

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

% **Reserved on: 25.11.2021**

Pronounced on: 03.12.2021

- (i) + **ARB. A. (COMM.) 51/2021 & I.A. 12443-44/2021**
(ii) + **ARB. A. (COMM.) 52/2021 & I.A. 12445-46/2021**
(iii) + **ARB. A. (COMM.) 53/2021 & I.A. 12447-48/2021**
(iv) + **ARB. A. (COMM.) 54/2021 & I.A. 12449-50/2021**

- (i) MR. VIJAY SHUKLA & ANR. Petitioners
(ii) MR. BHARAT PARMAR Petitioner
(iii) NALANDA FOUNDATION Petitioner
Through: Mr. Jayant Mehta, Senior Advocate
with Mr. Mani Gupta &
Ms. Aishwarya Nabh, Advocates
(iv) SHIVENDRA MISRA & ANR. Petitioners
Through: Mr. Rajshekhar Rao, Senior Advocate
with Ms. Samiksha Godiyal &
Mr. Govind Manoharan, Advocates

Versus

CAREER LAUNCHER INFRASTRUCTURE PVT.
LTD. & ORS. Respondents
Through: Mr. Akhil Sibal, Senior Advocates
with Mr. Rajat Arora, Mr. Ekansh
Bansal, Ms. Asavari Jain &
Ms. Deboshree Mukherjee, Advocates

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. The above captioned four appeals have been filed under the provisions of Section 37(2) (b) of the Arbitration and Conciliation Act, 1996
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read with Section 10 of the Commercial Courts Act, 2015 against the interim Award/order dated 25.08.2021 passed by the learned Arbitrator.

2. Appellants- Mr. Vijay Shukla and Mr. Sanjeev Kumar in the above captioned first appeal [ARB.A. 51/2021] are respondents No.2 and 6 and appellant- Mr. Bharat Parmar in the above captioned second appeal [ARB.A. 52/2021] is respondent No.3 in the arbitration proceedings. Appellant- Nalanda Foundation in the above captioned third appeal [ARB.A. 53/2021] is a public charitable trust, which was formed by Mr. Rakesh K. Sehgal, Mr. Puneet Rathi and Mr. Gopinathan C.P., who are associated with respondent No.1 herein and its group of companies, Career Launcher Educate Ltd., and is also respondent No.1 in the arbitral proceedings. Appellants- Shivendra Misra and Gautam Bhasin in the above captioned fourth appeal [ARB.A. 54/2021], who are respondents No. 4 & 5 in the arbitral proceedings, were Trustees of Nalanda Foundation from 11.04.2017 to 12.02.2019 and 11.04.2017 to 28.01.2019, who is respondent No.1 in the arbitration proceedings. Pertinently, Bharat Parmar, Shivendera Misra, Gautam Bhasin, Vijay Shukla and Sanjeev Kumar are erstwhile Trustees of Nalanda Foundation.

3. Respondent No.1- Career Launcher in the above captioned appeals is

a private limited company, which owns several parcels of land and provides land, building and infrastructure services.

4. The above captioned four appeals are directed against the interim order dated 25.08.2021 passed by the learned Arbitrator vide which application filed by the respondent No.1 under the provisions of Section 17 of the Arbitration and Conciliation Act, 1996 read with Order XXXIX R 10 CPC as well as three applications filed by the petitioners [one jointly filed by Vijay Parmar, Sanjeev Kumar and Bharat Parmar and two separately filed by Shivendra Misra and Gautam Bhasin] under Section 16 of the Act, have been disposed of.

5. Since parties to these appeals and before the Arbitral Tribunal, are common and challenge in these appeals is to the common impugned interim arbitral Award/order dated 25.08.2021, therefore, with the consent of learned counsel for the parties, these appeals have been heard together and are being disposed of by this common judgment.

