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

Reserved on: 2nd September, 2020
Pronounced on: 17th September, 2020

\+ ARB.A. 4/2020 & IAs 4373/2020

DINESH GUPTA AND OTHERS ..... Appellants

Through: Mr. Rajiv Nayyar and Mr. Ravi Gupta, Sr. Advs. with Mr. Rishi Agrawala, Ms. Niyati Kohli, Mr. Pranjit Bhattacharya and Ms. Megha Bengani, Advs.

versus

ANAND GUPTA AND OTHERS ..... Respondents

Through: Mr. Sudhir Nandrajog, Sr. Adv. With Mr. Vipul Ganda, Ms. Aastha Trivedi, Ms. Shreya Jain, Ms. Chandreyee Maitra and Ms. Guresha Bhamra, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G E M E N T

% 17.09.2020

1. This appeal, under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), assails the direction, in para 3.28 of order, dated 18th February, 2020,

passed by the learned Sole Arbitrator, to the appellants to furnish suitable security, equivalent to the sums involved, to the learned Arbitral Tribunal. *Vide* subsequent order dated 14th May, 2020, the learned Sole Arbitrator has clarified that the security would be furnished within a period of four weeks, to the satisfaction of the learned Sole Arbitrator.

2. With consent of parties, who have been heard over several days, this judgement disposes of the appeal of the appellant.

Facts

Undisputed Facts

3. Anand Gupta, Rajesh Gupta and Dinesh Gupta are brothers, Anand Gupta being elder to Rajesh Gupta, who is elder to Dinesh Gupta. Dinesh Gupta is Appellant No. 1, and Anand Gupta is Respondent No. 1, in these proceedings. Rajesh Gupta has not been impleaded as a party.

4. Dinesh Gupta, Anand Gupta and Rajesh Gupta headed three groups of a joint family, referred to, in the impugned order, by the acronyms 'DGG', 'AGG' and 'RGG', respectively. A fourth group, namely the Bechu Singh Group ('BSG') was also a party before the learned Sole Arbitrator. For ease of reference, this judgement uses the same acronyms.

5. The appellants, in this appeal, are Dinesh Gupta, his wife Shivani Gupta and his son Shreyansh Gupta, as Appellants No. 1, 3 and 2, and the various Companies constituting part of DGG, as Appellants No. 4 to 19. Respondents No. 2, 3 and 4 are the son, wife and daughter of Respondent No. 1 Anand Gupta, Respondent No. 5 is the HUF of the respondents and Respondents Nos. 6 to 12 are Companies which, together with Respondents Nos. 1 to 5, constitute AGG.

6. Before the learned Sole Arbitrator, DGG was the claimant, and RGG, AGG and BSG were the respondents.

7. Dinesh Gupta, Anand Gupta and Rajesh Gupta were, at one point of time, doing construction and real estate business (hereinafter referred to as "the family business") together, under the name "M/s BDR Builders and Developers Pvt Ltd" (hereinafter referred to as "BDR"). In 1992, Anand Gupta and his family members separated from the family business which, thereafter, was continued by DGG and RGG.

8. Disputes arose, in August 2017, between Dinesh Gupta and Rajesh Gupta. With the intervention of Anand Gupta, two Family Settlement deeds, dated 2nd December, 2017 and 9th December, 2017, were executed between DGG and RGG, and was signed, on their behalf, by Dinesh Gupta and Rajesh Gupta. The agreement dated 9th December, 2017 – which, apparently, set out the terms of settlement – read thus:

"**SETTLEMENT BETWEEN RAJESH GUPTA & ASSOCIATES AND DINESH GUPTA & ASSOCIATES**

This settlement is made at New Delhi on 9th day of December, 2017.

The terms of the settlement are as under: –

1. The list of BDR Group companies/entities which shall vest in Dinesh Gupta & Associates is annexed herewith as Annexure-A.

2. The list of BDR Group companies/entities which shall vest in Rajesh Gupta & Associates is annexed herewith as Annexure-B.

3. The list of properties which shall be transferred to Dinesh Gupta by the Companies vested in Rajesh Gupta and by Rajesh Gupta and Associates is annexed herewith as Annexure-C.

4. The list of properties which shall be transferred to Rajesh Gupta by the Companies vested in Dinesh Gupta and by Dinesh Gupta and Associates is annexed herewith as Annexure-D.

5. The list of actionable claims (only if received) which shall vest in Dinesh Gupta & shall be transferred to Dinesh Gupta by the Companies vested in Rajesh Gupta and by Rajesh Gupta and Associates is annexed herewith as Annexure-E.

6. The list of actionable claims (only if received) which shall vest in Rajesh Gupta & shall be transferred to Rajesh Gupta by the Companies vested in Dinesh Gupta and by Dinesh Gupta and Associates is annexed herewith as Annexure-F.

7. The list of liabilities (only if paid) which shall be borne by Dinesh Gupta though shown as outstanding in the Companies vested in Rajesh Gupta and in Rajesh Gupta and Associates is Annexed herewith as Annexure-G.

8. The above said settlement is binding on the parties, on companies/entities vested in the parties as well as family members and associates of the parties. None of the parties shall challenge the terms of the settlement in any court, authority etc.

9. The cross holdings shall be mutually transferred between the parties on the basis of vesting of companies as detailed above and in a manner and at valuations which will lead to the entire capital distributed 50:50 between both groups detailed as above A and B.

10. The parties agreed that the tax will be borne respectively by the respective parties as per Annexure-A & B. However, taxes pertaining to claims as per Annexure E & F as list as per Annexure H shall be borne by the respective beneficiary.

11. The parties shall cooperate with each other to implement the terms of this settlement.

12. That more than 100 Crores worth of actionable claims were held in excess by Dinesh Group which is to be reimbursed to Rajesh Group if received. Specific irrevocable resolutions of companies will be given to recover the actionable claims by Dinesh Group.

(Sd/-)

Rajesh Gupta
(for self & on behalf of his associates and entities vested in him)

(Sd/-)

Dinesh Gupta
(for self & on behalf of his associates and entities vested in him)

Witnesses:-

1. Shashank Gupta
2. Shreyans Gupta”

9. In line with the aforesaid Family Settlements (as the petitioners would aver), AGG

(i) resigned from M/s Renu Farms Pvt. Ltd. (hereinafter referred to as "Renu Farms"), which fell to the share of RGG,

(ii) resigned from M/s Renu Promoters Pvt. Ltd. (hereinafter referred to as "Renu Promoters"), which fell to the share of DGG,

(iii) transferred shareholdings, in nine companies, to RGG, without consideration,

(iv) transferred shareholdings, in six companies, to DGG, without consideration, and

(v) liquidated investments, held by AGG in Kotak Mahindra Mutual Funds, ICICI Prudential Mutual Funds and Edelweiss Mutual Funds (hereinafter referred to, collectively, as "the Mutual Funds"), and credited the amounts obtained thereby, in the accounts of Anand Gupta (HUF) and Sanchit Gupta (son of Anand Gupta), totalling ₹ 19,89,34,500.88, out of which an amount of ₹ 19,55,00,000/– was credited into the accounts of DGG.

10. DGG would aver that the aforesaid amount of ₹ 19,55,00,000/– was "gifted", by AGG to DGG. AGG denies this contention, as the facts recited hereinafter would disclose.

11. Consequent on the aforesaid Family Settlements, Rajesh Gupta resigned from seventeen Companies which fell to the lot of DGG, and transferred shares in four companies to DGG; DGG, likewise,

resigned from twenty six companies which fell to the lot of RGG, and transferred shares in thirteen companies to RGG. These facts, however, are not particularly relevant, for the purposes of the present appeal.

12. Thereafter, contends DGG, both RGG and AGG resiled from their commitments under the aforesaid Family Settlements, qua DGG. The actions of RGG, in this regard, do not seriously impact these proceedings, as the present *lis* is between DGG and AGG; however, reference, thereto, is necessary, in order to complete the factual recital.

13. Acts of Rajesh Gupta/RGG, leading to CS (OS) 51/2018

13.1 As a sequel to earlier communications, between Rajesh Gupta and Dinesh Gupta, the former wrote, to the latter, on 10th January, 2018, alleging that Dinesh Gupta was illegally trying to encash mutual funds of BDR, which, as per the Family Settlements, were vested in Rajesh Gupta. Resultantly, it was alleged that Dinesh Gupta was liable to reimburse, to Rajesh Gupta, an amount of ₹ 22,44,85,000/–. Dinesh Gupta was also called upon to furnish resolutions for pursuing actionable claims of companies, which vested in RGG. The communication also requested that a reputed accounting/auditing firm (the names of KPMG and PricewaterhouseCoopers (PwC) were suggested), be appointed to resolve the disputes between RGG and DGG.

13.2 DGG responded, on 12th January, 2018, asserting that the Mutual Funds in issue were in the personal name of Dinesh Gupta, and that Rajesh Gupta was merely the second holder therein. It was further asserted that the investments, in the said Mutual Funds, had been made by Dinesh Gupta from his personal savings. DGG, therefore, denied any monetary liability towards RGG, but assented to the appointment of KPMG, to settle the disputes between RGG and DGG.

13.3 On 19th January, 2018, RGG sent requisitions, under Section 100 of the Companies Act, 2013 (hereinafter referred to as "the Companies Act") to the Board of Directors (hereinafter referred to as "BOD") of BDR, for removal of Dinesh Gupta and Shreyansh Gupta from the Board of Directors of BDR, alleging that, by their acts, they had forfeited the right to continue as Directors, by virtue of Section 169 of the Companies Act. The requisition requested that an Extra Ordinary General Meeting (EGM) of the BOD be called, for the said purpose. Similar requisitions, in respect of M/s. Able Management Consultants Pvt. Ltd., M/s. Verma Finvest Pvt. Ltd., and M/s. Nishit Capinvest Pvt. Ltd. (hereinafter referred to as "Nishit"), were issued by RGG on 24th January, 2018, 25th January, 2018 and 29th January, 2018. Admittedly, BDR, Cable Management Consultants Pvt. Ltd., Verma Finvest Pvt. Ltd. and Nishit were companies which came to the share of DGG, under the Family Settlements.

13.4 The above acts of RGG/Rajesh Gupta led to the filing, by Dinesh Gupta, of CS (OS) 51/2018 (***Dinesh Gupta & Ors. v. Rajesh***

Gupta & Ors.), before this Court, praying for a permanent injunction, restraining Rajesh Gupta/RGG from acting in contravention of the Family Settlements dated 2nd December, 2017 and 9th December, 2017, or interfering with the rights of DGG thereunder, and for appointment of KPMG, or any other reputed firm, to effectuate the said Family Settlements.

13.5 Holding that DGG had managed to establish a *prima facie* case in its favour, a learned Single Judge of this Court, *vide* order dated 7th February, 2018, in CS (OS) 51/2018, restrained RGG from giving effect to the notices dated 19th January, 2018, 24th January, 2018, 25th January, 2018 and 29th January, 2018, till the next date of hearing.

14. Acts of Anand Gupta/AGG, leading to CS (OS) 100/2018

14.1 On 22nd February, 2018, Anand Gupta (HUF) and Sanchit Gupta, son of Anand Gupta, wrote to Shreyansh Gupta, alleging that the transfer of ₹ 19.55 crores, earned by liquidation of the investments made by AGG in Mutual Funds, to the account of DGG, had been effected without the consent of AGG and was, therefore, fraudulent. It was alleged that AGG had given signed blank cheques to Shreyansh Gupta, in good faith, so that the moneys, resulting from the liquidation of the Mutual Funds, could be invested in appropriate securities. Instead, it was alleged, Shreyansh Gupta, on behalf of DGG, had transferred the said moneys into the personal account of DGG, thereby misappropriating the said amount. The communication, therefore, required the said amount to be transferred back to AGG.

14.2 On 12th February, 2018, Anand Gupta wrote to BDR, Dinesh Gupta and Shreyansh Gupta, requiring them to repay, to Anand Gupta, a loan of ₹ 77,48,870/–, advanced by Anand Gupta, for investment in real estate projects and repayable on demand. The notice was predicated on the allegation that Dinesh Gupta and Shreyansh Gupta had committed various frauds, with which the present petition is not really concerned.

14.3 On 16 February, 2018, Sanchit Gupta issued a requisition, under Section 100 (2) of the Companies Act, in respect of Renu Promoters. Sanchit Gupta asserted his authority to issue the said requisition, as he held 50% of the total paid-up equity share capital in Renu Promoters. Alleging that Dinesh Gupta had mismanaged the affairs of Renu Promoters and had, thereby, rendered himself incapable of continuing as Director of the said Company and liable to be removed under Section 169 of the Companies Act, the requisition sought convening of an EGM for the said purpose.

14.4 On 23rd February, 2018, AGG wrote to Dinesh Gupta and Shreyansh Gupta, with respect to the shareholding of AGG in BDR. It was asserted, in the said communication, that AGG had never transferred, of its own volition, its shares in BDR to DGG. Rather, the notice asserted that AGG had agreed to sell its shares in BDR to DGG @ ₹ 200/– per equity share and that, for this purpose, AGG had affixed signatures on Blank Delivery Instruction Slips, which were handed over, to Dinesh Gupta, with the understanding that the slips

would be used to transfer the shares to DGG only after DGG paid, for such transfer, at the rate of ₹ 200/– per share. The slips, it was alleged, had been misused, by DGG, to fraudulently transfer the shares in its favour. As such, the notice called on DGG to pay, to AGG, consideration for such transfer, at the rate of ₹ 200/– per share, and not to deal with the said shares till such payment was made.

