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

+ O.M.P.(I) (COMM.) 177/2020 & I.As. 5463-65/2020, I.As. 5664-67/2020

*Reserved on: 23rd July, 2020
Pronounced on: 14th August, 2020*

AVANTHA HOLDINGS LIMITED

.... Petitioner

Through: Mr. Mukul Rohtagi, Sr. Adv.
with Mr. Jayant Mehta, Mr.
Pranay Chitale, Mr. Kaushik
Moitra, Ms. Sneha Jaisingh,
Mr. Anurag Tandon and Mr.
Aniruddha Banerji, Advs.

versus

VISTRA ITCL INDIA LIMITED

.... Respondent

Through: Mr. Rajiv Nayar, Sr. Adv. with
Mr. Manmeet Singh, Mr. V.P.
Singh, Mr. Kartik Nayar, Mr.
Anugrah Robin Frey, Mr.
Kartik Bajpai, Ms. Anindita
Roychowdhury and Mr. Raghav
Chadha, Advs. for respondent
no. 1

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G E M E N T

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14.08.2020

O.M.P.(I) (COMM.) 177/2020 & I.As. 5463-65/2020, 5664-67/2020

1. This petition, under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), seeks pre-arbitration interim relief.

Facts

2. The petitioner, Avantha Holdings Ltd., was in need of finances during 2016-2017. The Board of Directors of the petitioner, on 11th November, 2016, approved the borrowing of ₹ 1400 crores, by issuance of secured/unsecured non-convertible debentures on private placement basis. Consequent thereupon, the respondent M/s Vistra ITCL (India) Ltd. was appointed as Debenture Trustee, *vide* Debenture Trust Deeds dated 5th January, 2017.

3. On the same day, i.e. 5th January, 2017, two Debenture Trust Deeds, were executed, whereby 5650 non-convertible debentures, each with face value of ₹ 10 lakhs, and 7000 debentures, each with face value of ₹ 10 lakhs, were issued, in favour of a consortium of lenders comprising M/s KKR India Financial Services Pvt. Ltd. and KKR India Debt Opportunities Fund (referred to, collectively, as “KKR”), M/s L & T Finance Ltd., L & T Fincorp Ltd and Family Credit Ltd. (referred to, collectively, as “L & T”) and M/s BOI AXA Corporate Credit Spectrum Fund (“BOI”), who are referred to, collectively, as the “debenture holders”. The total value of the debentures was, therefore, ₹ 1400 crores, and were issued to the debenture holders on private placement basis.

Salient Features of the Debenture Trust Deeds

4. The Debenture Trust Deeds (which were identical) provided, *inter alia*, as follows:

(i) The debentures were issued, in favour of the debenture holders, by way of private placement, in one or more tranches.

(ii) The obligations, in respect of the debentures, were secured by way of

(a) a *pari passu* charge, by way of hypothecation, over Designated Bank Accounts, being Account No. 914020003736410 of the petitioner, to be maintained with Axis Bank, Bandra (E), Mumbai and Account No. 914020004636443, of the petitioner, maintained with Axis Bank, Bandra (E), Mumbai which were, in turn, referred to, in the Debenture Trust Deeds, as the “AHL Designated Bank Account” and “SFSL Designated Bank Account”, respectively, and

(b) a *pari passu* pledge over 13,53,92,496 shares, held by the petitioner in M/s Crompton Greaves Power and Industrial Solutions Ltd. (hereinafter referred to as “CGP”) and 32,26,89,019 shares held by the petitioner in M/s Ballarpur Industries Ltd. (hereinafter referred to as “BILT”), for which purpose, separate memoranda of pledge, dated 5th January, 2017 and 27th June, 2018, were entered into.

Clause 3.1 required the petitioner to execute and deliver, to the Debenture Trustee, the Memoranda of Pledge and Deeds of Hypothecation, prior to the first Deemed Date of Allotment, and prior to the signing of the Debenture Trust Deed. The Pledged Reference Entity Shares and the Designated Bank Accounts were collectively defined, in Clause 1.1.106, as “Secured Assets”.

(iii) The pledged shares of CGP and BILT were required to provide a “Security Cover”, relating to which Clause 3.4 of the Debenture Trust Deeds stipulated thus:

“3.4 Maintenance of Security Cover

3.4.1 At all times until all Outstanding Amounts have been paid/repaid, in full and in accordance with the terms of the Transaction Documents, the Company shall ensure that the Pledged Reference Entity Shares shall provide a Security Cover which shall at least be equal to the Required Security Cover.

3.4.2 If at any time the Security Cover falls below the Required Security Cover then, the Company shall within 7 (seven) Business Days of either becoming aware of, or being notified of the same, either (a) pledged an additional number of Reference Entity Shares (“**Top Up Shares**”) such that the Security, after such additional pledge is at least equal to the Required Security Cover; or (b) provide Security, in a form acceptable to the Debenture Trustee (“**Additional Cash Security**”) so that after aggregating the Pledged Reference Entity Shares Value with the Additional Cash Security, the Security Cover is equal to or greater than the Required Security Cover.”

“Required Security Cover” was defined, in Clause 1.1.100, somewhat enigmatically, as meaning “Security Cover of at least two times”.

(iv) “Obligations” were defined, in Clause 1.1.70 of the Debenture Trust Deed, as including all debts and liabilities, due or payable by the petitioner, under or in connection with any Transaction Document, including the Outstanding Amounts. “Transaction Documents”, as defined in Clause 1.1.127, included, *inter alia*, the Debenture Trust Deeds, the Deeds of Hypothecation (of the amounts in the Designated Bank Accounts) and the Memoranda of Pledge (whereby the shares of CGP and BILT were pledged as security, pending redemption of the debentures). “Outstanding Amounts” was defined in Clause 1.1.73, as meaning all the amounts payable by the petitioner to the Debenture Holders and the Debenture Trustee.

(v) KKR (comprising KKR India Financial Services Private Limited and KKR India Did Opportunities Fund II), L & T (comprising L & T Finance Ltd., L & T Fincorp Ltd. and Family Credit Ltd.) and BOI AXA Corporate Credit Spectrum Fund were enlisted and defined as the “Debenture Holders”, under Schedule 2 to the Debenture Trust Deed read with Clause 1.1.27 thereof.

(vi) The aggregate principal amount of each Tranche of the Debentures (defined as the “Tranche Investment Amount”) was required to be deposited, by the Debenture Holders, into the AHL Designated Bank Account. The date of deposit would constitute the “Deemed Date of Allotment”, in respect of each Tranche of Debentures. The petitioner was, on the same day, required to issue the Tranche of Debentures and pass all necessary corporate resolutions for allotment of the Debentures to the Debenture Holders. Within five days thereof, the petitioner was required to credit the Debentures, in dematerialized form, to the Demat account of each Debenture Holder.

(vii) “Identified Debt” was defined, in Clause 1.1.50 of the Debenture Trust Deed, as meaning, collectively, Debt 1, Debt 2 and Debt 3 which, in turn, were defined in Clauses 1.1.29, 1.1.30 and 1.1.31. Of these, Debt 3 does not concern the present proceedings, relating, as it did, to monies advanced by the Debenture Holders to M/s Salient Financial Solutions Ltd. Debts 1 and 2, however, referred to the debts of ₹ 565 crores, and ₹ 700 crores, extended by the Debenture Holders to the petitioner, by way of subscription to the Debentures, pursuant to the two Debenture Trust Deeds dated 5th January, 2017. The Debt, to which each Debenture Trust Deed related, was defined as the “Investment Amount”, qua that Debenture Trust Deed.

(viii) Clause 2.4 of the Debenture Trust Deeds required the petitioner to use the monies advanced, to the petitioner, by the

Debenture Holders, for refinancing the Debts, other liabilities of the petitioner, and other purposes as approved by the Debenture Trustee, as per instructions of the Debenture Holders (which were defined as “Approved Instructions”, by Clause 1.1.8 of the Debenture Trust Deed). The date on which any portion of the Tranche Investment Amount was released, for utilisation by the petitioner, in accordance with Clause 2.4, was defined as the “Utilisation Date”, *vide* Clause 1.1.128.

(ix) Redemption of the said debentures was covered by the various sub-Clauses of Clause 2.5 which, at the very outset, prohibited redemption of the Debentures, by the petitioner, in any other manner. The Debenture Trust Deed envisaged “Early Redemption”, “Mandatory Redemption” and “Final Redemption”, of the Debentures.

(x) “Early Redemption” was covered by Clause 2.5.1, and was permissible at the option of the petitioner. The petitioner was permitted, by this Clause, to repay, in part or in full, the Outstanding Amounts, any time within a period of 30 months from the first Deemed Date of Allotment (which period was defined, in Clause 1.1.122, as the “Tenure”). The “First Deemed Date of Allotment” was, in turn, defined, in Clause 1.1.47, as the Deemed Date of Allotment of the First Tranche, i.e. the date when the Investment Amount, relevant to the First Tranche, was deposited by the concerned Debenture Holder.

(xi) Early Redemption required the petitioner to issue a written notice, to the Debenture Trustee, stating the exact portion of the Outstanding Amounts, that it intended to redeem, and the date of such intended redemption.

(xii) “Mandatory Redemption” was covered by Clause 2.5.2, and was mandatorily required to be undertaken, within 5 days of the occurrence of an Identified Event. “Identified Events” were defined, in Clause 1.1.52, as meaning “all steps and actions, taken by the Company and the Debenture Trustee, for realization of the value of the assets of the Company, as specified in Schedule 15 to the Debenture Trust Deed”. Schedule 15 included, in such “Identified Events”, sale, by the petitioner, of the shares, are held by it in CGP or BILT, and also required the proceeds of such sale to be mandatorily remitted into the AHL Designated Bank Account and applied in accordance with the terms of the Transaction Documents. Clause 2.5.2 (a) required the petitioner to, within 5 days from the of occurrence of any Identified Event, mandatorily deliver, to the Debenture Trustee, a written notice, informing the Debenture Trustee of the occurrence of the Identified Event, the amounts received/expected to be received, as a result thereof, and the date on which the said amounts had been, or would be, credited to the AHL Designated Bank Account.

(xiii) “Final Redemption” of the debentures was covered by Clause 2.5.3, which required the petitioner to pay the remainder

of the Outstanding Amount, to the Debenture Holders, on the Final Redemption Date. The “Final Redemption Date” was defined, in Clause 1.1.43, as the last day of the tenure, i.e. 30 months from the First Deemed Date of Allotment – except where the Debenture Trustee exercised the Put Option or the Target Put Option, or the petitioner exercised its Call Option, none of which has occurred in the present case. The period of 30 months, from the First Deemed Date of Allotment, admittedly, expired on 6th July, 2019. Clause 2.5.3 (e) mandated the payment, by the Debenture Trustee, to each Debenture Holder, its pro rata share of the Outstanding Amounts, out of the amounts deposited in the AHL Designated Bank Account by the petitioner, in accordance with Clause 2.5.3 (a).

(xiv) Clause 25.1 required all payments and repayments to be made, by the petitioner, in accordance with the terms of the Transaction Documents, to be deposited into the AHL Designated Bank Account, at least seven days prior to the respective due dates, so that the said payments could be transferred, by the Debenture Trustee, to the Notified Accounts of the Debenture Holders, on the respective due dates for such payments.

