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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P.(I) (COMM.) 377/2021 & I.A. 15071/2021**

PINAKA STUDIOS PVT. LTD. Petitioner

Through: **Mr. Kunal Kalra, Adv.**

versus

MX MEDIA AND ENTERTAINMENT PTE LTD

..... Respondent

Through: **Mr. Rajshekhar Rao, Senior Advocate with Mr. Angad S. Dugal, Mr. Govind S. Grewal, Mr. Areeb Amanullah, Mr. Siddharth H Raval, Ms. Shivika Srivastav, Advs**

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T

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18.11.2021

(Video-Conferencing)

1. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996, ("the 1996 Act"), seeking certain pre-arbitral *interim* reliefs.

Facts:

2. The dispute emanates out of a production agreement dated 10th

March, 2021, between the petitioner and the respondent. The production agreement contained the following clause, envisaging resolution of the disputes between the parties by arbitration:

“21.3 In the event the Parties fail to resolve their disputes or differences amicably, within 30 (thirty) days from the date on which any Party first notifies the other Party of such dispute having arisen, then such disputes shall be settled by arbitration of a sole arbitrator, jointly appointed by the Parties. The arbitration will be conducted in accordance with the Arbitration and Conciliation Act, 1996 (as amended). The language of arbitration proceedings shall be English. The venue of arbitration shall be New Delhi.”

3. The opening recital ‘A’ in the agreement stated that the respondent, who was engaged in the business of developing, producing and distributing audio and video entertainment and other related activities, had developed, produced and exploited a web series, known as “Raktanchal”, and was desirous of producing Season 2 of the said web series under the tentative name “Raktanchal II”. The agreement envisaged development, production, addition, editing and delivery, by the petitioner to the respondent, of the said web series, by the name “Raktanchal II”. The series, as created and developed by the petitioner, was to be provided to the respondent on hard disks, made available by the respondent. Clause 3.8 of the agreement provided, in this regard, thus:

“3.8 Hard Disks. The Production Company shall ensure that all hard disks for the Series are used solely and exclusively in relation to the Series, and are utilized by the Production Company for the purpose of delivery of the Delivery Materials to MX. Further, upon expiry or termination of this Agreement, the Production Company shall handover all such hard disks to MX, promptly and without any demur or delay.”

4. Clauses 19 and 20 of the agreement, with their various sub clauses, provided for termination, and its sequelae. They read as under:

“19. TERMINATION

19.1 MX shall be entitled to terminate this Agreement upon occurrence of any of the following events, by providing 10 (ten) days’ notice in writing to the Production Company:

19.1.1 the Production Company breaches any of the terms and conditions of this Agreement, and fails to cure such breach within of the aforesaid 10 (ten) days’ notice period.

19.1.2 any representations and/or warranties of the Production Company are found to be false, misleading, untrue, or inaccurate in any manner, and the Production Company fails to remedy such inaccuracy within the aforesaid 10 (ten) days’ notice period.

19.1.3 the Services rendered by the Production Company not being in accordance with the terms and conditions of this Agreement.

19.1.4 on the commission or omission of any act by the Production Company which is prejudicial to the interest of MX, its associates and/or its affiliates, and/or the Series.

19.1.5 any petition for winding up, liquidation, insolvency or bankruptcy of the Production Company being adjudicated in any competent court.

19.2 Further, MX shall be entitled to terminate this Agreement by giving a prior written notice of 15 (fifteen) days to the Production Company.

19.3 The Production Company shall be entitled to terminate this Agreement by providing 15 (fifteen) days’ prior notice in writing to MX, in the event of a default by MX in

payment of any part of the Production Budget in accordance with this Agreement, and having failed to remedy such default within the aforesaid period of 15 (fifteen) days of being notified in writing by the Production Company of the occurrence of such default in payment.

20 CONSEQUENCES OF TERMINATION

20.1 Upon termination of this Agreement by MX pursuant to Clause 19.1 above, the Production Company shall not be entitled to any Production Fee, and all amounts towards the Production Fee paid by MX to the Production Company until the date of such termination shall be immediately refunded by the Production Company to MX. MX shall not be obligated to pay any further amounts to the Production Company towards the Production Fee and the following consequences shall apply:

20.1.1 MX shall have the sole, exclusive and irrevocable right to take over, assume supervision and control, produce, and complete the Series, by itself or through any other third party, whether a production company or an individual ("**Third Party Producer**"), who shall thereafter be responsible for completing the production of the Series on such terms and conditions as may be commercially agreed between MX and the relevant third party;

20.1.2 all Intellectual Property Rights in the Series, the Works and all underlying parts thereof, shall vest with MX, and all agreements (including Production Agreements) and assignments signed and executed by the Production Company with any third parties in relation to the Series, including agreements with all artists and other contributors of the Series, shall be novated in favour of MX and/or shall stand assigned to MX. The Production Company shall ensure that all such agreements are exclusively assigned and vested, with MX, free from all lien, charges, defects and encumbrances, and thereafter MX shall have the right to release and distribute the Series and all parts thereof, anywhere in the Territory, and appropriate all

revenues accrued or arising from the Series, exclusively; and

20.1.3 the Production Company shall forthwith return and deliver to MX, all materials relating to the Series, and all Confidential Information belonging to MX that may be in its possession as a result of the arrangement contemplated under this Agreement, or if so required by MX, immediately destroy all Confidential Information and provide a written confirmation of the same to MX.

