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

Reserved on: 14th September, 2021
Pronounced on: 27th September, 2021

\+ ARB. A. (COMM) 30/2021

AUGMONT GOLD PVT. LTD. ..... Appellant
Through: Mr. Dayan Krishnan, Sr. Adv. with Mr. Pankaj Bhagat, Adv.

versus

ONE97 COMMUNICATION LIMITED ..... Respondent
Through: Mr. Sandeep Sethi, Sr. Adv. with Mr. Niraj Singh, Adv.

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

% JUDGMENT

1. The appellant impugns order dated 24th January, 2021, passed by the learned Arbitral Tribunal in Arb. P. 303/2019.

2. For the sake of convenience, the appellant and respondent are referred to as "Augmont" and "One97", respectively.

Facts

3. The dispute arises out of an agreement, dated 1st August, 2018, between Augmont and One97. *Vide* Clause 2.1 of the agreement, One97 undertook, against consideration, to host a Gold Accumulation Plan (GAP) of Augmont, over the Paytm platform owned and managed by One97. The manner in which transactions were effected,

under the agreement, is perhaps best represented by the following process charts, provided with the agreement, of which Chart 1 sets out the manner in which the customer could purchase digital gold, Chart 2 sets out the manner in which the customer could redeem the gold and Chart 3 sets out the manner in which the customer could sell back the gold to Augmont, which may be reproduced thus:

CHART 1		
Step	**Process Owner**	**Process Action**
1	Customer	Customer sees the live price of gold on Paytm Platform
2	Customer	Customer confirms the buy quantity of Rs 1 upwards
3	Customer	Customer redirected to payment page
4	One97	Customer makes payment through preferred payment options
5	Augmont-Bullion	Augmont-Bullion generated invoice details are relayed to One97 system
6	One97	One97 system generates a digital invoice on behalf of Augmont-Bullion
7	Augmont-Bullion	Augmont-Bullion credits the quantity in the customer account.

CHART 2		
Step	**Process Owner**	**Process Action**
1	Customer	Customer selects 'Get Delivery' within Gold section of Paytm Platform and is redirected to product catalogue. Each product has its making + delivery charges indicated
2	Customer	Customer selects the product
3	Customer	Customer confirms delivery address
4	Customer /One97	Customer pays for making + delivery + taxes on the Paytm Platform
5	One97	One97 system tells Augmont to debit

		customer GAP Account balance
6	Augmont-Bullion	Augmont-Bullion debits corresponding Gold from customer GAP account balance
7	One97/ Augmont-Bullion	Order gets created in both One97 system and Augmont system
8	Fulfillment	Augmont-Bullion processes the order and the invoice is generated

CHART 3		
Step	**Process Owner**	**Process Action**
1	Customer	Customer desirous of selling gold in the GAP Account goes to Paytm Platform
2	One97	System to check if the customer has the holding of gold in his account
3	One97/ Augmont-Bullion	If yes, gold rate is blocked and system allows customer to proceed further
4	Customer	Customer confirms account details and confirms the transaction in the time window for which gold rate is blocked
5	One97	One97 issues an instantaneous digital receipt of sale on behalf of Augmont-Bullion
6	One97	One97 initiates transfer of money to customer's account
7	Augmont-Bullion	Augmont-Bulllon remits the money to One97 on T + 1

4. The present dispute does not concern Chart 2, and essentially involves the procedures stipulated in Charts 1 and 3, more specifically in Chart 3.

5. In simple terms, the procedure followed, for purchase of gold and sale back of gold to Augmont, may be explained thus:

(i) Procedure for purchase of gold

(a) A customer, who desires to avail the benefit of the scheme promulgated *vide* the aforesaid agreement, would have to open an account, known as the GAP account.

(b) The customers would make payment to Augmont, across the Paytm platform of One97, to purchase the digital gold.

(c) The details of the invoice, required to be raised on the customer, would be transmitted by Augmont to One97.

(d) On the basis of the said details, One97 would generate a digital invoice on the customer, on behalf of the Augmont.

(e) The quantity of digital gold purchased by the customers would be credited into the GAP account of the customers by Augmont.

(ii) Procedure for sale back of gold to Augmont

(a) This procedure applies where the customer desires to sell gold, earlier purchased by it, held in its GAP account, to Augmont.

(b) The customer would, for the said purpose, proceed to the Paytm platform of One97.

(c) The system set up by One97 would check if the customer held gold in its GAP account.

(d) If so, the gold rate would be blocked, so that the customer could proceed to sell the gold at the rate then prevalent. For this, a specific time window would be provided.

(e) The customer would confirm the transaction in the said time window.

(f) One97 would issue an instantaneous digital receipt of sale, on behalf of Augmont, acknowledging receipt of digital gold from the GAP account of the customer.

(g) One97 would then transfer an amount equivalent to the value of the gold which is sold back by the customer to Augmont, on the basis of the blocked gold rate, to the customer's account.

(h) On the next date, Augmont would credit the said amount to the account of One97.

6. The dispute between Augmont and One97 essentially arose because, between 5th January, 2019 and 7th January, 2019, there was a glitch in the system as a result of which certain customers repeatedly sold back, to Augmont, gold from their GAP accounts, without the debiting of gold from the accounts.

7. One97 claimed to have paid corresponding amounts to the said customers. This, naturally, resulted in a windfall to such customers, who continued to retain the gold purportedly sold back to Augmont in their GAP accounts and were also paid the value of the said gold by One97.

8. On One97 calling upon Augmont to remit, to One97, the payments thus made to the customers, Augmont demurred from doing so, on the ground that a fraud had taken place owing to the negligence of One97. As against this, One97 alleged negligence on the part of Augmont.

9. The glitch was resolved after 7th January, 2019.

10. The contractual relationship between the parties continued till 21st February, 2019. However, according to One97, Augmont did not remit, to One97, the amounts paid by One97 to the the customers after 7th January, 2019, against the gold sold back by the customers to Augmont. As a result, on 21st February, 2019, One97 terminated the agreement with Augmont. Augmont, *vide* response dated 4th March, 2019, objected to the said termination.

11. A dispute thus arose between the parties, in respect whereof a notice, invoking arbitration, was issued by One97 to Augmont on 19th March, 2019.

12. As the parties were unable to appoint, between themselves, an arbitrator to arbitrate on the aforesaid dispute, One97 filed Arb. P. 303/2019 before this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the 1996 Act").

13. *Vide* the following order dated 17th January, 2020, a learned Single Judge of this Court disposed of Arb. P. 303/2019:

> "On the last date of hearing, I have heard the learned counsels for the parties at length.
>
> Today, learned counsels appearing for the parties state, they have agreed that the matter be disposed of with the appointment of an Arbitrator.
>
> Learned counsels also state, they agree with the following:
>
> 1. The parties shall not be entitled to raise any allegations of fraud in their claim/ counter-claim before the learned Arbitrator.
>
> 2. However all the defences of both the parties are kept open to be taken before the learned Arbitrator.
>
> 3. This order shall not prevent either of the parties from commencing/ pursuing any criminal complaint / investigation.
>
> The above statements are taken on record.
>
> Further in view of the joint request of the counsel for the parties, this court appoints Justice Manmohan Singh, a retired

Judge of this court as the Sole Arbitrator, who shall adjudicate the disputes / differences between the parties.

The appointment of the Justice Manmohan Singh shall be governed by the Arbitration and Conciliation Act, 1996.

Parties shall appear before the learned Arbitrator after taking prior appointment on his mobile number being 9717495001.

The petition stands disposed of."

14. Subsequently, IA 7080/2020 was filed by Augmont, before this Court, for clarifying the order dated 17th January, 2020, specifically on the issue of whether it was entitled to raise a plea of fraud in its defence to the claims set up by One97.

15. This application was disposed of by this Court, *vide* the following order dated 22nd October, 2020:

"This is an application filed by the respondent with the following prayers:

"a. clarify its order dated 17.01.2020, and

b. pass such other order(s) in favour of the respondent, as this Hon'ble court deems fit and proper."

In effect, by this application, the respondent is seeking clarification of order dated January 17, 2020. The clarification as sought by the respondent is that the respondent is within its right to raise a plea of fraud in its defence. I find that the order dated January 17, 2020 is very clear. That apart, I also find that the learned Arbitrator in his order dated July 29, 2020 has also said in para 3 as under:

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3. In the Statement of Defense filed by the respondent, the plea of fraud is also taken. The said

> plea is contrary to the orders passed by the Hon'ble High Court of Delhi. The said issue raised by the counsel for the claimant has a force. The same will also be considered at the appropriate time."
>
> As the order dated January 17, 2020 does not require any clarification, the application is dismissed."

