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

% *Judgment reserved on: 31st May, 2016*
Judgment pronounced on: 29th July, 2016

\+ **O.M.P. (I) (COMM.) 71/2016**

KAL AIRWAYS PRIVATE LIMITED ..... Petitioner
Through Mr.Kapil Sibal, Sr. Adv.
Dr.A.M.Singhvi, Sr.Adv. and
Mr.Rajiv Nayar, Sr.Adv. with
Mr.Anirban Bhattacharya,
Mr.Gauhar Mirza & Mr.Aditya
Vikram, Advs.

versus

SPICEJET LIMITED & ANR ..... Respondents
Through Mr.Sandeep Sethi, Sr. Adv. with
Mr.Abhishek Sharma & Ms.Satakshi
Sood, Advs. for respondent No.1.
Mr.Atul Sharma, Adv. with
Mr.Anand Srivastava & Mr.K.R.
Sariprabhu, Adv. with Mr.Vishnu
Sharma, Adv. for R-2.
Ms.Surekha Raman, Adv. with
Mr.Anuj Sarma, Adv. for BSE.
Mr.Neeraj Malhotra, Adv. with
Mr.Rupal Luthra, Adv. for SEBI.

+ O.M.P.(I) (COMM.) 72/2016

KALANITHI MARAN ..... Petitioner
Through Mr.Kapil Sibal, Sr. Adv.
Dr.A.M.Singhvi, Sr.Adv. and
Mr.Rajiv Nayar, Sr.Adv. with
Mr.Anirban Bhattacharya,
Mr.Gauhar Mirza & Mr.Aditya
Vikram, Advs.

versus

SPICEJET LIMITED & ANR ..... Respondents

Through Mr.Sandeep Sethi, Sr. Adv. with Mr.Abhishek Sharma & Ms.Satakshi Sood, Advs. for respondent No.1.
Mr.Atul Sharma, Adv. with Mr.Anand Srivastava & Mr.K.R. Sariprabhu, Adv. with Mr.Vishnu Sharma, Adv. for R-2.
Ms.Surekha Raman, Adv. with Mr.Anuj Sarma, Adv. for BSE.
Mr.Neeraj Malhotra, Adv. with Mr.Rupal Luthra, Adv. for SEBI.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By way of this common order, I propose to decide the above mentioned two petitions by Kal Airways Pvt. Ltd., the petitioner in OMP (I)(Comm) No.71/2016 and Mr.Kalanithi Maran, the petitioner in OMP(I)(Comm) No.72/2016 filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as the "Act").

2. The Petitioner Kalanithi Maran was a Director and non-executive Chairman of Spicejet Limited- respondent No.1 (a company incorporated under the Companies Act, 1956 having its registered office at Indira Gandhi International Airport Terminal 1D, New Delhi-110037 and corporate office at 319, Udyog Vihar, Phase-IV, Gurgaon-122016, Haryana) (hereinafter referred to as the "Company") which is a public listed company engaged in the business of scheduled airline services, international airline services, etc. under the brand name "Spicejet".

3. The relief claimed in OMP (I) (Comm) 71/2016 reads as under:

"a. pass an ad-interim ex-parte order restraining Respondent No.1 and Respondent No.2 from allotting/ transferring/issuing/ alienating and/or creating any third party interest and/or encumbrance on any shares of the Company;

b. pass an ad-interim ex-parte order directing the Respondents to deposit a sum of Rs. 835,00,00,000/- (Rupees Eight Hundred and Thirty Five Crores only)in the Court i.e. the value of the shares due to the Petitioner against the Warrants and CRPS shares;

c. pass an ad-interim ex-parte order attaching the bank accounts of the Respondents bearing Nos. 000705011602 held in ICICI Bank Ltd, 9A Phelps, Connaught Place, New Delhi-110001, 000381400002337 held in Yes Bank, 11/48, Shopping Centre, Malcha Market Chanakyapuri, New Delhi-110021, 05860200001369 held in Bank of Baroda, Parliament Street, New Delhi-110001, 04852320000132 held in HDFC Bank Ltd, B-1, Vaniya Kunj, Enkay Tower, Udyog Vihar, Phase V, Gurgoan-122001, Haryana, 50000741832 held in Allahabad Bank, 2nd Floor, 37, B.S. Marg Fort, Industrial Finance Branch, Mumbai- 400023, Ale nos. 0361200001681086, 036109000143003 and 510909010018546 held in City Union Bank Ltd, Keerthis, 67, Mandaveli Street, Chennai- 600028. pending adjudication of the disputes;

d. confirm the above prayers in (a) to (c) above upon hearing the parties;

e. award costs of the present petition to the Petitioners;".

4. The relief sought in OMP (I) (Comm) 72/2016 reads as under:

"a. pass an ad-interim ex-parte order restraining Respondent No.1 and Respondent No.2 from allotting/ transferring/issuing/ alienating and/or creating -any third party interest and/or encumbrance on any shares of the Company;

b. pass an ad-interim ex-parte order directing the Respondents to deposit a sum of Rs. 250,00,00,000/- (Rupees Two Hundred and Fifty Crores only) in the Court i.e. the value of the shares due to the Petitioner against the Warrants and CRPS shares;

c. pass an .ad-interim .ex-parte order attaching the bank accounts of the Respondents bearing Nos. 000705011602 held in ICICI Bank Ltd, 9A Phelps, Connaught Place, New Delhi-110001, 000381400002337 held in Yes Bank, 11/48, Shopping Centre, Malcha Market Chanakyapuri, New Delhi-110021, 05860200001369 held in Bank of Baroda, Parliament Street, New Delhi-11 0001, 04852320000132 held m I-IDFC Bank Ltd, B-1, Vaniya Kunj, Enkay Tower, Udyog Vihar, Phase V, Gurgoan-122001, Haryana, 50000741832 held in Allahabad Bank, 2nd Floor, 37, B.S. Marg Fort, Industrial Finance Branch, Mumbai- 400023, A/c nos. 0361200001681086, 036109000143003 and 510909010018546 held in City Union Bank Ltd, Keerthis, 67, Mandaveli Street, Chennai- 600028. pending adjudication of the disputes;

d. pass an ad-interim ex-parte directing the Respondents to take all necessary steps for compounding the offence under Section 276B of the IT Act.

e. confirm the above prayers in (a) to (d) above upon hearing the parties;

f. award costs of the present petition to the Petitioners;"

5. Both the petitioners were the shareholders of respondent No.1, they held 35,04,28, 758 Equity Shares of the company constituting 58.46% of the share capital of which 26,73,70,826 Equity Shares were free from all encumbrances and 8,30,57,932 equity shares were encumbered with various lenders (hereinafter both petitioners would be referred as petitioners).

6. During the years 2013-2015, the respondent No.1 company was in the midst of tremendous distress, due to which it was facing difficulties in maintaining its fleet, staff and operational integrity. The

petitioner were therefore, keen and desirous of reviving the respondent No.1 company from the distress and in this regard.

7. Admittedly vide a Loan Agreement dated 18th December, 2013 (hereinafter "First Loan Agreement"), an amount of Rs.75,00,00,000/- (Rupees Seventy Five Crores only) was given by the petitioner to the respondent No.1. Further, a Loan Amendment Agreement dated 7th November, 2014 was executed between the petitioner and the respondent No.1 whereby the parties agreed to reduce the amount of Rs.10,40,83,830/- (Rupees Ten Crore Forty lakh Eighty Three Thousand Eight Hundred and Thirty only) from the loan amount provided under the First Loan Agreement and utilize the same towards the payment of exercise of option attached to 191,69,000 warrants issued on preferential basis to the Petitioner by the Respondent No.1. Accordingly, the outstanding loan amount under the First Loan Agreement stood at Rs.64,59,16,170/- (Sixty Four Crore Fifty Nine Lakh Sixteen Thousand One Hundred and Seventy only). Thereafter, another loan of Rs.114,00,00,000/- (Rupees One Hundred and Fourteen Crores only) was given by the petitioner to the respondent No.1 vide Loan Agreement dated 21st November, 2014 (hereinafter "Second Loan Agreement").

8. In terms of the Board Resolution passed by the Board of Directors of the respondent No.1 company on 21st August, 2014 the warrants were to be issued "in accordance with Regulation 76 of the SEBI (Issue of Capital & Disclosure Requirements) Regulations, 2009 …".

In view of passing of the said Board Resolution the Respondent No.1 Company made an application to the Bombay Stock Exchange (BSE). Admittedly, the respondent No. 1 Company was still under the

control and management of the Petitioner and KAL Airways Private Limited.

9. In its general meeting who also approved the issuance of the Warrants at a conversion price of Rs. 16.30 per Equity Share. The said resolution also recorded that the issuance of Warrants would be "in accordance with Regulation 76 of the SEBI (Issue of Capital & Disclosure Requirements) Regulations, 2009.

10. The respondent No. 1 company on 15th January, 2015 presented a scheme to the Ministry of Civil Aviation for transferring of shares from the Petitioner and Kal Airways Private Ltd.(hereinafter "KAL") to the respondent No.2.

11. The Ministry of Civil Aviation on 22nd January, 2015 approved the "Scheme of Reconstruction and Revival for takeover of the ownership, management and control of SpiceJet Limited" ("Scheme") and passed the following order:

> "In view of the forgoing, and under the provisions under Section 3, Series C, Part II of the Civil Aviation Requirements and other applicable regulations, this ministry conveys its no objection to:
>
> - The Scheme of Reconstruction and Revival for Takeover of Ownership, Management and Control for the takeover of the ownership, management and control of the Company by Mr. Ajay Singh;
> - The change in the ownership of the Company, pursuant to proposed transfer of the Sale Shares by the Outgoing Promoters in favour of the Incoming Promoters;
> - The change in the management of the Company arising out of proposed changes in the equity holdings of the Company;
> - Grant permission to Mr. Ajay Singh to propose appointment of new directors on the Board of the Company.

> This is subject to the security clearance of the new promoters and directors by the Ministry of Home Affairs, restrictions imposed by DIPP/FIPB on FDI, AIC 12/2013 dated 01-0ct 2013 and relevant regulations of SEBI on Substantial Acquisition of Shares and Takeovers."

12. Based on many discussions and in order to restore the operation and market position of the respondent No.1, the petitioners had agreed to transfer their shares and respondent No.2 agreed to acquire the same. The share Sale Purchase Agreement ("SPA") was executed between both the petitioners and the respondents on 29th January, 2015.

13. By virtue of agreement, the respondent No.2 had acquired 35,04,28,753 equity shares in the respondent No.2 i.e. 58.46% share capital of both petitioners i.e. Kalanithi Maran and Kal Airways Pvt. Ltd. in the respondent No. 1 company by paying just Rs. 2 (two) when admittedly each share of the company itself was around Rs.16.30/- at the time of entering into the SPA (admittedly the value of the said equity shares were atleast Rs.765 crores at that time) subject to the terms that these payments also included the adjustments of the advances monies provided to Spicejet by the Petitioner and KAL Airways Pvt Ltd under the loan agreements dated 18th December, 2013 and 21st November, 2014 and loan amendment agreements dated 7th November, 2014, 5th December, 2014 and letters dated 29th January, 2015 issued by the petitioner to Spicejet Ltd./respondent No.1 and the said position is not denied by the respondents in paras 6,19 and 20 of reply filed to the petitions.

14. The relevant terms of the SPA are extracted herein for ready reference:

> "3.1 The Parties agree and acknowledge that the shareholders of the Company at their general meeting held

on September 24, 2014 had approved the issuance of 8,16,80,629 and 10,74110,749 warrants of the Company to the Sellers as per details set forth in Schedule D("Warrants''), which can be converted into Equity Shares in the Financial Year 2015- 16 and Financial Year 2016-17, respectively. The Warrants will be converted at a conversion price of Rs. 16.30 per Equity Share, as per the price arrived in accordance with SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, for which the Sellers were required to pay to the Company, a sum of Rs.3,08,21,89,461 (Rupees Three Hundred and Eight Crores Twenty One Lakhs Eighty Nine Thousand Four Hundred and Sixty One only) in aggregate of which the amount payable on or before February 15, 2015, has been set out in Schedule D ("Balance Warrants Payment'').

3.2 The Seller 1 agrees to make the Balance Warrants Payment on or before February 15, 2015. The Parties agree and acknowledge that the Company shall issue the Warrants within fifteen (15) Business Days of receipt of all the necessary approvals including the Governmental Approvals required for the same.

3.3 Subject to the terms and conditions of this Agreement and the simultaneous payment of the Tranche 1 CRPS Amount to the Company in the manner set out in this Agreement, and in consideration of the mutual covenants set out herein, the Sellers agree to subscribe on or before the Second Closing Date and the Company agrees to thereafter, issue and allot on a preferential basis, the Tranche 1 CRPS Shares, the particulars of which are set forth in Schedule B, free and clear from all and any Encumbrance, together with all rights and ·advantages now and hereafter attaching or accruing thereto such that the Sellers shall, upon allotment of the Tranche 1 CRPS Shares in their name, receive full legal and beneficial ownership and all shareholder rights relating thereto.

