2023:DHC:4588

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

% *Date of Decision: 10th July, 2023*

\+ ARB. A. (COMM.) 19/2023 & I.A. 8304/2023

HANDICRAFT AND HANDLOOMS EXPORTS CO OF INDIA ..... Petitioner

Through: Mr. Varun Singh, Mr. Akshay Dev and Mr. Rishabh Rana, Advocates

versus

SMC COMTRADE LIMITED ..... Respondent

Through: Mr. Shreyas Jain, Advocate with Mr. Suman Kumar, Company Secretary

\+ ARB. A. (COMM.) 21/2023

SMC COMTRADE LTD. ..... Petitioner

Through: Mr. Shreyas Jain, Advocate with Mr. Suman Kumar, Company Secretary

versus

THE HANDICRAFTS AND HANDLOOMS EXPORTS CORPORATION OF INDIA LTD (HHEC) ..... Respondent

Through: Mr. Varun Singh, Mr. Akshay Dev and Mr. Rishabh Rana, Advocates

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. ARB. A. (COMM.) 19/2023 has been filed by the Handicraft and Handlooms Exports Corporation of India Ltd. ('HHEC'), challenging the order dated 02.03.2023, whereby the learned Arbitrator has allowed an application filed by SMC Comtrade Limited ('SMC') under Section 17

of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act') directing HHEC to preserve a sum of Rs.5 Crores in the form of an FDR in the name of SMC till the passing of the final award, within two weeks of the order. ARB. A. (COMM.) 21/2023 has been filed by SMC challenging the order dated 02.03.2023 limited to enhancement of the sum of Rs.5 Crores to Rs.10,51,99,624/-, the total amount under the claims. Since both the appeals arise out of a common order and the issues involved are inextricably linked, they are being decided by a common judgment.

2. The learned Arbitrator is in seisin of disputes between the parties with respect to First Agreement dated 13.09.2012 for import of gold/silver bars, coins etc. (Bullion) on behalf of HHEC, which is a Government company within the meaning of Section 617 of Companies Act, 1956 and was engaged in the field of export of handicraft and handloom products, jewellery etc. and was nominated by the Government of India as an agency to import gold/silver/platinum under the Foreign Trade Policy. As per the Agreement, subject to satisfaction of the conditions precedent, SMC was to place an indent on HHEC alongwith requisite security amount for import of Bullion on consignment stock basis and/or letter of credit, stand-by letter of credit, buyer's credit indicating purity of Bullion, quantity, delivery date, premium, provisional CIF price etc. On satisfaction of the indent, HHEC was to place an order on the foreign supplier and obtain a proforma invoice.

3. SMC was required to deposit with HHEC the applicable custom duty including taxes and levies, if any, clearing and handling charges etc. immediately on arrival of Bullion in India including Demurrage/

detention charges, if any. Delivery of the Bullion against purchases made by SMC, in accordance with the various clauses of the First Agreement, was to be made by HHEC to the authorized representative of SMC.

4. It is stated by SMC that upon obtaining the buyer's credit, the proceeds of sale consideration of the Bullion to SMC, were to be placed in term deposit with a bank for a period mutually agreed between SMC and HHEC and the interest accrued thereon was to be credited to SMC after tax deduction at source. It is SMC's case that the same arrangement applied *pari passu* to SMC's margin money with HHEC and the rates of pre-determined margin of profit which was to accrue to HHEC by virtue of the transactions were detailed in Clauses 9.1, 9.2 and 9.3 of the First Agreement dated 13.09.2012.

5. Pursuant to circulars issued by the Reserve Bank of India dated 22.07.2013 and 14.08.2013, subjecting gold imports to '20:80 Scheme' whereby 20% of every lot of gold imported into the country was to be exclusively made available for the purpose of export and only the balance 80% was available for domestic use, SMC and HHEC entered into a Second Agreement on 25.02.2014, whereby SMC deposited a sum of Rs.50 lacs with HHEC as security and this money was to be kept in FDR with a scheduled bank and the interest accrued thereon was to be credited to SMC.

6. SMC claims that vide email dated 07.05.2015, it asked HHEC to provide actual tally of the Books of Accounts and share the TDS certificate and on the same day, HHEC responded by stating that the Books of Account indicated a balance of Rs.2,45,18,578.48 credit. Chief Finance Manager addressed two letters confirming the balance as on 31.03.2014 and 31.03.2015 as Rs.6,69,54,985.65 and Rs.2,44,50,848.96,

respectively. By another letter dated 04.01.2018, it was conveyed to SMC that as per Books of Account, an amount of Rs.2,47,80,709.69 was payable to SMC, subject to final outcome of CBI investigation pertaining to an identical agreement with respect to another party. As per SMC, there was an admission by HHEC in several letters dated 16.03.2018, 13.07.2018, 01.03.2019 that money was outstanding and payable to SMC.

7. Since HHEC did not release the allegedly acknowledged amount of Rs.2.48 Crores alongwith interest @ 18% p.a. commencing from the date of approval i.e. 31.03.2014, SMC sent a legal notice to HHEC on 11.01.2020. Getting no response, SMC filed a civil suit for recovery, being CS(COMM) 276/2020 in July, 2020, which was dismissed as not maintainable vide order dated 29.07.2020, granting liberty to SMC to avail the remedy of arbitration. SMC, thereafter preferred a writ petition on 03.09.2020 being W.P.(C) 6152/2020 seeking a writ of mandamus directing HHEC to refund the admitted security deposit. SMC states that in the counter affidavit filed in the writ petition, HHEC admitted all documents of acknowledgement of payment.

8. On 27.01.2021, HHEC invoked the Arbitration Agreement and unilaterally appointed an Arbitrator, however, the learned Arbitrator recused herself by a letter dated 01.02.2021 and the proceedings did not progress. Thereafter, on 16.03.2021, the Union Cabinet issued a Notification granting approval for closure of HHEC and as per the information posted on HHEC's website, the employees have been given VRS and liabilities of contractor stand settled.

9. Once again on 24.05.2021, HHEC invoked Arbitration Agreement and unilaterally appointed another Arbitrator. On 08.06.2021, SMC

communicated its objection to the unilateral appointment, subsequent to which, no further action was taken by HHEC. Vide order dated 28.01.2022, the writ petition was dismissed by the Court on two-fold grounds i.e. concealment of the fact of filing CS(COMM) 276/2020 and existence of the arbitration clause between the parties. LPA 223/2022 filed against the said order was dismissed as not pressed on 29.03.2022 with reduction of costs imposed by the learned Single Judge in the writ petition. SLP 10950/2022 was also dismissed vide order dated 14.07.2022.