20.2 Upon termination of this Agreement pursuant to Clauses 19.2 or 19.3, the Production Company shall be entitled to receive the Production Fee on a pro-rated basis, in proportion to the Services rendered by the Production Company in respect of the Series until the date of such termination and the following consequences shall apply:

20.2.1 MX shall reimburse to the Production Company all cost/expenses incurred/accrued by it in respect of production of the Series until the date of termination, provided such costs and expenses are in excess of the Production Budget already paid by MX until the date of such termination, and provided further that the amounts so incurred by the Production Company have been previously approved by MX in writing, and the Production Company submits to MX appropriate documents evidencing such payments by the Production Company;

20.2.2 the Production Company shall refund to MX all amounts paid by MX towards the Production Budget that are unutilized until the date of such termination, within 7 (seven) days from the date of termination, and MX shall not be liable to pay any further amounts whatsoever to the Production Company;

20.2.3 MX, subject to payment of Production Budget as per the terms of the Agreement, shall have the sole, exclusive and irrevocable right to take over, assume supervision and control, produce, and complete

the Series, by itself or through Third Party Producer, who shall thereafter be responsible for completing the production of the Series on such terms and conditions as may be commercially agreed between MX and the relevant third party;

20.2.4 all Intellectual Property Rights in the Works and/or any parts thereof (including the Series and the Series Elements), shall vest with MX, and all .agreements and assignments signed and executed by the Production Company with any third parties in relation to the Series, including agreements with all artists and other contributors of the Series, shall be novated in favour of MX and/or shall stand assigned to MX. The Production Company shall ensure that each of them are exclusively assigned and vested, with MX, free from all lien, charges, defects and encumbrances, and thereafter MX shall have the right to release and distribute the Series and all parts thereof, anywhere in the Territory, and appropriate all revenues accrued or arising from the Series, exclusively; and

20.2.5 the Production Company shall forthwith return and deliver to MX, all materials relating to the Series, and all Confidential Information belonging to MX that may be in its possession as a result of the arrangement contemplated under this Agreement, or if so required by MX, immediately destroy all Confidential Information and provide a written confirmation of the same to MX.

20.3 The Parties agree and acknowledge that, notwithstanding the termination of this Agreement for any reason whatsoever, the Intellectual Property in the Works and/or any parts thereof (including the Series and the Series Elements) shall solely vest with MX, and the Production Company shall not have any claims, rights or entitlements whatsoever to the Works and/or any parts thereof.”

5. On 6th August, 2021, the respondent addressed the following notice to the petitioner:

“August 6, 2021

Pinaka Studios Private Limited
Unit No 31, Chandragupta Estate,
New Link Road, Andheri (West),
Mumbai-400053
Email: info@pinakastudios.co.in
shashank@pinakastudios.co.in

Re: Notice of Termination.

Dear Sir,

1. We act for and on behalf of our Client, MX Media & Entertainment Pte Ltd, a company incorporated under the laws of Singapore, having its registered office at 71, Robinson Road, #14-01, Singapore- 068895 ("**Our Client**").

2. As you are aware, Our Client is engaged in the production, development and distribution of audio and video content. As you are further aware, Our Client had produced an original web series titled "Raktanchal", which is available for viewing/streaming exclusively on Our Client's platform "MX Player" (hereinafter referred to as "**the Platform**"). It is noteworthy that Our Client owns all intellectual property rights and other proprietary rights in and to the said web series titled "Raktanchal".

3. This communication is in relation to the Production Agreement dated March 10, 2021 (hereinafter referred to as "**the Agreement**") executed between Our Client and Pinaka Studios Private Limited (hereinafter referred to as "**You/Pinaka**"), in terms whereof Our Client had commissioned Pinaka to provide the Services (as defined under the Agreement) in relation to the production of Season 2 of the said web series titled "Raktanchal". It is also pertinent to mention here that the said Agreement is a contract of service. Accordingly, all rights (including intellectual property rights and other proprietary rights) in and to Season 2 of the said web series titled "Raktanchal" vest solely with Our Client and are owned by Our Client alone.