16. Though no detailed arguments were advanced in that regard by Mr. Dayan Krishnan, learned Senior Counsel for the Augmont (perhaps advisedly), Augmont seeks to take exception to the finding, of the learned Arbitral Tribunal, that Augmont had, before this Court, given up its right to plead fraud in the arbitral proceedings. After the order dated 22nd October, 2020 – which, it appears, was never carried further – it is not open, in my opinion, for Augmont to urge such a contention. Clearly, the learned Arbitral Tribunal is correct in holding that the Augmont had given up its right to plead fraud in the arbitral proceedings. I concur with this view, as expressed by the learned Arbitral Tribunal.

17. One97, who was the claimant before the learned Arbitral Tribunal, urged, in para 19 of the Statement of Claim, that the technical glitch, which had occurred in the system between 5th and 7th January, 2019, was attributable to negligence on the part of Augmont. As a result thereof, it was averred that customers were able to place repeated orders for sale of the same gold, resulting in remittance, by One97 to the customers, of a total amount of ₹ 5,77,73,767/-. This amount, it was asserted, was required to be remitted by Augmont to One97, by the next day. One97 alleged that, even after 7th January, 2019, when the glitch no longer continued, several customers had sold

back digital gold to Augmont across One97's Paytm platform, against which payment had been credited into their accounts by One97 at the live rate of gold existing as on that date. These amounts, too, were, it was asserted, reimbursable by Augmont to One97 within one working day. This position, it was alleged, continued even after termination of the agreement, as gold continued to remain in the GAP account of the customers, and the accounts were required to be closed.

18. By way of evidence of payments having been made by it to the customers, against sale back, of gold, to Augmont, One97 placed on record a copy of its ledger accounts for the periods 5th to 7th January, 2019 as well as for the period thereafter. For the period between 7th January, 2019 and 21st February, 2019, One97 claimed to be entitled to payment, from Augmont, of an amount of ₹ 2,16,42,352/ -, as per terms and conditions set out in the agreement.

19. A tabular representation of the manner in which this amount was worked out was provided thus, in the Statement of Claim filed before the learned Arbitral Tribunal:

S. No.	**Particulars**	**Amount to be paid by Respondent to Claimant**	**Amount to be paid by Claimant to Respondent**
1.	Valuation of sell transactions from .. November, 2018 till 31.01.2020 including commission (excluding 55485 transactions on 5th, 6th	7,71,28,935	

	and 7th January, 2019)		
2.	Excess received from Respondent against failed orders along with commission.		12,51,888
3.	Amount recovered by the Claimant.		35,77,448
4.	Amount held by Claimant for Buy Orders		5,06,57,247
		Total	**2,16,42,352**

20. In view of the aforesaid, One97 claimed, from Augmont, a total amount of₹ 12,86,24,185/ - in three claims, of which Claim No. 1 pertained to the period 5th to 7th January, 2019, Claim No. 2 pertained to the period 7th January, 2019 till termination of the agreement and Claim No. 3 pertained to the gold which continued to remain in the custody of Augmont.

21. The prayer clause in the Statement of Claim reads as under:

> "In the facts and circumstances set forth as above and the submissions made hereinabove and in the fact and circumstances of the present case, it is most respectfully prayed that this Hon'ble Tribunal may be pleased to:-
>
> a) pass an award directing the Respondent to make payment to the tunes of outstanding of Rs.6,94,43,874/- (Rupees Six Crores Ninety Four Lakhs Forty Three Thousand Eight Hundred Seventy Four Only) along with future and *pendente-lite* interest@ 18% p.a.;
>
> b) pass an award directing the· Respondent to make payment for outstanding sum of Rs.2,61,22,319/- (Rupees Two Crores Sixty One Lakhs Twenty Two Thousand Three Hundred Nineteen Only) along with future and *pendente-lite* interest@ 18% p.a.;
>
> c) pass an award directing the Respondent to make

payment of a sum of Rs.3,30,57,992/- (Rupees Three Crores Thirty Lakhs Fifty Seven Thou sand Nine Hundred Ninety Two Only) along with future and *pendente-lite* interest @ 18% p.a. for a sum which is equivalent to the quantity of Gold that is in custody of the Respondent;

d) award the cost of the arbitration in favour of the Claimant; and

e) pass any order or further order(s) as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case."

22. One97 also filed, before the learned Arbitral Tribunal, an application, under Section 17 of the 1996 Act, seeking securing of the amount of ₹ 12,86,24,185/-, claimed by it against Augmont.

The Impugned Order

23. The order dated 24th January, 2021, passed by the learned Arbitral Tribunal on the said application of One97 constitutes the subject matter of challenge in the present appeal, at the instance of Augmont.

24. The reasoning of the learned Arbitral Tribunal is essentially contained in paras 18, 20, 22 to 24, 26 to 32, 35, 37 to 41 of the impugned order which, for ready reference, are reproduced as under:

"18. There is no dispute that after 7th January, 2019, even the parties continued to work the Agreement. For default of the Respondent, the contract was initially terminated by Notice dated 21st February, 2019 with immediate effect. For the period 8th January, 2019 to 21st February, 2019 while the Agreement was worked the Customers of the Respondent continued to sell gold from their GAP accounts and the Claimant instantly made payment to the said customers.

Despite there being no dispute for transactions during the period, the Respondent failed to reimburse the due amounts to the Claimant for the period despite there being no dispute. This amount as on date of filing of Section 17 application was a sum of Rs.2,61,22,319 /- and forms part of Prayer (a) of the said application. It is argued on behalf of the claimant that there is no dispute or controversy for this period or the said amount and yet the Respondent has failed to pay the said sum to the Claimant.

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20. Thus, *prima facie,* the claimant is entitled to receive the said amount which has gone from the pocket of the claimant. Thus, the value of said transactions have gone from the pocket of the claimant without any controversy between the parties. The said amount is receivable by the claimant even if denial by the respondent.

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22. As per facts in the present case, after 7th January, 2019, till the date of termination of agreement, actually both parties understood that despite of transactions prior to 7th January 2019, the understandings between their business activists would continue as per agreement and the amount sought to be protected in relief (a) the amount was paid with the confirmation of the respondent. Thus, the said amount is to be protected in the interest of justice and for the purpose of commercial business.

23. The Respondent has not denied having given its confirmation of the said transaction. The Respondent is directed to pay the said amount to the Claimant within two weeks from the date of receipt of Order. The interim order is passed accordingly. However, since the Claimant has raised his claim in the Statement of Claim, which is to be decided as per its own merit after the trial, the Claimant shall give an undertaking by way of affidavit within one week from the date of receipt of this order that in case the said relief is decided in favour of the Respondent, the Claimant shall secure the said amount after passing the award.

24. Pertaining to relief (b) is concerned about quantity of

gold in custody of the Respondent in Para 35 of the Statement of Claim on Page 44, the corresponding reply of the Respondent is on page 77 in Para 'hh'. There is a mere evasive denial.

26. As on 31st January, 2019, a total quantity of 7.06 Kgs of gold was lying with the Respondent. Needless to add, the said gold didn't belong to Respondent but instead to various customers, and the Respondent was merely a custodian thereof for and on behalf of the customers. On the termination of the said Agreement, the Respondent was liable to make over the said gold to the Claimant, but failed to do so and this claim forms subject matter of prayer (b) of the present Section 17 application.

27. In response to prayer (b), the Respondent does not deny that it is holding gold belonging to customers, but the Respondent stated that as and when a customer makes a request for sale to the Claimant, the Claimant may forward the said request to the Respondent and the Respondent shall satisfy the said claim. Firstly, the Respondent cannot hold the gold of third parties. Secondly, it is the obligation of the Claimant to pay the sale value of gold as and when sold by the customer from their GAP Account. Despite termination of Agreement, the Claimant has continued to satisfy the sale values of every customer instantly. In fact even after termination of the Agreement, the Claimant is continuously making payment to the customers instantly as and when sales are made by the respective customer. This shall continue to happen day after day.