6. The foundation of these appeals rests upon License Agreement dated 01.04.2009 executed between Nalanda Foundation with Career Launcher Infrastructure Private Limited (henceforth referred to “Career Launcher”) in respect of a school to be operated in Raipur, Chhattisgarh for a period of 30

years, whereunder on consideration of License Fee and Infrastructure Charges, respondent No.1-Career Launcher agreed to provide infrastructure, including provision of Open Space (Land), Covered Space (Building etc.) and other necessary infrastructure services including premises to run the schools with necessary fixtures, furniture for students and buses for transportation of students to and from School. The said License Agreement stood amended on various dates i.e. 01.04.2010, 01.11.2017, 15.04.2018 and 01.04.2019. Further, a similar License Agreement was also entered between the same parties for operating a school in Indore, which also stood amended several times i.e. 01.11.2017, 15.04.2018 and 01.04.2019 to revise the rental/ license fee to be paid by Nalanda Foundation to respondent No. 1-Career Launcher.

7. The arbitration proceedings between the parties relate to rent which allegedly became due and payable by the Nalanda Foundation to respondent No. 1/Career Launcher (claimant) in respect of aforesaid Agreements dated 01.04.2009 (as amended on 01.04.2010) and 01.04.2011 read with Addendums dated 01.11.2017, 15.04.2018 and 01.04.2019. Respondent No.1- Career Launcher, who is claimant in arbitral proceedings, has jointly and severally claimed recovery of rent from Nalanda Foundation, along with

some former Trustees.

8. At the hearing, Mr. Jayant Mehta, learned senior counsel appearing on behalf of appellants submitted that Nalanda Foundation is a public charitable trust which was formed by persons related to respondent No.1- Career Launcher and its group of companies, with whom the management of the Foundation remained until 30.1.2017. The said Nalanda Foundation is a not-for-profit, charitable trust which is involved in the activity of running of schools, who had entered into Agreement dated 01.04.2009 with respect to a property at Raipur, Chhattisgarh (amended on 01.04.2010 and Addendums dated 01.11.2017, 15.04.2018 and 01.04.2019) and another Agreement dated 01.04.2011 (Addendums dated 01.11.2017, 15.04.2018 and 01.04.2019) with respect to property at Jhalaria, Indore, Madhya Pradesh, through its various Trustees on behalf of Nalanda Foundation in their representative capacity with respondent No.1- Career Launcher.

9. It is submitted on behalf of appellants that the financial position of Nalanda Foundation was well within the knowledge of respondent No.1- Career Launcher at all points of time and the aforesaid Lease Agreements were not commercially arrived at and the rent was charged on per student basis or as percentage of non-refundable fee. However, pursuant to partial

change in the management of Nalanda Foundation, it raised the issue that the lease rents need to be brought down to market levels, as the rentals as a share of total revenues of the school was two to three times higher in the schools where the land was leased by respondent No.1-Career Launcher to Nalanda Foundation, as compared to the schools where land was leased from independent contractors/entities. Thereafter, various addendums were signed in the year 2019 with regard to Raipur Agreement and Indore Agreement and each of these addendums were clearly known and mentioned to be signed as “Trustees” in representative capacity. However, Nalanda Foundation had been in default for a long period of time in payment of rent to respondent No.1-Career Launcher due to exorbitant fee charged under the License Agreements dated 01.04.2009 and 01.04.2011. Further, since March, 2020, due to Covid pandemic and subsequent lock down, the school remained closed but when in August, 2020, respondent No.1-Career Launcher pressed for payment of rentals, Nalanda Foundation through its Trustees requested to consider the said period as force majeure event and take a benevolent view of the situation. To the contrary, respondent No.1-Career Launcher terminated the Lease Deeds and commenced the arbitration proceedings.

10. Pertinently, a petition under Section 11(6) of the Act [ARB.P. 155/2021] seeking appointment of an Arbitrator was filed by respondent No.1-Career Launcher before this Court, wherein this Court had appointed sole Arbitrator for adjudication of disputes between the parties. Also, the petition under Section 9 of the Act, filed by respondent No.1-Career Launcher [O.M.P.(I) (COMM.) 245/2020] was directed to be treated as the one filed under Section 17 of the Act and to be placed before the learned Arbitrator for consideration and disposal.