4. Our Client has notified us that Pinaka is in breach of numerous provisions of the Agreement and has failed to

cure/rectify the said breaches despite having been called upon to do so. Some instance of breaches by Pinaka of the provisions of the Agreement, which Pinaka has failed to cure/rectify despite having been called upon to do so are set out hereunder:

(i) Our Client was shocked to learn that you had on several occasions, without any permission/authorization from Our Client unilaterally shifted the location of the shoot. For instance, in the Mumbai schedule the shoot was scheduled to take place in Vajreshwari but was actually carried out in Bhandup. No permission/authorization was sought from Our Client in this regard. Further, Our Client was also shocked to learn that you had unilaterally and without permission/authorization from Our Client shifted the location of the shoot from Varanasi to Allahabad;

(ii) Pinaka has failed to provide the Services in terms of the directions and specifications of Our Client (Breach of Clause 2. 2. 2);

(iii) Pinaka unilaterally and without any authorization/permission from Our Client in this regard changed a number of the Head of Departments including the Art Director and other key technicians like the Online Editor, Executive Producer and Production Manager. (Breach of Clause 2.2.3);

(iv) Mr. Shashank Rai of Pinaka, who was supposed to be in charge of the production process was not even present on the sets. In fact, there was a complete failure to coordinate, facilitate and carry out the production related activities. The situation on the sets was alarming and completely chaotic. The members of the crew were completely unaware of their role and responsibilities (Breach of Clause 2.2.7);

(v) In addition to the fact that Mr. Rai of Pinaka was not present on the sets, what is even more shocking is that he was in fact simultaneously shooting another show/web series and had in fact diverted resources and equipment such as lights, cameras etc

(the cost whereof was borne by Our Client) from Our Client's shoot to the shoot of the said other show/web series. For instance, key contributors such as the On-Location Editor, Executive Producer, Production Manager and Light Men who were supposed to be on the set for the entire schedule of the shoot had been illegally diverted by Mr. Rai of Pinaka to the shooting of another show/web series;

(vi) On account of gross mismanagement by Pinaka and its representatives, the shoot itself had to be cancelled on several days. It is noteworthy that on several occasions the shoot had to be cancelled as Pinaka had failed to obtain the necessary permissions/licenses in this regard (Breach of Clause 2.2.8 and Clause 3.4);

(vii) In terms of Clause 2.2.10, Pinaka was under an obligation to ensure that all recordings, rushes including all raw footage was deposited with Our Client on the completion of shooting or recording in each shift. However, despite repeated requests made by Our Client in this regard, Pinaka failed to do so. (Breach of Clause 2.2.10);

(viii) Local Vendors and Artists were not paid their dues towards services provided in relation to the production. On account of your failure to pay the dues of the vendors and artists they stopped attending the shoot thereby disrupting the entire schedule and causing further financial loss to Our Client (Breach of Clause 2.2.12). What is even more shocking is the fact that Pinaka failed to clear the dues of vendors and artists despite repeated requests made by Our Client in this regard;

(ix) In terms of Clause 3.1, Pinaka was under an obligation to ensure that the Services were provided in a timely manner. However, on account of gross mismanagement and fraudulent conduct on the part of Pinaka and its representatives, none of the timelines were adhered to and there has been a significant delay in the production of the show/web series of Our Client.

The same necessarily entails additional and unnecessary financial burden for Our Client;

(x) In terms of Clause 3.10 (as also in terms of industry practice), Pinaka was under an obligation to provide to Our Client call sheets on a daily basis and shooting reports on a daily basis. Not only did Pinaka not comply with this obligation as required, when on occasions call sheets were provided to Our Client the same were false and incorrect. For instance, while the call sheet for July 13, 2021 records that the shooting location was Vajreshwari, the shoot was actually carried out at Bhandup. The same was done deliberately and with a mala fide and bad faith intent to ensure that Our Client was unable to monitor the shoot effectively. Further, even the daily progress reports (DPR) have not been submitted to Our Client;

(xi) In terms of Clause 3.16, Pinaka was under an obligation to address all complaints raised by Our Client within 24 hours. As is evident from the above, Pinaka repeatedly failed and neglected to address the complaints raised by Our Client.

It is noteworthy that the aforementioned instances are merely illustrative and not an exhaustive list of the breaches by Pinaka.

5. Further, Our Client is in receipt of several complaints alleging that Pinaka and its representatives have misbehaved with members of the crew and staff (including complaints from the Actors and the Director). In fact, Pinaka and its representatives have also repeatedly misbehaved with Our Client's representatives who were present at the location of the shoot. Our Client has also been made aware that cheques issued by Pinaka to several Vendors, several Artists and Crew Members have been returned dishonoured upon presentation with the bank. As set out here in above on account of non-payment by Pinaka of the dues of the Cast, Crew and Vendors several artists refused to attend the shoot for the said reason. Our Client is also in receipt of complaints that Pinaka has failed to deposit the TDS dues.

