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

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Date of Decision: 13.11.2024+ **ARB. A. (COMM.) 55/2024****ACCORD ADVERTISING PVT LTD & ANR.**

.....Appellants

Through: **Mr. Rahul Kumar and Ms. Debmalya Ganguli, Advs.**

versus

SM FINLEASE LTD

.....Respondent

Through: **None.****CORAM:****HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (ORAL.)****IA No.44833/2024 (Exemption)**

1. Allowed, subject to all just exceptions.
2. Application stands disposed of.

IA No.44834/2024 (delay of 13 days in filing the appeal)

3. For the reasons stated in the application, the same is allowed.
4. The application stands disposed of.

ARB. A. (COMM.) 55/2024 and IA No.44832/2024 (Stay)

5. Issue notice. Learned counsel, as aforesaid, accepts notice on behalf of the respondent.
6. The present appeal filed under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (hereafter '*the A&C Act*') assails an order dated 14.08.2024 passed by the arbitral tribunal (hereafter '*the impugned order*') while disposing of an application under Section 17 of the A&C Act.
7. The ongoing arbitral proceedings are in the context of a Business



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Loan Agreement dated 18.01.2021 along with a number of financial documents including a personal guarantee deed dated 18.01.2021, cheques, a promissory note dated 18.01.2021, an Addendum to the Business Loan Agreement dated 24.11.2022, entered into between the parties for the purpose of the appellant expanding its advertising business.

8. Under the said loan agreement dated 18.01.2021, the appellant availed a loan of Rs. 75,00,000/- payable within six months. Since the appellant defaulted in repaying the aforesaid loan amount within the stipulated time, by an Addendum dated 24.11.2022 to the said loan agreement, this period was extended till 31.03.2023. However, the respondent again defaulted in repaying the loan amount within the extended period of time.

9. It is the case of the respondent/claimant in the arbitration proceedings that the aforesaid loan was secured by a property admeasuring 9000 sq. ft. at Mauza Raichak, Pargana-Panchkuli, West Bengal. For this purpose, reliance is also placed on an Agreement to Sell dated 02.12.2022 (hereinafter 'the agreement to sell') in respect of the said property. The relevant portion of the agreement to sell is reproduced as under:-

"This property is presently encumbered and equitably mortgaged with NBFC - M/S SM FINLEASE LIMITED (LENDER), 504, Cinema Complex, Greater Kailash- II, New Delhi- 110048 against a Loan taken by M/S ACCORD ADVERTISING PVT. LTD having office at Unit No. 7/12, Acropolis Office Complex, 1858/1 Rajdanga Main Road Kolkata 700107. The property needs to be unencumbered and released before execution of the registered Sale-Deed in favour of the PURCHASER. The SELLER agrees for the same and will do the needful at his end in the event SELLER is not in position to do it, in that case the SELLER authorises the PURCHASER to pay the entire dues of the LENDER directly and adjust/deduct the amount so paid from the agreed total sale consideration. That apart from this, there is-no other defect in title of the SELLER or any impediment in law or under any contract to enter into this Agreement or to transfer the property being dealt under this agreement, further, the property is free from litigation, injunction,



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encumbrance except above mentioned, prior sale, prior agreement, gift, sale, mortgage, acquisition proceedings, attachment, charge, lien, etc. and if it is found otherwise, the SELLER shall compensate the PURCHASER adequately and besides, will also be liable for all kind of consequences because of his misrepresentation/s. The SELLER confirms that as per local laws, the use of the property being transferred is farm house and further the construction done on the property is authorised and the land is neither a forest land government land nor suffers from any prohibition of any nature. The SELLER confirms that he is absolute owner of the property and is in peaceful possession of the property since the time the SELLER has purchased it.”

10. A notice of demand dated 07.04.2023 was issued by the respondent/claimant, calling upon the appellants to repay an amount of Rs. 1,17,20,412/- (Rupees one crore seventeen lakhs twenty thousand four hundred and twelve rupees only) along with further interest in lieu of the outstanding amount due under the business loan agreement between the parties. Further, *vide* the said demand notice, the respondents also called upon the appellants to furnish the details of their movable and immovable assets along with details of their bank accounts.

11. Since the dispute between the parties remained unresolved, a notice invoking arbitration dated 17.02.2024 was sent by the respondent for recovery of the outstanding balance under the Business Loan Agreement. Consequently, the ongoing arbitral proceedings were initiated by the respondent/claimant for recovery of an outstanding amount of Rs. 1,76,96,053/- (including interest) under the said Business Loan Agreement.

