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

Reserved on: 27th August, 2021

Pronounced on: 8th November, 2021

+ ARB. A. (COMM.) 14/2020 & I.As. 4736-40/2020, I.A. 11490/2020

L & T FINANCE LIMITED Appellant
Through: Mr. Rajiv Nayar, Sr. Advocate
with Mr. Manmeet Singh, Ms. Nishtha
Chaturvedi and Mr. Chitwan Sharma, Advs.

versus

DM SOUTH INDIA HOSPITALITY PRIVATE LIMITED
AND ORS. Respondents
Through: Mr. Gopal Jain, Sr. Advocate with
Mr. Jayant Mehta, Mr. Pawan Sharma, Mr.
Aditya Chatterjee, Mr. Nirvikar Singh and
Ms. Ekta Kapil, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T

% **08.11.2021**

1. This appeal, under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996, assails order dated 8th June, 2020, passed by the learned Arbitrator, in two cases pending before him. The claimants before the learned Arbitrator are the respondents in the present appeal, and the respondent before the learned Arbitrator is the appellant herein.

2. Respondents 2 to 5 are directors of Respondent 1, and signatories to the Pledge Agreements dated 31st March, 2017 and 12th June, 2017, executed with the appellant.

Facts

3. The Contractual Documents:

3.1 The contractual relationship between the parties to the present appeal revolves around two Loan Agreements and four Pledge Agreements, dated 31st March, 2017 and 12th June, 2017, and an Escrow Agreement dated 31st May, 2017. The two Loan Agreements were between the appellant and Respondent 1, the four Pledge Agreements were between the appellant and Respondents 2 to 5, each agreement being executed between the appellant and one of the respondents. The Escrow Agreement was between the appellant, Respondent 1 and M/s IndusInd Bank Ltd. (“the Bank”), which was the Escrow Agent.

3.2 Respondent 1 is the owner of the Radisson Hotel in Mysore and the “Mall of Mysore”. Under the two Loan Agreements dated 31st March, 2017, the appellant lent, to Respondent 1, facility amounts/loans of ₹ 100 crores and ₹ 85 crores respectively.

3.3 The Loan Agreements:

3.3.1 The Loan Agreements were identical. Clause 2.2 of the Loan Agreements required Respondent 1 to repay the appellant, as per

payment schedule in Schedule II to the Loan Agreements. Clause 2.3 dealt with the interest payable by Respondent 1 to the appellant. Sub-Clauses (i) and (ii) of Clause 2.3 dealt with normal interest payable by Respondent 1 on the loan advanced by the appellant. Sub-Clause (iv) required Respondent 1, in the case of default in payment of any amount, under the Loan Agreements, on the respective due dates, to further pay interest at the stipulated default rate.

3.3.2 Clause 2.13 of each Loan Agreement required Respondent 1 to provide securities, to secure the loans advanced by the appellant, as described in Schedule III to the concerned Loan Agreements, and also to comply with the escrow mechanism stipulated in Schedule IV. The clause reads thus:

“2.13 The Borrower/Security Provider shall provide Securities as described in Schedule III and undertakes to comply with the escrow arrangement/waterfall mechanism set out in Schedule IV. The Security shall be monitored in the manner set, out in Schedule IV.”

3.3.3 Schedule III required the following securities to be provided by Respondent 1:

- (i) equitable mortgage of
 - (a) the hotel and mall located at Mysore and
 - (b) a farmhouse located at Delhi,
- (ii) hypothecation, to the appellant, of
 - (a) all revenue generated at the mall,
 - (b) all revenue generated at the hotel,
 - (c) present and future current assets and movable fixed assets located at the hotel and the mall and

- (d) escrow account of the hotel and the mall,
- (iii) collateral security of the following nature:
 - (a) pledge over
 - (i) Category I listed shares of minimum ₹ 120 crores,
 - (ii) shares of ZF Steering Gear (India) Ltd. of ₹ 40 crores,
 - (iii) 62.02% shares of Respondent 1, held by M/s Respondent 1G Finance & Investments Pvt. Ltd., and Respondent 2 and his family, and
 - (iv) 100% shares of BDS Developers Pvt. Ltd,
 - (b) personal guarantees of the persons named in the Schedule,
 - (c) corporate guarantees by the entities named in the Schedule,
 - (d) Shortfall undertaking, and
 - (e) a demand promissory note by Respondent 1.

3.3.4 The “Escrow Mechanism for Receipt of Mall and Hotel Revenue” in the Loan Agreements required Respondent 1 to open, establish and maintain two Escrow Accounts with a Bank acceptable to the appellant and to deposit all revenues generated from the mall and the hotel in the Escrow Account.

3.3.5 The Schedule further provided, in Clause (e) titled “Collateral Security” under the head “Security Monitoring process”, thus:

“In the event the value of Listed Category I Equity shares falls below ₹ 110 crores and/or value of ZF Steering Equity Shares falls below ₹ 35 crs the Borrower shall provide additional Security acceptable to lender/cash top up within 3 business days. The top up shall be done to restore the value to ₹ 120 crs and ₹ 40 crs. respectively.”

3.3.6 Clauses 2.14 and 2.15 of each Loan Agreement stipulated thus:

“2.14 If, at any time, during the subsistence of the Facility, the Lender is of the opinion that the security provided by the Borrower has become inadequate to cover the Facility repayments then outstanding, the Lender shall advise the Borrower to that effect. The Borrower shall provide and furnish to the Lender, such additional security as may be acceptable to the satisfaction of the Lender to cover such deficiency.

2.15 CONTINUING SECURITY

The Security hereunder created or created under any Transaction Documents in terms of this Agreement shall be and remain a continuing security to the Lender and accordingly shall:

- (i) be binding upon the Borrower, its successors in title, permitted assigns and/or such persons under any Transaction Documents and their respective successors in title or heirs, executors, administrators, legal representatives as may be applicable;
- (ii) Extended to cover the Borrower's Indebtedness hereunder or otherwise;
- (iii) Not be discharged by any intermediate payment by the Borrower or any settlement of accounts between the Borrower and the Lender;
- (iv) Be in addition to and not in substitution for or derogation of any other security which the Lender may at any time hold in respect of the Borrower's Indebtedness/obligations hereunder; and

(v) Be security for all amounts due and payable by the Borrower for all monies due by the Borrower to the Lender, whether under this Agreement or otherwise.”

3.4 The Pledge Agreements: In accordance with the Loan Agreements, and the requirement of furnishing of securities by the Borrower (Respondent 1) envisaged therein, four Pledge Agreements were executed between the appellant and Respondents 2 to 5, each Pledge Agreement being executed with one of the said respondents. The Pledge Agreements were identical. Clause 1 confirmed the pledging of securities, by the pledgor, for securing “due payment of the Loan and secure obligations of the Borrower under the Loan Agreements”. Clause 13 recorded the agreement, of the Security Provider “to accept, as conclusive proof, the correctness of any sum claimed to be due from the Borrower to the Lender under the Loan Agreement, *any statement of account made out and signed by a duly authorised officer of the Lender*”.

3.5 The Escrow Agreement: In further implementation of the Loan Agreement, an Escrow Agreement was also executed, on 31st May, 2017, between the appellant, Respondent 1 and the Bank as the Escrow Agent.

4. On 24th April, 2019, the appellant sent a notice to Respondent 1 under Section 176 of the Indian Contract Act, 1872 (“the Contract Act”) alleging commission, by Respondent 1, of “Events of Default”, within the meaning of the Loan Agreement. Specifically, it was

alleged that Respondent 1 had failed to deposit the entire revenue into the Escrow Accounts as required by Clause 2.13 read with Schedule IV of the Loan Agreements and that the value of the security cover provided in the form of the ZF Shares had fallen below the minimum threshold of ₹ 35 crores envisaged in para (e) of Schedule IV. In the circumstances, the respondents were put on notice that the appellant was selling the ZF Shares to third parties.