10. On 23.08.2022, SMC invoked the arbitration agreement, but there was no response from HHEC showing inclination for arbitration. SMC filed a petition in this Court under Section 11(6) of the 1996 Act being ARB. P. 1163/2022, which was allowed on 09.12.2022 in the presence of counsel for HHEC and the Court appointed the learned Arbitrator in view of the judgment of the Supreme Court in ***Perkins Eastman Architects DPC and Another v. HSCC (India) Limited, (2020) 20 SCC 760.***

11. The learned Arbitrator sent a declaration under Section 12 of the 1996 Act on 23.12.2022 and on the same day the email sent by the Arbitrator was acknowledged by the counsel who had appeared on behalf of HHEC in the petition under Section 11(6) of the 1996 Act. On 10.01.2023, SMC filed its Statement of Claim and served a copy on HHEC, both through email and physically. By email dated 11.01.2023, another counsel acting on behalf of HHEC communicated to the learned Arbitrator that HHEC had preferred Letters Patent Appeal against the appointment of the Sole Arbitrator on the same day.

12. On 12.01.2023, first hearing was conducted through Video Conferencing ('VC') and the link was shared with HHEC. None appeared on behalf of HHEC. The Arbitrator made an effort to contact the counsel who had appeared for HHEC in Court on 09.12.2022, but was informed that he was not representing HHEC in these proceedings and this was recorded by the learned Arbitrator in the order sheet. In the opinion of the learned Arbitrator, no credence could be given to the email dated 11.01.2023 originating from a third party and accordingly, notice was issued by all modes to HHEC at the addresses mentioned in the petition intimating the next date of hearing i.e. 07.02.2023 with scheduled time as 4:00 PM. It was also directed that if requested, the hearing shall be through VC and the link shall be shared with the opposite party by counsel for SMC.

13. On 06.02.2023, HHEC sent an e-mail through its counsel to the learned Arbitrator with copy to counsel for SMC, informing that HHEC was not consenting to the arbitration proceedings, as fraud had been committed by SMC and the order dated 09.12.2022 appointing the Arbitrator had been challenged by filing an LPA before this Court. It was also stated that the Advocate appearing in the High Court was not given approval for contesting the arbitration proceedings. On 07.02.2023, second hearing was conducted through VC and link was shared with HHEC for 4:00 PM. The order records that the learned Arbitrator waited till 4:20 PM but no one joined on behalf of HHEC. The Arbitrator noted that an e-mail forwarded by Senior Consultant of HHEC was received that morning which indicated that notice of hearing had been duly received. By this e-mail, the Arbitrator was informed of the filing of an LPA against the order of appointment of the sole Arbitrator and that

HHEC did not consent to the arbitration proceedings. The order further records that no one appeared on behalf of HHEC to inform about the status of the LPA and in the absence of orders of the Court in the said LPA proceedings, no occasion arose to stop the present proceedings solely on the basis of the communication from HHEC. Arbitrator also observed that since the appointment was made under Section 11(6) of the 1996 Act, no consent was required from HHEC. The next hearing was scheduled on 02.03.2023, through physical mode, for arguments on Section 17 application and SMC was directed to furnish a copy of the Statement of Claim alongwith application under Section 17 of the 1996 Act to HHEC. Three weeks' time was granted to HHEC to file the Statement of Defence and counter claim, if any, as well as reply to the application.

14. On 01.03.2023, an e-mail was sent by HHEC's counsel to the Arbitrator attaching a copy of the appeal, purportedly FAO(OS), indicating 03.03.2023 as a tentative date of listing. None appeared for HHEC during the hearing on 02.03.2023 and counsel for SMC opposed the request of adjournment *inter-alia* on the ground that the appeal was not maintainable under the provision of Section 37 of the 1996 Act, against an order passed under Section 11.

15. The Arbitrator proceeded to hear the application under Section 17 recording non-appearance on behalf of HHEC and/or non-filing of *vakalatnama*, despite knowledge of the hearing date and the observations in the order dated 07.02.2023. Learned Arbitrator was of the view that in the absence of a Court order staying the arbitral proceedings, there was no occasion to stop the proceeding merely on a communication from the counsel for HHEC. After hearing the counsel for SMC, the learned

Arbitrator directed preservation of part of the claimed amount and the operative part of the order reads as follows:

> *"13. However, considering that the question of interest being payable @ 18% p.a. would require adjudication, to balance the equities, this Tribunal is of the view that a direction may be issued to the Respondent to preserve a sum of Rs. 5 Crores in the form of a FDR in the name of the Claimant till passing of the final Award. The FDR be created within two weeks from the date of this order. The copy of the FDR be forwarded to the Tribunal for purposes of record."*

Contentions on behalf of HHEC:

16. Learned Arbitrator failed to appreciate that SMC was indulging in forum shopping and when it did not get favourable orders in the suit and the writ petition, recourse was taken to arbitration proceedings.

17. Arbitration proceedings continued on 12.01.2023 and 07.02.2023, despite requests to the learned Arbitrator via e-mails to defer the hearings as HHEC had filed an appeal in this Court, challenging the appointment of learned Arbitrator as matters involving fraud are not arbitrable. Even before the hearing on 02.03.2023, counsel for HHEC sent an email on 01.03.2023 to the learned Arbitrator requesting deferment of the hearing on Section 17 application as the appeal [FAO(OS)], was likely to be listed on 03.03.2023, but the learned Arbitrator went ahead with the hearing and granted interim relief to SMC directing HHEC to preserve a sum of Rs.5 Crores in the name of SMC, in complete violation of principles of natural justice.

18. In ***Godrej Properties Ltd. v. Goldbricks Infrastructure Pvt. Ltd., 2021 SCC OnLine Bom 3448***, the Bombay High Court has held that Arbitral Tribunal must give proper and fair opportunity to the parties at all stages of arbitral proceedings to present their case, which would

include an *ad-interim* order. It was held that it is unknown to law and peculiar for an Arbitral Tribunal to pass an *ex parte ad-interim* order, on mere filing of a Section 17 application, without hearing the contesting Respondent, which is a principle recognized by Section 24(2) of the 1996 Act. In the present case, learned Arbitrator did not grant adjournment, despite knowing that an appeal had been filed and was likely to be listed the next day. Principles underlying Order IX Rule 7 CPC would be squarely attracted in this case which provide that when the Court adjourns the hearing of the suit *ex parte* and the Defendant at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs, be heard in answer to the suit as if he had appeared on the date fixed for his appearance.

