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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision:- 02.07.2020

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O.M.P. (I)(COMM) 151/2020, CCP(O) 18/2020 & CCP(O) 19/2020

JAYNEER INFRA POWER AND MULTIVENTURES PRIVATE LIMITED & ORS.Petitioners

Through: Mr.Joy Basu, Sr.Adv with Ms.Ritwika Nanda & Ms.Petal Chandhok, Mr.Kanak Bose, Adv.

Versus

HERO FINCORP LIMITED

.....Respondent

Through: Mr.Sandeep Sethi, Sr.Adv. with Mr.Raunak Dhillon with Ms.Ananya Dhar Choudhury, Mr.Parikalp Gupta, Adv.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. The present matter has been taken up for hearing by way of video conferencing on account of COVID-19.

O.M.P. (I)(COMM) 151/2020

2. The present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') has been filed seeking the following reliefs:

“(i) Restrain the Respondents, its officers, employees, assignees or any person acting under instructions or on behalf of the Respondent from selling, invoking, creating any third party interests or in any other manner alienating the Pledged Shares of the Petitioners which are as under:-

<i>Name of Pledgor</i>	<i>Name of Listed Security</i>	<i>Number of shares pledged</i>
<i>Petitioner no.1</i>	<i>Zee Learn Limited</i>	<i>28,00,000</i>

<i>Petitioner no.2</i>	<i>Zee Media Corporation Limited</i>	<i>5,30,000/-</i>
<i>Petitioner no.3</i>	<i>Zee Learn Limited</i>	<i>21,00,000/-</i>

(ii) Restrain the Respondent, its officers, employees, assignees, or any person acting under instructions or on behalf of the Respondent from acting upon or in any manner whatsoever giving effect to E mail dated 22.06.2020.

(iii) Stay the operation and the effect of the E mail dated 22.06.2020.

(iv) Restrain the Respondent from taking any coercive action against the Petitioners.

(v) In the event that the Pledged Shares are sold, direct the Respondent to deposit the proceeds received from the sale of the Pledged Shares before this Hon'ble Court in the form of an interest bearing fixed deposit of a nationalized bank till the outcome of the arbitral proceedings and subject to such outcome.

(vi) Pass ad interim ex parte directions in respect of prayer (i) to (iv) as above."

3. The genesis of this dispute arises out of the commercial lending arrangements between one M/s Arrow Media and Broadband Pvt. Ltd. (borrower) and L&T Finance Limited, L&T FinCorp Limited and Family Credit Limited (original lender). Two loan against securities agreements were executed on 03.02.2017 by the original lender in favour of the borrower, first for a sum of Rs.3,25,00,00,000/- (Facility Agreement 1 or FA-1) and the second for a sum of Rs. 50,00,00,000/- (Facility Agreement 2 or FA-2) both of which were secured by pledge agreements, executed by several entities including the petitioner no.3. Now, the borrower continued to repay these loans over the course of the next year. However, on 11.06.2018, the original lender executed two deeds by way of which the remaining unpaid amounts of the loans

taken under FA-1 and FA-2 were *partially* assigned to Hero Fincorp Limited/the respondent (lender). In this partial assignment, the outstanding dues of Rs.43,33,33,333/- payable under FA-1 and Rs.6,67,00,000/- payable under FA-2 were assigned to the respondent.

4. On 21.08.2018, the respondent/lender and the borrower entered into two new Facility Agreements, viz., FA-3 for a sum of Rs. 75,00,00,000/- and FA-4 for a sum of Rs. 25,00,00,000/-, both of which were also secured by way of pledge agreements of the same date whereunder the shares held by the pledgers in certain businesses were pledged in favour of the respondent. The petitioners herein along with certain other entities were pledgers for the borrower in these facility agreements. While the petitioner no.3 was a party to both the pledge agreements executed on 03.02.2017 and 21.08.2018, it has claimed that the shares pledged in both these instances were entirely distinct from each other.

5. On 25.01.2019, the respondent informed the borrower that its security cover under FA-3 had reduced and that it was required to provide a further sum of Rs. 19,36,00,000/- failing which an event of default will be triggered under contractual terms and the lender would be forced to invoke and sell the shares pledged on 21.08.2018.

6. However, shortly thereafter on 30.01.2019, the loan availed under FA-3&4 was repaid and discharged in full, as a result of which, the petitioners claim, the contract stood discharged as per Clause 10 r/w Clause 2.4.1 of the Pledge Agreement dated 21.08.2018 and their obligations under this Agreement came to an end. The factum of repayment of the loan was unequivocally confirmed by the respondent on 08.03.2019.