14.5 These acts, of AGG, were challenged, by DGG, before this Court, by way of CS (OS) 100/2018 (***Dinesh Gupta & Ors. v. Anand Gupta & Ors.***).

Judgement dated 16th November, 2018 in IAs, under Order XXXIX, preferred in CS (OS) 51/2018 and CS (OS) 100/2018, and orders passed in FAO (OS) 6/2019 and FAO (OS) 18/2019, filed thereagainst

15. The interlocutory applications, preferred under Order XXXIX of the Code of Civil Procedure, 1908 (CPC), for stay – IA 1854/2018 in CS (OS) 51/2018 (***Dinesh Gupta & Ors. v. Rajesh Gupta & Ors.***) and IA 3238/2018 in CS (OS) 100/2018 (***Dinesh Gupta & Ors. v. Anand Gupta & Ors.***) were disposed of, along with IA 3241/2018 in CS (OS) 101/2018 (***Dinesh Gupta & Ors. v. Bechu Singh & Ors.***), *vide* judgement dated 16th November, 2018, in the following terms (*vide* paras 53 and 54 of the judgement):

> "53. Accordingly, in the interest of family amity and unity and to uphold the family settlement, I confirm the interim order passed by this Court dated 7.2.2018 in CS (OS) 51/2018. Similarly, in IA No 3238/2018 in CS (OS) 100/2018, I pass an interim order restraining the defendants from giving effect to the notice dated 16.02.2018 issued under Section 100 of the Companies Act. An interim order was also

passed against the defendants restraining them from giving effect to the notice/communication dated 12.02.2018, 22.02.2018 and 23.02.2018. As far as IA No. 3241/2018 in CS (OS) 101/2018 is concerned, an interim order was passed restraining defendant No. 2 from giving effect to the notice dated 16.02.2018 issued under Section 100 of the Companies Act.

54. However, the above interim order shall continue to operate during pendency of the accompanying suit provided the plaintiff does the following acts within six weeks from today: –

(i) He will pay to Mr. Rajesh Gupta a sum of Rs. 11.28 crores plus Rs.5.28 crores which he is seeking to withhold on his own interpretation of the family settlement. This amount would be in lieu of the redemption of mutual funds held by BDR Developers and Builders Private Limited. This would also be subject to further orders that may be passed by the court.

(ii) The plaintiff will ensure resolution of the Board of Directors of the companies vested in Dinesh Gupta Group be given in favour of Mr. Rajesh Gupta to contest/pursue the case of actionable claims pertaining to the said companies/actionable claims have been given to the Rajesh Gupta Group. This is subject to further orders the court may pass.

(iii) Plaintiff will also pass a resolution of the Board of Directors in favour of Rajesh Gupta of Companies which have fallen to his share for the purpose of pursuing litigation with respect to immovable properties which are vested in the Rajesh Gupta Group. This is subject to further orders that the court may pass.

(iv) Mr. Rajesh Gupta will place on record accounts of any amounts which are recovered by him in the course of adjudication of proceedings regarding actionable claims/immovable properties.

> (v) All the companies which are listed in the family settlement will ensure that the quarterly statement of accounts are regularly provided to the two main parties, namely, Mr. Dinesh Gupta and Mr. Rajesh Gupta respectively."

16. The above order, dated 16th November, 2018, was carried, in appeal, both by Dinesh Gupta and Anand Gupta, *vide* FAO (OS) 6/2019 (***Dinesh Gupta & Ors. v. Rajesh Gupta & Ors.***) and FAO (OS) 18/2019 (***Anand Gupta & Ors. v. Dinesh Gupta & Ors.***). While issuing notice, in FAO (OS) 6/2019, the Division Bench of this Court, on 14th January, 2019, stayed, till the next date of hearing, directions (i) and (iv) in para 54 of the judgement, dated 16th November, 2018 *supra*, of the learned Single Judge.

17. Finally, *vide* order dated 18th March, 2019, the Division Bench disposed of the aforesaid FAO (OS) 6/2019 and FAO (OS) 18/2019, by consent, as the parties agreed to reference of the dispute, between them, to the arbitration of Hon'ble Mr. Justice A. K. Sikri (retd.). All three suits, which were before the learned Single Judge, were referred to the learned Sole Arbitrator. The operative paragraphs of the order, dated 18th March, 2019, merit reproduction, thus:

> "Accordingly, the disputes in all three suits are referred to the Sole Arbitration of Mr. Justice A. K. Sikri (Retd. Judge, Supreme Court), for decision on merits.
>
> Parties are also agreeable that the interim arrangement ordered by the learned Single Judge in the impugned order dated 16.11.2018, as modified by the Division Bench in its order dated 14.1.2019 in FAO (OS) No. 6/2019 be continued, and the present appeal is i.e. FAO (OS) No. 6/2019 and FAO (OS) No. 18/2019 and Cross Objections [No. 5947/2019 in FAO (OS) No. 6/2019] be also placed before learned Arbitrator to be treated as the applications under Section 17

of the Arbitration and Conciliation Act, 1996, for decision. Parties are further agreeable that they may move further application, if any, under Section 17 of the Arbitration and Conciliation Act, 1996 before the learned Arbitrator. Ordered accordingly.

The learned Arbitrator shall be free to pass orders under Section 17 of the Arbitration and Conciliation Act, 1996 after hearing the parties, uninfluenced either by the impugned order dated 16.11.2018 passed by a learned Single Judge, or by the order dated 14.1.2019 passed by the Division Bench. The impugned order dated 16.11.2018 passed by the learned Single Judge and the order dated 14.1.2019 shall merge in the orders that may be passed by the Ld. Arbitrator."

Proceedings before the learned Sole Arbitrator, and the passing of the impugned Order dated 18th February, 2020

18. Before the learned Sole Arbitrator, Anand Gupta/AGG filed two counter-claims.

19. Counter-claim by Anand Gupta/AGG related to Mutual Funds, claiming a total of ₹ 19,55,00,000/–:

19.1 This counter claim (hereinafter referred to as "the Mutual Funds counter-claim", for the sake of convenience) was preferred by Anand Gupta (HUF) and Sanchit Gupta, representing, in essence, the interests of AGG. It was contended, in the counter-claim, that, on 30th November, 2017 and 4th December, 2017, the counter-claimants liquidated part of their investments in their Mutual Funds, and credited the amounts in their respective bank accounts. Thereafter, signed blank cheques were stated to have been handed over, to

Shreyansh Gupta, for investing the amounts in appropriate equity Mutual Funds, which, purportedly, was a practice that had been adopted on earlier occasions as well. It was alleged that Shreyansh Gupta, taking advantage of the family relationship, and without the consent of the counter-claimants, fraudulently transferred, to his own account, ₹ 19,55,00,000/–, using the said blank cheques. Of the said amount, ₹ 15,25,00,000/– was stated to have been misappropriated from Anand Gupta (HUF), and ₹ 4,30,00,000/– from Sanchit Gupta. Emphasising the fact that the counter-claimants (being the respondents in the present proceedings) were not party to any family settlement between DGG and RGG, and refuting the assertion, by DGG, that ₹ 19,55,00,000/– had been "gifted", to DGG by AGG, the counter-claimants asserted their right to recovery of the said amount of ₹ 19,55,00,000/-, with interest.

19.2 The counter-claim, therefore, prayed that Shreyansh Gupta be directed to pay ₹ 15,25,00,000/– and ₹ 4,30,00,000/–, respectively, to Sanchit Gupta and Anand Gupta, with interest @ 18% p.a.

20. Counter-claim by Anand Gupta/AGG relating to 26,86,190 shares of BDR:

20.1 This counter-claim, by Anand Gupta, Sanchit Gupta, Meena Gupta (wife of Anand Gupta) and Aashna Gupta (daughter of Anand Gupta) (referred to, hereinafter, for the sake of convenience, as the "BDR Shares counter-claim"), alleged

fraudulent and illegal transfer of 26,86,190 shares of BDR, held by the counter-claimants, by DGG, to its DEMAT account. It was asserted, in the counter-claim, that, by oral agreement, DGG was obligated to pay ₹ 53,72,38,000/–, to the counter-claimants, against transfer of 26,86,190 equity shares of BDR. On the said assurance, the counter-claimants claimed to have signed and executed blank Delivery Instruction Slips, which were expected to be used, by DGG, for transferring the shares only after the consideration, for such transfer, at the rate of ₹ 200/– per equity share, was paid by it. In violation of the said understanding, the counter-claimants alleged that DGG had fraudulently transferred the aforesaid 26,86,190 equity shares of BDR, to its DEMAT account, without paying the agreed consideration therefor. Emphasising the fact that they were not party to the purported Family Settlements between DGG and RGG, the counter-claimants asserted their right to be paid the agreed consideration, for transfer of the aforesaid equity shares of BDR, along with interest.

20.2 The counter-claim, therefore, prayed that DGG be directed to pay ₹ 19,02,74,000/– to Anand Gupta, ₹ 21,07,24,000/– to Sanchit Gupta, ₹ 4,81,20,000/– to Meena Gupta and ₹ 8,81,20,000/– to Aashna Gupta, along with interest @ 18% p.a.

Fresh applications, under Section 17, preferred before the learned Sole Arbitrator

21. Four fresh applications, under Section 17 of the 1996 Act, were preferred, before the learned Sole Arbitrator. Of these, one was preferred by DGG and three were preferred by AGG.

22. Fresh application, under Section 17, preferred before the learned Sole Arbitrator by DGG, seeking implementation of the Family Settlements:

22.1 Alleging that, while it had itself implemented the covenants of the Family Settlements "to an extent of more than eighty percent", RGG had implemented the said covenants only to the extent of thirty percent, and that the acts of AGG, prejudicial to the interests of DGG, were provoked by RGG, an application, under Section 17 of the 1996 Act, was moved, before the learned Sole Arbitrator, by DGG. Reference was invited to the orders, passed by the learned Single Judge, as well as by the Division Bench, cited *supra*. DGG expressed discomfiture at the fact that the shares, transferred by DGG to RGG, were being used by RGG for, *inter alia*, issuing notices under Section 100 of the Companies Act and filing proceedings before the NCLT. It was further contended that Mutual Funds, held by Dinesh Gupta in his personal name, were being blocked by Rajesh Gupta on the ground that he was the nominee therein. Owing to these obstructions, it was pointed out that Dinesh Gupta had not been able to withdraw any of the Mutual Funds which, even as per the Family Settlements, devolved on DGG.

22.2 DGG also advanced various reasons, to dispute the allegations of AGG, regarding fraudulent transfer of shares into the DEMAT

account of DGG. It was pointed out that the complete exit of AGG, from Renu Farms and Renu Promoters, was manifest even by the alteration of the authorised signatories of the said Bank accounts. Further, DGG pointed out that AGG had never set up any claim, in any Court of law, challenging the documents of transfer, and the limitation for such challenge had also expired. In view of the submissions, it was prayed, in the application, that

(i) the order, dated 16th November, 2018, passed by the learned Single Judge in CS (OS) 101/2018, be continued during the pendency of the arbitral proceedings,

(ii) RGG be directed to deposit, before the learned Sole Arbitrator, all shares held by him in Companies/entities which came to the share of DGG, under the Family Settlement dated 9th December, 2017,

(iii) RGG be directed to remove the objection in respect of encashment of the Mutual Funds in favour of DGG, and

(iv) RGG be directed to provide authorisation to DGG for commencement/prosecution of any actionable claims pertaining to the shares of DGG, in Companies which went to RGG under the Family Settlement.

23. Three applications, under Section 17, preferred before the learned Sole Arbitrator by AGG/Sanchit Gupta:

23.1 On 12th April, 2019, AGG/the members thereof, filed three applications, under Section 17, before the learned Sole Arbitrator. For the sake of convenience, they would be referred to, hereinafter, as the first, second and third Section 17 applications, respectively.

23.2 The first Section 17 application was filed by Sanchit Gupta, purportedly for protection of the rights and interests of shareholders in Renu Promoters, against the acts of Dinesh Gupta and Shreyansh Gupta, in their capacity as Directors in the said Company. The application alleged that Dinesh Gupta and Shreyansh Gupta were "not handling the issue efficiently with the tenant of the property" of Renu Promoters, located at W-12, Greater Kailash Part II, New Delhi. Even while judgement was reserved, by the learned Single Judge in CS (OS) 100/2018, it was alleged that Dinesh Gupta and Shreyansh Gupta had sold the said property, *vide* Sale Deed dated 18th May, 2018, for ₹ 10,50,00,000/–.

23.3 Pointing out that AGG was not a party to the Family Settlements between DGG and RGG, and that the said Family Settlements had also been disputed by RGG on various grounds, the application asserted that, in issuing notices under Section 100 of the Companies Act, for convening of the EGM, Sanchit Gupta was merely exercising his statutory rights, in view of the fact that Dinesh Gupta was acting against the interests of Renu Promoters. In the circumstances, the application prayed that

(i) Dinesh Gupta, Shreyansh Gupta and Renu Promoters be directed to maintain status quo, in relation to the immovable assets of Renu Promoters, as well as in relation to its shareholdings, and that

(ii) Dinesh Gupta and Shreyansh Gupta be restrained from taking any decision in their capacity as Directors in Renu

Promoters, or from utilising any money received on behalf of Renu Promoters.