28. There is no denial by the Respondent that it held the quantity of gold of customer as referred by the Claimant. It is also not denied that they are mere custodian of the said gold. It is also not denied that the said gold belongs to Customers. In fact, in para (1) on page 51 of the Statement of Defense, the Respondent admits that it is custodian of the gold lying in customer's GAP accounts. There is valid justification or reason of the Respondent to hold or continue to hold the said gold belonging to the customers.

29. It is argued on behalf of the claimant that the respondent by its email dated 4th December, 2019 admitted its liability and agreed to pay Rupees one Crore upfront and

the rest in future commission. However, no amount was paid since then. The said e-mail is referred by the counsel. The counsel for the respondent on the other hand submitted that the said admission was without prejudice. Therefore, the prayer is to be considered on merit.

30. The Section 17 Application was filed on the basis of the position as on 31st January 2019. Since then inasmuch as the customers continued to sell gold lying in their GAP Accounts, a number of transactions took place and the Claimant paid to the customers a further sum of Rs. 26,06,094/-, which the Respondent has not reimbursed to the Claimant. In addition, the stock of gold lying in GAP Accounts stood revised to 6.49 kgs. but the value of the said gold rose to Rs.3,85,71,507 /- because in the meantime the price of per unit of gold had gone up. After having considered the arguments of the parties, this Arbitral Tribunal, prima facie, is of the view that the amount mentioned in prayer is liable to be protected. There is no cause or reason for the Respondent to withhold said gold and thereby exploit the customers and the Claimant. In as much as it has no right to hold the said gold, as admitted by the Respondent, prayer (b) of the application deserves to be allowed. In fact, the Claimant is agreeable to deposit by the Respondent of the today's sale value of the gold held by the Respondent with this Tribunal.

31. Thus, the prayer (b) is allowed. The respondent is directed to furnish a Bank Guarantee for a sum of Rs.3,30,57,992/-in favour of the claimant within two weeks from today.

32. With respect to the transactions of 5th, 6th and 7th of January, 2019, the Claimant seeks protection of amount as mentioned in para (c) of the prayer in the application.

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35. The plea of fraud is barred by the order of reference by the order of the Hon'ble Delhi High Court dated 17th January, 2020 which records the statement of the Respondent's counsel that they shall not raise any plea of fraud. Even the said plea in view of Clause 12 of the agreement where the obligation to carry out KYC requirements for every customer is solely and

exclusively of the Respondent. The claimant is not to undertake any KYC process for Respondent customers. The Claimant is only required to provide customer name, unique customer ID, State and Pincode to the Respondent at the time of opening of GAP Account as per Clause 12.1. Indisputably, all these three details have been provided and are available with the Respondent for each customer. For every user of the Claimant, the claimant only undertakes a verification by OTP as per Clause 1.1.44. At the time of becoming a 'Paytm User', the concerned person is only to disclose his name, his mobile number and complete verification of One Time Password 'OTP' sent to his disclosed mobile number. For all 'Paytm users', the said process has been undertaken as alleged. The complete list of the said customer is given in Annexure C-9 of the Statement of Claim.

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37. The Respondent has also admitted in para (v) on page 64 of the statement of defense that the Respondent is responsible for de biting gold balance from customer's GAP accounts. It is however alleged that the glitch or error was on the Claimant's system and not of the Respondent and that a fraud has been committed.

38. During the course of submissions, the Respondent's counsel has relied upon RBI Master Directions dated 11.10.2017 and 25.02.2016 to allege that as per the said Master Directions the Claimant was also to undertake KYC requirement for its users. Admittedly, the Respondent not take any such plea in its statement of defence in its reply with respect to the said RBI Master Directions. In any case, the said RBI Master Directions applies to entities dealing in Prepaid Payment Instruments (PPIs). The Claimant states and confirms that the Claimant does not issue any PPIs as it is clear from the Certificates of Authorization issued by Reserve Bank of India and Settlement Systems Act 2007 for setting up and operating payment system in India. In fact on 25.07.2017, the Certificate of Authorization issued by RBI under Payment & Settlement Systems Act, 2007 in favour of the Claimant was cancelled as the business of PPI undertaken by the Claimant uptill that date was transferred to the company known as Paytm Payment Bank Limited (PPBL), which is a separate legal entity. The portion of Certificate of

Authorization issued by RBI under Payment & Settlement Systems Act, 2007 indicates that the Claimant is not an issuer of PPL

39. Prima facie, it appears that the said pleas are not tainable because of the reason that it was the responsibility of the respondent to maintain the GAP Account and it follows therefrom that the responsibility for deduction of the sale quantity from the GAP account of each customer is of the Respondent. As far as 55458 transactions are concerned, despite sale of certain quantity, the requisite debit was not made in the GAP account of the customers of the Respondent.

40. It is not denied and disputed that the Respondent sent the requisite sale confirmation for each transaction to the Claimant, whereupon the Claimant has no option, but is instead duty bound to pay each customer the sale value. There was no other option. Under the API System of the Respondent of the Statement of Defense, the code for a successful transaction is “200” and the code for failure is “400”. For each of the said 55458 transactions, indisputably the Respondent’s system sent code of "200" and not “400”. The Claimant is liable and has paid to each customer the sale value. Hence, the Respondent's plea is prima facie without any force.

41. The Respondent did not deny that it maintained the GAP Accounts of the customers. It also did not dispute that the accounts were not debited on account of sale made. It is admitted that the payments were made by the Claimant to the customers. Admittedly, the Respondent did not reimburse the said payments to the Claimant.”

25. Consequent on the aforesaid reasoning, the learned Arbitral Tribunal issued the following directions, in para 42 of the impugned order:

“42. After having gone through the entire gamut of the matter, this Arbitral Tribunal passes the following directions:-

a) The Respondent shall pay a sum of Rs.2,61,22,319/- to the Claimant, which is undisputed

amount and is payable as per agreement. The Respondent is directed to pay the same to the Claimant within two weeks from the date of receipt of this order. The interim order is passed accordingly. As far as interest component is concerned, the said aspect would be considered at the time of passing the final award.

b) The Respondent is directed to furnish the Bank Guarantee for a sum of Rs.3,30,57,992/- in favour of the Claimant within four weeks from today.

c) With regard to prayer (c) is concerned, the plea raised by both the parties will be decided after leading the evidence in view of facts and circumstances of the case. No doubt, the Claimant at this stage is able to make a prima facie case in its favour, but still the Tribunal is not inclined to pass the order of furnishing the bank guarantee. However, the balance is to be strike between the parties to some extent. Under these circumstances, in case the Respondent change its hand/fifty one percent ownership of the Respondent, the Respondent shall secure the amount by opening of open an escrow account before changing its hands and duly inform the Arbitral Tribunal as well as the counsel for the Claimant and maintain such balance during the pendency of the Arbitral Tribunal till the final award is passed."

26. Augmont is in appeal.

Rival submissions

27. I have heard Mr. Dayan Krishnan, learned Senior Counsel for Augmont and Mr. Sandeep Sethi, learned Senior Counsel for One97, at great length. Detailed written submissions have also been filed by both learned Senior Counsel.

28. Mr. Dayan Krishnan submits that the direction, in the impugned order, of the learned Arbitral Tribunal, to Augmont, to pay, to One97, ₹ 2,61,22,319/-, resulted in grant, at an interim stage, of the final relief sought by One97, which was impermissible. He submits that, under the agreement between Augmont and One97, the responsibility of conducting the requisite KYC exercise was of One97, for which purpose, Mr. Dayan Krishnan relies on Clauses 12 and 3.1 of the agreement. The respondent, according to him, defaulted in this obligation and Augmont could hardly be directed to recompense One97 for its default. In this context, Mr. Dayan Krishnan also relies on Clause 15.7 of the agreement, to contend that the integrity of the system was required to be maintained at all times. Additionally, submits Mr. Dayan Krishnan, One97 was remiss in its obligation to check the debit balance at all times, before selling the gold to the customer.