6. A perusal of the foregoing makes it evident that:

(a) Pinaka has repeatedly breached material provisions of the Agreement;

(b) Pinaka and its representatives have acted in a completely unprofessional manner. In fact, your aforementioned actions have also adversely impacted the quality of the production for which you are solely liable;

(c) Pinaka's intent was to defraud Our Client. The same is evident from the fact that not only has Pinaka not carried out the Services in terms of the Agreement, Pinaka has actually diverted Our Client's resources towards other projects, without any authorization/permission from Our Client in this regard;

(d) Our Client's association with Pinaka has in addition to causing significant financial loss to Our Client has also brought significant disrepute to Our Client in the industry. Pinaka's actions have adversely affected Our Client's goodwill and reputation significantly.

7. In addition to the foregoing, Our Client has as a direct result of your illegal actions also been arrayed as a Respondent in a petition filed by one Affluence Media under Section 9 of the Arbitration and Conciliation Act, 1996, before the Hon'ble Bombay High Court. A perusal of the said petition reveals that Pinaka (represented by Mr. Shashank Rai) had executed an agreement with the said entity (Affluence Media) for the purpose of 'financing' Our Client's show/web series titled Raktanchal Season 2. What is even more shocking is the fact that Pinaka (despite not having any right or authority to do so) had assured the said entity (Affluence Media) of credit (as a Co-Producer) in Our Client's web series/show titled Raktanchal Season 2. Not only is the same a blatant violation of the provisions of the Agreement (more specifically of Clause 15.2.4), the same is further demonstrative of your mala fide and bad faith intent to defraud Our Client.

8. It is therefore evident that your illegal actions have already exposed Our Client to litigation by third parties without any fault of Our Client.

9. In view of your aforementioned illegal actions there is a complete breakdown of the trust which Our Client had reposed in you (Pinaka). Further, on account of your illegal actions there is a complete and irreparable breakdown of the relationship between Our Client and Pinaka. It is further noteworthy that your aforementioned repudiatory breaches are incapable of being remedied.

10. In view of the above, Our Client is constrained to terminate the Production Agreement dated March 10, 2021 executed between Our Client and Pinaka Studios Private Limited, with immediate effect.

11. We accordingly call upon you to:

(i) Forthwith cease and desist from portraying any association with Our Client in any manner whatsoever; AND

(ii) Forthwith deliver to Our Client a complete list of the cast and crew engaged for the production of Our Client's web series titled Raktanchal Season 2, along with the agreements executed with each such member of the cast and crew; AND

(iii) Provide Our Client with No-Objection Certificates from each member of the cast and crew along with the details of payments disbursed and outstanding dues payable to such members of the cast and crew; AND

(iv) Provide Our Client with access to your accounts (in terms of the provisions of Clause 12 of the Agreement) to enable Our Client to determine the expenditure incurred in the production of Our Client's web series till date; AND

(v) Deliver to Our Client all hard disks and all copies of the show/web series titled Raktanchal Season

2 (to whatever extent completed as of the date of this notice) and also deliver to Our Client all material including but not limited to Art and Costumes and all other material sourced for the production of Raktanchal Season 2; AND

(vi) Provide Our Client with a written undertaking that you have not retained any copy (in any format) of the show/web series titled Raktanchal Season 2 or any part thereof.

12. You are called upon to comply with the aforementioned requisitions within 72 hours from the receipt hereof of this notice, failing which Our Client has instructed us to initiate appropriate legal action, civil and criminal, against you and your representatives for your aforementioned illegal actions, without any further notice, which shall be at your own risk as to the costs and consequences thereof.

13. Please also note that:

(i) Our Client shall not release any further payments to Pinaka till such time that Pinaka complies with the requisitions set out in paragraph 11 above;

(ii) Our Client shall deduct from any outstanding dues (if any found due) the post production cost incurred by it. Further, Our Client shall also be entitled to deduct any and all costs associated with the completion of the production of Raktanchal Season 2;

(iii) In the event that the audit of your accounts and books reveals that the amounts actually expended by Pinaka towards the production of Our Client's show/web series titled Raktanchal Season 2 are lesser than the amounts already disbursed by Our Client to Pinaka under the Agreement [Our Client has already paid Pinaka an amount of Rs. 4,12,50,000/- (Rupees Four Crores Twelve Lakhs and Fifty Thousand)], Our Client shall be entitled to a refund of the excess amounts so paid by Our Client;

(iv) In the event that after a perusal of the final footage delivered by you, Our Client is required to re-

shoot any part of the web series / show titled Raktanchal Season 2 or any patchwork shoot is required, the costs thereof will be deducted from any outstanding dues found due and payable to Pinaka. Further, Our Client shall also be entitled to deduct any and all costs associated with the completion of the production of Raktanchal Season 2.

