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

% **Date of decision: 30 January 2023**

+ **ARB.P. 1303/2022 & I.A. 19892/2022(Stay)**

M/S PACIFIC DEVELOPMENT CORPORATION LIMITED

..... Petitioner

Through: Mr. Sudhir Nandrajog, Sr. Adv.
with Mr. Naveen Raheja and
Mr. Sanjay Chauhan, advs.

versus

DELHI METRO RAIL CORPORATION LTD Respondent

Through: Ms. Vibha Mahajan Seth and
Ms. Divyanshi Anand, Advs.

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+ **O.M.P.(I) (COMM.) 295/2022 & I.A. 19890/2022(Delay in Re-filing), I.A. 19891/2022(Stay)**

M/S PACIFIC DEVELOPMENT CORPORATION LIMITED

..... Petitioner

Through: Mr. Sudhir Nandrajog, Sr. Adv.
with Mr. Naveen Raheja and
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versus

DELHI METRO RAIL CORPORATION Respondent

Through: Ms. Vibha Mahajan Seth and
Ms. Divyanshi Anand, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

YASHWANT VARMA, J. (ORAL)

1. The Court by means of the present order, and with the consent of parties, proposes to dispose of these two connected petitions. While O.M.P.(I) (COMM.) 295/2022 has been preferred under Section 9 of

the **Arbitration and Conciliation Act, 1996**¹, ARB.P. 1303/2022 came to be instituted subsequently and seeks the constitution of an Arbitral Tribunal in accordance with the provisions of Section 11(4) and (6) of the Act.

2. The record would reflect that on the petition preferred under Section 9, on 03 November 2022 a learned Judge of the Court proceeded to pass the following order:-

“1. Learned counsel appearing for the respondent states, as per her instructions, the matter has to be heard and decided by this Court.

2. In other words, respondent is not agreeable for appointment of an Arbitrator. She states, reply shall be filed by Tuesday, i.e., November 8, 2022.

3. Till the next date of hearing, status quo with regard to invocation of the bank guarantee, which is the subject matter of the present petition, shall be maintained.

4. List on November 14, 2022.”

It is that order which has continued till these two petitions were taken upon for final disposal today.

3. From the material which has been placed on the record by way of the petition under Section 11, it is manifest that the dispute between the parties emanates from a Lease Agreement dated 04 September 2017. The petitioner appears to have firstly initiated the conciliation process as envisaged under the agreement in terms of its letter of 14 March 2022. Consequent to conciliation proceedings having failed, a conciliation failure report came to be drawn and submitted whereafter the petitioner by its letter of 18 August 2022 called upon the **Delhi**

¹ The Act

Metro Rail Corporation² for constitution of an Arbitral Tribunal. This was followed by a reminder letter dated 12 September 2022 addressed to the DMRC by the petitioner in reiteration of the said request. It becomes relevant to note that responding to the notice of 18 August 2022, the DMRC by its letter of 15 September 2022 had, while purporting to act in furtherance of clause 11.3 of the Lease Agreement, forwarded a panel of five arbitrators to the petitioner requesting it to nominate one arbitrator who may be then treated to be a constituent of the three-member Arbitral Tribunal which was to enter upon the reference. The petitioner had questioned the aforesaid action of the DMRC asserting that it was entitled to choose an arbitrator out of the entire panel that was maintained by it. It is thereafter that the petition under Section 11 came to be preferred before this Court.

4. The dispute insofar as the aforesaid question is concerned is no longer *res integra* and stands conclusively settled by the Supreme Court in **Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited³**. It becomes pertinent to note that in the said decision while upholding the composition of the panel as drawn by the DMRC and finding that the choice of retired or erstwhile employees of Central Government and Public Sector Undertakings as offered would not be violative of Section 12 of the Act, the Supreme Court had observed as under:-

“**25.** Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the “circumstances”

² DMRC

³ (2017) 4 SCC 665

which give rise to “justifiable doubts” about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list.

26. It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide “to determine whether circumstances exist which give rise to such justifiable doubts”. Such persons do not get covered by red or orange list of IBA guidelines either.

