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

Date of Decision: 01st September, 2021

\+ **ARB. A. (COMM.) 42/2021, I.A. 10953/2021 & I.A. 10954/2021.**

M/S VARAHA INFRA LTD. ..... Appellant

Through: Mr. Sandeep Sethi and Mr. Rajeev Sharma, Senior Advocates with Mr. Abhishek Birthray, Mr. Prateek Seth and Mr. Akshit Mago, Advocates.

versus

M/S JIANGXI CONSTRUCTION ENGINEERING (GROUP) CO. LTD. ..... Respondent

Through: Mr. Sachin Datta, Senior Advocate with Mr. Farrukh Khan, Mr. Ateendra Saumya Singh and Mr. Amrit Lamba, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') has been filed impugning to a limited extent, the orders dated 9th August, 2021 and 18th August, 2021 passed by the learned Arbitrator, disposing of applications, filed by both the parties under Section 17 of the Act.

2. The Appellant is the Respondent in the arbitral proceedings and the Respondent is the Claimant therein. The reliefs granted by the learned Arbitrator, as noted in the operative portion of the order dated 9th August,

2021 read as follows:

> *"4. The operative part of the order is being passed as under:*
> *a) The Claimant is to release an amount of Rs 8,59,73,470/- in favour of the Respondent against RA bill number 12, out of Rs 9,05,46,067, which was received in the JV Account on 15.7.2021, subject to the condition that the said funds shall be used only for the purposes of Andhra Project. The Respondent will file the details of funds utilization along with documents by way of affidavit within thirty days. The Respondent will file an undertaking within seven days that the Respondent will not receive payment in its own account directly from the Authority. The Respondent will only receive the payment either from the Gujarat JV account or new account of JV account Andhra which is opened (when it will start operating) after completing the remaining few formalities by the Claimant.*
>
> *b) The Claimant is also to release an amount of Rs 15,15,39,073/- lying in the Gujarat JV Account towards its share as per JVA 6.12.2019. The Claimant has undertaken that if any order will be passed by this Arbitrator at any point of time in future, the claimant shall re-deposit/ return the restitution of the said amount and shall abide any direction issued by the Arbitrator. The Claimant is agreed to file formal undertaking by way of affidavit within seven days. The statement of Claimant's counsel is accepted without prejudice to its right and contention to contest the arbitration proceedings which are pending before me."*

3. The Appellant impugns the aforesaid order in respect of directions issued under para (b) above.

Factual background

4. Before dealing with the contentions of the parties, it would be apposite to briefly note the facts of the case:

4.1. The genesis of the dispute is that parties entered into a Joint Bidding Agreement dated 16th November, 2018 to constitute a Joint Venture ('JV') for the purpose of bidding for a National Highways Authority of India ('NHAI') Project in the State of Andhra Pradesh for *"Six laning of existing 4-lane road from Gundugolanu (Design km*

1023.280) to Kalaparru (Design km 1050.680) of NH-5 (New NH-16) (Design Length- 27.400 km) in the State of Andhra Pradesh NHDP Phase - V under Bharatmala Pariyojana on EPC Model" (in short 'Project').

4.2. The Appellant had provided bid security for the Project in form of a bank guarantee. The understanding between the parties was that the Appellant being a local contractor would lead the way by preparing the bid estimates, completing all requisite formalities for bid submissions, and act as the lead member post award of the work. In the event work was awarded to the JV, the bid security was to be released, and the Respondent was to furnish Performance Bank Guarantee and Mobilization Advance Bank Guarantees as may have been required as per the Engineering, Procurement and Construction Agreement ('EPC Agreement') to be executed with NHAI.

4.3. JV being the L-1 bidder, was awarded the Project. Post that, an EPC Agreement was executed between NHAI and JV on 25th October, 2019. This was followed by the execution of a Joint Venture Agreement ('JVA') on 6th December, 2019. As per the terms of the JVA, the Appellant had to discharge obligations under the EPC Agreement for which it was entitled to 94.5% of the revenue and the Respondent had to provide expertise and technical inputs for which it was entitled to an estimated consultation fee of 5.5% of the revenue.

