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

Reserved on: 19th August, 2020

Pronounced on: 5th October, 2021

+ ARB. A. (COMM.) 15/2020 & IA 6815/2020, IA 6816/2020
IA 6817/2020

MR. SANJAY ARORA & ANR. Petitioners
Through: Mr. Jayant K. Mehta, Ms.
Madhavi Khare, Mr. Apoorva Bhumesht and
Mr. Pranay Chitale, Advs.

versus

MR. RAJAN CHADHA & ORS. Respondents
Through: Mr. Rajshekar Rao, Mr. Rohan
Jaitley, Mr. Bhuvanesh Sehgal, Mr. Akshay
Sharma, and Mr. Kartik Sundar, Advs.

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

J U D G M E N T

% **05.10.2021**

1. This appeal, under Section 37(2)(b)¹ of the Arbitration and Conciliation Act, 1996 (the 1996 Act), is directed against the order dated 1st July, 2020, passed by the learned sole arbitrator.

¹ 37. **Appealable orders –**

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal –

(b) granting or refusing to grant an interim measure under section 17.

2. Before proceeding to advert, in detail, to the facts of the case, I deem it appropriate to dispose, at the outset, of one of the objections raised by the appellant to challenge the impugned order.

Re. contention regarding absence of “urgency”

3. The dispute pertains to the respective liabilities of Appellant No. 1, Sanjay Arora *vis-a-vis* Rajan Chadha and Rajiv Chadha (Respondents 1 and 2, referred to, hereinafter, as “the Chadhas”) and Sumit Gupta and Shilpa Gupta (Respondents 3 and 4, referred to, hereinafter, as “the Guptas”) *qua* a loan availed by Appellant No. 2, M/s RBT Pvt. Ltd. (“RBT”) from South Indian Bank (“the Bank”), against which a property located at C-11/4, Arjun Marg, DLF City, Phase-1 - 122002 (“the Gurgaon property”), belonging to Rajan Chadha and his wife, stood mortgaged. (For sake of convenience, Sanjay Arora would hereinafter be referred to as “the appellant”)

4. The impugned order has been passed on a petition, filed by Respondents 1 and 2, before this Court, under Section 9(1)(ii) of the 1996 Act², treating it as an application under Section 17(1)(ii)³. An

² “9. **Interim measures, etc. by Court. –**

(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court –

(ii) for an interim measure of protection in respect of any of the following matters, namely –

- (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
- (b) securing the amount in dispute in the arbitration;

- (d) interim injunction or the appointment of a receiver;
- (e) such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation, any proceedings before it.”

³ “17. **Interim measures ordered by arbitral tribunal. –**

(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal –

objection has been raised, by the appellant, regarding the jurisdiction and authority of the learned Arbitral Tribunal to do so; however, I will deal with that objection somewhat later in this judgment. Suffice it to state, at this stage, that, of the various prayers contained in the Section 17 application of Respondents 1 and 2, the only prayer which was pressed, and which has been granted by the learned Arbitral Tribunal *vide* the impugned order, is for a direction to the appellant to continue to pay, into the loan account of RBT, the equated monthly instalments (EMIs) payable against the loan advanced to RBT.

5. Having held that a *prima facie* case of liability, of the appellant, to pay the said EMIs during the pendency of proceedings existed, the learned Arbitral Tribunal has directed the appellant to continue to do so during the pendency of the arbitral proceedings. The following reasoning has been advanced, by the learned Arbitral Tribunal, in paras 36 and 37 of the impugned order, to justify grant of the impugned interim direction:

“36. Learned counsel for the respondents points out that the EMIs qua the loan account (which are 2 EMIs of Rs.9.72 lacs in a month) have to be discharged by the company in order that the loan account of the company does not become an NPA which otherwise would then target proceedings under the SARFESI(sic) Act. Learned counsel for the claimant

(ii) for an interim measure of protection in respect of any of the following matters, namely –

- (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
- (b) securing the amount in dispute in the arbitration;

- (d) interim injunction or the appointment of a receiver;
- (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.”

points out that the company was not abiding by this regime and the last installment of Rs.9.72 lacs had been paid by the claimants into the loan account of the company (admittedly paid) in order that the loan account of the company does not become NPA although this was not an obligation cast upon him. The obligation to discharge the EMIs into the loan account of the company was upon Shri Sanjay Arora. The claimant had done this only on an apprehension that the property might become the target of SARFESI(sic) proceedings.

37. Learned counsel for the claimant further submits that he is only pressing prayer (e) of his application. The undersigned notes this submission. The undersigned also notes the statement/concession granted before Hon'ble High Court by the respondent on 11.6.2020 which would continue till the disposal of the arbitral proceedings. The undersigned is of the view that an irreparable loss and injury would be suffered by the claimant at this stage if the loan liability is not discharged (as per the terms and conditions of the loan) and if the EMIs are not paid by the respondents the collateral security (house owned jointly by claimant No.1 and his wife) could become the subject matter of summary proceedings under the SARFESI (sic) Act. This apprehension of the claimant at this stage has been prima facie established and balance of convenience is thus in favour of the claimant. Accordingly the undersigned is of the view that till the disposal of this petition respondent No.2 acting for and on behalf of Respondent No.1 shall continue to pay the EMIs into the loan account of the company as per the terms and conditions of the loan account.”

6. The very first argument advanced before me by Mr. Jayant Mehta, learned Counsel for the appellant, was that, irrespective of the merits of the case, no such urgency existed, as would justify issuance of the impugned direction at this stage. The assertion, to this effect, as contained in para 1(iv) of the present appeal, on which pointed reliance was placed by Mr. Mehta, reads as under:

“The Respondent No.1 and 2 have pleaded fake urgency as there is no evidence of any impending threat of irreparable damage. The Application under Section 9 is based solely on the premise that interim direction for payment of Bank EMI is required as the loan account of RBT will be declared NPA if payments are not made urgently. It is submitted that in light of the spread of COVID -19, the Reserve Bank of India has vide circulars dated 27.03.2020 and 22.05.2020 already clarified that no accounts can be declared NPA till 31.08.2020. Further, no communication/notice has been issued by South Indian Bank stating that the loan account will be declared NPA if payments are not made urgently. Furthermore, under Section 13(2) of the SARFAESI Act, the bank is required to issue a notice granting 60 days to the borrower to pay the outstanding amounts before initiating any proceedings thereunder. No such notice has been issued by the South Indian Bank to the Appellants till date. The sole basis of seeking interim measure was a self serving, self generated and misleading documents (letter dated 2.3.2020 by Respondents to Bank) whereby Respondents (in spite of not being so authorized under the Memorandum of Understanding) suo moto approached a bank official and deposited one EMI of Rs. 9 lacs on a false pretext that non payment of EMI could lead to the loan account being declared NPA. Whereas on the contrary the Appellant No.1 had substantially reduced the loan liability by Rs. 4 Crore approximately since November 2019 and for which bank statements were also produced during the hearing”

7. To my mind, this submission is completely devoid of substance.

8. In the first instance, I may observe that the scope of interference, under Section 37(2)(b) of the 1996 Act, by a court, with the exercise of discretionary jurisdiction by an arbitral tribunal is subject to the following principles, as expostulated by the Supreme Court in **Wander Ltd. v. Antox India P. Ltd.**⁴, which dealt with the scope of appellate jurisdiction over interlocutory discretionary orders:

⁴ 1990 Supp SCC 727

“13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox’s alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in **Printers (Mysore) Private Ltd. v. Pothan Joseph, (1960) 3 SCR 713: AIR 1960 SC 1156.**”

“These principles are well established, but as has been observed by Viscount Simon in **Charles Osenton & Co. v. Jhanaton, 1942 AC 130** ‘...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case’.”

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

9. Assessment of whether a case denotes sufficient urgency, as would justify grant of interlocutory protective orders under Section 17, is undoubtedly a matter of discretion.

10. The scope of interference, in an appeal, with the exercise of such discretion, is extremely limited. The court cannot, ordinarily, interfere with the order on the ground that, in its estimation, the urgency was not such as would justify passing of the impugned order. If, no doubt, the learned Arbitral Tribunal has relied on irrelevant or inadmissible material to return a finding of urgency, or if the arbitral tribunal has passed the interlocutory protective order without returning any finding of urgency, then, undoubtedly, the court may interfere, as such exercise would border on perversity, as known to law. Where, however, the learned Arbitral Tribunal has returned a finding of urgency, supported by factual material, then, *if the material is not found to be incorrect or irrelevant*, the question of whether the material denotes urgency of a degree sufficient to grant interim protection is, essentially, a matter relating to the subjective satisfaction of the learned Arbitral Tribunal. The court would not - and should not, in my opinion – substitute its subjective satisfaction for that of the learned Arbitral Tribunal.

11. In the present case, the learned Arbitral Tribunal has opined that, were the EMIs not paid into the loan account of RBT, there was a

possibility of the loan account being declared a Non Performing Asset (NPA) and being subjected to proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002. The possibility of the loan account being declared NPA, and of SARFAESI proceedings being initiated on that ground, has not been refuted in the present appeal. Nor has Mr Mehta, during arguments, so sought to contend. All that is contended is that the SARFAESI proceedings require, at the first instance, a 60-day notice to the company against which the proceedings are proposed to be initiated, to liquidate the loan. As such, it is submitted that there was no such pressing urgency as would justify grant of the impugned interim protective measures.