27. As already noted above, DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the petitioner to nominate its arbitrator. They are not the employees or

ex-employees or in any way related to DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the Arbitral Tribunal.

28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.”

5. It would be pertinent to note that in paragraph 28, the Supreme Court had an occasion to observe that once a right stood conferred upon a party to choose from out of the panel so maintained by the DMRC, its choice could not be restricted to a panel of five which the DMRC may unilaterally choose to offer for consideration. It was in the aforesaid backdrop that the Supreme Court had observed that DMRC would be obliged to amend its Standard Conditions of Contract and ensure that the panel in its entirety was made available to

the party concerned enabling it to exercise with '*full freedom*', a choice with respect to appointment of an arbitrator.

6. Although the respondent has in its counter affidavit filed in ARB.P. 1303/2022 asserted that it has duly amended the Standard Conditions of Contract, the record would reflect that the panel as maintained by it in its entirety had not been offered for the consideration of the petitioner. In fact, Ms. Seth, learned counsel appearing for the DMRC, had while placing the entire panel in these proceedings, submitted that the Court may itself appoint or nominate an arbitrator from out of the panel so maintained by it. The Court, however, finds that the said course of action would clearly not be in consonance with paragraph 28 and the principles enunciated by the Supreme Court in **Voestalpine**. Ultimately that choice must be one which is left to be exercised by the petitioner in the first instance in light of the aforementioned judgment.

7. Viewed in that backdrop, it is manifest that the respondent has failed to act in terms of the appointment procedure as prescribed and as explained by the Supreme Court in **Voestalpine**. Consequently, the petition under Section 11 would merit disposal with a direction to the DMRC to provide the entire panel for the consideration of the petitioner who may exercise the requisite choice whereafter parties may proceed further for constitution of the Arbitral Tribunal in terms of the appointment procedure as stipulated under the agreement. Ordered accordingly.

8. That leaves the Court to deal with the petition under Section 9 and on which an order of status quo was granted thus restraining the DMRC from invoking the **Bank Guarantee**⁴.

9. Ms. Seth appearing for the DMRC would contend that once this Court has entertained the petition under Section 9, and restrained the respondent from invoking the BG, it would be incumbent upon it to decide the matter finally. The submission essentially was that the petition under Section 9 of the Act must be decided finally and on merits.

10. Mr. Nandrajog, learned Senior counsel appearing for the petitioner, on the other hand submitted that since the Court has proceeded to pass directions for the constitution of the Arbitral Tribunal, the ends of justice would warrant the order of 03 November 2022 being continued till such time as the Arbitral Tribunal is ultimately constituted and is able to consider the grant of interim reliefs in terms of Section 17 of the Act.

11. Ms. Seth would contend that the aforesaid course of action would not be permissible in law especially in light of the principles that were laid by the Supreme Court in **Arcelor Mittal Nippon Steel India LTD. vs. Essar Bulk Terminal LTD.**⁵

12. In order to appreciate the backdrop in which **Arcelor Mittal** came to be rendered by the Supreme Court the following salient facts would merit notice. Undisputedly, in the facts of that case, petitions

⁴ BG

⁵ 2021 (10) SCALE

under Section 9 came to be preferred by both sides before the parties moved the competent High Court for appointment of an arbitrator in terms of Section 11 of the Act. Arguments on the petition under Section 9 of the appellant before the Supreme Court are stated to have been concluded and orders reserved upon the same by the Commercial Court on 07 June 2021. The petition under Section 11 which came to be filed subsequently was disposed of on 09 July 2021 and in terms of which a three-member Arbitral Tribunal came to be constituted. On or about 16th July 2021, the Appellant filed an application praying for reference of both the applications, filed by the Appellant and the Respondent respectively under Section 9 of the Act, to the Tribunal. This application came to be rejected by the Commercial Court. The aforesaid order came to be assailed before the Gujarat High Court by way of a petition under Article 227 of the Constitution. The said petition was ultimately disposed of with the High Court providing that the Commercial Court should be called upon to pronounce orders on the pending applications under Section 9.