29. Mr. Dayan Krishnan also faults the learned Arbitral Tribunal for having returned the finding that the liability, to reimburse One97 for the payments allegedly made by One97 to customers, even after 7th January 2019, stood admitted by Augmont. He submits that there is no such admission. In fact, Mr. Dayan Krishnan sought to contend, by referring to the corresponding paragraphs from the Statement of Defence filed by Augmont before the learned Arbitral Tribunal, in response to the Statement of Claim of One97, that Augmont had, in no uncertain terms, denied both the factum of payment, by One97 to customers after 7th January, 2019, but also the assertion, of One97, that it had done so after confirmation of sale had been received from

Augmont. Mr. Dayan Krishnan emphasises the fact that, in fact, Augmont had filed a counter-claim, for the said purpose before the learned Arbitral Tribunal. He submits that, save and except for its own ledger, One97 had filed no document to vouchsafe its claim of having paid customers even after 7th January, 2019. Mr. Dayan Krishnan also drew my attention to the relevant pages of the ledger, as filed by One97 before the learned Arbitral Tribunal, to contend that the ledger did not even disclose the names of the payees, to whom payments had been made. Augmont had categorically denied the validity of the ledger. In these circumstances, he submits that the learned Arbitral Tribunal ought not to have treated the ledger as a proof of payment having been made by One97 to customers after 7th January, 2019.

30. Mr. Dayan Krishnan further submits that there was no justification for the learned Arbitral Tribunal to direct furnishing by Augmont of a bank guarantee covering the value of the gold in its possession, after termination of the contract. He points out that, in fact, before the learned Arbitral Tribunal, Augmont had clearly stated that, as and when any customer claimed the gold, Augmont would release the gold to the said customer. No occasion, therefore, arose, according to Mr. Dayan Krishnan, for securing the value of the gold. The prayer for furnishing of a bank guarantee for ₹ 3,30,57,992/- covering the value of the gold remaining in the possession of Augmont after termination of the agreement on 21st February, 2019, was also, according to him, thoroughly unjustified.

31. The third limb of Mr. Dayan Krishnan's attack on the impugned order was that the learned Arbitral Tribunal had failed to abide by the provisions of Order XXXVIII Rule 5 of the CPC, the satisfaction of the pre-requisites of which was a *sine qua non* for directing furnishing of any kind of security under Section 17(1)(ii)(b) of the 1996 Act. He submits that the learned Arbitral Tribunal has not addressed itself, at all, to the financial condition of One97, or to the possibility of frustration of any ultimate arbitral award, were security not to be directed. That apart, Mr. Dayan Krishnan submits that, before directing security under Section 17(1)(ii)(b) of the 1996 Act, the learned Arbitral Tribunal was required to record a finding that the party, who was being directed to provide security, was dissipating its assets with the intent of defeating the ultimate arbitral award to be posted in the matter. No such finding, he submits, is forthcoming in the impugned order.

32. Mr. Sandeep Sethi, learned Senior Counsel for One97, disputes all submissions advanced by Mr. Dayan Krishnan. He contends that, as per the agreement, the responsibility to ensure KYC compliance was always of Augmont and that the learned Arbitral Tribunal was entirely justified in so holding. He also seeks to endorse the finding of Augmont having admitted its liability in respect of the transactions which took place after 7th January, 2019, in which respect he has invited my attention to the averments contained in para 33 of the Statement of Claim which were not traversed in the corresponding para ff of the Statement of Defence except by way of bald denial. He

has also invited my attention to para 40 of the impugned order, which reads as under:

> "It is not denied and disputed that the Respondent sent the requisite sale confirmation for each transaction to the Claimant, whereupon the Claimant has no option, but is instead duty bound to pay each customer the sale value. There was no other option. Under the API System of the Respondent of the Statement of Defense, the code for a successful transaction is "200" and the code for failure is "400". For each of the said 55458 transactions, indisputably the Respondent's system sent code of "200" and not "400". The Claimant is liable and has paid to each customer the sale value. Hence, the Respondent's plea is *prima facie* without any force."

33. Additionally, he relies on the observation, in para 19 of the impugned order, that the liability to reimburse One97, for the payment made in respect of the transactions which took place after 7th January, 2019, was not disputed by Augmont during hearing. Mr. Sethi points out that there is no unequivocal denial, by Augmont, of the payments having been made by One97 after 7th January, 2019. He also submits that his client had, by way of evidence of such payments, produced a ledger, which was accepted by the learned Arbitral Tribunal as *prima facie* evidence thereof. No substantial ground, for questioning the veracity of the ledger had, he submits, been advanced by Augmont before the learned Arbitral Tribunal.

34. In so far as the direction to furnish a bank guarantee, covering the value of the gold which continued to remain with Augmont after the termination of the agreement, was concerned, Mr. Sethi submits that One97 was continuing to make payments to customers even after the agreement stood terminated, which fact, too, he submits, did not

meet with any substantial traversal on the part of Augmont. He submits, moreover, that One97 was responsible to ultimately close the accounts of all customers, which would necessitate, in the ultimate eventuate, payment of the price of the gold to the customers in whose GAP accounts gold remained unsold. Despite the fact that One97 was continuing to pay customers, he submitted that Augmont had made no reimbursement or remittance to One97 after 5th January, 2019, and even after 7th January, 2019, when the system was in working order. No exception, therefore, according to Mr. Sethi, could be taken to the direction, of the learned Arbitral Tribunal, to Augmont, to furnish a bank guarantee covering the value of the gold in its possession.

35. Mr. Sethi further submits that, while exercising its jurisdiction under Section 17(1)(ii)(b) of the 1996 Act, the learned Arbitral Tribunal was not shackled by the restrictions governing the exercise of jurisdiction under Order XXXVIII, Rule 5 of the CPC, 1908, and that the law, in this regard, was well settled.

Analysis

Applicability of Order XXXVIII Rule 5, CPC

36. Mr. Dayan Krishnan advanced, as his opening submission, the contention that the impugned order of the learned Arbitral Tribunal was vitiated as it did not appropriately examine the applicability of Order XXXVIII Rule 5 of the CPC. Mr. Krishnan submits that, apart from the existence of a *prima facie* case, the balance of convenience and irreparable loss, Order XXXVIII Rule 5 requires, for its

satisfaction, a finding to the effect that the respondent was not only in financially impecunious circumstances but was seeking to dissipate its assets with a view to defeat the arbitral award, in the event that the award was in favour of the appellant. More precisely, Mr. Krishnan submits that, even if the learned Arbitral Tribunal were to be regarded as having taken, into consideration, the financial condition of his client, there is no finding, whatsoever, to the effect that his client was seeking to dissipate its assets, with a view to defeat the ultimate arbitral award. In the absence of such a finding, contends Mr. Krishnan, no relief, under Section 17(1)(ii)(b) of the Act, could have been granted.

37. This is an aspect which comes up for consideration in case after case, and there are decisions galore on the point. Judicial opinion, in this respect, is mixed. It requires to be examined, therefore, in some detail.

38. Parliamentary statutes are not mere pen and parchment. They are living, breathing entities which pulsate with life. As in the case of any living entity, the intent of a plenary statutory legislative instrument is best discerned from its words, and the manner in which it chooses to express itself.

39. Before adverting to precedents, therefore, let us examine, in the first instance, the provisions.

40. Section 17(1)(ii)(b) and (e) read thus:

"**17. Interim measure is ordered by arbitral tribunal. –**

> (1) A party may, during the arbitral proceedings, apply to the arbitral tribunal –
>
> *****
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:–
>
> *****
>
> (b) securing the amount in dispute in the arbitration;
>
> *****
>
> (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, in the proceedings before it."

41. It is, by now, settled that the power of the Arbitral Tribunal under Section 17 and the power of the Court under Section 9 of the 1996 Act are co-extensive and co-equal in character. The judgment of this Court in ***Avantha Holdings Ltd. v. Vistra ITCL India Ltd***[1], to this effect, has expressly been approved by the Supreme Court in its recent decision in ***Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd***[2], to that extent.

42. Equally, the concluding clause in Section 17(1)(ii) makes it clear that the power of the Arbitral Tribunal, for making an order

[1] **2020 SCC OnLine Del 1717**
[2] **2021 SCC OnLine SC 718**

under Section 17 would be the same as the power of a Court, in relation to proceedings before it. On the basis of this statutory clarification, it has been held, in various decisions, that the Arbitral Tribunal, exercising jurisdiction under Section 17, is required to bear in mind the provisions of Orders XXXVIII and XXXIX of the CPC.

43. Section 17(1)(ii)(b) empowers the Arbitral Tribunal to secure the amount in dispute in the arbitration. Prior to its amendment by Section 10 of the Arbitration and Conciliation (Amendment) Act, 2015, with effect from 23rd October, 2015, Section 17 read 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)."