12. I am unable to agree. Once the possibility of the loan account of RBT being declared NPA, and SARFAESI proceedings, being initiated in that regard, loomed large, if the learned Arbitral Tribunal sought to grant interim protection in order to avoid such an exigency, I can hardly interfere with the exercise of such discretion, in exercise of my appellate jurisdiction under Section 37(2)(b) of the 1996 Act.

13. It cannot be said that the learned Arbitral Tribunal ought to have waited for a 60-day notice under the SARFAESI Act to be issued in the first instance, before granting interim protection. One does not close the stable doors after the horses have bolted. In any event, once there was a real and live possibility of the bank account of RBT being declared an NPA, owing to non-infusion of EMIs into the account,

that, even by itself, in my view, would have justified the passing of the interlocutory protective order by the learned Arbitral Tribunal.

14. The objection of Mr. Mehta, to the finding of urgency, as returned by the learned Arbitral Tribunal in paras 36 and 37 of the impugned order, is rejected.

Facts

15. Having said that, it is undoubtedly necessary to examine whether the finding of the learned Arbitral Tribunal, regarding *prima facie* liability, on the part of the appellant, to continue to pay the EMIs into the loan account of RBT, was, or was not, sustainable in law.

16. It is trite that exercise of jurisdiction under Section 17 of the 1996 Act has to abide by the principles of Orders XXXVIII and XXXIX of the Code of Civil Procedure, 1908 (“the CPC”).

17. Order XXXVIII of the CPC does not call for application, as it relates to Section 17(1)(ii)(b) of the 1996 Act, and the present order has not been passed under the said provision.

18. What has to be examined is, therefore, whether the finding of the learned Arbitral Tribunal, regarding *prima facie* liability of the appellant, to continue to pay EMIs into the loan account of RBT, calls for interference by this Court under Section 37(2)(b) or not.

19. This Court has already opined, in **Dinesh Gupta v. Anand Gupta**⁵ and **Augmont Gold Pvt Ltd v. One97 Communication Ltd**⁶ that the considerations guiding exercise of appellate jurisdiction under Section 37(2)(b) are, fundamentally, not really different from those which govern exercise of jurisdiction under Section 34 of the 1996 Act.

20. It is only, therefore, where the order suffers from patent illegality or perversity that the court would interfere with the order of the learned Arbitral Tribunal, under Section 37(2)(b). This is because, unlike appeals under other statutes or under the CPC, appeals against orders of arbitral tribunal are subject to the overarching limitations contained in Section 5⁷ of the 1996 Act, read with the Preamble thereto⁸, which proscribes interference, by courts, with the arbitral process, or with orders passed by learned Arbitral Tribunal, save and except on the limited grounds envisaged in the 1996 Act itself.

21. The dispute relates to a Memorandum of Understanding (MoU), dated 21st December, 2019, executed between RBT, the petitioner, the Chadhas and the Guptas. The First, Second, Third, Fourth, Fifth and Sixth parties, in the MoU, were RBT, Rajan Chadha, Rajiv Chadha, the appellant, Sumit Gupta and Shilpa Gupta respectively.

⁵ MANU/DE/1727/2020

⁶ 2021 SCC OnLine Del 4484

⁷ “5. **Extent of judicial intervention.** – Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.”

⁸ “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.”

22. At the time of execution of the MoU, the appellant, Rajan Chadha, Rajiv Chadha and Sumit Gupta, held 25%, 25.68%, 25.68% and 23.64%, respectively, in RBT. Respondent No. 4 Shilpa Gupta did not hold any shares in RBT.

23. According to the MoU, the parties would jointly manage the affairs of RBT till 31st October, 2019, and, with effect from 1st November, 2019, the appellant undertook to manage its affairs. All accounts stood reconciled till 31st October, 2019. This position is recognised by Clauses 3, 4 and 8 of the MoU, which read as under:

“3. The parties agree that the Fourth Party is ready and willing to take over the entire shares of the First Party and therefore he has represented to the Second, Third, Fifth Party to transfer their respective shares in his favour or in favour of his nominees subject to the fulfillment of the obligations agreed upon between the parties in this MOU. The Parties have agreed that the cut-off date in order to assess the liabilities and assets shall be 31.10.2019.

4. The Fourth Party further agrees that he is solely handling the affairs of the First Party since 01.11.2019 and that he is ready and willing to continue to do the same as per his own perils and wishes. The Second, Third, Fifth and the Sixth Party have agreed to exit from the First Party on the terms and conditions mentioned hereinbelow ...

8. That the parties have agreed and have reconciled the accounts of the First Party till the cut-off date i.e. 31.10.2019, the Existing Parties have upon the successful release of the collateral i.e. from the bankers, the Second Party and the Third Party have agreed to a total settlement amount of the balance of the loan amount after the payments made by the Forth Party.”

The learned Arbitral Tribunal has also noted this fact in para 34 of the impugned order. This finding is unassailed.

24. We are, therefore, concerned essentially with the position which existed after 1st November, 2019. The impugned direction to the appellant to continue to pay the EMIs into the loan account of RBT is also for the period after 1st November, 2019, and is premised on the undisputed fact that, with effect from 1st November, 2019, the affairs of RBT were entirely being managed by the appellant.

25. In this context, the learned Arbitral Tribunal has referred to Clauses 6 and 7 of the MOU, particularly to Clause 7 which required all bank instalments, after 1st November, 2019, of RBT, to be paid by the appellants. Clause 7 of the MOU read thus:

“7. The Fourth Party shall till the time of successful completion of the present MOU continue to pay all the statutory dues, salaries to labour and staff as well as cost overheads like utility charges, lease rentals, bank installments other day to day expenses etc from 01.11.2019. It is agreed between the parties that the Exiting Parties shall not be liable for any form of liability arising out of the aforementioned operations being handled by the Fourth Party after the cut-off date as mentioned above.”

(emphasis supplied)

26. The MoU recognises that, in order for the operations of RBT to continue, funds were required to be infused into its account. The Chadhas and Guptas expressed their disinclination to continue to contribute to the accounts of RBT and their desire to exit from the company. The MoU was essentially executed in order to set out the modality for such exit, from the RBT, of the Chadhas and the Guptas,

after which the entire control of the company would vest with the appellant.

27. The appellant agreed, under the MoU, to transfer of the shares of the Chadhas and the Guptas in RBT to himself, subject to fulfilment of the obligations envisaged by the MoU. The present dispute relates to the fulfilment of these obligations, particularly in the context of clause 4 of the MoU, which reads as under:

“4. The Fourth Party further agrees that he is solely handling the affairs of the First Party since 01.11.2019 and that he is ready and willing to continue to do the same as per his own perils and wishes. The Second, Third, Fifth and the Sixth Party have agreed to exit from the First Party on the terms and Conditions mentioned hereinbelow: -

a) The Second and Third Party, hereinafter to(sic) referred to as the ‘Exiting Parties’, have agreed to exit and transfer their entire shareholding as mentioned in Clause 2 of the recitals of this MOU in favour of the Fourth Party or his nominees subject to the First Party/ Fourth Party getting released the Collateral Security i.e. house bearing No. C11/4, Arjun Marg, DLF City, Phase-I, Gurgaon, Haryana-122002 from the South Indian Bank, i.e. where the Loan Accounts of the First Party are being maintained.

b) That in order to fulfill its obligation of releasing the Collateral Security from the Bankers the Fourth Party shall within 30 (Thirty) Days of the execution of this MOU:-

(i) Either Replace the entire collateral and inform the Exiting Parties to take handover of the original title documents of the house bearing No. C11/4, Arjun Marg, DLF City, Phase-I, Gurgaon, Haryana-122002, from the bankers .or pay off the entire loan to the bank.

(ii) Along with the above, the Fourth Party shall also get the personal guarantees of the Second Party and the Third Party, the Fifth Party & the Sixth Party or any of their family members released from the Bank and handover to the Exiting Parties requisite documents mentioning the same.

(iii) The exiting Parties in order to exit the company have agreed to infuse a sum equivalent to the balance of the loan amount in the bank account, subject to the terms and conditions and deductions mentioned in this MOU, the Fourth Party in order to reduce the liabilities of the First Party can ask the Exiting parties to infuse the said amounts directly into the Loan Account of the First Party. The Fourth Party shall be permitted to ask upon the same from the Exiting Parties, only upon handover of the requisite documents stating that an equivalent amount has been already deposited by him in the Loan Account and that the Loan Liability has been reduced only to the amounts to be infused by the Exiting Parties. It is needless to mention that the Exiting Parties shall infuse the amounts as desired by the Fourth Party only upon receipt of the balance confirmation from the bankers.

(iv) The Parties agree incase the Fourth Party seeks to exercise his option under Clause 4(b)(iii) hereinabove, then the Exiting Parties shall be at liberty to take over the entire balance outstanding Loan (i.e. the amounts payable after payments by the Fourth Party in the Loan Account) as on the date when the offer is made by the Fourth Party to their personal names or in the name of its associate companies, firm and the Fourth Party or the First Party shall not have any objection to the same. The exiting Parties shall be permitted to approach the bankers of the First Party and deal with them. The Exiting Parties shall within 10 days of the said offer being made shall share with the Fourth Party

and the First Party the No Dues Certificate from the Bankers of the First Party.”

28. Clause 5 of the MoU contemplated that, till the time of completion of obligation by the appellant, as envisaged by Clause 4, the appellant would be solely liable for handling day-to-day affairs of RBT, with effect from 1st November, 2019 and that, the Chadhas would have no role to play therein. It read thus:

“5. The parties agree that in the meantime as to when the Fourth Party shall be arranging for completion of his obligation as mentioned in the Clause 4 hereinabove, the Fourth Party shall be solely liable for handling the day to day affairs of the First Party from 01.11.2019 the Second and Third Party shall not have any form of say in the affairs of the First Party.”