19. In any event, there was no urgency for passing the interim order under Section 17 of the 1996 Act when SMC had waited from 2019 till 2023 for taking recourse to the arbitration proceedings, assuming that any cause of action had arisen in its favour in 2019. In fact, before deciding the application for grant of interim relief, the learned Arbitrator ought to have examined whether or not the claims preferred by SMC were grossly time-barred, in view of its own admission that the last alleged acknowledgment by HHEC was in 2019 and also looking at the fact that the claims pertain to the year 2013-14. In ***State of Goa v. Praveen Enterprises, (2012) 12 SCC 581***, the Supreme Court held that the Court can examine if the claims are so hopelessly time barred that they cannot be resurrected and referred to arbitration before making a reference. Limitation was an important facet which the learned Arbitrator ought not to have overlooked.

20. The impugned direction of the learned Arbitrator to preserve a sum of Rs.5 Crores as FDR in the name of SMC is against the settled law of security deposit and amounts to attachment before judgement, which was wholly unnecessary in the present case. This Court in ***Manish Aggarwal and Another v. RCI Industries and Technologies Ltd., 2022 SCC OnLine Del 1285,*** relying on the judgment of the Supreme Court in ***Raman Tech. & Process Engg. Co. and Another v. Solanki Traders, (2008) 2 SCC 302*** has held that an order directing deposit of security is akin to an order under Order XXXVIII Rule 5 CPC and can be passed only when the Arbitral Tribunal is satisfied that if the amount is not secured the proceedings would stand frustrated. The Supreme Court in ***Evergreen Land Mark Private Limited v. John Tinson and Company Private Limited and Another, (2022) 7 SCC 757,*** set aside the order of this Court whereby 100% deposit of the claim amount was directed, holding that this was a drastic measure going by the principles laid down under Order XXXVIII Rule 5 CPC.

21. SMC has not placed on record any evidence to show that assets of HHEC are depleting and *per contra* the balance sheet of HHEC for the financial year 2020-21, which is in public domain, shows that it has retained assets worth almost 300 Crores and liabilities have gone down. The investigation by CBI is still pending and transactions for the period 2010-14 are being looked into and keeping this in mind as well as the fact that HHEC would not fetter away its assets, the impugned order ought not have been passed. HHEC is a secured organization as the entire funding is by the Ministry of Textiles, Government of India and in case SMC succeeds in the arbitration proceedings, HHEC has the financial capacity to honour the award, if finally upheld.

22. The learned Arbitrator has also erred by including interest factor, which was excluded under Clause 14 of the Second Agreement between the parties. It is trite that an Arbitral Tribunal has no jurisdiction to award interest if the parties have by an agreement excluded the same. Reliance was placed on the judgment of the Supreme Court in ***Garg Builders v. Bharat Heavy Electricals Limited, (2022) 11 SCC 697***.

Contentions on behalf of SMC:

23. This Court has a very limited jurisdiction under Section 37(2) of the 1996 Act to test the impugned order passed by the learned Arbitrator under Section 17 and unless the order suffers from patent illegality or perversity, interference is proscribed. Learned Arbitrator has passed a well-reasoned order in exercise of the discretion, based on the telling facts and circumstances of the case and taken a view which is not only plausible but justified, warranting no interference.

24. SMC had availed services from HHEC under the First and Second Agreement and paid an advance margin money in the FDR mode amounting to Rs.22.85 Crores for gold import etc. out of which a balance of Rs.2.48 Crores is pending since 2014. Several letters/communications from the office of HHEC contain acknowledgements of the amount outstanding to SMC. No justifiable reason is forthcoming to deny the money due to SMC, save and except, CBI investigation against some other firms and persons and it is for the first time in this appeal that HHEC has disputed its liability, which is a false stand and contrary to its record. No investigation/inquiry was ever initiated against SMC and this is supported by reply given by the concerned authority to the unstarred question in Rajya Sabha on 15.03.2018.

25. Closure of HHEC has been approved by the Cabinet on 16.03.2021 and this fact is in the public domain. Majority of its employees, if not all, have taken VRS and the offices are not functional. No balance sheet has been filed by HHEC with the Ministry of Corporate Affairs after 31.03.2021 and presently no information with respect to its status can be accessed on the website of the company. Available information on the financial health of HHEC did not inspire confidence in its ability to honour the final award and the Arbitrator was justified in directing preservation of atleast part amount and no prejudice is caused to HHEC, as the money has not transferred hands.

26. Objection to the claims on ground of limitation is misconceived. Even today the stand of HHEC in the rejoinder is that HHEC is not shying away from the claim of SMC but the amount has been withheld pending CBI inquiry, which shows that the matter is under consideration and alive and thus limitation has not even commenced. Be that as it may, this issue cannot be decided in this Appeal and will be decided by the learned Arbitrator, if and when raised by HHEC, at the appropriate stage. In any case, having chosen to stay away from the arbitral proceedings, HHEC has not even raised this objection and cannot fault the Arbitrator for not having decided the issue of claims being allegedly stale.

27. It is wrong for HHEC to contend that it was not given opportunity for presenting its case. Record shows that the lawyers engaged by HHEC were completely aware of all the dates of hearing and consciously and deliberately chose to keep away from the proceedings on the frivolous ground that HHEC had not consented to the Arbitrator appointed and had filed an appeal challenging the order. The purpose of seeking interim relief would be defeated if the matter is prolonged and adjourned at the

convenience of one party. In the order dated 07.02.2023, the Arbitrator had recorded that the application under Section 17 shall be heard on 02.03.2023 and had given time to file reply. Despite the receipt of the order, HHEC was unrepresented on the date of hearing and took a calculated risk. Sending an email attaching a copy of the appeal and informing the date of its tentative listing and not appearing, knowing that the application was to be finally heard indicates its casual attitude in handling the arbitration proceedings.

28. Principles of grant of interim relief under Section 17 of the 1996 Act, which is akin to Section 9 are settled and an Arbitral Tribunal has the discretion and power to secure whole or part of the amount claimed, if it is of the opinion that the non-claimant/Respondent may not be able to satisfy the award and the proceedings will be finally frustrated. In ***Big Charter Private Limited v. Ezen Aviation Pty. Ltd. and Others, 2020 SCC OnLine Del 1713,*** this Court has observed that a Court dealing with a petition under Section 9, is concerned with protecting the corpus of arbitral dispute and if the apprehension of dissipation of assets forming the corpus is found to exist or circumstances indicate that the award when delivered would be hindered, the Court can grant interim measures of protection.

ANALYSIS:

29. The first question that arises for consideration is the scope and ambit of jurisdiction of this Court under Section 37(2) of the 1996 Act. The first judgment that comes to fore in the context of limitation on the powers of an Appellate Court is the judgment of the Supreme Court in ***Wander Ltd. v. Antox India (P) Ltd., 1990 Supp SCC 727*** *albeit* the decision does not emanate from arbitration proceedings but the

principles shall apply. Relevant paras of the judgment are as follows:

> ***"13.*** *On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.*
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> ***14.*** *The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)*
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> > *"... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton [1942 AC 130] '...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."*
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> *The appellate judgment does not seem to defer to this principle."*

30. From a reading of the observations of the Supreme Court, it is clear that an Appellate Court shall not interfere in exercise of discretion

by the Court of first instance and substitute its views except where the discretion is exercised arbitrarily, capriciously or where the decision impugned is perverse and Court has ignored the settled principles of law governing grant or refusal of interim orders. It is not open to re-assess the material and if the view taken by the Court below is a reasonable or a plausible view and all relevant material has been considered, no interference is warranted solely on the ground that the Appellate Court may have taken a different view on the same set of facts and circumstances.