14. This communication is without prejudice to Our Client's rights and contentions, including Our Client's right to seek damages for your aforementioned material breaches of the Agreement and illegal actions, which are hereby specifically reserved.

Yours sincerely
For Dugal Grewal & Partners

Govind Singh Grewal
Partner”

6. The petitioner, in its response, dated 5th September, 2021, disputed the legality and validity of the termination of the agreement, by the petitioner, as contravening Clause 19 of the agreement. Additionally, the respondent also alleged that an amount of ₹ 6,08,07,352/- was due to be paid by the respondent to the petitioner, and called upon the respondent to pay the said amount forthwith.

7. It appears that, thereafter, *vide*, e-mail dated 7th August, 2021, the respondent informed the cast, crew, and technicians of the web series “Raktanchal II”, that the petitioner was no longer associated with the production of the said web series and that the respondent was contracting with a new producer (GSEAMS) for completing the web series, which was still incomplete.

8. The petitioner has moved this Court under Section 9 of the 1996

Act, with the following prayer:

“In view of the abovementioned facts and circumstances, its if respectfully prayed that this Hon’ble Court may be pleased to:-

A) Restrain the respondent from using and/or airing and/or creating third party rights in respect of content of 550 minutes in respect of series titled as “Raktanchal 2” produced by the Petitioner which is in a hard drive and in possession of the Respondent.

B) Direct the Respondent to give due credit to the Petitioner in the title as “Produced By- Pinaka Studios Private Limited”.

C) Pass such other order as this Hon’ble Court deems fit and proper in facts and circumstances of the case.”

9. I have heard Mr. Kunal Kalra, learned Counsel for the petitioner and Mr. Rajshekhar Rao, learned Senior Counsel for the respondent, instructed by Mr. Angad Dugal, learned Counsel, at length.

10. As is apparent from the prayer Clause in this petition, as extracted hereinabove, the petitioner prays for only two interlocutory interim reliefs against the respondent. The first is that the respondent be restrained from using, airing or creating third party rights in respect of the content provided by the petitioner to the respondent, in hard disks, relating to the prospective “Raktanchal II” web series. The second prayer is that the petitioner be given due credit by including, in the web series, an acknowledgement identifying the petitioner as the producer thereof. This second prayer, I may note, is predicated on Clause 6.1 of the agreement, which reads thus:

“6.1 Subject to timely performance of the Services and

obligations by the Production Company in accordance with the terms and conditions of this Agreement, the Production Company shall be provided credits for its Services in respect of the Series substantially in the following manner:

“Produced By - Pinaka Studios Private Limited”

11. To a pointed query from the Court, in that regard, Mr. Kalra has not been able to satisfy me regarding the existence of any covenants, in the agreement, as would justify grant of the prayers in this petition.

12. The contention of Mr. Kalra, essentially, is that the termination of the contract by the respondent, *vide* notice dated 6th August, 2021, infracts Clause 19 of the agreement, which required grant of an opportunity, to the petitioner, to cure any perceived breach of the agreement, within a period of ten days, before the agreement could be terminated. He submits that a reading of the notice dated 6th August, 2021, indicates that the ground for terminating the agreement was perceived breach, by the petitioner, of the covenants thereof. If this was so, the agreement could not be terminated *forthwith*, and the petitioner would be entitled to 10 days' advance notice, to cure the alleged breach. This opportunity not having been granted, the notice of termination, submits Mr. Kalra, is *ex facie* illegal and violative of the terms of the agreement.

13. He further submits that Clause 20.2 of the agreement entitled the petitioner to receive the Production Fee on a pro-rata basis, towards the services rendered by it. He submits that payments, to the petitioner, are outstanding, to the tune of ₹ 6 crores, as already noted

supra. He further invites my attention to Clause 20.2.3 of the agreement, to contend that the entitlement, of the respondent, to take over, control, produce or complete the web series, was “subject to payment of production budget as per the terms of the agreement”. “Production Budget”, as he points out, is defined, in Clause 1.1.21 of the agreement in the following terms:

“**“Production Budget”** means the total cost of production of the Series, being the sum total of, BTL and Production Fee, which is the USD equivalent of **INR 7,49,00,000 (Indian Rupees Seven Crores and Forty Nine Lakhs Only)** subject to Taxes and payable in the manner specified in Clause 4.1. An item wise summary of the estimated production budget of the Series is as set out in **Schedule 4** hereto;”

14. As the Production Budget incurred by the petitioner in developing the web series, to the extent it has been developed and provided to the respondent on hard disks, has not been fully paid by the respondent to the petitioner, Mr. Kalra submits that the petitioner could not be allowed to release, air or complete the web series, in view of Clause 20.2.3.