11. An application under Section 16 of the Act is also stated to have been filed by the appellants before the learned Arbitral Tribunal challenging its jurisdiction and seeking deletion of name from the Array of Parties, as the addendums to the Lease Agreements were signed by them in the representative capacity of Nalanda Foundation. Another ground urged before the learned Arbitrator was that they were never arrayed as parties in the applications filed under Sections 9 and Section 11 of the Act before this Court. After hearing both the sides on applications filed under Section 16 as well as Section 17 of the Act, the learned Arbitrator passed the interim Award 25.08.2021, which is under challenge before this Court.

12. Learned senior counsel appearing on behalf of appellants submitted

that at the stage of hearing the parties for interim relief, the final relief cannot be granted. Further submitted that Trustees of Nalanda Foundation cannot be made parties to the arbitration proceedings and no orders of personal liability for the alleged dues of the trust can be issued against such Trustees. It was submitted that under Section 30 of the Trust Act, Trustees are accountable only for such moneys, stocks, and funds as actually come into their hands and that one Trustee shall not be accountable for the neglect, default, acts, omission or commission of the other Trustees and thereby, claim of respondent No.1-Career Launcher that the appellants herein has to bear the burden of payment jointly and severally is unsustainable.

13. Learned senior counsel also submitted that the impugned order directing all the respondents therein to jointly and severally pay an amount of Rs.3crore to Career Launcher is based purportedly upon an admission of liability made in an email dated 25.7.2019 and selective contents thereof have been relied upon by learned Arbitrator. However, relevance thereof in its entirety has to be seen during trial and not at the stage of grant of interim relief. Learned senior counsel vehemently submitted that by passing the impugned order, the learned Arbitrator has infact granted partial final relief, which is contrary to contractual terms. Thus, final relief cannot be granted at

interim stage, including in proceedings under Section 17 of the Arbitration Act.

14. Likewise, the learned Arbitrator has also ordered the appellants to jointly and severally pay amount of Rs.7,01,112/- to respondent No.1-Career Launcher towards alleged electricity dues, which amounts to grant of final relief. It was emphatically submitted by learned senior counsel for appellants that the order of attachment before pronouncement of final judgment has been issued without applying the principles of Order XXXVIII Rule 5 of the Code of Civil Procedure Code, 1908. Merely having a valid claim or a *prima facie* case will not entitle an order of attachment before pronouncement of judgment/final Award and to arrive at this decision, it has to be first established that the party against whom such an order is proposed to be made is attempting to remove or dispose of the assets with the intention of defeating the decree/award that may be passed. It was submitted that no averment was made before the learned Arbitrator that appellants are seeking to alienate their assets to defeat the interest of the claimant/ respondent No.1-Career Launcher and thereby, direction to secure the amount of Rs.4,08,24,688/- through an encumbrance on their assets or any other valid and proper security (like a bank guarantee) is contrary to the settled

principles governing attachment before judgment and deserves to be set aside.

15. To substantiate the submissions advanced by learned senior counsel Mr. Jayant Mehta, it was submitted by Mr. Rajshekhar Rao, learned senior counsel that appellants – Shivender Misra & Gautam Bhasin had no knowledge of the email dated 25.7.2019 until it was filed in arbitration proceedings. These appellants have not written this email, who were Trustees of Nalanda Foundation only from 11.4.2017 and 28.1.2019 and thereby, the impugned interim order holding joint and several liability could not have been passed, as this issue could not have been decided at an interim stage. Learned senior counsel submitted that the direction of learned Arbitrator to pay Rs.3 Crores and further to secure an amount of Rs.4,08,24,688/- by way of attachment is bad in law.