29. Clause 7, as already noted hereinabove, required the appellant to, till successful completion of MoU, continue to pay all statutory dues and accounts overhead, including bank instalments and other day-to-day expenses of RBT from 1st November, 2019. The Chadhas and the Guptas were entirely absolved from responsibility in this regard after 1st November, 2019.

30. Clause 10 of the MoU noted the fact that the Chadhas had handed over, to Mr. Raman Arora, the signed documents of transfer of their shares, resignations from RBT, etc. and that these documents would be handed over to the appellant consequent on successful release of the collateral securities/guarantees, in accordance with Clause 4 of MoU (reproduced *supra*).

31. Clause 17 of the MoU recorded the undertaking of Sumit Gupta that, upon execution of the MoU, he would execute, in favour of the appellant or his nominees, the relevant documents, for transfer of his entire 23.64% shareholding in RBT to the appellant.

32. Clauses 31 and 32 of the MoU relate to resolution of disputes which would arise thereunder, and envisage such resolution by mutual consultation and negotiation, failing which by arbitration.

33. Alleging default, by the respondents, of their obligations under the MoU, the appellant addressed a legal notice dated 22nd February, 2020 to the respondent, seeking of them to perform their obligations under the MoU and infuse monies into the loan account of RBT. This was followed by a notice invoking arbitration dated 5th June, 2020, by the appellant.

34. It appears that, thereafter, arbitral proceedings commenced before Mr. D.K. Saini, a learned retired Additional District and Sessions Judge, before whom the appellant preferred an application under Section 17 of the 1996 Act, on which the said learned arbitrator issued certain directions. Though the facts relating to those arbitral proceedings are somewhat nebulous, they do not appear to be of any significance, as the present proceedings were commenced *de novo* before the learned Arbitral Tribunal (which came to pass the impugned order), consequent on orders passed by this Court.

35. During the pendency of the arbitral proceedings before Mr. Saini, the Chadhas moved this Court, by way of OMP (I) (Comm) 127/2020 under Section 9 of the 1996 Act, containing various prayers, of which the Chadhas ultimately pressed only prayer (e), which sought a direction to the appellant “to forthwith pay the loan liability of (RBT) and release the collateral security provided for by the petitioners (i.e. the Chadhas) for the loan facility availed by (RBT)”.

36. OMP (I) (Comm) 127/2020 was disposed of, by a coordinate bench of this Court, *vide* the following order, passed on 11th June, 2020:

“1. The present petition has been filed by the petitioners under Section 9 of the Arbitration and Conciliation Act, 1996 with the following prayers:

“In view of the above facts and circumstances, it is most respectfully prayed that this Hon’ble Court may be graciously be pleased to grant the following ex-parte ad interim measure:-

- a. Direct and/or restrain the respondents from disposing off/alienating, siphoning off or in any manner creating any third-party interest or charge in the assets of respondent No.1;
- b. Restrain the respondents from using the premises of respondent No. 1 company for business operations of any other entity except for respondent No. 1;
- c. Direct the respondents to file before this Hon’ble Court all the books of accounts of the respondent No. 1 from 01.11.2019 till dated;
- d. Direct the respondent No. 2 to provide and execute all such documents as required for filing a claim for TUFF subsidy and to also

provide for the Login credential of the GST filing account for filing of the GST refund to the tune of Rs.90,00,000/- (Rupees Ninety Lakhs Only);

e. Direct the respondents to forthwith pay the Loan Liability of respondent No. 1 and release the collateral security provided for by the petitioners for the loan facilities availed by respondent No. 1;

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

2. It is the case of the petitioners and so contended by Mr. Darpan Wadhwa, learned Senior Counsel, that the petitioners are shareholders and directors of respondent No.1 company which is engaged in the business of manufacturing and export of garments. That on December 21, 2019 a Memorandum of Association was executed amongst all the shareholders and directors of respondent No.1 in terms of the said MoU, the respondent No.2, who is also a shareholder and director of respondent No.1 company was to purchase the entire shareholding of respondent No.1 company from the petitioners and thereafter would be responsible to run the affairs of the company.

3. He also states that there are certain obligations to be performed by the petitioners under the MoU and the petitioners are ready and willing to discharge the said obligations. In substance, it is his plea that the respondent No.2 has failed to discharge his obligations under the MoU and using the premises of the respondent No.1 for commercial gains of his other entities in absolutely illegal manner. In support of his submissions, Mr. Darpan Wadhwa has drawn my attention to various clauses of the MoU.

4. On the other hand, Mr. Jayant Mehta, learned counsel appearing for the respondent No.2 has disputed the submissions made by Mr. Darpan Wadhwa by stating that after the MoU, the respondent No.2 has infused lot of money in the respondent No.1 company and is expected to run the

company on his terms, unfortunately, the petitioners are not allowing the respondent No.2 to run the company, inasmuch as they are approaching the Banks and various other authorities, creating hinderances.

5. During the course of his submissions, he has suggested that he has no objection if instead of the Arbitrator already appointed by the respondent No.1 company to arbitrate the disputes between them, a new Arbitrator is appointed, who can conduct the proceedings de-novo.

6. I may state here that Mr. Darpan Wadhwa has not opposed to the appointment of a new Arbitrator to adjudicate the dispute between the parties. His submission is, that pending reference of the dispute to the Arbitrator, the respondent No.2 must be directed to pay the EMIs which are required to be paid monthly and the said liability must not be fastened upon the petitioners. That apart, it is his submission that the petitioners have come to know that the respondent No.2 is taking away the raw material and the machinery installed at the premises of the respondent No.1 company in Faridabad. That apart, he also states that the premises of the respondent No.1 company is being used for third parties and not for respondent No.1, which must be restrained. Mr. Mehta dispute the submissions. He on instructions also state that neither any material nor any machinery is being taken away. He qualifies the submission by stating that the pending reference to the Arbitrator, the petitioners shall not take away any raw material or machinery from the premises of the respondent No.1 company. He also state that the premises is not being used for third parties and shall not be used so in future.

7. Having noted the submissions made by the counsels for the parties and their agreement for appointment of a new Arbitrator, this court deem it appropriate to appoint Justice Indermeet Kaur, a retired Judge of this Court as a Sole Arbitrator, who shall adjudicate the dispute between the parties. The fees of the learned Arbitrator shall be regulated by the provisions of Fourth Schedule to the Arbitration & Conciliation Act, 1996.

8. As the counsels have shown urgency in this matter, I deem it appropriate to list this matter before Justice Indermeet

Kaur on June 17, 2020 at 04:30 P.M. The learned Arbitrator shall be at liberty to conduct the proceedings, through Video Conferencing. The petitioners are directed to email the complete copy of the petition including annexures along with copy of this order by tomorrow to Justice Indermeet Kaur by taking her e-mail ID by calling her on her mobile No. 9910384614.

9. It is made clear that this Court has not expressed itself on the merit of the dispute between the parties.

10. With the above, the petition is disposed of.”

As such, the proceedings before the learned Arbitral Tribunal were commenced *de novo*. As the Section 9 petition was preferred by Chadhas, the learned Arbitral Tribunal apparently treated the Chadhas as the claimants.

37. Undisputedly, however, the Statement of Claim (SoC) came to be filed, before learned Arbitral Tribunal, by the Chadhas only after the impugned order was passed.

38. On 17th June, 2020, when the matter was first listed before the learned Arbitral Tribunal, a request was made by the Chadhas to treat OMP (I)(Comm) 127/2020 as an application under Section 17 of the 1996 Act and to adjudicate on the reliefs in the said application. The learned Arbitral Tribunal passed the following order:

“The undersigned has been appointed as Arbitrator in terms of the order of the Hon'ble High Court of Delhi dated 11.6.2020. The matter has been posted before the undersigned in view of the urgency meted out by the petitioner and both the parties have accordingly appeared before the undersigned today.

Disclosure Statement of the undersigned is on record.

The copy of the application filed before the Hon'ble High Court under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) has been placed before the undersigned. Learned counsel for the petitioner states that the said application be treated as the application under Section 17 of the said Act and the reliefs claimed in the said application be read as the reliefs prayed for under Section 17 of the said Act. Learned counsel for respondent No.1 & 2 at the outset has an objection to the conversion of application from Section 9 to Section 17 of the said Act and its maintainability. He may take this objection in his reply which he has yet to file to this pending application.

Reply be filed by the respondent No.1 & 2 within 4 days i.e. on or before 21.6.2020 with a copy to the counsel for the petitioner.

Rejoinder be filed within 4. days thereafter i.e. on or before 25.6.2020.

List before the undersigned on 26.6.2020 at 4.30 p.m. at AB-84, Shahjahan Road, New Delhi.

The court notes that apart from Respondent No.1 & 2 there are 2 other respondents i.e. Respondent No.3 & 4. Today at about 4 p.m. an email was received from respondent No.3 informing the undersigned that due to the Covid situation he is unable to appear. It is noteworthy to note that the said respondents (No. 3 & 4) had not appeared before the Hon'ble High Court. Reliefs claimed in the pending application are even otherwise not directed against respondent No.3 & 4. Be that as it may let respondent No.3 & 4 be served through email for the next date of hearing. They may file the reply to the pending application within the same time period i.e, 4 days and appear on the next date. The statements made by the learned counsel for the respondent No.1 & 2 before the Hon'ble High Court (while recording the order dated 11.6.2020), will needless to state, be binding upon the said respondents.