7. A further development took place on 27.12.2019 when the original lender, borrower, pledgers of the Memoranda of Pledge dated 03.02.2017 and the respondent executed four further documents: (i) two supplemental deeds of assignment with respect to FA-1&2 were executed by the original lender in favour of the respondent (ii) two corresponding pledge agreements between the respondent with the very same entities who had executed the original pledge for FA-1&2 on 03.02.2017. This was carried out to fully assign the outstanding liabilities owed by the borrower to the original lender under FA-1&2, in favour of the respondent. Pertinently, while the petitioner no.3 was a party to the pledge agreements dated 03.02.2017, 21.08.2018 and 27.12.2019, the petitioner nos. 1 and 2 had only been a party to the pledge agreements dated 21.08.2018.

8. On 12.02.2020, the respondent sent an email to the borrower and five other entities regarding the loan facilities availed by the borrower under FA-1&2 which was assigned to the respondent on 11.06.2018 and 27.12.2019. It set out the factum of the loan having been advanced, the consequences of default in payment and explicitly set out, in Annexure I, all the shares pledged to secure this loan facility, which included the shares pledged on 03.02.2017 and 27.12.2019.

9. On 22.05.2020, the respondent issued two Notices, while one recalled the aforementioned loans sanctioned to the borrower for sums of Rs. 6,67,00,000/- and Rs.43,33,00,000/- advanced by the original lender by way of FA-1&2 further assigned to the respondent in June 2018 and December 2019, the other invoked the pledge agreement dated 27.12.2019. Till this point of time, the pledge agreement invoked, i.e., the pledge agreement dated 27.12.2019, corresponded to

the facility agreements under which the borrower had incurred outstanding dues, i.e., FA-1&2 assigned to the respondent on 11.06.2018 and 27.12.2019.

10. The borrower, in turn, on 01.06.2020 reiterated its earlier request to have the shares pledged on 21.08.2018 under FA-3&4 released considering that the facilities thereunder stood fully repaid. It is in response thereto, sent on 05.06.2020, that the respondent for the first time stated its intent to withhold the shares pledged on 21.08.2018 till all outstanding liabilities of the borrower under FA-1&2 were fully discharged. This was followed by a legal notice dated 12.06.2020 issued by the borrower to the respondent vehemently opposing the respondent's act of withholding the pledged shares and demanding their immediate release, to which the respondent, in its Reply dated 16.06.2020, reiterated its intent to retain and invoke them. This dispute between the parties came to a head on 22.06.2020 when the respondent expressed its intent to sell the shares pledged by the petitioners under FA-3 on 21.08.2018, in order to recover the dues owed by the borrower under FA-1&2.

11. It is in these circumstances that the present petition came to be filed and was listed before this Court on 24.06.2020 at around 4 PM. On this date, when the petition was taken up for consideration, learned counsel for the respondent had appeared and waived notice. Further, Mr. Sandeep Sethi, learned senior counsel for the respondent had submitted that the respondent did not wish to file a reply and would oppose the petition on the basis of the documents placed on record. In view of the aforesaid, the petition has, with the consent of the parties, been taken up for final hearing.

12. In support of the petition, Mr. Joy Basu, learned senior counsel for the petitioner, submits that the respondent is illegally attempting to sell the shares pledged on 21.08.2018 to liquidate the borrower's outstanding dues in respect of an unrelated agreement. He submits that the admitted position is that the shares which the respondent is threatening to sell were provided as security only with respect to FA-3 dated 21.08.2018 for the loan of Rs. 75,00,00,000/- which now stands fully repaid. Every loan/facility agreement signed between the borrower and the respondent was always accompanied by a corresponding contemporaneous pledge agreement and, therefore, when FA-1&2 were executed on 03.02.2017, attested pledge agreements were executed correspondingly by the then-pledgers to secure that particular debt. Similarly, the pledge agreement dated 21.08.2018 was *solely* executed for the purpose of securing the loan availed by the borrower for a sum of Rs. 75,00,00,000/- under FA-3. In this regard, he places reliance on recital (A) of the pledge agreement dated 21.08.2018 to contend that the same specifically states that as per FA-3, the respondent has agreed to provide facility for an amount of Rs. 75,00,00,000/-, thereby showing that the pledge was limited to the extent of the loan of Rs. 75,00,00,000/-. Yet, he submits, all recorded communications between the parties reveal the respondent's attempts to suddenly reverse this position to suit its own design and read in additional obligations into the pledge agreement. The respondent, by contending that the borrower's obligations under the facilities assigned in June 2018 and December 2019 can be enforced through the pledge agreement executed along with FA-3 in August 2018, is seeking to forcefully expand the extent of the petitioners' obligations under the

pledge agreement sought to be invoked. In doing so, he submits that the respondent is not only in violation of contractual terms, but is also maliciously proceeding in a manner to burden the petitioners with securing loans which they never agreed to secure in the first place.