16. In support of above submissions, reliance was placed by Mr. Jayant Mehta & Mr. Rajshekhar Rao, learned senior counsel, upon decisions in *State of U.P. Vs. Ram, Sukhi Devi* (2005) 9 SCC 733; *State Bank of India Vs. Ericsson India Private Limited And Others* (2018) 16 SCC 617; *TATA Advanced Systems Limited Vs. Telexcell Information Systems Limited* 2020 SCC OnLine Del 1716; *Raman Tech. & Process Engg. Co. and*

Another Vs. Solanki Traders (2008) 2 SCC 302 and *C.V. Rao & Ors. Vs. Strategic Port Investments KPC Ltd. & Ors.* 2014 SCC OnLine Del 4441.

17. On the other hand, Mr. Akhil Sibbal, learned senior counsel appearing on behalf of respondent No.1-Career Launcher vehemently opposed these appeals on the ground that the learned Arbitrator after hearing both the sides has passed a detailed interim Award with respect to liability of the Trustees.

18. Learned senior counsel submitted that the grounds urged before this Court were not even pleaded and argued before the learned Arbitrator and cannot be agitated for the first time in the appeal, as the same is contrary to the settled law that powers of the Appellate Court for consideration of Appeal under Section 37(1)(b) of the Act, are quite restricted and should not be invoked lightly. It was submitted that the impugned interim Award is based upon documents and submissions filed by the parties before the learned Arbitrator and in no way can be called contrary to law.

19. Learned senior counsel emphasized that a Trust is not a distinct juristic personality capable to sue or being sued in its own name without its Trustees and all the Trustees are necessary parties to any suit in relation to the Trust and the said position was not disputed before the learned Arbitrator at the time of hearing on the point of interim Award. It was also submitted

that the provisions of Trust Act relied upon by the appellants shall be applicable only for the determination of the liability of the Trustees in relation to the beneficiaries of Trust and not qua the contracts with the third parties. Learned senior counsel submitted that the impugned interim Award is premised upon various communications between the parties and the categorical admissions and assurances regarding the payment of the outstanding dues.

20. Learned senior counsel for respondent No.1-Career Launcher next submitted that whether the Trustees are on board or have retired is immaterial, as these Trustees had participated in the acts of commission/omission as alleged in the statement of claim and the various addendums were signed during the period when they were controlling the management of the Trust. All the Trustees were aware of the financial condition of the Trust and the addendums were executed only after mutual discussions that took place between the parties and this fact has been noted in the impugned interim Award.

21. Learned senior counsel submitted that the Trustees were illegally enjoying the property of respondent no. 1 without paying a penny despite termination of the license agreement and it is only after intervention of this

Court and observations made in its order dated 04.01.2021 [in OMP (I) (COMM) (No.) 245/2020] that the possession of the licensed infrastructure was handed over to the respondent No. 1 on 11.01.2021.

22. Learned senior counsel further submitted that according to affidavit dated 20.10.2021 filed by the Trust before this Court, no payment can be made by the Trust towards the payment of dues claimed by respondent No.1 in the arbitration proceedings and therefore, to secure the admitted amount and other dues during the pendency of the arbitral proceedings, the impugned interim Award has been passed.

23. With regard to appellants' averment that the learned Arbitrator was bound to follow principles of Order XXXIIX Rule 5 CPC, it was submitted that it is contrary to the provisions of Arbitration and Conciliation Act, 1996.

24. Attention of this Court was drawn to decisions in *Ajay Singh Vs. Kal Airways Private Limited and Ors.* 2017 SCC Online Del 8934; *Steel Authority of India Ltd. Vs. AMCI PTY Ltd.* 2011 SCC Online Del 3689; *Gatx India Pvt. Ltd. Vs. Arshiya Rail Infrastructure Limited & Anr.* 2014 SCC Online Del 4181; *Adhunik Steels Ltd. Vs. Orissa Manganese & Minerals (P) Ltd.* (2007) 7 SCC 125.

25. The submissions advanced by learned counsel representing both the sides were heard at length and the impugned interim order dated 25.08.2021, material placed on record as well as decisions cited by both the parties, have been carefully considered.

26. According to statement of claim filed before the learned Arbitrator, respondent No.1-Career Launcher has claimed recovery of license fee payable by the appellants (respondents therein) for the period October-December, 2017 and has therefore, roped in all the Trustees who served during 2017 as parties.