5. This prompted the respondents, as well as the pledgors, to file OMP (I) (Comm) 130/2019 and OMP (I) (Comm) 134/2019 under Section 9 of the 1996 Act, seeking pre-arbitral interim relief by way of a restraint against the appellant from enforcing the pledged securities, and for a stay of the notice dated 24th April, 2019 issued by the appellant to the respondents.

6. When these OMPs came up for hearing before this Court on 1st May, 2019, the appellant informed the Court that ZF Shares, of the value of ₹ 152.76 crores already stood transferred from the pledgors' depository account to the appellant's depository account and, further, sold in the open market. Pledged shares valued at ₹ 13 crores were, however, still stated to be available in the appellant's depository account, unsold. Both OMPs were disposed of, by consent, by appointing the learned Arbitrator, who has passed the order under challenge, to arbitrate on the disputes between the parties and with a direction to the learned Arbitrator to adjudicate the OMPs, treating them as applications under Section 17 of the 1996 Act. Pending orders to be passed by the learned Arbitrator, the appellant was directed to hold on to the remaining ZF shares, stated to be worth ₹ 13 crores,

available in its depository account, and not to deal with the promoter Directors' ZF Shares. The respondents were also directed, in the interregnum, to discharge their obligations under the Escrow agreement and the two Loan Agreements.

7. Before the learned Arbitrator, the respondents filed two additional applications under Section 17 of the 1996 Act on 18th May, 2019, during the course of hearing. The learned Arbitrator took the said applications on record and directed the appellant to file its response to all the four applications of the respondents, under Section 17 (i.e. the two converted Section 9 petitions and the two applications preferred on 18th May, 2019), with further time to the respondents to file rejoinder thereto. In the interregnum, the appellant and respondents agreed to an *ad interim* arrangement, whereunder Respondent 1 was to continue to discharge its obligations under the two Loan Agreements and the Escrow Agreement, subject to reduction of the amount due to the appellant to ₹ 39,39,89,725/–, which, according to the appellant, was the amount due as on 3rd May, 2019. As, on the basis of this figure, the monthly instalment payable by Respondent 1 would be in the vicinity of ₹ 44 lakhs, Respondent 1 was directed to ensure payment of monthly instalments of ₹ 44 lakhs to the appellant for the months of May and June 2019. The learned Arbitrator also fixed times for filing of such Statement of Claim and Statement of Defence as well as further proceedings. These schedules were subsequently modified, somewhat, *vide* Record of Proceedings dated 4th July, 2019.

8. On 14th August, 2019, the appellant issued a demand notice to the respondents, requiring the respondents to pay, within five days, the allegedly outstanding amount of about ₹ 38 crores. Aggrieved thereby, on 17th August, 2019, Respondents 2 to 5 filed a further application, before the learned Arbitrator, under Section 17, seeking a restraint against the appellant from taking any coercive action against the respondents consequent on the notice dated 14th August, 2019.

9. There were, resultantly, at this stage, five Section 17 applications before the learned Arbitrator, of which three were filed by Respondent 1, one was filed by Respondents 2 to 5 and one was filed by the Pledgors. The appellant was the respondent in all the five applications.

10. On 18th August, 2019, the learned Arbitrator granted time to the appellant to file a detailed reply to the Section 17 application filed by the respondents on 17th August, 2019 and restrained the appellant, till the next date of hearing (18th September, 2019) from taking any coercive steps against the respondents pursuant to the demand notice dated 14th August, 2019.

11. The appellant assailed the said order, dated 18th August, 2019, of the learned Arbitrator, before this Court by way of Arb A (Comm) 27/2019.

12. On 13th January, 2020, the respondents sought time to file an application for amendment, as they intended to modify their

reliefs/claims. They were directed to do so on or before 22nd January, 2020, and the appellant was granted time to respond to the application, if so filed, on or before 1st February, 2020. The proposed amendment application, it was further noted, would be taken up for hearing on 17th February, 2020.

13. On 4th February, 2020, the respondents submitted that they would file a revised draft/proposed amendment to the Statement of Claim. The learned Arbitrator, accordingly, adjourned the matter to 14th February, 2020.

14. On 13th February, 2020, the respondents filed a proposed amended Statement of Claim. Exception was taken, in the said amended Statement of Claim, to the attempt, of the appellant, to sell all the pledged shares immediately after the hearing, on 30th April, 2019, by this Court, of the Section 9 petitions filed by the respondents and the pledgor. The sale of some of the pledged shares, which had already taken place, was alleged to be violative of Section 176 of the Contract Act. The amended Statement of Claim, therefore sought a direction to the appellant to compensate Respondent 1 for the loss suffered by it owing to the sale of ZF Shares by the appellant and for a restraint against the appellant from enforcing any of the remaining securities.

15. Interim Order dated 14th February, 2020 of learned Arbitrator disposing of five pending Section 17 applications: The learned Arbitrator disposed of all five Section 17 applications pending before

him by a common order dated 14th February, 2020. The findings of the learned Arbitrator, as contained in paras 50 to 55 of the order, read thus:

“50. While noting that the Tribunal is unable to express any sort of final opinion in this matter, the Tribunal does find that, prima facie, there is some substance in the case made out by the Respondent regarding the Events of Default having been triggered. Even though this is only a temporary view, and is pending final determination, the Tribunal is of the opinion that equity has to be adjusted in the present case, and some solution must be found by way of a temporary relief. It must be noted that this temporary finding does not prejudice the trial in any way.

51. The tentative position taken by the Tribunal is that based on the prima facie submissions made by the parties before it, it appears that the value of the collateral security of listed Category 1 equity shares and ZF shares had to be maintained separately, with the format ₹ 120 crore and the latter ₹ 40 crore. If, at any point, the valuations of these shares fell below the stipulated amount, an event of default can be said to have occurred. This was the case in the present case, with the valuation of the shares, specifically the ZF shares dropping below ₹ 40 crore, to reach a value of ₹ 23.44 crore. The Claimants have not succeeded in convincing the Tribunal that the ZF shares were included only for their special interest and not for their monetary value. As a result of the event of default having been triggered, the Respondent was prima facie justified in taking further action, after following due process of issuing notices, etc. by selling the shares and taking further appropriate action under the terms of the Loan Agreements. The Claimant's case regarding due process not having been followed on account of the default notices having been sent by the Respondent after the SEBI restrictions came into effect on 1 April 2019, or that FDD reports were unsigned or undated does not satisfy the Tribunal.

52. As regards the other event of default, i.e., the shortfall in the escrow account, it is an admitted position that there were shortfalls in the deposits and the MIS reports also support this position. The Claimant's case regarding the

operational difficulties in making deposits, or due process not having been followed by the Respondent, or the inability to pledge the additional ZF shares due to the SEBI restrictions that came into effect, will need to be tested at trial.

53. Accordingly, the Tribunal is of the prima facie view that the Respondent was justified in undertaking the sale of shares. Equally, however, the Tribunal recognises that equity must be restored to both sides pending final adjudication of the matter.

54. In this context, the Tribunal directs that the remaining shares of Category 1 and ZF shares may be sold, subject to the Respondent filing a written undertaking on affidavit before the Tribunal that in case it fails in the arbitration, or is ordered by the Tribunal, it will either (a) buy these shares from the open market, and restore them to the Claimants, or (b) pay the claimants an amount equivalent to the listed price of the Category 1 shares and the ZF shares as of the day of this order, combined with an interest rate of not less than 12% per annum. The choice of which alternative is preferred at that point of time will be determined by the Claimants.