13. Mr. Basu further submits that in facility agreements of such nature, the Master Schedule, being the only portion bearing the requisite particulars of the contract, is the heart and soul of the document and can prove a useful instrument to ascertain the specific intention of the parties. On a perusal of the provisions of FA-3, specifically Clause 1.1 therein and serial nos.3 and 7 of the Master Schedule attached thereto, the borrower was required to repay the entire loan amount of Rs. 75,00,00,000/- within a period of 12 months. Therefore, even as per the particulars furnished in the Master Schedule, FA-3 was drawn up solely for the purpose of securing the loan amount of Rs.75,00,00,000/- for a period of a year.

14. Mr Basu submits that in any event, as per Clause 1.2.11 of the pledge agreement dated 21.08.2018 and Clause 11.1(b) of FA-3, in case of a conflict between the terms of the facility agreement and the pledge agreement, the terms of the pledge agreement prevail over the terms of the facility agreement. He submits that in these circumstances, a conjoint reading of Clauses 10 (Termination clause), 2.4.1 (Continuing Security clause) and 5 (Continuing Obligation clause) of the pledge agreement dated 21.08.2018 shows that the provision contained in the pledge agreement contemplating its termination on the date of repayment of the loan, shall prevail over any provision in this regard in the facility agreements.

15. Mr. Basu submits that in any event, as soon as the loan facilities availed by the borrower were repaid on 30.01.2019, which factum of repayment was confirmed by the respondent on 08.03.2019, the shackles of the pledge agreement dated 21.08.2018 binding the petitioners to the respondent were released. This implies that the petitioners' obligations under the pledge agreement came to an end w.e.f. 30.01.2019 and cannot be revived by the respondent's unilateral decision to invoke it on a later date. By relying on Clause 2.4.1 of the pledge agreement dated 21.08.2018, he submits that the Final Settlement Date of the pledge was the date on which the loan stood repaid and discharged. Even as per Clause 5 of the pledge agreement, which explicitly deals with continuing obligations, the undertaking and obligations of the petitioners was only to remain in effect till the final settlement date. Therefore, once the final settlement date, i.e. 30.01.2019 was achieved and all pending obligations of the petitioners were fulfilled by way of loan repayment, the respondent cannot insist on continuing existence of the pledge agreement dated 21.08.2018.

16. Mr Basu further submits that in the alternative, without prejudice to his aforesaid submissions, even if the respondent's decision to invoke the pledge agreement dated 21.08.2018 to satisfy the obligations under FA-1&2 were to be entertained or these pledge agreements were permitted to be utilised as cross-collateral, this could only be done till the loan availed on 21.08.2018 under FA-3 remained unpaid, i.e., when FA-3 was still alive and subsisting. Since the borrower has repaid the entire amount loaned under FA-3, the respondent's submissions in this regard can no longer hold ground. He submits that in these circumstances, the shares owned by the

petitioners which were pledged for a specific purpose cannot be allowed to be liquidated by the respondent for recovering outstanding dues under unrelated agreements. He, therefore prays that the present petition be allowed and the respondent be restrained from selling, invoking or creating third party interests in the pledged shares or from giving effect to its email dated 22.06.2020 till the arbitration proceedings proposed to be invoked by the petitioners commence.

17. Per contra, Mr. Sandeep Sethi, in opposition of the present petition, contends that the pledge agreement dated 21.08.2018 clearly envisaged that it would serve as security for all outstanding dues accruing in favour of the respondent across all facilities availed by the borrower. He submits that the obligations of the petitioners in terms of this pledge agreement was not limited to any particular facility agreement, but was to secure payment/repayment of all existing facility obligations. He further submits that the term 'Facility', as defined in these facility agreements, cannot be lent an interpretation as narrow as the petitioners have sought to do. He submits that the petitioner's plea that the term facility, as defined in these facility agreements, should be interpreted as being applicable to only a particular facility agreement ought to be rejected. Not only is it myopic, but it is also completely contrary to the express contractual stipulations and would amount to restricting the scope of the pledge agreement dated 21.08.2018 by limiting its functionality only to the extent of securing the loan under FA-3. Once FA-3 defines a 'facility' to mean credit facilities granted to the borrower in terms of the Master Schedule appended thereto and Paragraph 25 of the Master Schedule, in turn, provides that any default by the borrower under *any other loan agreement* with the respondent

would prove to be an event of default under FA-3, it is clear that the borrower's failure to pay the requisite sums due under FA-1&2 would qualify as an event of default under FA-3 *as well*.

