

\$~22 to 24(original)

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

+ **ARB. A. (COMM.) 68/2021 & I.A.15104/2021**

FARIDABAD IMPLEMENTS PRIVATE LIMITED

..... Petitioner

Through: Mr. Simran Mehta and Mr. K.
Bhimraj, Advs.

versus

**MYPREFERRED TRANSFORMATION AND
HOSPITALITY PRIVATE LIMITED & ANR..... Respondents**

Through: Mr. Sanjoy Ghose, Sr. Adv.
with Mr Jeevan Ballav Panda, Ms Shalini
Sati Prasad, Mr Satish Padhi, Ms Meher
Tandon, Mr Gaurav Sharma, Mr Naman
Jain, Advs.

+ **ARB. A. (COMM.) 71/2021 & I.A.15542/2021,
I.A.15543/2021**

**MYPREFERRED TRANSFORMATION AND
HOSPITALITY PVT LTD Petitioner**

Through: Mr.Sanjoy Ghose, Sr. Adv. with
Mr Jeevan Ballav Panda, Ms Shalini Sati
Prasad, Mr Satish Padhi, Ms Meher Tandon,
Mr Gaurav Sharma, Mr Naman Jain, Advs.

versus

FARIDABAD IMPLEMENTS PRIVATE LIMITED & ANR.

..... Respondents

Through: Mr. Simran Mehta and Mr. K.
Bhimraj, Advs. for R-1

+ ARB. A. (COMM.) 72/2021 & I.A.15547/2021,
I.A.15548/2021

OYO HOTELS AND HOMES PRIVATE LIMITED

..... Petitioner

Through: Mr. Sanjoy Ghose, Sr. Adv.
with Mr Jeevan Ballav Panda, Ms Shalini
Sati Prasad, Mr Satish Padhi, Ms Meher
Tandon, Mr Gaurav Sharma, Mr Naman
Jain, Advs.

versus

FARIDABAD IMPLEMENTS PRIVATE LIMITED & ANR.

..... Respondents

Through: Mr. Simran Mehta and Mr. K.
Bhimraj, Advs. for R-1

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

% **03.12.2021**

1. M/s Faridabad Implements Pvt. Ltd. (FIPL), MyPreferred Transformation And Hospitality Pvt. Ltd (MPTHPL) and OYO Hotels and Homes Pvt. Ltd. (OHHPL) were the claimant, Respondent 1 and Respondent 2 respectively, before the learned arbitrator in the proceedings from which the present appeals emanate.

2. The dispute emanated out of two lease deeds. The first lease deed dated 11th December, 2018 was executed between FIPL and OHHPL. Under the said lease deed, OHHPL leased out, to FIPL, the premises at C-18, Friends Colony East, New Delhi for a period of nine years, of which five years were to be treated as a lock in period, within which the contract could not be terminated and, if terminated, would entail penal consequences. The monthly rent of the premises was fixed at ₹ 17,75,000/- for the first year, to be increased by 4% every succeeding year.

3. A second lease deed, dated 1st October, 2019, was executed between FIPL and MPTHPL. MPTHPL, the petition asserts, is a group company of OHHPL, and OHHPL had expressed its intent to transfer the lease in favour of MPTHPL, resulting in the execution of the second lease deed on 1st October, 2019. The terms of the second lease deed were the same as those of the first, except that the period of lease was five years, with the entire period being treated as a lock in period.

4. From February, 2020, MPTHPL stopped paying rent. On 24th March, 2020, the lease deed was terminated by MPTHPL.

5. The disputes which thus arose between the parties were referred, by this Court, *vide* order dated 5th August, 2020, to arbitration by the learned arbitrator, who happens to be a retired Judge of the Supreme Court of India. Before the arbitrator, as already noted hereinabove, FIPL was the claimant, MPTHPL was Respondent 1 and OHHPL was Respondent 2.

6. In its statement of claim before the learned arbitrator, FIPL claimed ₹ 15,09,80,086/- as the principal amount due from MPTHPL and OHHPL.

7. OHHPL preferred an application, before the learned arbitrator, under Section 16 of the 1996 Act, seeking to be deleted from the proceedings, on the ground that it was not a party to the second lease deed. This application was, however, rejected by the learned arbitrator by order dated 27th January, 2021, which is not subject matter of challenge.