(xv) Upon satisfaction, in full, of the Outstanding Amounts, relating to the Identified Debt, and on a written request by the petitioner, the Debenture Trustee was required, by Clause 8.1, to unconditionally permit release and transfer-out, of all

Secured Assets held in the Designated DP Account and amounts standing to the credit of the Designated Bank Accounts. “Designated DP Account” was defined, in Clause 1.1.36, as meaning the dematerialised securities account of the petitioner, maintained with PNR Securities Ltd. and to be operated in accordance with the terms of the Debenture Trust Deed.

(xvi) Clause 4.3.1 required the petitioner to constitute a sub-committee of its Board, which was to be entrusted with the responsibility for providing guidance on value creation, including by way of transfer of the businesses or undertakings of the Reference Entities, or the petitioner, for the purpose of achieving the Identified Events. This sub-Committee, to be known as the “Strategic Committee”, was to comprise of one nominee of the petitioner and one nominee of the Debenture Trustee.

(xvii) Clause 9 dealt with “Events of Default”. “Event of Default” was defined, in Clause 1.1.41, as meaning any event set out in Schedule 3 to the Debenture Trust Deed. Schedule 3 enlisted as many as thirty three “Events of Default”. Of these, the following “Events of Default” may be reproduced:

“1. The proceeds of the Debentures are utilised for any purpose other than the purpose set out in this Deed;

2. The Company does not pay on the due date any amount payable by it pursuant to a Transaction

Document (including, without limitation, any principal amount of any Debenture, Redemption Premium, Default Interest (if any) payable in respect thereof) at the place and time and strictly in the manner in which it is expressed to be payable. Each failure of the Company to pay any amount due under the Transaction Documents shall constitute a separate Event of Default.

14. Any Pledged Reference Entity Shares are attached, sold or disposed of pursuant to any proceeding or action other than in accordance with the Transaction Documents, *or if the Company fails to comply with the terms of Clause 3.4 of this Deed;*

25. Failure to implement any Identified Event recommended by the Strategic Committee at any time after the nominee of the Debenture Trustee on the Strategy Committee is entitled to a casting vote with respect to decisions/recommendations of the Strategy Committee, in accordance with this Deed or in the manner mutually agreed to between the Company and the Debenture Trustee, and to the satisfaction of the Debenture Trustee;

26. If (a) all the outstanding amounts in relation to the Identified Debt (including any of the Outstanding Amounts in relation to the Debentures) is not redeemed/repaid by the end of 18 (eighteen) months from the First Deemed Date of Allotment and the representative of the Debenture Trustee on the Strategy Committee does not have the casting vote with respect to decisions/recommendations of the Strategy Committee in the event of a tie, until the Final Settlement Date or (b) any of the Target Events have not occurred as of the Target Date and on and from the Strategic Committee Target Date the representative of the Debenture Trustee on the Strategy Committee does not have the casting vote with respect to decisions/recommendations of the Strategic

Committee in the event of a tie, until the Final Settlement Date;

27. The Company fails to fulfil its obligations to credit Pledged Reference Entity Shares in the Designated DP Account within the time period set out herein;

31. Any default, breach or violation of any term of any transaction document entered into by the Company or any of its subsidiaries in relation to any portion of the Identified Date, which is considered to be an event of default under such transaction Document;”

(xviii) The sequelae, to the happening of an Event of Default, were contained in Clauses 9.1 to 9.6, which merits reproduction, *in extenso*, thus:

“9.1 Upon the occurrence of an Event of Default, the Company shall immediately inform the Debenture Trustee in writing of such occurrence, together with all details related thereto. The Debenture Trustee shall thereafter or upon becoming aware of an Event of Default immediately notify the Debenture Holders of the occurrence of such Event of Default, requesting for instructions as to the steps required to be taken by the Debenture Trustee, if any, under Clause 9.2 below.

9.2 On the occurrence of any Event of Default, the Debenture Trustee may (acting pursuant to Approved Instructions) by a notice in writing to the Company (an “**Enforcement Notice**”):

9.2.1 declare the Outstanding Amounts, in respect of the Debentures payable under the Transaction Documents to be immediately due and payable;

9.2.2 instruct the company to discharge the Obligations under the Transaction Documents,

including without limitation, by way of sale of one or more of the assets of the Company, including, without limitation, the Secured Assets;

9.2.3 without any further notice and without assigning any reason and at the risk and expense of the Company and if necessary as attorney for and in the name of the Company, be entitled to enforce the Security created under the Transaction Documents and, be entitled to take charge and/or possession of, seize, recover, receive and remove, sell by public auction or by private contract, dispatch, consign for realization or otherwise dispose of or deal with all or any part of the assets on which Security is created pursuant to the Transaction Documents, enforce, realize, settle, compromise and deal with any rights or claims relating thereto, in accordance with this Deed or as may be provided under any other Transaction Document, without prejudice to the Debenture Trustee's rights and remedies or suit or otherwise;

9.2.4 require the Company to procure any approvals (including from Governmental Authorities) that are, in the opinion of the Debenture Trustee (acting in accordance with Approved Instructions) required for any of the foregoing; and

9.2.5 exercise such other rights and remedies as are available to the Debenture Trustee under Applicable Law that the Debenture Trustee may deem fit.

9.3 Without prejudice to Clause 9.2 above, upon the occurrence of any event(s) specified in Clause 9.4:

9.3.1 Each of the Debenture Holders shall be entitled to require the Debenture Trustee to enforce such part of the Security (in accordance with the terms and conditions of the Transaction Document) as is proportionate to such

Debenture Holder's pro rata share of the total Outstanding Amounts or any portion thereof ("**Enforcement Right**") by issuing a written notice to the Debenture Trustee. In the event that a Debenture Holder has exercised its Enforcement Right in respect of a portion of the total Debentures held by it, then such Debenture Holder shall be entitled to the proceeds of the enforcement to the extent that such enforcement corresponds to such Debentures in respect of which the Enforcement Right has been exercised.

9.3.2 If the Enforcement Notice requires the sale of the Secured Assets (including the pledged Reference entity Shares)(or part thereof), the Company shall, promptly but in any event within 3 (three) Business Days after the date of any Enforcement Notice, sell the Secured Assets including the pledged Reference entity Shares or part thereof as instructed in the Enforcement Notice) in one or more lots and procure that the proceeds from all such sales (collectively, the "**Share Sale Proceeds**") are directly credited only to the AHL Designated Bank Account or such account as may be notified from time to time by the Debenture Trustee (acting pursuant to Approved Instructions).

9.4 The occurrence of any one of the events set out in **Schedule 3** shall constitute an event of default (an "**Event of Default**") for the purposes of this Deed.

9.5 Upon (i) the occurrence of any Event of Default or (ii) any event which, after the delivery of a notice, making of a determination or lapse of time (or any combination of the foregoing), could constitute an Event of Default (other than an Event of Default set out in paragraph 9 of **Schedule 3** to the extent it relates to a Material Entity), the company shall promptly give notice thereof to the Debenture Trustee in writing, specifying the nature of such Event of Default or of

such event and the remedies proposed to be taken to cure the same.

9.6 In the event the Debenture Trustee (acting in accordance with Approved Instructions) requires the Company to seek any approvals (including approvals from Governmental Authorities) pursuant to the Enforcement Notice, the Company shall within 1 (one) Business Day, file an application with the relevant Person seeking such approval and shall do all acts or deeds to procure such approvals within the time period specified by the Debenture Trustee (acting reasonably and in accordance with Approved Instructions). The Debenture Trustee shall endeavour to procure that the Debenture Holders and the Registrar provide the Company all information that may be reasonably required by the Governmental Authority to procure the aforementioned approval.”

(xix) The cash proceeds, received by the Debenture Trustee, pursuant to the exercise of any right under the Transaction Documents, were designated, by Clause 1.1.85 of the Debenture Trust Deeds, as “Recovery Proceeds”. Clause 10 dealt with the manner in which Recovery Proceeds were to be appropriated by the Debenture Trustee, and Clause 10.2 required the Debenture Trustee to apply the Recovery Proceeds, firstly to reimburse itself and discharge all costs and expenses incurred by it; secondly, to pay the Debenture Holders, *pari passu*, Default Interest (if any); thirdly, to pay, to the Debenture Holders, Redemption Premium; fourthly, to pay, to the Debenture Holders, *pari passu*, the principal amount of the Debentures; fifthly, to pay, to the Debenture Holders, *pari passu*, any Obligations remaining unpaid; and, lastly, towards payment of the surplus (if any) to the persons entitled thereto.

(xx) Clause 41.2 constituted the Arbitration Agreement, between the petitioner and the respondent, and read thus:

“41.2. Arbitration

(a) Subject to Debenture Trustee's/Debenture Holder's right to exercise any remedies under the DRT Act or the SARFESI Act, the Parties agree that at the option of the Debenture Trustee, any Dispute may be referred to arbitration by the Debenture Trustee, which decision shall be binding on the Company.

(b) If the Parties choose that any Dispute is to be resolved by arbitration under this Clause, the Debenture Trustee (it being hereby clarified that any costs required to be borne by the Debenture Trustee in relation thereto shall be borne by the Debenture Holders (but nevertheless recoverable by the Debenture Holders as per the provisions of the Transaction Documents) on the one hand shall appoint 1(one) arbitrator, the Company shall appoint the second arbitrator and the 2(two) arbitrators so appointed shall appoint the third arbitrator who shall act as the presiding arbitrator. In the event a party fails to appoint their arbitrator for any reason whatsoever within 15(fifteen) days of another party appointing the arbitrator, then, the appointment process set forth in the International Chamber of Commerce Rules of Arbitration (“Rules”) shall be followed. The seat of arbitration shall be at Delhi or such other seat in India as may be agreed to by the Parties and the arbitration shall be governed by the provisions of the Rules. The language of the arbitration proceedings shall be English. The expenses of the arbitration shall be borne in such manner as the arbitral tribunal may

determine. The award shall be final, conclusive and binding on all parties concerned. The arbitration tribunal may lay down from time to time the procedure to be followed in conducting arbitration proceedings and shall conduct the arbitration proceedings in such manner as it considers appropriate.

(c) Notwithstanding anything contained hereinabove, in the event of the law being made or amended so as to bring the Debenture Holders under the SARFESI Act or the DRT Act, or any other special legislation to enable the Debenture Holder (itself or through the Debenture Trustee) to enforce the security under the SARFESI Act or proceed to recover dues from the Company under the DRT Act, such Debenture Holder (itself or through the Debenture Trustee) shall be entitled at its sole discretion to initiate such additional / parallel actions as it deems fit. The Parties agree that any arbitration provisions commenced prior to such additional / parallel actions being initiated by the Debenture Holder (itself or through the Debenture Trustee) shall, if mutually agreed to between the Parties, stand terminated and the mandate of the arbitrators shall come to an end from the date of such mutual agreement between the Parties.”