15. Mr. Kalra also submits that a considerable amount is still outstanding to be paid by the respondent to the petitioner, and that, if the respondent is permitted to air the web series, as developed by the petitioner and provided to the respondent, the petitioner would have no remedy available except by way of filing of a suit or proceeding otherwise to recover the amounts, which would be a time consuming and cumbersome process. He submits that, *ex debito justitiae*, an order for interlocutory protection, by way of a restraint against the respondent airing or otherwise exploiting the web series, as developed

by his client and provided to the respondent on hard disks, is eminently justified.

16. To my mind, the submissions of the petitioner cannot, in the face of the express contractual terms, be accepted, *prima facie*.

17. Grant of the interlocutory prayers sought in this application would require, in the first instance, the petitioner to establish, *prima facie*, a right against the respondent, on the basis of which the respondent could be restrained from exploiting the web series, developed by the petitioner and provided to the respondent, pending the arbitral proceedings. *Ubi jus*, as the adage goes, *ibi remedium*.

18. In this context, it is important to read Clauses 19 and 20 of the agreement. Of the various sub clauses of Clause 19, sub-clauses 19.1 and 19.2 refer to termination of the agreement by the respondent, whereas Clause 19.3 contemplates termination of the agreement by the petitioner. In as much as the agreement has, in the present case, been terminated by the respondent, Clause 19.3, clearly, has no application.

19. Clause 19.1 envisages termination of the agreement by the respondent on the ground of perceived breaches having been committed by the petitioner, or on the petitioner having acted in a manner which prejudices the interest of the respondent. Clause 19.2 is a residual clause, which permits termination of the agreement, without cause, on 15 days' notice.

20. A bare reading of the notice of termination dated 6th August, 2021, makes it clear that the respondent has invoked Clause 19.1 and not Clause 19.2.

21. Mr. Kalra's submission is that Clause 19.1 required the respondent to provide the petitioner with a 10 days' cure period, to enable the petitioner to cure any breaches of the contract. I am unable to agree. The submission ignores Clause 19.1.4 of the agreement. The 10 day cure period is envisaged in Clauses 19.1.1 and 19.1.2. Clause 19.1.4 empowers, additionally, the respondent to terminate, forthwith, the agreement on the commission or omission of any act by the petitioner which is prejudicial to the interests of the respondent. This Clause does not refer to any 10 day cure period. A holistic reading of the notice of termination dated 6th August, 2021, cannot lead to a conclusion that the notice is restricted to Clauses 19.1.1 and 19.1.2. The respondent has clearly alleged that the petitioner's acts have prejudiced the respondent, *inter alia* to the extent that the respondent has had, as a result, to engage itself in unjustified criminal proceedings.

22. The correctness, or otherwise, of the allegations contained in the termination notice dated 6th August 2021, are not for this court to decide, exercising its jurisdiction under Section 9 of the 1996 Act. The respondent maybe right; equally, the respondent may be wrong. That would be a matter to be decided in arbitral proceedings. For the purposes of the relief sought in this application, suffice it to state that the notice of termination dated 6th August, 2021, *prima facie*, also

invokes Clause 19.1.4, which does not contain any 10 day cure period requirement. As such, *prima facie*, it is not possible for me to agree with the submission of Mr. Kalra that the notice of termination was in the teeth of Clause 19.1 of the agreement.

23. The sequitur is that the consequence of termination would have to be seen in the light of Clause 20.1 and its sub-clauses, and not in the light of Clause 20.2. Clause 20.2 covers termination under Clauses 19.2 and 19.3. The sequelae of termination under Clause 19.1 are provided in Clause 20.1 and its sub-clauses. Clause 20.1 makes it clear that, on termination by the respondent under Clause 19.1, the entitlement of the petitioner would only be to the production fee towards the extent of the web series, developed by the petitioner and provided to the respondent.

24. Clause 20.1.2, on the other hand, clearly states that, on termination of the agreement by the respondent, all intellectual property rights in the series, the works and underlined parts thereof would vest with the respondent.

25. As such, a holistic reading of Clause 20.1 read with sub-clause 20.1.2 thereof, makes it clear that the entitlement of the petitioner, consequent to termination of the contract by the respondent under Clause 19.1, would only be for the balance production fee. It does not entitle the petitioner to restrain the respondent from exploiting the content developed by the petitioner and provided to the respondent. Rather, all intellectual property rights in respect of the said content

continue to vest with the respondent.

26. The claim of the petitioner, therefore, at the highest, is a monetary claim. It cannot be secured by grant of prayers such as those sought in this petition, in least of all in exercise of the jurisdiction vested in the court by Section 9 of the 1996 Act.