27. The appellants herein had filed applications under Section 16 of the Act before the learned Arbitrator *inter alia* praying for striking of their names from the array of parties in the arbitration proceedings and also raising an objection that the arbitral tribunal had no jurisdiction to proceed with the matter.

28. The stand of appellants herein was that they were not a party to the Lease/Infrastructure License Agreements dated 01.04.2009 and 01.04.2011 nor to the addendums executed thereafter. Also that these appellants were neither Trustees nor associated with the claimant/ respondent No.1 when the Agreements were signed in 2009; they have not at any point of time

furnished a personal guarantee nor have they agreed to act as the surety for the liabilities of respondent No. 1. Further averred that since they were not a party to the arbitration agreement contained in the aforesaid Agreements, so the requirement under Section 7 of the Act does not stand satisfied and thereby, the arbitral Tribunal had no jurisdiction to bind third parties to the arbitration proceedings.

29. On the other hand, the claimant/ respondent No.1-Career Launcher had pleaded before the learned Arbitrator that the Trustees are not third parties in relation to the suits by or against the trust and it is enough to have an arbitration agreement with the trust to bind the Trustees.

30. While deciding application under Section 16 of the Act filed by the appellants (respondents therein), the learned Arbitrator noted the rival contentions of the parties in the impugned interim Award dated 25.08.2021 and observed as under:-

“After careful consideration of all the oral & written submissions advanced by the learned counsels for the rival parties and the facts, record and law, I conclude that the respondents' three applications U/s. 16 of the Act-one dated 27.03.2021 filed by respondents Nos. 2, 3 & 6 and two separate applications both dated 01.06.2021 filed by respondents Nos. 4 & 5 respectively are liable to be dismissed

and the same are hereby dismissed being not maintainable. This tribunal is within its power and jurisdiction to entertain and try the present claim against all the respondents.

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The Trust i.e. Respondent no. 1 is not a separate legal entity in law and has no distinct juristic personality capable to sue or being sued in its own name without its Trustees (unlike a company). A "Trust" is not a juristic person or a legal entity, as the juristic person has a legal existence of its own and hence it is capable of suing and being sued in a Court of law. Thus it appears that a "Trust" is not like a body corporate, which has a legal existence of its own and therefore can appoint an agent. The judgments (supra) cited by the claimant have brought the point home. I am in agreement with the submissions made by the claimant in its replies to the applications U/s. 16 and its synopsis coupled with the judgments cited in support thereof.

Similarly, the contention raised by the respondents that the Trustees were not impleaded in section 11 petition is also completely misplaced. The Trustees are not separate to the Trust and therefore every claim by/against the trust will have to be instituted/defended by the Trustees. Further, the joint and

several liability of the Respondents cannot be decided at this stage and is a matter of trial. Therefore, the Respondent Nos. 2 to 6 cannot be deleted from the array of parties.”

31. Further, in the application filed under Section 17 of the Act, read with Order XXXIX Rule 10 of the CPC, the claimant/ respondent No.1 - Career Launcher had prayed for the following interim directions:-

a. Direct the Respondents therein to pay the Claimant an amount of Rs. 3 Crores admitted by the Respondent No. 1 vide in its email dated 25.07.2019;

b. Deposit with the Hon'ble Arbitral Tribunal a balance sum of Rs.4,08,24,6881- being an amount of outstanding license fee arising out of the Agreement dated 01.04.2009 read with addendums dated 01.04.2010, 01.11.2017, 15.04.2018 and 01.04.2019 and Agreement dated 01.04.2011 read with addendums dated 01.11.2017, 15.04.2018 and 01.04.2019; Alternatively, it was also sought that the Ld Tribunal may direct the Respondents therein to furnish adequate security in the form of a bank guarantee issued by a nationalized bank in India or such other security that shall cover the entire sum in dispute between the parties and the amount so deposited by the Respondents therein by kept in an interest bearing fixed