23.4 The second Section 17 application, by Sanchit Gupta and Anand Gupta HUF, sought restraint, against Shreyansh Gupta, in respect of M/s. C. R. Farms Pvt Ltd (hereinafter referred to as "C.R. Farms"). The prayer was premised on the alleged entitlement, of AGG, to recover ₹ 19.55 crores from Shreyansh Gupta. As the share capital of CR Farms had been acquired by utilisating of part of the alleged fraudulent transferred amount of ₹ 19.55 crores, the application sought restraint, against Shreyansh Gupta, from

(i) alienating the said equity shares,

(ii) creating any charge, encumbrance or third party rights on the said equity shares,

(iii) enjoying any benefits, including exercising of voting rights, accruing to Shreyansh Gupta from holding of the said shares, and

(iv) transferring/liquidating any mutual funds, acquired from the allegedly fraudulently transferred amount,

till the amount of ₹ 19.55 crores was repaid to Anand Gupta HUF and Sanchit Gupta.

23.5 The impugned direction was issued in this application.

23.6 The third Section 17 application was filed by Anand Gupta, Sanchit Gupta, Meena Gupta and Aashna Gupta, for restraining Dinesh Gupta and Shreyansh Gupta from alienating 26,86,190 shares

of BDR. It was alleged, in the application, that, by oral agreement, the applicants had agreed to transfer 26,86,190 equity shares of BDR to Dinesh Gupta and Shreyansh Gupta, on condition of payment, by the latter, of ₹ 53,72,38,000/–. Acting on the basis of the said purported oral agreement, the applicants claimed to have executed blank Delivery Instruction Slips, which were to be used by Dinesh Gupta and Shreyansh Gupta, for transfer of the said shares to DGG, only after payment of consideration, therefor, @ ₹ 200/– per equity share. In violation of the said oral agreement, the application alleged that Dinesh Gupta and Shreyansh Gupta had fraudulently transferred 26,86,190 shares, of BDR, to their DEMAT Account. The applicants, therefore, claimed that they were entitled to consideration, for the said transfer, amounting to ₹ 53,72,38,000/–. The application, therefore, sought a restraint, against Dinesh Gupta and Shreyansh Gupta, from alienating the aforesaid 26,86,190 equity shares of BDR, or from creating any third party rights in respect thereof.

24. As a result, the learned Sole Arbitrator had, before him, seven applications, under Section 17 of the 1996 Act – the three Civil Suits filed before the learned Single Judge, i.e. CS (OS) 51/2018, CS (OS) 100/2018 and CS (OS) 101/2018, one fresh application filed by Dinesh Gupta and three fresh applications filed by AGG/its members. Besides these, applications had also been preferred, under Section 17, by RGG and by Bechu Singh, with which we need not concern ourselves.

The impugned Order

25. Though the grievance of the petitioner is with respect to a limited direction in the impugned Order, it is necessary to examine how the learned Sole Arbitrator has proceeded, while deciding the aforesaid applications, under Section 17, preferred by DGG and AGG/their respective members.

26. The learned Sole Arbitrator has observed, at the outset, that the execution of the Family Settlement dated 2nd December, 2017 and 9th December, 2017, was undisputed, and that it was also an admitted position that, even prior to the recording of the said Family Settlements, DGG, RGG and even AGG were taking actions to detangle their rights in various Companies, in terms thereof. Disputes, however, persisted, with respect to implementation of the Settlement Agreement qua actionable claims, to be pursued by one, or the other, faction, with respect to Companies which fell to the share of that faction, though they remained with the other. The learned Sole Arbitrator placed reliance on the decisions in ***Kale v Deputy Director of Consolidation***[1], ***S. Shanmugham Pillai v. K. Shanmugham Pillai***[2] and ***Hari Shankar Singhania v. Gaur Hari Singhania***[3], to hold that arrangements in family settlements were sacrosanct, and commanded implicit compliance.

27. Proceeding, thereafter, to the applications filed by DGG and AGG, or their members, under Section 17, the learned Sole Arbitrator has, on the application of DGG, continued the order, dated 16th

[1] (1976) 3 SCC 119
[2] (1973) 2 SCC 312
[3] (2006) 4 SCC 658

November, 2018, of the learned Single Judge, as his own order, in the arbitral proceedings. No grievance, with this decision, has been expressed by either side.

28. The learned Sole Arbitrator has, thereafter, proceeded to advert to the three applications, under Section 17, preferred by AGG, or its members.

29. Apropos the first Section 17 application, filed by Sanchit Gupta on 12th April, 2019, for a direction, to DGG and Shreyans Gupta to maintain *status quo* in relation to the immovable assets of BDR and Nimit Builders Pvt. Ltd., the learned Sole Arbitrator has noticed that these Companies fell to the share of DGG, under the Family Settlements. Though AGG was not a signatory thereto, DGG, it has been noticed, had contended that the Family Settlements had the blessings of Anand Gupta/AGG, who/which had acted on the basis thereof, by transferring shares, held by it in Companies which had fallen to the share of DGG under the Family Settlements, to DGG, and also by remitting, to the accounts of the members of DGG, amounts realised by encashment of various mutual funds. Observing that these actions were in tune with the covenants of the Family Settlements, the learned Sole Arbitrator has found that a *prima facie* case existed, in favour of DGG.

30. The learned Sole Arbitrator has, thereafter, referred to the decisions of the Supreme Court in ***Narendra Kante v. Anuradha***

Kante[4] and ***M. S. Madhusoodanan v. Kerala Kaumudi (P) Ltd***[5], as well as of this Court in ***Satya Pal Gupta v. Sudhir Kumar Gupta***[6], to observe that family settlements were enforceable even against non-signatories thereto. As BDR and Nishit fell, under the Family Settlements, to the share of DGG, the learned Sole Arbitrator held that it was not appropriate to restrain DGG from dealing with the said Companies, especially as they were in the business of real estate, and any direction, to them, to maintain *status quo* in respect of the immovable assets of BDR and Nishit would stifle their business. It was noticed that the said assets were the stock-in-trade of BDR and Nishit. Even so, DGG was directed to maintain *status quo* in respect of those immovable assets which constituted part of its capital assets, and were not part of its stock-in-trade.

31. Adverting to the second and third applications, under Section 17 of the 1996 Act, preferred by AGG/its members, the learned Sole Arbitrator held thus (in para 3.28 of the impugned Order, the concluding sentence of which constitutes the subject matter of challenge herein):

> "In the other two applications filed by members of AGG, they are seeking restitution of the amounts which they have remitted. For the reasons given above, such a relief cannot be granted at this stage as it needs determination as to whether the payments were made by AGG of (*sic to?*) DGG voluntarily pursuant to the Family Settlements or they are fraudulently secured by DGG as contended by AGG in these applications. At the same time, in order to secure the interest of AGG, in the event AGG ultimately succeeds, *it would be*

[4] **(2010) 2 SCC 77**
[5] **(2004) 9 SCC 204**
[6] **2016 SCC OnLine Del 2502**

appropriate to direct DGG to furnish suitable (security) equivalent to the sums involved, to the Tribunal."

(Emphasis supplied)

(It may be mentioned, here, that the word "security", as parenthesized in the concluding sentence of the afore-extracted para, does not figure in the paragraph, as contained in the copy of the impugned Order, filed by the petitioner. However, the subsequent clarificatory order, passed by the learned Sole Arbitrator on 14th May, 2020, indicates that DGG was directed to furnish security.)

32. DGG claims, in this appeal, to be aggrieved by the direction to it, as contained in the italicised sentence from the afore-extracted para 3.28 of the impugned Order passed by the learned Sole Arbitrator, to furnish security equivalent to the sums involved. This direction, contends DGG – as vocalized, on its behalf, by Mr. Rajeev Nayar, learned Senior Counsel – was completely unjustified, as well as unsustainable in law. It is, therefore, prayed that the said direction be quashed and set aside.

33. DGG, RGG and AGG, thereafter, moved an application, before the learned Sole Arbitrator, for clarification of the impugned order, dated 18th February, 2020, in certain respects. All these applications were disposed of, by the learned Sole Arbitrator, *vide* a common order dated 14th May, 2020. Dealing with the clarifications sought by DGG, the learned Sole Arbitrator observed, *inter alia*, that

(i) the direction for maintenance of status quo, by DGG, in respect of the capital assets of BDR and Nishit, related to the assets of Renu Promoters,

(ii) in addition to continuation, of the order, dated 16th November, 2018 *supra*, passed by the learned Single Judge, the orders of restraint, passed by the learned Single Judge, in respect of the notices, under Section 100 of the Companies Act, dated 12th February, 2018, 22nd February, 2018 and 23rd February, 2018, were also continued, and

(iii) the prayer for "clarification", of the direction, to DGG, to transfer the shares of Nishit by Renu Gupta to BDR, amounted to seeking a review of the impugned order, which was not permissible.

Apropos the clarifications sought by AGG, the learned Sole Arbitrator only addressed the submission that, *qua* the impugned direction to DGG to furnish security, no time period had been stipulated. The learned Sole Arbitrator clarified that security was required to be furnished, by DGG, as directed in the impugned para 3.28 of the order dated 18th February, 2020, within four weeks, to the satisfaction of the learned Sole Arbitrator.

34. The findings of the learned Sole Arbitrator, *qua* the clarifications sought by RGG, are not relevant for the purposes of the present petition, and are not, therefore, being adverted to.

Rival Contentions

35. Mr. Rajiv Nayar, on behalf of the appellant, advances the following submissions, to assail the impugned direction, in para 3.28 of the order dated 18th February, 2020, of the learned Sole Arbitrator:

(i) No prayer, for directing furnishing of security, by DGG, had been made by AGG, in any of its applications, under Section 17. The prayer was only for restraint, against DGG, from dealing with the shares held by DGG in C.R. Farms and with the shares of BDR. No prayer, for restitution of any amount, was contained in the applications. The impugned direction, for furnishing of security, proceeded on the premise that AGG had sought restitution/refund, of the amount of ₹ 19.55 crores. As such, the learned Sole Arbitrator had exceeded his jurisdiction in granting a relief, unclaimed by AGG. Reliance is placed, for this purpose, on the judgements of this Court in ***Tata Advanced Systems Ltd v. Texcell Information Systems Ltd***[7], ***Captain Guman Singh & Sons v. Indian Oil Corporation***[8] and ***NHPC Ltd v. HCC Ltd***[9].

(ii) Having observed, in para 3.26 of the impugned Order dated 18th February, 2020, that a *prima facie* case existed in favour of DGG, the learned Sole Arbitrator erred in directing furnishing of security, by DGG, in favour of AGG.

(iii) The direction for furnishing of security was also vitiated by non-compliance, in the facts of the case, with the ingredients

[7] **MANU/DE/1061/2020**
[8] **2016 SCC Online Del 983**
[9] **2018 IX AD (Delhi) 1**

of Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (CPC), which were not even pleaded by AGG. The learned Sole Arbitrator could not, therefore, have directed furnishing of security, by DGG, merely on the basis of an unascertained counter-claim. Reliance has been placed, for this proposition, on the judgements of the Supreme Court in ***State Bank of India v. Ericsson India Pvt Ltd***[10] and of this Court in ***C.V. Rao and Krishnapatnam Port Co. Ltd. v. Strategic Port Investments KPC Ltd***[11], ***Lanco Infratech Ltd. v. Hindustan Construction Co Ltd***[12], ***Goodwill Non-Woven (P) Ltd v. Xcoal Energy and Resources LLC***[13] and ***BMW India Private Limited v. Libra Automotives Pvt Ltd***[14].

(iv) Even if it were to be presumed that the learned Sole Arbitrator has the power to "mould" the reliefs prayed for, such moulding had to be informed by reasons, to be contained in the order. Relief, not sought in the application under Section 17, and not pressed even during arguments before the learned Sole Arbitrator, could not have been granted. Least of all could the learned Sole Arbitrator have directed furnishing of security, by DGG, without putting DGG, in the first instance, on notice in that regard. Reliance was placed, in this context, on the judgements of the Supreme Court in ***Om Prakash Gupta v. Ranbir B. Goyal***[15] (which, according to Mr. Nayar, set out the

[10] **(2018) 16 SCC 617**
[11] **218 (2015) DLT 200 (DB)**
[12] **234 (2016) DLT 175**
[13] **2020 SCC Online Del 631**
[14] **2019 (5) Arb LR 118 (Del)**
[15] **(2002) 2 SCC 256**

circumstances in which relief could be moulded, none of which were satisfied in the present case) and ***Seshambal v. Chelur Corporation Chelur Building***[16].

(v) No finding of the existence of a *prima facie* case, in favour of AGG, had been returned by the learned Sole Arbitrator. Nor has the learned Sole Arbitrator addressed the concerns of balance of convenience and irreparable loss, which, in conjunction with the existence of a prima facie case, constituted the *troika* for grant of interim relief. Mr. Nayar relied, in this context, on the judgement of this Court in ***Intertoll ICS Cecons O & M Co. Pvt Ltd v. N.H.A.I.***[17]**.**

(vi) AGG was acting with clear dishonesty, as it was challenging the actions, taken by it in favour of DGG, without challenging similar actions, taken by it in favour of RGG.