18. Mr Sethi further submits that in any event, a plain reading of all the facility agreements and the pledge agreements shows that the petitioners' obligations under the pledge agreement dated 21.08.2018 were envisaged as a continuation of the borrower's liabilities under the previous facility agreements. Therefore, it served as security till the very last outstanding dues of the borrower, including those under FA-1&2 were discharged. A combined reading of recital (B) and the definition of 'debt' in the pledge agreement dated 21.08.2018 shows that the shares pledged by the petitioners were in discharge of all monies due under inter alia any other facility availed by the borrower from the respondent. He submits that even as per Clause 1.1 of FA-3, the term 'Facility Obligations' has been defined to mean any amounts payable by the borrower to the respondent and, therefore, the total outstanding sum of Rs. 29,19,23,320/- payable by the borrower under FA-1&2 shall also be automatically included in the facility obligations arising out of FA-3. Although Facility Obligations was not defined within the pledge agreement dated 21.08.2018, but a perusal of Clause 1.2.1 of the pledge agreement shows that all undefined terms shall bear the meanings assigned to them in FA-3; this implies that even as per the pledge agreement dated 21.08.2018 executed against FA-3, the term 'Facility Obligations' included the outstanding dues of the borrower under FA-1&2. Furthermore, with respect to the outstanding amounts payable by the borrower under earlier facility arrangements, the borrower has triggered 'events of default' as defined under FA-

1&2 first in January 2019 and continuously w.e.f. 06.02.2020. He submits that in the light of the aforesaid, clearly the borrower's default in repaying the loans under FA-1&2 shall also constitute an event of default under FA-3. As a result, since the debts under FA-1&2 still remain unpaid and the pledge agreement dated 21.08.2018 secures the respondent even in respect of loans availed under FA-1&2, the obligations of the petitioners under the pledge agreement dated 21.08.2018 continues.

19. Mr Sethi submits that even otherwise, as per Clause 10.1, the pledge agreement can be deemed as being terminated only once the respondent confirms that all outstanding dues of the borrower stand discharged. When the respondent has never certified this fact and has instead clarified to the petitioners, by way of the email dated 08.03.2020, that certain amounts owed by the borrower under FA-1&2 still remain unpaid, an essential condition in Clause 10.1 for conclusive termination of the pledge agreement remains unfulfilled.

20. Finally, on the aspect of irreparable injury and balance of convenience required to be proved under Section 9 of the Act, Mr. Sethi submits that the borrower and the petitioners, who belong to the same group of companies, viz. Essel Group, are presently facing financial duress and are unable to meet their financial obligations. As a result, the shares pledged by the petitioners are highly volatile and facing continuous depreciation on a daily basis. He submits that inasmuch as these pledged shares are the only security available with the respondent to recover the amounts it lent to the petitioner, if the respondent is not permitted to sell these shares immediately, the values of these shares may further decrease thereby reducing the amount

which the respondent can recover. In fact, while the petitioners actually owe the respondent an outstanding sum of Rs. 29,19,23,320/- under the assigned facilities (FA-1&2), the amount recovered by selling the pledged shares in respect of FA-3, as per the share prices prevalent today, may not even be adequate to cover half of the loaned amount. He further submits that on the off chance that the petitioners succeed in arbitration, the respondent undertakes to refund the amount recovered by sale of the pledged shares with interest, as directed and, therefore, no loss or injury will be caused to the petitioners if the shares are permitted to be sold today. He submits that in contrast, irreparable loss and injury will be caused to the respondent if it is deprived of its ability to recover the huge sums owed to it by the petitioners and the borrower. He prays that the petition be dismissed with costs.

21. I have heard learned senior counsel for the parties and with their assistance, perused the record.

22. From the submissions of the parties, what emerges is that undoubtedly the borrower namely M/s Arrow Media, to which the petitioners' companies belong, still owes a sum of Rs. 29,19,23,320/- to the respondent, but it is undisputed that this amount is payable to the respondent under different facility agreements dated 03.02.2017 (FA-1&2) and not under FA-3 which was secured by the pledge agreement dated 21.08.2018. It is also an admitted position that the entire loan amount of Rs.75,00,00,000/- advanced by the respondent under FA-3 stands repaid. Thus, the short question which needs to be determined is regarding the extent of the petitioners' obligations under the Pledge Agreement dated 21.08.2018 - whether it survived only till the full repayment of the amount owed under FA-3, or whether the contract

envisages that the pledge would continue to operate till all continuing obligations of the borrower towards the respondent, under any other facility agreements, are finally repaid and discharged?