4.4. According to the Appellant, Respondent defaulted in its obligations under the JVA and committed breach of fundamental terms contained therein and was not entitled to any fee. After repeated warnings, the Appellant took over the assets in terms of Clause 6(h) of

the JVA to ensure completion of the Project and wrote to NHAI to remit subsequent payments in Appellant's bank account.

4.5. Respondent invoked arbitration on 6th August, 2020. By mutual consent, the Arbitrator was appointed, and the arbitration proceedings are in progress.

4.6. The Respondent filed an application under Section 17 of the Act, *inter alia*, seeking a direction to the Appellant to immediately transfer a sum of Rs. 14,43,98,200/- with interest to the Respondent, being its share of 5.5%. They further sought a direction to the Appellant to receive all funds in a designated joint venture account amongst other reliefs. When the said application was taken up for consideration, the learned Arbitrator passed the order dated 21st May, 2021, relevant portion whereof is extracted herein below:

> *"6. I have gone through the contents of the application. As a temporary measure, till the pleadings in the application are finally decided, without prejudice to the rights and contention of the parties, the suggestion made on behalf of the Respondent is accepted to the extent that the Respondent shall open a joint venture account within one week from today. The counsel for the Respondent states that till such time if any amount is received from Vijayawada Project, the same shall be deposited in the joint venture account. The Respondent undertakes to maintain the balance of not less than 5.5 percent in the designated joint venture account and he may be free to spend the money in the project and he shall also give all the details and documents for utilization of said amount before this Arbitral Tribunal, with a copy to the learned counsel for the Claimant. The Respondent is also agreeable that in case any amount is received in the said account from today onwards, the information will be given to the learned counsel for the Claimant as well as to the Arbitral Tribunal within 24 hours on the receipt of said amount. In view thereof, without prejudice to the right of the Claimant, the counsel states that he will not have any objection to release the said amount, subject to the condition that the respondent shall maintain at least 5.5 percent of the amount received during this period."*

4.7. The Appellant filed its reply to the Respondent's application

under Section 17 of the Act and disputed the entitlement of the Respondent to receive its share of 5.5% of the revenue.

4.8. In the meantime, on 15th July, 2021, an amount of Rs. 9,05,46,667/- was received from NHAI against R.A. Bill No. 12 into the JV account operated by the Appellant and the Respondent.

4.9. According to the Appellant, despite undertaking recorded in the order dated 21st May, 2021, the Respondent did not release the assured amount; they moved an application under Section 17 of the Act seeking immediate release of funds which were required for execution of the Project. Later, on 5th August, 2021, Appellant filed another application under Section 17 of the Act seeking immediate release of funds for purpose of execution of the Project.

4.10. By way of impugned orders dated 9th August, 2021 and 18th August, 2021, the learned Sole Arbitrator decided the applications filed by both the parties.

5. In this background, Appellant has filed the present appeal aggrieved with the directions given in para 4(b) of the impugned order dated 9th August, 2021, whereby Respondent is entitled to release of an amount of Rs. 15,15,39,073/- lying in the Gujarat JV Account towards its share as per JVA.

Contentions of the parties

6. Mr. Sandeep Sethi, Senior Counsel for the Appellant, assails the directions of the learned Arbitrator, by arguing as follows:

6.1. By virtue of the impugned orders, the learned Arbitrator has passed a money decree at the interim stage, while exercising

jurisdiction under Section 17 of the Act. Section 17 empowers an Arbitral Tribunal to pass orders by way of 'interim measure of protection' for securing the subject matter of dispute. The impugned directions to the Appellant to make payment of an amount, entitlement whereof is in dispute, is beyond the scope and ambit of Section 17.

6.2. The impugned directions are not sustainable under any of the provisions of the Act. The directions of this nature could only be issued having regard to principles applicable to Order 12 Rule 6, Order 39 Rule 10 or Order 15A of the Code of Civil Procedure, 1908 ('CPC'). However, in the instant case, none of the situations, as contemplated in the afore-noted provisions arise, that warranted grant of final relief.

6.3. As on the date of passing of the impugned order, there was no Statement of Claim ('SoC') filed before the learned Arbitrator by either party. The learned Arbitrator, therefore, was not even cognizant of the nature of the claims *inter se* the parties for assessing whether the directions in the impugned orders were called for or not.