27. Mr. Rajshekar Rao, learned Senior Counsel for the respondent, also draws my attention to the following communication from the petitioner to the respondent on 13th August, 2021, after termination of the agreement by the notice dated 6th August, 2021 *supra*. This communication reads thus:

“Dear Abhishek & MX Team,

This letter is regarding the termination notice that was sent to us by you on August 6th 2021. Before even attempting to explain the reason leading to this unintended mistake, misbehavior and misunderstanding, I would like to sincerely apologize to you for any inconvenience this may have caused to you and the entire Leadership and Team of MX Player.

You have known me for a while now and you would agree and understand my passion towards my job as a certificate which at times leads to my overreaction of things which is completely my fault unfortunately, sometimes unavoidable mistakes happen hence this apology. Also, the situation of pandemic (covid-19) had only added to our wounds effecting both the project and giving rise to the financial liabilities however in such rare cases, a satisfactory solution is always in a professional to move forward amicably and complete the journey that we had started in the form of Raktanchal.

After a thorough introspection, I have managed to pinpoint the reason leading to this unfortunate event that led you to take such extreme steps against me clearly a mistake from our side, and we take full responsibility for it.

In our attempt to serve you better and retain the trust that you had bestowed on us:

I am ready to share all my financial books to be audited so that you have a clear picture that there has been no misappropriation of funds as given by you.

I will re-plan the entire shoot which is left to complete the season with all locations and any other deliverables.”

28. As such, submits Mr. Rao, even after the termination notice, the petitioner has unequivocally acknowledged its default. In fact, submits Mr. Rao, owing to the fact that the petitioner submitted an incomplete web series to respondent, the respondent has had to contract with another agency for completing the web series.

29. As such, for all these reasons, prayer (a) in this petition cannot be granted, in exercise of Section 9 jurisdiction vested in this court.

30. Adverting, now, to prayer (b), Clause 6.1 of the agreement, requires reflection, in the web series, of the petitioner as the Producer thereof; “subject”, however, “to timely performance of the services and obligations”, by the petitioner, “in accordance with the terms and conditions of this agreement”. The termination notice dated 6th August, 2021, alleges, in so many words, that the petitioner has been remiss in complying with its obligations under the agreement. It is not possible, therefore, to enforce Clause 6.1 of the agreement, against the respondent and in favour of the petitioner, as prayed in prayer (b) of this petition.

31. At this stage, Mr. Kalra interjects to submit that his client had, in fact, fulfilled the contract, by providing 340 minutes of the web series.

32. The defaults enlisted in Para 4 of the termination notice dated 6th August, 2021, cannot be wished away merely by asserting that the petitioner had provided 340 minutes of the web series.

33. As I have already noted above, the correctness, or otherwise, of these allegations, would have to be tested in arbitral proceedings, and it is not for me to make any observations thereon.

34. The province of Section 9 jurisdiction of a court is fairly limited. The following passages from a recent decision in ***DLF Ltd. v. Leighton India Contractor Pvt. Ltd.***¹ may, in this context, be usefully reproduced as they, in my opinion, neatly encapsulate the legal position:

“48. There is another aspect that needs to be discussed. While passing interim orders, relief that would amount to grant of a final relief must be eschewed. Also, while it is true that what would be the nature of an interim measure of protection that would appear to the court to be “just and convenient” would certainly vary from case to case. But, while deciding on the relief, the court ought not to venture into determination of liabilities and the interpretation of clauses. This Bench in ***Bhubaneswar Expressway***² (supra) has held as below-

“44. *If the Courts, in exercise of powers under*

¹ 2021 SCC OnLine Del 3772

² **NHAI v. Bhubaneswar Expressway Private Limited, (2021 SCC OnLine Del 2421)**

Section 9, start enforcing the terms of the contract, it would do extreme disservice to the very concept of arbitration, where the parties choose to have their disputes adjudicated, instead of by the Courts, by Arbitrators of their choice. In the present case, the appellant NHAI has disputed its liability for termination payment on diverse grounds, as can be understood from the narrative hereinabove of the arguments of the senior counsel for NHAI. **If this Court, while exercising jurisdiction under Section 9, were to adjudicate whether there is any legal merit in the said grounds or not, this Court would be adjudicating the disputes, which the parties have agreed to be adjudicated by arbitration and in fact there would be nothing left for the Arbitral Tribunal to decide,** as far as the claim of BEPL for the termination payment directed to be made is concerned. In fact, after reading the impugned judgment, we have also wondered what remains for the Arbitral Tribunal to decide, as far as the claim of BEPL for termination payment on a demurer, believing the breach to be on the part of BEPL, is concerned. **It is a hard reality that once there is judicial order on the merits of the dispute and which judicial order is not granting any interim measure but granting the final relief claimed in the arbitration proceeding, the Arbitral Tribunal would hesitate from deciding contrary to the findings returned by the Court on interpretation of terms of the Concession Agreement** and of admission, and to which Court, an application under Section 34 of the Act would lie against the award of the Arbitral Tribunal.”

