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

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Date of decision: 04.03.2020

+ **ARB. A. (COMM.) 7/2020 & I.A. 2070-71/2020**

GTL INFRASTRUCTURE LIMITED Appellant

Through: Mr. D.N. Ray, Advocate with
Ms. Sumita Ray, Mr. Lokesh K. Choudhary,
Mr. Dillip K. Nayak and Ms. Disha Ray,
Advocates.

versus

GTL LIMITED Respondent

Through: Mr. Rajiv Nayar, Sr. Advocate
and Mr. Darpan Wadha, Sr. Advocate with
Mr. Amit Mahajan, Mr. Saket Sikri, Mr.
Ajay Pal Singh and Mr. Abhinav Garg,
Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

I.A. 2071/2020 (Exemption)

Exemption allowed, subject to all just exceptions.

Application stands disposed of.

ARB. A. (COMM.) 7/2020

1. This is an appeal filed under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as

‘Act’) for setting aside the order dated 17.12.2019 passed by the Arbitral Tribunal.

2. Respondent herein is the claimant before the Arbitral Tribunal and is being referred to as respondent for this appeal. During the Arbitral proceedings, respondent filed an application dated 24.09.2019 under Section 17 of the Act, seeking the following reliefs:-

(a) Pass an order directing the Respondent to pay to the Applicant/Claimant an admitted sum of Rs.650,00,00,000/- (Rupees Six Hundred Fifty Crores Only) Rs.40, 00,00,000/- (Rupees Forty Crores only) totalling to Rs.690,00,00,000/- (Rupees Six Hundred Ninety Crores only) along with interest @ 21% p.a. or at such rate as the Hon 'ble Tribunal may deem fit and proper from the due date till-the date of realization.

*(b) In an alternative to prayer clause (a) Pass an order directing the Respondent to furnish security in the sum of Rs. 650, 00, 00, 000/- (Rupees Six Hundred Fifty Crores Only) Rs. 40, 00, 00, 000/- (Rupees Forty Crores only) totalling to **Rs. 690,00,00,000/- (Rupees Six Hundred Ninety Crores only)** along with interest@ 21% p.a. or at such rate as the Hon 'ble Tribunal may deem fit and proper from the due date till the date of realization, in the form of deposit of the same before this Hon 'ble Tribunal to secure the claim in the Claimant in the arbitration proceedings;*

(c) Pending the hearing and final disposal of the Claim by this Hon 'ble Tribunal, the Respondent be

directed to pay to the Claimant a sum of Rs.40,00,00,000/-(Rupees Forty Crores only) in order to enable the Claimant to keep the network of the Respondent keep going or such other amount as this Hon 'ble Tribunal may deem fit and proper;

(d) Pass an order directing that pending the furnishing/ deposit of security in terms of prayer (a), Respondent is restrained from proceeding further with the sale of any of its assets including its real estate assets and tower assets as proposed;

(e) Pass an order directing the Respondent from transferring, encumbering, alienating or in any manner dealing with the shares of Respondent;

(f) Pending furnishing of security in the form of (a) above, pass an order of injunction restraining the Respondent, whether directly or indirectly, from selling, disposing or creating any third party interest in all or any of its movable or immovable assets including cash reserves in bank accounts and the active infrastructure equipment installed at the sites of the claimant;

(g) Issue an ad-interim and interim order and/ or direction in terms of prayer (a) to (f) above;

(h) Grant costs of this petition; and

(i) Pass such other/further order(s) as this Hon 'ble Court deem fit and proper in the facts and circumstances of the case."

3. The appellant herein (being referred to as appellant hereinafter) who is the respondent before the Arbitral Tribunal filed its reply on 04.10.2019 to which a rejoinder was filed by the respondent.

4. In the meantime, the appellant filed an application dated 10.10.2019 under Section 17 of the Act seeking the following reliefs:-

"a) that pending the hearing and final disposal of the arbitration proceedings, Claimant be ordered and directed to continue its services at the sites of the Applicant in uninterrupted manner

b) that pending the hearing and final disposal of the arbitration proceeding the Claimant/ their Vendors/ their Agent be restrained from taking any coercive steps by switching sites and/ or causing any damage at the sites of the Applicant;

c) for interim and ad-interim reliefs in terms of prayer (a) and (b) hereinabove;

d) for the costs of the Application;

e) for such further and other reliefs as this Hon 'ble Tribunal deems fit and proper in the circumstances of the case."