Dates for completion of pleadings will be fixed on 26.6.2020.

The parties remit a sum of Rs. 5.00 lacs each to the undersigned through RTGS mode before the next date. ”

39. In the context of the above order, the appellant has raised two objections. The first is that the learned Arbitral Tribunal could not have converted the Section 9 petition, filed by the Chadhas before this Court, as a Section 17 application. The second is that no Statement of Claim had, till then, been filed by the Chadhas before the learned Arbitral Tribunal and that, in the absence of a Statement of Claim, no prayer for interlocutory relief under Section 17 of the 1996 Act was maintainable.

40. Treating these as preliminary objections, the learned Arbitral Tribunal ruled thus, in paras, 25 to 27 of the impugned order:

“25. Before delving into the merits of the application it would first be relevant to discuss the preliminary objection raised by the learned counsel for the respondents which is to the effect that the present application is not maintainable.

26. This Tribunal notes that Section 17 of the said Act had been amended by Arbitration and Conciliation (Amendment) Act 2015. It is a settled position and also clear from the language of the erstwhile Section 17 and the newly amended Section 17 that much wider powers are not conferred upon the Arbitral Tribunal than before the amendment. The judgment of the **MD, AWHO Vs. Sumangal Services (P) Ltd.**⁹ relied upon by the respondent was based in the context of Section 17 of the Arbitration Act 1940. The Hon'ble Apex Court in that judgment had noted that even under Section 17 of the Act of 1996 the power of the Arbitrator was a limited power. Section 17 was subsequently amended in the year 2016 and the different types of interim orders of protection which can now be passed by the Arbitral Tribunal are enumerated in Section 17. Relevant would it be to note that these powers are para materia the powers which the Court has under Section 9 of the said Act. The powers under Section 9 and Section 17 are at par. The language in Section 17(1) (2) (e) clearly states

⁹ (2004) 9 SCC 619

"Arbitral Tribunal shall have the same power for making orders, as the court for the purposes and in relation to, in proceedings before it". The issue of the enforceability of the Arbitral proceedings is contained in Section 17(2). It would also be relevant to note that Section 9(3) had also been amended and states "once the Arbitral Tribunal has been constituted the Court shall not entertain an application under sub-Section (1) unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious."

27. Section 17 which is contained in Chapter IV of the said Act presupposes the pendency of "arbitral proceedings before the interim measures/reliefs as contained in the said section can be granted and these powers are within the domain of the Arbitrator". The undersigned is of the view that the arbitral proceedings were pending before the undersigned on 17.6.2020 when a statement had been made by the claimants that the application under Section 9 of the said Act be treated as an application under Section 17 of the said Act and the reliefs sought by him in the application under Section 9 be treated as the reliefs claimed under Section 17. The undersigned had been appointed as an Arbitrator by the Hon'ble High Court in terms of its order dated 11.6.2020, On this date the Arbitral Tribunal had been constituted. This order while appointing the undersigned as an Arbitrator had directed the undersigned to adjudicate the dispute between the parties; parties had to appear on 17.6.2020 at 4.30 on which date the aforementioned statement had been made by the Counsel for the claimant for the conversion of the application from one under Section 9 to under Section 17. The Arbitral Tribunal was functional on 17.6.2020. In this context Section 21 of the said Act would be also relevant. This section presupposes the date of the commencement of the arbitral proceedings which commence (as per the language of that section) on the date on which a request for a dispute to be referred arbitration is made by the respondent. This Tribunal notes that the legal notice was sent by the claimant to the respondent on 6.3.2020 and was replied to on 16.3.2020. Arbitral proceedings had already commenced and were pending before this Tribunal on 11.6.2020 when the date of hearing was fixed for 17.6.2020. It is thus clear that "arbitral proceedings were pending" before the undersigned on 17.6.2020 when the said statement was made by the counsel for the claimants. There was no

impediment in making such a statement. Such an application is wholly maintainable before the undersigned. This objection of the respondent is accordingly rejected.”

Re. objection to the Arbitral Tribunal having permitted OMP (I)(Comm) 127/2020 to be treated as an application under Section 17

41. On the first objection of the appellant, regarding the power and authority of the learned Arbitral Tribunal to convert the Section 9 petition, filed before this Court, into an application under Section 17 of the 1996 Act and to adjudicate thereon, there may, superficially, be some merit in the contention of the appellant that the learned Arbitral Tribunal could not *suo motu* have done so. In the present case, however, the conversion was at the request of the Chadhas. Ordinarily, no doubt, once a Section 9 petition is disposed by a court, in the absence of any caveat contained in the order disposing the petition, empowering the arbitral tribunal to treat the Section 9 petition as a Section 17 application, the learned Arbitral Tribunal would not be acting strictly within its authority in doing so. Having said that, this point was not orally urged before me either during the course of argument; neither does it find place in the written submissions filed by the appellant.

42. That apart, if one reads the order dated 11th June, 2020, of this Court, in a holistic manner, it is difficult to treat the objection of the appellant, regarding the exercise of jurisdiction by the learned Arbitral Tribunal *vis-a-vis* its power to convert a Section 9 petition into a Section 17 application, as fatal to the impugned order.

43. Paras 2 to 4 of the order dated 11th June, 2020, set out the original dispute between the appellant and respondents.

44. Para 6 notes, at the outset, the submission, of learned Senior Counsel for the Chadhas, that he had no objection to the appointment of a new arbitrator “to adjudicate the dispute between the parties”. Any power to adjudicate the dispute between the parties, needless to say, also includes the power to adjudicate on any prayer for interim relief, if raised under Section 17 of the 1996 Act.

45. Para 6 goes on to record the submissions advanced by the Chadhas, in support of the prayers in its Section 9 petition, as well as the submissions of learned Counsel for Sanjay Arora by way of response thereto. Having noted the said submissions, para 7 of the order records thus:

“Having noted the submissions made by the counsels for the parties and their agreement for appointment of a new Arbitrator, this court deem it appropriate to appoint Justice Indermeet Kaur, a retired Judge of this Court as a Sole Arbitrator, *who shall adjudicate the dispute between the parties*. The fees of the learned Arbitrator shall be regulated by the provisions of Fourth Schedule to the Arbitration & Conciliation Act, 1996.”

(Emphasis supplied)

46. This court, therefore, conferred the learned Arbitral Tribunal the jurisdiction to “adjudicate the dispute between the parties”. The expression “the dispute between the parties”, in my view, has to relate to all disputed issues noted by this Court in paras 2 to 6 of the order dated 11th June, 2020. This includes the main dispute between the parties as well as the disputes raised in the Second 9 petition. The

conferment of power to the learned Arbitral Tribunal by para 7 of the order dated 11th June, 2020, to adjudicate the disputes between the parties has, if the order is to be read holistically, to be deemed to include the disputes raised in the Section 9 petition.

47. That the learned Arbitral Tribunal had, therefore, the jurisdiction to adjudicate the controversy raised by the Chadhas in its Section 9 petition cannot, therefore, in my view, be gainsaid.

48. This aspect is underscored by para 8 of the order dated 11th June, 2020, which directed the Chadhas “to e-mail the complete copy of the petition including annexures alongwith copy of this order” to the learned Arbitral Tribunal. The only intent behind this direction could be that the learned Arbitral Tribunal would be empowered to take *seisin* of the issues raised in the Section 9 petition.

49. In this backdrop, if the learned Arbitral Tribunal agreed to treat the Section 9 petition as an application under Section 17, I am not convinced that the decision suffers from any such error as may be regarded as fatal to the impugned order. I may also observe, in this context, that the appellant has not referred, in its appeal, to any provision of the 1996 Act which *prohibits* the learned Arbitral Tribunal from doing so; nor has any such provision come to my notice.

50. The objection, of the appellant, to the learned Arbitral Tribunal having treated the Section 9 petition as an application under Section 17 is, therefore, rejected.

Re. objection regarding maintainability of Section 17 application in absence of Statement of Claim

51. The second ground on which the jurisdiction of the learned Arbitral Tribunal was questioned, was the non-existence, on the date when the Section 17 application was preferred before the learned Arbitral Tribunal, of any statement of claim under Section 23, having been preferred by the Chadhas. The contention advanced before the learned Arbitral Tribunal – which was reiterated by Mr. Mehta before me – was that, in the absence of a statement of claim, no application under Section 17 of the 1996 Act was maintainable. The statement of claim, admittedly, came to be filed only after the impugned order was passed. This, according to Mr. Mehta, was fatal to the impugned order. Reliance has been placed by Mr. Mehta, in this regard, on the judgment of this Court in **BPL Ltd. v. Morgan Securities & Credits Pvt. Ltd.**¹⁰. Additionally, before the learned Arbitral Tribunal, reliance was also placed on the judgment of the High Court of Bombay in **Moser Baer Entertainment Ltd. v. Goldmines Telefilms Pvt. Ltd.**¹¹.

¹⁰ 2008 (1) Arb. LR 325

¹¹ 2013 (2) Arb. LR 448

52. The learned Arbitral Tribunal has rejected this submission. The grounds for rejection, as set out in the impugned order, are in my view, unexceptionable.

53. The legal proposition, as advanced by Mr. Mehta appears, at first blush, to be almost axiomatic. It appears incongruous that, in the absence of a substantive challenge (in the form of a Section 23 Statement of Claim), an application for interlocutory relief would lie. Possibly for this reason, the Bombay High Court, speaking through G.S. Patel, J., has observed, in **Tasty Korner v. Merwan's Confectioners Pvt Ltd**¹², that “it also goes without saying that Section 17 Application cannot be disposed of or even taken up unless a statement of claim has (*sic* been?) filed to begin with”.