55. Finally, the Tribunal again seeks to make it clear that the findings recorded in this order are tentative and will not prejudice the rights of the parties in any manner. With this, the present interim applications are disposed of.”

16. Separate order, also passed on 14th February, 2020, *inter alia* staying operation of interim order *supra*: A separate order was passed, by the learned Arbitrator, on the same day, i.e. 14th February, 2020, on the amended Statement of Claim filed by the respondents on 13th February, 2020. Time was granted to the appellant to file reply to the amended Statement of Claim, and time was granted to the respondents to file rejoinder thereto. The order also noted the fact that, by a separate order of the same date, the learned Arbitrator had disposed of the five pending Section 17 applications. At request of learned Counsel for the respondents, the learned Arbitrator stayed the

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operation of his order dated 14th February, 2020, disposing of the five Section 17 applications, for a period of two weeks, i.e. till 28th February, 2020. The order concluded with a direction to the appellant to furnish, to the respondents, copies of the Ledger account regarding appropriation of monthly payment of ₹ 44 lakhs, as directed by the learned Arbitrator on 18th May, 2019, and also indicate the balance outstanding remaining to be paid.

17. Revision of proposals by respondents vide fresh Section 17 applications, and proceedings thereon:

17.1 First revised proposal: A fresh application under Section 17 was preferred by the respondents before the learned Arbitrator on 18th February, 2020. The respondents advanced, in the said application, the following proposal, without prejudice to their rights, contentions and claims:

“(i) That the Claimants propose to pay the entire outstanding amount in the Ledger accounts of the Respondent subject to a reconciliation over a period of 3 months detailed as under:

Date of payment	Amount to be paid (% of total outstanding)	Amount to be paid (provisional subject to reconciliation) (Rupees in Crore)
28.02.2020	11%	4.00
30.03.2020	14%	5.10
30.04.2020	25%	9.10
20.05.2020*	50%	18.20
	100%	36.4

Note: The amount of ₹ 36.4 crores is a provisional calculation as on 24.01.2020. The same is subject to reconciliation with

the Lender on or before 15.03.2020.

*last instalment amount will be determined after:

- a) taking into account the balance interest payable;
- b) Taking into account the amounts that will get paid to the Respondent after 24.01.2020 that is the last date of EMI payment through escrow mechanism:
- c) taking into account all adjustments required to arrive at the full and final balance like adjustment regarding tax deducted at source by the Claimant No. 1 on the payments made to the Respondent.

(ii) As the Claimant No. 1 would be looking for alternate financing to replace respondent's loans with the new lender, the Respondent will issue upon the request of the Claimant No. 1 its provisional No Objection Certificate to permit Claimant to take such alternative financing along with an undertaking to completely and irrevocably release any and all securities, liens, encumbrances, restrictions, collateral, personal/corporate guarantees, mortgages or charges of any and all nature whatsoever that the Respondent or any person claiming on its behalf may have in respect of the various loan agreements, pledge agreements or other related documents, agreements or undertakings between the Claimants and the Respondent and the escrow arrangement or provision in all the bank accounts of Claimant No. 1 upon payment of the said outstanding amount of loan given by Respondent to Claimant No. 1 as reflected above.

(iii) Upon payment of the said final amount (20th May, 2020 or earlier), the entire securities, liens, encumbrances, restrictions, collateral, personal/corporate guarantees, mortgages or charges of any and all nature whatsoever that the Respondent or any person claiming on its behalf may have in respect of the various loan agreements, pledge agreements or other related documents, agreements or undertakings between the Claimants and the Respondent and the escrow arrangement or provision in all the bank accounts of Claimant No. 1 (collectively, "Released Properties") will be released forthwith and in any event not later than 7 days from the date of final payment, by the Respondent by taking

all required steps;

(iv) Upon payment of last instalment, any and the loans agreements, pledge agreements, escrow agreements or any other agreements, documents, or undertaking related thereto shall stand immediately terminated and completely discharged without any further act or deed;

(v) The arbitration proceedings will continue only to the extent of claims of the Claimants;

(vi) That the present arbitration proceedings shall proceed as per the schedule fixed in the procedural order dated 14th February, 2020;

(vii) Till the release of all Released Properties as contemplated above, the stay of the procedural Order dated 14th February, 2020 will continue;

(viii) The Respondent shall be restrained from taking any coercive steps for recovery of any amount, including but not limited to the sale of any pledged securities/shares (Category 1 and the said F Shares), or otherwise till the date of release of all Released Properties.”

The application prayed for passing of an order, by the learned Arbitrator, in terms of the above proposal.

17.2 *Vide* order dated 21st February, 2020, the learned Arbitrator granted a week's time to the appellant to file a reply to the above Section 17 application, filed by the respondents. The respondents also handed over, to the appellant, a demand draft for ₹ 4 crores, as a sign of their *bona fides*, which was accepted by the appellant, albeit without prejudice. The learned Arbitrator reiterated the direction, already passed on 14th February, 2020, staying the operation of the interim order passed on the said date and reviving the *ad interim* reliefs granted *vide* the earlier orders dated 18th May, 2019 and 18th

August, 2019.

17.3 Appellant's reply to first revised proposal:

17.3.1 The appellant filed a reply to the Section 17 application filed by the respondents. The maintainability of the application was questioned, terming it as an attempt to render the interim order passed by the learned Arbitrator on 14th February, 2020 redundant. Additionally, it was contended that, having exercised their right to seek interim protection under Section 17, by filing as many as four earlier Section 17 applications, which stood decided by the order dated 14th February, 2020, the appellant could not re-invoke Section 17, advancing a fresh proposal which, if accepted, would render the order dated 14th February, 2020 redundant. The appellant also placed reliance on Clause 2.5 of the Loan Agreements, which rendered the respondents liable to pay, to the appellant "interest and all other amounts/monies payable under or pursuant to" the Loan Agreements, further specifying that the respondents' obligation in that regard would be absolute and unconditional, unaffected by any circumstances, including any claim which the respondents may have against the appellant. The fresh Section 17 application of the respondents, therefore, it was contended, was an attempt to rewrite the covenants of the Loan Agreements and the Pledge Agreements. Para 5 of the reply went on to state thus:

"In case the intention of the Claimants is to pay the entire outstanding amount, on a without prejudice basis, then the same has to be paid immediately *as per the Respondents statement of account* including the future interest, default interest, legal costs and expenses etc., until the final date of

payment. In case the Claimants wish to offer payments in a staggered manner they ought to approach the Respondent directly with the proposal for settlement.”

(Emphasis supplied)

This submission was reiterated in paras 10 and 11 of the reply. The appellant emphasised that the interim order dated 14th February, 2020, passed by the learned Arbitrator entitled the appellant to sell the pledged shares, worth ₹ 26,18,12,942/–, as well as other remaining securities “and appropriate the proceeds thereof against the amounts outstanding to it, which as per the Statement Of Account as tendered by the Respondent on 24.02.2020 is ₹ 43,65,03,141/– (subject to future interest, default interest and other costs and charges as per the Transaction Documents), as on the said date”. The stay, by the learned Arbitrator, of his own order dated 14th February, 2020, it was submitted, alone stood in the way of the appellant doing so. As against these dues, the reply pointed out that the respondents were offering to pay only ₹ 4 crores upfront and a further amount of ₹ 5.10 crores before 31st March, 2020. This, it was submitted, substantially diluted and whittled down the interim order dated 14th February, 2020, of the learned Arbitrator. It was also submitted that the respondents’ claims were without merit. The appellant relied, further, on Clause 2.10 of the Loan Agreements, which rendered a statement, signed by an officer of the appellant, certifying the amount of any payment, including interest, payable under the loan agreement or any other Transaction Document, final and binding on the respondents.

