts and stand of the parties, to my mind, three questions arise for determination by this Court:

(i) Whether the documents and correspondence show existence of a valid arbitration agreement between the parties?

(ii) Whether this Court has the territorial jurisdiction to entertain and try the present petition under Section 9 of the Arbitration and Conciliation Act, 1996?

(iii) Whether the respondent should be directed to furnish security to the extent of USD 2,777,000/-.

49. Section 7 of the Arbitration and Conciliation Act, 1996 defines an Arbitration Agreement. Section 7(4)(b) of the Act reads as under:-

> *"**Section 7***
>
> *(4) An arbitration agreement is in writing if it is contained in—*
>
> *(a)……..*
>
> *(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or*
>
> *....."*

50. To better understand the controversy at hand, it is pertinent to refer to the communications exchanged between the parties.

<u>Email exchange between R1 and the Petitioner</u>

Roxanne Johnson

From: anshuman gayen <anshuman@smgroup.co.in>
Sent: 21 October 2022 08:39
To: Sulthan Mohideen
Cc: Neel Singh; Captain Sanjay Goel; Tushar Agrawal; Nidhi Reddy; subrata barik
Subject: EXT:Re: EXT:Re: FW: Business Deal recap // Belvedere - SM Niryat (End Oct/Early Nov Loading Laycan)
Attachments: Belvedere - SM Niryat_4800NAR_90000 NOV22 loading (1).docx

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Dear Sulthan,

PFA the draft contract with some changes . You are requested to please confirm the same.

Also requesting you to please send the performing vessel details.

Thanks & regards,
Anshuman Gayen
S M Niryat Private Limited
Godrej Waterside - Tower 1
Unit-503, 5th Floor,
Sector V, Saltlake City,
Block DP-5
Kolkata - 700091
Mob No: +91 9903968562
Tel No : +9133 4090 3500

Email exchange between the Petitioner and R1

Roxanne Johnson

From: Yogesh Nerkar <yogeshn@ikwezi.co.za>
Sent: 26 October 2022 19:03
To: anshuman gayen; neel@smgroup.co.in
Cc: Tushar Agrawal; Captain Sanjay Goel; Nidhi Reddy; Sulthan Mohideen; Mumbai Shipping
Subject: MV GLYFADA I - Vessel nomination - Business Deal recap // Belvedere - SM Niryat (End Oct/Early Nov Loading Laycan)
Attachments: glyfada i tonnage.pdf; glyfada i iapp.pdf; glyfada i imsbc.pdf; glyfada i iopp.pdf; glyfada i manning.pdf; glyfada i sewage.pdf; MV GLYFADA I CLASS STATUS26102022.pdf; FG-03 General Arrangement REV1 16-APR-19.pdf; imo crew list .xls; baltic questionnaire -oct 22.doc; 22. last 20 ports of call.pdf; psc_clear_report__bunati_indonesia.pdf

Dear Anshuman / Neel ,

Please find below vessel nomination as per Business Deal recap // Belvedere - SM Niryat (End Oct/Early Nov Loading Laycan):

MV GLYFADA I OR SUBS
ABT 75.639 DWT ON ABT 14,20 M SSW - TPC 68.3
LOA/BEAM 225,00/32,26 M
MALTA FLAG - BLT 2009 // ABT 90.000 CBM GRAIN CAPACITY, INCL. HATCH COAMINGS
7HO / 7HA - GEARLESS - CLASS B.V. - M/E MAN B+W 5S60MC
HATCH DIMENS: ABT NO1 15,48X13,20 - NOS 2-7 15,48X14,40 ALL IN MTRS
RIGHTSHIP APPROVED - VSL IS FITTED FOR NEO PANAMA LOCKS
ALL DETAILS ARE ABOUT

ITINERARY : VSL ETCD/S GOA 28TH OCT, ETA LOAD PORT ARD 10/11 NOV 2022 AGW WP WOG
LOADABLE QTY : ABOUT 72,750-73500 MT SUBJECT TO MASTER FINAL STOWAGE PLAN.
DEMM : USD 21,000 PDPR DHD
CERTS : ATTACHED

REQUEST KINDLY ADVISE ON VESSEL ACCEPTANCE BEFORE 1200 HRS IST 27TH OCT 2022.