8. FIPL moved an application, before the learned arbitrator, under Section 17 of the 1996 Act, for securing its claim.

9. By the impugned order dated 20th September, 2021, the learned arbitrator directed furnishing, by Respondents 1 and 2, of security of ₹ 10 crores by way of bank guarantee. The reasoning preceding this direction, as contained in paras 20 to 22, 24, 26, 27, 30 to 32, 34 and 36 to 42 may be reproduced thus:

“20. The contentions urged by the learned Counsel for the parties *inter-alia* give rise to the points:- (i) Whether the Claimant has failed to produce the documents as alleged by the Respondents and whether the Claimant has committed default in performing its obligations under the lessee deeds as contended by the Respondents; (ii) Whether the ‘breach and cure’ notice issued by Respondent No. 1 was justified and in terms of the lease agreement; (iii) Whether the Claimant has furnished the documents as contended by the Claimant; (iv) Whether or not the Claimant furnished the documents to the Respondent thereby complying with the terms of its

obligations; and (v) How the Respondents have been running the hotel from 11.10.2018 till the Respondents vacated/allegedly abandoned the premises. The above points/questions could be determined only at the time of final hearing of the matter when the parties adduce oral and further documentary evidence and advance arguments in the main matter. The merits of the contentions urged by the learned Counsel for the parties cannot be considered and decided merely based on the averments made by the parties in the application and reply filed by the Respondents.

21. Applicant-Claimant states that during March, 2019, OSPL engaged in a corporate partition of their Company into more than one undertaking with their wholly owned subsidiary-Respondent No. 2, whereby the Indian Hotel Business of OSPL was to be vested/transferred in the name of Respondent No. 2-Alcott Town Planners Pvt. Ltd. This Restructuring was done by OSPL through a scheme of demerger. By virtue of this Scheme of Demerger between OSPL and Respondent No. 2 and its net result; the common “Business plan” of OSPL and that of Respondents No. 1 and 2 is that while the Indian hotel Business came to be vested in Respondent No. 2-OHHPL (Formerly Alcott), the infrastructure business of the said Business stood transferred to OHHPL from OSPL. It is stated that as per the Scheme of Demerger, while on 21.04.2020, the entire shareholding of OSPL in Respondent No. 2 was transferred/allotted in favour of the shareholders of OSPL, six fresh preferential allotments of compulsorily convertible cumulative preference shares in Respondent No. 2 have been made, in favour of OSPL, from 05.11.2020 to 17.11.2020, for a sum of USD 423 million, which has been routed back to OSPL. In this connection, the Claimant relies upon Fairness Report dated 05.03.2019 accompanying the Scheme of Demerger marked as Annexure A-22. At that time, various lease agreements in favour of Respondent No. 2 – OHHPL, formerly Alcott, including that of the Claimant were all transferred to Respondent No. 1 – MTHPL; whereas the Respondent No. 1 – MTHPL was a newly incorporated entity formed only on 02.11.2018.

22. Now the entire infrastructure of Indian Hotel Business of OYO stood transferred to Respondent No. 1 – MTHPL, which is now fully under the control of OSPL. For intents and purposes, the business is run by Respondent No. 1 – MTHPL, which is a newly incorporated entity formed only on 02.11.2018. The Respondent No. 1 – MTHPL committed breach of its obligations under the Second Lease Deed during the subsistence of the lease with the Claimant. Such default by Respondent No. 1, it is stated, is not an isolated one. It is stated that the entire revenue of Respondent No. 1 for the period from 01.04.2020 to 31.03.2020 i.e., an amount of Rs. 188.69 crore is placed in Respondent No. 2 and the same is shown as being owed by Respondent No. 2 to OSPL. And further a sum of USD 423 million is paid by Respondent No. 2 to OSPL for the period from 01.01.2018 to 31.03.2020.