(vii) The liability for security had entirely been fastened on DGG, whereas the liability of AGG, if any, would fall on the entire estate shared between DGG and RGG.

36. Responding to the submissions of Mr. Nayar, it was contended, by Mr. Sudhir Nandrajog, learned Senior Counsel for AGG, thus:

(i) AGG was neither a party, nor a signatory, to the Family Settlement dated 2nd December, 2017 and 9 December, 2017. In fact, it had been conceded by DGG, in CS (OS) 51/2018, that

[16] **(2010) 3 SCC 470**
[17] **ILR (2013) II Del 1018**

"all objections, rights and obligations of the third branch i.e. Anand Gupta Group stood satisfied and settled prior to the execution of the Family Settlement", thus obviating the necessity of including the Anand Gupta Group in the Family Settlement.

(ii) The business of AGG was not interconnected, in any manner, with that of DGG. There was no reason, therefore, for AGG to be part of any settlement between DGG and RGG.

(iii) The Family Settlements did not address the claims of AGG, and limited themselves to settling the estate of DGG and RGG. Such a "partial" Family Settlement, excluding the rights and claims of other groups, which had legitimate interests, was impermissible and unenforceable. There was no inter-se Family Settlement between DGG, RGG and AGG.

(iv) Having asserted, in CS (OS) 51/2018, (as noted hereinabove) that all rights and obligations of AGG stood satisfied and settled prior to the execution of the Family Settlements, DGG was seeking to contend, now, that AGG had obligations under the Family Settlements.

(v) Apropos the submission, of Mr. Nayar, that the learned Sole Arbitrator had erred in granting a relief, not sought or claimed by AGG, it was contended that a plain reading of the impugned Order revealed that the learned Sole Arbitrator had, in fact, rejected the relief, sought by AGG, and had granted a

lesser relief, in the form of furnishing of security. The power of the learned Sole Arbitrator, to do so, was unexceptionable. Mr. Nandrajog drew my attention, in this context, to the prayers of AGG, in the applications, preferred by it under Section 17. It was also submitted, in this context, that, in fact, the property at C.R. Farms had been purchased by DGG using the monies realised by liquidation of the Mutual Funds, in which AGG had invested.

(vi) Besides, even on facts, it was submitted that, as the order, dated 18th March, 2019, of the Division Bench in FAO (OS) 6/2019 and FAO (OS) 18/2019, directed the said appeals to be treated as applications under Section 17, it could not be said that the learned Sole Arbitrator had exceeded his jurisdiction in directing furnishing of security by DGG. My attention was invited, in this context, to the reliefs sought in the appeals which, according to Mr. Nandrajog, were in excess of mere furnishing of security.

(vii) The reliefs claimed by AGG, in its counter claims, was also relevant. The amounts claimed by AGG were in excess of ₹ 70 crores.

(viii) Para 3.27 of the impugned Order clearly noted the contentions of the parties, and gave reasons for not granting the larger relief claimed by AGG. The *status quo*, as directed to be maintained by DGG, was also restricted to its capital assets, and did not extend to its stock-in-trade. This direction was not

assailed by DGG. AGG had, in fact, sought restitution. The learned Sole Arbitrator held that, while it was not possible to grant restitution as claimed, it was equitable to direct furnishing of security by DGG. In so directing, the learned Sole Arbitrator clearly acted within the confines of the jurisdiction, vested in him by clauses (b) and (e) of Section 17 (2) of the 1996 Act.

(ix) The direction for furnishing of securities effectively balanced the equities between the parties. No occasion, for interference therewith, therefore, existed. In this context, my attention was invited to the fact that the learned Sole Arbitrator had stayed all the recovery notices, issued by AGG.

(x) The reliance, by the appellant, on Order XXXVIII Rule 5 of the CPC, was misplaced. Section 17 of the 1996 Act was a complete code in itself. In view of Section 19 of the 1996 Act, the CPC did not apply. The restrictions, which influenced exercise of jurisdiction under Order XXXVIII Rule 5 of the CPC, were not incorporated, either expressly or by necessary implication, into Section 17.

(xi) Besides, the invocation of Order XXXVIII Rule 5 was, even otherwise, misconceived on facts, as the learned Sole Arbitrator had not directed attachment, but only furnishing of security.

(xii) Though DGG, RGG and AGG had all applied for clarification of the impugned Order dated 18th February, 2020,

no clarification, of the direction to furnish security, was sought by the appellant. The balance of convenience was also, therefore, against the appellant.

(xiii) It was not open to DGG to rely on the Family Settlements, as the validity and scope thereof, were yet to be decided by the learned Sole Arbitrator. My attention was invited, in this context, to the "Proposed Points of Determination", as submitted by the appellant to the learned Sole Arbitrator, Points 4 and 7, whereof, read thus:

> "4. Where the Anand Gupta Group ('AGG') can be allowed to resile from the transactions made by it prior to and after the execution of the Family Settlement dated 02.12.2017 and 09.12.2017 on the basis that he was not a signatory to the said Family Settlements?
>
> 7. Whether RGG, DGG, AGG, BSE deserved to be directed to comply with the terms of the Family Settlement in a manner that valuations which leads to the entire capital distributed 50:50 amongst RGG and DGG and accordingly be directed to not employ others to destroy the letter and spirit of such terms of the Family Settlement dated 02.12.2017 and 09.12.2017?"

(xiv) There was nothing to indicate that the claim of ₹ 19.55 crores, by AGG, was part of the Family Settlement. Nor was there any evidence to indicate that the said amount had been gifted by AGG to DGG. The appellant, too, had not averred that this amount was shown as gift, in its Tax Returns.

(xv) Inasmuch as the issue of whether AGG was, or was not, part of the Family Settlement, and was bound by the terms

thereof, was yet to be determined, the direction, to DGG, to furnish security, was equitable, and did not call for interference. If, ultimately, the learned Sole Arbitrator was to reach the opinion that the Family Settlements were binding, AGG would be left high and dry.

(xvi) The reliance, by the appellant, on Sections 91 and 92 of the Evidence Act, was misplaced, as these provisions applied only where a person sought to lead evidence contrary to the document to which he was a signatory. No such occasion arose in the present case.

(xvii) The impugned Order had been passed at a preliminary stage, and could not be said to suffer from any such perversity, as would justify interference, by this Court.

37. Arguing in rejoinder, Mr. Nayar re-emphasised the fact that, having held, in para 3.28 of the impugned Order dated 18th February, 2020, that no relief, for restitution of the amounts, as claimed by AGG, could be granted, the learned Sole Arbitrator signally erred in directing furnishing of security by the appellant. Mr. Nayar emphasised, further, that the contentions, advanced by Mr. Nandrajog, did not constitute the basis for the impugned direction, of the learned Sole Arbitrator. He submitted that the direction to furnish security, if issued under Section 17 of the 1996 Act, had necessarily to conform to the discipline of Order XXXVIII Rule 5, sub-rule (4) whereof rendered void any order for attachment, passed in violation of sub-rule (1). Mr. Nayar submitted that the emphasis, by Mr. Nandrajog, on the

impugned direction being equitable in nature, was misguided, as the learned Sole Arbitrator was not empowered to act on the basis of equity. There was, Mr. Nayar re-emphasised, no prayer, for furnishing of security, made by AGG at any stage of the proceedings, including the appeals, against the order of the learned Single Judge, which had been converted, by this Court, into applications under Section 17 of the 1996 Act.

Analysis

Scope of interference under Section 37

38. Before proceeding to examine the submissions of learned Senior Counsel, as advanced before me, it would be appropriate to address, in the first instance, the scope and ambit of Section 37 of the 1996 Act, especially apropos the jurisdiction, of this Court, to interfere with interlocutory orders passed by the learned Arbitrator under Section 17.

39. Section 37, on its plain reading, provides for an appeal against certain orders. The provision does not define the scope and extent of the said jurisdiction of the High Court, in the matter of entertaining and disposing of the appeal. Nor is there any other provision, in the 1996 Act, which enlightens on this aspect. For ready reference, Section 37 may be reproduced, thus:

"**Section 37. Appealable orders.**

> (1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely : --
>
> > (a) refusing to refer the parties to arbitration under section 8;
> > (b) granting or refusing to grant any measure under section 9;
> > (c) setting aside or refusing to set aside an arbitral award under section 34.
>
> (2) Appeal shall also lie to a court from an order of the arbitral tribunal--
> > (a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
> > (b) granting or refusing to grant an interim measure under section 17.
>
> (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

40. Oftentimes, the question arises as to whether the jurisdiction of the High Court, under Section 37, is subject to the same circumscriptions as formed by its jurisdiction under Section 34. Mr. Nayar had submitted, before me, that it would be folly to restrict the jurisdiction of the High Court, under Section 37, by the principles which apply to Section 34. He had sought to emphasise that the jurisdiction vested in the Court by Section 37 was appellate, unlike Section 34. Appellate jurisdiction, by its very nature, Mr. Nayar had sought to submit, is wider than the jurisdiction which applies to consideration of objections against an arbitral award. Appellate jurisdiction encompasses, within its fold, the power to review findings of fact and, in fact, the appellate court is, jurisprudentially, an

extension of the original court, the appeal being a continuation of the original proceedings. As such, Mr. Nayar had sought to submit, the High Court, exercising appellate jurisdiction under Section 37, should not feel restricted by the constraints which govern its jurisdiction under Section 34.

41. Empirically viewed, Mr. Nayar's submissions appear attractive. There is, undoubtedly, qualitatively, a distinction between appellate jurisdiction and "judicial review jurisdiction". Appellate jurisdiction, equally, is classically regarded as an extension of original jurisdiction, the appellate proceedings being an extension of the original proceedings. The appellate court is, therefore, ordinarily, empowered to re-appreciate findings of fact entered by the original court. That the jurisdiction of the appellate court is much wider than the jurisdiction of a Court exercising judicial review, of any other kind, is also, classically, well settled.

42. Legal principles are, however, in every instance, required to be applied to the factual scenario, in which their application is invited. While, therefore, appreciating the jurisdiction of the High Court, under Section 37 of the 1996 Act, we are required to be aware of the fact that the order, interference with which is being invited, was passed by an arbitrator, or arbitral tribunal. The sanctity attached to arbitral awards, especially in the context of the 1996 Act – which is based on the UNCITRAL model – has, therefore, necessarily to be borne in mind, while exercising jurisdiction over the decision of the

arbitrator, whether in the form of a final award, or an interim award under Section 17.

43. In the opinion of this Court, another important, and peculiar, feature of the 1996 Act, which must necessarily inform the approach of the High Court, is that the 1996 Act provides for an appeal against interlocutory orders, whereas the final award is not amenable to any appeal, but only to objections under Section 34. If the submission of Mr. Nayar, as advanced, were to be accepted, it would imply that the jurisdiction of the Court, over the interlocutory decision of the arbitrator, would be much wider than the jurisdiction against the final award. Though, jurisprudentially, perhaps, such a position may not be objectionable, it does appear incongruous, and opposed to the well settled principle that the scope of interference with interim orders, is, ordinarily, much more restricted than the scope of interference with the final judgement.

44. Here, yet another peculiar dispensation, in the 1996 Act, apropos the scope of interference with the decision of the arbitrator, manifests itself. The proviso to Section 36 (3) ordains that the Court, while considering an application for grant of stay of a final arbitral award for payment of money, shall "have due regard to the provisions for grant of stay of a decree under the provisions of the Code of Civil Procedure, 1908". By reference, therefore, Order 41 Rule 5 of the CPC, which deals with stay, by the appellate court, of original decrees, stands incorporated into Section 36(3) of the 1996 Act. Though, therefore, the final arbitral award is not made amenable to

appeal, by the 1996 Act, any prayer for stay of the arbitral award, that accompanies objections under Section 34, is required to be examined in the light of the provisions, in the CPC, governing stay of original decrees, in exercise of appellate jurisdiction. Though, for the purposes of this judgement, it is not necessary to psychoanalyse the legislative intent in providing for such a peculiar dispensation, the fact that applications for stay of final arbitral awards, are required to be considered on the basis of the principles governing stay, by appellate courts, under Order 41 Rule 5 of the CPC, indicate, to an extent, that the principles of Order 41 are also required to be borne in mind, while exercising appellate jurisdiction, under Section 37.

45. The 1996 Act is, preambularly, a fallout of the United Nation's Commission on International Trade Law (UNCITRAL), adopted in 1995 as the Model Law on International Commercial Arbitration. The Statement of Objects and Reasons, preceding the 1996 Act, stipulates, in paras 2 to 5 thereof, as under, in this respect:

"

> 2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practise. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of the disputes by recourse to conciliation. An important feature of the UNCITRAL Model Law and Rules is that they have harmonized concepts on arbitration and conciliation of

different legal systems of the world and thus contains provisions which are designed for universal applications.

3. Though the said UNCITRAL Model Law and Rules are intended to deal with International Commercial Arbitration and Conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

4. The main objectives of the Bill are as under:-

a. to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;
b. to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
c. to provide that the arbitral tribunal gives reasons for its arbitral award;
d. to ensure that the arbitral tribunal remains within the limits of its jurisdiction;
e. to minimize the supervisory role of the courts in the arbitral process;
f. to permit an arbitral tribunal to use mediation, conciliation or other procedure during the arbitral proceedings to encourage settlement of disputes;
g. to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;
h. to provide a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and
i. to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign awards.