44. The power to direct furnishing of security, in connection with the subject matter of the arbitral dispute, therefore, vested in the Arbitral Tribunal even under the pre-amended Section 17, by virtue of sub-section (2) thereof. The law relating to the power to direct furnishing of security, as a measure of interim protection, as enunciated in the pre-amended regime would, therefore, continue to apply, to that extent, even after Section 17 was amended w.e.f. 23rd October, 2015.

45. In a case arising under the pre-amended Section 9, the Supreme Court, in ***Arvind Constructions v. Kalinga Mining Corporation***[3], while noting the view expressed by the High Court of Bombay that exercise of jurisdiction under Section 9 of the 1996 Act was not controlled by Order XXXVIII Rule 5 of the CPC, observed that the extent to which the said view was correct "requires to be considered in an appropriate case", but that it was not inclined to answer the question finally in the case before it. Even so, the Supreme Court observed that it was "*prima facie* inclined to the view that exercise of power under Section 9 of the Act must be based on the well-recognised principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver". Following the said decision, and the decision in ***Firm Ashok Traders v. Gurumukh Das Saluja***[4], a Division Bench of this Court, in ***Ajay Singh v. Kal Airways Pvt Ltd***[5], which arose under the amended Section 17, held thus, in para 27 of the report:

> "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 principal. 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 these provisions rather it is to follow the underlying principles*."
>
> (Emphasis supplied)

[3] **(2007) 6 SCC 798**
[4] **(2004) 3 SCC 155**
[5] **(2018) 209 Comp Cas 154**

46. The law enunciated in ***Ajay Singh***[5] continues, undisturbed, till date. It is clearly laid down in the said decision that the Section 9 court is not constrained by the express wordings of Order XXXVIII Rule 5, but is required to keep the principles underlying the said provision in mind.

47. To have an idea of the principles underlying Order XXXVIII Rule 5, one needs to look no further than the short decision of the Supreme Court in ***Raman Tech & Process Engg v. Solanki Traders***[6]. Paras 4 to 6 of the report in that case read as under:

> "**4.** *The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The scheme of Order 38 and the use of the words 'to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed.*

[6] **(2008) 2 SCC 302**

Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

5. *The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged.* Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out of court settlement, under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. *A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment.* (See ***Premraj Mundra v. Md. Manech Gazi***[7] for a clear summary of the principles.)"

(Emphasis supplied)

48. ***Premraj Mundra***[7], which was specifically approved – and, indeed, relied upon – by the Supreme Court in ***Raman Tech & Process Engg. Co.***[6], postulated the following "guiding principles", in

[7] **AIR 1951 Cal 156**

para 18, to govern exercise of jurisdiction under Order XXXVIII Rule 5:

> "(1) That an order under Order 38, Rules 5 & 6, can only be issued, if circumstances exist as are stated therein.
>
> (2) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court.
>
> (3) That the Court would not be justified in issuing an order for attachment before judgment, or for security, merely because it thinks that no harm would be done thereby or that the defts. would not be prejudiced.
>
> (4) That the affidavits in support of the contentions of the applicant, must not be vague, & must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the source of information should be disclosed, & the grounds for belief should be stated.
>
> (5) That a mere allegation that the deft. was selling off & his properties is not sufficient. Particulars must be stated.
>
> (6) There is no rule that transactions before suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation.
>
> (7) Where only a small portion of the property belonging to the deft. is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the pltf's claim.
>
> (8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply of cause a suit has been filed. There must be additional circumstances to show that the transfer is with an intention to delay or defeat the pltf.'s claim. It is open to the Court to look to the conduct of the parties immediately before suit, & to examine the surrounding circumstances, to draw an inference as to whether the deft. is about to dispose of the property, & if

so, with what intention. The Court is entitled to consider the nature of the claim & the defence put forward.

(9) The fact that the deft. is in insolvent circumstances or in acute financial embarrassment, is a relevant circumstance, but not by itself sufficient.

(10) That in the case of running businesses, the strictest caution is necessary & the mere fact that a business has been closed, or that its turnover has diminished, is not enough.

(11) Where however the deft. starts disposing of his properties one by one, immediately upon getting a notice of the pltf.'s claim, &/or where he had transferred the major portion of his properties shortly prior to the institution of the suit & was in an embarrassed financial condition, these were grounds from which an inference could be legitimately drawn that the object of the deft. was to delay and defeat the pltfs'. claim.

(12) Mere removal of properties outside jurisdiction, is not enough, but where the deft. with notice of the pltfs'. claim, suddenly begins removal of his properties outside the jurisdiction of the appropriate Court, & without any other satisfactory reason, an adverse inference may be drawn against the deft. Where the removal is to a foreign country, the inference is greatly strengthened.

(13) The deft. in a suit is under no liability to take any special care in administering his affairs, simply because there is a claim pending against him. Mere negect, or suffering execution by other creditors, is not a sufficient reason for an order under Order 38 of the Code.

(14) The sale of properties at a gross undervalue, or benami transfers, are always good indications of an intention to defeat the pltfs. claim. The Court must however be very cautious about the evidence on these points & not rely on vague allegations."

49. Post amendment, Section 17(1)(ii)(b) specifically empowers the Arbitral Tribunal to secure the amount in dispute in the arbitration.

50. To what extent would the exercise of power, by the Court, under Section 9(1)(ii)(b) or by the Arbitral Tribunal under Section 17(1)(ii)(b) of the 1996 Act be governed by provisions of Order XXXVIII Rule 5 of the CPC?

51. Order XXXVIII Rule 5 CPC reads as under:

> **"5. Where defendant may be called upon to furnish security for production of property**. –
>
> (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, –
>
> (a) is about to dispose of the whole or any part of his property, or
>
> (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,
>
> the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.
>
> (2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

> (3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.
>
> (4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."

52. A bare reading of Order XXXVIII Rule 5 CPC reveals that the statutory *sine qua non*, for a direction by the Court, to furnish security under the said provision, is the satisfaction, of the Court, that the defendant, "with intent to obstruct or delay the execution of any decree that may be passed against him", (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court.

53. Clearly, therefore, a Court would be acting without jurisdiction if, in the absence of *prima facie* material to indicate satisfaction of the considerations specified in one of Clauses (a) and (b) of Order XXXVIII Rule 5 (1), it directs the defendant to provide security.

54. Section 17(1)(ii)(b) [or Section 9(1)(ii)(b)] does not expressly incorporate the considerations stipulated in Order XXXVIII Rule 5(1). It merely empowers the Arbitral Tribunal (in the case of Section 17) or the Court (in the case of Section 9), to secure the amount in dispute in arbitral proceedings. Courts have, however, even after the amendment of Section 9 and Section 17, with effect from 23rd October, 2015, been adopting the view that the exercise of jurisdiction under Section 9 or 17, even if not circumscribed by the express words

of Order XXXVIII Rule 5, has to abide by the guiding principles thereof.

55. One of the earliest decisions of a Division Bench of this Court, after the amendment of Sections 9 and 17 with effect from 23rd October, 2015, is ***Ajay Singh***[5]**.** As already noted hereinabove, the Division Bench, in ***Ajay Singh***[5]**,** held that though the Section 9 Court was not bound by the express words of Order XXXVIII Rule 5 of the CPC, while exercising jurisdiction under Section 9(1)(ii)(b), the guiding principles behind the provision were required to be borne in mind. *Mutatis mutandis*, this enunciation of law would apply to exercise of jurisdiction under Section 17(1)(ii)(b) as well.

Order XXXIX Rule 10, CPC

56. While exercising jurisdiction under Section 17, however, the Arbitral Tribunal is required to bear in mind not only Order XXXVIII but also Order XXXIX CPC. Order XXXIX Rule 10 CPC reads as under:

> **"10. Deposit of money, etc., in Court. –** Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court."

57. The learned Arbitral Tribunal holds, in the impugned order, that, inasmuch as the right of One97 to reimbursement of the amounts paid by it to the customers who sold back the digital gold to Augmont

between 8th January, 2019 and 21st February, 2019 stood admitted by Augmont, the interests of justice deserved issuance of a direction, to Augmont, to secure the amount.