24. Per contra, the learned Senior Counsel for the Respondent has drawn attention of the Tribunal to Clause 10.6 "Assignment" and submitted that the Claimant has agreed for the Assignment/ transfer of its rights and obligations to Respondent No.1 as it is a part of restructuring of the Group Companies of the Respondents. It is submitted that this is an 'Assignment Clause' through which parties need not enter into a second lease deed but it happened at the instance of Claimant itself and just for the satisfaction of the Claimant under the terms of the Agreement itself. The learned Senior Counsel placed the reliance upon the email dated 30.04.2019 sent by Respondent No.2 informing the Claimant that they are transferring their rights and obligations under the lease Agreement dated 11.12.2018 to Respondent No. 1 with effect from 01.06.2019 as a part of restructuring of their company. It was submitted that the interpretation of Clause 10.3 and other clauses and the extent of liabilities of Respondent No. 1 and 2 is a matter of trial and the same cannot be summarily decided in the Applications filed before this Tribunal. It was submitted that it is highly unlikely that the business plan of Respondents affected the rights of the Claimant in any manner. Hence, no question of granting any security deposit in favour of the Claimant nor has there been any final adjudication on the merits of the matter.

26. Here again, the merits of the contentions regarding Clause 10.6 of the lease agreement and transfer of Respondent No.2's claims and obligations to Respondent No. 1-MTHPL could be considered only at the time of final hearing when the parties adduce oral and further documentary evidence and advance arguments in the main matter. Expression of any views on the contentions raised at this stage might cause prejudice to either of the parties at the time when the Tribunal is to consider the main matter. In fact, by the order dated 27.02.2021, various questions raised regarding the Second Lease Deed dated 01.10.2019 and the merits of the contention urged by the parties have been kept open to be decided at the appropriate stage.

27. For the purpose considering the application under Section 17 of the Act, and whether the Respondents are to be directed to furnish a security for the claim amount, we need to consider the subsequent events and the number of other claims made by the various lessors against the Respondents. The prima-facie case made out by the Claimant is to be considered not only from the claims made by the Claimant, but also the subsequent events and the various other claims made against the Respondents.

30. From the materials brought on record, it is seen that the Respondents are facing number of Claims. All these Claims are similar to that of the Claimant, made on the basis of the lease agreements and the alleged defaults. Brief details of the various claims made against the Respondents are referred to in the order of the NCLAT. Considering the number of claims made against the Respondents, the Tribunal has to consider the financial position of the Respondents. Placing reliance upon the financial statements, the learned Counsel for the Claimant submitted that the Respondents have no resources to honour any Award that may be passed in favour of the Claimant and therefore prayed for creation of charges over the assets of the Respondents.

31. Learned Counsel for the Claimant has submitted that the financial statement of Respondent No.1 was filed only on 27.08.2021 after the Tribunal, on 26.08.2021, has rejected the Respondent's prayer to extend the time for filing reply to the Applications filed under section 17 and Order I Rule 10 CPC. It was submitted that the financial statements (01.04.2019-31.03.2020) show that while on 01.04.2019, immediately prior to the transfer of the lease deed in favour of Respondent No.1, Respondent No. 1 had liquid assets in the form of mutual funds of the value of Rs.685.66 crores which were disposed off during the period from 1.4.2019 to 31.03.2020 to the extent of Rs.665.56 Crores which amounts to a reduction of 97.06%. The learned Counsel for the Claimant contended that despite such huge disposal of liquid assets, that Respondent No.1 has no immovable property and the 'Total Property, Plant and Machinery' possessed by Respondent No.1 as mentioned in the Balance Sheet of Respondent No. I-MTHPL at Pg.47 as on 31.03.2020 is only valued at Rs. 1.06 crore. It is contended by the Claimant that in the balance sheet of Respondent No. 1 Company, out of the total assets of Rs.787.53 Crores, Rs.377.33 crores and Rs.354.06 Crores is shown as receivable from the Respondent No.2 at Balance Sheet- page 47 read with the disclosures of related party under the heading of 'Trade receivables' enclosed by the Respondents on page 164 of the financial statement of Respondent No.1-MTH. It is submitted that these receivables as on 01.04.2019 were zero. The learned Counsel for the Claimant contended that actual assets of the Respondent No. 1 as alleged by the Claimant are Rs.56.14 crores after deducting the receivables from Respondent No.2 i.e., Rs.787.53 crore less Rs.377.33 crores and less Rs.354.06 crores. It is contended that the 'Total Liabilities' of Respondent No. 1 Company, (as shown in the balance sheet at page-47) stands to be Rs.73.59 crores which is excess of Rs.54.15 crores by Rs. 18.41 crores.