5. The Bill seeks to achieve the above objects."

46. The Supreme Court has, in ***Chloro Controls (I) Ltd v. Severn Trent Water Purification Inc.***[18], held that the legislative intent and essence of the 1996 Act "is to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention and Geneva Convention". The afore-extracted passages, from the Statements of Object and Reasons of the 1996 Act has, necessarily, to guide the Court, while interpreting the provisions thereof. While on the point, it may be noted that, in ***Bharat Sewa Sansthan v. U. P. Electronics Corporation Ltd***[19], the Supreme Court has clearly held the "main objective of the (1996) Act" as being "to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration *and to minimise the supervisory role of courts in the arbitral process* and to permit an arbitral Tribunal to use mediation, the conciliation or other procedures during the arbitral proceedings in settlement of disputes, etc."

47. There can be no gainsaying the proposition, therefore, that, while exercising any kind of jurisdiction, over arbitral orders, or arbitral awards, whether interim or final, or with the arbitral process itself, the Court is required to maintain an extremely circumspect approach. It is always required to be borne, in mind, that arbitration is intended to be an avenue for "alternative dispute resolution", and not a means to multiply, or foster, further disputes. Where, therefore, the arbitrator resolves the dispute, that resolution is entitled to due respect

[18] **(2013) 1 SCC 641**
[19] **AIR 2007 SC 2961 : (2007) 7 SCC 737**

and, save and except for the reasons explicitly set out in the body of the 1996 Act, is, ordinarily, immune from judicial interference.

48. Interestingly, while examining, in ***Snehadeep Structures (P) Ltd v. Maharashtra Small Scale Industries Development Corporation Ltd***[20], the scope of the expression "appeal" as employed in Section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993, the Supreme Court held that , "if … the meaning of "appeal" is ambiguous, the interpretation that advances the object and purpose of the legislation, shall be accepted." Purposive interpretation, as has been noticed in ***Shailesh Dhairyawan v. Mohan Balkrishna Lulla***[21] and ***Richa Mishra v. State of Chhattisgarh***[22], has, over time, replaced the principle of "plain reading" as the golden rule, for interpreting statutory instruments.

49. In my opinion, this principle has to guide, strongly, the approach of this Court, while dealing with a challenge such as the present, which is directed against an order which, at an interlocutory stage, merely directing furnishing of security, by one of the parties to the dispute. The power, of the learned Sole Arbitrator, to direct furnishing of security, is not under question; indeed, in view of sub-clause (b) of Section 17 (1) (ii) of the 1996 Act, it cannot. The arbitrator is, under the said sub-clause, entirely within his jurisdiction in securing the amount in dispute in the arbitration. Whether, in exercising such jurisdiction, the arbitrator has acted in accordance

[20] **(2010) 3 SCC 34**
[21] **(2016) 3 SCC 619**
[22] **(2016) 4 SCC 179**

with law, or not, can, of course, always be questioned. While examining such a challenge, however, the Court has to be mindful of its limitations, in interfering with the decision of the arbitrator, especially a decision taken at the discretionary level, and at an interlocutory stage.

50. One may also refer, in this context, to Section 5 of the 1996 Act, which reads as under:

> "**5. Extent of judicial intervention.** – Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part, no judicial authority shall intervene except where so provided in this Part."

It is, no doubt, possible to argue that the intent, of Section 5, is to restrict judicial intervention, with arbitral proceedings, and orders passed therein, to the avenues for such interference, as provided by Part I of the 1996 Act, and not to restrict the scope of the Sections and the provisions contained in Part I. Perhaps. Section 5 remains, however, a clear pointer to the legislative intent, permeating the 1996 Act, that judicial interference, with arbitral proceedings, is to be kept at a minimum. Significantly, in ***Venture Global Engineering v. Satyam Computer Services Ltd***[23], it was opined that the scheme of the 1996 Act was "such that the general provisions of Part I, including Section 5, will apply to all Chapters or Parts of the Act". In ***State of Kerala v. Somdatt Builders Ltd***[24], a Division Bench of the Kerala High Court held that the jurisdiction of the Court, under Section 37 of

[23] **(2008) 4 SCC 190**
[24] **2012 (3) Arb LR 151 (Ker) (DB)**

the 1996 Act, was also required to be interpreted in the light of the legislative policy contained in Section 5. I entirely agree.

51. The principle of least intervention by courts was held, in ***Enercon (India) Ltd v. Enercon Gmbh***[25], to be well-recognised in arbitration jurisprudence, in almost all jurisdictions. In a similar vein, earlier in point of time, the Supreme Court held, in ***P. Anand Gajapathi Raju v. P. V. G. Raju***[26], that Section 5 "brings out clearly the object of the new Act, namely, that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the court's intervention should be minimal." Likewise, albeit in the context of Section 34, it was held, in ***McDermott International Inc. v. Burn Standard Co. Ltd***[27], thus:

> "The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. the court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as *the parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.*"
>
> (Emphasis supplied)

Though the above exposition of the law is in the context of Section 34, the principles enunciated therein embody the general philosophy underlying the 1996 Act. The italicised words, towards the

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[25] **(2014) 5 SCC 1**
[26] **(2000) 4 SCC 539**
[27] **(2006) 11 SCC 181**

conclusion of the paragraph, especially, would apply, with equal force, to challenges to interlocutory orders of arbitral tribunals, under Section 37, as they would, to challenges to the final award, under Section 34.

52. Section 37 is, in a sense, a somewhat peculiar provision as, against the decision of the arbitrator, it provides for a first appeal, as well as a second appeal, to the High Court. Sub-section (1) provides for an appeal, to the High Court, from the decision of the Section 34 Court, before which the final award has, in the first instance, been tested. Sub-section (2), on the other hand, provides for a first appeal, against interlocutory orders of the arbitral tribunal under Section 16 or Section 17. There is, necessarily, a qualitative difference between these two challenges, though both would lie to the High Court. The challenge under Section 37(1), which is directed against a final award of the arbitrator/arbitral tribunal, is akin to a second appeal, as was observed by this Court in ***M.T.N.L. v. Fujitshu India Pvt Ltd***[28]**.** The challenge under Section 37(2), on the other hand, is directed against the decision of the arbitral tribunal and has therefore, in my opinion, necessarily to conform to the discipline enforced by Section 5. It would, therefore, be improper for a Court to treat an appeal, under Section 37 (2) of the 1996 Act, as akin to an appeal under the CPC, or as understood in ordinary – or extraordinary – civil law. An appeal against an order by an arbitrator, or by an arbitral tribunal, is an appeal *sui generis*, and interference, by the Court, in such appeals, has to be necessarily cautious and circumspect.

[28] **2015 (2) Arb LR 332 (Delhi)**

53. This position would stand especially underscored where the order, under challenge, is discretionary in nature. Orders of arbitrators, or Arbitral Tribunals, which are amenable to appeal, under Section 37(2), have, statutorily, to have been issued either under Section 16(2) or (3) or under Section 17. Section 16(2) and 16(3), essentially, deal with rulings on the jurisdiction and authority of the arbitral tribunal, to arbitrate. Any order, passed under either, or both, of these provisions has, therefore, necessarily to partake of a purely legal character. Such an order would not, ordinarily, be discretionary in nature.

Section 17(1), and applicability of Order XXXIX, CPC, thereto

54. As against this, orders which are appealable under Section 37(2)(b) are orders granting, or refusing to grant, interim measures under Section 17. Section 17(1), for its part, reads thus:

> "**17. Interim measures ordered by arbitral tribunal. –**
>
> (1) A party may, during the arbitral proceedings, apply to the arbitral tribunal –
>
> (i) for the appointment of a guardian for minor or person of unsound mind for the purposes of arbitral proceedings; or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely: –
>
> (a) the preservation, interim custody or sale of any goods which are the

subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, authorizing any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

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 proceedings before it."

55. The concluding caveat, in Section 17 (1), makes it abundantly clear that the power of an arbitrator, to grant interim measures, under Section 17(1), is analogous and equivalent to the power of a Court, to pass such orders. Section 9 of the 1996 Act grants co-equal jurisdiction, worded in identical terms, on the Court, to pass interim orders, concluding with a parallel caveat, to the effect that "the Court

shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it".

56. The scope and ambit of Section 9, especially in the light of this concluding caveat, was examined by the Supreme Court in ***Arvind Constructions Co. (P) Ltd v. Kalinga Mining Corporation***[29] and ***Adhunik Steels Ltd v. Orissa Manganese and Minerals (P) Ltd***[30]. In ***Arvind Constructions Co. (P) Ltd***[29], it was held thus (in para 15 of the report):

> "The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot prima facie be accepted. The reliance placed on ***Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 SCC 155*** in that behalf does not also help much, since this Court in that case did not answer that question finally but prima facie felt that the objection based on Section 69(3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court under Section 9 of the Act. The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. *It is also clarified that the court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply.* The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. … we may indicate that we are prima facie

[29] **(2007) 6 SCC 798**
[30] **(2007) 7 SCC 125**

> inclined to the view that exercise of power under Section 9 of the Act must be based on well-recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a Receiver."
>
> (Emphasis supplied)

In ***Adhunik Steels Ltd***[30], P.K. Balasubramanyan, J. (who had also authored ***Arvind Constructions Co. (P) Ltd***[29]), after a somewhat longer and more detailed discussion, reiterated the position that "it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of interim injunction that generally governed the courts in this connection".

57. The principles governing Order XXXIX of the CPC have, therefore, also to guide the Court, while granting interim protection under Section 9(1), or the arbitrator, while granting such protection under Section 17(1), of the 1996 Act.

58. Applicability of Order XXXVIII Rule 5, CPC, to Section 9(1)(ii)(b), and Section 17(1)(ii)(b) of the 1996 Act

58.1 On the applicability, to Section 9(1)(ii)(b), or Section 17(1)(ii)(b), of Order XXXVIII Rule 5, CPC, reliance was placed, by Mr. Nandrajog, on the judgement of a learned Single Judge of this Court in ***Steel Authority of India Ltd v. AMCI PTY Ltd***[31], to contend that Order XXXVIII Rule 5 of the CPC has no applicability to

[31] **(2011) 3 Arb LR 502**

proceedings under the 1996 Act, specifically to the exercise of jurisdiction under Section 17.

58.2 Undoubtedly, ***Steel Authority of India Ltd***[31] says so. That position has, however, altered, subsequently, with the judgement, of a Division Bench of this Court in ***Ajay Singh v. Kal Airways Pvt Ltd***[32], paras 25 to 28 of which read thus:

> "**25.** The first question which the court addresses is the one adverted to by the appellant, that principles underlying Order XXXVIII, Rule 5 CPC have to be kept in mind, while making an interim order, in a given case, directing security by one party. ***Indian Telephone Industries v. Siemens Public Communication, (2002) 5 SCC 510*** is an authority of the Supreme Court, which tells the courts that though there is no textual basis in the Arbitration Act, linking it with provisions of the CPC, nevertheless, the principles underlying exercise of power by courts – in the CPC – are to be kept in mind, while making orders under Section 9. In ***Arvind Constructions v. Kalinga Mining Corporation (2007) 6 SCC 798***, the court held as follows:
>
> > "The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the

[32] **(2018) 209 Comp Cas 154**

provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order XVIII Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver."

26. Interestingly, in a previous decision, ***Firm Ashok Traders v. Gurumukh Das Saluja (2004) 3 SCC 155***, the Supreme Court observed that:

> "13. ..The Relief sought for in an application under Section 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated….."

27. *Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles.* In this regard, the observations of Lord

Hoffman in ***Films Rover International Ltd. v. Cannon Film Sales Ltd. (1986) 3 All ER 772*** are fitting:

> "But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e. useful generalizations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that *there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described.* The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

28. It was observed later, in the same judgment that:

> "The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction." "
>
> (Emphasis supplied)

58.3 The Special Leave Petition, preferred against ***Ajay Singh***[32], was dismissed, by the Supreme Court on 28th July, 2017, albeit without going into merits, as the order was interlocutory in nature.

58.4 ***Steel authority of India Ltd***[31] and ***Ajay Singh***[32] were, however, both decisions which arose under Section 17 of the 1996 Act, as it stood prior to its amendment, with effect from 23rd October, 2015. ***Lanco Infratech***[12], rendered by a learned Single Judge of this Court, however, seriously doubts the applicability of Order XXXVIII Rule 5 of the CPC, to cases arising under Section 17 of the 1996 Act, *after its amendment with effect from 23rd October, 2015*. The controversy, in that case, arose under the pre-amended Section 17, and paras 12, 14 and 35 of the report are of stellar significance, in the context of the issue of applicability of Order XXXVIII Rule 5 of the CPC. They read thus:

> "**12.** The above submissions have been considered. The submissions revolve around the scope of the powers under Section 17 of the Act *as it stood prior to the amendment by the Arbitration and Conciliation (Amendment) Act, 2015 with effect from 23rd October 2015.* The unamended Section 17 reads thus:
>
> > "**17. Interim measures ordered by arbitral tribunal. –**
> >
> > (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.
> >
> > (2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)."