17.3.2 Without prejudice, the appellant sought to further contend, in the reply, that Clauses 1.1(xxiv), 2.15, 7.3 and 10.1 of the Loan

Agreements and Recital B and Clauses 5(e) and 16 of the Pledge Agreements, disentitled the respondents to release of the security furnished by them, even were they to pay, to the appellant, the entire amounts as per the Statement of Account tendered by the appellant. These clauses, submitted the appellant, indicated that the security provided by Respondent 1 covered not only the amounts borrowed by it, but extended to other components such as interest, default interest, legal costs and expenses etc., constituting dues under the Loan Agreements. Drawing attention to the fact that the respondents chose to continue to arbitrate with respect to their claims, the appellant pointed out that it would have to continue, parallelly, to incur costs, charges and expenses till final adjudication of the dispute between the parties, till which time no direction for release of the securities could be passed. Any such direction, it was submitted, would amount to rewriting of the Loan Agreements and the Pledge Agreements, which was outside the province of the jurisdiction of the learned Arbitrator. Till such time, it was further submitted that the appellant was under no obligation to issue any 'No Objection Certificate'. Nonetheless, the appellant agreed to furnish such a 'No Objection Certificate' subject to payment, by the respondents, to the appellant, of the dues as per the Statement of Account furnished by the appellant, staggered in the manner proposed in the reply – which, needless to state, was more rigorous than the payment mechanism proposed by the respondents.

17.3.3 The appellant also disputed the claim of the respondents that the amount payable to the appellant was ₹ 36.4 crores. Attention was drawn to email dated 24th February, 2020, whereunder the appellant

had filed its Statement of Account with the respondents, reflecting the correct amount outstanding from the respondents, which was in the vicinity of ₹ 43 crores.

17.3.4 The learned Arbitrator was, therefore, requested to dismiss the Section 17 application of the respondents and vacate the stay of the order dated 14th February, 2020, as granted by him.

17.4 On 4th March, 2020, the appellant undertook, before the learned Arbitrator, to supply copies of the up-to-date ledger accounts to the respondents on or before 12th March, 2020. Albeit with some delay, the ledger accounts of the respondents, in the books of the appellant, came to be filed by the appellant, before the learned Arbitrator, in respect of the ₹ 85 crore loan on 14th March, 2020, and in respect of the ₹ 100 crore loan on 22nd March, 2020.

17.5 Second revised proposal of respondents: Consequent on receipt of the said up-to-date ledger accounts, the respondents tendered, on 10th May, 2020 before the learned Arbitrator, a revised proposal, reworking the amount payable to the appellant at ₹ 37.78 crores and suggesting a standard mechanism for payment thereof. Stress was laid, by the respondents, on the hardships being faced by them consequent on the intervening COVID-19 pandemic. Subject to approval of payment, by the respondents as suggested by them, the following mechanism was further suggested, for release of the pledged shares by the appellant:

“(a) release of 400,000 ZF Promoter Shares within 3 days of payment of the 2nd instalment, by which time

INR 9.27 crores would have been repaid

(b) release of 50% balance market listed shares (of value ₹ 4.75 crores) within 3 working days of payment of 3rd instalment (i.e. ₹ 9.5 crores),

(c) release of the remaining 50% of market listed shares (of value ₹ 4.75 crores) within 3 working days of payment of 4th instalment (of value ₹ 9.5 crores).”

17.6 Appellant’s response to second revised proposal: The appellant filed a reply, strongly objecting to the revised proposal of the respondents. Pointing out that it had not, as yet, encashed the demand draft of ₹ 4 crores tendered by the respondents, the appellant contended that the proposal for structured discharge of security by the appellant, conditional on payment by the respondents, was starkly in contravention of the Loan Agreements, particularly Clause 2.15 thereof, which entitled the appellant to retain the security for the entire balance of the outstanding amounts payable under the Loan Agreements. Other contentions, advanced in the reply, were broadly reiterative of those contained in the response, of the appellant, to the original revised proposal of the respondents, submitted on 18th February, 2020.

18. On 6th June, 2020, the learned Arbitrator reserved orders on the Section 17 application of the respondents, dated 20th February, 2020.

19. Thereafter, the impugned order came to be passed on 8th June, 2020, with which the appellant claims to be aggrieved.

20. On 16th December, 2020, the respondents submitted, to this Court, that Arb A (Comm) 27/2019, which challenged an *ad interim* order of the learned Arbitrator on one of the Section 17 applications, had become infructuous. The appeal was, however, adjourned as the appellant sought time to take instructions. Thereafter, though the appeal was listed twice, it could not reach for hearing. As a result, it remains pending. *Prima facie*, however, the appeal *has* been rendered infructuous in view of the subsequent order dated 14th February, 2020 *infra*, which the learned Arbitrator came to pass.

The Impugned Order

21. The submissions of learned Counsel before the learned Arbitrator, and the findings of the learned Arbitrator thereon, as contained in paras 19 to 24 of the impugned order, deserve to be reproduced, *in extenso*, thus:

“C. SUBMISSIONS OF THE PARTIES

19. Mr. Gopal Jain, appearing for the Claimants, submitted that their business had virtually stopped, but they did not want to go back on their word of repaying the loans, so they were prepared to pay back the entire outstanding amount of ₹ 37.84 crore (as determined by the Respondent), without prejudice to their rights. Mr. Jain said that the Claimants would make the payment in 4 instalments, and gave the following details:

a. Apart from the shares, the Claimants had also given securities consisting of immovable property worth more than ₹ 600 crore, as a consequence of which the Respondent remained fully protected against any alleged default.

b. The Claimants had already paid ₹ 4 crore when the present application was filed on 28.2.2020; and ₹

1.59 crore was deducted as tax at source (TDS) (this is thus to be accounted for).

c. The remaining amount would be paid as follows:

- i. 1st instalment by 23.6.2020 for ₹ 3.68 crore;
- ii. 2nd instalment by 23.7.2020 for ₹ 9.5 crore;
- iii. 3rd instalment by 10.8.2020 for ₹ 9.5 crore; and
- iv. 4th instalment by 31.8.2020 for ₹ 9.56 crore.

20. Mr. Jain requested that, upon payment of the 2nd instalment on 23.7.2020, the Respondent should issue a temporary No Objection Certificate (NOC), and release the pledged ZF shares to enable Claimant No. 1 to raise alternative financing. He also requested that after all instalments are paid, all the securities including the immovable properties (viz., the hotel, the mall and the farmhouse) should be released. He added that the personal and corporate bank guarantees pledged by the Claimants should also be returned. He pointed out that all of these remain without prejudice to the Claimants right to pursue their claim for damages.

21. Mr. Chandioke, appearing on behalf of the Respondent, said that it had no issues with the dates and amounts of instalments listed by the Claimants. However, the Respondent was not willing to issue a temporary NOC, or release the securities, as requested by the Claimants, even if the entire amount was paid. This was for two reasons. Firstly, he said that the Respondent was entitled to the cost of this arbitration, which was estimated to be at ₹ 4 crores, and these would act as securities against the said amount; and secondly, he said that Respondent was entitled to charge default interest, of a value not specified, for which also these would act as securities. Mr. Chandioke further submitted that in any event, under the contract, the Respondent is entitled to

withhold all the securities till the account is closed and consequently, the securities will not be released till the arbitration proceedings are concluded.