3.4 On or before the Third Closing Date, the Sellers shall subscribe to, and the Company shall issue and allot on a preferential rights basis to the Seller 2, upon receipt of the Tranche 2 CRPS Amount to be delivered in a single tranche in immediately available funds to the Designated Account 1,

the Tranche 2 CRPS Shares, the particulars of which are set forth in Schedule B, free and clear from all and any Encumbrance, together with all rights and advantages now and hereafter attaching or accruing thereto such that the Seller 2 shall, upon allotment of the Tranche2 CRPS Shares in his name, receive full legal and beneficial ownership and all shareholder rights relating thereto.

4. CONDITIONS PRECEDENT TO FIRST CLOSING

4.1 The obligation of the Acquirer to purchase the Sale Shares and pay the Purchase Consideration on the First Closing Date is conditional upon the achievement of, to the reasonable satisfaction. of the Acquirer (or where permissible under Law, waiver in writing by the Acquirer in its sole discretion), the conditions as set forth below within the time specified in this Clause 4.1 (the "Conditions Precedent"). The processes for the fulfilment of the Conditions Precedent shall be initiated on or immediately after the Effective Date or any other date as agreed between the Acquirer, Sellers and the Company, unless otherwise specified in this Clause

4.1 to be initiated and/or completed at any later date.

4.1.2 ...

4.1.3 ...

4.1.4 Within two (2) days of the Effective Date, the Company shall have initiated steps for taking the approval of the Shareholders by undertaking a postal ballot under the Act and the Companies (Management and Administration) Rules, 2014, subject however to the provisions of applicable Law and receipt of requisite Governmental Approvals: (a) for the issuance and allotment of Tranche 1 CRPS Shares and Tranche 2. CRPS Shares to the Sellers for the Tranche.] CRPS Amount and the Tranche 2 CRPS Amount respectively, on the terms and conditions specified in Schedule B;

4.1.3 The following actions shall have been undertaken and completed within 3 (three) Business Days of the Effective

Date:

(a) The Escrow Agreement, shall have been executed between the parties thereof and be in full force and the

Escrow Account shall have been opened with the Escrow Agent;

(b) The Sellers shall deliver or cause to be delivered to the Escrow Agent, the Collaterals;

6. CONDITIONS SUBSEQUENT

6.1 ..

6.2 ..

6. 3. The Acquirer shall procure the release of the Seller Guarantees:

6.3.1 The Acquirer shall procure the release from Yes Bank, of the Seller Guarantee, being the Personal Guarantee executed by Seller 2 on July 11, 2012 for financing facility provided in favour of the Company on or before February 24, 2015; and

6.3.2 The Seller 2 shall make a fixed deposit of Rs.100, 00, 00, 000 (Rupees One Hundred Crores only) in the City Union Bank ("Fixed Deposit'') and provide the evidence of the same to the Company. Thereafter, the Company shall procure the release from City Union Bank of the Seller Guarantee, being the Mortgage and Personal Guarantee created by Seller 2 on March 3, 2012 and December, 2012 for financing facility provided in favour of the Company, on or before February 24, 2015. The Seller 2 shall issue irrevocable instructions to the City Union Bank to forthwith release the Fixed Deposit in favour of the Company towards Tranche] CRPS Amount, upon receipt of an instruction of the Company in this regard.

7. SECOND CLOSING

7.1 Second Closing Date

The Second Closing shall take place on February 15, 2015 or such other date as may be agreed between the Parties ("Second Closing Date'') subject to the achievement of the First Closing and the satisfaction of the Conditions Precedent specified in Clause 5.3.5 (d) and Clause 6.3. All transactions relating to the subscription of the Tranche I CRPS Shares by the Sellers shall be deemed to have occurred simultaneously.

7.2 Closing Agenda

On the Second Closing Date, the following events shall take place:

7.2.1 The Sellers shall remit the Tranche 1 CRPS Amount (less Rs. 100,84, 06,170 (Rupees One Hundred Eighty Four Lakhs Six Thousand One Hundred and Seventy only) which shall be adjusted in the manner stated in Schedule D pursuant to the Amendment Agreements) and the Seller 1 shall remit the Balance Warrants Payment into Designated Account 1 and Designated Account 2 respectively, in such proportion and manner as set out under Schedule H, provided that the amount of :

(a) Rs.1,05,20,35,549.34(Rupees One Hundred and Five Crores Twenty Lakhs Thirty Five Thousand Five Hundred and Forty Nine and Paisa Thirty Four only) shall be deposited in Designated Account 2 on or before February 24, 2015; and;

(b) Rs. 100,00, 00, OOO(Rupees One Hundred Crores only) shall be deposited in Designated Account 2 within two(2) days of the Company issuing written instructions to City Union Bank for the encashment of the Fixed Deposit. The Parties agree that the Company shall issue the written instructions to City Union Bank as aforesaid, upon Consent of Export Development Canada has been obtained for repayment of the financing facility provided by City Union Bank to· the Company of Rs.100,00,00,000(Rupees One Hundred Crores only).

7.2.2 A meeting of the Board shall be held at which meeting, the following shall be resolved, subject to the approval of the shareholders of the Company pursuant to Clause 4.1. 4:

(a) The Tranche 1 CRPS Shares shall be issued and allotted to the Sellers, free and clear of all Encumbrances, in accordance with the applicable provisions of the Act;

(b) The name of the Sellers shall be entered in the register of members of the Company as the legal and beneficial owner of the Tranche 1 CRPS Shares;

(c) Certificates representing the Tranche 1 CRPS Shares shall be issued to the Sellers in such numbers as may be required by the Sellers;

7.2.3 The Parties agree and acknowledge that upon the payment of the Balance Warrant Payment and the Tranche 1 CRPS Amount, the Company shall issue the Release Notice to the Escrow Agent for the release such portion of Co/laterals, being 3,35,04,342 equity shares of SUN DTH Private Limited and post dated cheque nos. 001662, 001663 and 001457, all dated February 15, 2015 for an amount aggregating to Rs.400,00,00,000 (Rupees Four Hundred Crores only); and

8.1 Third Closing Date

The Third Closing shall take place on June 1, 2015 or such other date as may be agreed between the Parties ("Third Closing Date''). All transactions relating to the subscription of the Tranche 2 CRPS Shares by the Seller 2 shall be deemed to have occurred simultaneously.

8.2 Closing Agenda

On the Closing Date, the following events shall take place:

8.2.1 The Seller 2 shall remit the Tranche 2 CRPS Amount into the Designated Account 1;

8.2.2 ....

8.2.3 The Parties agree and acknowledge that upon the payment of the Tranche 2 CRPS Amount, the Company shall issue the Release Notice to the Escrow Agent for the release the Collaterals being 41,77,699 equity shares of SUN DTH Private Limited and post dated cheque no. 001452 drawn on City Union Bank dated June 1, 2015 for an amount of Rs.50,00,00,000 (Rupees Fifty Crores only) for Tranche 2 CRPS Amount."

15. In terms of Clause 12.2 of the SPA, the parties ensured and procured amounts in a designated account to be utilized only for the settlement of the existing outstanding statutory dues of the respondent No.1 to the statutory authorities.

The said clause is reproduced below:

"12.2 The Sellers and the Acquirer shall ensure and shall procure that the amounts in Designated Account 2 is utilized only for the settlement of the existing outstanding

statutory dues to the Governmental Authorities of the Company and towards release of Sellers Guarantees as per the order of priority set forth in Schedule H and the amounts in the Designated Account 1 shall be utilised by the Company for its operations in the Ordinary Course."

16. In terms of clause 12.3 of the SPA, the respondent No.2 indemnified, ensured and undertook to take all steps to defend and hold harmless the petitioner and KAL from any penal action, liability or claim due to non-payment of statutory dues in relation to respondent No.1. The said clause is reproduced below:

> *"12.3. The Acquirer shall procure that the Company shall undertake the Business in compliance with Governmental Approvals and shall ensure that the Company undertakes all steps to defend and hold harmless the Sellers, the nominee Directors of the Sellers who have resigned on the First Closing Date or Representatives of the Sellers as well as existing Directors on the Effective Date .from any penal action, liability or claim due to non-payment of statutory dues stated in Schedule I in relation to the Company.* "
> The Respondent No.1 also issued a letter dated 24.02.2015 to the Petitioner and KAL, indemnifying, ensuring and undertaking to take all steps to defend and hold harmless the Petitioner and KAL from any penal action, liability or claim due to non-payment of statutory dues in relation to Respondent No.1. The relevant extract of the letter dated 24.02.2015 are reproduced below:
> *"The Company undertakes to pay all statutory liabilities to the satisfaction of the authorities concerned and to defend and hold harmless Seller 1 and Seller 2, from any penal action, liability or claim due to nonpayment of statutory dues.* "

17. Vide a letter dated 29th January, 2015, Kalanithi Maran waived the outstanding interest on the outstanding loan amount of Rs.64,59,16,170/- (Rupees Sixty Four Crore Fifty Nine Lakh Sixteen Thousand One Hundred and Seventy only) and discharged the

respondent No. 1 company from payment of the same. It was also agreed that the aforesaid outstanding loan amount of Rs.64,59,16,170/- (Rupees Sixty Four Crore Fifty Nine Lakh Sixteen Thousand One Hundred and Seventy only) shall be utilized for the future subscription to the non-convertible redeemable cumulative preference shares of the respondent No.1 company.

18. In terms of the agreement between the petitioners and the respondents, the petitioner vide another letter dated 29th January, 2015 with respect to the outstanding amounts as per the Second Loan Agreement stated the following:

i) Rs. 33,90,40,000/- (Rupees Thirty Three Crore Ninety Lakh Forty Thousand only) from the outstanding loan amount of Rs.114,00,00,000/- (Rupees One Hundred and Fourteen Crore only) to be utilized for the subscription to 208,00,000 warrants to be issued by respondent No. 1 company and convertible in the financial year 2015-2016;

ii) Rs.43,84,70,000/- (Rupees Forty Three Crore Eighty Four Lakh Seventy -Thousand -only) from the outstanding loan amount of Rs.114,00,00,000/- (Rupees One Hundred and Fourteen Crore only) to be utilized for the subscription to 269,00,000 warrants to be issued by respondent No. 1 company and convertible in the financial year 2016-2017;

iii) The balance loan amount Rs. 36,24,90,000/- (Rupees Thirty Six Crore Twenty Four Lakh Ninety Thousand only) to be utilized for the future subscription to the non-convertible redeemable cumulative preference shares of face value of Rs.1,000/-(Rupees One Thousand only) per share of the respondent No.1 company.

19. By letter dated 14th February, 2015, the First Closing Date as per Clause 5.1 of the SPA was amended and the date was extended to 24th February, 2015.

20. By letter dated 17th February, 2015 the SPA was amended and the following extension of dates were agreed upon:

i) the Second Closing Date as per Clause 1.1 of the SPA was extended to 23.02.2015;

ii) in Clauses 3.1 and 3.2. of the SPA, the reference to 15.02.2015 was amended to 23.02.2015;

iii) in Clause 5.1 of the S,.PA, the reference to 15.02.2015 was amended to 23.02.2015;

iv) in Clause 7.1 of the SPA, the reference to 15.02.2015 was amended to 23.02.2015.

21. Vide letter dated 23rd February, 2015, the SPA was further amended and the following dates were further extended:

i) the "Second Closing Date" was extended to 24.02.2015;

ii) Clause 6.3 and 7.2.1 were amended and replaced;

iii) Schedule B and Schedule H were also amended.

22. In terms of the SPA the Sellers i.e. petitioners made the following payments:

> "20.1) The Balance Warrant Payments (as defined under Clause 3.1 read with Schedule D of/to the SPA) for an amount of Rs.100,00,00,000/- (Rupees Hundred Crores only) under Clause 3.2 of the SPA were made to the Respondent No.1 on 24.02.2015;
>
> 20.2) The Tranche 1 CRPS Amount of Rs.20,02,93,039/- (Rupees Twenty Crore Two Lakh Ninety Three Thousand and Thirty Nine only) in terms of Clause 3 .3 of the SPA was paid to the Respondent No.1 on 24.02.2015;
>
> 20.3) The Tranche 2 CRPS Amount of Rs.94,79,64,450/- (Ninety Four Crore Seventy Nine Lakh Sixty Four Thousand Four Hundred and Fifty only) was

paid to the Respondent No.1 in terms of Clause 3.4 ofthe SPA on 24.02.2015;

20.4) The Tranche 1 CRPS Amount ofRs.5,20,35,549/-(Rupees Five Crore Twenty Lakh Thirty Five Thousand Five Hundred and Forty Nine only) in terms of Clause 7.2.1 of the SPA was remitted to the Respondent No.1 on 24.02.2015;

20.5) The Balance Warrant Payments for an amount of Rs.79,97,06,961/- (Rupees Seventy Nine Crore Ninety Seven Lakh Six Thousand Nine Hundred and Sixty One only) in terms of Clause 7.2.1 of the SPA was remitted into the designated accounts on 24.02.2015;

20.6) On 24.02.2015, the Fixed Deposit for an amount of Rs.100,00,00,000/-(Rupees One Hundred Crore only) was created in City Union Bank Ltd., Maildaveli in lieu of the release of collaterals;

20.7) The Tranche 2 CRPS Amount of Rs.50,00,00,000/- (Rupees Fifty Crore only) was remitted into the Designated Accounts on 03.06.2015."