32. Claimant has relied upon the Disclosure of related party annexed (Page 162-164 of the Balance Sheet) with the Financial statement of Respondent No.1 and submitted that the property worth Rs.191.22 crores belonging to Respondent No.1 has been transferred to Respondent No.2 for which Respondent No.2 has not paid any consideration and the same

is shown as owing from Respondent No.2 to Respondent No.1. In contrast, property which has been purchased by Respondent No. 1 from Respondent No.2 which is allegedly valued at Rs.277.84 crores (page 163 of the Balance Sheet) has been paid for, in full, by Respondent No. 1 -MTH as the same is not showing as a payable. Learned Counsel for the Claimant submits that it is to be noticed that the opening balance of Respondent No.1's property as on 01.04.2019 stands zero and that the property of Rs.277.84 crores supposedly acquired by Respondent No. 1 from Respondent No.2 appears to be part of the total addition of property, during the period 01.04.2019 to 31.03.2020 being a sum of Rs.588.32 crores (Disclosure of property, plant and equipment at page-100-101 of the Balance Sheet). It is the contention of the learned Counsel for the Claimant that mere look at 'Disclosure of Property, Plant and Equipment' of Respondent No.1 (page-100) would show that the entire addition of Rs.588.32 crores, to the property of Respondent No.1 during the period of 01.04.2019 to 31.03.2020 for which inter alia, a consideration of Rs.277.84 crores (on page 163 of the Balance Sheet) was paid to Respondent No.2 within a time frame of one financial year has been now valued at Rs.1.06 crores only as on 31.03.2020.

34. Insofar as the financial statements are concerned, this Tribunal cannot sit upon the audited balance sheets duly filled by the Ministry of Corporate Affairs. Of course, the balance sheets were filed by the Respondent before the Statutory Authorities on 27.08.2021, the next day after this Tribunal had rejected the request of the Respondents for filing their reply to these applications. But that cannot be the reason for doubting the financial statements, balance sheets or sit on judgment over the audited Financial Statements and comment upon the same.

36. Based on the Financial Statements filed by the Respondent along with their reply to the Applications, though much contentions were advanced in the financial position of the Respondents No. 1 and 2, and OSPL, this Tribunal does

not propose to go into the minute details of the financial statements of the above entities. Suffice to note that the Respondents are facing number of claims from a number of Lessors/ Operational Creditors. During the course of arguments, it was submitted that the parent company-OSPL is raising Debt Funds. In the Statement of Claim, the Claimant has made a total claim of about Rs.21.00 crore; whereas, the Respondents have made a counter-claim of about Rs.12.00 crore in the Statement of Defence. Of course, the arbitration proceedings is at the stage where parties are to adduce oral evidence if any and advancing the arguments in the main matter. The Arbitration proceedings itself could be concluded in the given time. However, considering the subsequent events and number of claims made against the Respondents, this Tribunal is of the view that an interim order has to be passed for securing part of the claim made by the Claimant. This Tribunal is of the view that while passing the interim order the counter claim made by the Respondent No.-I and the defence and the Counter Claim put forth by the Respondents is to be kept in view and a balance has to be struck, while passing the interim Order.

37. Prior to the 2015 Amendment, scope of Section 17 was quite narrow or restricted. However, after the Amended Act, the scope was widened and presently, Section 17 is almost at par with scope of Section 9 of the Act, meaning thereby that the arbitrator has virtually the same powers for granting interim relief under Section 17, which the court has under Section 9 of the Act. The language appearing after Section 17(I)(ii)(e) of the Amended Act makes it clear by providing "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 proceeding before it." Section 17 of the Act makes it clear that the Arbitral Tribunal has been given discretion to consider the request/Application filed by a party and direct the other party to take any measure of interim of protection in respect of the subject matter of dispute. The Arbitral Tribunal can in order to secure the amount in dispute, direct the Respondent to furnish security for the same. Under section 17(1)(ii)(b) of the Act, a party may seek interim relief of protection by way of security to the tune of the claim amount. However, for obtaining the said interim relief i.e. a direction

to the opposite party for furnishing security, the applicant has to make out a strong prima facie case and only then the Arbitral Tribunal can grant an interim order to furnish security for the claim amount. The Arbitral Tribunal while exercising powers under Section 17(1)(ii)(b) of the Act, must be satisfied that it is necessary to pass the order to secure the amount in dispute. The object of the order would be to prevent the other party against whom the Claim has been made from disbursing its assets or from acting in a manner so as to frustrate the Award that may be passed.