*****

14. It will straightway be seen that *while under the unamended Section 17 of the Act, there was no specific power for the AT to order interim measures to secure the amount in dispute, that power has been expressly provided under the amended Section 17(1)(ii)(b) of the Act. The other important change is in Section 17(2) which states that the interim order passed by the AT would be enforceable as if it were an order of a Court under the CPC. This makes it explicit that the purpose of these changes was to bring the powers of the AT under Section 17 of the Act on par with that of the Court under Section 9 of the Act. In the amended forms both Section 9 and Section 17 read alike. This is therefore a significant change and not one, as contended by counsel for HCCL, one that is clarificatory of an implicit legal position.* This distinction is necessary to be kept in mind because *both parties here do not dispute that the application filed by HCCL before the AT was governed by Section 17 of the Act as it stood prior to its amendment. It is also significant that the decisions cited by both parties seek to interpret Section 17 as it stood prior to its amendment.*

*****

35. It is also clear from the impugned order that the AT failed to come to any conclusion even *prima facie* that Lanco was about to dispose of or remove whole or part of its assets from the local limits of the AT which was one of the contentions warranting exercise of power under Order XXXVIII Rule 5 CPC *the underlying principle of which, as explained in the decisions examined hereinbefore, apply to Section 17 of the Act as it stood prior to the amendment with effect from 23rd October, 2015*."

(Emphasis supplied)

58.5 The Special Leave Petition, preferred by M/s Hindustan Construction Co. Ltd against the aforesaid judgement of the learned Single Judge in ***Lanco Infratech***[12] was dismissed, by the Supreme

Court, on 30th January, 2017, holding that "no ground for interference (was) made out".

58.6 The resultant legal position is that, while the applicability of Order XXXVIII Rule 5, CPC, to the amended Section 17(1)(ii)(b) of the 1996 Act, may be seriously questionable, even under the pre-amended Section 17, the provisions of Order XXXVIII Rule 5 of the CPC cannot, bodily, be incorporated into the provision, though the principles governing the exercise of jurisdiction under Order XXXVIII Rule 5 are required to inform such exercise of jurisdiction. Either which way, therefore, while exercising jurisdiction under Section 17(1)(ii)(b), the arbitrator is not strictly bound by the confines of Order XXXVIII Rule 5 of the CPC, but is also proscribed from acting in a manner completely opposed thereto. A middling approach is, therefore, required, without treating Order XXXVIII Rule 5 as entirely inapplicable to Section 17(1)(ii)(b) (as Mr. Nandrajog would contend), or as applicable with all its vigour and vitality (as Mr. Nayar would contend).

59. Having said that, it is indisputable that the exercise of jurisdiction, by the arbitrator, under Section 17, is fundamentally discretionary in nature – as contrasted with Section 16(2) and (3). Judicial interference, with the exercise of discretionary power, is, classically, limited, and is even more circumscribed, where the authority exercising discretion is itself a judicial authority – as opposed to a purely administrative or executive functionary. (One uses the expression "judicial authority", here, to denote the *nature* –

rather than the *status* – of the jurisdiction exercised by the Arbitrator, it having been settled, by the Supreme Court, in ***M.D., Army Welfare Housing Organisation v. Sumangal Services (P) Ltd***[33], that an arbitrator is not a "Court", and does not exercises judicial functions.) Discretionary orders passed by arbitral tribunals have, therefore, to be handled with kid gloves, and protected from injury by any over-zealous administration, by the court, of the law as it perceives it to be. 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.

60. This position is additionally underscored, where the order of the arbitrator is relatable to Section 17(1)(ii)(b) or (e), and directs furnishing of security. Direction, to litigating parties, to furnish security, is a purely discretionary exercise, intended to balance the equities. The scope of interference, in appeal, with a discretionary order passed by a judicial forum, stands authoritatively delineated in the following passages, from ***Wander Ltd v. Antox India P Ltd***[34]:

> "**13.** On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the

[33] **(2004) 9 SCC 619**
[34] **1990 Supp SCC 727**

quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in ***Printers (Mysore) Private Ltd. v. Pothan Joseph, (1960) 3 SCR 713 : AIR 1960 SC 1156***:

> "... These principles are well established, but as has been observed by Viscount Simon in ***Charles Osenton & Co. v. Jhanaton, 1942 AC 130*** '...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."

The appellate judgment does not seem to defer to this principle."

That this principle applies to exercise of appellate jurisdiction, over discretionary interlocutory orders, passed by arbitrators, under Section

17 of the 1996 Act, has been reiterated, by this Court, in several decisions, including ***Bakshi Speedways v. Hindustan Petroleum Corporation***[35], ***EMAAR MGF Land Ltd v. Kakade British Realities Pvt Ltd***[36], ***Reliance Communications Ltd v. Bharti Infratel Ltd***[37], ***Ascot Hotels and Resorts Pvt Ltd v. Connaught Plaza Restaurants Pvt Ltd***[38] and ***Green Infra Wind Energy Ltd v. Regen Powertech Pvt Ltd***[39].

61. I proceed to apply the above principles to the facts at hand, and the rival contentions advanced by learned Senior Counsel before me.

62. Re. Submission that the learned Sole Arbitrator exceeded his jurisdiction by granting relief in excess of that sought by the respondents

62.1 In order to appreciate this submission, it is necessary, in the first instance, to set out the reliefs sought by AGG, in its applications under Section 17, which stand adjudicated by the impugned order.

62.2 The order, dated 18th March, 2019, of the Division Bench of this Court in FAO (OS) 6/2019 and FAO (OS) 18/2019, directed that the said appeals be treated as applications under Section 17. Additionally, parties were granted liberty to file fresh applications, under Section 17, before the learned Sole Arbitrator. Acting on the liberty thus granted, AGG filed three fresh applications, under Section

[35] **2009 (162) DLT 638**
[36] **2013 (138) DRJ 507**
[37] **2018 SCC OnLine Del 6564**
[38] **2018 (249) DRJ 329**
[39] **2018 SCC OnLine Del 8273**

17, before the learned Sole Arbitrator. In all, therefore, there were four applications, under Section 17, of AGG, before the learned Sole Arbitrator, i.e. FAO (OS) 18/2019 and the three fresh applications.

62.3 The prayer clauses, in FAO (OS) 18/2019, and in the three fresh applications filed by AGG before the learned Sole Arbitrator, may be reproduced, to the extent relevant, thus:

FAO (OS) 18/2019

"It is, therefore, most respectfully prayed that this Hon'ble Court may kindly be pleased to allow the present Appeal: –

a. Set aside the Impugned order dated November 16, 2018 passed in IA No 3238 of 2018th in CS (OS) No. 100 of 2018 to the extent that the Appellants were restrained from giving effect to the notices/communications dated February 16, 2018, February 12, 2018, February 22, 2018 and February 23, 2018;

b. Fix a date of meeting of shareholders of Renu Promoters Pvt. Ltd. (Respondent No. 12) in pursuance of and as contemplated in the notice/communication dated February 16, 2018 in accordance with the provisions of the Companies Act, 2013."

The First Section 17 application

"It is, therefore, most respectfully prayed that Ld. Arbitrator may kindly be pleased to allow the present Application and: –

i. Direct Claimant Nos. 1, 2 and 12 to maintain status quo in relation to its immovable assets and not to create any charge, encumbrance and/or third-party rights in relation to the said immovable assets.

ii. Direct Claimant No 1, 2 and 12 to maintain status quo in relation to the shareholding of Claimant No. 12.

iii. Restrained the Claimant Nos. 1 and 2 from taking any decision in the capacity of being the Director during the pendency of the present proceedings and further, restrained the Claimant No. 1 and 2 from interfering in the day to day operations and working of the Claimant No. 12.

iv. Direct the Claimant Nos. 1 and 2 not to utilize any money received on behalf of the Claimant No. 12."

(Claimant No. 1 and Claimant No. 2 were Dinesh Gupta and Shreyansh Gupta, and Claimant No. 12 was Renu Promoters.)

The Second Section 17 application

"It is, therefore, most respectfully prayed that Ld. Arbitrator may kindly be pleased to allow the present Application and: –

a. Restrain the Claimant No. 2 from alienating equity shares held in C.R. Farms Pvt. Ltd. having its registered office at C-43, LGF Jangpura Extension New Delhi South Delhi-110014, by the Claimant No. 2, until the Rs. 19,55,00,000 (Rupees Nineteen Crores and Fifty-five Lakhs only) is paid by the Claimant No. 2 to the Counter-Claimant Nos. 2 and 5;

b. Restrain Claimant No. 2 from creating any charge, encumbrance or any other third-party rights over the above-mentioned equity shares held in C.R. Farms Pvt. Ltd. having its registered office at C-43, LGF Jangpura Extension New Delhi South Delhi-110014, by the Claimant No. 2 until the Rs. 19,55,00,000 (Rupees Nineteen Crores and Fifty-five Lakhs only) is paid by the Claimant No. 2 to the Counter-Claimant Nos. 2 and 5;

c. Restrain Claimant No. 2 from enjoying any benefit(s) including exercising of voting rights accruing to the Claimant No. 2 out of the shares held in C. R. Farms Pvt. Ltd. until the Rs. 19,55,00,000 (Rupees Nineteen Crores and Fifty-five Lakhs only) is paid by the Claimant No. 2 to the Counter-Claimant Nos. 2 and 5.

d. Restrain Claimant No. 2 from transferring/liquidating any mutual fund(s) which has been acquired from the fraudulently transferred amount until the Rs. 19,55,00,000 (Rupees Nineteen Crores and Fifty-five Lakhs only) is paid by the Claimant No. 2 to the Counter-Claimant Nos. 2 and 5."

(Claimant No. 2 and 5 were Shreyansh Gupta and Dinesh Gupta, and Counter-Claimants Nos. 2 and 5 were Anand Gupta and M/s. Anand Gupta HUF, respectively.)

The Third Section 17 application

"It is therefore, most respectfully prayed that the Ld. Arbitrator may be pleased to: –

a. Restrain the Claimants from alienating the 26,86,190 (Twenty-Six Lakh Eighty-Six Thousand One Hundred And Ninety) equity shares of BDR, which were held by the Counter-Claimants/Respondent Nos. 1 to 4 and were illegally and fraudulently transferred by the Claimant Nos. 1 and 2, in their favor, until the consideration of Rs. 53,72,38,000/– (Rupees Fifty-Three Crores Seventy Two Lakhs Thirty Eight Thousand only) is paid by the Claimant Nos. 1 and 2 to the Counter-Claimants/Respondent Nos. 1 to 4, for such transfer of shares, as explained above;

b. Restrain the Claimants from creating any charge, encumbrance or any other third-party rights over the above mentioned 26,86,190 (Twenty-Six Lakh Eighty-Six Thousand One Hundred And Ninety) equity shares of BDR, until the consideration of Rs.

53,72,38,000/– (Rupees Fifty-Three Crores Seventy Two Lakhs Thirty Eight Thousand only), for transfer of the said shares has been paid by the Claimant Nos. 1 and 2 to the Counter-Claimants/Respondents Nos. 1 to 4."

62.4 On these three applications, the learned Sole Arbitrator has ruled, thus (in para 3.27 and 3.28 of the impugned Order):

> "3.27 Having regard to the aforesaid, and when the companies have gone to DGG, it may not be appropriate to restrain Claimants 1, 2 and 12 from dealing with the properties of BDR and Nishit. The two companies are in the business of real estate and directing the companies to maintain status quo in respect of immovable assets would amount to stifling their business. Therefore, these immovable properties which are stock-in-trade of the two companies, cannot be subject to such restrictions. At the same time, Claimants 1, 2 and 12 are directed to maintain status quo in respect of those immovable assets which are the capital assets of the two companies and do not form part of stock-in-trade. Relief only to this extent can be given in this application.
>
> 3.28 In the other two applications filed by members of AGG, they are seeking restitution of the amounts which they have remitted. For the reasons given above, such a relief cannot be granted at this stage as it needs determination as to whether the payments were made by AGG of DGG voluntarily pursuant to the Family Settlements or they are fraudulently secured by DGG as contended by AGG in these applications. At the same time, in order to secure the interest of the AGG, in the event AGG ultimately succeeds, it would be appropriate to direct DGG to furnish suitable equivalent to the sums involved, to the Tribunal."

62.5 The notices, dated 12th February, 2018, 16th February, 2018, 22nd February, 2018 and 23rd February, 2018, issued by AGG/its members, alleged (i) misconduct, on the part of Dinesh Gupta and Shreyansh Gupta, in the affairs of BDR, (ii) mismanagement in the

affairs of Renu Promoters, (iii) fraudulent transfer of shares, held by AGG in BDR, to the DEMAT Account of DGG, and (iv) fraudulent misappropriation, by DGG, of the amounts earned by liquidation of Mutual Funds, held by AGG. Premised on these allegations, AGG sought, *vide* the said notices/communications, (i) repayment, by DGG, of the loans advanced by AGG and lying in the accounts of BDR, totaling ₹ 81,31,725/–, (ii) convening of an EGM of Renu Promoters, to remove Dinesh Gupta and Shivani Gupta from the Directorship of the said Company, (iii) repayment, to AGG, of ₹ 19,55,00,000/–, earned by liquidation of the Mutual Funds held by AGG and, allegedly, fraudulently misappropriated by Dinesh Gupta and Shreyans Gupta and (iv) payment, by DGG, of ₹ 53,72,38,000/–, as the price for 26,86,190 equity shares of BDR, held by AGG/its members and, allegedly, fraudulently transferred by DGG to its DEMAT Account. The response of DGG, to these claims, was that the shares, held in BDR by AGG, as well as the monies earned by liquidation of the Mutual Funds held by AGG, had, voluntarily and without consideration, being transferred, and gifted, by AGG to DGG, as sequelae to the Family Settlements dated 2nd December, 2017 and 9th December, 2017. Mr. Nandrajog, representing AGG, emphatically contended that it was preposterous to imagine that AGG would, willy-nilly and without any consideration whatsoever, relinquish such huge amounts on investments, in favor of DGG. He also pointed out that AGG was, in fact, not even a party to the Family Settlements.