23. As per law, the respondents were obligated to seek approval of the Competition Commission of India for the sale and purchase of the equity shares in the respondent No.1 Company. On 19th February, 2015, the respondent No.2 – Mr. Ajay Singh received the approval of the Competition Commission of India for the sale and purchase of 35,04,28,758 equity shares in the respondent No.1 Company constituting 58.46% of the paid up equity share capital of the respondent No.1 Company and to issue warrants as agreed.

24. The respondent No. 2 is become the promoter, director and majority shareholder of respondent No.1 and is a signatory to the SPA including the arbitration agreement contained in Clause 16 thereof. The equity shares of the respondent No.1 company are listed and admitted to trading on the Bombay Stock Exchange.

25. Both petitioners claimed to have paid entire amount towards their contractual obligations under the binding SPA including the amounts which were dues of the respondent No.1 Company to the statutory authorities. The petitioners case is that admittedly the respondents have received the amount of Rs.679 crores till 23rd February, 2015 who failed to honour any contractual commitments under the binding SPA.

26. The present petitions under Section 9 of the Arbitration and Conciliation Act, 1996 have been filed to preserve the subject matter of the disputes arising on failure of the Respondents to honour their contractual obligations under the Share Sale and Purchase Agreement dated 29th January, 2015 (hereinafter referred to as "SPA").

27. It is submitted by the petitioners that despite the Petitioners have fulfilled all their obligations under the SPA by depositing the requisite amounts as per the SPA in the designated accounts, the Respondents failed to honour their commitments/obligations under the SPA in the following manner:

a. The Respondents failed to issue the 'Warrants' in terms of Clauses 3.1 and 3.2 of the SPA.

b. The Respondents failed to issue and allot the Tranche 1 and Tranche 2 CRPS Shares in terms of Clauses 3.3, 3.4, 7.2.2 and 8.1 of the SPA;

c. The Respondents failed to utilize the amounts in the Designated Account 2 in order to pay the outstanding statutory dues in terms of Clause 12.2 of the SPA.

d. The Respondents failed to issue the Collaterals in terms of Clauses 4.1.3(b), 7.2.3 and 8.2.3 of the SPA;

e. Despite the fact that the statutory dues of the Government Authorities were to be paid by 12.02.2015, the Respondent No.1 sent a letter to the Central Board of Direct Taxes requesting for waiver of interest leviable under Section 201(1A) of the Income Tax Act, 1961 pursuant to the powers conferred under Section 119 of the Income Tax Act, 1961. This was done by the Respondent No.1 only after filing of two (2) complaint cases being CC Nos. 103/4 and 104/4 titled "ITO vs. M/s Spicejet Ltd. & Ors." (hereinafter "Complaints") have been filed on 02.03.2015 by the Assistant Commissioner of Income Tax under Section 200 of the Code of Criminal Procedure, 1973 (hereinafter "Cr.PC") for alleged contravention under Sections 276B read with Sections 278B, 279 (1) and 278E of the IT Act against the Mr. Kalanithi Maran and the Respondent No.1 before the Court of Shri Pritam Singh, Ld. Additional Chief Metropolitan Magistrate, Tis Hazari Court, Delhi (hereinafter "the Ld. ACMM"). The Ld. ACMM took cognizance of the alleged offence and issued Summons against the Mr.Kalanithi Maran and the Respondent No. I among others vide summoning order dated 20.07.2015.

28. It is stated by the petitioners that in terms of Clause 12.2 of the SPA read with Schedule-H and I, all the requisite amounts were deposited by the petitioners in the Designated Accounts, which were agreed to be utilized for settlement of the statutory dues payable by the Respondents to the Governmental Authorities, specially towards the Income Tax liabilities, service tax with respect to which the

criminal proceedings have been initiated by way of the Complaints, however, the respondents have failed in their obligation.

29. The petitioners issued a letter dated 24th September, 2015 demanding as under:

> "a. To issue the Warrants in terms of the letter and spirit of clauses 3 .1 and 3 .2 of the SPA.
>
> b. To issue and allot the Tranche 1 CRPS Shares and Tranche 2 CRPS Shares in the names of the Petitioner and Mr.Kalanithi Maran, in terms of the letter and spirit of clauses 3.3, 3.4 and 7.2.2 and 8.1 of the SPA.
>
> c. To take all steps to utilize the amounts in the Designated Account 2 in order to pay the outstanding statutory dues, as claimed in the Complaints in terms of the letter and spirit of clause 12.2 of the SPA;
>
> d. To take all necessary steps for compounding the offence under Section 276B of the IT Act as alleged in the Complaints and relieve Mr. Kalanithi Maran from any penal action and/or liability."

30. In nut-shell, it is submitted by the petitioners that the respondents have received the amount of Rs. 679 Crores till 23rd February, 2015 who failed to honour even a single contractual commitment under the binding SPA and on the other hand, the Petitioners' money was used to run the company and pay the statutory dues.

31. It was the obligations by the Respondents to hold Mr. Kalanithi Maran harmless from any penal action and he continues to face criminal proceedings for non-discharge of statutory liabilities vide complaints filed in March, 2015 when the responsibility of discharge of statutory duties was on the respondents.

Respondents' main contentions

32. It is stated by the respondent inter alia that the petitioners were aware of the fact that the application which had been made to the BSE may or may not fructify. It was also incorporated in the Share Sale Purchase Agreement ("SPA") executed between the parties that the issuance of warrants would be within 15 days "of receipt of all the necessary approvals including the Governmental Approvals required for the same. It is also submitted that the respondents have not only complied with the terms of the SPA but have gone beyond their obligations by utilizing the amounts in Designated Accounts for the prescribed purposes only and have in addition to releasing the mortgage and personal guarantee of the Petitioner, also paid the entire outstanding Income Tax liabilities including the interest thereon.

33. It is further submitted that the subject matter of the present dispute, as asserted by the petitioner is the issue of allotment of Warrants, Tranche 1 CRPS and Tranche 2 CRPS. However, the BSE and the SEBI have made their stand clear that in light of the SEBI ICDR Guidelines the Warrants cannot be issued in the prevailing facts and circumstances. The petitioners have not initiated any action to challenge/appeal the stand taken by SEBI and BSE by the parties herein before this Court. Therefore, having accepted the position that the Warrants cannot be issued the petitioner is not entitled to any relief and the same ought to be dismissed with costs. It is not in the control of respondents insist upon the SEBI and BSE to allot the warrants.

34. It is alleged on behalf of respondent No.2 that in view of the requirements of 42 (3) of the Companies Act, 2013, the Respondent No.1 Company cannot make an invitation for fresh offer of securities unless and until the offer or invitation for issue and allotment of

securities made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the Respondent No.1 Company. Accordingly, until the conclusion of the issuance of the warrants and completion of the obligations of the Petitioner under the SPA, the respondent No.1 Company shall be in violation of applicable laws and the terms of the SPA, should the Respondent No.1 Company proceed with the issuance of CRPS Shares and any such issuance of CRPS Shares will be illegal and irregular. Accordingly, the respondent No.1 Company has not been able to proceed with the issuance of the CRPS Shares.

35. It is submitted that the subject matter of the present dispute does not concern the shares of the respondent No.1 Company as admittedly, due to non-compliance with certain regulations, the respondent No.1 Company is unable to issue Warrants. Since the shares of the Respondent No.1 Company to which the petitioner would have been entitled to upon conversion of the Warrants have not even come into existence, the petitioner cannot claim any interim relief in the nature of a restrain from allotting / transferring / issuing any shares of the Respondent No.1 Company. When Rs. 178 crores was brought in as loan by the petitioners, the respondent No.1 Company, the same was under the management and control of the Petitioners. The said amount was used for the operations of the respondent No.1 Company before execution of SPA. In addition to that an amount of Rs. 100 crores was not received from the petitioners by the respondents in terms of SPA. As such, an amount of Rs. 278 crores out of the total Rs. 308 crores is already accounted for and therefore, the entire dispute, if any, pertains to Rs. 30 crores.

36. It is admitted in reply that the issuance of warrants at the earlier price has become an impossibility. In view of the same the claim raised by the petitioner can at best be a claim for restitution, which would in turn amount to a money claim which has to be decided by a Learned Arbitrator in arbitration proceedings as issuance of warrants has become an impossibility, if the petitioners were to abandon the application for warrants and bar of Section 43 of the Companies Act would be removed, the respondents could also offer to issue CRPS shares for the value for which warrants were to be issued to the petitioners thereby settling the entire dispute between the Parties. As such, no cause for grant of interim relief to the petitioner has arisen, therefore, the present petition should be dismissed and the interim relief granted by this Court should be vacated.

37. Both parties have made their submissions who have also filed the written argument.

38. The main disputes raised on behalf of the petitioner in the present matters are about

i) non issuance of warrants and
ii) non-convertible redeemable cumulative preference shares ("CRPS")
iii) non-compounding of the offences under Section 278B of the Income Tax Act, 1961.

Each head is to be both dealt with separately in view of pointwise submissions made by the parties.

39. **Non-issuance of Warrants, the contention of the petitioners**

With regard to non-issuance of warrants by the respondents, Mr. Kapil Sibal, learned Senior counsel appearing on behalf of the

petitioners submits that warrant were to be issued to Mr. Kalanithi Maran and KAL under Clause 3.1 and 3.2 the SPA in Tranche 1 and Tranche 2 at an agreed price of Rs. 16.30/- per share. But the respondents failed to issue the same. In terms of the SPA the respondent No.2 ("Mr. Ajay Singh") acquired the 58.46% stake of the petitioners, i.e. Mr. Kalanithi Maran and Kal Airways Pvt. Ltd. in the respondent No. 1 company, Spicejet Limited (hereinafter "Spicejet") by paying just Rs. 2 (two) when the value of the said stake was atleast Rs. 765 crores as per the case of the petitioners.

40. Mr.Kapil Sibal, learned Senior Counsel submits that the entire payment for the warrants was made by Mr. Kalanithi Maran Rs.777,510,000/- by KAL Airways Pvt. Ltd. Rs.2,304,679,461/- i.e. Total sum of Rs.3,082,189,461/- as consideration for Tranche 1 and Tranche 2 warrants by 23rd February, 2015 itself. It is submitted by him that his client was following the application dated 18th September, 2014 very strongly. However, when Company was taken over by respondent No.2 on 29th January, 2015. It was the duty of the respondents to do whatever was necessary for the purpose of ensuring the issuance and allotment of the warrants at the agreed price of Rs.16.30/- per share. After 29th January, 2015, both petitioners have lost full control of respondent No.1, they could not have approached the BSE and SEBI directly, though they were always willing and agreeable to co-operate with the respondents to pursue the pending application dated 18th September, 2014.

Learned Senior counsel submits that even when BSE sought certain clarifications vide its letter dated 27th March, 2015, the respondents for obvious reasons maintained silence which led to closing of the in-principal application for want of response from

Spicejet Ltd. Mr.Sibal has referred to letter dated 10th July, 2015 issued by BSE to Spicejet Ltd. wherein it has been categorically stated that *"due to lack of response from the company the application is considered closed"* which is attributable only to the respondents.

41. The respondents do not dispute that on the basis of said resolution on 18th September, 2014 filed an application with the BSE under clause 24(a) of the Listing Agreement for seeking its in-principle approval for the issue and allotment of up to:

i) 8,16,80,629 warrants having option to apply for and be allotted equivalent number of equity shares of the face value of Rs. 10 each on preferential basis and convertible in year 2015-2016; and

ii) 10,74,10,749 warrants having option to apply for and be allotted equivalent number of equity shares of the face value of Rs.10 each on preferential basis and convertible in year 2016-2017.