13. While dealing with the correctness of the aforesaid directions as framed by the Gujarat High Court, the Supreme Court in **Arcelor Mittal** firstly noticed the irrefutable fact that the power conferred on the Arbitral Tribunal in terms of Section 17 now stands and placed at par with the powers that are conferred on a court in terms of Section 9. While dealing with the issues which arose for its consideration, the Supreme Court also had an occasion to consider two decisions rendered by Division Benches of this Court in **Energo Engineering**

Projects Limited vs. TRF Ltd.⁶ and. Benara Bearings and Pistons Limited v. Mahle Engine Components India Private Limited⁷.

14. This would be evident from paragraphs 82 and 84 of the report which are extracted hereinbelow:-

“82. In *Energo Engineering Projects Ltd. v. TRF Limited* (supra) authored by one of us (Indira Banerjee, J.), a Division Bench of Delhi High Court held:-

“27. A harmonious reading of Section 9(1) with Section 9(3) of the 1996 Act, as amended by the 2015 Amendment Act, makes it amply clear that, even after the amendment of the 1996 Act by incorporation of Section 9(3), the Court is not denuded of power to grant interim relief, once an Arbitral Tribunal is constituted.

28. When there is an application for interim relief under Section 9, the Court is required to examine if the applicant has an efficacious remedy under Section 17 of getting immediate interim relief from the Arbitral Tribunal. Once the court finds that circumstances exist, which may not render the remedy provided under Section 17 of the 1996 Act efficacious, the Court has the discretion to entertain an application for interim relief. Even if an Arbitral Tribunal is non functional for a brief period of time, an application for urgent interim relief has to be entertained by the Court under Section 9 of the 1996 Act.

29. It is a well settled proposition that if the facts and circumstances of a case warrant exercise of discretion to act in a particular manner, discretion should be so exercised. An application for interim relief under Section 9 of the 1996 Act, must be entertained and examined on merits, once the Court finds that circumstances exist, which may not render the remedy provided under Section 17 of the said Act efficacious.

30. In our view, the Learned Single Bench patently erred in holding “there is no impediment or situation where the remedy under Section 17 of the Act is not efficacious”. The Learned Single Bench failed to appreciate that the pendency

⁶ 2016 SCC OnLine Del 6560

⁷ 2017 SCC OnLine 7226

of a Special Leave Petition in which the constitution of the Arbitral Tribunal was under challenge, was in itself, a circumstance which rendered the remedy of the parties under Section 17 uncertain and not efficacious.

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34. An application for interim relief should ordinarily be decided by the Arbitral Tribunal, once an arbitral tribunal is constituted. However, if circumstances exist which may not render the remedy under Section 17 of the 1996 act efficacious, the Court has to consider the prayer for interim relief on merits, and pass such order, as the Court may deem appropriate.

35. The Learned Single Bench has not at all considered whether any interim protection was at all necessary in this case. The bank guarantee was apparently unconditional. In effect, the appellants have been restrained from invoking an unconditional guarantee. The application cannot be heard out until the special leave petition is disposed of.”

84. In ***Banara Bearings & Pistons Ltd.*** (supra) cited by Mr. Sibal a Division Bench of the Delhi High Court, speaking through Badar Durrez Ahmed J. Held:

“24..... We are of the view that Section 9(3) does not operate as an ouster clause insofar as the courts’ powers are concerned. It is a well-known principle that whenever the Legislature intends an ouster, it makes it clear. We may also note that if the argument of the appellant were to be accepted that the moment an Arbitral Tribunal is constituted, the Court which is seized of a Section 9 application, becomes coram non judice, would create a serious vacuum as there is no provision for dealing with pending matters. All the powers of the Court to grant interim measures before, during the arbitral proceedings or at any time after the making of the arbitral award but prior to its enforcement in accordance with Section 36 are intact (and, have not been altered by the amendment) as contained in Section 9(1) of the said Act. Furthermore, it is not as if upon the very fact that an Arbitral Tribunal had been constituted, the Court cannot deal with an application under sub-section (1) of Section 9 of the said Act. Section 9(3) itself provides that the Court can entertain an application under Section 9(1) if it finds that circumstances

exist which may not render the remedy provided under Section 17 efficacious.