6.4. Under Clause 3.12 of the JVA, for providing technical inputs, the Respondent was entitled to fee to the extent of 5.5% of the payments received from NHAI. The Appellant strongly disputes the entitlement of the Respondent. However, the learned Arbitrator has recorded that *"providing of technical inputs is merely a formality"*. The said finding is perverse and explicitly contrary to Clauses 3.12 and 7.1 of JVA and amounts to rewriting the contract.

6.5. The learned Arbitrator has not only recorded conclusions contrary to the pleaded case of the Respondent but has also failed to consider the documents and submissions placed before him by the

Appellant. The learned Arbitrator, on the one hand recorded that no conclusion can be drawn about providing technical inputs and on the other passed directions at the interim stage that amount to passing of a money decree.

6.6. The impugned order militates the Appellant's right of restitution if it eventually succeeds in arbitration, since the Respondent is a Chinese company having no assets in India. For this reason, the undertaking given by the Respondent has no value in the eyes of law. It has been disclosed that Respondent has provided bank guarantees worth Rs. 500 crores in other projects. This would be to no avail since the bank guarantee is a separate agreement between the bank and the beneficiary and cannot be invoked for any other purpose other than for which the bank guarantee has been issued. In case of any default or failure on part of the Respondent, the banks cannot be compelled to make payment for and on behalf of the Respondent on the strength of bank guarantees relied upon by the Respondent. Therefore, the undertaking given by the Respondent is illusionary and meaningless.

6.7. In support of his submissions, Mr. Sethi has relied upon the judgments of this Court in ***Bharat Heavy Electricals Ltd. v. DPC Engineering Project Pvt. Ltd.***[1] and ***Supertrack Hotels Pvt. Ltd. v. Friends Motels Pvt. Ltd.***[2] (para nos. 13, 15, 16, 17 and 19).

7. Mr. Sachin Datta, Senior Counsel for the Respondent, on the other hand defends the impugned orders and submits as follows:

[1] 2011 SCC OnLine Del 4378.
[2] 2017 SCC OnLine Del 11625.

7.1. The Appellant is a willful defaulter and has been blacklisted by several organizations.

7.2. The directions given by the learned Arbitrator are premised on a correct analysis and construction of the terms of the contract. The amount directed to be released is the legitimate entitlement of the Respondent, computed on the basis of payments received from NHAI.

7.3. The Appellant did not have the wherewithal to furnish the bank guarantees to the NHAI which was the prerequisite for the award of the contract. These bank guarantees were arranged by the Respondent. For the Project in question, Respondent has furnished bank guarantees for a value of Rs. 77.80 crores, for which it has incurred expenditure of Rs. 1.41 crores.

7.4. In terms of Clause 3.12 of the JVA, entitlement of the Respondent, described as consultancy, is fixed at 6% of the net amount received from NHAI. Payment has admittedly been received from NHAI, but till date, the Respondent has not received a single penny.

7.5. Reliance was also placed upon Clause 7.1 to argue that in terms of the said provision, entitlement of the Respondent shall be in terms of Clauses 3.12 and 3.13. Further, Clause 7.1(d) expressly also provides that the fee payable to the Respondent (Claimant therein) shall be given priority over any other payment to be made.

7.6. Despite the mobilization amount having been released by the NHAI into the JV Account, no amount has been received by the Respondent. On the other hand, Appellant has started diverting money to its own account in utter violation of the contractual obligations to that effect.

7.7. The learned Arbitrator has observed that providing of technical inputs is a mere formality and the Respondent has always been willing to provide the same. The Respondent would still be entitled to 6% of the amount received from NHAI as Clause 3.12 of the JVA does not make the payment of the said amount conditional on work being done by the Respondent.

7.8. Despite multiple reminders, the Appellant has not submitted bills from vendors and sub-contractors to the Respondent. This conduct has led to the suspicion that Appellant is siphoning funds of the Project.

7.9. Without prejudice, in case the Court finds ground to interfere in the impugned orders, then the Respondent would also be entitled to similar relief regarding the direction contained in terms of operative portion/ relief being para 4(a) of the impugned order dated 9th August, 2021.