Please confirm safe receipt of above nomination / certificates and doing needful

Thanks & Regards,
Yogesh Nerkar
Mob : +91 9833196568
Under Instructions from Belvedere Resources DMCC, UAE

Email exchange between R1 and the Petitioner

Roxanne Johnson

From:	anshuman gayen <anshuman@smgroup.co.in>
Sent:	27 October 2022 05:42
To:	Yogesh Nerkar
Cc:	Captain Sanjay Goel; Mumbai Shipping; Nidhi Reddy; Sulthan Mohideen; Tushar Agrawal; neel@smgroup.co.in
Subject:	EXT:Re: MV GLYFADA I - Vessel nomination - Business Deal recap // Belvedere - SM Niryat (End Oct/Early Nov Loading Laycan)

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Dear Yogesh,

The subject vessel can be accepted at Haldia port.

Thanks.

Email exchange between R1 and the Petitioner

Roxanne Johnson

From:	anshuman gayen <anshuman@smgroup.co.in>
Sent:	27 October 2022 07:44
To:	Yogesh Nerkar
Cc:	Captain Sanjay Goel; Mumbai Shipping; Nidhi Reddy; Sulthan Mohideen; Tushar Agrawal; neel@smgroup.co.in; Aindrila Banerjee; subrata barik
Subject:	EXT:Re: MV GLYFADA I - Vessel nomination - Business Deal recap // Belvedere - SM Niryat (End Oct/Early Nov Loading Laycan)

Dear Yogesh,

Ref. to mail , Please note subject vessel is accepted at Paradip Port.

Subject to provide valid below certificate.

01.Certificate of Registry

02.Tonnage Certificate full Set

03.P&I Certificate of Entry

04.Certificate of Class with annual endorsement

05.Safety Management Certificate

06.International Ship Security Certificate

07.Document of Compliance

08.I. O. P. P.

09.Load Line Certificate

10.Safety Construction Certificate

11.Safety Equipment Certificate

12.Safety Radio

13. Ship Sanitation Control Exemption Certificate

14.M. L. C.

15.Safe Manning Document

Email exchange between R1 and the Petitioner

Roxanne Johnson

From: Aindrila Banerjee <aindrila@smgroup.co.in>
Sent: 03 November 2022 07:35
To: Komal Vaity
Cc: anshuman gayen; Yogesh Nerkar; Captain Sanjay Goel; Mumbai Shipping; Nidhi Reddy; Sulthan Mohideen; Tushar Agrawal; neel@smgroup.co.in; subrata barik
Subject: EXT:Re: MV GLYFADA I - Vessel nomination - Business Deal recap // Belvedere - SM Niryat (End Oct/Early Nov Loading Laycan)

Dear Komal

Good day

Request you to update ETA/ETB daily basis

Thanks & Regards
Aindrila Banerjee

On Fri, Oct 28, 2022 at 2:37 PM Aindrila Banerjee <aindrila@smgroup.co.in> wrote:
Dear Komal

Good day

Please advise ETA at loadport

Thanks & Regards
Aindrila Banerjee

On Thu, Oct 27, 2022 at 2:39 PM Aindrila Banerjee <aindrila@smgroup.co.in> wrote:
Dear Komal

Good day

Subject Vsl is accepted at Paradip.

Thanks & Regards
Aindrila Banerjee

Email exchange between the Petitioner and R1

DOCUMENT 12

Roxanne Johnson

From:	Sulthan Mohideen <sulthanm@ikwezi.co.za>
Sent:	02 November 2022 06:14
To:	anshuman gayen
Cc:	Neel Singh; Captain Sanjay Goel; Tushar Agrawal; Nidhi Reddy; subrata barik
Subject:	RE: EXT:Re: EXT:Re: EXT:Re: FW: Business Deal recap // Belvedere - SM Niryat (End Oct/Early Nov Loading Laycan)
Attachments:	Belvedere - SM Niryat_4800NAR_90000 NOV22 loading 2 (003).docx

Dear Anshuman
PFA is the corrected Contract , Please sign and send back if all are in order .
Also please advise the status of the payment against our proforma invoice (15%)

Thanks & Regards,
Sulthan Mohideen
Manager- Marketing
IKWEZI MINING FZE

IKWEZI MINING
m +971559158911 t +97145808418
Office no 805, HDS Tower, F Cluster, JLT, Dubai.
w www.ikwezimining.com e sulthanm@ikwezi.co.za