31. Reference may also be made in this regard to the judgment of a Co-ordinate Bench of this Court in ***Green Infra Wind Energy Limited v. Regen Powertech Private Limited, 2018 SCC OnLine Del 8273,*** relevant paras of which are as follows:

> *"**16.** In my view, the Arbitral Tribunal has balanced the equity between the parties and has considered the submissions made by the parties before the Arbitral Tribunal. This Court in exercise of its power under Section 37 of the Act cannot interfere with the order passed by the Arbitral Tribunal under Section 17 of the Act unless the discretion exercised by the Tribunal is found to be perverse or contrary to law. As an Appellate Court, the interference is not warranted merely because the Appellate Court in exercise of its discretion would have exercised the same otherwise.*
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> *xxxx xxxx xxxx*
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> ***20.** In view of the above, the Arbitral Tribunal having exercised its discretion and found a balance of equity between the parties, this Court in exercise of its power under Section 37(2)(b) of the Act would not interfere with the same unless it is shown that the discretion so exercised is perverse in any manner or contrary to the law. In the present case, no such exception has been made out by the appellant."*

32. In ***Ascot Hotels and Resorts Pvt. Ltd. and Another v. Connaught Plaza Restaurants Pvt. Ltd., 2018 SCC OnLine Del 7940***, this Court reiterated the above principles. In ***Bakshi Speedways v. Hindustan***

Petroleum Corporation, 2009 SCC OnLine Del 2476, Court observed that the principles applicable to an appeal under Section 37(2)(b) of the 1996 Act ought to be the same as principles in an appeal against an order passed under Order XXXIX Rules 1 and 2 CPC i.e. unless the discretion exercised by the Court against whose order the appeal is preferred is found to have been exercised perversely and contrary to law, the Appellate Court ought not to interfere merely because the Appellate Court would have exercised its discretion otherwise. This position of law was recognised by this Court in ***Shiningkart Ecommerce Pvt. Ltd. v. Jiayun Data Limited, 2019 SCC OnLine Del 11464*** and ***Sona Corporation India Pvt. Ltd. v. Ingram Micro India Pvt. Ltd. and Another, 2020 SCC OnLine Del 300.***

33. In ***Dinesh Gupta and Others v. Anand Gupta and Others, 2020 SCC OnLine Del 2099,*** Court highlighted and emphasized that while exercising any kind of jurisdiction over arbitral orders/awards or the process itself, Court is required to maintain an extremely circumspect approach. It must be always borne in mind that arbitration is intended to be an avenue for alternative dispute resolution and not a means to multiply or foster further disputes and therefore, when the Arbitrator resolved the disputes, the resolution is entitled to due respect, save and except, for reasons set out in the 1996 Act and ordinarily the orders must be immune from judicial interference. The Court also observed that challenge under Section 37(2) is necessarily to conform to the discipline enforced by Section 5 which restricts judicial intervention in arbitral proceedings and orders passed therein to avenues provided by Part-I of the 1996 Act. Relevant passages from the judgment are as under:

> *"**60.** In the opinion of this Court, another important, and peculiar, feature of the 1996 Act, which must necessarily inform the approach*

of the High Court, is that the 1996 Act provides for an appeal against interlocutory orders, whereas the final award is not amenable to any appeal, but only to objections under Section 34. If the submission of Mr. Nayar, as advanced, were to be accepted, it would imply that the jurisdiction of the Court, over the interlocutory decision of the arbitrator, would be much wider than the jurisdiction against the final award. Though, jurisprudentially, perhaps, such a position may not be objectionable, it does appear incongruous, and opposed to the well settled principle that the scope of interference with interim orders, is, ordinarily, much more restricted than the scope of interference with the final judgment.

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64. *There can be no gainsaying the proposition, therefore, that, while exercising any kind of jurisdiction, over arbitral orders, or arbitral awards, whether interim or final, or with the arbitral process itself, the Court is required to maintain an extremely circumspect approach. It is always required to be borne, in mind, that arbitration is intended to be an avenue for "alternative dispute resolution", and not a means to multiply, or foster, further disputes. Where, therefore, the arbitrator resolves the dispute, that resolution is entitled to due respect and, save and except for the reasons explicitly set out in the body of the 1996 Act, is, ordinarily, immune from judicial interference.*

xxxx xxxx xxxx

66. *In my opinion, this principle has to guide, strongly, the approach of this Court, while dealing with a challenge such as the present, which is directed against an order which, at an interlocutory stage, merely directing furnishing of security, by one of the parties to the dispute. The power, of the learned Sole Arbitrator, to direct furnishing of security, is not under question; indeed, in view of sub-clause (b) of Section 17(1)(ii) of the 1996 Act, it cannot. The arbitrator is, under the said sub-clause, entirely within his jurisdiction in securing the amount in dispute in the arbitration. Whether, in exercising such jurisdiction, the arbitrator has acted in accordance with law, or not, can, of course, always be questioned. While examining such a challenge, however, the Court has to be mindful of its limitations, in interfering with the decision of the arbitrator, especially a decision taken at the discretionary level, and at an interlocutory stage.*

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68. *It is, no doubt, possible to argue that the intent, of Section 5, is to restrict judicial intervention, with arbitral proceedings, and orders passed therein, to the avenues for such interference, as provided by Part I of the 1996 Act, and not to restrict the scope of the Sections and the provisions contained in Part I. Perhaps. Section*

5 remains, however, a clear pointer to the legislative intent, permeating the 1996 Act, that judicial interference, with arbitral proceedings, is to be kept at a minimum. Significantly, in Venture Global Engineering v. Satyam Computer Services Ltd., (2008) 4 SCC 190, it was opined that the scheme of the 1996 Act was "such that the general provisions of Part I, including Section 5, will apply to all Chapters or Parts of the Act". In State of Kerala v. Somdatt Builders Ltd., (2012) 3 Arb LR 151 (Ker) (DB), a Division Bench of the Kerala High Court held that the jurisdiction of the Court, under Section 37 of the 1996 Act, was also required to be interpreted in the light of the legislative policy contained in Section 5. I entirely agree.