23. The petitioners have vehemently contended that once their liabilities under FA 3 stood discharged on 30.01.2019, it necessarily implied that the securities pledged along with these agreements also stood released. In this regard, reliance has been placed on the manner in which the terms 'facility agreement' and 'facility' are defined in clauses 2.4.1 and 10 of the pledge agreement dated 21.08.2018 which read as under:

"2.4 Continuing Security

2.4.1. The Parties agree that this Unattested Memorandum of Pledge and the Security to be created hereunder or pursuant thereto, shall be a continuing Security and shall, subject to Clause 10, remain in full force and effect until the full repayment of the Facility and the same is notified to the HFCL in writing by the Lender ("Final Settlement Date")."

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10.1 This Unattested Memorandum of Pledge shall terminate on the Final Settlement Date, on receipt of confirmation/notice from the Lender. Upon termination of this unattested Memorandum of Pledge on the Final Settlement Date, the HFCL agrees, on the Borrower/Pledgors request and at the Borrower/Pledgors costs and expense, to release the Collateral from the pledge and the charge, if created pursuant to the provisions of this Unattested Memorandum of Pledge and, thereafter notify the Borrower/Pledgors of the same in writing.

10.2 xxx

10.3 The HFCL shall upon termination of this Unattested Memorandum of Pledge redeliver the Power of Attorney executed in favour of the HFCL marked 'cancelled'.

24. It has thus been contended that irrespective of whether the borrower owed any outstanding dues to the respondent, the obligations of all the pledgers under the pledge agreement dated 21.08.2018,

including the petitioners, stood discharged once Clause 2.4.1 of the pledge agreement was satisfied and the specific facility of Rs. 75,00,00,000/- in respect whereof the shares were pledged stood fully repaid.

25. On the other hand, the respondent has primarily relied on the definitions of 'debt' in the pledge agreement dated 21.08.2018 and 'facility obligations' in FA-3 as also Paragraph 25 of the Master Schedule to contend that the shares were pledged for all sums payable by the borrower to the respondent not only under this loan arrangement but also under any existing and future loan arrangements executed between them. The respondent has also opposed permitting a defaulting borrower like M/s Arrow Media, which has failed to fulfil its contractual obligations under previous agreements, to simply walk off with the security it had pledged while seeking a different loan on the ground of mere technicalities. In my view, however, the question whether the shares pledged on 21.08.2018 can be used to secure outstanding liabilities of the borrower in respect of earlier loan agreements, has to be based on a conjoint reading of the contractual terms rather than basing it on select provisions of the agreements which have been relied upon by the parties.

26. To ascertain the intention of the parties, reference may be made to the relevant clauses which read as under:

(i) In the pledge agreement dated 21.08.2018,

““Debt” means the aggregate of the Facility Obligations and all present and future moneys, including interest, default interest, charges, debts and liabilities due, owing or incurred from time to time by any Obligor/Borrower, under or in connection with the Facility or any other facility availed by the Borrower from HFCL,

this Agreement and/or any other Facility Documents or any other loan agreement (in each case, whether alone or jointly, or jointly and severally, with any other person, whether actually or contingently, and whether as principal, surety or otherwise).

(ii) In FA-3 dated 21.08.2018

“Facility” means the credit facility granted by HFCL to the Borrower as specified in the **Master Schedule** on the terms and conditions provided in the Facility Documents.

“Facility Amount” means the sanctioned amount of the Facility as specified in the **Master Schedule** or such other revised amount as subsequently communicated by HFCL to the Borrower.

“Facility Agreement” means this agreement and its Schedules (including the **Master Schedule**)

“Facility Documents” means this **Facility Agreement, the Sanction Letter, Security Documents** and such other documents as may be executed by a party in connection with this Facility Agreement.

“Facility Obligations” shall mean the aggregate of all amounts payable by the Borrower from time to time to HFCL in connection with the Facility or pursuant to the terms of the Facility Documents, including without limitation:

(a) The principal of the amounts disbursed under the Facility, interest due thereon, and all other Charges, obligations and liabilities of the Borrower, including indemnities, Interest, Default Interest, Default Charges, commissions, liquidated damages, premium on prepayment, and other monies incurred under, stipulated in, arising out of or in connection with any Facility Document.