12. Alongwith the statement of claim, an application under Section 17 of the A&C Act was also filed by the respondent seeking the following relief/s:-

- a. *“This Hon'ble Tribunal may kindly restrain alienation or creation of third party rights on the properties of the Respondents referred above under para 14 of this application.*



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- b. *This Hon'ble Tribunal may kindly attach as security for judgement/award the properties referred above under para 14 of the application, as the amount due so far is now far more than the value of security under this Business Loan Agreement or in the alternative, this Hon'ble Tribunal may kindly direct the Respondents to deposit with this Arbitral Tribunal unencumbered assets of the value similar to the claim as a security for judgment.*
- c. *This Hon'ble Tribunal may kindly direct Respondents to file list of all assets available with them along with details of their Bank Accounts.*
- d. *This Hon'ble Tribunal may direct deposit of the entire sale consideration before this Hon'ble Tribunal of the secured asset whether received or to be received."*

13. The above said application was filed by the respondent/claimant in light of the aforesaid agreement to sell, and on premise that the sale of the secured asset would be insufficient/much less than the outstanding amount under the business loan agreement.

14. *Vide* the impugned order, the above stated application under Section 17 A&C Act was allowed by the arbitral tribunal and it was directed that the respondents be restrained from alienating or creating any third party rights with respect to the following properties :-

- i. 166B, 1A, Merlin Links, SP Mukherjee Road, Kalighat, Kolkata-700026.
- ii. 7/12 Acropolis Office Complex, 1858/1 Rajdanga Main Road, Kolkata-700107.
- iii. Flat No. 1803, Tower-II, Upohar HIG Complex, 2052 Chakragaria, Kolkata-94.

15. The impugned order takes note of the agreement/s between the parties, the terms of the personal guarantee, and the agreement to sell duly notes that the same was being executed in respect of a property which was already mortgaged with the claimants as security against the Business Loan Agreement. The tribunal found that the outstanding amount under the loan



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agreement, as claimed by the respondent/claimant in its statement of claim, not only far exceeded the amount which could have been recovered by the respondent by way of the sale consideration under the agreement to sell but also that the amount to be recovered as sale consideration under the said agreement to sell was subject to reductions on account of a penalty being levied. The finding/s of the tribunal in this regard, is as under:-

“37. That from Clause 6 of the Agreement to Sell Dated 02.12.2022 it can be seen that property bearing a farmhouse admeasuring 9000 sq. ft. along with bungalow at Mauza Raichak, Pargana-Panchkuli, West Bengal is encumbered and mortgaged with the Claimant.

38. That from Clause 1 of the Agreement to Sell Dated 02.12.2022 it can be seen that property bearing a farmhouse admeasuring 9000 sq. ft. along with bungalow at Mauza Raichak, Pargana-Panchkuli, West Bengal is being sold for a consideration amount of Rs. 1,25,00,000/- (Rupees One Crore Twenty-Five Lacs Only). Out of which a sum of Rs. 25,00,000/- (Rupees Twenty Five Lacs) has already been received by the Respondent as advance earnest money. Further, it has been provided in the said Agreement to Sell that upon delay in execution of Sale Deed, the balance sale consideration would be reduced as penalty, thus, the balance sale consideration of Rs.1,00,00,000/- (Rs. One Crore) is likely to get further reduced.

39. That under the Claim Petition as on 15.02.2024, the Claimant seeks an amount of Rs. 1,76,96,053/- along with interest @ 4% per month with monthly rests from 16.02.2024 till the date of actual payment. That as such, evidently, the consideration amount of the secured asset is lesser than the claim amounts being raised by the Claimant in the present proceedings. That it is relevant to note that as per Clause 7 of the Agreement to Sell Dated 02.12.2022 the sale consideration might be subject to further deduction in the form of penalties.

40. That from the above, it appears that the valuation of the secured asset is not sufficient to realize the claims of the Claimant against the Respondents. That in view thereof, the apprehension of the Claimant that in case the Respondent is not able to satisfy the award, which may be passed, the entire purpose of the proceedings will be lost, cannot be overlooked or negated at this stage.