69. *The principle of least intervention by courts was held, in Enercon (India) Ltd. v. Enercon Gmbh, to be well-recognised in arbitration jurisprudence, in almost all jurisdictions. In a similar vein, earlier in point of time, the Supreme Court held, in P. Anand Gajapathi Raju v. P.V.G. Raju, that Section 5 "brings out clearly the object of the new Act, namely, that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the Court's intervention should be minimal." Likewise, albeit in the context of Section 34, it was held, in McDermott International Inc. v. Burn Standard Co. Ltd., thus:*

> *"The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. the Court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the Court at minimum level and this can be justified as the parties to the agreement make a conscious decision to exclude the Court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."*

(Emphasis supplied)

34. In both ***Augmont Gold Private Limited v. One97 Communication Limited, 2021 SCC OnLine Del 4484*** and ***Sanjay Arora v. Rajan Chadha, 2021 SCC OnLine Del 4619***, this Court observed that only where the order of the Tribunal under Section 17 suffers from patent illegality or perversity that the Court under Section 37(2)(b) would interfere. In ***Sanjay Arora (supra),*** it was observed that unlike appeals

under other statute, appeals against orders of Arbitral Tribunal are subject to overarching limitation contained in Section 5 of the 1996 Act. Subsequently, in ***Manish Aggarwal (supra)***, the Court again held that viewed from the settled perspective of guarded and sparing use of powers under Section 37(2)(b), it is only in exceptional circumstances that this Court would interfere in the order passed by the Tribunal. Reference may also be made in this context to a recent judgment of this Court in ***Supreme Panvel Indapur Tollways Private Limited v. National Highways Authority of India, 2022 SCC OnLine Del 4491.***

35. From a conspectus of the aforesaid judgments, it is explicitly and luminously clear that while exercising power under Section 37(2)(b), the Court is required to maintain an extremely circumspect approach keeping in mind the object and purpose of the legislation and Section 5 of the 1996 Act which is a clear pointer to the legislative intent of keeping the Court's interference at the minimum.

36. Once the scope of interference by this Court in an order passed by the learned Arbitrator under Section 17 of the 1996 Act is understood, it is necessary to look at the scope of power of the Arbitral Tribunal under Section 17, which to my mind is an issue no longer *res integra.* Section 17 of the 1996 Act has been specifically enacted by the legislature to provide to a party, during the arbitral proceedings or after the award is made but before it is enforced, a right of seeking preservation of the subject matter of the arbitration agreement and/or securing the amount in dispute in arbitration. Post the amendment of Section 17 of the 1996 Act, it is in the same province as Section 9 of the Act, as held by the Supreme Court in a recent decision in ***Arcelor Mittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd., (2022) 1 SCC 712*** and bestows power on the

Arbitral Tribunal to make orders of interim protection on a wider canvass. In ***Shakti International Private Limited v. Excel Metal Processors Private Limited, 2017 SCC OnLine Bom 321,*** the Bombay High Court summed up the scope and powers under Section 17 as follows:

> *"**48.** Even after the enactment of the 1996 Act, as pointed out by Mr. Jagtiani, different Courts took different views and approaches on the scope of the arbitral tribunals' power to grant interim reliefs or 'interim measures of protection' under Section 17 of the 1996 Act. For instance, in the case of Intertoll ICS Cecons O & M Co. Pvt. Ltd. v. National Highways Authority of India (supra), the Delhi High Court at paragraphs 15-18 on pages 1026-1027 dealt with the scope of powers under Sections 9 and 17 of the Act. In brief, the Court expressed the view that the powers of an arbitral tribunal under Section 17 of the 1996 Act are much narrower than that of a Court under Section 9 of the Act, although there may be some overlap. The Court in Intertoll (supra), held that an arbitral tribunal can only protect the subject matter of the dispute, which must be tangible property, and therefore it cannot order the furnishing of a security for securing a money claim.*
>
> ***49.** As against this, this Court in Baker Hughes Singapore Pte. v. Shiv-Vani Oil and Gas Exploration Services Ltd. (supra) took a broader view (at paragraphs 40, 50-51) of the arbitral tribunals powers under Section 17 of the 1996 Act. This Court also distinguished the Judgment in the case of Intertoll (supra). This Court held, in Baker Hughes (supra), that an arbitral tribunal can, in a given case, make an appropriate order of security.*
>
> ***50.** A perusal of these decisions is helpful because it brings into focus the reason why Section 17 as amended, was enacted.*
>
> ***51.** Under the 1940 Act, the position was, as stated by the Hon'ble Supreme Court in MD, Army Welfare Housing Organization (supra), that an arbitral tribunal is not a Court of law and its orders are not judicial orders and its functions are not judicial functions.*
>
> ***52.** This position changed under the 1996 Act, but in relation to Section 17 of the 1996 Act, the same Judgment of Army Welfare (supra), says that the power is a limited one, and that the arbitral tribunal has no power to enforce its own order nor is it made judicially enforceable.*
>
> ***53.** Even though different Courts may have taken different views on the scope of the powers under Section 17 of the 1996 Act, it is very clear that the powers were narrower than Section 9 of the 1996*

Act. Ex facie, Section 17 of the 1996 Act did not provide for any power for the appointment of a Receiver. Also, as noted by the Hon'ble Supreme Court, there were difficulties in matters relating to the enforcement of order passed by an arbitral tribunal under Section 17 of the Act.

54. *Whereas Section 9 of the 1996 Act expressly provided for various interim orders that a Court could pass, Section 17 of the 1996 used the expression 'any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute'. Therefore, it was always necessary for a party applying for interim relief before an arbitral tribunal to show that a specific interim orders, covered by the express provisions of Section 9, was also covered by the limited language of Section 17 of the 1996 Act. These challenges and difficulties perhaps led to parties applying for interim measures to a Court under Section 9 of the 1996 Act, even after a tribunal had been constituted.*

55. *It is in this background that Section 17 of the Amended Act obviously came to be enacted. Section 17 of the Amended Act is now in para materia or very similar in content to the provisions of Section 9 of the Amended Act. The powers to make different types of interim orders of protection are now enumerated in Section 17 of the Amended Act, as they are under Section 9 of the Amended Act.*

56. *The powers, of an arbitral tribunal, to make orders is put on par with that of a court. The language appearing after Section 17(1)(ii)(e) of the Amended Act makes this clear. It states "and the arbitral tribunal shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceeding before it."*

57. *The issue of enforceability of such orders is now expressly addressed by Section 17(2) of the Amended Act, which provides that such orders of the arbitral tribunal, "... shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court."*

58. *In light of the enhanced powers and efficacy of recourse under Section 17 of the Amended Act, there have been corresponding changes to Section 9 of the Amended Act as well. Section 9(3) of the Amended Act states that, "once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.""*