WhatsApp Communication between the Petitioner and R1

Email by R1 – canceling the deal

DOCUMENT 18

Roxanne Johnson

From: S M Niryat Pvt Ltd <smniryat@smgroup.co.in>
Sent: 15 November 2022 11:12
To: Nidhi Reddy
Cc: Manish Khemka; Neel Singh; Captain Sanjay Goel; Tushar Agrawal; subrata barik; Sulthan Mohideen; Madhumita Mukherjee; anshuman gayen
Subject: EXT:Re: Reminder! Signed Contract awaited //Business Deal recap // Belvedere - SM Niryat (End Oct/Early Nov Loading Laycan)

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Dear Madam,

This is in furtherance to your immediate last trail email sent to us today, i.e., 15th November, 2022 at 1:47 PM and is with reference to your email dated 4th October, 2022 at 2:44 PM to us stating that the laycan for the intended shipment is 5th October to 15 November basis which laycan we confirmed the deal by our subsequent email to you dated 6th October 2022 sent at 20:20 hours.

It is pertinent to note that the generally accepted standard market practice of laycan in such transactions is always for 10 days but in the case of this deal we had made a very unusual exception and accomodated your request of 40 days laycan considering the possible exegenicis you were contemplating that could be associated with making the arrangements/ clearances at the loadport. We had conceded to your request of 40 days laycan with the understanding that since it is a 40 days window, not only will the nominated vessel arrive at the loadport during such 40 days period but the loading of the cargo shall be concluded and the nominated vessel shall set sail with the discharge port as destination within such aforesaid 40 days period.

Based on the aforesaid understanding, we had been waiting for the nominated vessel to arrive at the lodport considerably earlier in the 40 days laycan period window as compared to when it actually arrived, to berth, loading operations to commence and the nominated vessel to sail for discharge port by 15th November, 2022 but the nominated vessel is yet to berth at the loadport's relevant berthing site leave alone the loading operations being complete and the nominated vessel sailing for the discharge port by 15th November, 2022.

Kindly treat this as a formal notice of cancellation of the deal.

With best regards,

51. A perusal of the email exchanges clearly shows that the petitioner had duly forwarded the ScoTA to R1 on 02 November 2022 and R1 had

assured the petitioner that the contract will be sent after being signed and stamped.

52. ScoTA contains arbitration clause being clause Q of the TS – Appendix 5 ScoTA. To my mind the above documents show that an arbitration agreement is duly contained in the exchange of emails providing a record for the agreement.

53. A perusal of Section 7(4)(b) of the Act reveals that it is not necessary for a concluded contract to be in existence for a valid arbitration agreement to be existing between the parties. The arbitration agreement must form a part of documents/communication exchange between the parties. The same has duly been so laid down by the Hon'ble Supreme Court in ***Cox & Kings Ltd. v. SAP India (P) Ltd.,*** **(2024) 4 SCC 1** wherein, it has been observed as under: -

> *"76. Section 7(4)(b) provides the second circumstance, according to which an arbitration agreement is in writing if it is contained in an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement.* ***According to this provision, the existence of an arbitration agreement can be inferred from various documents duly approved by the parties.*** *[Shakti Bhog Foods Ltd. v. Kola Shipping Ltd., (2009) 2 SCC 134 : (2009) 1 SCC (Civ) 411; Trimex International FZE Ltd. v. Vedanta Aluminium Ltd., (2010) 3 SCC 1 : (2010) 1 SCC (Civ) 570] Section 7(4)(b) dispenses with the conventional sense of an agreement as a document with signatories. Rather, it emphasises on the manifestation of the consent of persons*

or entities through their actions of exchanging documents. However, the important aspect of the said provision lies in the fact that the parties should be able to record their agreement through a documentary record of evidence. In Great Offshore Ltd. v. Iranian Offshore Engg. & Construction Co. [Great Offshore Ltd. v. Iranian Offshore Engg. & Construction Co., (2008) 14 SCC 240] , ***this Court observed that Section 7(4)(b) requires the Court to ask whether a record of agreement is found in the exchange of letters, telex, telegrams, or other means of telecommunication. Thus, the act of agreeing by the persons or entities has to be inferred or derived by the Courts or tribunals from the relevant documents and communication, neither of which can be equated with a conventional contract."***

(Emphasis added)

54. In the facts and circumstances of the present case, SCoTA was sent vide email dated 02 November 2022 by the petitioner to R1. The respondent No.1 duly responded to the said email on 03 November 2022 and in furtherance thereof, asked for its updated ETA/ETB on a daily basis. Additionally, R1 via WhatsApp on 03 November 2022 informed the petitioner that the SCoTA would be signed and sent immediately.