D. FINDINGS OF THE TRIBUNAL:

22. The Tribunal notes that the question of default interest raised by the Respondent as a ground for not releasing the securities and not issuing a temporary NOC was never pleaded at any time, either in correspondence or in the pleadings filed by the Respondent. This is the 1st time that this issue of default interest is being raised. It is also important to note that during the counter proposals made by the Respondent, the Respondent had itself agreed to issue a temporary NOC. The concept of NOC was explained in the Respondent's own pleadings of 26.5.2020 in para 7.4D. It was not to be treated as a "no dues" certificate, but is a document issued to enable the borrower to raise alternative finances. Surprisingly, this stand has now completely changed. The Respondent is now contending that even if the entire amount is paid, it cannot release the immovable properties or personal/corporate guarantees until the present arbitration matter is over, because it claims that it is entitled to hold onto the securities until the account is closed. In other words, the Respondent is arguing that, even if the whole amount has been paid, since the Claimants are pursuing claims for damages and the arbitration is pending, the Respondent has a right to withhold all the securities worth more than ₹ 600 crore, even if no dues are payable.

23. In the view of the Tribunal, this is an extremely unreasonable stand. It is evident that the Respondent is trying to pressurise the Claimants to give up or forgo the claims for damages made in their Statement of Claim as part of this arbitration. This unreasonable stand of the Respondent will also amount to effectively ruining the financial health of Claimant No. 1, whose business has already been adversely affected. There is no justifiable argument for the Respondent pursuing this position. We are at an unprecedented crossroads in India (and the world) today where the global economies are in dire straits, and no one can really predict what the future holds. In these circumstances, the RBI is considering extending the loan moratoria, and the Central government is looking to suspend the application of the

Bankruptcy Code. Even in the face of these unusual circumstances, in the present situation, the borrower has voluntarily expressed a willingness to pay the entire amount due, which makes the stance taken by the Respondent entirely unreasonable. Such a stance cannot be countenanced. It is virtually impossible for Claimant No. 1 to run its business without finances. Arguably, the Respondent is making a demand that is akin to that of a modern-day Shylock, seeking not only the pledged amount, but virtually claiming the right to withhold the securities indefinitely, which will likely lead to the ruin and bankruptcy of Claimant No. 1.

24. The Tribunal clearly finds this position of the Respondent entirely unacceptable.”

22. The impugned order concludes with the following directions (in para 25):

“a. The outstanding amount due will be paid by the Claimants to the Respondent in the instalments as stated below:

- i. 1st instalment by 23.6.2020 for ₹ 3.68 crore;
- ii. 2nd instalment by 23.7.2020 for ₹ 9.5 crore;
- iii. 3rd instalment by 10.8.2020 for ₹ 9.5 crore; and
- iv. 4th instalment by 31.8.2020 for ₹ 10.06 crore.

b. The outstanding amount due on the 4th and final instalment, i.e., on 31.8.2020, was valued by the Claimants at ₹ 9.56 crore. To this, the Tribunal adds a lump sum amount of ₹ 50 lakhs towards interest fallen due from 1.4.2020 to 31.8.2020. As a result, the total amount due on the 4th and final instalment on 31.8.2020 would be ₹ 10.06 crore (Rupees ten crore and six lakhs).

c. After the payment of the 2nd instalment on 23.7.2020, the Respondent will release half of the pledged ZF shares, and the remaining half of the pledged ZF shares will be deposited in an Escrow Account with the Tribunal’s Secretariat. At this

stage, the Respondent will also issue a temporary NOC to the Claimants to enable them to seek alternate financing. Needless to say, the Claimants' 3rd instalment is liable to be paid subject to the Respondents compliance with the direction of issuing the temporary NOC and release of the ZF shares as indicated above.

d. After the payment of the 4th and final instalment on 31.8.2020, the remaining half of the ZF shares kept in escrow will be released by the Tribunal. At this stage, all remaining securities will be released forthwith by the Respondent, including immovable properties, blue-chip (Category I) shares, and personal/corporate guarantees.

e. Claimant No. 1 and its CEO and MD shall file an undertaking with the Tribunal on or before 23.6.2020 that in case the Tribunal order costs or orders to pay any additional amount under the final award, the Claimants will deposit the same within 60 days of the date of the award, without prejudice to pursue appropriate remedies.

f. The interim injunction granted vide order dated 18.5.2019 will continue to stand. However, in case of any one default on the part of Claimant no. 1 in the payment of the instalments as listed above, the Respondent will be entitled to encash the pledged shares, apart from taking any action it prefers to take in respect of the immovable properties and the personal/corporate guarantees in the event of such default.”

Grounds of challenge, and their analysis

23. Detailed arguments were advanced, by Mr. Rajiv Nayar, learned Senior Counsel for the appellant, to assail the sustainability of the impugned order. Mr Gopal Jain, learned Senior Counsel, responded. In my view, however, even if considered cumulatively, the grounds urged by Mr Nayar do not make out a case for interference by this Court, in exercise of its appellate jurisdiction

under Section 37(2)(b) of the 1996 Act.

24. Some prefatory observations:

25.1 It is necessary, in my view, for any court, exercising appellate jurisdiction under Section 37(2)(b) over an interlocutory order of an arbitral tribunal, especially one rendered under Section 17, to be conscious of the peripheries of the jurisdiction of the arbitral tribunal, as well as of the appellate court under Section 37(2)(b).

25.2 An arbitral tribunal, while adjudicating an application for interim protection under Section 17, does not determine the *lis* between the parties. It is not required, or even expected, to embark on a detailed analysis of the clauses of the contract, or their true construction and import. It acts, essentially, on equity. While doing so, of course, the arbitral tribunal – as in the case of a Court exercising Section 9 jurisdiction – would not pass directions inimical to the contractual covenants, or which would hinder their compliance or enforcement at a later stage. If, however, while protecting the rights and claims of the parties as urged on the basis of the terms of the contract, the arbitral tribunal, in order to balance the equities, ensure placement of the parties before it on an even ground, and preserve the sanctity of the arbitral process, grants interim protection, the sustainability of the grant cannot be tested on a strict construction of the covenants of the contract.

25.3 *Arcelor Mittal Nippon Steel India Ltd v. Essar Bulk Terminal*

*Ltd.*¹, recently rendered by the Supreme Court, definitively settles the position that the scope of Section 17 jurisdiction of the arbitral tribunal is akin to that of the court under Section 9.

25.4 The following passages, from a recent decision of a Division Bench of this Court in *DLF Ltd. v. Leighton India Contractors P. Ltd.*², neatly encapsulate the legal position regarding the approach of the Section 9 Court, or the Section 17 Tribunal, to the contractual covenants and their interpretation:

“48. There is another aspect that needs to be discussed. While passing interim orders, relief that would amount to grant of a final relief must be eschewed. Also, while it is true that what would be the nature of an interim measure of protection that would appear to the court to be “just and convenient” would certainly vary from case to case. But, *while deciding on the relief, the court ought not to venture into determination of liabilities and the interpretation of clauses....*

49. In the instant case, *both sides have extensively referred to communications between them, pertaining to extension of time to complete the project, the issuance of C.C., the defaults found in the work and the Clauses of the C.A., detailing the mutual rights and obligations. Clearly, therefore, these are matters that cannot be considered by the court in an application under Section 9.* But the learned Single Judge has clearly dealt with the question of illegality and had laid the fault at the door of DLF. This it did on the basis of an assessment of the facts and the Clauses of the C.A. and concluded that while DLF could have encashed the RBGs, it was not proper to have encashed the PBGs and therefore, found it “just and proper” to direct DLF to furnish FDRs of

¹ 2021 SCC OnLine SC 718

² (2021) 4 Arb LR 160

the value of Rs. 143,87,22,708/-. The court has, thus, accepted the stand of Leighton, preferring it over the stand of DLF.”