5. The petitioner held 34.7% and 25.5% of the paid-up equity share capital, in CGP and BILT, respectively, resulting in the petitioner having a controlling interest in both the said companies. Of the aforesaid shareholding, 13,53,92,496 equity shares of CGP (constituting 21.6% of the petitioner’s shareholding therein), and 32,26,89,019 equity shares of BILT (constituting 24.95% of the petitioner’s shareholding therein), were pledged, by the petitioner,

with the respondent, *vide* two Memoranda of Pledge, dated 5th January, 2017 and 27th June, 2018, respectively.

Alleged “Sinister sequence of events”, qua pledged shares of CGP

6. The petitioner proceeds to highlight what it terms, in a somewhat ornate fashion, as a “sinister sequence of events”, engineered and managed by KKR, as the lead Debenture Holder under the Debenture Trust Deeds, thus:

6.1 As required by Clause 4.3 of the Debenture Trust Deeds, a “Strategic Committee”, on the BOD of the petitioner, was constituted, in which Mr. B.V. Krishnan, then CEO, KKR India Financial Services private limited, was appointed, by the respondent, as Debenture Trustee, as its nominee. At this stage, it becomes necessary to reproduce Clauses 4.3.4 to 4.3.6 of the Debenture Trust Deeds:

4.3.4 During the first 18 (eighteen) months from the first Deemed Date of Allotment, in the event there is a tie in the decision of the members of the Strategic Committee, the nominee of the Company will have a casting vote with respect to decisions/recommendations of the Strategic Committee.

4.3.5 Notwithstanding Clause 4.3.4, if (i) on the Target Date any of the Target Events have not occurred to the satisfaction of the Debenture Trustee (acting on the Approved Instructions) then on the Strategic Committee Target Date, the nominee of the Debenture Trustee on the Strategic Committee will have the casting vote with respect to decisions/recommendations of the Strategic Committee in the event of a tie, until the Final Settlement Date, or (ii) immediately upon the occurrence of an Event of Default

under para 2 of Schedule 3 or if the Company fails to pay the Outstanding Amounts in case of acceleration of the Outstanding Amounts of the Debentures by the Debenture Trustee pursuant to this Deed or any other Transaction Document, the nominee of the Debenture Trustee on the Strategic Committee will have the casting vote with respect to decisions/recommendations of the Strategic Committee in the event of a tie, until the Final Settlement Date.

4.3.6 *If any portion of the Outstanding Amounts is still outstanding by the end of 18 (eighteen) months from the first Deemed Date of Allotment, then, the nominee of the Debenture Trustee on the Strategic Committee will have the casting vote with respect to decisions/recommendations of the Strategic Committee in the event of a tie, until the Final Settlement Date.”*

(Emphasis supplied)

6.2 The petitioner has sought to emphasise the fact that the Strategic Committee was, per Clause 4.3.1 of the Debenture Trust Deeds, entrusted with the responsibility of providing guidance, in order to achieve the Identified Events, which were specifically delineated in Schedule 15 to the Debenture Trust Deeds (reproduced hereinabove). (In this context, it is necessary to note that Clause 4.3.1 specifically empowered the Strategic Committee with the responsibility of providing guidance on value creation, merely clarifying, thereafter, that such guidance on value creation would include, but would not be limited to, value creation by way of transfer of the businesses or undertakings of the Reference Entities (i.e. CGP and BILT), and/or the petitioner, for the purpose of achieving the Identified Events. Significantly, there is no comma, in Clause 4.3.1, before the words “for the purpose of achieving the Identified Events”. It is possible, therefore, that the words “for the purpose of achieving

the Identified Events”, as they find place in Clause 4.3.1, delimit the latter part of the said Clause, which refers to “transfer of the businesses or undertakings of the Reference Entities and/or Company”. In other words, one possible interpretation of Clause 4.3.1 is that the responsibility, for providing guidance on value creation, as vested in the Strategic Committee by Clause 4.3.1, was absolute, not limited to achieving of the Identified Events.)

6.3 Admittedly, payment of all “Outstanding Amounts”, could not be effected, by the petitioner, by the expiry of 18 months from the First Deemed Date of Allotment, as a result whereof, by operation of Clause 4.3.6 *supra*, Mr. B.V. Krishnan, as the nominee of the Debenture Trustee in the Strategic Committee, acquired a casting vote.

6.4 The Strategic Committee met on 12th July, 2018. It was observed, in the said meeting, that the value of CGP had declined, significantly, over several months, and that preservation of the value of CGP, as also enhancement thereof, so as to create liquidity, with regard to the holding of the petitioner in CGP, was of the essence. Mr. Krishnan, as the nominee of the Debenture Trustee on the Strategic Committee, suggested that an external, independent individual, be appointed as a resource, who would work with the Chief Financial Officer, CEO and other executives of CGP, to implement objectives relating to value creation in CGP. The Strategic Committee agreed to implement the recommendation.

6.5 Following on the above recommendation, in the next meeting of the Strategic Committee, on 16th November, 2018, Mr. Krishnan suggested the appointment of Tranzmute LLP (hereinafter referred to as “Tranzmute”), a partnership of KKR and Mr. Narayan Seshadri, as the “Independent Resource”, to suggest measures for value creation at CGP.

6.6 Subsequently, however, Mr. Krishnan suggested that the appointment of Tranzmute, as “Independent Resource” be placed on hold, as a result whereof it never fructified. The Debenture Trustee decided to withdraw the proposal for appointment of Tranzmute and, as an alternative thereto, Mr. Sanjay Nayar, as the representative of Mr. Krishnan in the 200th Meeting of the BoD of the petitioner, held on 6th March, 2019, proposed the engagement of Mr. Sumanth Cidambi, Director of the Credit Business of KKR India, as a consultant to CGP. Mr. Gautam Thapar, Chairman of the petitioner, agreed to the engagement of Mr. Cidambi, by the petitioner, to assist the petitioner in relation to its investment in CGP and to suggest measures for value creation of the petitioner’s investment in CGP. The Strategic Committee considered, and recommended the engagement of Mr. Cidambi, as consultant on the board of CGP. The Resolution, approving the engagement of Mr. Cidambi, read thus:

“RESOLVED THAT the engagement of Mr. Sumanth Cidambi as a consultant to the Company for assisting the Company in monitoring, tracking and assessing the value of its investment in CG Power and Industrial Solutions Ltd (“CD”) on a regular basis and for suggesting measures for value creation at CG in the interest of all its shareholders by working with representatives of the

Company and CG on behalf of the Company, is hereby approved. Any recommendations made by Mr. Cidambi will be discussed by a committee comprising of Mr. S.K. Khandelwal, Executive Director and COO, Mr. P.B. Krishnan, Nominee Director of Debenture Trustee and Mr. Jatinder Cheema, Independent Director, who may after due consideration either present such recommendations to the Board/recommendations to CG, for its consideration, as may be thought fit by them, in any case in compliance with applicable laws.”

6.7 According to the averments in the petition, the petitioner had been negotiating with KKR and the respondent, for extension of the time period for repayment of the debentures as well as re-negotiating the redemption premium. It is further asserted that, on 6th March, 2019, an oral agreement was entered into, between the petitioner and KKR, in which KKR represented the debenture holders and the respondent, and that, *vide* the said agreement, the petitioner, the Debenture Trustee and KKR (on behalf of the debenture holders), agreed to extension of the redemption period of the debentures by 18 to 24 months, and ceasing of the accrual of redemption premium, after 31st March, 2019. The said oral agreement also, purportedly, agreed for transfer of the pledged shares of CGP, in the name of the Debenture Trustee, with the understanding that the shares would be released in favour of the petitioner, upon payment of the redemption amount as negotiated and within the time as extended by the parties. As such, the petitioner contends that the pledged shares of CGP, which were earlier in the name of the petitioner, were transferred to the name of the Debenture Trustee, i.e. Respondent No. 1. The petitioner has placed on record, a communication, dated 10th March, 2019, addressed by the petitioner to the National Stock Exchange of

India Ltd. (NSE), the Bombay Stock Exchange Ltd. (BSE) and CGP, whereunder intimation has been provided, as required by Regulations 29 and 31 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as “the 2011 SEBI Regulations”), regarding invocation, to the effect that the Respondent, as the Debenture Trustee, had invoked the pledge, of the shares of CGP, held by the petitioner. The said communication may be reproduced thus:

“Date: 10th March, 2019

National Stock Exchange of India Limited
Exchange Plaza Bandra Kurla Complex
Bandra (East), Mumbai 400 051

Bombay Stock Exchange Limited
1st Floor, New Trading Ring,
Rotunda Building,
Phiroze Jeejeebhoy Towers,
Dalal Street, Mumbai – 400 001

The Company Secretary
CG Power and Industrial Solutions Limited
6th Floor, CG House Dr. Annie Besant Road,
Worli, Mumbai – 400 030

**Re: Intimation under Regulation 29 and 31 of SEBI
(Substantial Acquisition of Shares And Takeovers)
Regulations, 2011**

Dear Sir(s)

The pledge on shares created by the Company as a Promoter in CG Power and Industrial Solutions Limited has been invoked by Vistra ITCL (India) Ltd., the Debenture Trustee. The necessary disclosures under Regulations 29 and 31 of SEBI (Substantial Acquisition of Shares And Takeovers) Regulations, 2011, are attached herewith.

We request you to kindly take the same on record.

Thanking you,

Yours faithfully

For AVANTHA HOLDINGS LIMITED

Sd./-

Sonia Niranjana Das

Company Secretary & AVP – Law & Compliance ”

6.8 Appended, towards the end of the disclosure, was a Note, which reads thus:

“Note:

While the pledge has been invoked, until sale of the shares by Vistra ITCL (India) Ltd. the Debenture Trustee, on behalf of BOI AXA Credit Risk Fund, KKR India Financial Services Private Limited and KKR India Debt Opportunities Fund II. Avantha Holdings Limited will continue to have the right to require a re-transfer of the shares to itself *upon repayment of the debt*. In the event of any sale of the shares by the Debenture Trustee any amounts received by the Debenture Trustee over and above the outstanding amount of the debt will be payable to Avantha.”

(Emphasis supplied)

6.9 On 8th March, 2019, Mr. Narayan Seshadri was appointed as an independent director of CGP and, on the same day, the BoD of CGP proposed that an Operations Committee be constituted, to focus on “operational improvement, credible decisions on the international business, capital restructuring ” and other similar matters, so as to enable CGP to leverage strong growth in its industrial and railways businesses.

6.10 On 24th April, 2019, the Operations Committee appointed a law firm, namely M/s. Vaish Associates (hereinafter referred to as “Vaish”), purported to investigate transactions, entered into, purportedly without proper authorisation by CGP. The petition further asserts that, on 21st June, 2019, CGP proposed appointment of Tranzmute to help CGP in a capital restructuring exercise.

6.11 The petition alleges that on 5th August, 2019, Vaish tabled a Preliminary Report, resulting in a misleading disclosure, by CGP to NSEI and BSE. On 29th August, 2019, Mr. Gautam Thapar was removed as Chairman of the BoD of CGP.