5. On 22.10.2019, the parties addressed arguments in support of their respective applications, and the Tribunal reserved the

applications for orders. Two days later, i.e. on 24.10.2019 an email was addressed by counsel for the appellant titled “*Clarificatory Submissions in respect of Applications u/s 17*” in which it was prayed as follows.

"1. The fundamental premise of the Claimant's application under section 17 was to secure the eventual award, if any, and to ensure that the same does not turn into a paper decree. For that purpose, a deposit in an escrow (even of the Claimant's choice) will suffice. There is no necessity at this stage to pass any order directing the Respondent to hand over the moneys to the Claimant. If such a direction to pay the Claimant is passed, the following irreversible consequences for the Respondent will arise:

(A) The Respondent's net worth will erode to a point where it will be definitely pushed into insolvency. Whereas, if the moneys are parked in an escrow, till the pendency of the present proceedings, the Respondent will still be able to (at least on paper) lay a potential claim to the funds. This might be all the edge the Respondent requires in its balance sheet, to stay afloat which also will be crucial to the claimant's interests. Therefore also, the balance of convenience lies with a direction for escrow.

(B) In a situation where outright payment is ordered to be made to the Claimant, there will be every possibility that other creditors of the Respondent will immediately file similar proceedings and pray for similar reliefs, thereby eroding the substratum of the Respondent, which, to say the least, will jeopardize even the Claimant's ability to recover any

amount from the Respondent. Further, the Respondent's accounts are in CDR (corporate debt restructuring) with banks who may advise the Respondent or independently challenge the payment direction in appeal. Either, way, the balance of convenience lies in a direction to deposit in escrow.

2. As far as the Respondent's application under s 17 is concerned, the strict compliance of clauses 4.1 and 4. 5 may be directed. The payment of the refundable deposit of Rs. 40 crores to the Claimant may be directed but made subject to the outcome of the present proceedings.

3. The suggested time table was only in anticipation of an adverse order in the claimant's application under s 17. It's not as if the Respondent voluntarily proposes to make the deposit in escrow but considering the cash flow, it was indicated that should an adverse order be passed, at least, the staggered time table to make the payments (in escrow) may be directed. In other words, the suggested payment schedule is not in the manner of a concession but as an alternate submission in case of an adverse order. It is most respectfully submitted that any of the concessions recorded (except that as a working measure, the Respondent is willing to pay Rs. 40 crores to the Claimant towards obligations under clause 4.5) will have heavy and irreversible consequences on the Respondent who will face similar claims from other creditors (potential claimants)."

6. Notice was issued by the Tribunal on the aforesaid email on 25.10.2019 with a direction to the respondent to respond to the

contents of the e-mail within one week. Respondent sent an email dated 04.11.2019 and responded as follows:-

"1. During the course of the hearing of the applications under section 17, the entire case in support of the application for interim award has been argued out. The Claimant/Applicant reiterates its stand that the amount of Rs. 400 crores have been admitted by the Opposite Party since years, including before the Learned Conciliator.

2. Claimant has filed the Application for securing the amount payable by the Respondents and its ultimate release in its favour. Keeping in mind the averments made by Respondent and for whatever reasons if this Hon'ble Tribunal deems inappropriate to pass interim award for direct payments, Claimant humbly prays to direct the Respondent to deposit Rs.400 crore in an escrow account (in line of its prayer B in the Application), to be maintained by the Claimant/Applicant or any other escrow agent as mutually agreed between the Parties. The said amount to be deposited in schedule directed by Hon 'ble Tribunal in the last hearing.

3. Further, in the aforementioned circumstances, consequential reliefs may also be granted that should there be even a single default towards escrow payments by the Opposite Party, in terms of the payment schedule, the entire amount of Rs. 400 crores shall become due and payable to the Claimant/Applicant forthwith and the sums deposited in the escrow shall stand appropriated to the Claimant's account without any further order of the of the Hon'ble Tribunal.