deposit until the conclusion of the arbitration proceedings;

c. Direct the Respondents to pay the Claimant a sum of Rs.07,01,1121- being the outstanding electricity dues payable by the Respondent No. 1 as on the date of handing over the possession, i.e. 11.01.2021 as stated above;

d. Direct the Respondent to file an affidavit of its assets and income as per the directions and judgment dated 05.08.2020 by Hon'ble High Court of Delhi in M/s Bhandari Engineers and Builders Pvt. Ltd. Vs. Maharia Raj Joint Ventures bearing case no. Ex. P. 27512012;

e. Direct the Respondent No. 1 to disclose its Trustees since 2017 till the date of filing of this claim petition.

32. The learned Arbitrator after considering the replies and rejoinder filed to the aforesaid applications, observed as under:-

“I tend to agree with the afore-mentioned stand and reasoning given by the claimant vis-à-vis the liability of all the respondents, including respondents Nos. 4 & 5. The e-mail dated 25.07.20 19 (supra) by respondent No. 2 to the claimant only re-affirms the liability of the

respondent No.1 towards the claimant, as per Agreement dated 01.04.2009 read with addendums dated 01.04.2010, 15.04.2018 and 01.04.2019 and Agreement dated 01.04.2011 read with addendums dated 15.04.2018 and 01.04.2019 which were entered between the claimant on the one hand and respondents on the other. Broadly speaking in all fairness, prima facie, the claimant is entitled to receive the license fee (as agreed between the rival parties and amended from time-to-time) from the respondent No.1 besides the electricity charges levied by the Electricity Department of both the States during the relevant period till the possession of the properties in question was handed over back to the claimant. It is not out of place to mention here the observation made by the Hon'ble Delhi High Court in its order dated 04.01.2021 (supra) in OMP (I) (COMM) No. 245/2020.

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The claimant has made out a prima facie case in its favour. Respondents cannot be allowed to run away from their liability of payment of licence fee and electricity dues during the

period of their use & occupation of the claimant's premises as per the agreed rate. The amount runs in crores of rupees. Respondents' conduct is wanting in bonafide. Despite their clear assurance & commitment to make part payment (refer e-mail dated 25.07.2019), the respondents have neglected to honour their commitment and did not pay a penny towards the same to the claimant. In view of the aforementioned facts documents and the record coupled with the judicial pronouncements (supra), claimant's interest is liable to be protected lest the claimant may suffer irreparable injury. Balance of convenience also lies in favour of the claimant in safe-guarding its interest.”

33. While returning the aforesaid findings, the learned Arbitrator held as under:-

“INTERIM AWARD/ORDER ON PRAYER CLAUSE (a):

For the reasons stated here-in-above and for the reasons stated in my separate order of disposing respondents' applications U/s. 16 of the A & C Act, the prayer clause (a) is allowed. All the respondents, jointly & severally, are hereby directed to pay to the Claimant an amount of Rs.3,00,000,00/= (Rupees Three Crores only). Claimant

may take steps as per law.

INTERIM AWARD/ORDER ON PRAYER CLAUSES (b) & (d):

For the reasons stated here-in-above and for the reasons stated in my separate order of disposing respondents' applications U/s. 16 of the A & C Act, the prayer clause (b) in the alternative and prayer clause (d) are allowed. The respondents are hereby directed to file separate affidavits truthfully disclosing their personal assets and income details. Respondents are further directed to secure the said amount of Rs.4,08,24,688/= (Rupees Four Crores Eight Lakhs Twenty Four Thousand Six Hundred and Eighty Eight only) by not alienating and/or encumbering their assets to the extent of said amount of Rs.4,08,24,688/=. For this purpose, the respondents shall file individual declarations in the form of affidavits. These affidavits shall be filed by the respondents within two weeks of the pronouncement of this Interim Award. In the alternative, the respondents are permitted to file any other valid and proper security, such as bank guarantee, deposit with the Registrar General, Delhi High Court or Fixed Deposit Receipts etc. to the tune of Rs4,08,24,688/=.