42. Counsel for the respondents does not dispute that in its meeting held on 21st August, 2014, proposed to issue and allot 189,091,378 warrants at an issue price of Rs.16.30 convertible into equivalent number of equity shares of the Respondent No.1 Company, in two tranches, to the erstwhile promoters of the Respondent No.1 Company (i.e. the Petitioner herein and Mr. Kalanithi Maran-the Petitioner on preferential allotment basis. His simple reply is submits that when the resolution passed by the Board of Directors on 21st August, 2014, the Respondent No. 1 Company was under the management of the Petitioner and Mr. Kalanithi Maran provided that the issue of warrants would be "in accordance with Regulation 76 of the SEBI (Issue of Capital & Disclosure Requirements) Regulations, 2009 ... ".

43. It is not denied by the respondents that prior to execution of SPA, the Respondent No. 1 Company at its general meeting held on 24th September, 2014 approved the issuance of the Warrants at a conversion price of Rs.16.30 per Equity Share. As certain part of pre-preferential shareholding of Petitioner was pledged with the Banks (Yes Bank Limited and Allahabad Bank), the BSE on 25th September, 2014 raised a query and requested the Respondent No 1 Company to provide a non-disposal undertaking/confirmation from the said Banks in compliance with the lock-in requirements under applicable laws. On 1st October, 2014, the BSE sent a reminder to the Respondent No.1 Company in regard to its earlier communication dated 25th September, 2014. The Respondent No. 1 Company again wrote to the BSE vide its letter dated 7th October, 2014 seeking time to provide the said non-disposal undertakings/confirmations from the said Banks (being Yes Bank and Allahabad Bank). One of the Banks with which pre-preferential allotment shareholding of the Petitioner was pledged Le. Yes Bank Limited, provided the said non-disposal undertaking/ confirmation vide its letter dated 10th October, 2014. (which was subsequently withdrawn by the said Bank due to financial distress of the Respondent No. 1 Company). This letter was forwarded by the Respondent No. 1 Company to the BSE under cover of its letter dated 10th October, 2014. From 14th October, 2014 to 25th October, 2014, BSE once again requested the Respondent No. 1 Company to provide said non-disposal undertaking/confirmation from the Banks. However, as a result of non-cooperation of the banks due to the extreme financial distress faced by the Respondent No.1 Company, these undertakings could not be provided to the BSE. The Respondent No.1 Company continued to pursue its application dated 18th September,

2014 filed with the BSE with great persistence and these efforts have continued till date. These efforts were made by the Respondent No.1 Company while it was under the control and management of the petitioners. It is stated on behalf of the respondents that subsequently when it came under the management and control of Respondent No.2- Mr. Ajay Singh by virtue of SPA (w.e.f. 29th January, 2015) the petitioners on 13th January, 2015 conveyed the respondent no.2 that they willing to infuse an additional sum of Rs. 450 crores in the Respondent No. 1 Company with the objective of supporting the turnaround plan.

44. In the reply it is not denied by the respondents that it was also agreed in the SPA that upon payment of the Tranche 1 CRPS amount and Tranche 2 CRPS amount, the Respondent No.1 Company shall issue and the sellers i.e. petitioners shall subscribe to the Tranche 1 CRPS and Tranche 2 CRPS shares respectively, the particulars of which were set forth in Schedule B of the SPA.

45. However, it is submitted by the respondents that the issuance of warrants was contingent upon obtaining the necessary approvals from all Governmental Authorities. The Respondent No.1 Company continued to pursue its Application with the BSE throughout this period. However, on 10th July, 2015 BSE issued a letter to the Respondent No. 1 Company referring to its last intimation dated 27th March, 2015 wherein it had sought non-disposal undertaking/confirmation from the Banks. In its letter of 10th July, 2015, in light of failure of the Banks to submit non-disposal undertaking/ confirmation, the Application of the Respondent No.1 Company was considered closed.

46. Consequent to letter dated 10th July, 2015 being issued by BSE, the Respondent No.1 Company again actively followed up with the BSE and accordingly, provided a written response dated 5th August, 2015 to BSE contesting the wrongful disposal of the application and the reasons cited thereof. Thereafter, on 14th September, 2015, officials of the Respondent No.1 Company together with the representatives of the Petitioner and Mr.Kalanithi Maran attended the offices of the BSE and provided explanations sought by the BSE. It is stated by the respondents that the only remedy lies with the petitioners to challenge the disposal of the application in wrongful manner.

47. In reply to the submission of the respondents, Mr.Sibal has refuted the argument that the warrants under the SPA had no value. Currently, warrants would be issued by the Bombay Stock Exchange. He argued that since the allotment of warrants at Rs.16.30/- per share would have afforded the Petitioners 24% equity (approx.) in Spicejet Ltd.-respondent No.1 and the attendant rights flowing from such shareholding in terms of the applicable law, but, if a fresh application is made today, the same would be at the prevailing price (Rs. 82/- approx) and the Petitioners would not have more than 3% equity.

48. Mr.Sibal submits that it is the admitted position that once the SPA is executed, it was the respondent No.2's obligation for the compliance. As there was no compliance on the part of the respondents, therefore, the application filed by the earlier dated 18th September, 2014 closed.

49. The respondents ought to have returned the amount to the Petitioners within 60 days of the closure of the in-principal application on 10th July, 2015 together with the statutory interest @ 12% p.a. The difference between Rs. 16.30/-(in terms of the SPA) and Rs. 66.30/-

(price of the shares at the time of filing of the petitions) amounts to a total loss of Rs. 250 Crores to Mr.Kalanithi Maran and Rs. 835 Crores to KAL Airways Pvt. Ltd. Therefore the said amount is required to be secured under Section 9(1)(ii) of the Arbitration Act as per petitioners apprehends that in case the interim relief is not granted, the petitioners would suffer irreparable loss and injury and if the Respondents are not restrained by an order of injunction from alienating or transferring or dealing with the shares great hardship will be caused to the Petitioner.

50. Prima facie it appears to the Court that the petitioners at this stage cannot be blamed for non-compliance in view of existence of Clause 3.2 of the SPA which is again extracted below:

> *"3.2 The Seller 1 agrees to make the Balance Warrants Payment on or before February 15, 2015. The Parties agree and acknowledge that the* ***Company shall issue the Warrants*** *within fifteen (15) Business Days of receipt of all* ***necessary approvals including the Governmental Approvals*** *required for the same".*

The terms of SPA are not denied by the respondents. The respondents cannot take the stand contrary to the agreed terms. Admittedly after 29th January, 2015, both petitioners have no control with the respondent No.1 even they could not have directly dealt with BSE and SEBI being stranger after the execution of S.S.A. on 29th January, 2015. As per clause 3.2 it were obligation of the Respondents. The Clause 17.8 of the SPA which is also extracted as under:

> *"17.8 Further Actions-The Parties shall do or cause to be done such further acts, deeds, matters and things and execute such further documents and papers as may be reasonably required to give effect to the terms of this*

Agreement, in each case without any additional consideration."

As per Clause 17.11 of the SPA attracted in support of the petitioners. The same is extracted below:

"17.11 Time is of the Essence-Time is of the essence with respect to all provisions of this Agreement that specify a time for performance, provided, however, that the foregoing shall not be construed to limit or deprive a Party of the benefits of any grace or use period allowed in this Agreement."

51. If the Clauses 3.2 read with 17.8 read with 17.11 of the SPA are read co-jointly it appears that parties agreed that the respondents were obligated under the SPA to undertake all actions to ensure that the petitioners are allotted the warrants at the agreed price.

52. Though, the said issue of non-compliance which is disputed by the respondents is to be finally decided by the arbitral tribunal as to whom should be blamed with, but prima facie there is a force in the submissions of Mr.Sibal that after execution of SPA the obligation was of the respondents qua the issuance of warrants because on the date of execution of agreement dated 29th January, 2015, the respondent No.2 was fully aware about the pendency of the application. Assuming for the sake of argument, the respondent No.2 is not to be blamed but at the same time, it cannot be denied by the respondent No.2 warrants as per SPA were to be allotted to the petitioners and amount thereto were in possession of the respondents. On one hand, the respondents are alleging that the warrants should have been issued and after prescribed period of time, the respondents were also supposed to issue share of CRPS. On other hand, it is being argued on their behalf that the CRPS shares cannot be issued as the warrants

could be allotted and in the absence thereof there they would be in violation of Section 42 of the Companies Act, 2013.

53. The other important aspect is that the respondents in their reply at para 3 of the Preliminary Objections have themselves stated that the issuance of warrants has become an impossibility in law". Therefore, in view of the submissions of BSE/SEBI and also the statement made by the Respondents supported by an affidavit it is clear that the issuance of warrants at Rs. 16.30/- per share is an impossibility. Surprisingly on one hand there is specific argument of the respondents that it is impossible in law to issue of warrants, on other hand it is argued by the respondents that the petitioner should have challenged the order of BSE by filing of an appeal. It is the respondents who have received the consideration from the petitioners and one is failed to understand why the petitioners should litigate with BSE or SEBI who are simply stranger to the SPA and particularly when it was the obligation of the respondents.

54. When the matters were heard on 14th March, 2016, the following orders were passed:

> "1. The abovementioned two petitions have been filed under Section 9 of the Arbitration and Conciliation Act, 1996, seeking various interim reliefs, *inter-alia,* for restraining the respondents No.1 & 2 from allotting/transferring/ issuing/ alienating and/or creating any third party interest and/or encumbrance on any shares of the Company.
>
> 2. When these petitions were listed on 11th March, 2016, Mr.Kapil Sibal, learned Senior counsel appearing on behalf of the petitioner in O.M.P. (I) (COMM.) No.72/2016 had informed the Court that the petitioner Mr.Kalanithi Maran has issued the 'General Lien Letter' dated 24th February, 2015 to the Chief Manager, City Union Bank Limited, Mandaveli Branch, Chennai-600028, requesting

him to take delivery of the deposit of Rs.100 crores duly discharged in favour of the said Bank and hold the same as security for the credit facilities sanctioned up to an overall limit of Rs.100 crores. The submissions of the petitioner are controverted by the learned Senior counsel appearing on behalf of the respondents.

3. Various other issues were discussed by both the parties. Learned Senior counsel appearing on behalf of the respondents had also relied upon various paras of the reply dated 9th October, 2015 to the notice. After small submissions, both the parties agreed that the resolution would be passed by the Board of the respondent No.1-Company, authorizing an Agent to appear and represent the Company before the Bombay Stock Exchange (BSE)/Securities and Exchange Board of India (SEBI) in the matter of issuance of warrants and place the same before the BSE to consider the application dated 18th September, 2014. Thereafter, the matter was adjourned for today for the purposes of drafting the resolution to be passed by the Board as well as authorization to appear and represent the respondent No.1-Company in the matter of issuance of warrants.

4. It is pertinent to mention here that on 24th August, 2014, the Board Resolution was passed for the issuance of (i) 81,680,629 and (ii) 107,410,749 Warrants. On 18th September, 2014, 'in-principle' application for issuance of warrants was made by respondent No.1-Spicejet to BSE. On 24th September, 2014, the general meeting was held and thereafter, on 29th January, 2015, Share Purchase Agreement was executed between the parties. The entire shareholding of the petitioners was transferred to Mr.Ajay Singh, respondent No.2 herein. The BSE thereafter on 27th March, 2015 sent a letter to respondent No.1-Company seeking undertaking from banks for the pledged shares. On 10th July, 2015, the BSE also sent another letter to respondent No.1-Company closing the 'in-principle' application dated 18th September, 2014, as the said Company did not provide clarification. It is a matter of fact that respondent No.1 sent a letter dated 5th August, 2015 to BSE stating that entire shareholding has been

transferred, therefore, clarification/ undertaking was not required. Respondent No.1 thereafter on 7th January, 2016 made representation to the SEBI for approval on the 'in-principle' application.

5. Learned counsel for respondent No.1 has informed the Court that the aspect of closing of the application dated 18th September, 2014 is now pending before SEBI.

6. Learned counsel for the petitioners submits that as far as the compliance of deposit of the sum of Rs.100 crores is concerned, the same was deposited in time and a letter was also issued to the Chief Manager, City Union Bank Limited, Mandaveli Branch, Chennai. He says that after the application is closed, the same should be reconsidered by the BSE, as the respondents are agreeable to submit the fresh resolution by the Board before the BSE along with the authorization letter so that in the application, appropriate order be passed and thereafter, the respondents may issue the warrants as agreed.

7. Certain suggestions are given without prejudice. The same are read as under:-

a) In terms of Clause 6.3.2 of the SPA, Rs.100 crores to be released to the Company forthwith.

b) The Board of the Company shall pass a resolution jointly authorizing the representative of KAL Airways/ Mr.Kalanithi Maran and the Company to represent and pursue the application seeking approval for the issue of warrants with the BSE/SEBI.

c) Thereafter the Company shall pass a board resolution for issuing the CRPS shares in terms of the provisions of the SPA.

d) On receipt of approval of BSE/SEBI, the warrants are to be issued on the same terms

as approved in the General Meeting dated 24th September, 2014.

e) Since, the Company has paid the statutory dues stated in Schedule 1 of the SPA to the extent of the principle amount, as required under the amended Schedule H of the SPA and as the penal action has not been launched due to any breach/default of the terms of the SPA thus there is no breach of the undertaking given under the SPA. As the penal action has been launched despite payment of the statutory dues stated in Schedule 1, and has in fact been initiated prior to the SPA, the matter is in the domain of a dispute and would have to be adjudicated in an appropriate proceedings.