37. In ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd., (2007) 7 SCC 125*** *albeit* in the context of Section 9, Supreme Court

held as follows:

> *"11. It is true that Section 9 of the Act speaks of the Court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the Court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, "and the Court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the Court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."*

38. The Kerala High Court in ***K.G. Rathish Kumar and Others v. M/s. NPR Finance Ltd., 2012 SCC OnLine Ker 29908*** and this Court in ***Dinesh Gupta (supra)*** have held that an interim measure of protection can be granted by Arbitral Tribunal which may include providing appropriate security. Insofar as provisions of Order XXXVIII Rule 5 CPC are concerned, from a reading of judgment of ***Dinesh Gupta (supra)***, it emerges that while exercising jurisdiction under Section 17(1)(ii)(b), the Arbitrator may not be strictly bound by the confines of the said provisions but cannot act in a manner completely opposed thereto. It is beyond debate and was rightly urged by HHEC that in ***Raman Tech. & Process Engg. Co. and Another (supra),*** the Supreme

Court has held that the power under Order XXXVIII Rule 5 CPC is a drastic and extraordinary power and should not be exercised mechanically or merely for the asking and should be used sparingly and strictly.

39. Having seen the scope of interference in the impugned order as well as the powers of the learned Arbitrator under Section 17 of the 1996 Act, this Court would now examine the impugned order and the rival contentions of the parties in light of the principles elucidated in the judgments referred above.

40. The first contention of HHEC was that no opportunity was given to present its case and the impugned order was passed in its absence. This contention in my view deserves to be rejected outrightly. It is a matter of record that the learned Arbitrator was appointed by this Court under Section 11(6) of the 1996 Act vide order dated 09.12.2022. The Arbitrator sent declaration under Section 12 on 23.12.2022 and on the same date the email was acknowledged by the counsel for HHEC, who had appeared before Court when the petition under Section 11(6) was disposed of. SMC filed its Statement of Claim on 10.01.2023 and a copy was served both by email and physically on HHEC. On 11.01.2023, counsel for HHEC through email communicated that an LPA had been preferred against the order appointing the Arbitrator on the same day. During the hearing on 12.01.2023, there was no appearance on behalf of HHEC. On contacting the counsel who had appeared in this Court when the Arbitrator was appointed, it was learnt that the counsel had withdrawn his *vakalatnama*. Since the e-mail had been received from third party, the learned Arbitrator did not take cognizance of the same and to ensure that HHEC was duly represented, directed

issuance of notice by all modes to HHEC at the addresses mentioned in the petition indicating the next date i.e. 07.02.2023 and the time of hearing.

41. On 06.02.2023, again one day before the next hearing on 07.02.2023, an email was sent by counsel for HHEC, reiterating the filing of an LPA. On 07.02.2023, the hearing was conducted through VC and link was shared with HHEC. The Arbitrator waited for over 20 minutes but none appeared to represent HHEC. The Arbitrator took on record the stand of HHEC in the e-mail that an LPA had been filed against the appointment of the Arbitrator and HHEC was not consenting to the arbitration proceedings. Thereafter, the hearing was adjourned to 02.03.2023 for arguments on the application under Section 17 through physical hearing. SMC was directed to furnish a copy of Statement of Claim along with application under Section 17 on HHEC, if not already furnished and three weeks were granted to HHEC to file Statement of Defence and counter claim, if any, and reply to Section 17 application.

42. Pertinently, before adjourning the hearing to 02.03.2023, learned Arbitrator recorded in the order that none appeared on behalf of HHEC even to inform about the status of the LPA filed. Since the appointment of the Arbitrator was by order of the Court, further consent of parties to proceed with arbitration was not required and that all objections statutorily available would have to be raised before the Arbitrator to be dealt with as per law. It was also noted that the e-mail sent on 06.02.2023 only revealed a disinclination to participate alleging fraud committed by SMC and filing of an LPA. The Arbitrator was of the opinion and in my view rightly so, that in the absence of orders of the Court in the appeal stated to have been filed, there was no occasion to

stop the arbitration proceedings solely on the basis of a communication of HHEC.

43. As a matter of record, even on the adjourned date i.e. 02.03.2023, HHEC was unrepresented and the order reflects that an email was sent on behalf of HHEC by its counsel on 01.03.2023, merely attaching a copy of appeal, stated to be FAO(OS) and not LPA and intimating 03.03.2023 as a tentative date of listing. Despite being aware that the application under Section 17 was listed for hearing on 02.03.2023, HHEC consciously kept away from the hearing and took a calculated risk of an order being passed in its absence. As held by the Supreme Court in ***Sohan Lal Gupta (Dead) through LRS. and Others v. Asha Devi Gupta (Smt.) and Others, (2003) 7 SCC 492,*** the Arbitrator has the right to regulate and manage its hearings. Reasonable opportunity means that each party must have notice that the hearing is to take place and should be given an opportunity to be present at the hearing. However, if after having proper notice, a party chooses not to appear, law does not mandate that the Arbitral Tribunal should put the proceedings in abeyance or adjourn them indefinitely, waiting for one party. Principles of natural justice cannot be put in a straitjacket formula and violation thereof depends upon facts and circumstances of each case. Party has no absolute right to insist on his convenience being consulted in every respect and the matter is within the discretion of the Arbitrator and Court will intervene only in the event of positive abuse.

44. Order sheets reflect that apart from sending emails communicating the filing of LPA/FAO(OS), no one cared to join the proceedings on behalf of HHEC *albeit* it is clear as day that none of the two remedies chosen by HHEC were legally correct. However, even assuming that

HHEC intended to challenge the order of appointment of the Arbitrator under Section 11(6), mere filing of the appeal(s) was not reason enough to abstain from the hearings, particularly, when the order dated 07.02.2023 clearly notified that the application under Section 17 was listed for hearing on 02.03.2023. It is not the case of HHEC even today that it had no notice of the hearings and/or that the application was heard without giving time to file reply.

45. Before this Court, HHEC urges that no prejudice would have been caused to SMC if the learned Arbitrator would have adjourned the hearing on 02.03.2023 as the appeal filed by HHEC was likely to be listed the next day, which in my view, is an over simplification of the situation in the facts of this case. First and foremost, HHEC took recourse to wrong remedies for challenging the appointment of the Arbitrator. Even today the outcome of the LPA is unknown and insofar as the FAO(OS) 30/2023 is concerned, it is stated that the same was dismissed on 03.03.2023 as not maintainable. It was admitted during the course of hearing that no further challenge was laid to the appointment of the learned Arbitrator. Secondly, in the absence of a stay order from the Court, the counsel ought to have been instructed to appear and apprise the Learned Arbitrator of the status and the appearance could have been without prejudice to the appeal filed. The Arbitrator made every effort to notify the dates of hearing and give sufficient opportunity to HHEC and cannot be faulted. The chain of events which are docketed, lead this Court to conclude that the impugned order does not warrant an interference on this score.