(Emphasis supplied)

25.5 It is hazardous, therefore, for an arbitral tribunal exercising jurisdiction under Section 17, to embark on a detailed analysis of the clauses of the contract. This would amount to a pre-trial determination of the issues in controversy and would also be inimical to the concept of a dispassionate arbitral process. So long as the Arbitral Tribunal appreciates the contentions and protects the rights of the parties which would result, were their contentions to be accepted at the final stage, the Arbitral Tribunal would be entirely within its authority in issuing interlocutory protective directions. To reiterate, the two main factors which are required to weigh with the Arbitral Tribunal at that stage are (i) protection of the arbitral corpus and preservation of the arbitral process, and (ii) balancing of equities between the parties. While doing so, of course, the arbitral tribunal is required to bear, in mind, the considerations of the existence of a *prima facie* case, balance of convenience, and the possibility of irreparable loss or prejudice to one or the other party, were interim protection to be, or not to be, granted.

25.6 Acute awareness of this legal position is expected, of the appellate court exercising jurisdiction under Section 37(2)(b) of the 1996 Act. It cannot proceed to interfere with interlocutory protective orders, passed by the arbitral tribunal under Section 17, by sifting through the contract and its covenants with a toothcomb. While, in

the matter of the extent of its jurisdiction, with respect to the nature of order which it would pass, the Section 37(2)(b) court enjoys all the latitude which any appellate court would enjoy, it remains, however, subject to the constraints which would apply to any court, seized with a challenge to an arbitral award. Discretionary orders, passed by the arbitral tribunal under Section 17, are not easily to be trifled with. So long as the arbitral tribunal adheres to the broad principles of equity and protects the claims of the parties, predicated on the covenants of the contract and their respective contentions, the discretion enjoyed by the arbitral tribunal under Section 17 is required to be respected. On this aspect, I have had occasion to observe thus, recently, in *Augmont Gold (P) Ltd v. One97 Communication Ltd*³:

“68. On the scope of interference with the exercise of discretion by the Arbitral Tribunal under Section 17(1)(ii)(b), I have had occasion to observe thus, in *Dinesh Gupta v. Anand Gupta*⁴:

“60. This position is additionally underscored, where the order of the arbitrator is relatable to Section 17(1)(ii)(b) or (e), and directs furnishing of security. Direction, to litigating parties, to furnish security, is a purely discretionary exercise, intended to balance the equities. The scope of interference, in appeal, with a discretionary order passed by a judicial forum, stands authoritatively delineated in the following passages, from *Wander Ltd. v. Antox India P Ltd.*⁵:

“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

³ 2021 SCC OnLine Del 4484

⁴ MANU/DE/1727/2020

⁵ 1990 Supp SCC 727

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.

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**⁶:*

“... These principles are well established, but as has been observed by

⁶ AIR 1960 SC 1156

Viscount Simon in *Charles Osenton & Co. v. Jhanaton*⁷, ‘...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’.”

The appellate judgment does not seem to defer to this principle.”

*That this principle applies to exercise of appellate jurisdiction, over discretionary interlocutory orders, passed by arbitrators, under Section 17 of the 1996 Act, has been reiterated, by this Court, in several decisions, including Bakshi Speedways v. Hindustan Petroleum Corporation*⁸, *EMAAR MGF Land Ltd. v. Kakade British Realities Pvt. Ltd.*⁹, *Reliance Communications Ltd. v. Bharti Infratel Ltd.*¹⁰, *Ascot Hotels and Resorts Pvt. Ltd. v. Connaught Plaza Restaurants Pvt. Ltd.*¹¹ and *Green Infra Wind Energy Ltd. v. Regen Powertech Pvt. Ltd.*¹².”

69. In examining any challenge to an order passed by an Arbitral Tribunal, whether interlocutory or final, the Court has to be mindful of the preamble to the 1996 Act, as well as of Section 5 thereof. Preambularly, the 1996 Act is “an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.” The Act, therefore, seeks, avowedly, to foster the arbitral process. Towards this end, Section 5 of the 1996 Act provides thus:

“5. Extent of judicial intervention. –
Notwithstanding anything contained in any other law for the time being in force, in matters governed by this

⁷ [1942] A.C. 130

⁸ (2009) 162 DLT 638

⁹ (2013) 138 DRJ 507

¹⁰ 2018 SCC OnLine Del 6564

¹¹ (2018) 249 DRJ 329

¹² 2018 SCC OnLine Del 8273

Part, no judicial authority shall intervene except where so provided in this Part.”

70. In this context, one may also refer to Section 6, which reads thus:

“6. **Administrative assistance.** – In order to facilitate the conduct of the arbitral proceedings, the parties, or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.”

71. *Every attempt is required to be made, therefore, to promote the arbitral process, and every attempt at seeking to retard it, is, equally, required to be eschewed. This philosophy, in my view, is required to pervade the exercise of jurisdiction as much under Section 37(2), as under Section 34 of the 1996 Act.”*

72. *Added to this, is the need for judicial circumspection, when the order under challenge is discretionary in nature, as in the present case.*

73. *It is only in rare and extreme cases, therefore, that, in exercise of its appellate jurisdiction under Section 37, a Court would interfere with a discretionary order passed under Section 17. An order for deposit, under Section 17(1)(ii)(b), is, fundamentally and at all times, an order passed in exercise of its jurisdiction. Discretionary orders, by their very nature, are amenable to judicial interference to a far lesser degree than others.”*

(Emphasis supplied)

25.7 The scope of judicial review by Court exercising Section 37(2)(b) jurisdiction cannot not, therefore, be likened to appellate jurisdiction in the classical sense. It remains, at all times, circumscribed by the pre-eminent consideration that the order under challenge is interlocutory, discretionary and one rendered by an

arbitral tribunal, entitled to all the proscriptive protections which attach to the arbitral process in general.

26. A bird's eye view:

26.1 What has the learned Arbitrator done in the present case? He has accepted the offer of the respondents to pay to the appellant, the entire amount as computed in the Statement of Accounts tendered by the appellant itself, in instalments. He has protected the right of the appellant by directing that the respondents would continue to remain liable to pay any additional amounts, if found payable by the learned Arbitrator in the final award.

26.2 The appellant did not prefer any claim before the learned Arbitrator. Nor did the appellant prefer an application under Section 17. The claim before the learned Arbitrator was at the instance of the respondents. The appellant is the respondent in the arbitral process. The claim of the respondents, before the learned Arbitrator, was against invocation, by the appellant, of the pledged securities, specifically the pledged shares. The only justification – indeed, the only possible justification – of the appellant, for invoking the securities, was that the respondents were in breach of the loan agreements. The liability of the respondents, under the loan agreements, was purely financial. The entitlement of the appellant, against the respondents, under the loan agreements, equally, was only to monies, and nothing more. Once the learned Arbitrator protected *this* entitlement, in my view, no fault could be found in his direction

to the appellant to release the pledged securities.