6.12 It is submitted by Mr. Mukul Rohatgi, learned Senior Counsel and Mr. Jayant Mehta, learned counsel appearing on behalf of the petitioner, that this Preliminary Report was part of a plan, devised by KKR to ensure that the value of the shares of CGP, which stood transferred to the name of the Debenture Trustee, i.e. the respondent, plummeted, so that they could later purchase the shares at a pittance.

6.13 As a consequence of the aforesaid alleged machinations, chiefly, by KKR, the petition alleges that there was a fall in the value of the shares of CGP, from ₹ 36.60 on 1st March, 2019 to ₹ 12.25 on 6th December, 2019 per share.

6.14 It is alleged that, having thus succeeded in ensuring that the value of the shares of CGP, earlier held by the petitioner and which

had been transferred in the name of the Debenture Trustee, plummeted in the stock market, the Debenture Trustee, in complete breach of the fiduciary relationship between the pledgee and pledgor, and the alleged oral agreement, dated 6th March, 2019 (*supra*), sold the pledged shares of CGP, between July and September, 2019. As a result thereof, KKR acquired 10% shareholding in CGP @ ₹ 14.62 per share and 9.99% of the pledged shares of CGP were sold by the respondent to L & T Finance Ltd. on 6th November, 2019. Disclosures to the NSEI and BSE, evidencing this fact, have been placed on record.

6.15 On 10th September, 2019, the Debenture Trustee addressed a notice to the petitioner, intimating the petitioner of the possible sale of the pledged shares of CGP. This provoked the petitioner to respond on 11th September, 2019, to KKR, expressing disappointment at the proposed sale of the pledged shares of CGP, and submitting that, as per the oral agreement between the petitioner and KKR, the pledged reference entity shares had been transferred to the DEMAT account of the respondent, to be held as collateral, pending satisfaction of the obligations under the Debenture Trust Deeds. KKR was, therefore, requested to ensure that no precipitate action was taken by the Debenture Trustee, especially as the value of the shares of CGP, had, as the petitioner alleged, been artificially depressed.

6.15 The petitioner has also relied on certain observations made by the Mumbai Bench of the learned National Company Law Tribunal (NCLT), in CP 4127/2019, under Section 130 of the Companies Act,

2013, whereby the books of account of CGP were directed to be reopened and financial statements of the CGP were recast, for a period of five years, ending 31st March, 2019. It is true that the said order records the fact of an internal fight, between Mr. Gautam Thapar and the subsisting management of CGP, and has also expressed doubts regarding the reasons for removal of Mr. Gautam Thapar as well as regarding the reliability of the report of Vaish. For reasons which would become apparent hereinafter, however, I do not deem it necessary to allude, in any greater detail, to the observations and findings of the learned NCLT.

6.16 It is alleged, by the petitioner, that there could be no occasion for invoking and selling the pledged shares of CGP, prior to the expiry of 30 months from 5th January, 2017, i.e. prior to 6th July, 2019. Instead of doing so, it is alleged that the respondent illegally transferred the pledged shares of CGP in its name, in March, 2019, creating a situation in which the value of the shares fell in the market and, thereafter, sold the shares in September, 2019, at a pittance. This, it is submitted, was entirely illegal.

6.17 On 30th June, 2020, the respondent wrote to the petitioner, alleging that, starting 28th September, 2018, several notices have been issued, by the respondent to the petitioner, pointing out that the required security cover, as per Clause 3.4 of the Debenture Trust Deeds, was not being maintained, and highlighted other breaches. It was also pointed out, in the said communication, that as per the covenants of the Debenture Trust Deeds, all Outstanding Amounts

were payable by the petitioner on the final redemption date, i.e. 10th July, 2019, in which respect, too, the petitioner had defaulted. A tabular statement, setting out the amounts outstanding, to be paid by the petitioner, to the Debenture Trustee, on behalf of the debenture holder for onward payments to the debenture holders, as on 30th June, 2020, was also enclosed, which may be reproduced thus:

“DETAILS OF OUTSTANDING AMOUNTS AS ON JUNE 30, 2020 UNDER THE DEBENTURE TRUST DEEDS

Sl. No.	Particulars	Amount (Rs.)
1.	Overdue Principal	3,62,86,15,772
2.	Overdue Redemption Premium	1,94,77,81,148
3.	Total Overdue	5,57,63,96,920
4.	Delayed Charges	1,08,67,00,568
Total		6,66,30,97,488

”

6.18 The alleged default on the part of the petitioner, in failing to liquidate the entire Outstanding Amounts, under the Debenture Trust Deeds and, *inter alia*, to ensure maintenance of the required security cover, it was alleged, constituted “Events of Default”, within the meaning of Clause 1.1.41 of the Debenture Trust Deeds, read with Schedule 3 thereof. The letter, therefore, called upon the petitioner to, within a period of ten days, pay, to the debenture holders, the entire Outstanding Amounts, remaining to be paid to them, in accordance with the Transaction Documents, failing which the respondent reserved its right to invoke and sell the shares of BILT, pledged against the payment of the Outstanding Amounts, by the petitioner. The petitioner was directed to treat the said communication dated 30th

June, 2020, as a notice under Section 176 of the Indian Contract Act, 1872 (hereinafter referred to as “the Contract Act”), and under the Debenture Trust Deeds. For ready reference, Section 176 of the Contract Act may be reproduced thus:

“176. Pawnee’s right where pawnor makes default. — If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale. —

If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.”

6.19 The petitioner responded, to the above communication, *vide* letter dated 8th July, 2020, addressed by counsel, asserting that it had been agreed, between the petitioner and KKR, (who was acting on behalf of the Debenture Holders), that the pledged CGP shares, after being moved to the DEMAT account of the respondent, would continue to be held as collateral, to enable the petitioner to repay the Outstanding Amounts under the Debenture Trust Deeds. The sale of the CGP shares, between July and September, 2019, it was alleged,

was in stark violation of the said agreement and understanding. The manner in which the debenture holders had acted, it was alleged, reflected market manipulation, using the petitioner as a scapegoat. In view thereof, it was submitted that the Debenture Trust Deeds and the Memoranda Of Pledge stood vitiated and the petitioner, had no liability under the debenture trust deeds, which stood, accordingly rescinded. The petitioner has also pointed out that it had complained, in the above regard, to the SEBI, which was enquiring into the matter.

7. The petition asserts that, “in these extraordinary circumstances”, the petitioner was seeking interim measures of protection, pending initiation of arbitration proceedings, in terms of the Debenture Trust Deeds and Memoranda of Pledge, under Section 9 of the 1996 Act.

8. At this stage, it would be appropriate to reproduce the prayer clause, in the petition, thus:

“In view of the above facts and circumstances, it is most respectfully prayed that this Hon'ble Court may be graciously be pleased to grant the following interim measures:

A. Call upon the Debenture Trustee, including its officers, agents, servants and assigns to forthwith transfer the Pledged CG Shares into the demat account of the Petitioner and to do all necessary and incidental acts in relation to the same;

B. Direct and/ restraint the Debenture Trustee, including its officers, agents, servants and assigns from selling the shares of BILT held by the petitioner and/or acting in furtherance and/or in implementation of the notice dated 30 June, 2020;

C. Direct and/or restraint the Debenture Trustee including its officers, agents, servants and assigns from taking any steps against the petitioner under the Debenture Trust Deeds dated 5 January, 2017 and/or the Memoranda of Pledge dated 5 January, 2017 and 27 June, 2018;

D. Pass any further order(s) as this Hon'ble Court may deem fit, proper and necessary in the facts and circumstances of the present case and in the interests of justice;

E. Ad-interim reliefs in terms of prayers (1) to (3) above;

F. Costs.”

Rival Contentions

9. I have heard Mr. Mukul Rohatgi, learned Senior Counsel and Mr. Jayant Mehta, learned Counsel appearing on behalf of the petitioner, as well as Mr. Rajiv Nayar, learned Senior Counsel appearing for the respondent.

10. The petition asserts that the circumstances, as set out in the petition and, as outlined hereinabove, disclosed egregious fraud, completely disempowering the respondent to exercise any rights, whatsoever, over the shares of CGP and BILT. The manner in which the price of the CGP shares was artificially depressed, it is asserted, entitled the petitioner to restoration, of the illegally transferred, pledged CGP shares, to the DEMAT account of the petitioner. It is further asserted that the facts made it apparent that a similar *modus operandi* was being engineered, by the respondent, in respect of the

pledged BILT shares, by artificially depressing the value of the shares and obtaining a controlling stake in BILT. The petitioner has, therefore, expressed serious apprehension that the debenture trustee, i.e. respondent, in collusion with the debenture holders, would invoke the pledge and sell the pledged BILT shares, as threatened, in the notice dated 30th June, 2020 *supra*, thereby rendering all rights of the petitioner infructuous. This, it is submitted, is bound to result in irreparable loss and prejudice to the petitioner. The petitioner has, in its written submissions, highlighted the “intrinsic value”, of the pledged BILT shares; however, for the purposes of disposal of the present petition, I do not deem it necessary to advert thereto.

11. This petition was initially listed, before this Court, on 10th July, 2020, and was renotified for 16th July, 2020. Mr. Mukul Rohatgi, learned Senior Counsel appearing for the petitioner, pointed out, on 16th July, 2020, that, even while the matter was thus pending before this Court, 50% of the pledged shares of BILT have been sold, by respondent, on 15th July, 2020. In the circumstances, he exhorted this Court to restrain the respondent from selling the remaining 50% of the BILT shares.

12. Before proceeding to refer to the submissions of Mr. Rajiv Nayar, learned Senior Counsel by way of response to the submissions of Mr. Rohtagi, it would be appropriate to reproduce the tabular statement, filed by the respondent, setting out the details of shares of CGP and BILT, as the position obtains today, thus:

	Particulars	CG Power and Industrial Solutions Limited (CG Power)	Ballarpur Industries Limited (BILT)
1.	Total number of Shares Pledged with Debenture Trustee for L&T Finance (in percentage)	6,76,96,248 (10.8% of total share capital of CG Power)	16,13,44,510 (12.47 % of total share capital of BILT)
2.	Total number of Shares Invoked by Debenture Trustee for L&T Finance (in percentage)	6,76,96,248 (10.8%)	12,80,52,000 (9.89%)
3.	Total number of Shares Uninvoked by Debenture Trustee for L&T Finance (in percentage)	NIL	33292510 (2.57%)
4.	Total number of shares sold by Debenture Trustee for L&T Finance (in percentage)	6,26,00,000 (9.988%)	12,80,52,000 (9.89%)
5.	Total number of shares available for sale	50,96,248 (0.81%)	3,32,92,510 (2.57%)

13. Responding to the submissions of Mr. Rohatgi, Mr. Rajiv Nayar, learned Senior Counsel appearing for the respondent, submits that the present petition was completely devoid of any actionable grievance, which the petitioner could legitimately have against the respondent, and, therefore, was also devoid of any sustainable cause of action.

14. Adverting to the prayers in the petition, Mr. Nayar submits that prayer A has been rendered infructuous, as all shares of CGP stood invoked, and 6.26 crores shares had already been sold. Prayer C, it

was submitted, was in the nature of a final relief, which could be granted only consequent on arbitral proceedings. All that survived submits Mr. Nayar was prayer B, to the extent of 3,32,92,510 shares of BILT, which, as yet, have not been sold.