54. Despite the high estimation in which I hold Patel, J., I regret my inability to agree with this proposition.

55. Empirically, in ordinary civil law, an application for interlocutory relief would lie only in substantive proceedings, claiming the main relief. The arbitral protocol, under the 1996 Act is, however, somewhat peculiar in its dispensation. Section 9 itself envisages grant of interim protection, by a Court, before institution of arbitral proceedings and can be invoked, in an appropriate case, even before the notice of arbitration, under Section 21, is issued. The reason is that, while considering the prayer for interim protection under the 1996 Act, whether under Section 9 or under Section 17, apart from the *troika* of a *prima facie* case, balance of convenience

¹² Order dated 6th January, 2020 in Arbitration Petition (L) 1300/2019 and connected cases

and irreparable loss, the Court, or Arbitral Tribunal, is also required to preserve the sanctity of the arbitral process, which is the very *raison d'être* of the 1996 Act. All efforts to foster and promote the arbitral process, and prevent its interception or interdiction have, therefore, to be made. The Court under Section 9, or the Arbitral Tribunal under Section 17 is also, therefore, empowered to grant interim protection where any possibility of the arbitral proceedings being frustrated is found to exist, whether such frustration be before the arbitral process is initiated, during the arbitral process or even after the passing of the Award. If, therefore, before a Statement of Claim is filed, the situation that presents itself is such that interim protection has to be granted, to ensure the preservation of the arbitral process, the Court under Section 9, and the Arbitral Tribunal under Section 17, is empowered to grant such protection. In view of this peculiar dispensation, unique to arbitration, I am of the opinion that the filing of Statement of Claim under Section 23 cannot be treated as a *sine qua non* for the maintainability of an application for interim protection under Section 17.

56. The decision in **BPL Ltd.**¹⁰ relates to a period prior to the amendment of Section 17 by Section 10 of the Arbitration and Conciliation (Amendment) Act, 2015. Section 17, prior to amendment (by way of substitution) read thus:

“17. Interim measures ordered by arbitral tribunal. –

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).”

57. After amendment, Section 17(1) reads as under:

“17. Interim measures ordered by arbitral tribunal. –

(1) A party may, *during the arbitral proceedings*, apply to the arbitral tribunal –

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely –

(a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.”

(Emphasis supplied)

58. The words “during the arbitral proceedings”, which figure in Section 17(1) after amendment were not present in the pre-amended Section 17. Section 21 deems arbitral proceedings to commence on the date when a notice, requesting for reference of the dispute to arbitration is issued by one party to the other, and reads as under:

“21. Commencement of arbitral proceedings. –

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

59. Read conjointly, Sections 21 and 17, therefore, empower the Arbitral Tribunal to pass orders in terms of Section 17 *at any point of time*. The arbitral proceedings have commenced even before the Arbitral Tribunal is constituted, as the notice invoking arbitration would necessarily be prior in point of time. From its very inception, therefore, the Arbitral Tribunal is empowered to pass orders on any application filed, before it, under Section 17, by any of the parties. The requirement of filing of a statement of claim, prior to moving the Arbitral Tribunal under Section 17, can no longer be regarded as a mandatory requirement, after the amendment of Section 17 with effect from 23rd October, 2015.

60. Even under the pre-amended Section 17, I may note that a Single Bench of this Court of Hon'ble Mr. Justice Vikramjit Sen (as he then was), in **NTPC Ltd. v. BALCO Ltd.**¹³ opined that an application under Section 17 would lie even in the absence of a prior Statement of Claim. Para 6 of the report, in which it is so held reads thus:

“6. As has already been seen, the impugned Orders had been passed in April 2004, before the Claims had been filed before the learned Arbitrator. Predicated on this sequence of events the Award has been assailed on the ground of its being coram non judice since the learned Arbitrator could not have assessed the boundaries or the subject matter of the dispute. A comparison of the two Sections will immediately reveal that the powers of the Court to pass interim orders/measures is of wider amplitude than those of the Arbitrator whose role is circumscribed to the subject matter of the dispute only. However, the powers “in respect of the dispute” are coextensive. So far as the present case is concerned, the parties have not directly approached the learned Arbitrator. BALCO had filed a petition praying for interim orders under Section 9 of the A and C Act which had been disposed of on 7.4.2004 by my learned Brother Mukundakam Sharma, J. directing inter alias that – “The interim prayer which is made in this petition, namely, under Section 9 shall be treated as an application under Section 17 by the learned Arbitrator and, therefore, a reply thereto shall be filed by the Respondent preferably on or before April 12, 2004 so that the plea of the interim relief sought for by the petitioner could be taken up by the learned Sole Arbitrator and decided before the end of the month.” The learned Arbitrator had thus not been presented with a clean slate. Even though the Statement of Claim had not been presented to him by that time, he would have become fully acquainted with the subject matter of the disputes, and this would indubitably have transpired upon learned Senior counsel addressing detailed arguments before him. The learned Arbitrator has made a precise of the case of NTPC. It is evident that NTPC had not remonstrated before this Court that the Arbitrator should not pass interim Orders until the pleadings viz a viz the Claims had been

¹³ MANU/DE/1204/2004

completed; it is certainly possible that if this objection had been articulated, Justice Sharma may have himself passed interim orders pending the Reference. Section 19 of the A and C Act specifically empowers the parties and the Arbitrator to agree on the procedure to be followed in the proceedings. In paragraph 145, the learned Arbitrator has dealt with this question and his reasoning cannot be slated. Furthermore, *Section 9 does not specifically empower the Court to pass interim orders in the absent of the Statement of Claim but this Court has nevertheless not felt inhibited or impeded in passing interim measures if circumstances necessitated it. I find no indication in the language of the two sections to the effect that an Arbitrator cannot also follow the same practice. All that is necessary is that the Arbitrator should have become broadly acquainted with the subject matter of the dispute. I cannot therefore accept the argument that the impugned Order is flawed on the ground that it preceded the filing of the Statement of Claim.*"

(emphasis supplied)

That the power and jurisdiction of the arbitral tribunal, under Section 17, is co-equal with the power of the Court under Section 9 of the 1996 Act, stands recognised recently by the Supreme Court in **Arcelor Mittal Nippon Steel v. Essar Bulk Terminal**¹⁴ The decision in **BPL**¹⁰, which is also of a learned Single Judge of this Court does not take into account, the earlier decision in **NTPC**¹³ and cannot, therefore, be followed, even for this reason.

61. The objection, of the appellant, to the Arbitral Tribunal having condescended to entertain the Section 17 application of the Chadhas, even before a statement of claim was filed by it, is also, therefore, rejected.

¹⁴ 2021 SCC OnLine SC 718

On merits

62. On the merits of prayer (e) in the Section 17 application of the Chadhas, the learned Arbitral Tribunal has held, in paras 32 to 37 of the impugned order, thus:

“32. This document runs into several pages and at this stage while dealing with this application it would not be relevant to refer to the other clauses contained in the said MOU (at page 20). A perusal of the aforementioned clauses of the MOU make one thing crystal clear. It is clear that the 2nd, 3rd, 5th and 6th party had agreed that their liability vis-à-vis the company would be only upto 01.11.2019. After this cut off Le, w.e.f 31.10.2019 the company would be run by Mr. Sanjay Arora. The collateral security for the loan amount of respondent No.1 (owned jointly by second party and his wife) was to be released and pending finalization of the MOU the day to day affairs which included managing the loan account of the respondent company would be carried out by the fourth party alone. This included the payment of the EMIs of the Bank. This is clearly contained in Clauses 5, 6, and 7 of the MOU(reproduced and highlighted supra).

33. Clause 4 at the cost of repetition stated that in the meantime when the 4th party/Mr, Sanjay Arora would be arranging tor completion of his obligations the 4th party would be solely responsible for handling the day to day affairs of the company and second and third party would have no say in the company. The cut of date has been described as 1.11.2019. Clause 4(b) stipulates that the 4th party/Shri Sanjay Arora within 30 days from the execution of this MOU shall get the collateral security released/replaced and inform the exiting parties to take over the original documents of the said property. The exiting parties in order to exit from the company in order to reduce the liability of the company would infuse amounts directly into the loan account of the company only upon handing over the requisite documents of the property wherein 4th party would inform the exiting parties that the loan liability has been reduced and the exiting parties would then infuse the amounts as desired by the 4th party; this would be further subject to receipt of the balance confirmation from the bankers. Admittedly no such balance confirmation

has been received by the exiting party/Chadha Group from the bankers and this position stands admitted. Learned counsel for the respondent has drawn attention of the undersigned to the bank statement of the loan accounts. It is pointed out that there are 3 loan accounts of the company with the South Indian Bank i.e. a CC Limit; TL168; TL169. It is pointed out that the bank loan status as on 31.10.2019 was Rs. 9,72,96,977.97 but as on 14.2.2020 the respondents having infused money into this loan account has now reduced the loan liability to Rs.6,11,76,074.37. In this context learned counsel for the claimant points out that even presuming that the loan liability of the company has been reduced these amounts are not the amounts which have been infused by the respondents into the loan account; these were amounts due to the company on other accounts which have been deposited into the loan account of the company. No money by Shri Sanjay Arora has been deposited into the account of the company. Admittedly balance confirmation has also not been received from the bankers. The obligation on the part of the claimants to infuse any money at this stage into the loan account of the company would thus not arise; it would arise only when the respondents have fulfilled their obligation.