Suitable directions may also be passed by the Hon'ble Tribunal that the Claimant/Applicant will be entitled to prefer a suitable application for withdrawal/appropriation of the sums deposited in escrow, or any part thereof."

7. On the joint request of the parties, the Tribunal held a hearing on 26.11.2019. During the arguments, learned senior counsel for the respondent made a submission to the Tribunal that although it had moved an application under Section 17 of the Act, the same be treated as an application under Section 31(6) of the Act and an interim award/partial decree be passed against the appellant qua the alleged undisputed sum of Rs.400 Crores. It was argued by the respondent that the appellant had throughout admitted its liability of Rs. 650 crores towards the appellant. It was pointed out that the various clauses of the Suspension Agreement were only incorporated as an interim arrangement arrived at by the parties to enable the appellant to restructure its debt and perform its obligations under the EMA and other Agreements executed between the parties.

8. On the other hand, counsel for the appellant had controverted the stand of the respondent by contending that the respondent had already recovered a sum of Rs. 200-250 crores in terms of EMA and O&M Agreements dated 31.03.2015 and was thus not entitled to Rs. 650 crores as claimed. It was further argued that had the respondent continued with the arrangements agreed upon, the appellant would have been able to square off the entire payments due to the respondent.

9. The Tribunal after hearing the parties and on the basis of an offer made by appellant to pay in tranches, ordered as under:-

(i) The Respondent will pay a sum of Rs. 40 crores to the Claimant before or by 27th December, 2019 towards Security Deposit as contemplated under Clause 4.5 of the Suspension Agreement dated 8th March, 2018 (hereinafter referred to as the "Suspension Agreement").

(ii) The Respondent shall pay Rs.400 crores in accordance with the below mentioned schedule:

<i>80 Crores to be paid directly to the Claimant</i>	<i>Before or by 27th December, 2019</i>
<i>80 Crores to be deposited in an Escrow Account to be maintained by the Respondent</i>	<i>Before or by 27th January, 2020</i>
<i>80 Crores to be paid directly to the Claimant</i>	<i>Before or by 27th February, 2020</i>
<i>80 Crores to be deposited in an Escrow Account to be maintained by the Respondent</i>	<i>Before or by 27th March, 2020</i>
<i>40 Crores to be paid to the Claimant directly</i>	<i>Before or by 27th April, 2020</i>
<i>40 Crores to be deposited in an Escrow Account to be maintained by the Respondent</i>	<i>Before or by 27th April, 2020</i>

(iii) The Claimant shall provide uninterrupted services to the Respondent subject to the terms of payments contained in the two foregoing sub-clauses.”

10. The Tribunal further held that in the eventuality of any default in adhering to the Schedule aforesaid, the appellant shall become immediately liable for payment of the entire sum of Rs.400 Crores less the unpaid/remaining sum to the claimant.

11. It is this order which is assailed by the appellant in the present appeal.

12. The brief background of the present matter is that Chennai Network Infrastructure Limited (CNIL) which was an Infrastructure Provider and the Aircel Group of Companies (which at the relevant time was providing Telecommunication services) had entered into an Existing Site Agreement dated 14.01.2010 (hereinafter referred to as the ‘ESA’) under which the Aircel Group of Companies agreed to transfer to CNIL the ownership/tenancies of sundry sites/land along with existing Passive Facilities, if already in existence, retaining its right to use the same at each of the sites. As per Clause 6.4 of the ESA, CNIL was responsible for making payments of electricity/diesel consumed at the site.

13. On 14.01.2010, a Tripartite Agreement was entered into between CNIL, the respondent herein and the Aircel Group of Companies. As per Clause 3.1 of this Agreement, called the Energy Management Agreement (EMA), CNIL was required to oversee the

management of the electricity and diesel consumption at site and their payment. Under Clause 3.2 of the EMA, CNIL had the liberty to outsource the responsibilities to GTL i.e. the respondent.