(b) all costs, charges and expenses for preserving the Security and/or enforcement thereof incurred by HFCL to the extent that the same are not repaid or recovered by HFCL in accordance with the provisions of the Facility Documents; and

(c) *in the event of any proceeding for the collection or enforcement of the Facility Obligations, after an Event or Default shall have occurred and be continuing the expenses of retaking, holding, preparing for sale or lease, selling or otherwise disposing of or realizing the Security Interest, or of any exercise by HFCL, or any security trustee, of its right under the Facility Documents, together with legal fees and court costs to the extent that the same are not repaid or recovered by HFCL in accordance with the provisions of the Facility Documents.*

(d) *any sum of money due under any other facility, including all interest, charges, costs availed by Borrower from the HFCL herein*

“Final Settlement Date” means the date on which the Facility Obligations has been irrevocably discharged in full and final in accordance with the terms of the Facility Documents.

“Term” means term of the Facility commencing from the first Disbursement Date as specified in the Master Schedule within which the Facility Obligations must be repaid by the Borrower to HFCL.

(iii) In the Master Schedule appended to FA-3

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3.	Sanctioned Amount	Rs. 75 crore
**		
7.	Tenor/Maturity	12 months from the date of disbursement
*		
25	Event of Default Covenants	1. Customary to financing of such nature to be provided including but not limited to the following. *Non payment of any amount due and payable under the facility. *Failure to Maintain Security Cover in case top up is not

		<i>done within stipulated time.</i> <i>* Potential delisting/cessation of trading of the shares of mentioned in clause 'Portfolio Mix'</i> <i>* Cross default with existing financial obligation of the Borrower with HFCL.</i> <i>* Breach of any covenants as mentioned in this sanction letter.</i> <i>* In case the borrower defaults in any of the loans vailed from other lenders, HFCL shall reserve the right to recall the loan facility or declare EOD.</i> 2. **
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27. No doubt the definitions of the terms 'debt' and 'facility obligation' do mention loans payable by the borrower under any *other* facility agreement, but on the other hand, the provisions relating to 'continuing security' and the definition of 'final settlement' clearly restricts the life of the security created under these agreements and envisages their termination on final repayment of the facility amount. In fact not only does recital (A) of the pledge agreement exclusively link this pledged security to the loan of Rs. 75,00,00,000/-, even the definitions of 'facility', 'facility amount', 'facility Agreement' and 'term' contained in the facility agreement (FA-3) expressly refer to the security as credit facility as specified in the Master Schedule. While the respondent has relied on clause (d) to the definition of 'facility

obligations' to imply that any sums of money due under any other facility availed by the borrower were to be included therein, interestingly the term 'facility obligations' itself has been specifically defined as the aggregate of all amounts payable by the borrower from time to time in connection with the *facility* giving an indication that the primary intent of the parties was to secure only the amount under the particular facility. At this juncture, it would also be appropriate to examine the relevant clauses of the Master Schedule, on which heavy reliance has been placed by both the parties, for further clarity.

28. In the Master Schedule, while the basic clauses pertaining to sanctioned amount and term contained in paragraphs 3 and 7 expressly stipulate that the shares have been pledged only against the loan amount of Rs. 75,00,00,000/-, paragraph 25 does appear to suggest that any instance of the Borrower indulging in a cross-default under an existing financial obligation owed to the respondent shall qualify as an Event of Default under FA-3. However, the specific exclusion of any other facility or facility obligations pending under FA-1&2 executed on 03.02.2017 assigned in June 2018, from paragraphs 3 and 7 of this very Master Schedule, indicates that the parties' intent was to pledge the security only for the sanctioned loan amount of Rs. 75,00,00,000/-. At best, it can be said that there is a slight incongruity in the clauses nestled in these agreements and, therefore, these clauses have to be read harmoniously in a manner to gauge the true intent of the parties. In this regard, reference may be made to the decision in ***Nabha Power Limited (NPL) Vs. Punjab State Power Corporation Limited (PSPCL) & Anr.*** (2018) 11 SCC 508 wherein the Supreme Court had,

while examining the issue of interpreting the terms of a multi-clause commercial contract, held as under:-

*“We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)] test of giving “business efficacy” to the transaction, as must have been intended at all events by both business parties. The development of law saw the “five condition test” for an implied condition to be read into the contract including the “business efficacy” test. It also sought to incorporate “the Officious Bystander Test” [Shirlaw v. Southern Foundries (1926) Ltd. [Shirlaw v. Southern Foundries (1926) Ltd., (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)]]. **This test has been set out in B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings [B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)] requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract.** The same penta-principles find reference also in Investors Compensation Scheme Ltd. v. West Bromwich Building Society [Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)] and Attorney General of Belize v. Belize Telecom Ltd. [Attorney General of Belize v. Belize Telecom Ltd., (2009) 1 WLR 1988 (PC)] Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. **The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.**”*