INTERIM AWARD/ ORDER ON PRAYER CLAUSE (c):

For the reasons stated here-in-above and for the reasons stated in my separate order of disposing respondents'

applications U/s. 16 of the A & C Act, the prayer clause (c) is allowed. All the respondents, jointly & severally, are hereby directed to pay to the Claimant an amount of Rs.7,01,112/= (Rupees Seven Lakhs One Thousand One Hundred and Twelve only) towards the outstanding electricity dues payable by the respondent No.1 as on the date of handing over the possession, i.e., 11.01.2021. Claimant may take steps as per law.

INTERIM AWARD/ORDER ON PRAYER CLAUSE (e):

For the reasons stated here-in-above and for the reasons stated in my separate order of disposing respondents' applications U/s. 16 of the A & C Act, the prayer clause (e) is allowed. The respondent No.1 is directed to disclose its Trustees since 2017 till the date of filing of the claim petition. It is noted that the respondent No.1 has already annexed the copy of the register of Trustees of Respondent No. 1, as Annexure: R-12 with its Statement of Defence dated 27.03.2021. In its rejoinder dated 14.04.2021, the claimant has not disputed the correctness of this annexure, hence the same is presumed to be correct. Thus, this prayer clause (e) has been met. The claimant is expected not to cherry-pick few Trustees' and to leave others from arraying them as party/respondents in its claim, especially after the Annexure: R-12 has been filed on record. If the claimant still fails to make all the Trustees as party/respondents then

its effect shall be seen on the claim at the appropriate stage.

The claimant's application dated 01.03.2021 U/s. 17 of the A & C Act read with Order XXXIX Rule 10 C.P.C. is accordingly disposed off in above terms.”

34. Before adverting to aforesaid finding returned by the learned Arbitrator while passing the interim Award and testing its legality or illegality, this Court finds it appropriate to first look into the statement of claims made by respondent No.1/Claimant- Career Launcher before the learned Tribunal, which reads as under:-

a) *Award a sum of INR 7,08,24,688 (Rupees Seven Crores Eight Lakhs Twenty Four Thousand Six Hundred and Eighty Eight) towards the total amount due and payable till date of filing of this Statement of Claim under the Agreement along with interest @15% per annum from the date it became due till the date of filing of this Statement of Claim, be passed in favour of the Claimant and against the Respondents jointly and severally;*

b) *Award a sum of INR 7,01,112 (Rupees Seven Lakhs One Thousand One Hundred and Twelve) towards the electricity charges along with interest @15% per annum from the date it became due till the date of filing of this Statement of Claim, be passed in favour of the Claimant and against the Respondents jointly and severally;*

c) *Award pendente lite and future interest @15% per*
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annum from the date of filing of this Statement of Claim till realization, be passed in favour of the Claimants and against the Respondents jointly and severally;

d) Award litigation expenses incurred by the Claimant in favour of the Claimants and against the Respondents jointly and severally;

e) Award costs of arbitration proceedings to the Claimant in favour of the Claimants and against the Respondents jointly and severally;

35. The prayers made by both the sides in their respective applications filed under the provisions of Sections 16 and 17 of the Arbitration and Conciliation Act and the findings returned by the learned Arbitrator thereupon, have been carefully considered in the light of statement of claims made before the arbitral Tribunal.

36. Based upon a purported admission in e-mail dated 25.07.2019, the learned Arbitrator has allowed application under Section 17 of the Act filed by the respondent. The provisions of Section 17(1) of the Act provides as under:-

“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).”

37. A Coordinate Bench of this Court in a somewhat similar case in ***Tata Advanced Systems Limited (Supra)*** has observed as under:-

“23. There cannot be a quarrel with the settled law that interference by the Courts should be the least in the orders of the Arbitral Tribunals. However, this cannot be understood to be laying down an absolute proposition that the orders of the Tribunal are totally immune to interference and in no case can they be set aside. The facts and circumstances of each case would determine whether the orders deserve to be interfered or not.