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47. That owing to the above, this Tribunal is of the view that the Claimant has made out a prima-facie case in his favour and the balance of convenience also lies in favour of the Claimant. That it appears that irreparable loss might be caused to the Claimant in case the present Application u/s 17 of the Arbitration and Conciliation Act, 1996 is not allowed. The factum of grant of loan by the Claimant is undisputed, the factum of taking of loan by the Respondent is also undisputed, the mortgaged security has been dealt by the Respondent and third-party interest in the same has been created, the factum of executing guarantee deed is undisputed, the issuance of loan recall letter is undisputed, however, the liability if any, is disputed which would be determined by this Tribunal. It is also not disputed that the Guarantor is the person in charge of affairs of the Respondent Principal Debtor. It is not disputed that the terms of the Loan Agreement provides that the properties of the Guarantor would be security for the Claims of the Claimant and the accounts maintained by the Claimant would be admitted by them. It is not the case made out by the Respondents that even one property amongst the below property would sufficiently secure the Claimant of its Claims. It is not disputed that the ownership of the assets being sought to be secured belongs to the Respondents. It is also not disputed that both Respondents are represented by same person, i.e., Mr. Sudeep Ganguly, even in present proceedings. The Respondents have not brought on record any property as security that shall sufficiently secure the Claims of the Claimant, despite the fact that both Respondents are obliged to do under Loan Agreement. There is no serious dispute at least at this stage presented on the amount due statement of the Claimant. If Respondent's argument are accepted, then the entire purpose of securing the Loan by a Guarantor by a Lender would be lost. Arbitral Tribunal is supposed to implement the Agreement terms agreed between the parties in letter and spirit, the terms agreed between the parties have been quoted in extenso above. That furthermore, Arbitral proceedings are time bound proceedings, it is not that the Respondents would suffer irreparably if during pendency the Claimant is protected. That in this scenario, the Claimant has made a prima-facie case of protection of it's claim against the Respondent Debtor and Guarantor."

16. Learned counsel for the appellant has assailed the impugned order contending that the directions contained in the impugned award could not have been passed without evaluating the case of the respective parties on merits. Further, it is contended that the properties with regard to which the



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impugned directions have been issued do not even belong to the appellants except for one. Further, the power of the arbitral tribunal to issue the impugned directions has been questioned and it is contended that such an order could not have been passed without the ingredients of Order XXXVIII Rule 5 of CPC, 1908 being established.

17. I find no merit in the aforesaid contentions on behalf of the appellant. There can be no cavil that the arbitral tribunal has extensive powers to issue appropriate directions for securing the amount in dispute in arbitration. The jurisdiction of the arbitral tribunal in this regard is not necessarily circumscribed on the analogy of Order XXXVIII Rule 5 of CPC, 1908. This issue has been considered at substantial length by the Bombay High Court in **J.P.Parekh & Son & Anr. v. Naseem Qureshi & Ors.** [Commercial Arbitration Petition No. 629 of 2021] wherein it has been held as under:-

“20] One such contingency where the interim measure for protection can be granted is contemplated by clause (b), for securing the amount in dispute in arbitration. This contingency prompting the Court to mould the interim relief for securing the amount in dispute in arbitration is often compared with Order XXXVIII Rule 5 of the CPC and the position as regards whether the party filing an application under Section 9 would strictly bound to adhere to Order XXXVIII Rule 5 is no more res integra and has been put to rest by two Division Benches of this court and also recently by the Hon'ble Apex court itself in the case of Essar House Private Limited vs. Arcellor Mittal Nippon Steel India Limited in Civil Appeal (Arising out of SLP (C) No.3187 of 2021).

21] In the case of Jagdish Ahuja and another vs. Cupino Limited, 2020 SCC OnLine Bom 849, Division Bench of this Court made specific observations while formulating the question as to whether the Court while granting relief under Section 9 of the Act of 1996 is strictly bound by the provisions of Order XXXVIII Rule 5 and answered it in Para 6 and 7 as follows :-

"6. As far as Section 9 of the Act is concerned, it cannot be said that this court, while considering a relief thereunder, is strictly



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bound by the provisions of Order 38 Rule 5. As held by our Courts, the scope of Section 9 of the Act is very broad; the court has a discretion to grant thereunder a wide range of interim measures of protection "as may appear to the court to be just and convenient", though such discretion has to be exercised judiciously and not arbitrarily. The court is, no doubt, guided by the principles which civil courts ordinarily employ for considering interim relief, particularly, Order 39 Rules 1 and 2 and Order 38 Rule 5; the court, however, is not unduly bound by their texts. As this court held in Nimbus Communications Limited v. Board of Control for Cricket in India (Per D.Y. Chandrachud J, as the learned Judge then was), the court, whilst exercising power under Section 9, "must have due regard to the underlying purpose of the conferment of the power under the court which is to promote the efficacy of arbitration as a form of dispute resolution." The learned Judge further observed as follows:

"Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case."