58. To my mind, a direction under Section 17, by the learned Arbitral Tribunal to secure the admitted amount during the arbitral proceedings may not justify interference in exercise of the jurisdiction vested in this Court by Section 37 of the 1996 Act, either on first principles or on merits, *unless the finding of admission of liability on the part of the party who is asked to make the deposit is itself found to suffer from perversity or patent illegality*.

59. If the finding of admitted liability, as arrived at by the learned Arbitral Tribunal, and which constitutes, *inter alia*, the basis of the impugned direction to secure the amount, is not found deserving of interference under Section 37, the inexorable sequitur, in my view, would be that the consequential direction, to secure the admitted amount, would be equally impervious to such interference.

60. The learned Arbitral Tribunal has, in fact, placed reliance on the decision of this Court in ***NHAI v. Jetpur Somnath Tollways***[8] which has been held, by a Division Bench of this Court ***NHAI v. Bhubaneswar Expressway Pvt. Ltd***[9] to have been rendered in the context of Order XXXIX Rule 10 of the CPC.

[8] **2017 SCC OnLine Del 11312**
[9] **2021 SCC OnLine Del 2421**

61. In ***Sanjeev Sarin v. Rita Wadhwa***[10] this Court has held that the exercise of jurisdiction under Order XXXIX Rule 10 of the CPC has to be on principles analogous to those which apply to Order XII Rule 6 of the CPC. This judgment was affirmed, on merits, by the Division Bench of this Court, *vide* order dated 27th August, 2018 in FAO (OS) 50/2018 (***Rajiv Sarin v. Rita Wadhwa***).

62. The High Court of Bombay has lowered the bar still further, in ***Rajul Manoj Shah v. Navin Umarshi Shah***[11], by holding thus (in para 22 of the report, authored by Oka, J., as he then was):

> "Considering the scheme of Rule 10 of Order XXXIX, we find it difficult to accept the Delhi view as correct. On its plain reading, Rule 10 is applicable when subject matter of the suit is money or some other thing capable of delivery. An order of deposit can be made provided the party to the suit admits that he holds such money or thing as a trustee of other party. The order of deposit can be passed when the party admits that the money or the thing held by the party belongs to the other party or the money is due to the other party. Rule 6 of Order XII is a discretionary provision which empowers the Court to pass a judgment on admission made either in the pleadings or otherwise, whether orally or in writing. Therefore, in a suit where there is a clear admission of a fact which enables the Court to pronounce a judgment on admission, the Court may in its discretion pronounce the judgment on admission and thereafter in terms of sub-rule (2) of Rule 6 of Order XII, the Court is under a mandate to make a decree on admission. Thus, if in a given case, there is a clinching admission by a defendant that he is holding the money or some other thing capable of delivery as a trustee for the plaintiff and the Court is satisfied that it is a fit case to exercise discretion by passing a judgment on admission under Rule 6 of Order XII, the Court would very well pass a judgment on admission so that by executing the decree drawn

[10] **2018 SCC OnLine Del 6658**
[11] **2018 SCC OnLine Bom 8206**

> in terms of the said judgment, the plaintiff gets the money or the thing capable of delivery. If such a stringent test is to be applied for applicability of Rule 10 of Order XXXIX, the provision of Rule 10 will virtually become redundant. Rule 10 confers powers on the Court to pass an interim order directing the money to be deposited in the Court or to be delivered to the party for whose benefit the concerned party is holding the same as a trustee. There is a power vesting in the Court to direct the party to deposit property ordered to be delivered or to furnish a security. The power under Rule 10 of Order XXXIX is a power to pass an interim order pending suit. But the power under Rule 6 of Order XII is a drastic power of passing a decree on admission without conducting trial. The standards applicable to a provision conferring power to pass a decree on admission cannot be applied to Rule 10 of Order XXXIX which empowers the Court to pass an interim order. Therefore, in our view, the test applicable for passing the judgment on admission under Rule 6 of Order XII of the said Code cannot be imported in Rule 10 of Order XXXIX. If the conditions provided in Rule 10 of Order XXXIX are satisfied, the Court can exercise the power under Rule 10 by directing the payment of money to the party for whose benefit the same is being held as a trustee or to direct deposit of the money in the Court."

In the context of Order XII Rule 6 of the CPC, it is well settled[12] that the admission, on the basis of which judgment is rendered under the said provision, is not required necessarily to be in the pleadings, but may also be in the documents filed with the plaint or even in any cognate instrument. Borrowing the analogy, therefore, a Court, or an Arbitral Tribunal, which directs deposit of an amount by defendant, which, in its view, is admitted to be payable by the defendant to the plaintiff, is not acting without jurisdiction or even in an illegal manner, if such admission is found to exist in a document executed

[12] Refer ***Uttam Singh Duggal & Co. v. Union Bank of India, (2000) 7 SCC 120, Urmila Devi v. Laxman Singh, 2015 SCC OnLine Del 8487, Delhi Jal Board v. Surendra P. Malik, (2003) 104 DLT 151*** and ***Jasmer Singh Sarna v. Electronics Trade and Technology Development Corp Ltd, ILR (2001) II Delhi 385.***

by the defendant, even if it is not reflected in the pleadings before the court.

63. An arbitral order which arrives at such a conclusion, would not, therefore, merit interference in exercise of the appellate jurisdiction vested by Section 37 of the 1996 Act.

Scope of Section 37(2)

64. The legislature, consciously and deliberately, has provided only for the filing of *objections* under Section 34 of the 1996 Act, against a final award, but has made interlocutory orders of Arbitral Tribunal amenable to *appeal* under Section 37(2). The reason for this differential dispensation is, unfortunately, not immediately forthcoming either from the provisions of the 1996 Act, or from the Statement of Objects and Reasons thereto. The UNCITRAL model, which admittedly constitutes the basis of the 1996 Act, too, does not enlighten on this aspect.

65. Having said that, so long as such a differential treatment has been extended, by the statute, to interlocutory orders under Section 16 or 17 of the 1996 Act, *vis-à-vis* final awards, the intent of the legislature in doing so has to be respected.

66. Section 37(2) envisages appeals, to the Court, from orders passed by the Arbitral Tribunal either under sub-sections (2) or (3) of Section 16, accepting the objection regarding want of jurisdiction in

the Arbitral Tribunal, or granting or refusing to grant an interim measure under Section 17. Sections 16(2) and (3) read thus:

> "**16. Competence of arbitral tribunal to rule on its jurisdiction. –**
>
> *****
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
>
> (3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings."

67. At a bare glance, the difference between orders passed under sub-sections (2) and (3) of Section 16, and an order passed under Section 17, is starkly apparent. Orders passed under sub-section (2) and (3) of Section 16 rule on the jurisdiction and authority of the Arbitral Tribunal to deal with the arbitral proceedings. Any orders accepting the objection to the jurisdiction of the Arbitral Tribunal would, therefore, in that sense, be final, as a decision thereon would conclude the issue of whether the Arbitral Tribunal possesses jurisdiction and authority to arbitrate. As against this, an order of interim protection under Section 17 – especially an order under Section 17(1)(ii)(b) such as the order under challenge – is fundamentally discretionary in nature, and does not put an end to the *lis*. Such orders would abide by the final award, to be passed later in the arbitral proceedings.

68. On the scope of interference with the exercise of discretion by the Arbitral Tribunal under Section 17(1)(ii)(b), I have had occasion to observe thus, in *Dinesh Gupta v. Anand Gupta*[13]:

> "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***[14]:
>
> > "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 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

[13] **MANU/DE/1727/2020**
[14] **1990 Supp SCC 727**

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***[15]***:***

> "... These principles are well established, but as has been observed by Viscount Simon in ***Charles Osenton & Co. v. Jhanaton***[16]**,** '...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***[17], ***EMAAR MGF Land Ltd v. Kakade British Realities Pvt Ltd***[18]**, *Reliance Communications Ltd v. Bharti Infratel Ltd.*[19]**, *Ascot Hotels and Resorts Pvt Ltd v. Connaught Plaza Restaurants Pvt Ltd.*[20]**and ***Green Infra Wind Energy Ltd v. Regen Powertech Pvt Ltd***[21]**."**

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[15] **AIR 1960 SC 1156**
[16] **1942 AC 130**
[17] **2009 (162) DLT 638**
[18] **2013 (138) DRJ 507**
[19] **2018 SCC OnLine Del 6564**
[20] **2018 (249) DRJ 329**
[21] **2018 SCC OnLine Del 8273**

69. In examining any challenge to an order passed by an Arbitral Tribunal, whether interlocutory or final, the Court has to be mindful of the preamble to the 1996 Act, as well as of Section 5 thereof. Preambularly, the 1996 Act is "an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto." The Act, therefore, seeks, avowedly, to foster the arbitral process. Towards this end, Section 5 of the 1996 Act provides thus:

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

70. In this context, one may also refer to Section 6, which reads thus:

> "**6. Administrative assistance. –** In order to facilitate the conduct of the arbitral proceedings, the parties, or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person."