26.3 The only real objection, as ventilated by Mr. Nayar, based on the contractual covenants, was that the securities did not secure merely the loan amounts, but also secured all entitlements of the appellant, against the respondents, including damages, costs, default interest, etc. Once this purported right of the appellant, against the respondents, was protected, in the manner which appeared most appropriate to the learned Arbitrator, no substantial objection by the appellant, to the release of the pledged securities, survives. The learned Arbitrator has adequately protected this interest, by directing that the respondents would remain bound to pay, to the appellant, any additional amount which may become payable, consequent on the final Award. A written undertaking, to that effect, was also directed to be furnished by the CEO and MD of the respondents. The entire amount payable by the respondents to the appellant, as per the Statement of Accounts of the respondents as furnished by the appellant itself, was directed to be physically paid. Once, without demur, the respondents were willing to pay this amount upfront, and the right of the appellant to any additional amount from the respondents remain preserved in the impugned order, I fail to understand how the appellant can claim to nurture any grievance.

26.4 Mr. Gopal Jain, learned Senior Counsel for the respondents, in fact, expressed surprise at the appellant having sought to challenge the impugned order as, in his submission, the order, if anything, was in the nature of a windfall to the appellant. I must confess that I am

inclined to agree with the submission, especially as – to reiterate – the appellant was neither claimant, nor counter-claimant, before the learned Arbitrator.

27. The objections of Mr. Nayar, to the impugned order may, in the backdrop of these observations, be briefly dealt with, thus:

(i) Certain preliminary objections, to the maintainability of the Section 17 application of the respondents (which came to be decided by the impugned order), and to the jurisdiction of the learned Arbitrator to pass the impugned order, were advanced. They are addressed, seriatim:

(a) It was sought to be contended that the respondents could not have maintained a fresh Section 17 application, once the five earlier applications, filed by them, were decided by the learned Arbitrator *vide* his order dated 14th February, 2020. Collaterally, it was argued that the learned Arbitrator could not have reviewed his own order dated 14th February, 2020, which he did. I am unable to agree. In my view, neither did the respondents seek a review of the order dated 14th February, 2020 nor, by the impugned order dated 8th June, 2020, did the learned Arbitrator review his earlier order. The five applications, decided by the order dated 14th February, 2020, were for an injunction against the appellant invoking the pledged securities, even while the claims of the respondents

against the appellant were pending arbitration. The learned Arbitrator held that the mere pendency of the claims of the respondents did not operate as a fetter on the contractual right of the appellant to invoke the pledged securities, once an event of default had, in the appellant's perception, occurred. At that stage, the liability of the respondents towards the appellant, under the loan agreements, was at large. After the passing of the interim order dated 14th February, 2020, however, the respondents agreed, voluntarily, to liquidate the entire amount due to the appellant, as per the Statement of Accounts furnished by the appellant itself. No such offer was in existence at the time of passing of the order dated 14th February, 2020. The fresh Section 17 application, filed by the respondents on 18th February, 2020, was in the wake of this offer/proposal, which constituted an entirely new circumstance, not in existence when the order dated 14th February, 2020 was passed. There is no bar, under the 1996 Act, to the filing of a subsequent Section 17 application, after the disposal of the earlier application under the same provision, especially where the subsequent application is based on new facts, a new offer and contained prayers entirely distinct from those contained in the earlier Section 17 application. As this was a new circumstance, the learned Arbitrator cannot be said, in having passed the impugned order on the fresh Section 17 application, in view of this new circumstance

and the revised proposal of the respondents, to have reviewed his earlier decision. The preliminary objections of the appellant are, therefore, in my view, bereft of merit.

(b) Even otherwise, the plea of the appellant, predicated on the lack of authority in the learned Arbitrator, to review his earlier decision, must also be regarded as completely misconceived, as it fails to take into account the fundamental circumstance that the view of the learned Arbitrator, whether in the order dated 14th February, 2020 or, for that matter, in the impugned order dated 8th June, 2020, is only a *prima facie* view. It is always open to a Court – and, equally to an arbitral tribunal – to reconsider an earlier *prima facie* view expressed by it in the proceedings and even to adopt a diametrically opposite view at a later stage. It is, axiomatically, for this very reason that interlocutory opinions, expressed during the pendency of the litigation, are always *prima facie*. Interlocutory orders are interlocutory, and nothing more. They do not constitute any final expression of opinion, as would bind the arbitrator, or the Court, at a later stage of the proceedings. No exercise of review would be involved even if a Court takes, during the pendency of proceedings in a particular litigation, a view different from the earlier *prima facie* view expressed by it. For these reasons, the

decisions cited by Mr. Nayar, to support the submission that no power of review vested in the learned Arbitrator, is completely inapplicable.

(c) Mr. Nayar also took exception to the staying, by the learned Arbitrator, on 14th February, 2020, of the interim order passed by him earlier on the same day. This objection, too, in my view, is without serious substance. Effectively, what the learned Arbitrator did was only to make his interim directions, earlier passed on the same day, operative from a future date. Courts regularly do this, and no legitimate exception can, in my view, be taken thereto. It is always open to a Court, while passing interim directions, to make them operative, or applicable, from a future date to preserve the interests of justice and safeguard the rights of the parties.

The preliminary objections of Mr. Nayar, therefore, fail to impress.

(ii) Elaborate arguments were addressed, both orally as well as in writing, with respect to the covenants of the Loan Agreements and the Pledged Agreements, to contend that the impugned order was in the teeth thereof. Various judicial authorities were also cited. These decisions, however, without exception, pertained to challenges arising from final awards, under Section 34 of the 1996 Act. While finally adjudicating

the *lis* between the parties, the arbitral tribunal is, unquestionably, strictly bound by the covenants of the contracts. No consideration of equity has any part to play at that stage. Even if the contractual covenants result, in their application, in an outcome inequitable to one or the other party, the arbitral tribunal has no option but to decide in accordance with the contractual covenants. That stage has not, however, been reached, till date. The considerations which operate at the Section 17 stage are, as already expressed by me, fundamentally different. All that the arbitral tribunal is expected to do, at that stage, is to appreciate the contentions of the parties predicated on the rival constructions of the contractual covenants, and the entitlements of the parties were their contentions to be accepted, and to protect these entitlements while granting interim protection. Once this is done, the mandate of Section 17 stands satisfied. Of course, it is not open to an arbitral tribunal to pass any directions, under Section 17, as would divest either party, altogether, from its right, as claimed in the pending arbitral proceedings. Nor can the Section 17 order operate so as to frustrate any attempt, by either side, at enforcing, at a later stage, the covenants of the contract. Indeed, the appellant has not even sought to contend that the learned Arbitrator has done anything of the kind in the present case.

(iii) Having said that, I must take stock of Mr. Nayar's submission that the pledged securities secure not only the loan

amounts, but also all entitlements of the appellant against the respondents, including default interest, costs of the arbitration, damages, etc. These are essentially aspects to be decided by the learned Arbitrator while finally adjudicating the *lis* and, therefore, the learned Arbitrator has, rightly, not expressed any opinion thereon, in the impugned order. At the same time, the clauses on which Mr. Nayar relies, whether in the Loan Agreements or in the Pledged Agreements, secure the amounts “due and payable” to the appellant, by the security furnished by the respondents. The ambit of the expression “due and payable”, and the issue of whether this would extend to amounts which are still inchoate, such as arbitral costs, damages, etc., may be arguable. It is not in my place to express any opinion in this regard, especially when the arbitral proceedings are still pending. This, however, merely reinforces the fact that, by securing the rights of the appellant, against the respondents, to any additional amounts which might become payable consequent on the final Award, and directing the CEO and MD of Respondent 1 to file an undertaking in that regard, the learned Arbitrator has fairly balanced the equities between the parties.