14. CNIL and Aircel Group of Companies entered into a New Site Agreement dated 14.01.2010 (hereinafter referred to as the 'NSA') which had a Clause relating to Right of First Refusal. CNIL then requested the respondent to be its implementation partner and the two parties entered into a TSPI Agreement dated 28.01.2010. Under the said Agreement CNIL outsourced its obligations under the Agreements entered with Aircel Group of Companies, wherein it was required to procure necessary materials for installation and thereafter provide Passive Telecom Infrastructure. Respondent agreed to procure the necessary material and carry out the required electric and civil work etc.

15. CNIL issued a Purchase Order on 05.02.2010 to the respondent for a sum of Rs. 4,350/- crores which was accepted by the respondent vide its letter dated 08.02.2010. Simultaneously CNIL, consequent on receiving assurances from the Aircel Group to compensate for losses incurred by the respondent in the event Aircel failed to perform its obligations extended an indemnity for such losses and Addendum dated 09.02.2010 was executed.

16. The respondent thereafter proceeded to procure the requisite material and based on the assurances given by CNIL, placed bulk orders for procurement. However, due to failure of CNIL to provide

the details of the sites, where the material was to be delivered, respondent faced huge financial hardship. The stand of CNIL was that it was Aircel which had stopped the site orders and hence CNIL was not able to provide them to the respondent. In response, the respondent wrote to the CNIL that based on its assurances it had made huge advance payments to the vendors and had borrowed money from the Banks.

17. Admittedly the respondent, CNIL and Aircel Group had entered into a Settlement Agreement on 24.05.2014, whereby a sum of Rs. 1,800/- crores was settled leaving an outstanding of Rs. 650/- crores. This amount along with certain other claims is what is claimed by the respondent herein in the Arbitration Proceedings.

18. The parties then approached a Conciliator and a Settlement was arrived at between them, pursuant to which an EMA was executed on 31.03.2015 and an O&M was executed on the same day.

19. From a reading of the impugned order it emerges that vide order dated 22.12.2017 passed by the NCLT (Mumbai Bench) liabilities of CNIL were transferred to the appellant and hence the Arbitration Proceedings were initiated against the present petitioner.

20. After hearing the parties, the Tribunal observed that at this stage of the proceedings a sum of Rs. 400/- crores was a liability not specifically denied by the appellant. As far as the balance of Rs. 250/- crores is concerned, the Tribunal recorded the stand of the respondent that the same would require adjudication. The Tribunal

thereafter, came to a finding that there being no categorical denial of the appellant of its liability to pay a sum of Rs. 400/- crores, it must be deduced that there was a tacit admission by the appellant. The Tribunal then relied upon the judgment of the Supreme Court in the case of *Uttam Singh Duggal Co. Ltd. vs. United Bank of India Ltd. (2000) 7 SCC 120* for the proposition that the object of Order 12 Rule 6 CPC is that where a claim is admitted, the Court has the jurisdiction to pass a decree on the admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of relief which it is entitled to according to the admission of the defendant. The Tribunal also relied on the judgment of a Division Bench of this Court in *Numero Uno International Ltd. vs. Prasari Bharti 2008 (101) DRJ 479 (DB)*, where it has been held that making of an Interim Award ensures to the party, immediate payment of an admitted amount. There is no reason why payment of an admitted due should await the determination of other disputes which may take years to be finally resolved.

21. Relying on the said judgments, the Tribunal was of the view that for the present, a sum of Rs. 400/- crores was an admitted liability of the appellant and, therefore, as per law the same should be released to the respondent. It is pertinent to mention that the Tribunal also took into account the statement given by learned counsel for the appellant on 22.10.2019, on instructions from its Authorized Representative, who were present before the Tribunal, that by way of

an interim arrangement, the appellant would make payment of Rs. 400 crores in five tranches of Rs. 80 crores each, along with a Security Deposit of Rs. 40 crores in terms of Clause 4.5 of the Suspension Agreement. The appellant thereafter pressed for depositing the aforesaid amount in an Escrow but the respondent during the hearing on 22.11.2019 opposed the proposed arrangement and pressed for passing of an interim Award.