62.6 The learned Single Judge had, *vide* his order dated 16th November, 2018, stayed the operation of the aforesaid notices, dated

12th February, 2018, 16th February, 2018, 22nd February, 2018 and 23rd February, 2018, issued by AGG. AGG had, in FAO (OS) 18/2019, challenged the said order of stay. FAO (OS) 18/2019 was converted into an application under Section 17 of the 1996 Act, to be decided by the learned Sole Arbitrator. The learned Sole Arbitrator was, therefore, seized the of the issue of whether to continue the interim order, dated 16th November, 2018, of the learned Single Judge, thereby continuing the injunction against operation of the notices dated 12th February, 2018, 16 February, 2018, 22nd February, 2018 and 23rd February, 2018, or vacate the injunctions, as sought by AGG. The learned Sole Arbitrator chose to continue the said orders, thereby rendering the notices, as well as the actions proposed therein, by AGG, inoperative during the currency of the arbitral proceedings.

62.7 AGG, in its first Section 17 application, alleged mismanagement, by Dinesh Gupta and Shreyansh Gupta, of the affairs of Renu Promoters and, therefore, sought that they be directed to maintain status quo, in relation to the immovable assets of Renu promoters and its shareholdings, and be restrained from taking any decision, in their capacity as Directors in Renu Promoters. The second Section 17 application alleged illegal acquisition of the share capital of C.R. Farms, by DGG, using the ₹ 19.55 crores received by liquidation of the Mutual Funds held by AGG. The third Section 17 application, similarly, alleged illegal misappropriation, by DGG, of 26,86,190 equity shares of BDR, and consequent liability, by DGG, towards AGG, of ₹ 53,72,38,000/–. AGG, therefore, sought a restraint, against DGG, from alienating the equity shares in BDR, held

by AGG and allegedly misappropriated by DGG, as well as payment of the amount of ₹ 53,72,38,000/–, accompanied by an order of restraint, against DGG, from alienating the aforesaid 26,86,190 equity shares of BDR.

62.8 The learned Sole Arbitrator did not grant any of the reliefs, as sought by AGG, opining that, as DGG was engaged in the real estate business, grant of the said reliefs would result in severe financial hardship to it. No restraint, on DGG dealing with the affairs of any of these Companies, was, therefore, imposed by the learned Sole Arbitrator. Neither was any direction issued, to pay, or repay, any amount to AGG, as sought by it. All that the learned Sole Arbitrator did, in the circumstances, was, having rejected the prayers of AGG, and continued the interlocutory injunction, on the notices issued by AGG, as granted by the learned Single Judge in his order dated 16th November, 2018, to secure the claim of AGG, directed DGG to furnish Bank Guarantee for the said amount.

62.9 There is substance in the submission, of Mr. Nandrajog, that the concluding sentence, in para 3.28 of the impugned Order dated 18th February, 2020, cannot be torn out of its context, and subjected to independent microscopic analysis. As is correctly pointed out, the learned Sole Arbitrator did not decide, by the said Order, a single application, or even a group of applications filed by AGG under Section 17, alone, but disposed of all the applications, under Section 17, pending before him, whether filed by AGG, DGG or RGG. The rationale and *raison d'etre*, for the decision of the learned Sole

Arbitrator has, therefore, to be discerned by a holistic appreciation of the impugned Order, and not by an isolated, or insulated, reading of the last sentence in para 3.28, with which DGG claims to be aggrieved. It is clear that the learned Sole Arbitrator has not directed furnishing of security, equivalent to the disputed amount, as his mere *ipse dixit*, but has arrived at the said decision by a careful process of ratiocination, keeping the competing interests of the claims of the claimants and the respondents, as well as their legitimate business concerns and considerations, in mind.

62.10 The discussion, hereinabove, has already made it apparent that the principles behind Orders XXXVIII and XXXIX of the CPC are required to guide the exercise of jurisdiction under Section 9, or Section 17 of the 1996 Act, though the provisions themselves are not to be regarded as having been bodily incorporated into Sections 9 or 17. Ultimately, the prevailing consideration, applying the law laid down in ***Ajay Singh***[32] is the doing of complete and substantial justice between the parties. Where it appears, on the face of it, that the impugned direction is loaded in favor of one party and that, therefore, the direction cannot be sustained as balancing the equities between the litigants before the Arbitral Tribunal, interference on the other hand, the Court may legitimately interfere therewith. Where, however, the Arbitral Tribunal has balanced the equities, given the fact that the jurisdiction, conferred on the Tribunal by Section 17 is fundamentally discretionary in nature, the Court has, necessarily, to be slow to interfere, lest the autonomy of the arbitral process be imperiled. In my view, the restraint, to be exercised by Courts in interfering with

the decision of the arbitrator, has to extend to not seeking to substitute, for the exercise of discretion by the arbitrator, what may seem, to the Court, to be a "more appropriate" manner of such exercise. In other words, even if the Court were to feel that the equities could have been better balanced, by some arrangement other than that which has appealed to the discretion of the Arbitral Tribunal, that would not constitute a legitimate basis, for interfering with the exercise of such discretion.

62.11 The impugned Order of the learned Sole Arbitrator does not grant any interlocutory mandatory injunction. Nor has the learned Sole Arbitrator secured, *stricto sensu*, the amount, or property, in dispute in the arbitral proceedings, by directing deposit, thereof, by the appellant/DGG. He has merely directed furnishing of a Bank Guarantee, after an examination of the competing stands of the parties before him, to ensure that the balancing claims are secured. Directing securing of the amount involved in the arbitration, is a power statutorily invested in the learned Sole Arbitrator, by Section 17(1)(ii)(b). No excess of jurisdiction can, therefore, be imputed to the learned Sole Arbitrator, in directing furnishing of security by DGG. No want of proper application of mind can be imputed to the learned Sole Arbitrator, in so directing. The submission, of Mr. Nayar, that, in so directing, the learned Sole Arbitrator has granted relief in excess of that sought by AGG is also, in the facts, clearly misguided, as the impugned direction has been issued after balancing the rival claims of both parties.

62.12 The judgements, on which Mr. Nayar sought to place reliance, to support his submission that the learned Sole Arbitrator had erred in awarding relief in excess of that sought by AGG, do not really advance his case. ***Tata Advanced Systems Ltd***[7] did not notice the judgement of the Division Bench of this Court in ***Ajay Singh***[32]; besides, there was no application, under Section 17, before the arbitrator in that case, and there is a specific finding, by the learned Single Judge, to the effect that the direction, for furnishing of Bank Guarantee, was not preceded by any reasoning. ***Captain Guman Singh***[8], too, does not help Mr. Nayar, as it merely reiterates the principle that a Court cannot grant relief, not sought by the parties before it. In the present case, as I have observed, the learned Sole Arbitrator was well within his jurisdiction in directing DGG to furnish security, of the amount in dispute. Besides, the direction to furnish security was an attempt to balance the equities, rejecting the greater relief, sought by AGG. The facts in the present case, therefore, are peculiar to that extent, and cannot be analogised to those in ***Captain Guman Singh***[8]**.** ***NHPC Ltd***[9] involved a situation in which the Arbitral Tribunal was found to have granted an interim measure of protection, travelling beyond the confines of the subject matter of the dispute before it. In the present case, it has not even been contended, by DGG, that the amount, in respect of which Bank Guarantee has been directed to be furnished by the learned Sole Arbitrator, was not the subject matter of the dispute before him.

63. Re. Submission that, having found that a prima facie case existed in favour of DGG, the learned Sole Arbitrator could not have

granted interim relief to AGG, by directing furnishing of security by DGG:

63.1 Mr. Nayar relies on the observation, in para 3.26 of the impugned Order, that DGG has made out a *prima facie* case. The reliance is, in my opinion, out of place. Following on the said observation, the learned Sole Arbitrator proceeded to reject the prayer, of AGG, for a direction, to DGG not to deal with the properties of BDR and Nishit, limiting the relief, in that regard, to maintenance of status quo in relation to immovable assets constituting the capital assets of the said two companies. The learned Sole Arbitrator, thereby, acted on the basis of his finding that DGG had made out a *prima facie* case. The direction, to DGG, to furnish security, for the amount in dispute in the arbitral proceedings, does not militate, in any manner, against the said finding. At the cost of repetition, it must be emphasised that the circumstances, and rationale, behind the said direction, are required to be appreciated. Para-3.28 of the impugned Order, though brief, is sufficiently evocative in that regard. The learned Sole Arbitrator has, initially, noted that, in the Section 17 applications filed by it, AGG had sought restitution of the amounts remitted by it – which, according to AGG, were unlawfully and illegally appropriated, by DGG, into its accounts. The learned Sole Arbitrator, thereafter, goes on to observe that, "*for the reasons given above*", such a relief could not be granted at that stage. The "reasons", to which the learned Sole Arbitrator refers, clearly encompass the entire recital prior to the said decision, in the course of which the learned Sole Arbitrator has examined, in detail, the facts of the case, and has comprehensively analysed the competing equities,

and the claims of the parties before him. The dispute was still at large before the learned Sole Arbitrator, and it would have been entirely inappropriate, for the learned Sole Arbitrator, at that stage, to opine, one way or the other, thereon, with any modicum of finality. The learned Sole Arbitrator, therefore, correctly observes that it needed determination "as to whether the payments were made by AGG (to) DGG voluntarily pursuant to the Family Settlements or they are fraudulently secured by DGG as contended by AGG in these applications". Even so, while rejecting the relief sought by AGG, the learned Sole Arbitrator has, acting within the confines of the jurisdiction vested in him by Section 17(1)(ii)(b), deemed it appropriate to secure the amount in dispute.

63.2 Even on facts, the learned Sole Arbitrator was justified in so directing. The impugned Order does contain factual justification for the direction. The allegation, of AGG, was that their shares, are held by it in BDR, and the monies realised by liquidation of the Mutual Funds, which undisputedly belongs to AGG, had fraudulently been appropriated, by DGG, into its accounts. DGG does not contend, either before the learned Sole Arbitrator, or before this Court, that there existed any written document, evidencing intention, on the part of AGG, to relinquish, gratis, the entire amount of ₹ 19.55 crores, earned by liquidation of the Mutual Funds, or the 26,86,190 shares of BDR, which, in the price of ₹ 53,72,38,000/–. In the absence of any such written document, or registered Gift Deed, the submission of AGG, that these amounts had illegally been appropriated, by DGG, i.e. by Dinesh Gupta and Shreyansh Gupta, to enrich itself,

undoubtedly deserves consideration. It certainly cannot be regarded as moonshine. If, therefore, the learned Sole Arbitrator deemed it appropriate to secure the amount in question, that direction adequately balanced the rival claims. No injunction, as sought by AGG against DGG, was granted. Neither was any direction issued, to DGG, not to deal with the finances of Renu Promoters, C.R. Farms or BDR. No direction, to secure the amounts credited to the accounts of DGG, without any consideration having been paid to AGG therefor, was issued. In the circumstances, I am of the opinion that DGG really has no cause to complain against the direction to furnish security, which, as the learned Sole Arbitrator himself observes, was "in order to secure the interest of AGG, in the event AGG ultimately succeeds". This is precisely what Section 17(1)(ii)(b) contemplates.

63.3 The amounts/shares in question having shifted base, from the accounts of AGG to those of DGG, without a farthing by way of consideration, and with no written document, evidencing intent, on the part of AGG, to such transfer gratis, no exception can be taken to the decision, of the learned Sole Arbitrator, to secure the amounts, to protect the interests of AGG and, thereby, balance the equities.

64. Re. Order XXXVIII Rule 5, CPC

64.1 This judgement has, adequately, dealt with Order XXXVIII Rule 5, CPC, in the backdrop of the impugned direction, hereinabove. Mr. Nayar has, however, placed reliance on several decisions, and, in fairness to him, it would be appropriate to examine the import thereof.

64.2 ***State Bank of India v. Ericsson India Pvt Ltd***[10] is a short order, of the Supreme Court, which dealt with the challenge to the direction, of the Arbitral Tribunal, restraining the claimant's from alienating, encumbering or transferring its assets without permission of the Arbitral Tribunal. As such, the order in question was injunctive in nature, unlike the present case, where injunction has specifically been refused. This, even by itself, renders the said decision entirely inapplicable to the facts of this case. It is further observed, in the said order, that the Arbitral Tribunal merely cited balance of convenience and irreparable injury, as a ground for the injunction. Further, the Supreme Court observes that "the Arbitral Tribunal has no jurisdiction to affect the rights and remedies of the third party secured creditors in the course of determining disputes pending before it", as the claim of the appellants, before the Supreme Court, was that they were not even parties before the arbitrator. The order does not disclose that any direction, furnishing security, had been passed by the Arbitral Tribunal in that case. As such, the reliance, by Mr. Nayar, on the observation, in the concluding para 5 of the order, that the decision of the Arbitral Tribunal "does not comply with the mandate of Rules 5 and 10 of Order XXXVIII CPC", torn out of context, is completely misplaced.