55. The above correspondence leaves no room for doubt that the arbitration agreement was contained in the exchange of email and WhatsApp communications between the parties, and hence, there is an

existence of a valid arbitration agreement between the parties. Hence, issue no.1 as enumerated in paragraph 48 is decided in favor of the petitioner.

56. As regards the territorial jurisdiction, *prima facie* it seems that R1 has a branch office at Delhi as is evident from the filing of 12 May 2023 and 23 September 2022. However merely maintaining a branch office will not clothe this court with the territorial jurisdiction in the matter. A perusal of the communications between the petitioner and Anshuman Gayen a correspondent of R1 and Appendix 5: Form of Transaction Summary (SCoTA Transaction Summary) shows the address of R1 as 4th Floor, Room No. 402, Sagar Trade Cube, 104, SP Mukherjee Road, Kolkata, West Bengal. The documents clearly suggests that it was the Kolkata office which was communicating and was seized of the matter *vis a vis* the petitioner.

57. Hence only because R1 has office at Pamposh Enclave, New Delhi will not give this court jurisdiction to entertain and try the petition, in view of the law laid down ***Rattan Singh Associates v. M/S Gill Power Generation Company Pvt. Ltd. 2007 SCC OnLine Del 19***, the relevant paragraph reads as under:-

> *"36. ……. In the light of the principles laid down in a catena of judicial pronouncements noticed by me hereinabove, I find that it has been repeatedly emphasised that* ***the mere existence of an office within the jurisdiction of the court which is called upon to exercise jurisdiction, anything more, by itself, would not be sufficient to permit the court to exercise jurisdiction over the subject matter of the litigation****."*

(Emphasis added)

58. Mere existence of a branch office which, *prima facie*, had nothing to do with the transaction in question will not give Delhi, jurisdiction to entertain the present petition. Additionally, it is also the statement of the respondent No.1 that respondent No.1 no longer carries operations at Pamposh Enclave.

59. Additionally, no part of cause of action has arisen in Delhi. The contract between the petitioner, having its office at Dubai and R1 having its office at Kolkata was negotiated through brokers at Singapore. As per the contract, the supply for coal was from Richards Bay, South Africa to Paradip, Orrisa and Sagar, West Bengal. Lastly, the contract was repudiated from Kolkata.

60. The petitioner has also argued that the respondent No.1 holds 423.41 Crores worth of shares in Jai Balaji Industries, which has its office at Delhi, and hence, this Court will have territorial jurisdiction. In the absence of an exclusive jurisdiction clause or an exclusive seat of arbitration clause, sections 15 to 20 of the Code of Civil Procedure, 1908 do not contemplate the jurisdiction of a Court where assets of the defendant are situated. The said argument may be valid for an execution petition but will not apply to the present petition.

61. For the aforesaid reasons issue no.2 is decided against the petitioner and I am of view, that this court does not have the territorial jurisdiction to entertain and try the present petition**.**

62. Even though I have held that this Court does not have the territorial jurisdiction in the matter but as the matter has been argued on merits, I

am also proceeding to discuss the merits of the claims of the petitioner.

63. The third issue is whether the whether the respondent should be directed to furnish security to the extent of USD 2,777,000/-.

64. In the present case, the claim is for damages caused due to breach of contract. The same are unliquidated damages. The law relating to unliquidated damages is clear and settled. Unliquidated damages do not give rise to debt unless the liability is adjudicated upon by a competent Court or an adjudicating authority and the damages have been assessed.

65. When there is a breach of contract, the aggrieved party, does not *ipso facto* become entitled to debt due from the other party. The only right it has is the right to sue for damages. The aggrieved party is not entitled to compensation/damages due to an existing obligation on part of the party who committed the breach. Pecuniary liability only arises after the Court has determined that the aggrieved party is entitled to damages. This view has been consistently supported by the Courts in India, the Hon'ble Supreme Court in the case of ***Union of India v. Raman Iron Foundry, (1974) 2 SCC 231*** observed as under: -

> *"11. Having discussed the proper interpretation of clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned,*

there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that ***a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a***

decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eoinstanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. *That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we find it stated by Wightman, J., in Jones v. Thompson [(1858) 27 LJ QB 234 : 120 ER 430] "Exparte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed". It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in O'Driscoll v. Manchester Insurance Committee [(1915) 3 KB 499 : 113 LT 683] Swinfen Eady, L.J., said in reference to cases where the claim was for unliquidated damages: "...in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given". The same view has also been taken consistently by different High Courts in India. We may mention only a few of the decisions, namely, Jabed*

Sheikh v. Taher Mallik [AIR 1941 Cal 639 : 197 IC 606 : 45 Cal WN 519] , S. Milkha Singh v. N.K. Gopala Krishna Mudaliar [AIR 1956 Punj 174] and Iron and Hardware (India) Co. v. Firm Shamlal and Bros [AIR 1954 Bom 423, 425-26 : ILR 1954 Bom 739 : 56 Bom LR 473] .Chagla, C.J. in the last mentioned case, stated the law in these terms: (at pp. 425-26)

"In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages*. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed.* ***The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is.***

But till that determination there is no liability at all upon the defendant."