15. Mr. Nayar submitted, further, that the grievance of the petitioner, if at all, dated back to March, 2019, when the pledged shares of CGP were transferred to the DEMAT account of the respondent, in the process invoking the pledge over the said shares. The shares of CGP, it is submitted, were invoked and sold owing to defaults on the part of the petitioner, and were preceded by notices, by the respondents, to the petitioner, under Section 176 of the Contract Act, to which no reference is made in the petition. Insofar as the BILT shares were concerned, Mr. Nayar submits that, 12,80,52,000 shares, (out of a total of 16.14 crores shares) were invoked on 13th July, 2020, and were sold on the stock exchange on 15th July, 2020.

16. Apropos the defaults of the petitioner, Mr. Nayar points out that, with effect from 28th September, 2018, the petitioner was in default in maintaining the required Security Cover, as required by Clause 3.4 of the Debenture Trust Deeds and that, despite several notices, from the respondent, till February/March, 2019, did not rectify the default. It is alleged that these notices, too, have been suppressed in the petition, though, on 6th March, 2019, the petitioner acknowledged receipt of the shortfall notices, and intimated the respondent that it would remedy the breaches and ensure repayment of the Outstanding Amounts. Reference has been invited, by Mr. Nayar,

to the said communication dated 6th March, 2019, of the petitioner (which is on record), in para 3 of which the petitioner admitted breach, on its part, in payment of the Outstanding Amounts under the Transaction Document. The said document deserves to be reproduced *in extenso* thus:

“March 6, 2019

From
Avantha Holdings Limited
Thapar House
124 Janpath,
New Delhi-110001
Facsimile: +91 11 23368729

Email: rajendra.mangal@avanthaholdings.com
s.khandelwal@avanthaholdings.com

Attention: Mr. Rajendra Mangal and Mr. S. Khandelwal

Salient Financial Solutions Limited
Thapar House, 124, Janpath, New Delhi-110001.

Facsimile +91 11 23368729
Email:rajendra.mangal@avanthaholdings.com
s.khandelwal@avanthaholdings.com
Attention: Mr. Rajendra Mangal: Mr. S. Khandelwal

To

Vistra ITCL (India) Limited
The IL&FS Financial Centre,
Plot C-22, G Block, 7th Floor
Bandra Kurla Complex, Bandra (East)
Mumbai 400 051

Facsimile number +91 22 26593535
Email: Mumbai@vistra.com

Dear Sirs,

**Sub: Your Notice dated February 26, 2019
regarding Shortfall in Security Cover**

1. We, Avantha Holdings Limited (“AHL”) and Salient Financial Solutions Limited (“Issuer”) make reference to your captioned notice dated February 26, 2019 (“Notice”), and each of the documents referred to therein. Capitalized terms used but not defined herein shall have the meaning ascribed to such terms under the Notice.

2. We, the Issuer and AHL (collectively, the “Obligors”) acknowledge the receipt of the Notice sent by you on behalf of the Debenture Holders referred to in Annexure 1 of your Notice, the Obligors failure to maintain the Required Security Cover, and the Aggregate Accrued Amount owing to the Debenture Holders’ as identified in your Notice, as on date as set out in the Notice.

3. We wish to notify you of our intent to remedy each of the breaches under the Transaction Documents, and of our intent to ensure the payment of the Outstanding Amounts under the Transaction Documents, in accordance with the terms of the Transaction Documents.

4. As you are aware, the capital markets condition in India is volatile due to various extraneous factors. The shortfall in the Required Security Cover under the Transaction Documents is merely a result of such volatility despite the fact that the intrinsic value of the Pledged Reference Entity Shares is high. In any event, we are making sincere efforts for meeting the Required Security Cover of two times the outstanding principal amount under the Transaction Documents. However, due to the ongoing volatility in the markets globally and locally, the process has been elongated.

5. At this stage, while acknowledging your right to cause the transfer and/or sale of the Pledged Reference Entity Shares, at the prevailing market price for such Pledged Reference Entity Shares as on the date of such transfer/sale, and without prejudice to such rights, we request you not to sell such Pledged Reference Entity Shares at the current time, as we believe that the current market value of the Pledged

Reference Entity Shares is not reflective of the actual value of such Pledged Reference Entity Shares. We therefore request you to refrain from accelerating the payment of the Outstanding Amounts under the Transaction Documents, and from any sale of the Pledged Reference Entity Shares at the present time in consideration for which and as an alternative to an immediate sale of the Pledged Reference Entity Shares, we request you as the Debenture Trustee:

5.1 to move to the demat account of the Debenture Trustee, up to all of the pro-rata share of the Debenture Holders as identified in Annexure 1 of your Notice of the equity shares of CG Power and Industrial Solutions Limited that have been pledged in favour of the Debenture Trustee in terms of the Transaction Documents (“Pledged Reference Entity 1 Shares”), as collateral for the benefit of the Debenture Holders as identified in Annexure 1 of your Notice, pursuant to an invocation of the pledge created by AHL over such Pledged Reference Entity 1 Shares in favour of the Debenture Trustee; and

5.2 to assume, retain and exercise all rights, including all voting rights, in respect of any such Pledged Reference Entity 1 Shares so invoked and transferred to the Debenture Trustee, as collateral, until the payment of the Outstanding Amounts owing to the Debenture Holders as identified in Annexure 1 of your Notice in accordance with the terms of the Transaction Documents; and

5.3 in the event that the Outstanding Amounts owed to the Debenture Holders identified in Annexure 1 of your Notice are discharged, to immediately re-transfer, to AHL, any Pledged Reference Entity 1 Shares that continue to be held by the Debenture Trustee at such time and which have not previously been sold by the Debenture Trustee and/or the Debenture Holders, in accordance with the Transaction Documents.

6. We acknowledge and agree that such invocation of the pledge over such Pledged Reference Entity 1 Shares shall, if undertaken by the Debenture Trustee in the manner described above, be deemed to have been undertaken at the express request of the Obligors, and that the Obligors hereby expressly waive all rights, claims and remedies as may be

available to the Obligors, in law or in equity, in respect of any such invocation of the pledge over such Pledged Reference Entity 1 Shares other than the Obligors' right to (a) seek a re-transfer of such Pledged Reference Entity 1 Shares upon payment of the Outstanding Amounts to the Debenture Holders identified in Annexure 1 of your Notice; and (b) to receive the surplus, if any, after adjustment of the Outstanding Amounts owed to the Debenture Holders identified in Annexure 1 of your Notice, in the event of sale of such Pledged Reference Entity 1 Shares. We covenant and undertake that we shall not take, or permit to be taken, any action which may prejudice the rights of the Debenture Holders under the Transaction Documents or in respect of the Pledged Reference Entity Shares.

7. We hereby agree to jointly and severally indemnify and hold harmless the Debenture Trustee and the Debenture Holders identified in Annexure 1 of the Notice (collectively, the "Indemnified Parties") from any and all losses, liabilities, claims, costs, expenses, taxes or damages that may be incurred or suffered by any of the Indemnified Parties arising out of or in connection with the Notice, this letter and/or any action that may be taken and/or any right that may be exercised by the Indemnified Parties pursuant to the Notice and this letter or otherwise in pursuance of their rights under the Transaction Document.

8. We further acknowledge and agree that, notwithstanding anything contained in this letter, the Debenture Trustee and the Debenture Holders shall continue to be entitled to exercise all rights available to the Debenture Trustee and the Debenture Holders, including all rights and remedies under any of the Transaction Documents, or under law or in equity, including the right to transfer and/or sell any of the Pledged Reference Entity Shares to recover any or all of the Outstanding Amounts due to the Debenture holders under the Transaction Documents upon the occurrence of an Event of Default.

9. We request you to kindly counter-sign this letter to indicate your agreement with the terms hereof, following which this letter (and the covenants contained herein) shall be

binding on us, and shall be a “Transaction Document”, as such term is defined under the Transaction Documents.

Yours sincerely,

For Avantha Holdings Limited
Sd/-
Authorised Signatory
For Salient Financial Solutions Limited

Sd/-
Authorised Signatory

For Vistra ITCL (India) Limited”

17. All Outstanding Amounts, Mr. Nayar points out, were required to be paid on or before 6th July, 2019, in which respect, too, the petitioner defaulted. This led to the issuance of an “Event of Default” notice, followed by notices under Section 176 of the Contract Act, calling on the petitioner to remedy the defaults, failing which sale of the pledged CGP shares was mooted as a possibility. The invocation of the pledged CGP shares, therefore, Mr. Nayar points out, was preceded by notices under Section 176 of the Contract Act, following which the pledge was invoked on 16th September, 2019.

18. Mr. Nayar also points out that the petitioner’s account has been categorised as a Non-Performing Account on 10th October, 2019, as per applicable guidelines of the Reserve Bank of India (RBI). Additionally, the written submissions filed by the respondent asserts that a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) has been filed, by the ICICI Bank, against the petitioner.

19. In the circumstances, the respondent submits that the petitioner has no *prima facie* case in its favour, and that the respondent is entitled to invoke the pledge against the BILT shares, consequent on the defaults of the petitioner. Besides, it is pointed out that the petitioner is seeking to base its case on an alleged – but, as the respondent would contend an non-existent – oral agreement, which, quite obviously, is not covenanted by any arbitration clause. No specific performance of such oral agreement could, therefore, it is submitted, be sought in arbitral proceedings, for which reason, too, the present petition under Section 9 of the 1996 Act would not be maintainable.

20. Mr. Nayar points out that, save and except for grandiose allegations, regarding the actions taken in respect of the pledged CGP shares, the petitioner has been unable to point out any illegality in the issuance of the impugned notice dated 30th June, 2020, invoking the pledge over the BILT shares. Section 176 of the Contract Act, it is submitted, directly applies.

21. The respondent has placed reliance on the judgments of this Court in *Khoobsurat Infra Pvt. Ltd. v. IDBI Trusteeship Services Ltd.*¹ and *Tindrel Financial Services Pvt. Ltd. v. Nemedi Leasing and Finance Ltd.*²

¹ MANU/DE/1340/2020

² MANU/DE/1275/2018

22. For all the above reasons, it is submitted by the respondent that the petitioner cannot maintain its claim for interim relief, as it has no *prima facie* case. The principles of balance of convenience and irreparable loss, too, it is submitted, would militate grant of any interim relief to the petitioner.

Analysis

23. Having heard learned Senior Counsel for the parties, and perused the material on record, I am of the firm opinion that the present petition is nothing more than a shot in the dark and is clearly bereft of any sustainable cause of action.