34. Clause 5 stipulated that in the meanwhile till the 4th party is arranging for the funds, he alone is responsible for the day to day handling of the affairs of the company. Clause 6 cast an obligation upon the 4th party that till the successful closure of this arrangement, all post dated cheques issued for and on behalf of the company would be honoured and the second and third party would have no personal liability. Clause 7 further detailed that till the successful completion of the present MOU all statutory duties as also bank instalments, w.e.f 1.11.209 would be paid by the 4th party/Mr. Sanjay Arora; the exiting parties would not be liable in any form. In terms of clause 8 the parties had recorded that the accounts of the company stood reconciled upto 31.10.2019. In clause 10 the parties had agreed that the claimant i.e, 2nd and 3rd party would handover the signed transfer deeds to one Mr. Raman Arora who the undersigned informed is a common party known to all and the relevant documents after which share transfer having been signed by the claimant group are presently in the custody of Shri Raman Arora.

35. A prima facie reading of the terms of this MOU show that certain money had to be infused into the loan account by the respondent to reduce the loan liability of the company. Balance confirmation of the loan account of the company was then to be sent by the bankers to the exiting parties i.e, the Chadha Group and Gupta Group. None of this has been done. Even presuming that the loan liability of the company had been reduced from 31.10.2019 and the loan account on 14.2.2020 showed a reduced amount but as rightly pointed out by the claimants there is nothing on record at this stage to show that this amount was infused into the company by Shri Sanjay Arora. The collateral security i.e. house at Gurgaon jointly owned (by claimant No.I and his wife) had to be released to the claimants in the first exercise i.e. infusion of the amount into the loan account of the company by the respondents followed by a balance confirmation from the Bankers to be given to the claimants who would in turn would infuse other amounts into the loan account of the company. The MOU in clear terms states that after 31. 10.2019 i.e, w.e.f 1.11.2019 the company would be run by the 4th party/Shri Sanjay Arora. He would be responsible for the day to day functions including payment of all bank loan instalments. This is clear in the clauses recited Supra.

36. Learned counsel for the respondents points out that the EMIs qua the loan account (which are 2 EMIs of Rs.9.72 lacs in a month) have to be discharged by the company in order that the loan account of the company does not become an NPA which otherwise would then target proceedings under the SARFESI Act. Learned counsel for the claimant points out that the company was not abiding by this regime and the last installment of Rs.9.72 lacs had been paid by the claimants into the loan account of the company (admittedly paid) in order that the loan account of the company does not become NPA although this was not an obligation cast upon him. The obligation to discharge the EMIs into the loan account of the company was upon Shri Sanjay Arora. The claimant had done this only on an apprehension that the property might become the target of SARFESI proceedings.

37. Learned counsel for the claimant further submits that he is only pressing prayer (e) of his application. The undersigned notes this submission. The undersigned also notes the statement/concession granted before Hon'ble High

Court by the respondent on 11.6.2020 which would continue till the disposal of the arbitral proceedings. The undersigned is of the view that an irreparable loss and injury would be suffered by the claimant at this stage if the loan liability is not discharged (as per the terms and conditions of the loan) and if the EMIs are not paid by the respondents the collateral security (house owned jointly by claimant No.1 and his wife) could become the subject matter of summary proceedings under the SARFESI Act. This apprehension of the claimant at this stage has been prima facie established and balance of convenience is thus in favour of the claimant. Accordingly the undersigned is of the view that till the disposal of this petition respondent No.2 acting for and on behalf of Respondent No.1 shall continue to pay the EMIs into the loan account of the company as per the terms and conditions of the loan account.”

63. A perusal of paras 32 to 37 of the impugned order discloses that, in acceding to prayer (e) in the Section 17 application, the learned Arbitral Tribunal has essentially reasoned that (i) the MoU required infusion of monies, by the Chadhas and the Guptas, into the loan account of RBT, only after “an equivalent amount” had been infused into the said account by the appellant and confirmation had been received, from the bank, regarding proportionate reduction of the loan liability of RBT, (ii) there was no evidence to show that the requisite amounts had been infused into the loan account by the appellant, (iii) no confirmation had been received from the bank, regarding reduction of the loan liability of RBT consequent on such infusion, (iv) it was only consequent on such infusion that the collateral security, in the form of the Gurgaon property, could be released, (v) the responsibility to ensure such release was, as per the MoU, on the appellant, and (vi) till such release took place, the MoU would continue to operate and all liabilities, including the liability to pay bank instalments of RBT,

would, for the period after 1st November, 2019, have to be met by the appellant.

Rival Contentions

64. The grounds on which the appellant seeks to dispute the legality and validity of these findings, as set out in the appeal and as orally urged by Mr. Mehta, are the following:

(i) The appellant had already paid, into the account of RBT, amounts in excess of his liability which, even as per the MoU, was restricted to 25%.

(ii) Clause 4(b)(iv) of the MoU entitled the Chadhas to, consequent on exercise by the appellant of his option under Clause 4(b)(iii), take over the entire balance outstanding loan. As such, the responsibility to infuse monies into the said loan account was on the respondents, once the option under Clause 4(b)(iii) had been exercised by the appellant.

(iii) The learned Arbitral Tribunal had erred in holding that the appellant had failed to infuse, into the loan account of RBT, the amounts which were required to be paid by him. Mr. Mehta drew my attention to para 33 of the impugned order, which notes the fact that the appellant had, before the learned Arbitral Tribunal, produced the bank loan status of RBT as on 14th February, 2020 *vis-à-vis* the status which stood on 31st October, 2019, which showed that the loan liability of RBT had been

reduced from ₹ 9,72,96,977.97 to ₹ 6,11,76,074.37. This, it was submitted, was because of the infusion of monies, by Sanjay Arora, the appellant, into the loan account.

(iv) Subsequently, during arguments, however, responding to the findings of the learned Arbitral Tribunal that there was no evidence to show that these monies had been infused into RBT's loan account by the appellant, Mr. Mehta submitted that it really made no difference whether the monies were paid by the appellant out of his own pocket or were infused from the accounts of the company, as all assets of RBT vested in the appellant after 1st November, 2019. This aspect has been emphasized, in the written submissions, filed by the appellant, in the following words:

“The Impugned Order has erroneously observed that under the MoU, obligation was upon Appellant No.1 to infuse money in the loan account and he could not use the receivables/income of RBT for the said purpose. The Ld. Arbitrator failed to appreciate that no distinction could be created between the funds infused by the Appellant No. 1 in RBT after 01.11.2019 and the profits/income/assets of RBT.”

In this regard, the appellant also placed reliance on Clause 25 of the MOU which reads thus:

“25. That all the assets and liabilities including intellectual assets after the execution of this agreement shall stand (vested) in the new management of the company i.e. Fourth Party on as is where is basis.”

According to Mr. Mehta, as all assets of RBT vested in Sanjay Arora, consequent to execution of the MoU, he was entitled to

use the receivables of RBT to reduce its bank liabilities. The distinction drawn, by the learned Arbitral Tribunal, between personal infusion, by Sanjay Arora, into the loan account of RBT and infusion from the receivables of RBT into the said loan account, was, therefore, he submits, completely misconceived. He has also relied, in this context on Clause 4(a) of the MoU which obligated the “first party/fourth party”, i.e. RBT/Sanjay Arora, to get the collateral released. According to Mr. Mehta, this position also stands acknowledged in para 34(v) of the statement of claim which subsequently came to be filed by the Chadhas before the learned Arbitral Tribunal which reads thus:

“v. Incase, the Respondent No.1/2, were not able to arrange for the entire funds for payment of the entire Term Loan, the Respondent No.1/2, could have exercised another option and could have called upon the Claimants to infuse an amount equivalent to an amount deposited by him into the Term Loan Account after the execution of the MOU. It is further a matter of record and an admitted fact that till date the Respondent No.2, has not informed the Claimants or called upon the Claimants to deposit any amount in the Term Loan Account. It is further a matter of record that the Respondent No.2, in order to exercise the said option had to submit with the Claimants a balance confirmation from the bankers after infusion of the amount by him, which admittedly the Respondent failed to do.”

(v) In view of the fact that the loan account statement of RBT clearly reflected reduction of its loan liability, the learned Arbitral Tribunal was in error in holding that there was no formal confirmation from the bank in that regard. Reliance has

also been placed, by Mr. Mehta, in this context, on Clause 4(b)(iv) of the MoU to contend that the respondents could have approached and dealt with the bank directly. He has also referred to a communication dated 23rd February, 2019, from Rajan Chadha to the Bank and to a response dated 2nd March, 2020, from the Bank to Rajan Chadha, regarding the outstanding loan amounts.

(vi) In these circumstances, the onus to show willingness to infuse the amounts, into the loan account of RBT, proportionate to their respective shareholdings, was on the Guptas and the Chadhas which they failed to do.

(vii) The learned Arbitral Tribunal materially erred in requiring the appellant to continue to pay the EMIs against the loan advanced by the Bank to RBT, without calling on the Guptas and the Chadhas to infuse, into the loan account of RBT, the amounts required to be paid by them. In this regard, he placed reliance on an e-mail dated 14th February, 2020 from the Chadhas to the appellant, in which they expressed their readiness to take over the remainder of the Bank Loan “post the payments made by (the appellant) in reference to (the appellant’s) share of the loan amount”. Mr. Mehta submits that the appellant would have no objection to continuing to pay the EMIs as directed by the learned Arbitral Tribunal provided, concomitantly, the Chadhas and the Guptas were also directed

to infuse, into the said loan account, the amounts which, according to the MoU were required to be infused by them.