7.10. Respondent has already filed two applications under Section 17 of the Act before the learned Arbitrator, one of which is for seeking further directions regarding utilization of the amount of Rs. 15.15 crores, which has been directed to be released to the Respondent. The other application which is for utilization of money that has been directed to be released to the Appellant, is also pending. Clause 4.8 of the JVA would apply insofar as the amount which has been directed to be released to the Appellant. The said applications are still pending consideration and, therefore, hearing of the present appeal may be deferred.

Analysis & Reasoning

8. The Court has considered the contentions of the counsel for parties.

9. Section 17(1)(ii) vests power with the Arbitral Tribunal to grant orders for interim measures of protection. The language of the said provision outlines the broad width of the scope of jurisdiction that can be exercised by the Arbitral Tribunal. Although, the provision does not lay down the standards to be applied, the Courts invariably rely upon standards prescribed under Orders 38 and 39 of the CPC 1908.

10. A Division Bench of this Court in ***Ajay Singh v. Kal Airways Private Limited***[3] relying upon the judgment of the Supreme Court in ***Indian Telephone Industries v. Siemens Public Communication***[4] observed that although there is no textual basis in the Act linking the aforesaid provision with the provisions in the CPC, nevertheless, principles underlying exercise of power by Courts in the CPC are to be kept in mind, while passing orders under Section 9 of the Act.

11. Recently, a coordinate Bench of this Court in ***Dinesh Gupta v. Anand Gupta***[5] further clarified the applicability of the principles of CPC to Sections 9 and 17 of the Act and held that the principles governing Order 39 CPC would also guide the Court while exercising jurisdiction under Section 9 of the Act as well as the Arbitral Tribunal under Section 17. Further, the Court observed that while the applicability of Order 38 Rule 5, 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 38 Rule 5 of the CPC cannot, bodily, be incorporated into the provision, though the principles governing the exercise of jurisdiction under Order 38 Rule 5 are required to inform such exercise of jurisdiction; a middle approach would have to be

[3] Judgment dated 3rd July, 2017 in FAO(OS)(COMM) 61/2016.
[4] 2002 (5) SCC 510.
[5] Judgment dated 17th September, 2020 in Arb. A. 4/2020.

taken without taking Order 38 Rule 5 as entirely inapplicable to Section 17(1)(ii)(b) or as applicable with all its rigour and vitality.[6] The Court summarized the position by stating that it is apparent that the principles behind Orders 38 and 39 of the CPC are required to guide the exercise of jurisdiction under Section 9, or Section 17 of the Act, though the provisions themselves are not to be regarded as having been bodily incorporated into Sections 9 or 17.[7]

12. On this issue, it would also be apposite to refer to the observations made by the Supreme Court in ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.***[8]**,** which was referred to in ***Dinesh Gupta*** *(supra)*. In ***Adhunik Steels*** *(supra)*, the Supreme Court drew a parallel between Section 9 of the Act and the power of a Court to grant an interim injunction and observed that it is difficult to imagine that the Legislature while enacting Section 9 of the Act intended to make a provision which was *de hors* the accepted principles that governed the grant of an interim injunction. More importantly, the Court observed when a party is given a right to approach an ordinary Court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that Court would govern the exercise of power conferred by the Act and thus, the principles of balance of convenience, *prima facie* case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act, cannot be kept out.[9]

13. Then in ***Supertrack Hotels*** *(supra)*, another Division Bench of this

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[6] Para 58.6 of *Dinesh Gupta (supra)*.
[7] Para 62.10 of *Dinesh Gupta (supra)*.
[8] AIR 2007 SC 2563.
[9] Para 10 of *Adhunik Steels (supra)*.