Scope of Section 9 of the 1996 Act

24. Section 9 of the 1996 Act contemplates “interim measures, etc.”, by the Court. The expression “etc.”, used at the end of a definition clause has been held, in several decisions, to be required to be interpreted *noscitur a sociis* and *eiusdem generis* (the latter principle applying where the words, preceding the word “etc.”, constituted a genus, and the former principle applying more universally, in all cases), the words preceding it.³ Measures, put in place by the Court, in exercise of the jurisdiction vested by Section 9 has, therefore, to be in the nature of “interim measures”. “Interim reliefs”, held the Bombay High Court in *Bank of Maharashtra v. M.*

³ Rajagopala Pandarathar v. Thirupathi Pillai , AIR 1923 Mad 511; CIT v. Maulane Tea Co, (2000) 244 ITR 589 (Ker); K.V. Mathew v. District Manager, Telephones Ernakulam, AIR 1984 Ker 40, Bombay Municipal Corporation v. Daily Taj Pvt Ltd, AIR 2001 Bom 263

*V. River Oghese*⁴, “are granted to serve the temporary purpose of protecting the plaintiff’s interest so that the suit is not frustrated”.

25. The Court, while exercising its power under Section 9 of the 1996 Act, has to be acutely conscious of the power, vested in the arbitrator/arbitral tribunal, by Section 17 of the same Act. A reading of Section 9, and Section 17, of the 1996 Act, reveals that they are identically worded. The “interim measures”, which can be ordered by the arbitral tribunal, under Section 17, are the very same as those which can be ordered by the Court under Section 9. It is for this reason that sub-section (3) of Section 9 proscribes grant of interim measures, by the Court, consequent on constitution of the arbitral tribunal, save and except where the Court finds that circumstances exist, which may not render the remedy, under Section 17, to be efficacious. The Court, while exercising jurisdiction under Section 9, even at a pre-arbitration stage, cannot, therefore, usurp the jurisdiction which would, otherwise, be vested in the arbitrator, or the arbitral tribunal, yet to be constituted. The Court is also required to ensure that Section 9 is not employed, by litigants, who feel that it is easier to obtain interim relief from a Court, rather than from an arbitrator or arbitral tribunal, to forum shop. Left unchecked, Section 9 is easily amenable to such misuse. While, in an appropriate case, the Court must not hesitate in ordering “interim measures”, under Section 9, in judging whether a particular case is “appropriate” or not, the Court is required to do some tightrope walking. While the principles, to be borne in mind, while examining whether a case for ordering interim

⁴ AIR 1990 Bom 107

measures, under Section 9, exists or not, the same as those which govern Order 39 of the Civil Procedure Code, 1908, i.e. the existence of a prima facie case, the balance of convenience and the possibility of irreparable loss or prejudice, were interim relief not to be granted, apart from the consideration of public interest, evolved by later decisions, chiefly in *Ramnijklal N. Bhutta v. State of Maharashtra*⁵ and *Raunaq International Ltd. v. I.V.R. Construction Ltd.*⁶

26. That said, the mere satisfaction of these criteria does not, *ipso facto*, make out a case for ordering interim measures under Section 9. Additionally, the Court is also required to satisfy itself that the relief, being sought under Section 9, cannot await the constitution of the arbitral tribunal, or the appointment of the arbitrator, and the invocation, before such arbitrator or arbitral tribunal, of Section 17. Emergent necessity, of ordering interim measures is, therefore, an additional *sine qua non*, to be satisfied before the Court proceeds to grant relief under Section 9 of the 1996 Act. While passing orders under Section 9, therefore, the Court is required to satisfy itself that (i) the applicant, before it, manifestly intends to initiate arbitral proceedings⁷, (ii) the criteria for grant of interim injunction, which apply to Order 39 of the CPC, stands satisfied, and (iii) circumstances also exist, which renders the requirement of ordering interim measures an emergent necessity, which cannot await a Section 17 proceeding, before the arbitrator, or arbitral tribunal. In assessing whether such an emergent necessity exists, or not, the Court would, essentially, have to

⁵ (1997) 1 SCC 134

⁶ (1999) 1 SCC 492

⁷ *Sundaram Finance Ltd v. NEPC India Ltd*, (1999) 2 SCC 479

satisfy itself that failure to order interim measures, under Section 9, would frustrate, or would render the recourse, to arbitration – which is yet to take place – a futility.

27. In *Adhunik Steels Ltd v. Orissa Manganese and Minerals (P) Ltd*⁸, the Supreme Court examined, in detail, the scope of Section 9 of the 1996 Act. Paras 11, 14, 15 and 21 of the report may be reproduced, thus:

“9. Learned counsel also relied on International Commercial Arbitration in UNCITRAL Model Law Jurisdictions by Dr. Peter Binder, wherein it is stated:

“It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.”

It is further stated:

“In certain circumstances, especially where the Arbitral Tribunal has not yet been established, *the issuance of interim measures by the court is the only way assets can be saved for a future arbitration. Otherwise, the claimant could end up with a worthless arbitral award* due to the fact that the losing party has moved his attachable assets to a ‘safe’ jurisdiction where they are out of reach of the claimant's seizure. The importance of such a provision in an arbitration law is therefore evident, and a comparison of the adopting jurisdictions shows that all jurisdictions include some kind of provision on the issue, all granting the parties

⁸ (2007) 7 SCC 125

permission to seek court-ordered interim measures.”

14. Professor Lew in his Commentary on Interim and Conservatory Measures in ICC Arbitration Cases, has indicated:

“The demonstration of irreparable or perhaps substantial harm is also necessary for the grant of a measure. This is because it is not appropriate to grant a measure where no irreparable or substantial harm comes to the movant in the event the measure is not granted. The final award offers the means of remedying any harm, reparable or otherwise, once determined.”

15. The question was considered in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993 AC 334 : (1993) 2 WLR 262 : (1993) 1 All ER 664 (HL)] The trial Judge in that case took the view that he had the power to grant an interim mandatory injunction directing the continuance of the working of the contract pending the arbitration. The Court of Appeal thought that it was an appropriate case for an injunction but that it had no power to grant injunction because of the arbitration. In further appeal, the House of Lords held that it did have the power to grant injunction but on facts thought it inappropriate to grant one. In formulating its view, the House of Lords highlighted the problem to which an application for interim relief like the one made in that case may give rise. The House of Lords stated at AC p. 367: (All ER p. 690g-h)

“It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial stage of a dispute arising under a construction contract to order the defendant to continue with a

performance of the works. But the court should approach the making of such an order with the utmost caution, and should be prepared to act only when the balance of advantage plainly favours the grant of relief. In the combination of circumstances which we find in the present case I would have hesitated long before proposing that such an order should be made, even if the action had been destined to remain in the High Court.”

21. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject-matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject-matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to OMM Private Limited for a period of 10 years and its attempted abrupt termination by OMM Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of OMM Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by OMM Private Limited or the termination of the contract by OMM Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that

behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well-settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case.”

28. The manner in which the Supreme Court applies the above principles, in the case before it, is also instructive. In the case before it, M/s Orissa Manganese and Minerals (P) Ltd (hereinafter referred to as “OMM”) entered into an agreement, dated 14th May, 2003, with Adhunik Steels (hereinafter referred to as “Adhunik”), for raising manganese ore on its behalf. The agreement was to subsist for 10 years, w.e.f. 18th May, 2003, with the option, to Adhunik, to seek renewal for a further term. Pursuant to the agreement, Adhunik mobilised huge resources, and incurred considerable expenditure. Just six months after entering into the agreement, on 24th November, 2003, OMM issued a notice, to Adhunik, purporting to terminate the agreement. The justification, cited by OMM for doing so, was that it had realised that the contract was in violation of Rule 37 of the Mineral Concession Rules, 1960, and that, therefore, OMM was in danger of losing its right as the lessee, necessitating termination of the contract. As Adhunik had incurred considerable expenditure, as well as losses, it moved the District Court, under Section 9 of the 1996 Act, for an injunction, restraining OMM from terminating the contract and

from dispossessing it from the site. *Vide* order dated 18th August, 2004, the District Court allowed the application and restrained OMM from acting on the letter of termination dated 24th November, 2003, and from dispossessing Adhunik from the mines. In so holding, the District Court opined that Rule 37 of the Mineral Concession Rules, 1960, was not applicable to the arrangement between OMM and Adhunik. OMM appealed to the High Court of Orissa. The High Court reversed the decision, of the District Court, on the ground that the loss, if any, that Adhunik may have had to sustain, were the contract between OMM and Adhunik to be terminated, could be compensated in terms of money and that, therefore, by virtue of clause (c) of the Specific Relief Act, 1963, injunction, as prayed for by Adhunik, could not be granted. Appeals, thereagainst, were filed, before the Supreme Court, by both Adhunik as well as OMM, leading to the passing of the judgement by the Supreme Court. Having set out the guiding principles, as above, the Supreme Court adumbrated the issue for consideration, before it, as being “whether in the circumstances, an order of injunction could be granted restraining OMM Pvt. Ltd. from interfering with Adhunik Steels working of the contract which OMM Pvt. Ltd. has sought to terminate”. Significantly, no injunction, restraining OMM from acting on its decision to terminate the contract with Adhunik, was granted. The only interim direction that was passed was in the form of a restraint, against OMM from entering into a similar contract with any other entity, till the conclusion of the arbitral proceedings. The *raison d’etre* for so holding, is also relevant. Paras 24 and 25 of the report may, in this context, be reproduced thus:

“24. But, in that context, we cannot brush aside the contention of the learned counsel for Adhunik Steels that if OMM Private Limited is permitted to enter into other agreements with others for the same purpose, it would be unjust when the stand of OMM Private Limited is that it was cancelling the agreement mainly because it was hit by Rule 37 of the Mineral Concession Rules, 1960. Going by the stand adopted by OMM Private Limited, it is clear that OMM Private Limited cannot enter into a similar transaction with any other entity since that would also entail the apprehended violation of Rule 37 of the Mineral Concession Rules, 1960, as put forward by it. It therefore appears to be just and proper to direct OMM Private Limited not to enter into a contract for mining and lifting of minerals with any other entity until the conclusion of the arbitral proceedings.

25. At the same time, we see no justification in preventing OMM Private Limited from carrying on the mining operations by itself. *It has got a mining lease and subject to any award that may be passed by the arbitrator on the effect of the contract it had entered into with Adhunik Steels, it has the right to mine and lift the minerals therefrom. The carrying on of that activity by OMM Private Limited cannot prejudice Adhunik Steels, since ultimately Adhunik Steels, if it succeeds, would be entitled to get, if not the main relief, compensation for the termination of the contract on the principles well settled in that behalf. Therefore, it is not possible to accede to the contention of learned counsel for Adhunik Steels that in any event OMM Private Limited must be restrained from carrying on any mining operation in the mines concerned pending the arbitral proceedings.*”

(Emphasis supplied)

29. *Arvind Constructions Ltd v. Kalinga Mining Corporation*⁹

reiterated the principle that the exercise of jurisdiction, under Section 9 of the 1996 Act, is subject to the restrictions and limitations contained in the Specific Relief Act, while *Firm Ashok Traders v.*

⁹ (2007) 6 SCC 798

*Gurmukh Das Saluja*¹⁰ also holds – as did *Adhunik Steels Ltd*⁵, two years later – that “the Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated”.