8. In view of the entire gamut of the matter, I am of the view that at present, there is no impediment if the BSE may consider the application dated 18th September, 2014 in the light of change of circumstances, because of the reason that earlier the respondent No.1-Company did not provide clarification and now, since the clarification is available coupled with the subsequent events, the application dated 18th September, 2014 can be considered by the BSE and the said subsequent events can also be informed to SEBI who is dealing with the representation made by respondent No.1 for approval.

9. Accordingly, as agreed, the parties will file the fresh resolution along with the letter of authorities before the BSE within three days from today. In case of any further queries or any clarification required by the BSE, the parties are ready to cooperate with each other. In view of the same, the BSE will decide the application within two weeks from the date of submitting the requisite papers. As soon as if the orders are passed 'in-principle' application dated 18th September, 2014, consequently there would be no impediment on the part of the respondents to issue the warrants without any delay.

10. List these petitions on 7th April, 2016 for further directions.

11. Copies of this order be given *dasti* to the learned counsel for the parties, under the signatures of the Court Master and copies thereof be also communicated to the BSE & SEBI for information."

55. In view of difficulty explained by the respondents the order dated 24th March, 2016 were passed with the consent of the parties when the matter was taken on 7th April, 2016, the following order was passed:

"On 14th March, 2016, the interim order was passed, the operative portion of which reads as under:-

"9. Accordingly, as agreed, the parties will file the fresh resolution along with the letter of authorities before the BSE within three days from today. In case of any further queries or any clarification required by the BSE, the parties are ready to cooperate with each other. In view of the same, the BSE will decide the application within two weeks from the date of submitting the requisite papers. As soon as if the orders are passed 'in-principle' application dated 18th September, 2014, consequently there would be no impediment on the part of the respondents to issue the warrants without any delay."

I have been informed by the learned counsel for the parties that so far no decision has been taken by the BSE as well as SEBI in view of the detailed order passed. Learned counsel for the respondents submits that as per his information, the BSE has sent the matter to SEBI. As a matter of fact, two weeks have already been expired. Let the notice be issued to BSE and SEBI, who can appear through their counsel, returnable on 26th April, 2016 and inform

the outcome of the decision if taken in view of the order passed on 14th March, 2016. Notice *dasti* as well".

56. It appears that as on 14th March, the respondents were agreeable if the warrants are issued by the BSE in favour of the petitioners as petitioner application made in 2014 when the petitioners in the control of respondent No.1. At that time, they were also agreeable that once the warrants are issues, the compliance of CRPS was also offered by the respondents as per agreed terms of SPA. Their only plea was that if the warrants are not allotted by the BSE and SEBI, the respondents may be able to issue the CRPS, otherwise, their act would be considered as violation of Section 42 of the Companies Act CRPS, they may be prosecuted the same.

57. Later on, learned counsel appeared on behalf of Bombay Stock Exchange on 10th May, 2016 and informed the Court that the earlier application filed if proceeded further would amount to be contrary to the SEBI (ICDR) Regulations, 2009.

Even Mr.Neeraj Malhotra, learned counsel appearing on behalf of SEBI took short adjournment to take the final instruction from his client and to inform the Court. However, on 18th May, 2016 he also informed that it was for the BSE to take the final call about the compliance of orders dated 14th March, 2016 and 7th April, 2016.

Thereafter, the remaining submissions were made by the learned counsel for the parties on 31st May, 2016 and orders were reserved.

58. The respondents have admitted in reply as well as during the course of hearing that it is now not possible to issue the warrants to the petitioners. It means under no circumstances as per old

application, the petitioners can get warrants as agreed by the parties. The said position is also confirmed by the BSE and SEBI. It is also stated by the petitioners that in terms of Section 42(6) of the Companies Act, 2013.

59. The respondents in support of their submission relied upon Clause 17.6 of the SPA extracted below:

> *17.6 Severability- Any provision of this Agreement, which is invalid or unenforceable, shall be ineffective to the extent of such invalidity or unenforceability, without affecting in any way the remaining provisions hereof. If for any reason whatsoever, any provision of this Agreement is or becomes, or is declared by a court of competent jurisdiction to be, invalid, illegal or unenforceable, then the Parties will negotiate in good faith to agree on such provision to be substituted, which provisions shall, as nearly as practicable, leave the Parties in the same or nearly similar position to that which prevailed prior to such invalidity, illegality or unenforceability.*

60. The said arguments of the respondents do not help the case. intent of the respondents as the said Clause indicates that parties agreed that in case of an eventuality wherein any clause of the SPA becomes unenforceable, the parties shall be reinstated to their respective earlier positions. Once prima facie it is held that the respondents were responsible for the present state of affairs it is agreed between the parties in Clause 15.2.2 the agreement shall automatically terminated.

Clause 15.2.2 of the SPA extracted below:

> *"15.2.2 This Agreement shall automatically terminate in the circumstances set forth in Clause 5.2 or if any action has been taken, any order has come into effect, or any Law having been enacted, promulgated or issued or deemed applicable to the transactions contemplated by this Agreement, which would restrain, enjoin or otherwise prohibit*

or make illegal the consummation of the transactions contemplated in this Agreement." whereby all the transactions under the SPA have been rendered void.

61. As on 4th March, 2016, the price per share of respondent No.1 is Rs.66.30 when commitment was made to the petitioners, price of per share was Rs.16.30. The petitioners are insisting the same number of warrants as per SPA and on the other hand, the respondent is agreeable if fresh application is filed but the warrants are issued against the value of amount and not as per sum of warrants mentioned in SPA. In view of such situation coupled with the statement made by BSE and SEBI who refused to allot the warrants on the basis of old application in view of rules, it is clear that warrants as per old application cannot be allotted as even confirmed by the respondents.

62. The schedule D of the SPA depicts the details of amounts paid by the petitioners against the warrants as per agreements:-

NAME	TRANCHE 1 (FY2015-16)				TRANCHE 2 (FY 2016-17)			
	No. of Warrants	Total Consideration (INR)	Advance/Loan Amount (Refer No. 1)	Amount payable for Tranche 1 after adjustment of Advance/Loan Amount	No. of Warrants	Total Amount Payable (INR)	Amount payable for Tranche 2 after adjustment of Advance/Loan Amount	Total Amount to be Paid for Tranche 1 and Tranche 2 of Warrants ("Balance Warrant Payment")
KAL AIRWAYS PVT. LTD	608,80,629	9923,54,253	5049,72,500	4873,81,753	805,10,749	13123,25,209	13123,25,209	17997,06,961
KALANITHI MARAN	208,00,000	3390,40,000	17859,16,170	14468,76,170	269,00,000	4384,70,000	10084,06,170	10084,06,170
TOTAL	816,80,629	13313,94,253	22908,88,670	9594,94,417	1074,10,749	17507,95,209	3039,19,039	7913,00,791

63. The petitioners have also provided the details of payment paid to the respondents as under:-

Kal Airways and Mr.Kalanithi Maran payments details for issue of Warrants and CRPS:

Particulars		Kal Airways Pvt. Ltd.	Kalanithi Maran	
No. of warrants in Tranche 1	No's	60,880,629	20,800,000	
No. of Warrants in Tranche 2	No's	80,510,749	26,900,000	
Total no. of warrants	No's	141,391,378	47,700,000	
Total consideration at the rate of Rs.16.30	Rs.	2,304,679,461	777,510,000	3,082,189,461

CRPS to be issued

Particulars		Kal Airways Pvt. Ltd.	Kalanithi Maran	
No. of warrants in Tranche 1	No's	3,008,406	200,293	
No. of Warrants in Tranche 2	No's	-	500,000	
Total no. of warrants	No's	3,008,406	700,293	
Total consideration face value of Rs.1000 each	Rs.	3,008,406,000	700,293,000	3,708,699,000

Total Transaction Value	6,790,888,461

Payment details:

Payment details of Mr.Kalanithi Maran and Kal Airways Pvt Ltd.	Paid by	

Advance	Rs.	504,972,500		
Adjustment of loan	Rs.	1,785,916,170		
Warrant payment 24.02.2015	Rs.	1,000,000,000	Kal Airways	
Balance Warrant payment 24.02.2015	Rs.	799,706,961	Kal Airways	
CRPS on 24.02.2015	Rs.	200,293,039	Kal Airways	
T-2 CRPS on 24.02.2015	Rs.	947,964,451	Mr.Kalanithi Maran	
T-1 CRPS on 24.02.2015	Rs.	52,035,549	Mr.Kalanithi Maran	
T-2 CRPS on 02.06.2015	Rs.	500,000,000		
Fixed Deposit	Rs.	1,000,000,000	Mr.Kalanithi Maran	
Total consideration paid	Rs.	6,790,888,670		

Total Amount Paid	6,790,888,670

Difference, if any	209

64. The petitioners have claimed compensation on account of loss in investment and interest thereon. The said details referred as under:

Kal Airways Private Limited investment & Loss Details

Particulars		
Total Investment (2304679461+3008406000)	Rs.	5,313,085,461
60880629*50 (loss)		3,044,031,450

Current Investment		8,357,116,911

The petitioners insist that the respondents must secure a sum of Rs.835 crores approximately along with interest at the rate of Rs.12% per annum from the date of receipt of money till the date of payment.

65. Warrants were to be issued to the Petitioner and KAL under Clause 3.1 and 3.2 the SPA in Tranche 1 and Tranche 2.

Payments for the Warrants was made in the following manner:

Petitioner- **Rs. 777,510,000**/-(Rupees Seventy Seven Crore Seventy Five Lakh and Ten Thousand only)

KAL- **Rs. 2,304,679,461/-**(Rupees Two Hundred and Thirty Crore Forty Six Lakh Seventy Nine Thousand Four Hundred and Sixty One only)

Total- **Rs. 3,082,189,461**/-(Rupees Three Hundred and Eight Crore Twenty One Lakh Eighty Nine Thousand Four Hundred and Sixty One only)

66. The total consideration for Tranche 1 and Tranche 2 warrants is **Rs.3,082,189,461**/-. These payments also included the adjustments of the advances monies provided to Spicejet by the Petitioner and KAL under the loan agreements dated 18th December, 2013, and 21st November, 2014 and loan amendment agreements dated 7th November, 2014, 5th December, 2014 and letters dated 29th January, 2015 issued by the Petitioner to Spicejet. The said position is admitted by the Respondents in the reply filed to the petitions.

67. In view of submissions of SEBI/BSE, issuance and allotment of warrants is impossible under law, therefore, Section 56 of the Indian Contract Act, 1872 read with Clause 17.6 of the SPA is triggered and

now it is to be decided at this stage as to what extent the petitioners can be secured in the petitions filed under Section 9 of the Act.

68. Section 56 of the Indian Contract Act, 1872 reads as follows:

> *"56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void. —An agreement to do an act impossible in itself is void."* ***Contract to do act afterwards becoming impossible or unlawful****.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.2"*
>
> **Compensation for loss through non-performance of act known to be impossible or unlawful.**—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise. —Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

Thus, there is a force in the submission of Mr.Kapil Sibal that if the warrants now cannot be issued, under these circumstances, the petitioners are entitled to protect the said amount.

Non-issuance of CRPS

69. In relation to Non-issuance of Non-convertible redeemable cumulative preference shares (for short CRPS), Mr. Sibal has submitted that admittedly the CRPS shares were to be issued to the Petitioner and KAL under Clause 3.3 and 3.4 the SPA in Tranche 1 and Tranche 2.

Payments for the CRPS shares was made in the following manner:

> "Mr. Kalanithi Maran- Rs.700,293,000/-(Rupees Seventy Crore Two Lakh Ninety Three Thousand only) KAL Airways Pvt. Ltd. Rs.3,008,406,000/-(Rupees Three Hundred and Eight Crore Four Lakh Six thousand only)"

70. Mr.Sibal submits that admittedly the total consideration for the Tranche 1 and Tranche 2 CRPS shares was Rs.3,708,699,000/- was made as per SPA. These payments also included the adjustments of the advances monies provided to Spicejet by the petitioner and KAL under the loan agreements dated 18th December, 2013, and 21st November, 2014 and loan amendment agreements dated 7th November, 2014, 5th December, 2014 and letters dated 29th January, 2015 issued by the petitioner to Spicejet. The said position is also admitted by the respondents in the Reply filed to the petitions and paras 19-20 by the respondent No.1.