7. In an appropriate case, where the court is of the view that there is practically no defence to the payability of the amount and where it is in the interest of justice to secure the amount which forms part of the subject matter of the proposed arbitration reference, even if no case strictly within the letter of Order 38 Rule 1 or 2 is made out, though there are serious allegations concerning such case, it is certainly within the power of the court to order a suitable interim measure of protection. As we have noted above, the amount is either to be deposited into the treasury in accordance with the agreement between the parties or if, for any reason, it is not payable to the revenue towards the Respondent's tax liability, as is the case of the Appellants here, it is to be paid to the Respondent itself as part of the 22] Another Division Bench of this Court in Valentine Maritime Ltd. vs. Kreuz Subsea Pte Limited & Another, (supra), derived a similar inference by relying upon the Apex Court decision in the case of Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd. (2007) 7 SCC 125 and



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observed as under :-

"95. Insofar as judgment of this Court delivered by the Division Bench of this court in case of *Nimbus Communications Limited v. Board of Control for Cricket in India Cupra*) relied upon by the learned senior counsel for the VML is concerned, this Court adverted to the judgment of Hon'ble Supreme Court in case of *Adhunik Steels Ltd. v. Orisa Manganese and Minerals (P) Ltd.*, (2007) 7 SCC 125 and held that in view of the decision of the Supreme Court in case of *Adhunik Steels Ltd.*, (supra) the view of the Division Bench in case of *National Shipping Company of Saudi Arabia* (supra) that the exercise of power under section 9(ii)(b) is not controlled by provisions of the Code of Civil Procedure, 1908 cannot stand. This court in the said judgment of *Nimbus Communications Limited* (supra) held that the exercise of the power under section 9 of the Arbitration Act cannot be totally independent of the basic principles governing grant of interim injunction by the civil Court, at the same time, the Court when it decides the petition under section 9, must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution.

96. This court held that just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure, 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b) of the Arbitration Act."

It was thus held that the arbitral tribunal is also empowered to make an interim Award and to grant money claim on the basis of admitted claim and or acknowledged liability, so as to clear the claim which is subject matter of the dispute before the arbitral tribunal if such case is made out by the Applicant.

23] The Hon'ble Apex Court in the case of Essar House Private



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Limited vs. Arcellor Mittal Nippon Steel India Limited (supra) by making a reference to both the above decisions of the Bombay High Court, has taken the principle ahead and specifically concluded as under :-

While it is true that the power under Section 9 of the Arbitration Act should not ordinarily be exercised ignoring the basic principles of procedural law as laid down in the CPC, the technicalities of CPC cannot prevent the Court from securing the ends of justice. It is well settled that procedural safeguards, meant to advance the cause of justice cannot be interpreted in such manner, as would defeat justice."

24] Taking cognizance of the decisions from various High Courts, holding that power under Section 9 of the Arbitration Act is wider than the power under the provisions of CPC, it reproduced the relevant observation from the decisions of this Court and held as under :-

"48. Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is, whether the applicant for interim measure has a good prima facie case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.

49. If a strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC.

50. Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending Arbitral Award is not imperative for grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice. To assess the balance of convenience, the Court is required to examine and weigh the consequences of refusal of interim relief to the applicant for



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interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail."

25] The position of law thus stands crystalized in the above manner and the inference which could be gainfully drawn from the authoritative pronouncement, is that the provisions as contained in Section 9 and 17 of the Arbitration Act, 1996 are meant for protecting the subject matter of the dispute till the arbitration proceedings culminate into an Award. The court is also entitled to consider whether denial of such order would result in great prejudice to the parties seeking such protective order. The obstructive conduct of the party against whom such direction is sought, is also to be recorded as material consideration, apart from the most important element whether there is practically no defence to the payability of the amount, and, therefore, it is only in the interest of justice to secure the amount, which forms part of the subject matter of the proposed arbitration reference and in such case, it is certainly within the power of the Court to order suitable interim measures for its protection.

The apprehension expressed in Para 51, based on the correspondence, exchanged by Respondent Nos.1 and 2, is sufficient to secure the claim of the Petitioners by invoking Order XXXVIII Rule 5 of CPC, particularly in absence of specific denial of the claim and since now the MCGM has granted substitution of the Petitioner firm by another Architect.

18. In the present case, the learned arbitrator has noted that :
- (i) the factum of the grant of loan by the claimant is undisputed;
 - (ii) the mortgaged security has been dealt with by the appellant and third party interest therein has been sought to be created therein;
 - (iii) the factum of execution of guarantee deed is undisputed;
 - (iv) issuance of loan recall letter is undisputed;
 - (v) it is undisputed that the guarantor (appellant no.2) is a person in-charge of the affairs of the appellant/principal debtor and that the properties of the guarantor can be taken recourse to for the purpose of satisfying the liability under the Business Loan Agreement.