38. As discussed earlier, in the present case, since there are number of claims made against the Respondents, in order to secure the Claimant's claim amount in dispute, it is necessary to direct the Respondents to furnish security for part of the claim amount. The Claimant has prayed for creation of Charges over the liquid and realizable assets of the Respondent. The Respondents are ongoing concerns; Creation of Charges over the assets of Respondents would cause hardship to the Respondents in running their Business and hence such direction for Creation of Charge cannot be ordered.

39. Reliance was also placed upon *CV Rao and Ors v. Strategic Port Investments KPC Ltd and Ors 2014 SCC Online Del 4441* where the Court has observed that for passing interim order pertaining to security prior to an Award, it is necessary for the court to satisfy itself that the assets which are subject matter of the arbitration are about to be alienated or removed beyond the limits of the court with an intent to obstruct or delay the execution of an Award. An order restraining the outside party from dealing with his properties being drastic in nature, grant of such a relief has necessarily to be based on the principles governing Order 38 Rule 5 CPC and before passing such an order, the Court has to ensure that a specific case is made out that a party against whom an order is proposed to be passed is attempting to remove or dispose of the assets with the intention of defeating the decree/Award that may be passed. On behalf of the respondent, it was submitted that in the present case, no case of alienation of properties has been made out and the Respondent No. 1 is one of the fastest growing hospitality

chains and the prayer of the Claimant for creating charge over the assets of the Respondent is not sustainable and the same is liable to be rejected.

40. Placing reliance upon **1969 (2) SCC 554, *Maula Bux vs. UOI*** it was submitted that damage claims pertaining to the lease deed are provable and are required to be proved in trial by the Claimant. It was submitted that as per settled position of law, no security / charge can be created with respect to unadjudicated claims and therefore, no security/charge can be created on the assets of Respondent No. 1. It was urged that creation of any such charge over the assets of Respondent No. 1 would cause serious prejudice to Respondent No. 1 in running its business operations.

41. As contended by the Respondents, the claim of the Claimant still remains to be adjudicated. The respondents have also made a counter claim. Creating a charge over the assets of a corporate entity is a drastic measure. Due to pandemic, the business of the Respondents like any other hotel business is said to have been affected. The Respondents are on-going concerns; creation of charge over the liquid assets and other assets of the Respondents might affect their business operations. Hence, the prayer of the Claimant for creating charge over the assets of the Respondents cannot be granted and the same is declined.

42. As discussed earlier, number of Claims by the Creditors/ Lessors are made against the Respondents. In order dated 07.07.2021, the NCLAT has given liberty to the Financial! Operational Creditors to move Applications before the Adjudicating Authority. The NCLAT also observed that Hospitality and Tourism Industry has been affected by the Pandemic, and hence the Creditors are at liberty to approach the Corporate Debtor - Respondent No.-2 for settlement. When so many claims are made against the Respondents and considering the financial position of the Respondents and in the interest of justice, this Tribunal is of the view that the Claimant has made out a prima-facie case for passing the interim order to direct the Respondents No.1 and 2 to furnish security. Considering the Claims and the Counter Claims made by the Respondent No. 1, interest of justice would be

met by directing the Respondents No. 1 and 2 to furnish security for Rs. 10.00 Crore by way of Bank Guarantee in favour of the Claimant towards the Claim.”

10. FIPL seeks, in Arb A (Comm) 68/2021, enhancement of the deposit directed by the learned arbitrator, on the ground that it does not sufficiently secure FIPL’s interests. MPTHPL, on the other hand, in Arb A (Comm) 71/2021 and OHHPL in Arb A(Comm) 72/2021, on the other hand, assail the order as having been passed without sufficient reasons. Mr. Mehta, too, submits that the impugned order does not record sufficient reasons to justify limiting the security, to be furnished by the respondents, to a bank guarantee for ₹ 10 crores.

11. According to Mr. Mehta, the learned arbitrator has acted in a rule of thumb manner without properly appreciating the financial wherewithal of MPTHPL and OHHPL, despite protracted submissions on that aspect having been advanced by FIPL before her.