22. Based on the law of admitted liability and the admission of the appellant, the Tribunal passed an order, operative part of which is extracted in para 9 of this judgment.

23. Mr. Ray, learned counsel for the appellant assailing the impugned order submits that the impugned interim award is virtually a final award as nothing remains to be adjudicated by the Tribunal. It is further argued that the order is beyond the scope of Section 17 of the Act as the appellant has been directed to pay the amounts directly to the respondent, though the proceedings are still pending adjudication.

24. Learned counsel for the appellant further submits that it is wrongly recorded by the Tribunal that there was a tacit admission of the liability by the appellant to pay Rs. 400/- crores to the respondent.

25. Learned counsel further argues that the respondent had provided advances close to Rs. 2,450/- crores to its various vendors in anticipation of the roll out obligations which the appellant was to

undertake on the back of Aircel entities ROFR and contracted commitments. Thus, settlement agreements were executed and Rs. 1800/- crores have been settled. For the balance claim of Rs. 650/- crores, the respondent had agreed to suspend the claim during the conciliation proceedings. Due to continued pending outstanding dues from its various customers and uncertainty of future business including but not limited to Aircel Group and R-Com shutting down the wireless business, appellant was badly affected in its overall tenancies and hence was not in a position to fulfil its obligations under EMA and O&M dated 31.03.2015. In this background the appellant had requested the Tribunal to permit the appellant to run through its course of business so that the outstanding could be cleared. However, the Tribunal did not permit the appellant to adopt this course of action and directed the money to be paid to the respondent.

26. Mr. Nayar and Mr. Wadhwa, learned senior counsels for the respondent, however, submit that there is no error in the impugned order. The appellant has admitted its liability to pay Rs. 650/- crores and had also requested for the money to be paid in instalments, instead of in one go. Having requested for this course of action it is not even open to the appellant to challenge the impugned order.

27. I have heard the learned counsel for the appellant and learned senior counsels for the respondent.

28. A perusal of the impugned order indicates that at the initial stage applications under Section 17 of the Act were filed by the respective parties and the same were heard and Order was reserved on 22.10.2019. Two days later an e-mail was addressed by the appellant making certain clarificatory submission in respect of the application under Section 17 filed by the respondent. The respondent responded to the said e-mail wherein it reiterated its stand that liability of Rs. 400 crores was admitted by the appellant for the past several years, including before the Conciliator. On joint request of the parties, the Tribunal heard further arguments on 26.11.2019. Argument of the respondent was that the appellant had admitted its liability of Rs.650/- crores and should, therefore, suffer an interim award or a partial decree at this stage itself, while the argument of the appellant was that they should be permitted to continue with the business so that they could discharge the outstanding liabilities.

29. The order records that the Tribunal had put a pointed query to the appellant as to whether it disputed that a sum of Rs. 400 crores was due and payable to the respondent and the counsel for the appellant was unable to point out anything on record or the pleadings which would indicate any dispute with respect to the said liability. The only contention raised was that if the parties run through their entire course of business till the year 2030, the entire liability of Rs. 650 crores would be cleared. Relevant para of the order reads as under:-

“27. Further, to a pointed query from the Tribunal as to whether apart from the aforesaid sum of Rs.250 crores, the Respondent has disputed the balance sum of Rs.400 crores as averred by the Claimant in its pleadings, Mr. Ray was unable to point out anything on record/pleadings which could indicate that any dispute in respect of Rs.400 crores has been raised. He however submits that if the lumpsum combined operations between the parties run their entire course till the year 2030, the entire liability of Rs. 650 crores would stand liquidated.”

30. As mentioned above the Tribunal then relied on the judgments in the case of ***Uttam Singh (supra)*** and ***Numero Uno (supra)*** and applying the principles laid down therein, was of the view that there was no reason why the admitted amount of Rs. 400 crores should not be immediately paid to the respondent. Relevant para of the Order of the Tribunal reads as under:-

“35. In these circumstances, though the Claimant has moved its Application under Section 17, Mr. Wadhwa has urged the Tribunal to treat it under Section 31 (6) of the A&C Act and pass an Interim Award/ Partial Decree against the Respondent and in favour of the Claimant qua the undisputed sum of Rs.400 crores. In the SOC there is a claim of over Rs.890 crores. In reply to which the Respondent has pleaded in the SOD that approximately Rs.200-250 crores has been recovered from adjustments made by inter party transactions from 2015 to 2019. The Tribunal finds that the Claimant is justified in its contention that there being no categorical denial to the Respondent's liability for the sum of Rs.400 crores, the Tribunal must deduce that there is a tacit admission by the Respondent.”