25. We may also note that there is no provision under the said Act which, even as a transitory measure, requires the Court to relegate or transfer a pending Section 9(1) application to the Arbitral Tribunal, the moment an Arbitral Tribunal has been constituted.””

15. Proceeding further to deal with the meaning to be ascribed to the word ‘*entertain*’ as occurring in Section 9 (3) of the Act, the Supreme Court held as follows:-

“89. In *Lakshmi Rattan Engineering Works Ltd.* (supra) the Court held: -

9. The word “entertain” is explained by a Divisional Bench of the Allahabad High Court as denoting the point of time at which an application to set aside the sale is heard by the court. The expression “entertain”, it is stated, does not mean the same thing as the filing of the application or admission of the application by the court. A similar view was again taken in *Dhoom Chand Jain v. Chamanlal Gupta* [AIR 1962 All 543] in which the learned Chief Justice Desai and Mr Justice Dwivedi gave the same meaning to the expression “entertain”. It is observed by Dwivedi, J., that the word “entertain” in its application bears the meaning “admitting to consideration”, and therefore when the court cannot refuse to take an application which is backed by deposit or security, it cannot refuse judicially to consider it. In a single bench decision of the same court reported in *Bawan Ram v. Kunj Beharilal* [AIR 1961 All 42] one of us (Bhargava, J.) had to consider the same rule. There the deposit had not been made within the period of limitation and the question had arisen whether the court could entertain the application or not. It was decided that the application could not be entertained because proviso (b) debarred the court from entertaining an objection unless the requirement of depositing the amount or furnishing security was complied with within the time prescribed. In that case the word “entertain” is not interpreted but it is held that the Court cannot proceed to consider the application in the absence of deposit made within the time allowed by law. This case turned on the fact that the deposit was made out of time. In yet another case of the Allahabad High Court reported in

Haji Rahim Bux & Sons v. Firm Samiullah & Sons [AIR 1963 All 326] a Division Bench consisting of Chief Justice Desai and Mr Justice S.D. Singh interpreted the words of Order 21, Rule 90, by saying that the word “entertain” meant not “receive” or “accept” but “proceed to consider on merits” or “adjudicate upon”.

9. In our opinion these cases have taken a correct view of the word “entertain” which according to dictionary also means “admit to consideration”. It would therefore appear that the direction to the court in the proviso to Section 9 is that the court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. ...”

90. In *Kundan Lal v Jagan Nath Sharma and Ors.* (supra), a Division Bench of Allahabad High Court held that the expression “entertain” did not mean the same thing as the filing of the application or admission of the application by the Court. The dictionary meaning of the word “entertain” was to deal with or to take matter into consideration. The High Court further held:-

“7. The use of the word ‘entertain’ in the proviso to R. 90 of Or. XXI denotes a point of time at which an application to set aside the sale is heard by the court. This appears to be clear from the fact that in the proviso it is stated that no application to set aside a sale shall be entertained ‘upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up.’ Surely, the question as to the consideration of the grounds upon which the application is based can only arise when it is being considered by the court on the merits, that is, when the court is called upon to apply its mind to the grounds urged in the application. In our view the stage at which the applicant is required to make the deposit or give the security within the meaning of Cl. (b) of the proviso would come when the hearing of the application is due to commence.”

91. In *Hindustan Commercial Bank Ltd. v Punnu Sahu* (supra), the Court held that the expression “entertain” in the proviso to clause (b) Order 21 Rule 90 (as amended by Allahabad High Court), means to “adjudicate upon” or “proceed to consider on merits” and not “initiation of proceeding.”