71. Every attempt is required to be made, therefore, to promote the arbitral process, and every attempt at seeking to retard it, is, equally, required to be eschewed. This philosophy, in my view, is required to pervade the exercise of jurisdiction as much under Section 37(2), as under Section 34 of the 1996 Act.

72. Added to this, is the need for judicial circumspection, when the order under challenge is discretionary in nature, as in the present case.

73. It is only in rare and extreme cases, therefore, that, in exercise of its appellate jurisdiction under Section 37, a Court would interfere with a discretionary order passed under Section 17. An order for deposit, under Section 17(1)(ii)(b), is, fundamentally and at all times, an order passed in exercise of its jurisdiction. Discretionary orders, by their very nature, are amenable to judicial interference to a far lesser degree than others.

74. In this context, it is necessary to differentiate between the *scope* and *ambit* – expressions which often exist cheek by jowl – of Section 37 jurisdiction, *vis-a-vis* the *reach* and *extent* of such jurisdiction. The scope of jurisdiction – which embraces its governing considerations – is restricted, as already observed hereinabove. While remaining within those constraints, however, the Court, in its appellate *avatar*, can modify the award; something which is outside the reach of the Section 34 Court. Expressed otherwise, and more simply, having examined the award/order under challenge within the limited scope of Section 34 or 37, if the Court finds that the interests of justice could be met by modifying the decision of the Arbitral Tribunal, it *can do so* under Section 37, but it *cannot do so*, under Section 34[22]. This, in my opinion, is one of the inevitable sequelae of the legislative dispensation in conferring, on Courts, *appellate jurisdiction* over orders passed under Section 17 by the Arbitral Tribunal, granting or refusing to grant interim protection.

[22] Refer ***N.H.A.I. v. M. Hakeem, 2021 SCC OnLine SC 473***

Re. impugned direction to Augmont to pay, to One97, ₹ 2,61,22,319/- for transactions between 8th January and 21st February, 2019

75. Returning to Mr. Dayan Krishnan's submission that the impugned order deserves to be set aside, as it does not examine the applicability of Order XXXVIII Rule 5 CPC, the above analysis compels me to disagree with him. The learned Arbitral Tribunal has directed payment of ₹ 2,61,22,319/- by Augmont to One97, consequent on a finding, by it, that the liability of Augmont to reimburse, to One97, the amounts paid by One97 to the customers between 8th January, 2019 and 21st February 2019, stood admitted by Augmont. For this purpose the learned Arbitral Tribunal has relied on two circumstances. The first circumstance finds mention in para 19 of the impugned order, in which it is stated, *inter alia*, thus:

> "19. During the course of hearing, it is not denied on behalf of respondent about the undisputed transactions after 7th June, 2019. In response to prayer (a), the Respondent has submitted that it has itself filed a counterclaim and a Section 17 Application and the amounts payable to the Claimant under the said prayer may be set off against the amounts found payable to the Respondent under their Counterclaim or its Section 17 Application. Admittedly, the Respondent's counter claim is filed because of loss of profit, business, reputation, goodwill and damages which is expressly barred under clause 28 of the Agreement, as per Clause 28 of the Statement of Claim, as alleged by the claimant.
>
> It is not proper that this Tribunal at this stage give the finding about the impact of the case of the respondent's counter-claim."

There is no averment, in the appeal by the appellant, to the effect that the afore-extracted finding of the learned Arbitral Tribunal is, on facts,

incorrect. Apparently, therefore, apart from the recitals in the counter-claim and the Section 17 application filed by it, the appellant did not deny, even during arguments before the learned Arbitral Tribunal, the transactions effected after 7th January, 2019 and the factum of payments made by One97 in connection therewith.

76. The learned Arbitral Tribunal has opined that, by so pleading, Augmont had impliedly admitted its liability to reimburse, to One97, the amounts claimed by it.

77. The second circumstance is that, for each of the 55458 transactions which took place between 5th and 7th January, 2019, the respondent's system sent the code of "200" indicating success, rather than "400" indicating failure. The statement in that regard is also on record, and this position is found to be correct. That One97 did actually reimburse the customers in respect of the transactions which took place between 5th and 7th January, 2019 is, *prima facie*, borne out by the record and, in any event, the finding of the learned Arbitral Tribunal in that regard cannot be said to be such as would merit interference in exercise of the appellate jurisdiction vested in this Court.

78. Save and except for a bald denial, there is nothing to indicate that this position changed after 8th January, 2019. Nor has it been Mr. Dayan Krishnan's argument before this Court, that, having paid the customers till 7th January, 2019, One97 suddenly stopped paying the customers thereafter.

79. The learned Arbitral Tribunal also relied on the ledger account of One97, which was placed on record. In this context, Mr. Mehta has invited my attention to para 33 of the Statement of Claim, filed by One97 before the learned Arbitral Tribunal, and to the response by Augmont in the corresponding para ff of its Statement of Defence. Though there is a one line denial of the ledger in the Statement of Defence, no further credible material has been produced on record by Augmont in that regard. Section 34 of the Indian Evidence Act, 1872 makes books of accounts, maintained by a party in the ordinary course of business, relevant in evidence. The learned Arbitral Tribunal has specifically noted that no credible challenge had been advanced, by Augmont, to the ledgers placed on record by One97. I have also seen the copies of ledgers and find that they do in fact record payments having been made by One97, against gold sold to Augmont after 7th January, 2019. The particulars of each transaction are also to be found in the said ledger account, even if the individual payee's identifications are not forthcoming. In the absence of any credible material advanced by Augmont to challenge the veracity of the ledger, I, in the exercise of the appellate jurisdiction vested in me by Section 37(2) of the 1996 Act, am loath to interfere with the finding of the learned Arbitral Tribunal in that regard.

80. I may note, in this context, that, *apropos* the ledger, the submissions of Mr. Dayan Krishnan were entirely on the evidentiary value of ledgers and as to whether it was sufficient to constitute evidence of payment having not been made.

81. Sufficiency of evidence is not an aspect on the basis of which, in my view, an interlocutory order of the learned Arbitral Tribunal can be set aside, in exercise of Section 37 jurisdiction.

82. *Prima facie*, if amounts were paid by One97 to the customers, in respect of gold sold to Augmont, Augmont was liable to reimburse One97 on the very next day.

83. The learned Arbitral Tribunal has, keeping in view all these factors, arriving at a finding that the liability of Augmont, to reimburse One97 in respect of the amounts paid by One97 to the customers during the period 8th January, 2019 till the termination of the contract on 21st February, 2019, was *prima facie* undisputable. It has also observed that no concrete rebuttal, to these submissions, was forthcoming in the stand of Augmont before it.

84. In these circumstances, if the learned Arbitral Tribunal directed One97 to deposit the amounts paid by One97 to the customers during the period 8th January, 2019 to 21st February, 2019, as reflected from its ledgers, pending decision in the arbitral proceedings, that direction, in my view, cannot be said to suffer from perversity or patent illegality as would warrant interference, by this Court, in exercise of its jurisdiction under Section 37 of the 1996 Act.

85. No doubt, in the present case, the learned Arbitral Tribunal did not direct deposit of the amount but, rather, directed Augmont to pay

the amount to One97. There is substance in Mr. Dayan Krishnan's submission that no direction for such outright payment could have been made in exercise of Section 17 jurisdiction. Mr. Sethi, has, however, no objection to the amount being deposited with the Registrar General of this Court, awaiting the outcome of the arbitral proceedings, instead of being paid to his client. In that view of the matter, I am of the opinion that no case for interference with the direction, to One97, to pay ₹ 2,61,22,319/- can be said to exist, subject to the payment being made, not to One97 but being deposited with the Registrar General of this Court.