29. In the light of this position, although the respondent's plea that all outstanding dues of the borrower ought to be treated as facility obligations under FA-3 is ostensibly appealing on the face of it, the remaining clauses of the agreement containing repeated and specific reference to the amount of Rs. 75,00,00,000/- cannot be simply ignored. If the explanation sought to be advanced by the respondent were to be accepted at this stage, it would imply that even though a particular loan is specifically secured by a particular pledge, the lender could still invoke security executed in respect of a completely separate loan agreement. Moreover, this would also violate the parts of the contract which expressly signify that the pledge agreement secured only the sanctioned loan amount of Rs.75,00,00,000/-. All things considered, this Court, while interpreting the terms of these agreements, has to ensure that its interpretation lends business efficacy to the transactions between the parties and prevents any absurdity. While doing so, it must be seen that the same neither burdens the parties with nor emancipates them from obligations beyond those which were originally contemplated by them at the time of signing the contract. Notwithstanding the admitted position that the borrower continues to owe a huge sum to the respondent under previous facility agreements, viz. FA-1&2, the fact remains that the respondent took a business decision while executing FA-1&2 to extend loans worth sums of Rs.325,00,00,000/- and Rs.50,00,00,000/- against the pledge agreements dated 03.02.2017 which were signed by *a different set of pledgers*, although petitioner no.3 is common to all the pledge agreements.

30. When the aforesaid facts are examined in the light of the settled legal position that the meaning of a contract ought to be gathered from the intent of the parties by adopting a common sense approach, not a pedantic one, I find that mere mention of the phrase ‘other facility’ in the definition of the term ‘financial obligations’ in FA-3 or inclusion of cross-defaults in the Master Schedule is not sufficient on its own to establish a prima facie case in favour of the respondent. It is imperative for this Court to read these agreements holistically by taking the surrounding circumstances into account while deciding the present petition. After all, it cannot be overlooked that the parties chose to secure every instance of loan extension by executing a *separate contemporaneous* pledge agreement. Thus, at this stage, it would be premature to assume any unbridled right in favour of the respondent to sell the shares which were pledged on 21.08.2018 in exchange for loans which now admittedly stand fully repaid, under a pledge agreement which stands discharged as a consequence of this repayment, just so that the respondent can recover amounts due from a loan facility extended on 03.02.2017.

31. Also important are the circumstances surrounding the invocation of the shares pledged on 21.08.2018. A perusal of the communication exchanged between the parties reveals that originally on 22.05.2020, when the respondent realised that certain loan facilities under FA-1&2 as assigned to them by the original lender on 11.06.2018 and 27.12.2019 had remained unpaid, it intended to invoke only the shares pledged vide the unattested pledge agreement dated 27.12.2019. Nowhere in the Invocation of Pledge Notice dated 22.05.2020 did the respondent contemplate invoking the shares

pledged on 21.08.2018. This continued to be the position till 05.06.2020 when the respondent, in response to the borrower's request for release of the shares pledged on 21.08.2018, suddenly expressed its intent to withhold these shares. Evidently, the decision to invoke the shares pledged on 21.08.2018 was a mere afterthought, a last-ditch effort on the respondent's part to secure the monies it had lent to the borrower. If the respondent was of the opinion that it was permitted to invoke any pledge agreement to secure the loans advanced under any facility agreements, executed in the past, present or future, then it would have certainly been aware of this position on 22.05.2020 when it sent its Invocation of Pledge Notice. This, in turn, would have found a mention in the invocation itself, much prior to its communication dated 05.06.2020. In fact, even earlier, on 12.02.2020, when the respondent had first sent an email detailing the particulars of the outstanding liabilities owed by the borrower under FA-1&2, it expressly set out all the shares pledged to secure this liability in Annexure I therein. It is pertinent to note that even this list does not contain any mention or reference to the shares pledged by the petitioners on 21.08.2018 under FA-3.