71. It is contended by the respondents, the petitioners on their on 23rd February, 2015 another amendment letter was executed between the Petitioner, KAL Airways Private Limited and the Respondents whereby the SPA was amended and:

i) Respondent No. 2 -Mr. Ajay Singh agreed to procure release of a personal guarantee issued by Mr. Kalanithi Maran on or before 24th February, 2015; and
ii) Mr. Kalanithi Maran was to make a fixed deposit of Rs.100 crores in City Union Bank and provide

evidence to the Respondent No. 1 Company of the same. Upon the Respondent No. 1 Company releasing the personal guarantees of Mr. Kalanithi Maran, Mr. Kalanithi Maran was to issue written instructions to City Union Bank to forthwith release the Rs. 100 crores in favour of the Respondent No. 1 Company towards the Tranche 1 CRPS Amount

iii) The Second Closing Date was defined to mean the date on which the consent from Export Development Canada (EDC) was obtained for repayment of financing facility obtained by the Respondent No.1 Company and upon completion of aforesaid actions, i.e release of Rs. 100 crores to the Respondent No.1 Company towards the Tranche 1 CRPS Amount. Further, the Second Closing Date was extended to 24th February, 2015;

iv) The details of Tranche 1 CRPS Shares and Tranche 2 CRPS Shares to be issued and allotted to the Petitioner and Mr. Kalanithi Maran were agreed as follows:

Tranche 1 CRPS Shares:
To Petitioner: 2,00,293 CRPS Shares
To Mr. Kalanithi Maran: 30,08,406 CRPS Shares

Tranche 2 CRPS Shares:
To Mr. Kalanithi Maran: 500,000 CRPS Shares

72. As far as the dispute regarding Rs. 100 Crores for the Tranche 1 CRPS is concerned, it is alleged by the respondents that amount was not deposited in the Designated Account 2 under the SPA by the petitioner. It is stated by the respondents that even though the respondent No.1 Company procured the release from City Union Bank of the seller guarantee and obtained the consent of EDC for repayment of the financing facility provided by City Union Bank within the stipulated time. In fact the petitioner failed to honour his commitment of remitting Rs. 100 Crores to Designated Account 2 towards Tranche

1 CRPS in view of failure to issue irrevocable instructions to the City Union Bank."

73. In reply of the respondents, it is contended by Mr. Sibal, learned Senior counsel for the petitioners that firstly, the Respondents have suppressed the amendment to Clause 7.1 of the SPA vide letter dated 23.02.2015 which states as under:

> *"2.3. Clause 7.1 shall be deleted and amended and restated in its entirety as follows:*
>
> *7.1. The Second Closing shall take place on February 24, 2015 or within two days after the date on which Consent of Export Development Canada ("EDC") has been obtained for repayment of the financing facility provided by City Union Bank("CUB") to the Company of Rs.100,00,00,000(Rupees One Hundred Crores only) or such other date as may be agreed between the Parties("Second Closing Date") subject to the achievement of the First Closing and Clause 6.3. In case the Consent of EDC is not received within ninety(90) days from the date hereof, the Company shall have the lien removed from the Fixed Deposit and provide alternate form of security acceptable to CUB. Immediately upon release of lien on the Fixed Deposit, Seller 2 agrees to forthwith remit Rs.100,00,00,000 (Rupees One Hundred Crores only) to Designated Account 2……."*

74. It is submitted by Mr.Sibal that upon reading of the aforesaid provision shows that firstly, the consent of EDC for the repayment of the financing facility was to be obtained. Secondly, if the said consent was not received within 90 days, the respondent No.1 was obligated to remove the said lien. The respondents do not disclose as to when the said consent from EDC was obtained by them. The two pre-requisites for Mr. Kalanithi Maran to remit Rs. 100 Crores to the Designated Account 2 were (a) removal of the lien and (b) provision of an alternate form of security by respondent No.1 to City Union Bank. Both the said acts were not accomplished due to lapse of the Respondents.

Further, it is difficult to believe that if the said "substantial amount" was allegedly not paid to respondent No.1, they would not have kept quiet and demanded the same and raised. The issue for the first time in their reply dated 9th October, 2015 to the petitioner's letter dated 24th September, 2015. Therefore, it is submitted by Mr.Sibal that the petitioners were not in default in the remittance of the Rs. 100 Crores and are entitled to the shares for which the consideration stood paid and as the CRPS shares have not been issued. Even the petitioners would have paid Rs.One Hundred crores in time without any controversy, the position for non issuance of warrants and non convertible redeemable cumulative preference shares would remain the same as it is the case of the respondents that issuance of warrants is not possible and once it is not possible under Section 42(3) of the Companies Act, the respondent No.1 cannot make an invitation for issuance of CRPS shares otherwise such issuance of CRPS shares will be illegal and irregular and in violation of law.

75. Mr.Sibal has refuted the submission of the respondents that the alleged Rs. 100 Crores was due towards warrants is factually incorrect as the said amount clearly was attributable only towards Tranche 1 CRPS as started on behalf of the petitioners. The details are given as under:

Date	Amount	Name of the Party	Purpose
24-Feb-15	1,00,00,00,000.00	Seller 2(FD to be created with CUB in lieu of release of Collaterals provided to CUB)	Tranche 1 CRPS Amount

76. It is stated on behalf of the petitioners that Mr. Kalanithi Maran created the said FD and deposited the said amount, it was then the contractual obligation of the respondents was to procure the consent from EDC, then to remove the lien and further to provide alternate security to City Union Bank, which not having been undertaken during the stipulated time, he was not required under the SPA to remit the said amount to the Designated Account and due to lapse on the part of the respondents, the said amount could not be remitted. The attachment of the said FD lying with the City Union Bank by the Enforcement Directorate is irrelevant since the pre-requisitions for such remittance not having been met, there was no obligation for him to remit the said Rs.100 Crores in the Designated Account. In any event, even if Rs.100 Crores lying in the FD was attached, he could have made alternate arrangements provided the respondents had performed their obligations and inform the petitioners.

77. Even otherwise the said dispute relating to Rs. 100 Crores is to be determined in arbitration. But the fact remains that as per the case of the petitioners barring Rs.1001 croers the respondents are paid of Rs. 579 Crores, which even in terms of Section 42(6) of the Companies Act, 2013 (hereinafter "CA13"), they are liable to have returned to the Petitioners within 60 days of the closure of the in-principal application i.e. on 10.07.2015, together with the statutory interest @ 12% p.a.

78. Mr.Sibal submits that the difference between Rs. 16.30/-(in terms of the SPA) and Rs. 66.30/-(price of the shares at the time of filing of the petitions) amounts to a total loss of Rs. 250 Crores to petitioners. The respondents are also liable to pay interest and they

are required to be secured under Section 9(1)(ii) of the Act, 1996 as prayed for in the petitions.

79. With regard to issuance of CRPS shares are concerned, admittedly the respondents in para 48 of reply stated that under Section 42 (3) of the Companies Act, 2013, the respondent No.1 Company cannot make fresh offer of securities unless and until the offer or invitation for issue and allotment of securities made earlier have been completed. In case the Respondent No.1 Company proceed with the issuance of CRPS shares and any such issuance of CRPS shares will be illegal and irregular. Therefore, the respondent No.1 Company has not been unable to proceed with the issuance of the CRPS shares as the application dated 18.09.2014 was closed by BSE vide its letter dated 10th July, 2015, the offer of warrants was no longer open. It is the case of the petitioners that the CRPS shares ought to have been issued. Further, the offer of CRPS as opposed to "issuance" as agreed by the Respondents on 29th January, 2015 while the offer of allotment of warrants were pending is violation of Section 42(3) of Companies Act.

80. The above difficulty has also been explained by the BSE in its letter dated 18th May, 2016 wherefrom it is evident that Spicejet is in violation of the Company Act, 2013. The petitioners submits that under such situation the respondents are liable for penal action under Section 42(10) of Companies Act, 2013 which extends to the amount involved in the offer or invitation or two crore rupees, whichever is higher.

81. Section 42(3) of Companies Act, 2013 is extracted below for convenience:

> *"Section 42(3) No fresh offer or invitation under this section shall be made unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company."*

82. Mr.Kapil Sibal has rightly submitted that it is respondents' responsibility for penal action under Section 42 (10) of the Companies Act, 2013. In case without issuance of warrants, CRPS shares cannot be allotted under the provision of Section 43(3) of the Companies Act, 2013. The contract under these circumstances is to become void. Once the contract is void and once the contract is liable to be restored and petitioners are entitled for compensation which were received by the respondents under the contract.

83. Section 65 of the Indian Contract Act, 1872 read as under as relied upon by Mr.Sibal:

> *"65. Obligation of person who has received advantage under void agreement, or contract that becomes void When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore, it, or to make compensation for it, to the person from whom he received it."*

84. Mr.Sibal submits that the consideration accepted by the respondents in lieu of the said CRPS must be repaid to the Petitioners with the applicable interest in terms of Section 42(6) of Companies Act, 2013 and as the respondents having received the consideration in contravention of Section 42(3) of Company Act, 2013 are liable for penalties under Section 42(10) of Companies Act, 2013.

85. It is correctly alleged by Mr.Sibal on behalf of the petitioners that the amounts received/adjusted by the Respondents are lying with the Respondents, no warrants and CRPS shares have been allotted at

the agreed terms of the SPA, therefore, the respondents are liable to refund the said amount to the petitioners. Such amount i.e. Rs.579 Crores and the losses i.e. Rs.403 Crores caused to the Petitioners being a subject matter of arbitration are therefore, liable to be preserved by the respondents. Further, since Spicejet accepted the consideration for the CRPS in violation of Section 42(6) of Companies Act, 2013, it is statutorily liable to return the monies to the respondents in terms of Section 42(6) of Companies Act, 2013 is extracted below for convenience:

> *"Section 42(6) A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent. per annum from the expiry of the sixtieth day:*
>
> *Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—*
>
> *(a) for adjustment against allotment of securities; or*
>
> *(b) for the repayment of monies where the company is unable to allot securities."*

Further, under Section 42(10) of Company Act, 2013, the respondent No.1 has made itself liable for penalties to the tune of Rs.370 Crores:

> *"42(10) If a company makes an offer or accepts monies in contravention of this section, the company, its promoters and directors shall be liable for a penalty which may extend to the amount involved in the offer or invitation or two crore rupees, whichever is higher, and the company shall also*

refund all monies to subscribers within a period of thirty days of the order imposing the penalty."

The said position is affirmed by BSE in its letter dated 18th May, 2016 which states as under:

"2…..

c)……company's obligation under the relevant provisions of the Companies Act 2013(the "Act") has expired as of date, it attracts the applicable consequent provisions, including penal, as well as the deeming provisions of the Act relating to acceptance of deposits."

"3…….

i…….

The proposed action of adjusting the short term loan from the allottees(i.e. outgoing promoters) amounting to Rs. 178.59 crores against future subscription money due from the outgoing promoter in connection with issuance of proposed warrants and CRPS as stated in AR will result into non-receipt of the consideration by way of payment(as required in terms of said resolutions passed by the shareholders)"

86. It is the case of the petitioners that the respondents have received the entire consideration for the warrants and CRPS barring a sum of Rs. 100 Crores (which is an arbitrable dispute). However, CRPS have not been allotted/issued even after receipt of the consideration even when the same is statutorily liable to be returned to the petitioners together with the loss caused to the petitioners, being the subject matter of arbitration, is required to be preserved.

87. Prima facie, this Court does not find any force in the submissions of the respondents that the petitioners were not ready and willing to perform their part of the obligations under the SPA who have failed to comply the obligation to pay Rs. 1,00,00,00,000 under the SPA and since they are having failed to perform their obligations under the SPA and thus they are now cannot claim any benefit under the same SPA

by granting any interim relief as sought in the present petitions as it appears prima facie to the Court that the petitioners had taken steps to pay the said amount. At this stage, they cannot be blamed. The said plea of the respondents is now to be determined by the Arbitral Tribunal.

88. Prima facie this Court is of the view that the justification given by the petitioners on the on the said amount of Rs.100 crores plausible, the said issue is to be decided by the Arbitral Tribunal. Even otherwise once it is the stand of the respondents themselves that shares of CRPS could not be allotted in the absence of issuance of warrants by BSE otherwise there would be a breach under Section 42 of the Companies Act. Even the said issue at this stage becomes irrelevant because the respondents themselves, BSE and SEBI have made the statements before Court that it is not possible to allot the warrants on the basis of application of 2014. Even if the said amount of Rs.100 crores would have been received by the respondents as per terms of the agreement, the position ought to have become the same. The petitioners themselves are agreeable for adjustment of the said amount and submitted that the said issue is an arbiterable issue which is accordingly to be decided by the Arbitral Tribunal in the light of evidence.