30. The need for restraint, while exercising jurisdiction under Section 9 of the 1996 Act, was also emphasised by this Court, through Dalveer Bhandari, J. (as he then was) in *Olex Facas Pvt Ltd v. Skoda Export Co. Ltd*¹¹, thus:

“In my view, though the Court is vested with the power to grant interim relief, but the Court’s discretion must be exercised sparingly and only in appropriate cases. *The Courts should be extremely cautious in granting interim relief in cases of this nature. The Court’s discretion ought to be exercised in those exceptional cases where there is adequate material on record, leading to a definite conclusion that the respondent is likely to render the entire arbitration proceedings infructuous, by frittering away the properties of funds either before or during the pendency of arbitration proceedings or even during the interregnum period from the date of award and its execution. In those cases, the Courts would be justified in granting interim relief.*”

(Emphasis supplied)

31. The categories of “interim measures”, which could be directed under Section 9, stand specifically delineated in the provision itself. The Court can, under Section 9, (i) appoint a guardian for the purposes of arbitral proceedings, (ii) direct preservation, interim custody or sale of the goods which are subject matter of the arbitration agreement, (iii) secure the amount in dispute in the

¹⁰ (2004) 3 SCC 155

¹¹ AIR 2000 Del 161

arbitration, (iv) direct detention, preservation or inspection of any property or thing which is the subject matter of dispute in arbitration, or as to a breach any question may arise therein, (v) grant interim injunction or appoint a receiver and (vi) grant such other interim measure of protection as may appear to the court to be just and convenient. The ambit of sub-clause (ii)(e) of sub-section (1) of Section 9, which empowers the Court to grant “such other interim measure of protection as may appear to the court to be just and convenient” – specifically the ambit of the expression “just and convenient” – constitutes subject matter of the following enunciation of the law, by Banumathi, J. (as she then was), speaking for the High Court of Madras, in *V. Sekar v. Akash Housing*¹²:

“The purpose of Section 9 is to provide an interim measure of protection *to the parties to prevent the ends of justice from being defeated*. Section 9(2)(e) vests the Court with the power to grant such interim measures of protection as may be just and convenient. The jurisdiction under the “just and convenient” clause is quite wide in amplitude, but must be exercised with restraint. *Interim measures are to be granted by the Court so as to protect the rights in adjudication before the arbitral tribunal from being frustrated*. It does not allow the Court the discretion to exercise unrestrained powers and frustrate the very object of arbitration.”

(Emphasis supplied)

The cause of action, and the prayers, in the petition

32. Tested on the touchstone of the above principles, it becomes apparent that none of the prayers, in this petition, can be granted, under Section 9 of the 1996 Act.

¹² AIR 2011 Mad 110 : (2011) 3 Arb LR 327 (DB)

33. A recapitulation of the facts is sufficient to disclose how featherweight the case of the petitioner – despite the allegation, otherwise serious, of an elaborate facade having been engineered by the respondents – really is. The petitioner borrowed ₹ 1265 crores, from the consortium of KKR, L & T and BOI, against 12,650 debentures, each with face value of ₹ 10 lakhs. The respondent was the Debenture Trustee. The debentures were redeemable on 6th July, 2019, in ordinary course. To secure the debentures, the petitioner pledged 13,53,92,496 equity shares, held by it in CGP and 32,26,89,019 equity shares, held by it in BILT. Of these, between 10th July, 2019 and 16th September, 2019, 6,71,87,692 shares, and, on 4th November, 2019, 6,26,00,000, of the remaining 6,82,04,804 pledged shares of CGP, were sold in the open market. These shares were purchased by KKR and L & T, respectively. As these purchases resulted in substantial acquisition of the open market shares, by single entities, the requisite statutory disclosures, under Regulation 29 (2) of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011, were made, which have been placed on record by the petitioner. 56,04,804 shares of CGP, alone, therefore, remain available for sale, of which 50,96,248 shares remain, out of the total 6,76,96,248 shares, which had been invoked, by the Respondent on 8th March, 2019, against the debentures held by L & T.

34. According to the respondent, the invocation, by the Respondent, of the pledged CGP shares, took place because of continuous default, on the part of the petitioner, in maintaining the Required Security

Cover, in terms of Clause 3.4 of the Debenture Trust Deeds. The respondent also alleges that the petitioner has suppressed, from this Court, the communications, between the petitioner and the respondent, evidencing this fact, and that, in order to conceal the real reason, for invocation of the pledged CGP shares, the petitioner has created a Machiavellian smokescreen, of a fraudulent conspiracy, between KKR, Mr. Narayan Seshadri and Vaish & Co., whereby the shares of CGP were, in the first instance, transferred to the DEMAT account of the Respondent, their value artificially depressed and, thereafter, purchased, by KKR and L & T themselves from the open market, at throwaway prices. In actual fact, the respondent would seek to contend, the “transfer” of the pledged CGP shares to the DEMAT account of Respondent was not, actually, a transfer simplicitor, accompanied by an “oral agreement” – the existence of which the respondent emphatically denies – but was by way of invocation, of the pledged shares, in accordance with Clauses 9.1 to 9.3 of the Debenture Trust Deeds, as the failure, on the part of the petitioner, to maintain the requisite Security Cover constituted an “Event of Default”, within the meaning of Clause 1.1.41 of the Debenture Trust Deeds, read with Schedule 3 thereto.

35. That, however, is a dispute which must, necessarily, fall to the the arbitrator, or arbitral tribunal, which would, some day, be seized of the matter. I refrain from expressing any opinion thereon, lest the arbitral proceedings – if and when they take place – are prejudiced. Suffice it to state, for the purposes of the present petition, that no interim direction can, in the above circumstances, be issued, to

transfer the pledged CGP shares into the DEMAT account of the petitioner, as all the shares stand invoked, and a majority thereof stands sold in the open market, wherefrom they were purchased by KKR and L & T. Invocation of the pledged CGP shares has taken place, the shares have been dematerialised, sold in the open market, and purchased by KKR and L & T; and Section 9 of the 1996 Act, howsoever wide its amplitude, cannot justify setting the clock back to a stage anterior to the invocation of the pledge, by the Respondent, which took place as far back as in March, 2019.

36. Interestingly, the Note below the Disclosure, qua the invocation and sale of 6,71,87,692 shares (purchased by KKR from the open market), specifically states that, even after the said sale, 6,82,04,804 equity shares of CGP, continued to be held by the Respondent as Debenture Trustee in respect of the Debentures issued by the petitioner, and that, “until sale of the shares by the Debenture Trustee, the Pledgor (i.e. the petitioner) will continue to have the right to require a re-transfer of the shares to itself upon repayment of the debt.” That repayment has, till date, not happened. In the meanwhile, of the remaining 6,82,04,804 shares, 6,26,00,000 have been purchased by L & T Ltd from the open market, leaving 56,04,804 shares, alone, unsold.

37. Prayer B, in the petition, seeks a restraint, against the Respondent, from selling of the shares of BILT, held by the Respondent, and against acting in furtherance of the notice, dated 30th June, 2020 *supra*. The notice alleges that multiple notices had, earlier, been issued, to the petitioner, by the Respondent, starting 28th

September, 2018, drawing the attention of the petitioner to various breaches, including non-maintenance of the Required Security Cover. It is also alleged, in the notice, that due payment of the Outstanding Amounts, in accordance with the Transaction Documents, had not been effected, by the petitioner, despite the expiry of the Final Redemption Date, i.e. 10th July, 2019. In view thereof, para 5 of the impugned Notice recites thus:

“5. In view of the failure of the Company to pay the total Outstanding Amounts due and payable under the Debenture Trust Deeds and also the other defaults existing under the Transaction Documents, including but not limited to the failure to maintain the Required Security COver, in accordance with the covenants contained in the Transaction Documents, we wish to inform you that Events of Default, as stipulated in Schedule 3 of the Debenture Trust Deeds have occurred under the Debenture Trust Deeds and the Transaction Documents. Accordingly, pursuant to the Debenture Trust Deeds, the Pledge Memoranda and other Transaction Documents, we hereby wish to inform you as below:

a. The Company is hereby called upon to immediately, and in any event not later than 10 (ten) days from the receipt of this letter to make payment, to the Debenture Holders listed at Annexure 1, of the entire amount of all Outstanding Amounts owed to such Debenture Holders listed at Annexure 2 in accordance with the Transaction Documents forthwith; and

b. In the event that all Outstanding Amounts required to be paid to the Debenture Holders listed at Annexure 1 are not paid to the Debenture Holders in their entirety, then the Debenture Trustee shall, without prejudice to any and all rights available to the Debenture Holders and the Debenture Trustee under the Transaction Documents, take all necessary steps to enforce such rights and remedies as are available to the Debenture Trustee and the Debenture Holders in

respect of the Pledged Reference Entity 2 Shares set out in Annexure 1, including but not limited to the invocation and sale of such Pledged Reference Entity 2 Shares without any further notice to this effect, whether to the Debenture Holders listed at Annexure 1 or otherwise to any other person, and appropriation of any proceeds realized from such sale towards the discharge of the relevant portion of such Outstanding Amounts.”

The impugned Notice further advised the petitioner to treat it as the notice under Section 176 of the Contract Act, for invocation of Pledge.

38. The petitioner responded to the aforesaid Notice, *vide* letter dated 8th July, 2020. The said response merits reproduction, *in extenso*, thus:

“Ref.: MPB / SJ / 97

BY EMAIL

8 July 2020

To,
Vistra ITCL (India) Ltd.,
The IL&FS Financial Centre,
Plot C-22, G Block, 7th Floor,
Bandra Kurla Complex, Sandra (East),
Mumbai 400 051.
Facsimile number: +91 22 26593535
E-mail: Mumbai@vistra.com

Kind Attn.: Senior Vice President

Dear Sirs,

Re.: Debenture Trust Deeds dated January 5, 2017

1. We write to you under instructions of our client, Avantha Holdings Limited (AHL) and with reference to the Debenture Trust Deeds dated January 5, 2017 (**Debenture Trust Deeds**), entered into with you by and on behalf of KKR India Financial Services Limited and KKR India Debt opportunities Fund II (**KKR**), L&T Finance Ltd., L&T FinCorp Ltd. and Family Credit Ltd. (**L&T**) and BOI AXA Corporate Credit Spectrum Fund.

2. The Debenture Trust Deeds were *inter alia* secured by a pledge of shares held by AHL in (i) CG Power and Industrial Solutions Ltd. (**CG Power**) hereinafter referred to as the **Pledged Reference Entity 1 Shares** and (ii) Ballarpur Industries Ltd. hereinafter referred to as the **Pledged Reference Entity 2 Shares** which was documented in the Memorandum of Pledge dated 5 January 2017 and 27 June 2018.

3. After several discussions between late 2018 and early 2019 with KKR who were also Arrangers of the said transaction and who acted on behalf of all the debenture holders, it was agreed that said Pledged Reference Entity 1 Shares would be moved to the Debenture Trustee's dematerialized securities account and would be continued to be held as "collateral" to enable AHL to repay the outstanding amounts under the Debenture Trust Deeds. Relevant disclosures in this regard were also made to the Stock Exchanges.

4. However, contrary to our arrangement and understanding, the Debenture Trustee sold the Pledged Reference Entity 1 Shares between July 2019 and September 2019. These facts were also pointed out to you by our letter of 11 September 2019 seeking KKR's intervention, to which we received no response.