(Emphasis added)

49. In the instant case, both sides have extensively referred to communications between them, pertaining to extension of time to complete the project, the issuance of C.C., the defaults found in the work and the Clauses of the C.A., detailing the mutual rights and obligations. Clearly, therefore, these are matters that cannot be considered by the court in an application under Section 9. But the learned Single Judge has clearly dealt with the question of illegality and had

laid the fault at the door of DLF. This it did on the basis of an assessment of the facts and the Clauses of the C.A. and concluded that while DLF could have encashed the RBGs, it was not proper to have encashed the PBGs and therefore, found it “just and proper” to direct DLF to furnish FDRs of the value of Rs. 143,87,22,708/-. The court has, thus, accepted the stand of Leighton, preferring it over the stand of DLF.

51. Now that the Arbitral Tribunal has been constituted and claims and counterclaims along with applications under Section 17 of the A&C Act have been filed and have to be decided, it would be in the interest of fair play that this Court does not embark into an assessment of material on record to determine who was at fault and whether the BGs have been encashed in terms of the Clauses of the C.A. or illegally and unlawfully and further, to grant a relief of the nature of a final relief of refunding or restituting, as claimed by Leighton. In our view, it would be beyond jurisdiction to direct restitution in proceedings under Section 9 of the A&C Act as restitution by its very nature involves a final determination of rival contentions even if it were to appear just and proper to do so. Substantive questions have to be left to be decided in arbitration, the mode of dispute resolution chosen by the parties.

52. It is for the learned Arbitral Tribunal to determine all these issues relating to illegality of action, entitlement, liability, damages, etc. It is also for the learned Arbitral Tribunal to consider whether DLF would be required to furnish any security in the light of the claims and counter-claims made by the parties. Suffice it to note, at this juncture, as an interim measure, no case has been made out for grant of the relief claimed of refund or security that has been prayed for by Leighton.”

35. The hazard in moving the court under Section 9 for interim reliefs without due justification, is exemplified by the present case. This court has had to return *prima facie* observations regarding the

various clauses which Mr. Kalra sought to invoke.

36. The applicability of these Clauses, the issue of whether there has, or has not, been default by the petitioner in complying with its obligations under the agreement, the justifiability of the termination of the contract by the respondent, and all other such associated aspects would, appropriately, have to be tried and tested in arbitral proceedings. It is clarified, therefore, that the observations contained in this order are merely *prima facie*, with a view to examining whether a case for exercise of Section 9 jurisdiction is, or is not, made out. They would not inhibit the arbitral tribunal, as and when it is constituted from taking a view in the matter, on the merits of the case and the various covenants of the agreement.

37. Suffice it to state that, on the basis of the clauses which have invoked by Mr. Kalra, I am unable to hold that any enforceable right, to restrain the respondent from completing or airing the “Raktanchal–II” web series is made out. The claim of the petitioner against the respondent, on the anvil of the contractual terms, is apparently, a simple money claim. Such a claim cannot be protected by a restraint against the respondent from airing the web series, in the absence of any contractual stipulation, justifying such a restraint. There is no contractual provision, granting a lien to the petitioner over the content developed by it and provided to the respondent, till the petitioner’s dues are liquidated by the respondent.

38. Mr. Kalra has not been able to draw my attention to any

contractual provision, under which the respondent could be restrained from completing, developing, airing or otherwise dealing with the material developed by the petitioner and provided to the respondent on hard disks, till the petitioner's alleged dues are liquidated by the respondent.

39. Section 9 of the 1996 Act cannot be used as a tool to compel the opposite party to pay money to the claimant. In a case where the claim of the claimant is monetary in nature, ordinarily, the highest that can be sought from a Court under Section 9, is securing of the monetary claim under Section 9(1)(ii)(b). There is no such prayer in the present petition. That apart, any direction for securing the amount can be passed only if the case, in principle, fulfills the requirements of Order XXXVIII Rule 5, of the Code of Civil Procedure, 1908.

40. For all the aforesaid reasons, it is not possible to grant the prayers sought in this petition which is accordingly dismissed *in limine*.

41. It is made clear that the observations contained in this order are restricted to examining whether a case for exercise of Section 9 jurisdiction by this court is made out or not. They shall not be treated as binding on the arbitral tribunal as and when it is constituted in dealing with the claims of the petitioner or any interlocutory applications that the petitioner may choose to file before the arbitral tribunal.

42. There shall be no orders as to costs.

C.HARI SHANKAR, J

NOVEMBER 18, 2021

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