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(vi) Importantly, the impugned order notes that ‘it is not disputed that the ownership of the assets being sought to be secured belongs to the respondent (appellant herein)’

19. It was in the light of the consideration of the aforesaid aspects that for the purpose of balancing the equities and for securing the amount in dispute, the learned sole arbitrator issued the impugned directions as contained in para 50 of the impugned order whereby the appellants have been restrained from alienating, dealing and creating third party rights in respect of assets enumerated therein.

20. Moreover, liberty has been granted to the appellant to provide sufficient security of requisite amount for the purpose of getting the aforesaid order varied from the arbitral tribunal. Needless to say, it is open for the appellant to exercise this option. However, in these proceedings, the Court is not inclined to interfere with the discretion exercised by the arbitral tribunal and the impugned directions.

21. It has been held in a series of judgments that the orders passed under Section 17 of the A&C Act are interlocutory in the nature and that the scheme of the A&C Act frowns upon interference with such orders while the arbitral proceedings are ongoing, except for exceptional reasons.

22. In ***World Window Infrastructure Pvt. Ltd. v. Central Warehousing Corporation*** 2021: DHC: 3798, it was observed by a Co-ordinate Bench of this Court as under:

“29. The scope of interference, in appeal, against orders passed by arbitrators on applications under Section 17 of the 1996 Act is limited. This court has already opined in Dinesh Gupta v. Anand Gupta MANU/DE/1727/2020, Augmont Gold Pvt. Ltd. v. One 97 Communication Ltd. and Sanjay Arora v. Rajan Chadha MANU/DE/2643/2021 that the restraints which apply on the court while



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examining a challenge to a final award under Section 34 equally apply to a challenge to an interlocutory order under Section 37(ii)(b). In either case, the court has to be alive to the fact that, by its very nature, the 1996 Act frowns upon interference, by courts, with the arbitral process or decisions taken by the arbitrator. This restraint, if anything, operates more strictly at an interlocutory stage than at the final stage, as interference with interlocutory orders could interfere with the arbitral process while it is ongoing, which may frustrate, or impede, the arbitral proceedings.

30. Views expressed by arbitrators while deciding applications under Section 17 are interlocutory views. They are not final expressions of opinion on the merits of the case between the parties. They are always subject to modification or review at the stage of final award. They do not, therefore, in most cases, irreparably prejudice either party to the arbitration. Section 17-like Section 9-is intended to be a protective measure, to preserve the sanctity of the arbitral process. The preeminent consideration, which should weigh with the arbitrator while examining a Section 17 application, is the necessity to preserve the arbitral process and ensure that the parties before it are placed on an equitable scale. The interlocutory nature of the order passed under Section 17, therefore, must necessarily inform the court seized with an appeal against such a decision, under Section 37. Additionally, the considerations which apply to Section 34 would also apply to Section 37(ii)(b). Qua impugned order dt. 17th June, 2020 in first Section 17 application.”

23. Again, in ***Dinesh Gupta and Ors. v. Anand Gupta and Ors.*** 2020: DHC: 2786, it was observed as under:-

“59.....If anything, therefore, the jurisdiction of the Court, under Section 37(2)(b), is even more limited than the jurisdiction that it exercises under Section 37(2)(a) or, for that matter, under Section 34. The discretionary jurisdiction, as exercised by the arbitrator, merits interference, under Section 37(2)(b), therefore, only where such exercise is palpably arbitrary or unconscionable.”

24. In the facts and circumstances of the present case, this Court is not inclined to interfere with the directions contained in the impugned order. However, considering that one of the contentions of the appellant is that the properties with regard to which the impugned directions have been issued do not belong to the appellants at all, liberty is granted to the appellants to



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move an application before the learned arbitrator drawing attention to this aspect and seeking appropriate directions for modification of the impugned award. It shall also be open to the appellants to seek modification of the impugned directions upon furnishing of adequate security to the satisfaction of the learned sole arbitrator for the purpose of securing the amount in dispute. Needless to say, any such request of the appellants shall be considered by the learned sole arbitrator on its own merits.

25. One of the contentions of the appellant, as also recorded in the impugned order, is that in the present case, the arbitrator was unilaterally appointed. It is clarified that the present order would not preclude the appellants from availing appropriate remedies in respect of this aspect of the matter. This order shall not be construed an expression of opinion of this Court with regard thereto.

26. With the foresaid directions, the present appeal is disposed of. Pending application also stands disposed of.

SACHIN DATTA, J.

NOVEMBER 13, 2024/dn