(iv) I may note, in this regard, that Mr. Nayar did not seek to contend, even without prejudice, that any additional safeguard ought to have been put in place by the learned Arbitrator, to protect any additional amounts which, finally, may be found to be payable by the respondents to the appellant. The written

submissions filed by the appellant, however, seek to castigate the undertaking, exacted from the CEO and MD of Respondent 1 in the impugned order, as “worthless”. No substantial basis for this contention is, however, forthcoming, except for a broad reference to a chargesheet having been issued by the Enforcement Directorate to the CEO and MD of Respondent 1, and raids having taken place at his premises. These, according to the written submissions, “expose these assets to the imminent threat of attachment”. The submission is completely presumptuous, with no supportive particulars whatsoever. Besides, the impugned order does not disclose any such stand having been taken by the appellant before the learned Arbitrator.

(v) Mr. Nayar also sought to contend that the learned Arbitrator could not have regarded the dues of the respondents to the appellant, as reflected in the Statement of Accounts of the respondents in the books of the appellant, as reflective of the entire outstanding amount, payable by the respondents to the appellant. This objection, again, even if treated as valid, stands safeguarded by clause (e) in para 25 of the impugned order. At the interim Section 17 stage, no exception can be found with the learned Arbitrator having chosen to accept the figures contained in the Statement of Account as furnished by the appellant itself. Clause 2.10 of the Loan Agreements also accords, *prima facie*, sanctity to the Statement of Accounts of the parties in their books. Clause 3 of the Pledge Agreements,

too, confers sanctity to the Statement of Accounts as tendered by the appellant. The appellant, too, in its reply to the respondents' Section 17 application, had called upon the respondents to make payment, to the appellant, in accordance with the Statement of Accounts furnished by it. Nonetheless, in order to assuage any apprehensions in this regard, it is clarified that it would be open to the appellant to demonstrate, before the learned Arbitrator, that the dues of the respondent, against the appellant, exceed the amount reflected in the Statement of Account as furnished by the appellant – and, needless to say, to the respondents to demonstrate contrariwise.

(vi) The written submissions, filed by the appellant, further contend that, as the claim of the respondents, in their amended Statement of Claim, was for damages, the impugned order was not required to be passed to preserve the subject matter of arbitration. All that needs to be noted, while dealing with this submission, is that the claims of the respondents against the appellant, in the amended Statement of Claim, was not limited to damages. In fact, a specific prayer for an injunction, against the appellant, from enforcing the pledged securities, was also incorporated.

(vii) The appellant further contends that the interests of the respondents stood sufficiently safeguarded by para 54 of the interim order passed by the learned Arbitrator on 14th February, 2020. The learned Arbitrator had, in the said paragraph,

permitted sale, by the appellant, of the pledged shares, subject to the appellant filing a written undertaking to, in the event of its failing in the arbitration or on the learned Arbitrator so directing, purchase the shares from the open market and restore them to the respondents or pay, to the respondents, an amount equivalent to the listed price of the said shares as on that date, along with interest. There could, quite obviously, have been no question of the learned Arbitrator adopting this course, once the respondents were willing to liquidate the entire dues of the appellant, as per its Statement of Account. Once the decision of the learned Arbitrator, to direct release of the pledged securities, at the interlocutory stage, on the respondents liquidating the dues of the appellant as per its Statement of Account, is found not to be deserving of interference, this contention of the appellant does not survive for consideration.

(viii) Mr. Nayar also sought to question the authority of the learned Arbitrator to permit payment, by the respondents to the appellant, on instalment basis. To my mind, this direction was entirely within the province of the jurisdiction of the learned Arbitrator. Where the interlocutory directions, under Section 17, included a direction for payment by either party to the arbitration, whether to the other party or by way of a deposit, the Arbitral Tribunal was well within its authority to allow such payment to be made in instalments. There is, therefore, no substance whatsoever in the objection of Mr. Nayar.

(ix) The impugned order, it is further contended, converts the appellant from a secured creditor to an unsecured creditor. Again, once the learned Arbitrator had directed the respondents to disgorge, to the appellant, the entire amount due to the appellant, as per its Statement of Accounts, and had also bound down the respondents to pay, to the appellant, any further amounts, as per the final Award which may come to be passed, I fail to understand how the appellant could have any grievance in its failing to remain a “secured creditor”. The right of a creditor to remain secured continues only so long as any dues remain, requiring security. Apart from the loaned amounts, the entitlement of the appellant against the respondents, even as per the appellant, was only to default interest, arbitral costs, damages, and the like. The loaned amount has been directed, by the impugned order, to be paid to the appellant forthwith. The entitlement, of the appellant, to any additional amount, stands safeguarded by clause (e) in the operative directions as contained in the impugned order. All dues of the appellant against the respondents, thus, stand secured. No occasion remains, therefore, for the appellant to continue to hold on to the pledged securities. The view of the learned Arbitrator that, all its dues against the respondents having thus been secured, the appellant cannot continue to hold on to the pledged shares and other securities, cannot, therefore, be said to be illegal, or even unreasonable. This contention of Mr. Nayar, too, therefore, does not commend acceptance.

(x) Though Mr. Nayar did not plead violation of the principles of natural justice by the learned Arbitrator, the written submissions filed by the appellant seek to contend that the learned Arbitrator did not afford adequate opportunity, to the appellant, to respond to the revised proposal of the respondents. I see no substance in this contention either. The appellant filed written responses to both revised proposals tendered by the respondents. Both parties were heard by the learned Arbitrator. The impugned order came to be passed only thereafter. The appellant cannot, therefore, be said to have suffered for want of due opportunity to meet the proposals advanced by the respondents.

28. Indeed, the appellant having itself, in its reply to the second revised proposal of the respondents, having, albeit without prejudice, agreed to accept ₹ 37.84 crores for the time being, I fail to understand how the appellant can claim to be aggrieved by the impugned order. In this regard, para 51 of the written submissions filed by the appellant contends thus:

“...the counter offer No. 2, was made on a without prejudice basis. In the said counter offer, the Appellants agreed to accept Rs.37.84 crore for the time being, however, such acceptance was expressly made subject to the rights of the Appellant to claim all amounts as per the Loan Agreements.”

(Emphasis supplied)

This single acknowledgement, in my considered opinion, is by itself sufficient to completely non-suit the appellant in the present appeal.

The appellant itself agreed to accept, at the interim stage, ₹ 37.84 crores from the respondents, “for the time being”. The only caveat was that the rights of the appellant, to claim all amounts as per the Loan Agreements, was required to be protected. The impugned order adequately protects this right. That, by itself is, in my opinion, sufficient to dismiss the present appeal.

29. Indeed, I am constrained to observe that the vehemence of the appellant’s opposition to the impugned order appears to be influenced, to no little extent, by the value of the pledged securities, which is admittedly in the region of ₹ 600 crores. As against this, the loan amount payable by the respondents to the appellant was only in the region of ₹ 37.84 crores or thereabouts. Even if one were to augment this figure with arbitral costs, interest and damages, the total amount due would be nowhere in the region of the value of the securities. Though I may not venture so far as to characterise the appellant as a “modern day Shylock” – Shylock having sought of Antonio no less than his life itself¹³ – I am unable to find fault with the observation, of the learned Arbitrator, that the insistence, of the appellant, to hold onto – or, worse, to dissipate – the securities, even in the face of the offer extended by the respondents, was less than fair.

Conclusion

30. In the circumstances, no occasion exists, in my view, to interfere with the impugned order.

¹³ Ref. Shakespeare’s ‘The Merchant of Venice’

31. The appeal is dismissed with no orders as to costs.

C. HARI SHANKAR, J.

NOVEMBER 8, 2021*dsn/r.bararia*