This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right conferred upon it under clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of clause 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under clause 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so."

(Emphasis added)

66. Hence claim for damages is not in the nature of a debt till it is adjudicated upon by a Court or an adjudicating authority. There exists no obligation to an amount when damages are claimed for breach of contract unless the competent court adjudicates upon the claim and

holds that there has been a breach of contract committed by the defendant and is thereby liable to compensate the aggrieved party for the loss following which the quantum of such liability is assessed.

67. A breach of contract entitles the aggrieved party a right to sue for damages but does not create a right to claim "debt". After the competent court holds an enquiry, as to whether the defendant has committed breach of the contract and has therefore incurred a liability towards the aggrieved party does a claim for damages turn into "debt due". Damages are payable only by a decree of the Court and not on the account of quantification by the aggrieved party. The same as been reiterated by a co-ordinate bench of this Court in ***Thar Camps Pvt. Ltd. v. Indus River Cruises Pvt. Ltd. & Others 2021 SCC OnLine Del 3150*** wherein it was observed as under:-

> *"69. The Court went on to rely on the following propositions of law, emerging from earlier decisions of the Supreme Court and various High Courts, as enumerated by the High Court of Karnataka in Greenhills Exports (P) Ltd. v. Coffee Board and cited by the High Court of Bombay in E-City Media Pvt. Ltd. v. Sadhrta Retail Ltd.:*
>
> *"(i) A "Debt" is a sum of money which is now payable or will become payable in future by reason of a present obligation. The existing obligation to pay a sum of money is the sine qua non of a debt. "Damages" is money claimed by, or ordered to be paid to; a person as compensation for loss or injury. It merely remains a claim till adjudication by a court and becomes a "debt" when a court awards it.*

(ii) In regard to a claim for damages (whether liquidated or unliquidated), there is no "existing obligation" to pay any amount. No pecuniary liability in regard to a claim for damages, arises till a court adjudicates upon the claim for damages and holds that the defendant has committed breach and has incurred a liability to compensate the plaintiff for the loss and then assesses the quantum of such liability. An alleged default or breach gives rise only to a right to sue for damages and not to claim any "debt". A claim for damages becomes a "debt due", not when the loss is quantified by the party complaining of breach, but when a competent court holds on enquiry, that the person against whom the claim for damages is made, has committed breach and incurred a pecuniary liability towards the party complaining of breach and assesses the quantum of loss and awards damages. Damages are payable on account of a fiat of the court and not on account of quantification by the person alleging breach.……."

68. As of today, at best, the petitioner has a claim against R1 for breach of contract. The claim of the petitioner is yet to crystalise into a debt due.

69. Additionally, the prayers as sought by the petitioner are akin to prayers under Order XXXVIII Rule 5 for attachment. The powers under the Order XXXVIII Rules 5 are extraordinary powers and must be exercised sparingly in accordance with the law. The object of Order XXXVIII Rule 5 is not to convert unsecured debt into a secured one but to ensure that the defendant does not obstruct or delay the execution of the decree. A co-ordinate bench of this Court in

Skypower Solar India (P) Ltd. v. Sterling and Wilson International FZE, (2023) 6 HCC (Del) 702, has held:-

> *"63. The principle for granting orders under Order 38 Rule 5CPC are now well-settled. In Raman Tech. & Process Engg. Co. v. Solanki Traders [Raman Tech. & Process Engg. Co. v. Solanki Traders, (2008) 2 SCC 302 : (2008) 1 SCC (Civ) 539] , the Supreme Court had observed that* ***the power under Order 38 Rule 5 are drastic and extraordinary powers and are required to be used sparingly and in accordance with the rule. The Supreme Court also observed that the purpose of Order 38 Rule 5 was not to convert an unsecured debt as a secured one. The object of Order 38 Rule 5 was to prevent any defendant from defeating the realisation of a decree that may ultimately be passed in favour of the plaintiff****……"*
>
> ***(Emphasis added)***

70. In order to successfully establish a case, the petitioner is required to show that the defendant with an intent to obstruct or delay the execution of a decree that may be passed against him is about to dispose of whole or part of his property or is about to remove any part or whole of his property from the local limits of the jurisdiction of the Court.