12. Mr. Mehta has submitted that Respondent 2 transferred its entire business to M/s Oravel Stays Pvt. Ltd. (OSPL) and transferred the lease with FIPL to Respondent 1 i.e. MPTHPL. As a result, he submits, a situation has arisen in which MPTHPL would not be in a position to honour the Award, even if the Award were to ultimately be passed in favour of FIPL. He has invited my attention to the position of the current financial assets of MPTHPL as on 31st March, 2020, which was on the eve of the above transfer of the business of the OHHPL to OSPL, especially to the fact that the current investments were to the tune of ₹ 685 crores. This amount, he submits, was reduced to ₹ 20 crores, consequent to the aforesaid transfer. He has

also invited my attention to the disclosure of financial instruments contained in the books of accounts of MPTHPL, which shows that the amount of ₹ 685 crores was attributable to investments in mutual funds. He has further taken me to the auditor's report in the aforesaid statement of accounts which contains a recital that MPTHPL does not own the immovable properties.

13. Mr. Mehta further points out, from the profit and loss statement in the books of accounts of MPTHPL that it had, during the financial year 2019-20, earned revenue from operations of ₹ 188 crores, and submits that there is no explanation regarding the status of this amount. He submits that this amount has been diverted to other entities so as to defeat the award which may come to be passed in favour of his client. To substantiate this submission, he has also shown me, from the balance sheet of MPTHPL, that the entire revenue earned by MPTHPL during the year 2019-20 has been transferred to OHHPL. He has invited my attention to the entries regarding sale of property, plant and machinery as well as trade receivables, to submit that no monies have been received against transfer of assets from MPTHPL to OHHPL. Mr. Mehta has also drawn my attention to the order dated 7th July, 2021 passed by the National Company Law Appellate Tribunal and to the list of creditors of MPTHPL, as per the order dated 7th July, 2021, passed by the NCLAT, which shows a total claim amount of ₹ 152.49 crores payable to ten creditors.

14. Mr. Mehta has thereafter invited my attention to the balance sheet of OHHPL as on 31st March, 2019, specifically to the entries

with regard to assets and liabilities therein, read with the Explanatory Statement in the books of OHHPL.

15. These considerations, he submits, had they been holistically been appreciated by the learned arbitrator could not have justified securing of the claims of FIPL, directing of furnishing of a security of as low an amount of ₹ 10 crores, by way of bank guarantee. He points out that the prayer of FIPL before the learned arbitrator in its Section 17 application was for creation of a charge over the assets of MPTHPL. Having rejected that request, he submits that the learned arbitrator, in para 42 of the impugned order merely notes that, considering the claims and counter claims made by the parties before the learned arbitrator, the interests of justice would be met by directing MPTHPL and OHHPL to jointly furnish security by way of bank guarantee for ₹ 10 crores in favour of FIPL. This order, according to him, is unreasoned, arbitrary and cannot sustain.

16. Mr. Sanjoy Ghose, learned Senior Counsel appearing for MPTHPL and OHHPL submits that, in fact, the learned arbitrator has been unduly lenient to FIPL and that no direction for deposit was justified at all. He also takes exception to the fact that the learned arbitrator has not afforded sufficient reasons before coming to the figure of ₹ 10 crores. He submits that the learned arbitrator has merely carried out a mathematical exercise of subtracting the counter claims from the amount of the claim. Mr. Sanjoy Ghose, submits that the actual claim of FIPL was only for ₹ 65 lakhs.

Analysis

17. This Court has had repeated occasion to examine the scope of its appellate jurisdiction under Section 37(2)(b) of the 1996 Act. I have taken a view, in more cases than one¹, that interference, in appeal, with interlocutory orders passed by Arbitral Tribunal under Section 17 of 1996 Act must be in the rarest of cases. Even more circumspect is such intervention required to be, where the order under challenge directs securing of the amount in dispute in the arbitration. Any interlocutory order under Section 17 is, by its very nature, discretionary. Where the order is for furnishing of security in the arbitral proceedings, the element of discretion gets augmented. It is normally in the discretion of the Arbitral Tribunal to decide whether, in the facts of a case before it, security should be directed to be furnished, and if so, the quantum of security. The interference with the order of security, on the aspect of quantum, in my opinion, should be restricted to the most exceptional of cases. Ordinarily, it is for the arbitrator to take a decision on the amount of security which is required to be furnished, and the mode of such security. Where the arbitrator is alive to the contentions advanced by the parties, and directs furnishing of security, it would be entirely contrary to the very ethos of the 1996 Act for Courts to interfere on the ground that the reasoning of the arbitrator is insufficient. Essentially, what a Court would be doing, were it to adopt such an approach, would be to substitute its discretion for the discretion of the arbitrator, which is

¹ Augmont Gold Pvt. Ltd. v. One97 Communication Ltd. MANU/DE/2479/2021; World Window Infrastructure v. Central Warehousing Corporation MANU/DE/3207/2021; L&T Finance Ltd. v. DM South India Hospitality Pvt. Ltd. MANU/DE/2952/2021

something that stands expressly proscribed by a catena of judicial authorities.