46. On merits also the impugned order is a well-reasoned order, passed after taking into account all relevant aspects that were required

for considering the application under Section 17. Learned Arbitrator has taken note of several documents authored by the officials of HHEC, indicating the amounts outstanding to SMC, commencing from the year 2014 and finally reduced to a sum of Rs.2,47,80,709.69 over the years, reflected in the document dated 01.03.2019. The impugned order indicates that most of the documents relied upon are in the nature of audited/unaudited balance sheets of HHEC and/or acknowledgments based on its Books of Accounts. Arbitrator has also considered that in the documents being Annexures P-16 and P-17 pertaining to the year 2018, HHEC has raised the plea that the amount could not be released to SMC on account of pending CBI investigations in respect of another company. Cognizance was taken of Annexure P-20, which is a response to an unstarred question before the Rajya Sabha reflecting that no case or inquiry was pending against SMC. On this basis, the learned Arbitrator has come to a *prima-facie* conclusion that the reason for withholding the payment had no legs to stand. Pertinently, the learned Arbitrator also took note of the fact that Cabinet had approved the closure of HHEC and a Press release was issued to this effect in the year 2021.

47. Taking a holistic view of the cumulative facts viz: approval of closure of HHEC, official documents acknowledging the residual amount from the initial security deposit due to SMC and the factum of there being no inquiry/CBI investigation/criminal case against SMC at any stage, the learned Arbitrator took a conscious decision in its discretion to preserve part of the subject matter of the arbitration agreement.

48. It needs to be noted that by the impugned order, the learned Arbitrator in its discretion has only directed HHEC to preserve a sum of

Rs.5 Crores in the form of FDR in the name of SMC and produce a copy of the FDR for record, observing that since the Government of India has taken a decision to close HHEC, it would be necessary to secure the amount in dispute so that a situation does not arise where in the eventuality of an award being made in favour of SMC, it is left only with a solace of having a technical victory with no means to enjoy the fruits. Even today, HHEC is unable to dispute the approval of the Cabinet for its closure or that its employees have taken VRS and/or it is not carrying any business transactions. The argument of HHEC before this Court is that the list of assets on the website shows that HHEC has assets worth Rs.300 crores and would be enough to satisfy the award, if passed in favour of SMC. Firstly, this is an argument HHEC ought to have raised before the Arbitrator, which it chose not to do by staying away from the proceedings. Secondly, while HHEC has highlighted the assets, its pending liabilities towards other parties are unknown to this Court. The factum of closure and VRS by its employees is *prima facie* a pointer of the financial health of HHEC and a preservation order by the learned Arbitrator in these circumstances, in my considered opinion, requires no interference. Learned Arbitrator is the best judge to assess the manner in which the claimant is to be secured, pending the proceedings, so that the award is not rendered a paper award.

49. SMC has rightly relied on the judgment of the Bombay High Court in ***Baker Hughes Singapore Pte v. Shiv-Vani Oil & Gas Exploration Services Ltd., 2014 SCC OnLine Bom 1663,*** where the moot question before the Court was whether the power of the Court under Section 9(ii)(b) to grant interim measures or protection by ordering a party to secure the amount in dispute in the arbitration, can be

exercised by the Arbitral Tribunal under Section 17. It requires to be noted that the judgment was on the unamended provision which is now Section 9(1)(ii)(b) of the Amended Act. The Bombay High Court held as follows:

> *"**40.** A perusal of section 17 of the Act makes it clear that the arbitral tribunal can order a party to take any interim measure or protection as such tribunal may consider necessary in respect of the subject mater of the dispute. The arbitral tribunal may require a party to provide appropriate security in connection with a measure order under sub-section (I) of section 17. Question then arises is whether a money claim made by a party before the arbitral tribunal can be considered as the 'subject matter of dispute'.*
>
> *xxxx xxxx xxxx*
>
> ***43.** On plain reading of section 17 of the Arbitration and Conciliation Act, 1996, in my view the money claim made by the petitioner in the arbitration proceedings would amount to the 'subject matter of the dispute'. The respondent had in the written statement opposed the said claim. The money claim was thus the subject matter of the dispute based on the invoices issued by the petitioner upon the respondent.*
>
> ***44.** Under section 6.1 of the contract, the respondent had agreed to pay the undisputed invoices to the petitioner within 60 days from the date of submission of such invoices. The case of the petitioner before the arbitral tribunal was that none of those invoices were disputed by the respondent in the correspondence exchanged between the parties till the petitioner invoked the arbitration agreement. The respondent had acknowledged the liability from time to time and had promised the petitioner to pay the amount due and payable under the Mud Services Contract to the petitioner from time to time. The respondent had pleaded difficulties in making payment on the ground that the payments of the respondent due from ONGC was held up. The respondent had submitted schedule of payment from time to time to the petitioner with an assurance to pay. The respondent had also made part payment pursuant to such correspondence exchanged between the parties. Only when the petitioner invoked arbitration agreement, the respondent for the first time raised a dispute and denied the said claim contrary to what was conveyed in the correspondence prior thereto.*
>
> *xxxx xxxx xxxx*
>
> ***46.** In my prima facie view on perusal of various letters addressed by the respondent prior to the petitioner invoking arbitration agreement, it is clear that the respondent was pleading financial difficulty on the ground that their payment due from ONGC*

was held up and did not dispute the liability and on the contrary submitted various schedule of payments from time to time with an assurance to pay.

xxxx xxxx xxxx

48. *Mr. Jagtiani, learned counsel appearing for the petitioner in my prima facie view is right in his submission that even if the said part of the counter claim in the sum of USD65756.57 is atmost considered as a genuine claim which is disputed by the petitioner and is adjusted against the claims of the petitioner being undisputed invoices, petitioner would be still entitled to recover a sum of USD 2430053.18 from the respondent.*

xxxx xxxx xxxx

50. *Interim reliefs are in aid of final reliefs. The arbitral tribunal while deciding such application for interim measures ought to have considered the material on record including affidavits for taking a prima facie view. In my view application under section 17 could not have been rejected on the ground that the rival claims could not be considered at all since evidence was yet to be led. For the purpose of considering interim measures, the arbitral tribunal has to consider whether the claimant has made out a prima facie case that he would succeed finally in the arbitration proceedings and whether had made out a case for grant of interim measures. In my view, the arbitral tribunal has failed to exercise that power and duty to even look into the matter for the purpose of taking a prima facie view which is mandatory while considering an application for interim measures.*