16. The reasoning for the ultimate directions which came to be framed and which weighed with the Supreme Court are evident from the following passages of that decision:-

“95. On a combined reading of Section 9 with Section 17 of the Arbitration Act, once an Arbitral Tribunal is constituted, the Court would not entertain and/or in other words take up for consideration and apply its mind to an application for interim measure, unless the remedy under Section 17 is inefficacious, even though the application may have been filed before the constitution of the Arbitral Tribunal. The bar of Section 9(3) would not operate, once an application has been entertained and taken up for consideration, as in the instant case, where hearing has been concluded and judgment has been reserved. Mr. Khambata may be right, that the process of consideration continues till the pronouncement of judgment. However, that would make no difference. The question is whether the process of consideration has commenced, and/or whether the Court has applied its mind to some extent before the constitution of the Arbitral Tribunal. If so, the application can be said to have been entertained before constitution of the Arbitral Tribunal.

96. Even after an Arbitral Tribunal is constituted, there may be myriad of reasons why the Arbitral Tribunal may not be an efficacious alternative to Section 9(1). This could even be by reason of temporary unavailability of any one of the Arbitrators of an Arbitral Tribunal by reason of illness, travel etc.

97. Applications for interim relief are inherently applications which are required to be disposed of urgently. Interim relief is granted in aid of final relief. The object is to ensure protection of the property being the subject matter of Arbitration and/or otherwise ensure that the arbitration proceedings do not become infructuous and the Arbitral Award does not become an award on paper, of no real value.”

17. On an overall conspectus of the aforesaid facts, the matter came to be disposed of in the following terms:-

“108. For the reasons discussed above, the appeal is allowed only to the extent of clarifying that it shall not be necessary for the Commercial Court to consider the efficacy of relief under Section 17, since the application under Section 9 has already been entertained and considered by the Commercial Court. The

judgment and order under appeal does not, otherwise, call for interference.”

18. As would be manifest from the above, the Supreme Court came to conclude that since the application under Section 9 had already come to be entertained prior to the constitution of an Arbitral Tribunal, it would be open for the Commercial Court to decide the same notwithstanding Section 17 of the Act. It was further observed that since the application under Section 9 had been entertained prior to the constitution of the Arbitral Tribunal itself, it would not be incumbent upon the Commercial Court to consider the efficacy of the relief that may be sought under Section 17.

19. It would be apposite to note that the Division Bench of this Court in **Energo Engineering** was dealing with the correctness of the view taken by a learned Judge of the Court which had held that once the Arbitral Tribunal had come to be constituted, any application for interim relief should ordinarily be decided by the Tribunal and that courts should desist from entertaining any application under Section 9 thereafter. The Division Bench, however, took notice of the fact that the order under Section 11 at the relevant time formed subject matter of challenge before the Supreme Court on which an order of restraint operated as a consequence of which the Tribunal itself could not be constituted. It was in the aforesaid backdrop that the Court ultimately held that it was clearly a case where the Section 17 remedy had been rendered inefficacious.

20. It becomes relevant to observe that the provisions of Section 9(3) of the Act would come into play only in a situation where a court

is approached for the grant of interim measures after the Arbitral Tribunal has been constituted. The said provision, in fact, requires courts to be circumspect in entertaining an application under Section 9(1) after an Arbitral Tribunal has been constituted and to invoke its powers only if it finds that circumstances exist which may render the remedy under Section 17 ineffectual.

21. That clearly is not the position which obtains in the present case since admittedly not only was the application under Section 9 entertained prior to the constitution of the Arbitral Tribunal, an interim order was also passed on 03 November 2022. That order is not shown to have been assailed or questioned by the respondents till date. In fact and as was noticed in the introductory parts of this order, that interim order of restraint continued to operate even when the present petitions were taken up for final disposal together. The Arbitral Tribunal is yet to be constituted. In fact, parties would now have to proceed further in terms of the directions which have been framed on the petition under Section 11 of the Act.