18. In the present case, the paragraphs from the impugned order, which stand reproduced hereinabove, clearly indicate that the learned arbitrator was alive to the contentions advanced by the parties. The contentions advanced by Mr. Mehta before me stand recorded by the learned arbitrator. A holistic reading of the impugned order indicates that it is keeping in mind these contentions, the balance of convenience and the quantum of claim and counter claim that the learned arbitrator has directed furnishing of security. The mere fact that the learned arbitrator may not have dealt, seriatim, with each contention advanced by the parties before her can hardly be a ground for this Court to interfere with the exercise of discretion under Section 17(1)(ii)(b) of the 1996 Act.

19. I am unable, therefore, to interfere with the impugned order on the ground that the learned arbitrator has not provided sufficient reasons for directing furnishing of security.

20. Were I to re-visit the direction for deposit, on the issue of quantum, on the grounds urged by Mr. Mehta before me, what I would essentially be allowing Mr. Mehta to do would be to re-argue the very same grounds which were urged before the learned arbitrator, and to urge the Court to arrive at its own subjective discretion regarding the amount of deposit which should be directed. This is essentially a request for the Court to substitute its discretion for the discretion

exercised by the arbitrator, on the very same grounds which were urged before the learned arbitrator. That cannot be done.

21. Having said that, there is one aspect on which the order of the learned arbitrator may require to re-examine the matter, *qua* the quantum of deposit.

22. A reading of para 36 of the impugned order conveys the impression that the arbitrator has proceeded on the basis of the total claim of FIPL being ₹ 21 crores. This is apparent from the further recital, in the said paragraph, that the direction for deposit was being passed “considering the claim and the counterclaim made by Respondent No. 1”, Respondent No. 1 before the learned arbitrator being MPTHPL.

23. Though, it is correct that the amount claimed by FIPL, before the learned arbitrator, was ₹ 21 crores, that amount included interest and other such embellishments to the original claim amount. As against this, the amount which FIPL sought to be *secured*, in Section 17 application was ₹ 15,09,80,086/-. Prayer A in its Section 17 application read thus:

“In light of the abovementioned facts and circumstances, it is respectfully prayed that this Hon'ble Tribunal may be pleased to:

A. Pass orders directing the Respondents to create a charge on their unencumbered and liquid assets, equal in value to the claim amount of Rs.15,09,80,086/- in favour of the Claimant; and register the same under the provisions of the Companies Act, 2013.”

24. As the learned arbitrator has worked out the quantum of deposit to be directed by the respondent by treating the claim of FIPL to be ₹ 21 crores, whereas the amount that FIPL desired to be secured was only ₹ 15,09,80,086/-, I am of the opinion that the learned arbitrator should reconsider the quantum of deposit, as directed by her, treating the amount that FIPL desired to be secured as ₹ 15,09,80,086/-, rather than proceed on the overall claim amount of ₹ 21 crores in the statement of claim.

25. Having said that, I make it clear that the learned arbitrator would, in re-examining the quantum of claim on this basis, be free to decide any appropriate quantum as she deems fit in the facts of the case. This order is not to be treated as an opinion, far less a direction, that the quantum of deposit is required to be reduced.

26. The learned arbitrator would, therefore, while re-examining the issue of quantum of deposit, treating the amount, that FIPL desired to secure, as ₹ 15,09,80,086/-, be free to maintain or reduce the amount of deposit, as she may deem appropriate.

27. Except for the above limited aspect, the order of the learned arbitrator stands upheld. The matter is remitted to the learned arbitrator only to take a fresh look at the issue of quantum of deposit, treating the amount that FIPL desired secured as ₹ 15,09,80,086/- instead of ₹ 21 crores.

28. All the appeals alongwith pending applications stand disposed of in the aforesaid terms with no orders as to costs.

29. Parties may act on the basis of the order, copy of which be provided to them by the Registry.

C. HARI SHANKAR, J

DECEMBER 3, 2021/kr