Re. direction to Augmont to furnish bank guarantee for ₹ 3,30,57,992/- for post-termination transactions

86. The second direction of the learned Arbitral Tribunal, with which Augmont claims to be aggrieved, is the direction to One97 to furnish a bank guarantee covering the value of the gold which continued to remain with Augmont after 21st February, 2019 (hereinafter referred to as "the residual gold"), i.e. the date of termination of the agreement. Mr. Dayan Krishnan submits that there is no justification for such a direction. The contention of Augmont before the learned Arbitral Tribunal, which has been reiterated by Mr. Dayan Krishnan before me, is that if Augmont had no proprietarial right over the gold lying unredeemed and unsold on the date of termination of the agreement, neither had One97. He draws my attention to the specific undertaking, given by Augmont before the learned Arbitral Tribunal, to the effect that, were any customer to approach the Augmont for redeeming gold or selling the gold to

Augmont, Augmont would provide the requisite consideration to the customer, whether by way of customer redeemable products and/or the price of the gold. One97, he submits, had no right to claim the value of the gold.

87. A reading of the impugned arbitral order discloses that the learned Arbitral Tribunal has proceeded to justify this direction on the premise that Augmont was merely a custodian of the gold lying unredeemed and unsold on the date of termination of the agreement. Coupling this fact with the observation that, even after termination of the agreement, One97 was continuing to pay customers who sold back the gold from their GAP accounts, the learned Arbitral Tribunal deemed it appropriate to direct Augmont to secure the value of the digital gold remaining in the customers' GAP accounts on the date of termination.

88. Clause 24 of the agreement sets out the "obligations upon termination". The said clause, with sub-clauses 24.2 to 24.4 thereof, which are of some relevance, may be reproduced thus:

> "**24 OBLIGATIONS UPON TERMINATION**
>
> If this Agreement is terminated as provided herein:
>
> 24.1 One97 shall be responsible to immediately stop taking any further Customer Purchase Order, Customer Redemption Instruction, Transfer Instruction Favouring customer, Open Sale Back Order, or accumulation of Product/ gold through the Paytm Platform.
>
> 24.2 Augmont-Bullion shall be responsible to continue providing services for a period of at-least 4 (Four) months

from the date of termination **("Transition Period")** for effectuating redemption or selling of Gold by customers or transfer of balance to an alternate GAP partner of One97 **("Alternate GAP Platform").**

24.3 One97 shall be responsible for informing and communicating to Customer(s) regarding the termination of the Agreement and arrangement between the Parties, and offering the Customers to:

24.3.1 Redeem the Gold accumulated by them in their GAP accounts, take delivery of the Customer Redeemable Products and close GAP account, as the case may be

24.3.2 Transfer balance into alternate GAP account as prescribed by One97

24.4 For the Customer(s) who have neither redeemed the product nor transferred to alternative GAP during the **Transition Period**, Augmont-Bullion will be entitled to repurchase such product at the end of **Transition Period** at the then prevalent Live Rate of Gold-Sell Back, after deducting applicable charges and Taxes, provided the customer has not called for redemption. "

89. On a plain reading, there appears to be some inconsistency between Clause 24.1, on the one hand, and Clauses 24.2 and 24.3 on the other. Clause 24.2 requires Augmont to continue to provide services, for at least four months beyond termination "*for effectuating redemption or selling of gold by customers* or transfer of balance to an alternate GAP partner of One97". Parallelly, Clause 24.3 requires One97, mandatorily (as is apparent from the use of the word "shall") to, consequent on termination of the agreement, offer the customers either to redeem the gold continuing to remain in their GAP accounts, take delivery of the customer redeemable products and close the GAP account, or to transfer the balance in the GAP account into alternate

GAP accounts, i.e. accounts managed by alternate GAP partners of One97. Of these, the second option does not concern us.

90. Clauses 24.2 and 24.3, read together, clearly entitled the customer, even after the termination of the agreement and at least for four months, to redeem the gold continuing to remain in their GAP accounts. "Closure" of the GAP account, as envisaged by Clause 24.3.1, would necessarily require payment, by One97, to the customers, of an amount equivalent to the value of the gold lying in the GAP account on the date of termination, i.e. the residual gold.

91. Clause 24.4 dealt with a situation in which the customer neither chose to redeem the residual gold, nor to transfer the balance into an alternate GAP account. In such circumstances, Augmont was entitled to re-purchase the gold. In such a circumstance, too, it goes without saying that One97 would have to pay the customer the value equivalent to the gold thus purchased by Augmont "at the then prevalent live rate of gold sell back, after deducting applicable charges and taxes" (as is expressly stated in Clause 24.4).

92. Having said that, the agreement does appear to be somewhat ambiguous regarding the status of the residual gold, which was neither redeemed, nor purchased by Augmont, nor transferred to any alternate GAP account, during the period of four months. How such gold would have to be treated is, however, a conundrum which this Court, in exercise of its Section 37 jurisdiction, is mercifully not called upon to unravel. This aspect is, however, of significance in the present case, given the fact that the learned Arbitral Tribunal has directed Augmont

to secure the *full value of the residual gold. Such a direction, viewed any which way, could sustain only if there was, at least prima facie, material on the basis of which it could be held that Augmont would be liable, ultimately, to disgorge the full value of the residual gold to One97.*

93. The liability of One97 to pay customers who chose to exercise their option of redemption or in respect of whose gold, Augmont chose to exercise its option of re-purchase, to pay the customers, cannot be gainsaid. The fact that such payments were indeed made by One97, are reflected in from its ledger, have also been noted by the learned Arbitral Tribunal.

94. One97 had, in its Statement of Claim, specifically claimed the value of the residual gold, as one of its claims before the learned Arbitral Tribunal. The *power* of the learned Arbitral Tribunal to secure the said claim cannot, therefore, be denied. The only issue, therefore, is whether the said interlocutory direction, as passed by the learned Arbitral Tribunal in the impugned order, calls for interference by this Court in exercise of its appellate jurisdiction under Section 37(2).

95. Unlike the direction for deposit of the monies paid by One97 to the customers, during the period 8th January, 2019 to 21st February, 2019, in respect of which the learned Arbitral Tribunal had found the amount to be admittedly payable to One97 by Augmont, there is, *prima facie*, no justifiable basis on which it could be said that One97

would be liable to pay the entire value of the residual gold to the customers.

96. Even if there were, the learned Arbitral Tribunal, in directing furnishing of a bank guarantee by Augmont, has not proceeded either on the basis of a *prima facie* finding of liability of Augmont to pay the entire value of the residual gold, or on the basis of any admission, or admitted liability, of Augmont in that regard. All that the learned Arbitral Tribunal holds is that Augmont was merely a custodian of the residual gold and that One97 was, as a matter of fact, paying customers, who sold back the gold to Augmont even after 21st February, 2019. Any direction to Augmont, to secure the *value* of the residual gold, could follow only *if there was a further finding, at the very least, that Augmont was liable to pay the said value of the residual gold to One97. That finding, however, is absent.*

97. Moreover, Clause 24.2 requires Augmont to continue providing services for redemption or selling of gold only for four months after termination. Whether such liability would continue in respect of customers who did not choose either to sell back the gold to Augmont, or to redeem the residual gold, is, in my view, arguable. There is no *prima facie* view, in that regard, expressed by the learned Arbitral Tribunal. Sans such a finding, the learned Arbitral Tribunal could not, in exercise of its Section 17 jurisdiction, have directed securing, by Augmont, of the entire *value of the residual gold*.

98. The direction, by the learned Arbitral Tribunal to Augmont, to furnish a bank guarantee covering the entire value of the residual gold cannot, therefore, sustain.

Conclusion

99. For the aforesaid reasons, the impugned order is upheld to the extent it directs securing, by Augmont, of ₹ 2,61,22,319/-, with the modification that the said amount would not be paid to One97, but would be deposited with the learned Registrar General of this Court, and would abide by the outcome of the arbitral proceedings. The direction, to Augmont, to furnish a bank guarantee of ₹ 3,30,57,992/-, representing the value of the residual gold, is set aside.

100. The appeal stands disposed of accordingly.

101. Needless to say, the findings in this order are only for the purposes of disposing of the present appeal, against the order passed by the learned Arbitral Tribunal under Section 17 of the 1996 Act. They would not, therefore, influence the learned Arbitral Tribunal on taking a final view in respect of any of the issues in controversy before it in the arbitral proceedings.

C. HARI SHANKAR, J.

SEPTEMBER 27, 2021
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