51. *Since the arbitral tribunal is also empowered to make an interim award and to grant money claim on the basis of admitted claim and/or acknowledged liability, in my view the arbitral tribunal has also power to grant interim measures so as to secure the claim which is subject matter of the dispute before the arbtiral tribunal if such case is made out by the applicant. The provisions under sections 9 and 17 of the Arbitration and Conciliation Act are meant for the purpose of protecting the subject matter of the dispute till the arbitration proceedings culminates into an award.*

52. *Division Bench of this court in case of Nimbus Communication Ltd. (supra) has adverted to the judgment of division bench of this court in case of National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd., (2004) 2 Bom CR 1. The division bench of this court in case of National Shipping company (supra) has held that though the power under section 9(ii)(b) is wide, it has to be governed by the paramount consideration that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award. Court has to also consider whether a denial of such order would result in a grave*

> *injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought is also regarded as a material consideration.*
>
> *xxxx xxxx xxxx*
>
> ***65.*** *In my view interest of justice would be met with if the respondent is directed to furnish a bank guarantee of a nationalized bank in favour of the Prothonotary and Senior Master of this Court in the sum of USD20,00,000 initially for a period of two years and shall be kept alive till the arbitral award is rendered and for a period of three months from the date of the award."*

50. In the limited scope and confines of jurisdiction that the Court has over the interim order passed by the learned Arbitrator, this Court does not find that the same warrants interference. Be it ingeminated that whether it is Section 9 or 17 of the 1996 Act, the ultimate consideration, applying the law laid down in ***Ajay Singh v. Kal Airways Private Limited and Others, 2017 SCC OnLine Del 8934,*** is doing complete and substantial justice between the parties. The impugned order has not resulted in grant of an order in the nature of mandatory injunction to pay any amount to SMC and nor has the learned Arbitrator directed a deposit. HHEC has only been directed to preserve the amount in the form of an FDR in the name of SMC for securing the amount being part of the subject matter of the arbitration proceedings. The learned Arbitrator has exercised a power statutorily conferred under Section 17(1)(ii)(b) and the order passed is a well-reasoned order balancing the equities between the parties. The impugned order is far from being perverse or in excess of jurisdiction and cannot be termed as a product of arbitrary exercise of discretion applying the parameters circumscribing the limited window of interference under Section 37(2) of the 1996 Act.

51. Insofar as the issue of the claims being barred by limitation is concerned, rival parties have their own stand to take and it is not for this

Court in the present appeal to adjudicate on this issue. It is also not understood how in the absence of this plea being raised before the Arbitrator, HHEC can fault the Arbitrator in not deciding that the claims of SMC are allegedly time barred. Similarly, whether or not SMC is entitled to include interest as a part of the claim on the alleged outstanding amount is a matter of merits and outside the scope of consideration in the present appeal.

52. Insofar as ARB. A. (COMM.) 21/2023 is concerned, this Court sees no reason to enhance the amount directed to be preserved by the learned Arbitrator. The total claim of SMC is approximately Rs.10 Crores and the learned Arbitrator has directed preservation of 50% of the said amount. The discretion is exercised on laid down parameters and no infirmity can be found with the same.

53. The judgments relied upon by learned counsel for HHEC, in my view, are inapplicable to the facts of the present case. In ***State of Goa (supra),*** the Supreme Court has observed that the issue of limitation is not an issue to be decided in an application under Section 11 of the 1996 Act, but in appropriate cases, the Court may consider whether the application was in regard to a claim which on the face of it was so hopelessly barred by time that it is already a dead/stale claim not deserving to be resurrected and referred to arbitration. The judgment clearly has no relevance to the controversy before this Court in the present appeals, particularly, when this plea is not even taken before the learned Arbitrator. Insofar as the judgments in ***Raman Tech. & Process Engg. Co. and Another (supra) and Manish Aggarwal (supra)*** are concerned, the propositions of law laid down cannot be disputed. However, in the present case this Court does not find any reason to

interfere when the learned Arbitrator has come to a finding after assessing the facts and circumstances of the case that a preservation order is required, which was solely in the discretion and domain of the Arbitrator. ***Garg Builders (supra)*** was cited in the context of interest factor claimed by SMC. This is an issue which will be decided by the learned Arbitrator as and when the merits are adjudicated and is irrelevant at this stage.

54. The judgment of the Supreme Court in ***Evergreen Land Mark Private Limited (supra)*** also does not help HHEC as the fact situation in the case was completely different. The primordial issue in the said case was a dispute relating to rentals for the period March, 2020 to December, 2021, for which, the Arbitral Tribunal had directed the Appellant therein to deposit the amount as an interim measure under Section 17 of the 1996 Act. The liability to pay was seriously disputed by the Appellant by invoking *force majeure* principle contained in clause 29 of the Lease Agreement, premised on complete closure due to lockdown on account of pandemic COVID-19. The Supreme Court even in such circumstances only modified the order of the Arbitral Tribunal to the extent of the period covered by complete closure due to lockdown and for the remaining period, the direction to deposit was sustained.

55. Great emphasis was placed by learned counsel for HHEC on the judgment of the Bombay High Court in ***Godrej Properties Ltd. (supra)*** where the Court has observed that it is unknown to law for an Arbitral Tribunal to pass an *ex parte ad interim* order on a mere filing of Section 17 application without hearing the contesting Respondent, who would be affected by the said order. However, a minute scrutiny of the facts of the said case would show that after the Sole Arbitrator was

appointed by the Court and the learned Arbitrator entered upon reference, applications under Section 17 were filed by both parties. On 08.09.2021 and thereafter on 12.09.2021, these applications were reserved for orders. Subsequent to 12.09.2021, there was an exchange of email between the parties in regard to sale of unsold flats in the concerned towers. In this backdrop, on 07.10.2021 at 6:00 PM, Appellant before the Bombay High Court received a second application appended with an email seeking relief under Section 17 on an apprehension that the Appellant was trying to arbitrarily sell the balance inventories of Tower-'F'. A request was made by the Respondent to the Arbitral Tribunal for fixing an early hearing on the said application. Immediately on the next day i.e. 08.10.2021, the Arbitral Tribunal took up the application *suo moto*, without hearing the Respondent/Applicant and much less the Appellant and passed an *ex parte* order. It is in these extreme circumstances that the Court was constrained to hold that an opportunity ought to have been granted to the contesting party. Reliance on the judgment is therefore wholly misconceived.

56. For all the aforesaid reasons, this Court finds no merit in the appeals and the same are accordingly dismissed alongwith the pending application.

57. It is clarified that the observations in the judgment are only *prima facie* in nature and do not represent any final expression on the merits of the issues of which the learned Arbitrator is in seisin. The learned Arbitrator shall proceed uninfluenced by any observations in this judgment which are for the purpose of deciding the present appeals.

JYOTI SINGH, J

JULY 10, 2023/ck