32. In any event, while exercising jurisdiction under Section 9 of the Act, this Court is only required to adopt a prima facie view because, ultimately, the rights of the parties can be finally determined only in arbitration, which the parties propose to invoke, once the learned Arbitrator has been able to ascertain the true intent and effect of the pledge agreement dated 21.08.2018 and the various facility agreements. However, for the time being, the very fact that there were separate, contemporaneous pledge agreements securing certain shares

for the execution of the loan facility agreements, viz. FA-1, FA-2 and FA-3, prima facie shows that the parties, in their wisdom, intended to independently secure every facility with a different pledge agreement. Therefore, on the face of it, the petitioners are right in contending that the shares pledged on 21.08.2018 ought to be construed as being security for the amount secured under the facility agreement, i.e. FA-3, dated 21.08.2018.

33. It is now time to examine the respondent's claim that denial of its right to sell shares at this point would cause it greater inconvenience. Although I do find merit in the petitioners' plea that the shares pledged on 21.08.2018 ought to have been returned to them once the borrower had successfully repaid the loan amount due under FA-3 and impliedly the very purpose for which the pledge had been made stood discharged, it is a matter of record that the pledged shares are still in the respondent's possession. In fact, these shares will and ought to continue being in possession of the respondent, undisturbed, till the final determination of this dispute in arbitration, which the parties propose to invoke. The respondent's plea that it is entitled to recover the shortfall in the amount received from the sale of shares pledged under FA-1&2 may have merit, but that cannot per se entitle the respondent to unilaterally sell the shares pledged in respect of FA-3. Undoubtedly, it will be open to the respondent to institute action against the borrower in this regard to claim the shortfall before an appropriate forum. It may be pertinent to note that neither have the petitioners prayed nor is any direction warranted for return of these pledged shares to the petitioners at this stage. I am therefore of the considered opinion that the pledged shares already in the respondent's

possession serve as adequate protection for the respondent to secure its interests in the amounts loaned to the borrower under FA-1&2 and assigned on June 2018. Therefore, even the balance of convenience lies in favour of the petitioners.

34. On the issue of irretrievable injury, mere apprehension of the respondent that the value of assets pledged on 21.08.2018 by the petitioners may depreciate owing to the precarious financial position of the group of companies, to which the petitioners and the borrower belong, is not sufficient on its own to permit the respondent to sell the shares pledged on 21.08.2018; especially when it still needs to be decided whether the respondent is entitled to invoke the pledged shares in order to satisfy the borrower's outstanding dues towards a loan extended by a preceding agreement, secured by different shares under a separate pledge agreement. On the other hand, I find merit in the petitioners' contentions that there is no reason to be hasty in selling the pledged shares in a market already reeling from the adverse impact of a global pandemic. Given these circumstances, if the shares were to be sold today, the petitioners would suffer irreparable harm on the dissipation of their assets which the respondent is proposing to sell at today's depreciated value. In this regard, I find merit in the petitioners' claim that given that these are extraordinary times that we are living in and it is likely that the country's economy and financial markets may recover in the coming years, there is a strong possibility that the very shares held by the respondent could cushion it from incurring any further losses under these agreements. Thus, when looked at from any angle, I find that the petitioners have satisfied the test to qualify for interim reliefs under Section 9 of the Act by establishing a prima facie

case and balance of convenience in their favour and that irretrievable injury would be caused to them in case they are denied the interim measures sought in this petition.

35. For the aforesaid reasons, it is considered essential to safeguard the interests of all parties by restraining the respondent from invoking, selling or creating any third party rights in the shares pledged by the petitioners on 21.08.2018 against FA-3, the details whereof have been reproduced in paragraph 1 hereinabove. It is, however, made clear that keeping in view the respondent's grievance, this is only a prima facie view and this order will remain in force subject to the petitioners invoking arbitration within thirty days whereafter it will be open for the learned Arbitrator to extend this direction or modify it as it deems fit upon the parties filing an application under Section 17 of the Act.

36. Before I conclude, I may also note that before the petition was taken up for hearing for the first time on 24.06.2020, the respondent had already sold all the shares pledged by petitioner no.2 and 2,95,773 shares pledged by petitioner no.1 under the pledge agreement dated 21.08.2018. Though the petitioners have vehemently contended that the amount received from this sale ought to be passed on to the affected petitioners, keeping in view that the borrower still owes a huge amount to the respondent, albeit under a different loan agreement, I am not inclined to pass directions in this regard at this stage. It will, however, be open for the petitioners to raise this issue before the learned Arbitrator.

37. The petition is allowed in the aforesaid terms.

CCP(O)18/2020 & CCP(O) 19/2020

38. Learned senior counsel for the petitioners seeks leave to withdraw the present contempt petitions.

39. The petitions stand dismissed as withdrawn.

JULY 02, 2020
sr/sdp

REKHA PALLI, J



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