89. Thus, as agreed by the respondents that CRPS cannot allotted, otherwise, they would be held for guilty by violation of the provisions of Section 42 of the Companies Act. However, at the same time, it is mentioned time and again that they are helpless, otherwise there is no denial from the said of the respondents. Only warrants are issued they are duty bound to allot CRPS. Under this situation, it is to be

considered as to what extent the amount should be protected at this stage.

Non-obligation of the offences under Section 276B of Income Tax Act.

90. With regard to non-obligations of the respondents for non-compliance of Non-compounding of the offences under Section 276B of the Income Tax Act, 1961 in para 4 of the reply, it is submitted by the respondents that no doubt that the obligation of the respondents but the same was limited to defending the petitioner and cannot by any stretch of imagination be taken to include compounding of offences.

It appears from SPA that in terms of Clause 12.3 the respondent No.2 indemnified, ensured and undertook to take all steps to defend and hold harmless the petitioners from any penal action, liability or claim due to non-payment of statutory dues in relation to Respondent No.1. The said clause is reproduced below:

> *"12.3. The Acquirer shall procure that the Company shall undertake the Business in compliance with Governmental Approvals and shall ensure that the Company undertakes all steps to defend and hold harmless the Sellers, the nominee Directors of the Sellers who have resigned on the First Closing Date or Representatives of the Sellers as well as existing Directors on the Effective Date from any penal action, liability or claim due to non-payment of statutory dues stated in Schedule I in relation to the Company."*

91. It also appears from record that the respondent No.1 also issued a letter dated 24th February, 2015 to the petitioners, indemnifying, ensuring and undertaking to take all steps to defend and hold harmless the Petitioners from any penal action, liability or claim due to non-payment of statutory dues in relation to it. The relevant extract of the letter dated 24.02.2015 are reproduced below:

"The Company undertakes to pay all statutory liabilities to the satisfaction of the authorities concerned and to defend and hold harmless Seller 1 and Seller 2, from any penal action, liability or claim due to non-payment of statutory dues."

92. It is evident that it was the respondents to take all steps to defend the Petitioners from and penal action due to non-payment of the TDS dues. It is submitted on behalf of the petitioners that the complete payment was made in February, 2015, if the offence was compounded then the complaints would not have been filed in March, 2015. In case, if the entire money has been paid, the complaints wouldn't have been filed. It is the case of the petitioners that the respondents did not pay the interest and sought a waiver of the same only on 22nd July, 2015 i.e. after the complaints were filed. The respondent No.1 can still compound the offences. Only the respondent No.1 who can file an application for compounding, Mr. Kalanithi Maran has been arraigned for being the Chairman and allegedly the 'principal officer' of respondent No.1 despite of having execution of MSA and fracturing of shareholders.

93. As per SPA "CRPS Shares" shall mean the non-convertible redeemable cumulative preference shares of face value of Rs. 1,000 (Rupees One Thousand only) per share of the Company, issued in accordance with the terms and conditions specified in Schedule B of this Agreement to be approved by the Board of Directors subject to Clause 4.1.4.

94. As per SPA, "Tranche 1 CRPS Amount" shall mean Rs. 320,86,99,209 (Rupees Three Hundred and Twenty Crores Eighty Six Lakhs Ninety Nine Thousand and Two Hundred and Nine only); "Tranche 1 CRPS Shares" shall mean 32,08,699 CRPS Shares:"Tranche

2 CRPS Amount" shall mean Rs. 50,00,00,000 (Rupees Fifty Crores only); "Tranche 2 CRPS Shares" shall mean 5,00,000 CRPS Shares.

95. As per clause 7.2.1 to 7.2.3 of SPA, the meaning of Closing Agenda described:-

On the Second Closing Date, the following events shall take place:

> 7.2.1 The Sellers shall remit the Tranche 1 CRPS Amount (less Rs, 100,84;06,170 (Rup¢es One Hundred Eighty Four Lakhs Six Thousand One Hundred and Seventy only) which shall be adjusted in the manner stated in Schedule D pursuant to the Amendment Agreements) and the Seller 1 shall remit the Balance Warrants Payment into Designated Account 1 and Designated Account 2 respectively, in such proportion and manner as set out under Schedule H;
> 7.2.2 A meeting of the Board shall be held at which meeting, the following shall be resolved, subject to the approval of the shareholders of the Company pursuant to Clause 4.1.4:
>
> (a) The Tranche 1 CRPS Shares shall be issued and allotted to the Sellers, free and clear of all Encumbrances, in accordance with the applicable provisions of the Act;
>
> (b) The name of the Sellers shall be entered in the register of members of the Company as the legal and beneficial owner of the Tranche 1 CRP$ Shares;
>
> (c) Certificates representing the Tranche 1 CRPS Shares shall be issued to the Sellers in such numbers as may be required by the Sellers;
>
> 7.2.3 The Parties agree and acknowledge that upon the payment of the Balance Warrant Payment and the Tranche 1 CRPS Amount, the Company shall issue the Release Notice to the Escrow Agent for the release such portion of Collaterals, being 3,35,04,342 equity shares of SUN DTH Private Limited and post dated cheque nos. 001662, 001663 and 001457, all dated February 15, 2015 for an amount aggregating to Rs.400,00,00,000 (Rupees Four Hundred Crores only}; and

7.2.4 The Company shall comply with the disclosure requirements under the Listing Agreement.

96. Details of Sale Shares as per schedule A of SPA are

Status of Shares	Kal Airways Pvt.Ltd.	Mr.Kalanithi Maran
Unpledged shares	73,460,073	129,741,753
Pledged share	83,0570932	-
Shares yet to be credited to depositor account (unpledged)	45,000,000	19,169,000
Total	201,518,005	148,910,753

97. Terms and Conditions of the CRPS Shares are mentioned in schedule B of SPA. The same read as under:

(a) CRPS Shares shall be non-convertible redeemable cumulative preference shares of face value of Rs. 1000 (Rupees One Thousand only);

(b) CRPS Shares shall be issued at a nominal coupon rate of 6%:

(c) CRPS Shares shall be redeemed at the end of 8th year from its subscription;

(d) Dividend on the CRPS Shares shall become payable only subject to availability of profit of the Company. In the event of non-availability of profits for dividend, the same shall get accumulated year on year until the Company is able to achieve distributable profits.

Tranche 1. CRPS Shares to be issued:

To Seller 1: 30,08,406 CRPS Shares
To Seller 2: 2,00,293 CRPS Shares

Tranche 2 CRPS Shares to be issued: --
To Seller 2: 5,00,000 CRPS Shares.

98. Order of Priority for Payment as per schedule H is mentioned in SPA in the following manner:

Aggregate of Balance Warrant Payment and Tranche.1
CRPS Amount= Rs. 400 Crores
Amount to be deposited in Designated Account 1 = Rs. 220,02,93,039
Amount to be deposited in Designated Account 2 = Rs.179,97,06,961

99. Schedule H of the SPA was amended in the following manner:-

Manner in which amount to be remitted by sellers

Aggregate of balance warrant payment and tranche I CRPS amount = Rs.400 crores.

Amount to be deposited in Designated Account 1=Rs.194,79,64,450.66

Amount to be deposited in Designated Account 2=Rs.2,05,20,35,549.34

	Designated Account 1		
Date	Amount	Name of party	Purpose
24-Feb-15	94,79,64,450.66	Seller-2	Tranche-1 CRPS Amount
24-Feb-15	100,00,00,000.00	Seller-1	Balance Warrants Payment
	Designated Account 2		
24-Feb-15	79,97,06,961.00	Seller-1	Balance Warrants Payment
24-Feb-15	20,02,93,039.00	Seller-1	Tranche 1 CRPS Amount
24-Feb-15	5,20,35,549.34	Seller-2	Tranche 1 CRPS Amount
24-Feb-15	100,00,00,000.00	Seller 2(FD to be created with CUB in lieu of release of Collaterals provided to CUB	Tranche 1 CRPS Amount
TOTAL	205,20,35,549.34		

Order of Priority for payment

100. The amount in designated Account 1 shall be utilized by the Company for its operations in the ordinary course.

The amounts in Designated Account 2 shall be utilized for settlement of the existing outstanding statutory dues to the Governmental Authorities of the Company and other liabilities of the Company as mentioned below:

a. Rs.100 crores to be utilized towards repayment of the financing facility obtained by the Company from the City Union Bank.

b. Rs.891,682.799 shall be utilized towards payment of Income Tax liabilities (being the principal amount of Tax Deducted at source) as on January 31, 2015.

c. Rs.9,45,11,635.09 shall be utilized towards overdue installment of term loan facility availed from Yes Bank.

d. The balance amount of Rs.6,58,41,111.25 shall be utilized towards creation of margin with Yes Bank in form of fixed deposit.

101. Outstanding dues as on December 31, 2014 as per schedule-I are given in SPA:

1.	TDS	Rs. 99,30,15,695
2	Interest	Rs. 27,57,72,835

Interest is calculated on the basis that the amount paid till now is against TDS liability only.

2.	Service Tax	Rs. 21 ,83,82,119
	Interest on Service Tax	Rs. 66,04,653

For both the cases, the liability and interest are as on December 31, 2014.

Any statutory dues which are disclosed to the Acquirer and have accrued and are payable after December 31, 2014 and until the receipt of funds on February 15, 2015 and June 1, 2015 from the Sellers should also be utilised for payment of statutory dues.

102. It is stated in the reply that the Respondents have paid off all substantial liabilities of the Respondent No.1 Company despite the failure of the sellers to remit a substantial amount agreed under the SPA (viz Rs. 100 crores) and for this purpose, the Respondent No.1 Company has generated cash flows from its own resources. Thus, the Respondents have in fact not just complied with the terms of the SPA but have gone beyond their obligation despite blatant breaches by the sellers (including the Petitioner) of their obligations and it is the Respondents who deserve protection rather than the Petitioner. The Respondent No.1 Company has settled its entire principal TDS liability as on 24th February, 2015 aggregating to Rs.89,16,82,799 in accordance with the SPA. Further, the Respondent No.1 Company has also paid the entire interest on the said principal outstanding aggregating to Rs.30,71,12,602. As the petitioners have failed to comply with the terms of the SPA by failing to remit a substantial amounts under the SSPA i.e. an amount of Rs. 100 crores, they are in breach of the SPA. It is submitted that the scheme of payment of consideration by the Petitioner and Mr. Kalanithi Maran under the SPA is provided below:

Date(s)	Amount (in Rs.)	Name of the Party who paid the Amount	Utilisation	Status
August 2014 to November 2014	50,49,72,500.00	KAL Airways Private Limited	Utilised by the Respondent No. 1 under the ownership, management and control of the Petitioner	The amount was provided as advance towards subscription of warrants proposed to be allotted to the Petitioner.
During December, 2014	178, 59,16,170.00	Mr. Kalanithi Maran	Utilised by the Respondent No. 1 under the ownership, management and control of the Petitioner	The amount was provided as unsecured loan to the Company and by letter dated February 29, 2015 was agreed to be utilised towards the payment to be made by Mr Kalanithi Maran towards the outstanding dues for warrants and the CRPS Shares.
24-Feb-15	94,79,64,450.66	Mr. Kalanithi Maran	Utilised by the Respondent No. 1 for ordinary operations of the Company as per SSPA	Performed by the Parties- the amount was paid for subscription of CRPS
24-Feb-15	100,00,00,000.00	KAL Airways Private Limited	Utilised by the Respondent No. 1 for ordinary operations of the Company as per SSPA	Performed by the Parties- the amount was paid for subscription of warrants.
24-Feb-15	79,97,06,961.00	KAL Airways Private Limited	a) Rs.891,682,799 utilized towards payment of Income Tax liabilities (being the principal amount of Tax Deducted at source) as on January 31, 2015 b) Rs.9,45,11,635.09 utilized towards overdue instalment of term loan facility availed from Yes Bank. c) Rs.6,58,41,115.25 utilized towards creation of margin with Yes Bank in form of fixed deposit to enable release of personal guarantee of Mr. Kalanithi Maran.	Performed by the Parties- the amount was paid for subscription of warrants and CRPS.
24-Feb-15	20,02,93,039.00	KAL Airways Private Limited		
24-Feb-15	5,20,35,549.34	Mr. Kalanithi Maran		
24-Feb-15	100,00,00,000.00	Mr. Kalanithi Maran	To be utilized towards repayment of the financing facility obtained by the Company from the City Union Bank	Mr. Kalanithi Maran has not deposited this amount till date in the Designated Account 2- the amount is still outstanding and payable towards subscription of CRPS.
03-Jun-15	50,00,00,000.00	Mr. Kalanithi Maran	Utilised by the Respondent No. 1 for ordinary operations of the Company as per SSPA	Performed by the Parties- the amount was paid for subscription of CRPS

103. The counsel for the respondents had submits that had taken steps towards ensuring that the TDS liability is discharged in the most efficacious manner and with the least liability to all the parties. It is submitted that the order sanctioning the filing of a criminal complaint against the respondent No.1 Company, the petitioner and the managing director of the respondent No.1 Company at the relevant time was passed by the Commissioner of Income Tax (TDS), Delhi - 110002, New Delhi on 11th February, 2015, well before the date of the takeover of management and control of the respondent No. 1 Company by the respondent No.2 and there was no way that the respondents could have prevented the said complaints from being instituted on 5th March, 2015.