31. This Court finds no error or infirmity in this finding of the Tribunal. Once any part of the liability is admitted, law does not envisage that the admitted payments should be postponed till the disputed amounts are adjudicated and finalized. Even today before this Court while learned counsel for the appellant has argued that there was no tacit admission of liability, but the fact of the matter is that on being confronted with the observations of the Tribunal, regarding the admission of liability, it could not be pointed out that these findings were incorrect. Learned counsel has also not been able to point out any material or document from which it could be gathered that the finding of the Tribunal of admitted liability is erroneous. In fact, the admission of liability by the appellant is further fortified by the fact that the appellant itself on 22.10.2019 had agreed to an interim arrangement whereby it undertook to make the payments in five tranches of Rs. 80 crores each. Relevant para of the Order is extracted in the earlier part of the judgment. Since the appellant itself offered to clear the outstanding liability in five tranches, the Tribunal accepted the offer and directed accordingly. The Schedule that has been drawn out by the Tribunal regarding the modalities of payment in para 37 of its Order is only in terms of the offer, voluntarily made by the appellant. Learned senior counsel for the respondent is thus right in its contention that having offered to clear the liability in installments, the appellant cannot even assail the impugned order.

32. Learned Tribunal has correctly relied upon the judgment in the case of **Uttam Singh (supra)**, relevant para of which reads as under:-

"12. As to the object of Order 12 Rule 6, we need not say anything more than what the legislature itself has said when the said provision came to be amended. In the Objects and Reasons set out while amending the said Rule, it is stated that "where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of relief to which according to the admission of the defendant, the plaintiff is entitled". We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where the other party has made a plain admission entitling the former to succeed, it should apply and also whether there is a clear admission of facts in the fact of which it is impossible for the party making such admission to succeed. "

33. On the issue of admitted liability the reliance on the judgment in case of **Numero Uno International Ltd. vs. Prasari Bharti 2008 (101) DRJ 479 (DB)** is well justified. Relevant para reads as under:-

"8. The issue can be viewed from yet another angle. The making of the interim award ensures to the party in whose favour the same is made the payment of an amount which is an admitted position payable to it. There is no reason why the payment of what is admittedly due should await the determination of other disputes which may take years before they are finally resolved. If at the conclusion of the arbitral

proceedings, the defendant were to succeed in his claim, either wholly or partially, and if after adjustment of the amounts found payable to the plaintiff, any amount is eventually held payable to one or the other party, the arbitrator can undoubtedly make such an adjustment and direct payment of the amount to one or the other party, as the case may be. The final award would in any such case also take into consideration the payments, if any, made under the interim award. Suffice it to say that the making of the interim award in no way prevents the arbitrator from making adjustments of the amount in the final award and doing complete justice between the parties. By that logic even if we assume that the Prasar Bharti was to fail in substantiating its further claims which are disputed and the appellant were to succeed wholly in the counter claim that it has made, all that it would result in is an award in favour of the appellant. There is, therefore, no inherent illegality or perversity in the making of the interim award by the arbitrator so as to call for interference by this Court under Section 34 of the Act.”

34. Thus in my view, on account of the admission and offer of the appellant to clear its liability and the law that if an amount is admitted by a party, the same should be released to the opposite party at the earliest, without waiting for adjudication of the remaining disputes, no infirmity can be found with the impugned order, calling for any interference by this Court in the present proceedings. The appeal has no merits and is accordingly dismissed.

I.A. No. 2070/2020

In view of the order passed above, no further orders are required to be passed. Accordingly, present application is dismissed.

MARCH 04, 2020
jitender/srb/

JYOTI SINGH, J