65. Responding to the submissions of Mr. Mehta, Mr. Rajshekhar Rao, learned Counsel for the respondents initially drew my attention to Para 10 of the MoU, which reads thus:

“10. That basis the records and the financial position of the First Party, it is deemed appropriate by all the parties that funds are required to be infused in order to continue operations of the First Party. *The Second Party, Third Party, Fifth and the Sixth Party are no longer interested in infusing any further amounts in the Company/First Party and had agreed that an arrangement with the Fourth Party, to exit from the First Party. The Fourth Party is ready and willing to run the First Party on as as is where is basis and has agreed to the arrangement mentioned hereinbelow, in detail.*”

(Emphasis supplied)

66. Para 10, submits Mr. Rao, clearly recorded the fact that the Chadhas and the Guptas were no longer interested in infusing any further amounts in RBT. Having agreed to this covenant, Mr. Rao submits that the appellant could not insist on any infusion, by the Guptas or the Chadhas, of any amount into the loan account of RBT. Mr. Rao also referred to Clauses 2 and 3 in the MoU, which read as under:

“2. The parties agree that upon the signing of the present MOU they shall do all such acts as mentioned hereinbelow within the timelines as mentioned in the present MOU and that they shall abide by each and every term of the present MOU.

3. The parties agree that the Fourth Party is ready and willing to take over the entire shares of the First Party and therefore he has represented to the Second, Third, Fifth Party to transfer their respective shares in his favour or in favour of his nominees subject to the fulfillment of the obligations

agreed upon between the parties in this MOD. The Parties have agreed that the cut-off date in order to assess the liabilities and assets shall be 31.10.2019.”

Time was, therefore, according to Mr. Rao, of the essence of the MoU. Mr. Rao also contends that, by virtue of sub-clauses (i) and (ii) of Clause 4(b), the entire liability of RBT, after 1st November, 2019, was of the appellant. He has laid particular emphasis on the words “by him” contained in Clause 4(b)(iii) of the MoU, to contend that the infusion of monies into the loan account of RBT had, in the first instance, to be by *the appellant in his personal capacity*. No exception can, therefore, according to Mr. Rao, be taken to the finding, of the learned Arbitral Tribunal, that there was no material to indicate that the appellant had infused any money into the loan account of RBT. Mr. Rao has also referred, in this context, to the bank statement filed by the appellant himself, which indicates that the total infusion of monies into the loan account of RBT by the appellant was an amount of ₹ 90,50,000/- during the period 1st November, 2019 to 29th February, 2020. Mr. Rao contends that, therefore, the assertion of Mr. Sanjay Arora that he had paid an amount of ₹ 3,97,44,267/- is totally incorrect and that, in fact, all other infusions, which resulted in reduction of the remaining loan liability of RBT were by other third parties which owed money to RBT.

67. Mr. Rao has also drawn attention to the opening recitals in Clause 4 in the MoU, which reads thus:

“4. The Fourth Party further agrees that he is solely handling the affairs of the First Party since 01.11.2019 and that he is ready and willing to continue to do the same as per his own perils and wishes.”

Mr. Rao points out that Sanjay Arora, with his eyes open, expressed his readiness and willingness to continue to handle the affairs of RBT from 1st November, 2019, “as per his own perils and wishes”. Further drawing attention to sub-clauses (iii) and (iv) of Clause 4(b) of the MoU, Mr. Rao submits that the reasoning of the learned Arbitral Tribunal is entirely in accordance with the said provision. The respondents, according to Mr. Rao, made their *bonafides* manifest by their e-mail dated 14th February, 2020 *supra*, addressed by the Chadhas to Sanjay Arora, in which they expressed their readiness, with finances, “to take over the loan post the payments made by (the appellant) in reference to (the appellant’s) share of the loan amount”.

68. Arguing by way of rejoinder, Mr. Mehta refutes the reliance, by Mr. Rao on Para 10 of the MoU, by pointing out that para 10 was subject to the “arrangement mentioned hereinbelow” which included Para 11. Referring, thereafter to Para 11, Mr. Mehta submits that the Chadhas and the Guptas had, in the said para, expressed their willingness to exit from RBT and had given up all rights, title and interest in RBT, but had not surrendered their liabilities. He has also placed reliance on the words “first party/fourth party” as contained in Clause 4(a), to submit that there was nothing irregular in reduction of the loan liability of RBT even if it was based on infusion of funds from third parties, as the “first party” under the MoU was RBT and the “fourth party” was the appellant. This position, he reiterates, also stands recognized in para 34(v) of the statement of claim which later came to be filed by the Chadhas.

69. Mr. Mehta also faults the learned Arbitrator in distinguishing between amounts personally infused into the loan account of RBT by the appellant and those which may have augmented the loan account owing to liquidation of debts by third parties. He submits that the balance confirmation even if received back from the Bank, would not show the source of funds. As such, by making receipt of the balance confirmation from the Bank a condition for infusion of amounts into the loan account by the Guptas and the Chadhas, Mr. Mehta submits that the MoU eviscerated the distinction between monies infused into the loan account of the bank personally by the appellant and monies which may have come from third parties.

70. Mr. Mehta also contends that the impugned order amounts to a mandatory injunction at an interlocutory stage, which the learned Arbitral Tribunal was not competent to grant and which, even otherwise, was not justified in the facts before the learned Arbitral Tribunal. He also submits that the impugned order amounts to a direction for specific performance of the contract between the parties, which could not have been issued by the learned Arbitral Tribunal in exercise of its power under Section 17 of the 1996 Act, for which purpose he relies on the judgment of this Court in **Lanco Infratech Ltd. v. Hindustan Construction Company Ltd**¹⁵. In view thereof, Mr. Mehta contends that the impugned order cannot sustain legal scrutiny and requires, therefore, to be set aside.

¹⁵ 2016 SCC OnLine Del 5365

Analysis on merits

71. The reasoning of the learned Arbitral Tribunal, as contained in paras 32 to 37 of the impugned order is, in my considered opinion, unexceptionable.

72. Clause 4 of the MoU set out the modalities for exit, by the Guptas and the Chadhas from RBT, and for release of the Gurgaon property, pledged as collateral with the Bank. The position that emerges from a reading of the various Sub-Clauses of Clause 4 is the following:

(i) The exiting, by the Chadhas and the Guptas, from RBT, and the transfer of their shareholding in RBT to the appellant was conditional on the appellant getting released, *a priori*, from the bank, (a) the collateral in the form of the Gurgaon property pledged and, (b) the personal guarantees of the Chadhas, the Guptas or any of their family members.

(ii) For release of the collateral, clause 4 envisaged the following modalities:

(a) The appellant could replace the collateral with an alternate collateral.

(b) The appellant could pay off the entire loan to the bank.

(c) (The dispute in the present case is concerned with this option.) The appellant would deposit, “an equivalent amount” (which, according to Mr. Mehta, referred to the share of the loan liability proportionate to the appellant’s shareholding in RBT) in the loan account of RBT, thereby reducing the loan liability of RBT. Having done so, the appellant could ask the Chadhas and the Guptas to infuse amounts equivalent to the balance of the reduced loan liability into the loan account. The Chadhas and Guptas agreed to do so, subject to

(i) handing over, by the appellant, *of the requisite documents, evidencing deposit, by him, of an equivalent amount in the loan account, and*

(ii) receipt of balance confirmation from the bankers.

(d) Clause 4(b)(iv) of the MoU, however, provided an alternative to the Chadhas and Guptas, in the event of the appellant electing to follow option (c) [in Clause 4(b)(iii) of the MoU] *supra*. The Chadhas and the Guptas could take over the entire balance outstanding loan as on the date of offer by the appellant to their personal names or in the names of their associate companies. In that event, the Chadhas and Guptas were required to share, with RBT and the appellant, the No Dues Certificate from the Bank.

73. The options at (a) and (b) were never exercised by the appellant. They are, therefore, of no relevance to the present case. The dispute relates entirely to option (c) – and, in its wake, option (d).

74. The learned Arbitral Tribunal has correctly held that, before any liability, to make any payment, or to take over the balance outstanding loan, devolved on the Chadhas or the Guptas [under option (c)], the appellant was required, in the first instance, to discharge his obligation under the said option. This required the appellant *himself* to deposit, in the loan account of RBT, the share required to be contributed by him, and to produce documentary proof of such deposit having been made “*by him*”, in the said loan account.

75. The submission of the appellant, that this requirement stood satisfied by the production, by him, of the statement of account of RBT, showing a reduction of its loan liability from ₹ 9,81,48,864.97 on 1st November, 2019 to ₹ 6,11,68,882 on 1st March, 2020, was rejected by the learned Arbitral Tribunal, on the ground that the mere reduction of loan liability did not indicate that the amounts had been infused into the loan account by the appellant. Indeed, the statement of account on which the appellant relied, does not disclose the source from which amounts were infused into the loan account of RBT, resulting in the reduction of its loan liability. The requirement of such infusion having to be made by the appellant himself was an express covenant in Clause 4(b)(iii) of the MoU and, if the learned Arbitral Tribunal held that strict compliance therewith was required, the

decision is, at the very least, a plausible one, not deserving interference under Section 37(2)(b).