22. The Court upon due consideration finds that **Arcelor Mittal** was dealing with the question whether a court stands deprived of the power to consider an application under Section 9 which may have been entertained prior to the constitution of the Arbitral Tribunal. That issue was clearly answered in the negative. The Supreme Court pertinently observed that once an application comes to be “entertained” prior to the constitution of the Arbitral Tribunal, the question of efficacy or otherwise of the remedy provided under Section 17 of the Act would become irrelevant.

23. However, **Areclor Mittal** cannot be understood as being an authority for the proposition that once an application under Section 9 comes to be entertained, it must necessarily be continued and decided finally or inevitably taken to its logical conclusion. While the aforesaid statement of the legal position is not liable to be understood as the Court holding that such applications must be mandatorily disposed of the moment an Arbitral Tribunal is constituted, it would ultimately fall within the discretion of the court to consider whether to continue proceedings on the Section 9 petition after the Arbitral Tribunal comes to be constituted or to leave it open to parties to seek interim and protective measures before the Tribunal. The court would in such a situation have to weigh and balance relevant factors and evaluate whether circumstances warrant a continuance of the proceedings or leave it open to parties to seek their remedies before the Tribunal.

24. **Areclor Mittal** was considering a challenge to the order of the Commercial Court refusing to remit Section 9 applications to the Arbitral Tribunal which had been duly entertained and on which orders had been reserved. It was that principal issue which came to be decided with the Supreme Court opining that since the petitions had already been entertained, the bar and the deterrent comprised in Section 9(3) of the Act would have no application. The said principle, however, has no bearing on the question whether a petition under Section 9 while duly entertained prior to the constitution of the Tribunal must inevitably be continued notwithstanding directions having been framed for its constitution. In such a situation, the Court

may in exercise of its discretion and on a consideration of the facts of a particular case, if found expedient, relegate parties to pursue their remedies before the Tribunal.

25. That then takes the Court to consider whether the order of 03 November 2022 should be maintained at least till such time as the Arbitral Tribunal is constituted and an opportunity accorded to the petitioner to petition for the grant of appropriate interim measures.

26. Undisputedly, the interim order granted by the Court on 03 November 2022 has held the field till today. The said order has neither been questioned nor assailed by the DMRC. The respondent was also unwilling to state that it would not take precipitate action to invoke the BG till such time as the Tribunal is constituted in terms of the directions issued on the Section 11 petition. Once the Court has found that the DMRC had failed to act in accordance with the appointment procedure and the principles laid down in **Voestalpine**, it would be inequitable to change the status quo which has held the field since November 2022. The Court is further of the considered opinion that the ends of justice would warrant that the position which has prevailed today is maintained at least till such time as the Arbitral Tribunal is able to adjudge and examine the contentions of respective parties in greater detail.

27. As this Court balances the rights of respective parties, it finds that the ends of justice would merit the order of 03 November 2022 being continued only till such time as the Arbitral Tribunal is constituted and the petitioner is granted the opportunity to petition the

said Tribunal independently for appropriate interim measures as contemplated under Section 17.

28. In view of the aforesaid, the Section 9 petition would also warrant being disposed of finally leaving it open to the petitioner here to move an appropriate application for the grant of appropriate interim measures once the Arbitral Tribunal stands constituted. The Court further observes that any such application that may be made shall be decided by the Arbitral Tribunal uninfluenced by the order of 03 November 2022 or its continuance in the interregnum in term of the directions framed hereinabove. The aforesaid order shall hold the field only till such time as the Arbitral Tribunal is duly constituted.

29. In order to expedite the process for constitution of the Arbitral Tribunal and to hold parties to strict timelines, the Court directs the petitioner to express and convey its choice with respect to its nominee arbitrator within a period of one week from today. It shall be open to the DMRC to nominate its arbitrator from out of the panel prepared and maintained by it within a week thereafter. The two appointed arbitrators shall be obliged to indicate the name of the Presiding Arbitrator within a period of ten days therefrom.

30. Subject to the aforesaid observations, the instant petitions shall stand disposed of. All contentions of respective parties on merits are kept open to be addressed before the Arbitral Tribunal.

YASHWANT VARMA, J.

JANUARY 30, 2023

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