71. It is settled law that an order under Section 9 the Arbitration and Conciliation Act, 1996 as sought by the petitioner, cannot be passed unless the conditions as provided under Order XXXVIII Rule 5 are satisfied.

72. Only after the pre-requisites as noted above are met can an order under Section 9 of the Act be passed. The Hon'ble Supreme Court in ***Sanghi Industries Ltd. v. Ravin Cables Ltd. and Anr. 2022 SCC OnLine SC 1329*** has reaffirmed this position and has observed as under:-

> *"4. ……..we are of the opinion that* ***unless and until the pre-conditions under Order XXXVIII Rule 5 of the CPC are satisfied and unless there are specific allegations with cogent material and unless prima-facie the Court is satisfied that the appellant is likely to defeat the decree/award that may be passed by the arbitrator by disposing of the properties and/or in any other manner, the Commercial Court could not have passed such an order in exercise of powers under Section 9 of the Arbitration Act, 1996****. At this stage, it is required to be noted that even otherwise there are very serious disputes on the amount claimed by the rival parties, which are to be adjudicated upon in the proceedings before the arbitral tribunal.*
>
> *5. The order(s) which may be passed by the Commercial Court in an application under Section 9 of the Arbitration Act, 1996 is basically and mainly by way of interim measure.* ***It may be true that in a given case if all the conditions of Order XXXVIII Rule 5 of the CPC are satisfied and the Commercial Court is satisfied on the conduct of opposite/opponent party that the opponent party is trying to sell its properties to defeat the award that may be passed and/or any other conduct on the part of the***

opposite/opponent party which may tantamount to any attempt on the part of the opponent/opposite party to defeat the award that may be passed in the arbitral proceedings, the Commercial Court may pass an appropriate order including the restrain order and/or any other appropriate order to secure the interest of the parties. However, unless and until the conditions mentioned in Order XXXVIII Rule 5 of the CPC are satisfied such an order could not have been passed by the Commercial Court *which has been passed by the Commercial Court in the present case, which has been affirmed by the High Court."*

(Emphasis added)

73. Further, a co-ordinate bench of this Court, in the case of ***Thar Camps (supra)*** reiterated the above principles as under:-

"103. I also refrain, in the circumstances, from embarking on any detailed discussion of Order XXXVIII Rule 5 of the CPC, and its applicability to the present proceedings. Suffice it to state, in this context, that the mere possibility of frustration of arbitral proceedings, or any award which may be passed therein, cannot justify grant of interim protection under Section 9 of the 1996 Act. ***The Court has, in the first instance, to be satisfied, prima facie, of the entitlement, of the petitioner, to the amount claimed, and of the permissibility, in law, of securing of the said amount in the manner sought by the petitioner. It is only if these twin considerations are met, satisfactorily, by the petitioner, that***

> ***any order for security, or for interim protection in any other manner, can be passed****. The threshold of these considerations, unfortunately for the petitioner, remains inviolate in the present case. No prima facie case exists, for the claim, of the petitioner against IRCPL, of Rs. 18 crores. Neither can, in law, the Court proceed to detain the vessels, independently owned by Respondents 4 and 5, thereby transgressing on the rights enuring to them under the Charter Agreements."*
>
> ***(Emphasis added)***

74. From the facts narrated above, at best, it can only be said that the petitioner has a claim, but that claim is yet to be established, the amount is yet to be quantified, financial health of R1 being bad is yet to be established and the fact that R1 is malafidely disposing of its assets is also yet to be established.

75. The orders of attachment affects the financial health of the company and are not to be passed merely as a routine. In the present case, there is nothing to show as to the intent of R1 to obstruct or delay the execution of a decree that may be passed against it.

76. The fact that R1 was under CIRP and R1 has loans secured by mortgaging its properties is not sufficient to pass an order under Order XXXVIII Rule 5. R1 is a commercial company and its operations require taking loans, mortgaging assets and to my mind the same cannot be sufficient to effect attachment.

77. In view of aforesaid observations, the petition is dismissed.

78. The observations made herein are only for the purpose of deciding the present petition and will have no bearing on the final adjudication of the matter.

79. Pending applications, if any, are disposed of.

JASMEET SINGH, J

JULY 01, 2025
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