24. The issue that arises for consideration is what are the guiding principles for grant of relief by the Arbitral Tribunal under Section 17 of the Act. This law is no more res integra. It is settled that in exercising discretion while granting an interim relief under Section 17 of the Act, Tribunal should be extremely cautious and the power should be exercised for purpose of safeguarding the interests of the parties to the proceedings, so that the

subject matter of the Arbitration is preserved. There should be adequate material on record to show that the Respondent will fritter away the property or assets or funds, being the subject matter of Arbitration, so as to frustrate the Award, in case the Claimant succeeds.”

38. The power of Arbitral Tribunal to pass interim Awards on the basis of apparent and explicit admissions by a party is undisputed, however, the admission has to be specific and categorical. In the case in hand, appellants- Vijay Shukla and Sanjeev Kumar have alleged that the learned Arbitrator has considered the selective portions of e-mail dated 25.07.2019 and also stand of appellants – Shiveder Misra, Gautam Bhasin, Bharat Parmar is that they had no knowledge of the email dated 25.7.2019 until it was filed in arbitration proceedings. In the opinion of this Court, the relief based upon a disputed admission, that too without trial, cannot be permitted on the basis of piecemeal consideration of a document. Moreover, this court fails to understand on what premise the learned Arbitrator has directed that the respondents (appellants herein) shall jointly and severally pay the claimant/respondent No.1 the amount of R.3 crores. The reason is obvious, the learned Arbitrator in the impugned order dated 25.08.2021 has observed that the claimant i.e. respondent No.1-Career Launcher cannot “cherry pick”

the Trustees to be made party to the arbitration proceedings and has therefore directed the respondent No.-1/Nalanda Foundation to disclose its Trustees since 2017 till the date of filing of the claim petition. The Arbitral Tribunal in its further order dated 18.11.2021 has observed and held as under:-

“It is made clear that this Interim Order, is however, without prejudice to the rights, title, contentions and interest of the parties. Meaning thereby, the effect of non-impleadment of the individuals, named by the respondents (supra), as parties respondents in the present arbitration proceedings, shall be seen on the claim at the appropriate stage, as already ruled by this Tribunal in its Interim Award/ Order dated 25.08.2021”

39. In view of what has been observed by the learned Arbitrator hereinabove, the matter is yet to be adjudicated on the point as to which individual/ Trustee shall be held liable for the activities of Nalanda Foundation and without answering this disputed question, passing a direction to appellants to jointly and severally pay the amount of Rs.3 Crores [on Prayer Clause-(a)] to claimant, cannot sustain.

40. Similarly, the direction to appellants to jointly and severally pay amount of Rs.7,01,112/- towards the outstanding electricity dues payable by

Nalanda Foundation cannot sustain in the absence of fixing the liability. Moreover, as per Statement of Claims filed by the claimant before the learned Arbitrator, similar relief has been claimed and by issuing this direction, the learned Arbitrator has infact granted the main relief claimed in the arbitral proceedings, that too without therebeing any trial.

41. With regard to prayer Clause (b) and (d), this Courts finds that the learned Arbitrator has directed the appellants to file separate affidavit disclosing their personal assets and income or to furnish bank guarantee/ fixed deposit receipt to the tune of Rs.4,08,24,688/- before this Court. In the opinion of this Court, such a direction is passed to secure the disputed amount. However, prior to passing of such direction, the learned Arbitrator was not only required to fix the liability in specific but also to establish that there is likelihood of escaping the person liable, which is not the case in hand.

42. It is not disputed that the vacant possession of the premises has been handed over to the first respondent on 11.01.2021 pursuant to directions of this Court vide order dated 04.01.2021 [in OMP (I) (COMM) (No.) 245/2020] i.e. during pendency of the arbitration proceedings.

43. In view of afore-going narration, these appeals are allowed and the

impugned Award dated 25.08.2021 is hereby set aside. Pending applications are also disposed of being infructuous.

(SURESH KUMAR KAIT)
JUDGE

DECEMBER 03, 2021

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