64.3 In ***C. V. Rao***[11], the Division Bench of this Court was, again, dealing with an injunctive direction, by the learned Single Judge, under Section 9, restraining the appellant from dealing with its assets. The learned Single Judge restrained the appellants from "availing any

additional debt without the specific consent of the respondent No. 1 and also (restrained) them from selling/transferring/alienating their interest in any of the properties" (from para 47 of the report). At the cost of repetition, no such injunction has been granted in the present case; rather, the learned Sole Arbitrator has specifically rejected the prayer for such injunction, as advanced by AGG.

64.4 The Division Bench noted that the learned Single Judge had, in granting an injunction, proceeded on "the prima facie satisfaction that the respondent No. 1 is entitled to realise the put consideration". In this context, it was held, in para 55 of the report, that "even if a prima facie case is made out by the respondent No. 1 as to the claim for put amount, the same will not entitle them to seek an interim measure of protection by restraining the appellants from dealing with their assets unless it is also established that the appellants are intending to defeat the right of the respondent No. 1 to enforce the arbitral award". In these circumstances, the Division Bench opined that the learned Single Judge erred in issuing orders of prohibitory injunction. The order of the learned Single Judge, which was under challenge before the Division Bench in ***C. V. Rao***[11], and the impugned direction, as issued by the learned Sole Arbitrator are, therefore, as alike as chalk and cheese.

64.5 Before parting with the point, I deem it appropriate to observe that reliance, in a case such as the present, with precedents dealing with orders of interlocutory prohibitory injunctions, would be entirely misguided. Interim prohibitory injunctions, as a category of relief, are

a specie *sui generis*. They follow a strict regimen, chalked out, by the Supreme Court, in a series of authorities, including ***Deoraj v. State of Maharashtra***[40], ***Dorab Cawasji Warden v. Coomi Sorab Warden***[41] and ***Hammad Ahmed v. Abdul Majeed***[42]. As the present dispute does not involve any order of prohibitory injunction, I do not deem it necessary to burden this judgement with the law on the point; suffice it to state that judgements, involving challenges to orders of interim prohibitory injunction, whether under Section 17, or under Section 9, of the 1996 Act, may not be of much relevance, while examining a challenge to an order directing furnishing of security by way of Bank Guarantee.

65. ***Lanco Infratech***[12] is completely inapplicable, as it did with the pre-amended Section 17. In fact, the learned Single Judge of this Court, while deciding the petition, has clarified, or more than one point, that he was adjudicating the matter in the context of the pre-amended Section 17, and that "the underlying principle" behind Order XXXVIII Rule 5 of the CPC "apply to Section 17 of the Act as it stood prior to the amendment with effect from 23rd October, 2015". It has also been observed, in the said decision, that "while under the unamended Section 17 of the Act, there was no specific power for the AT to order interim measures to secure the amount in dispute, that power has been expressly provided under the amended Section 17(1)(ii)(b) of the Act". The amendment of Section 17, w.e.f. 23rd October, 2015, it was observed, was intended "to bring the powers of the AT under Section 17 of the Act on par with that of the Court under

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[40] (2004) 4 SCC 697
[41] (1990) 2 SCC 117
[42] (2019) 14 SCC 1

Section 9 of the Act". This change, held the learned Single Judge, was "significant", and not merely "clarificatory of an implicit legal position". This judgement, therefore, rather than supporting the petitioner, would throw up the issue of whether, in respect of arbitral proceedings which were governed by the amended Section 17, Order XXXVIII Rule 5 of the CPC would apply at all.

66. ***Goodwill Non-Woven (P) Ltd***[13] arose, not under Section 17, but under Section 9 of the 1996 Act. Pre-arbitral interim directions were sought, and para-56 of the judgement reveals that the primary ground, urged by the petitioner (in that case) was that, in view of the COVID-2019 pandemic, it was unable to meet the timelines for invoking arbitration, and apprehended that, in the interregnum, the respondent would attempt to obstruct satisfaction of a decree which might be awarded in the petitioner's favour. No doubt, there is an observation, in para-55 of the judgement, that, "for grant of the relief as prayed for by the petitioner, the petitioner has to show that; (a) it has a prima facie case and balance of convenience in its favour and shall succeed in the arbitration proceedings and (b) that the respondent is acting in a manner as to defeat the realisation of the future award that may ultimately be passed". Besides the fact that the said decision does not consider ***Lanco Infratech***[12], or the difference, if any, which the amendment to Section 17, would make to the applicability of Order XXXVIII Rule 5, CPC, thereto (no such case having, apparently, been urged before the learned Single Judge, before whom ***Lanco Infratech***[12] was not cited by either party), the facts, before the learned Single Judge in that case are so markedly different from those in the

present, as to render the decision in ***Goodwill Non-Woven (P) Ltd***[13] an extremely unsafe precedent, while examining the present controversy.

67. Enunciations of the law, in judicial precedents, are not to be equated with the Ten Commandments handed down to Moses, or even, on a more terrestrial note, the theorems of Euclid, but have to be understood in the backdrop of the fact-situation which presented itself before the Court, and the precise controversy, with which the Court was seized.[43] In the present case, no parallel, whatsoever, can be drawn with the facts which presented themselves before this Court in ***Goodwill Non-Woven (P) Ltd***[13]. Here, the precise case of AGG was that DGG had, in a fraudulent manner, misappropriated, to its own unjust advantage, ₹ 19.55 crores, resulting from liquidation of the Mutual Funds of AGG, as well as 26,86,190 with the shares of BDR, valued at ₹ 53,72,38,000/–. As such, the allegation of AGG was that DGG had not only failed to abide by the oral agreement between AGG and DVD, on the basis whereof blank Delivery Instruction Slips, qua the 26,86,190 shares of BDR, and blank cheques, qua the amount of ₹ 19.55 crores, realised by liquidation of the Mutual Funds, had been provided by AGG to DGG, but that it had used the said blank Delivery Instruction Slips and blank cheques to misappropriate, to its own advantage, the shares of BDR, as well as the amount of ₹ 19.55 crores. It was further alleged that, using the said monies, DGG had invested in other corporate concerns as well. These allegations have been noticed by the learned Sole Arbitrator, and taken into

[43] **U.O.I v. Major Bahadur Singh (2006) 1 SCC 368 ; BGS SGS Soma JV v. NHPC Ltd. (2020) 4 SCC 234**

account, before issuing the impugned direction. Once that is so, it no longer lies within the province of the jurisdiction of this Court, acting under Section 37 of the 1996 Act, to examine, further, whether these circumstances were sufficient to warrant the direction to furnish security. Sufficiency of the grounds on which the learned Sole Arbitrator acted, especially where such action was in exercise of discretion statutorily conferred on him, cannot be tested by this Court, as any such exercise would amount to an attempt to substitute, for the discretion exercised by the learned Sole Arbitrator, its own discretion. This is an exercise which has been proscribed, time and time again, by several judicial authorities, too numerous to mention.

68. No such occasion arose, before this Court, in ***Goodwill Non-Woven (P) Ltd***[13], and the reliance, by Mr. Nayar, on the said decision, therefore, fails to impress.

69. ***BMW India Private Limited***[14], similarly, was a case which arose under Section 9 of the 1996 Act. This decision is, in para-29 of the report (in SCC OnLine), observed that, while the Court should not ignore the principles all the well-known guidelines, governing Order 38 Rule 5 of the CPC, while exercising jurisdiction under Section 9(1)(ii)(b), it should not be unduly bound by the text thereof. Observing, further, that an order for securing the amount, prior to an arbitral award, was comparable to the nature of relief provided under Order 38 Rule 5, the learned Single Judge of this Court has, in the said decision, observed that, before directing furnishing of security, the Court is required to be satisfied regarding the existence of a prima

facie case in favour of the applicant, and the possibility of the opposite party defeating the realisation of the future award that may ultimately be passed, were such security not directed. Direction for furnishing of security cannot, in the opinion of this Court in the said case, be passed mechanically, and has to be informed by the "underlying basis of Order 38 Rule 5, CPC". Having thus observed, the learned Single Judge has proceeded to note that the sole argument, on the basis of which the prayer for security, in the said case, was premised, was that the respondent was in financial distress. The learned Single Judge observed that the question of whether, in fact, such "financial distress" existed, or not, was a disputed question of fact, which could not be adjudicated under Section 9. This sole ground, therefore, held the learned Single Judge, was insufficient to sustain a prayer for directing furnishing of security, by the opposite party. In the present case, the learned Sole Arbitrator was exercising jurisdiction, not under Section 9, but under Section 17. That apart, as the discussion hereinabove amply reveals, the learned Sole Arbitrator as set out, in detail, the facts of the case, which disclosed that the amount of ₹ 19.55 crores, realised by liquidation of the Mutual Funds of the AGG, as well as the 26,86,190 shares of BDR, held by AGG, had been appropriated, by DGG, to its bank account, and to its DEMAT Account, respectively, without any consideration having been paid to AGG therefor. Further, AGG had alleged that part of the said amount had also been invested in certain other corporate enterprises. This, therefore, is clearly not the case in which the prayer, for furnishing of security, was made, solely on the ground of financial distress of the opposite party. The learned Sole Arbitrator

has, keeping all these facts in mind, felt that it was necessary to secure the claim of AGG, by directing furnishing of security, and, within the confines of the appellate jurisdiction of this Court under Section 37, I am of the opinion that no occasion arises, to interfere. The decision in ***BMW India Private Limited***[14], too, cannot, therefore, assist the appellant.

70. Mr. Nayar also advanced submissions on the power, of the learned Sole Arbitrator, to mould reliefs. I do not deem it necessary to traverse that terrain, as Section 17(1)(ii)(b) clearly empowered the learned Sole Arbitrator to secure the amount in dispute in the arbitration. There is, therefore, no gainsaying the fact that, in directing as he did, the learned Sole Arbitrator committed no jurisdictional error. The learned Sole Arbitrator referred to the "reasons given above", as constituting, inter alia, the basis for this decision. Having, for the said reasons, rejected the relief sought by AGG, which was undoubtedly much more drastic, the learned Sole Arbitrator restricted his order to a direction, to DGG, to secure the amount in dispute, by furnishing suitable security. A holistic reading of the order reveals that the balance of convenience was kept in mind, while passing the impugned direction. No patent illegality can, in my view, be discerned, in the impugned decision.

Conclusion

71. This Court, while exercising appellate jurisdiction, under Section 37 (2) of the 1996 Act, over the interim order of the learned

Sole Arbitrator, is not expected, or even required, to delve deep into the facts of the case. Nor is it expected to substitute its own discretion, for the discretion of the learned Sole Arbitrator. If the exercise of discretion, by the learned Sole Arbitrator, suffers from patent illegality, or is otherwise unconscionable in law or on facts, interference may be justified; never otherwise.

72. Judicial intervention, with arbitral proceedings, has necessarily to be reduced to a bare minimum, under the 1996 Act. Applying this salutary principle, I am of the opinion that, were this Court to set aside, or even modify, the direction, of the learned Sole Arbitrator, to DGG, to furnish security for the amount in dispute in the arbitration – which, clearly, is within the province of the jurisdiction of the learned Sole Arbitrator, conferred by Section 17(1)(ii)(b) – it would do violence to the entire ethos of the 1996 Act, and would militate against the avowed objective of the legislation itself.

73. In my view, any interlocutory order, by the arbitrator, under Section 17, to furnish security, if preceded by adequate examination and appreciation of the facts, and the rival stands of the parties, should remain impervious to judicial interference. The Court is required to adopt a holistic, and comprehensive, view in such cases. Any attempt, by the Court, to vivisect, microscopically, the order of the arbitrator, to find flaws, would be entirely inappropriate. So long as the decision is informed by adequate application of mind, it should be allowed to prevail, especially as it is in the nature of an interlocutory direction,

and is always subject to the final award, to be passed in the arbitral proceedings.

74. For all these reasons, I am of the opinion that no occasion arises, for this Court to interfere with the impugned direction, in para 3.28 of the Order *supra*, dated 18th February, 2020, of the learned Sole Arbitrator to DGG, to furnish suitable security, equivalent to the amount involved in the dispute. This Court, therefore, upholds the said direction.

75. It is clarified that observations in this judgement are *prima facie* in nature, and do not intend to represent any final expression of opinion on any of the issues of which the learned Sole Arbitrator is *in seisin*, including the validity of the Family Settlements, the nature of the acquisition, by DGG, of the 26,86,190 shares of BDR and their transfer into the DEMAT account of DGG, the transfer of ₹ 19.55 crores into the account of DGG, or, indeed, any other aspect whatsoever. The learned Sole Arbitrator shall, while arbitrating on the issues before him, proceed entirely uninfluenced by any observation contained in this judgement. This Court is, in the present case, essentially concerned with whether a case for interference, with the impugned direction of the learned Sole Arbitrator, has, within the confines of Section 37 of the 1996 Act, been made out or not, and has, for the reasons adduced hereinbefore, answered the issue in the negative.

76. The appeal is, accordingly, dismissed, albeit with no orders as to costs.

77. Pending applications, if any, stand disposed of accordingly.

C. HARI SHANKAR, J.

SEPTEMBER 17, 2020
HJ