76. Mr. Mehta has placed reliance on Clause 25 of the MoU, which vests assets and liabilities, of RBT, after execution of the agreement, in the appellant, to contend that the source from which monies were infused in the loan account of RBT resulting in reduction of its loan liability, was irrelevant. He has also placed reliance, in this context, on Para 34(v), of the Statement of Claim, filed by the Chadhas before the learned Arbitral Tribunal.

77. It is obvious that the correctness of the impugned order cannot be tested on the ground of any recital contained in the Statement of Claim subsequently filed by the Chadhas before the learned Arbitral Tribunal, as the said Statement of Claim was not before the learned Arbitral Tribunal when the impugned order was passed. That apart, I do not find, in Para 34(v) of the Statement of Claim, (reproduced in para 64(iv) *supra*), any concession to the infusion of amounts by third parties, into the accounts of RBT being sufficient to substitute the requirement, in Clause 4(b)(iii) of the MoU, of such infusion having to be made by the appellant himself

78. Clause 25 of the MoU, in my opinion, would be of no significance in interpreting Clause 4(b)(iii). Clause 25 merely vests the assets and liabilities in the appellant after execution of the MoU. It does not do away with the requirement of the appellant infusing, into

the loan account of RBT, his share of RBT's loan liability, as required by Clause 4(b)(iii).

79. The contention, advanced in the written submissions filed by the appellant and reproduced in para 64 *supra*, to the effect that “no distinction could be created between the funds infused by the appellant in RBT after 01.11.2019 and the profits/income/assets of RBT” would amount to re-writing of Clause 4(b)(iii) of the MoU and would, in fact, provide for yet another alternate mode of liquidating the loan liability of RBT. In this context, I find substance in the reliance, by Mr. Rajshekhar Rao, on the words “by him”, as contained in Clause 4(b)(iii), referring to the source of infusion of funds into the loan account of RBT, resulting in reduction of its loan liability. These words definitively belie the contention advanced by the appellant, in their written submissions, that no distinction could be created between the funds infused by the appellant in the loan account and the profits/income/assets of RBT.

80. Nor am I able to accept the contention that the mere use of the words “First Party/Fourth Party” in Clause 4(a) of the MoU would operate to entitle the appellant to treat receivables infused into the loan account of RBT from other sources as equivalent to payments made “by him” for the purposes of Clause 4(b)(iii). In fact, the use of the expression “First Party/Fourth Party” in Clause 4(a) of the MoU may militate against the contention being advanced by Mr. Mehta. There is a clear distinction between the expressions used in Clauses 4(a) and 4(b). Whereas Clause 4(a) refers to release of the collateral security by

the “First Party/Fourth Party”, Clause 4(b) requires all acts and contributions, in that regard, to be made *by the Fourth Party*, i.e. the appellant. In case, infusion of monies from other sources, into the loan account of the RBT, were to be sufficient for the purposes of Clause 4(b)(iii) of the MoU, the contract could very well have used the expressions “First Party/Fourth Party” in Clause 4(b)(iii) as well. That the contract has not done so indicates a clear intent that infusion of moneys, into the loan account of RBT, for the purposes of exercise of the option under Clause 4(b)(iii), has to be *by the appellant himself*. There is no document, evidencing any infusion, by the appellant, of his share of the loan liability of RBT’s loan account.

81. Mr. Rajshekhar Rao has, in this context, correctly drawn the attention of the Court of the summary of the bank account of the RBT, which indicates that the total amount infused by the appellant, was only ₹ 90,50,000/-. I deem it appropriate, in this context, to reproduce the said summary, as placed on record by the appellant himself, thus:

SUMMARY					
	Particulars	CC-013/Interest/Principal	TL-168/Interest/Principal	TL-169 Interest/Principal	Total
01.11. 2019	South Indian Bank Outstanding	21109863.97	13993613	53045388	98148864
1	Current A/c 261 01.11.2019 to 29.02.2020	16383122	2500000	1151998	20035120
2	CC-013 01.11.2019 to 29.02.2020	6307427.12	798710	3553010.5	10659147.63
3	Sanjay Arora/Frisco 01.11.2019 to 29.02.2020	90,50,000			90,50,000

	Total Payment	31740549	3298710	4705008	3,97,44,267
01.03.20	South Indian Bank Outstanding	-96,837	11138513	50127206	6,11,68,882

82. As has been pointed out by Mr. Rao, the total amount infused by the appellant into the account of RBT, after 1st November, 2019, appears to be only ₹ 90,50,000/-. This cannot, clearly, be considered to be the “equivalent amount”, for the purposes of the Clause 4(b)(iii) of the MOU. The contention of Mr. Mehta that the appellant must be treated as having complied with the requirement of infusion of an “equivalent amount” into the loan account of RBT, as contained in Clause 4(b)(iii) of the MoU, does not, therefore, commend itself to acceptance.

83. The second requirement, in order to entitle the appellant to the benefit of the third option under Clause 4(b)(iii) of the MoU, was the receipt of confirmation from the banker of the reduced reduction of loan liability of RBT. The learned Arbitral Tribunal has held that no such confirmation was received. To this, Mr. Mehta’s response is that, as the statement of the loan account of RBT was issued by the bank, no further confirmation was required. There may be some substance in this contention, especially as the MOU did not specify any particular format in which the bank was to certify the reduced loan liability. Nonetheless, as the statement of loan account of RBT did not evince reduction of the loan liability *consequent upon infusion of any amount by the appellant in excess of ₹ 90,50,000/-*, the finding of the learned Arbitral Tribunal on this issue, too, does not merit interference.

84. The submission that the respondent could have contacted the Bank and obtained a clarification, in the circumstances, fails to retain significance. The contractual position remains, that the first responsibility was on the appellant to deposit his share in the loan account of RBT and, thereby, reduce its loan liability. It was for the appellant to establish that he had done so. That not having been done, the appellant can hardly be heard to contend that the respondents could have obtained a clarification from the Bank.

85. At the highest, the submissions of Mr Mehta relate to the manner in which the terms of the MoU were to be interpreted. The interpretation advanced, by the learned Arbitral Tribunal cannot be said, by any stretch of imagination, to be contrary to the contractual provisions. Rather, if anything, the learned Arbitral Tribunal has interpreted Clause 4(b)(iii) of the MoU literally. The appellant seeks to canvas what, in its submission, would be a more “purposive” interpretation of the clause. The words “by him”, according to Mr Mehta’s submissions, should not be read literally, but should also encompass a situation in which the monies were infused from other debtors of RBT. Similarly, the Statement of Accounts of RBT should be treated, according to Mr Mehta, as equivalent to a written confirmation from the Bank regarding the reduction of the loan liability of RBT. The interpretation of Clause 4(b)(iii), as advanced by Mr Mehta, may be one possible interpretation. That adopted by the learned Arbitral Tribunal is, however, at the very least, clearly another. The interpretation adopted by the learned Arbitral Tribunal

cannot be said to defeat the intent of the contract, or be so unreasonable or perverse as to justify its jettisoning. It is not an *impossible* interpretation, in any event. What the Court, examining the sustainability of an arbitral order or award, is concerned with, is the *possibility*, rather than the *probability*, of the reasoning of the Arbitral Tribunal. A reasoning which is *possible*, and which does not militate against any other provisions of the contract or appear patently unreasonable, is immunized from interference. In such a situation, in my view, the Court should stay its hands.

86. In that view of the matter, the necessary prerequisites, for exit, by the Chadhas and Guptas, from the affairs of RBT were not, *prima facie*, satisfied in the present case. The sequitur would be that after 1st November, 2019, all liabilities of RBT including payment of loan taken from the banks were to be met by the appellant. I am unable, therefore, to fault the learned Arbitral Tribunal in directing the appellant to continue to pay the EMIs, during the pendency of the arbitral proceedings.

Concluding observations

87. This Court has noted that, as a matter of routine, appeals are preferred against interlocutory orders passed by the Arbitral Tribunal, even if they do not result in irreparable prejudice to the appellant and are always capable of being modified when the final arbitral award is passed. Unlike the course of action, which it follows while dealing with petition under Section 9, the Court, when seized with an appeal against an interlocutory order of the learned Arbitral Tribunal under

Section 17 of the Act, is constrained to return findings on merits, on the issues in controversy, as the Court is effectively sitting in judicial review over the findings of the learned Arbitral Tribunal. These findings have the potentiality of effecting, to some extent, the future course of the arbitral proceedings, as well as the final award that may come to be passed, even if the Court enters the usual cautionary caveat, that the findings are intended only to dispose of the appeal against the Section 17 order. The fact that observation made by the High Court, even if, without prejudice, do affect the future course of arbitral proceedings, is an aspect that has been noted by a Division Bench of this Court in **N.H.A.I. v. Bhubaneswar Expressways Pvt Ltd¹⁶** and **D.L.F. Ltd v. Leighton India Contractors Pvt Ltd¹⁷**. Parties, who have chosen to refer their disputes to arbitration and, thereby have the distinct advantage of a speedy resolution of the disputes without having to undergo a protracted litigative process may, therefore, be well advised to consider whether orders passed under Section 17 of the 1996 Act should routinely be challenged by way of appeal. This also clogs the docket of the appellate Court, already bursting at the seams.

Conclusion

88. In view of the aforesaid, the grounds on which the appellant seeks to challenge the impugned order of the learned Arbitral Tribunal are, in my view, devoid of merits.

¹⁶ 2021 SCC OnLine Del 2421

¹⁷ 2021 SCC OnLine Del 3772

89. The appeal is dismissed with no order as to costs.

C. HARI SHANKAR, J.

OCTOBER 05, 2021

kr/dsn/ss/r.bararia