104. The respondents submit that they have paid the substantial amount as schedule H and I of the SPA. The amount of Rs.1052035549.54 were to be utilized towards settlement of existing outstanding due of the company i.e. respondent. The amount lying with the respondents which was paid by the petitioner including the amount to be paid to the statutory authority. It is submitted that it is the petitioners who did not fulfil the terms of SPA, therefore, they are not entitled for any relief for refund of the amount.

105. It is also the admitted case of the respondents that both petitioners had transferred the equity shares of 35,04,28,478 constituting of 58.46% of respondent No.1 for just Rs.2/-. The value of the said shares was Rs.765 crores at that time in the market. Obviously, the respondent No.2 to clear the liabilities of respondent No.1 and in lieu thereof, the shares were transferred for Rs.2/-. The respondents have not shown any cogent evidence before this Court that by this time they have spent more than Rs.765 crores. The petitioners admittedly asked the respondents by letter dated 24th September, 2015 to take the steps to utilize the amount in the designated account No.2 in order to pay outstanding statutory dues and to take the necessary steps for compounding the offence under Section 276B of the Income Tax Act as alleged in the complaint. No doubt, certain details are provided to show that some dues were cleared. At the same time, it is not denied by the respondents if the BSE would have allowed the application filed in 2014, the warrants were supposed to be issued. It was agreed earlier and even after execution of SPA. Further during hearing the respondents have time and again mentioned that they are helpless at the hand of BSE. Otherwise, they are ready for issuance of warrants.

106. As per issue of non-compounding of offences under Section 276B of Income Tax Act is concerned, as per SPA, in case the amount is received by the respondents and after adjustment already paid, the respondent is liable to pay the remaining outstanding as per details of designated account No.1 and 2 subject to the final adjustment of the amount before the Arbitral Tribunal. In case at this stage if both parties are agreeable they may take the necessary steps for the purpose of compounding of offences with cooperation with each other once the amount in the designated account No.1 and 2 is cleared.

Relief

107. The petitioner in OMP (I) (Comm) 71/2016, inter alia, sought interim order directing the respondents to deposit a sum of Rs.835,00,00,000/- in the Court i.e. the value of the shares due to the petitioner against the warrants and CRPS shares and also to attach the bank accounts of the Respondents and restraining the respondents from allotting/transferring and/or creating any third party interest on any shares of the respondent No.1

108. In OMP (I) (Comm) 72/2016, the relief sought against the respondents is to deposit a sum of Rs. 250,00,00,000/- in the Court i.e. the value of the shares due to the petitioner against the Warrants and CRPS shares and to attach the bank accounts and from allotting, transferring and/or creating third party interest on any shares of the company.

109. The petitioners have referred various decisions in order to seek the relief of securing the admitted amount.

i) This Court in a recent judgment of ***Huawei Technologies Co. Ltd. v. Sterlite Technologies Ltd.****; 2016 SCC*

OnlineDel604 (Manmohan Singh J.) decided on 29.01.2016 has held:

> "40…. *I agree that the discretion should be exercised in those exceptional cases when there is adequate material on record leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous or there is an admitted liability.*
>
> *58……However, if the petitioner has been able to make out a strong case against the respondent, particularly, when the respondent has received the amount from the employer and it is avoiding to clear the due amount and is raising flimsy reasons and when it appears to the Court to be just and convenient, then the Court has ample power to exercise its discretion to secure the amount even when the condition of the company is solvent, under Sections 9(1)(ii)(b) and (e) of the Arbitration and Conciliation Act, 1996. The amount, under these circumstances, should be secured, once the dispute is of commercial in nature. The present case of the petitioner falls within the range of exceptional one where the amount is liable to be protected*
>
> *60. The interim relief in the present case is sought on the respondent's admitted obligation under the contract. The interim relief claimed in the present case is nothing but an admitted obligation on the part of the respondent and such an obligation can be enforced under Section 9 of the Act by way of interim relief"*

ii) The High Court of Bombay in the case of ***Nimbus Communications Limited v. BCCI;*** *2013(1) MHLJ 39 held:*

> *"22 …The Division Bench noted that the power being of a drastic nature, a direction to secure the amount claimed in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave injustice to*

the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought was regarded as being a material consideration. However, the view of the Division Bench of this Court that the exercise of power under Section 9(ii)(b) is not controlled by the provisions of the Code of Civil Procedure 1908 cannot stand in view of the decision of the Supreme Court in Adhunik Steels."

23 …The Delhi High Court observed that the provisions of Order 38, Rule 5 would serve as a guiding principle for the exercise of the jurisdiction while dealing with a petition under Section 9 requiring the respondent to furnish security and the basic consideration is that the Court should be satisfied that the furnishing of security is essential to safeguard the interest of the petitioner."

24. A close reading of the judgment of the Supreme Court in Adhunik Steels would indicate that while the Court held that the basic principles governing the grant of interim injunction would stand attracted to a petition under Section 9, the Court was of the view that the power under Section 9 is not totally independent of those principles. In other words, the power which is exercised by the Court under Section 9 is guided by the underlying principles which govern the exercise of an analogous power in the Code of Civil Procedure 1908. The exercise of the power under Section 9 cannot be totally independent of those principles. At the same time, the Court when it decides a petition under Section 9 must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution. Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which

would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b).”

iii) This Court in **S. Harinder Singh v. S. Nirmal Singh & Ors**; 2009c (113) DRJ 784 (DB) has held:

“28. We may note that repeated attempts to persuade the parties to settle their disputes amicably have failed. One of the primary reasons for the deadlock appears to be the unfair advantage being enjoyed by the respondents, who continue to hold the entire amount of US$ 550,000, even though, as per the agreement dated 29.08.2002 the amount of US$ 300,000 had to be transferred to the appellant and was to remain his custody till the resolution of the disputes. Where is the incentive for the respondents to settle their disputes with the appellant? The fact that the respondents are enjoying the custody, and possibly the gainful use and exploitation of the entire amount of US$ 500,000, in our view is a stumbling block to a fair and equitable resolution of the disputes between the parties who are brothers.”

“29. Section 9 of the Act (which could be invoked on 12.01.2009 as the appeal was even then pending) not only entitles a party to apply to the Court 'for an interim measure of protection in respect of...preservation, interim custody...of' the subject matter of the arbitration agreement' and to secure 'the amount in dispute in arbitration', but also goes on to say 'and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.' The power of the Court to suo moto pass orders in terms of

Section 9 of the Act is therefore, preserved. Section 94 read with Section 151 C.P.C also invests the Court with inherent power to pass interlocutory orders as may appear to the Court to be just and convenient to prevent the ends of justice from being defeated. (See Vareed Jacob v. Sosamma Geevarghese and Ors. MANU/SC/0410/2004 : AIR 2004 SC 3992.) In the interest of justice, and to bring the parties to an even keel, as we were seized of the appeal. We had the jurisdiction to pass the order dated 12.01.2009 as jurisdiction to pass the order dated 12.01.2009 as corrected on 6.2.2009. We, therefore, reject this submission as well."

iv) The Supreme Court in ***Arvind Constructions Co. (P) Ltd. v. Kalinga*** (2007) 6 SCC 798 the Supreme Court held

"the power under Section 9 cannot be read as independent of the Specific Relief Act and it could not be contended that the restrictions placed by the Specific Relief Act cannot control the exercise of the power under Section 9. The Court observed that while entertaining an application under Section 9 the Court must have the same power for making orders as it has for the purpose of and in relation to any proceedings before it. Consequently the general rules that govern the Court while considering the grant of an interim injunction at the threshold would be attracted even while dealing with an application under Section 9. The Court also noted the principle that when a power is conferred under a special statute and is conferred on an ordinary court of the land, without laying down any special condition for the exercise of that power, the general rules of procedure would apply. The Supreme Court adverted to the position which was inter alia taken by the Division Bench of this Court that the power under Section 9 is not controlled by Order 38, Rule 5 of the Code of Civil Procedure 1908, but left it open to be determined in an appropriate case."

v) The High Court of Bombay in the case of ***National Shipping Company of Saudi Arabia v. Sentrans Industries Limited;*** *AIR 2014 Bom 136* has held:

> *"7. In Pushpa P. Mulchandani (Mrs.) and Ors. v. Admiral Radhakrishin Tahilani (Retd.) and Ors., MANU/MH/0021/2001: (2001)1BOMLR169, the learned Single Judge of this Court held that the provision contained in Section 9 of the Act of 1996 was a self operative code and that the provisions of Civil Procedure Code are not applicable while considering the application under Section 9 of the Act of 1996.*
>
> *10……..In a special provisions of the nature like Section 9(ii)(b), we are afraid, exercise of power cannot be restricted by importing the provisions of Order 38, Rule 5 of the Code of Civil Procedure as it is. The legislature while enacting Section 9(ii)(b) does not seem to us to have intended to read into it the provisions of Order 38, Rule 5 of the Civil Procedure Code as it is. It is true and as has been held by the Supreme Court in ITI Ltd, (supra), that for want of specific exclusion of the Code of Civil Procedure in the Act of 1996, it cannot be inferred that the Code was not applicable but that would not mean that provisions of Code have to be read into as it is when the Court exercises its powers as prescribed in the Act of 1996…….The obstructive conduct of the opposite party may be one of the relevant considerations for the Court to consider the application under Section 9(ii)(b). The party seeking protection order under Section 9(ii)(b) ordinarily must place some material before the Court, besides the merits of the claim that order under Section 9(ii)(b) is eminently needed to be passed as there is likelihood or an attempt to defeat the Award, though as indicated above, the provisions of Order 38, Rule 5, CPC are not required to be satisfied. The statutory discretion given to the Court under Section 9(ii)(b) must be exercised judicially in accordance with established*

legal principles and having regard only to relevant considerations. In our view, this is the proper approach for consideration of the application for interim relief under Section 9(ii)(b) and we hold that the provisions of Order 38, Rule 5 of the Civil Procedure Code cannot be read as it is and imported in Section 9 of the Act of 1996."

vi) The High Court of Bombay in the case of ***Delta Construction Systems Ltd. Hyderabad v. Narmada Cement Company Ltd.****; 2002(1) MH.L.J. 684* has held at para 13 that *"The language used in Section 9(ii) is an interim measure of protection, if it is money then to secure the amount in dispute."*

110. The petitioners at this stage are also claiming compensation and interest on the amount which is in possession of by the respondents. However, in the facts and circumstances of the present case, the entire amount as asked by the petitioner cannot be secured. The petitioner is also seeking the relief of amount to a total loss of huge amount on account of difference between Rs.16.30 in terms of SPA and Rs.66.30 (price of the shares at the time of filing of petitions) together with interest @12% per annum which comes to more than three hundred crores. This Court is of the view at this stage only undisputed amount should be secured. The claim of compensation and interest would be considered by the Arbitral Tribunal after evidence and hearing of the parties as there are some disputed facts. Therefore, this Court is not inclined to secure the entire amount as prayed for while deciding the petition under Section 9 of the Act.

111. Barring Rs.100 crores which is not received by the respondents as informed during the hearing, the respondents are in

possession of Rs.579 crores towards value of warrants and shares of CRPS. The amount was paid towards their contractual obligation under the SPA. The respondents agreed to comply the terms of Clause 3 of SPA.

112. Thus in the facts of the present cases, that if the respondents will dispose of the shares of respondent No.1 to the third party, award if passed in favour of the petitioners, the same will become merely paper decree.

113. Without expressing anything on merit, as all the disputes have to be decided by the Arbitral Tribunal the part prayers in both petitions are allowed. The said amount of Rs.579 crores shall be deposited by the respondents without prejudice in five equal monthly installments by way of fixed deposit for twelve months in the name of Registrar General of this Court. The first installment amount shall be deposited by the respondents on or before 7th August, 2016. Thereafter, the remaining installments shall be deposited on every succeeding month. Till the time all five installments are deposited, the interim order shall continue. As and when the amount is deposited, the petitioners would be at liberty to file the application for releasing of amount, the same would be considered on merit as well as the issue of interim orders.

114. Both the parties shall take the necessary steps for the purpose of constitution of Arbitral Tribunal and once the Tribunal is constituted, it is expected that Arbitral Tribunal would publish the award within the period of twelve months. Liberty is also granted to move the application under Section 17 of the Act before the Arbitral Tribunal if so necessary or under any change of circumstances.

115. Both petitions are accordingly disposed of.

(MANMOHAN SINGH)
JUDGE

JULY 29, 2016