5. Instead, on 16 September 2019, KKR India Financial Services Limited purchased 5,07,28,829 Pledged Reference Entity 1 Shares and KKR India Debt opportunities Fund II purchased 1,19,45,780 Pledged Reference Entity 1 Shares at Rs. 14.62 per share amounting to 10% of CG Power. On 4 November 2019, L&T Finance Ltd purchased 62,600,000

Pledged Reference Entity 1 Shares at Rs. 14.65 per share amounting to 9.9% of CG Power.

6. As events have unfolded, it appears that the debenture holder's actions were part of market manipulation and putting CG into play, using AHL as a scapegoat.

7. In this context, it is also relevant to note that in mid-2018, the debenture holders had the option of convening its debt into equity shareholding of CG Power, the share price of which at the relevant time was approximately Rs.64/- per share. CG Power's operational profitability was also increasing across India and other offshore subsidiaries. However, at that time, KKR suggested appointing one Tranzmute Business Advisory LLP (**Tranzmute**) as a consultant to CG Power since KKR was purportedly interested in increasing operational efficiencies and creating value for CG Power. Tranzmute was a limited liability 50 - 50 partnership between KKR Capital Markets India Pvt. Ltd. and one Mr. Narayan Seshadri. Presentations to this effect were made to AHL.

8. However, finally it was decided that Mr. Narayan Seshadri would be appointed to the Board of CG Power as an 'independent director' as required by KKR and he was appointed on 8 March 2019.

9. Thereafter, a series of events unfolded.

10. On the same day of Mr. Seshadri's appointment, an Operations Committee was set up by the Board of CG Power under the chairmanship of independent directors to "focus on operational movement, credible decisions on the international business, any capital restructuring requires, and other similar matters so as to enable the Company to leverage the strong growth". Mr. Seshadri was key member of the Operations Committee.

11. On 24 April 2019, an independent law firm, M/s Vaish Associates Advocates (**Vaish**) was appointed to "investigate" certain transactions which were allegedly unauthorised. On 21 June 2019 the engagement of Tranzmute was approved by the Risk and Audit Committee to assist in "capital restructuring exercise" and on 19 August 2019, based on the preliminary,

incomplete and heavily disclaimed report issued by Vaish, CG Power made a disclosure alleging fraudulent transactions and sought to recast and restate its financial statements for the past 5 years.

12. Pertinently, between March 2019 and December 2019, there was a major spurt in the volume of shares and CG Power's value fell over 50% from Rs. 36.60/- in March 2019 to Rs. 12.25/- in December 2019.

13. Meanwhile, the Vaish Report, being prepared by a privately appointed agency, has been held to be unreliable by the National Company Law Tribunal, Mumbai.

14. Each of the above facts reveal that not only did the debenture holders take advantage of the prevailing situation whereby the value of the securities were artificially depressed but also played a vital role in market manipulation at large scale to obtain control of CG Power with the intention to deceive AHL (as well as the public investors) and act in breach of the agreement arrived at with AHL.

15. In these circumstances, the Debenture Trust Deeds and Memoranda of Pledge stand vitiated and AHL has no liability under the Debenture Trust Deeds which stand rescinded.

16. This letter is issued without prejudice to AHL's rights in equity, law and contract including AHL's right to claim damages.

Yours faithfully,
Bharucha & Partners

(Sd/-)

Partner

Cc.:

1. **KKR India Financial Services Private Limited**
2nd Floor, Piramal Tower, Peninsula

Corporate Park, Ganpatrao Kadam Marg
Lower Parel (W), Mumbai 400 013, India
Facsimile number: + 91 22 4355 1301
Email: naozad.sirwalla@kk.com: jigar.shah@kk.com

Attention: Mr. Naozad Sirwalla / Mr. Jigar Shah

2. **KKR India Debt Opportunities Fund II**
KKR Capital Markets India Private Limited
(in its capacity as Sponsor to KKR India Debt Opportunities
Fund II)
2nd Floor, Piramal Tower, Peninsula
Corporate Park, Ganpatrao Kadam Marg
Lower Parel (W), Mumbai 400 013, India
Facsimile number: + 91 22 4355 1301
E-mail: naozad.sirwalla@kk.com: jigar.shah@kk.com

Attention: Mr. Naozad Sirwalla / Mr. Jigar Shah”

(Emphasis as in original)

39. Significantly, there is no whisper of any denial, in the aforesaid response, dated 8th July, 2020, from the petitioner to the Respondent, of the allegations that the petitioner had failed to maintain the Required Security Cover, and to liquidate all Outstanding Amounts by the final Redemption Date, i.e. 10th July, 2019. The fact of failure, on the part of the petitioner, to pay the Outstanding Amounts by the cut-off date of 10th July, 2019, stands, in fact, expressly acknowledged and admitted, by the petitioner, in its letter dated 30th June, 2020. The approach of the petitioner, in its response dated 8th July, 2020, was to maintain a studied silence thereon, and, instead, to allege “market manipulation” by KKR and its confederates. Even in the present petition, before this Court, the petitioner has remained completely silent, regarding the allegation of non-maintenance of the Required Security Cover, and of failing to repay all Outstanding Amounts, to

the Debenture Holders, on or before 10th July, 2019. *Prima facie*, therefore, “Events of Default” had taken place, within the meaning of Clause 1.1.41 of the Debenture Trust Deeds, read with Clause 3.4 and S. No. 2 and 14 of the “Events of Default”, enumerated in Schedule 3 to the Debenture Trust Deed.

40. No occasion, therefore, arises for this Court to interdict the invocation and sale, if any, of the pledged BILT shares. Any such direction, by this Court, would amount to a proscription, on the respondents exercising the rights, conferred and vested in them by the covenants of the Debenture Trust Deeds. This, on the face of it, is impermissible; in any case, no such relief can be granted, in a proceeding under Section 9 of the 1996 Act.

41. An attempt was made, by learned Counsel for the petitioner, to submit that the allegedly contemptible manner in which the respondents had acted, so as to seize hold of the CGP shares, artificially depress their price by fraudulent means, and purchase them, “for a pittance” from the open market, led to the petitioner to believe and apprehend that a similar stratagem would be adopted, so as to acquire the BILT shares for a song. Apart from the fact that the entire “conspiracy” – as the petitioner would allege – of artificially depressing the price of the pledged CGP shares, and purchasing them from the market at the artificially depress the price, essentially obfuscate the main issue in controversy between the parties, and have no real bearing thereon, the “apprehension”, voiced by the petitioner, regarding a similar treatment being accorded to the BILT shares, is

merely an apprehension, and nothing more. Even if there were any legitimate ground, for the petitioner to entertain such an apprehension, and the respondents were, *arguendo*, to resort to such “market manipulation”, to purchase the BILT shares after artificially depressing their value, that cannot justify grant of any interim directions, by this Court, against invocation, by the respondents, of the pledged to BILT shares, where the alleged defaults, on the part of the petitioner, have not been controverted or denied. The assertion, of the petitioner, in para 15 of the afore-extracted response, dated 8th July, 2020, to the Respondent, that, owing to the alleged machinations of the respondents, the “Debenture Trust Deeds and Memoranda of Pledge stand vitiated”, and that the petitioner “has no liability under the Debenture Trust Deeds which stands decided” has no legs, whatsoever, to stand on. Purchasing the pledged shares from the open market, after their price had fallen and, thereby, gaining control over CGP and BILT, are not contemplated, in the Debenture Trust Deeds, as circumstances which would result, *ipso facto*, in the rescinding thereof.

42. For that matter, the very contention, of the petitioner, that the price of the CGP shares had fallen owing to a misleading report, by Vaish & Co., too, is entirely presumptuous in nature, amounting to nothing more than speculation. There are myriad and manifold considerations, which operate to raise, or lower, the prices of stocks in the stock market. Fluctuation of the stock market, as is axiomatic in macroeconomic theory, is one of the most unpredictable of all unpredictable sciences. It would be legally facile to presume that,

merely because of the report by the law firm engaged by the respondents, the price of the CGP shares fell. In the absence of solid and unimpeachable evidence to bolster such an averment – which may well nigh be impossible to source – no judicial notice can be taken thereof.

43. In any event, that dispute is entirely foreign to the issue of default, by the petitioner, to honour its obligations under the Debenture Trust Deeds, and the resultant right, of the Respondent to invoke the pledged shares, and sell them in the stock market, for realisation of the outstanding amounts.

44. Prayer B in the petition, too, therefore, cannot be granted.

45. For the same reasons, Prayer C, in the petition, too, must fail. The petitioner prays, in the said prayer, that the Debenture Trustee, i.e. the Respondent, be restrained from taking any steps against the petitioner under the Debenture Trust Deeds, dated 5th January, 2017 and/or the Memoranda of Pledge dated 5th January, 2017 and 27th June, 2018. While the prayer, even as worded, cannot be granted, as it amounts to an absolute embargo, on the respondents exercising their rights under Debenture Trust Deeds, such a prayer cannot be urged by the petitioner, in the absence of any denial to the alleged defaults, on its part. Apparently, this prayer is premised on the theory that the Debenture Trust Deeds and Memoranda of Pledge no longer apply, and stand rescinded which, as already held by me above, has no merit.

46. Reliance was placed, by Mr. Jayant Mehta, arguing in rejoinder on behalf of the petitioner, on the judgement of the Supreme Court in *Mardia Chemicals Ltd v. U.O.I.*¹³, to contend that the respondents were required to act in good faith. My attention was invited, particularly, to para 71 of the report, which does hold that “the financial institutions, namely, the lenders owe a duty to act fairly and in good faith”. There can be no gainsaying this proposition. In my opinion, however, it is completely irrelevant to the issue at hand. The dispute, between the petitioner and the respondent, which could legitimately form the basis of an arbitral proceeding and, consequently, of the present proceedings under Section 9 of the 1996 Act, is the alleged infraction, by the petitioner, of the covenants of the Debenture Trust Deeds, and the right of the respondents, on that basis, to proceed against the shares, pledged by the petitioner by way of security. That dispute has nothing to do with good faith or bad faith. The “want of good faith”, on the part of the respondents – as alleged by the petitioner – is in the manner in which the respondents allegedly depressed, artificially, the price of the CGP shares, before purchasing them in the open market. Even if it were to be assumed that there was any want of “good faith”, on the part of the respondents in that regard, such a dispute would be entirely foreign to the arbitration agreement between the parties, and cannot, therefore, be agitated in proceedings under Section 9 of the 1996 Act. I do not deem it, therefore, necessary to dwell, any further, on the submission, of the petitioner, that the respondents did not act in “good faith”.

¹³ (2004) 4 SCC 311

Conclusion

47. The prayers of the petitioner, in the present petition cannot, therefore, be granted, in exercise of the power conferred on this Court by Section 9 of the 1996 Act.

48. In view thereof, I do not deem it necessary to advert to the decisions cited by the respondents.

49. The petition, therefore, fails and is dismissed.

50. Observations on this judgement are limited to deciding the prayers, in this petition, in the context of Section 9 of the 1996 Act.

51. There shall be no orders as to costs.

52. Pending applications, if any, stand disposed of accordingly.

AUGUST 14, 2020

HJ

Kr/r.bararia

C. HARI SHANKAR, J.