Court referred to the judgment in ***Ajay Singh*** *(supra)* and reiterated that Section 9 grants wide powers to the Courts in fashioning an appropriate interim order. Further, the Court also observed that general rules that govern and guide the Court while considering grant of an interim injunction are attracted even while dealing with an application under Section 9 of the Act.[10] The relevant portion of the said judgment reads as under:

> *15. Section 9 of the Act empowers the Court to issue an interim measure of protection securing the amount in dispute in the arbitration as also such other interim measures of protection as may appear to the Court to be just and convenient. Section 9 specifically provides that "Court shall have the same power for making orders as it has for the purpose, and in relation to, any proceedings before it." Thus, though it is correct that Arbitral Tribunal shall not be bound by the CPC i.e. Code of Civil Procedure, 1908, as held by the Supreme Court in Arvind Construction Company Pvt. Ltd. v. Kalinga Mining Corporation & Ors., MANU/SC/7697/2007 : 2007(6) SCC 798, general rules that govern and guide the Court while considering grant of an interim injunction are attracted even while dealing with an application under Section 9 of the Act.*
> *16. In Ajay Singh (supra) it has been held that Section 9 grants wide power to the Court in fashioning an appropriate interim order. Thus, it is correct that in exercise of such power, the Court should be guided by known principles, equally, the Court should not find itself unduly bound by the text of Section 9 of the Act rather it is to follow the underlying principles.*

14. The observations rendered above in the context of Section 9 would equally apply to Section 17 of the Act. The upshot of the above discussion is that the exercise of power under Section 9 should be principled, premised on some known guidelines– hence, the analogy of Orders 38 and 39 of the CPC, is relevant. Equally, the Court should not find itself unduly bound by the text of those provisions, rather it is to follow the underlying principles.[11]**.**

15. In light of the scope of jurisdiction, as outlined hereinabove, the Court finds that the impugned direction to be way beyond the ambit of Section 17

[10] Para 15 of *Supertrack Hotels (supra).*
[11] *Ajay Singh (supra).*

of the Act. The learned Arbitrator has allowed release of part of the amount in dispute, at the interim stage, without adjudication, by applying principles that are essentially applicable to grant of interim injunctions *viz*. *prima facie* case, balance of convenience and irreparable loss. These cardinal principles applicable for grant of interim measure(s) of protection could not be applied for issuing direction(s) that is akin to grant of final relief.

16. The impugned directions cannot be considered as "interim" just because a safeguard of restitution has been introduced by way of direction to the Respondent to furnish an undertaking that the amount will be returned if so directed in future. By virtue of this caveat the release is made conditional-yet the determination is final. The Court finds merit in the contention of Mr. Sethi that in the event the Appellant succeeds in arbitration, it will have to go after the Respondent for recovery and the undertaking would not serve any purpose since Respondent is a Chinese company having no assets in India. Thus, the safeguard introduced by asking for an undertaking could be rendered ineffective and the Appellant may be left with an unenforceable arbitral award.

17. Pertinently, the issue of entitlement is intrinsically linked to Respondent's claim of its consultancy fee for providing expert and technical services. The relevant clauses of the agreement on this aspect - 3.12, 3.13 and 7.1 read as under:-

> *"3.12 The party of the first part i.e. JCEG shall be providing the expertise & technical inputs for the work contract and the estimated billing amount of the consultancy is fixed at 6.0 % of the Net Amount received from the Client, though the deductions from the RA bills will happen at 5.5%, an additional amount of 0.5% will be paid to JCEG in the event of project not getting completed within the Project Schedule as accepted by the Client. The party of the first part will raise the appropriate billing for the consultancy from time to time and this amount will be directly paid through the JV bank*

account.
3.13 Out of this amount of consultancy, 1% (One percent) of the total project value shall be paid from the first installment of Mobilization Advance received from the authority and 1% (One percent) of the total project value from the second installment received of mobilization advance from the authority. The balance 3.50% (Three point five zero percent) payment of the progress payment shall be made against the receipt of running invoices from the authority from time to time.
xxxxxx
xxxxxx
7.1. Revenue Sharing
Subject to the fulfillment of the roles, responsibilities and obligations under the Agreement by JCEG, it is agreed amongst the Party as follow:

JCEG for providing its service shall be entitled to collect a consultation Fees, which shall be paid as detailed in clause 3.12 & 3,13

a) Any amount remaining shall be paid out of receipts from the final bill, as and when paid by the Authority.
b) JCEG only undertakes to bear the Income Tax as per current or further corresponding India laws for mentioned above revenue & rest of the taxes shall form part of the Project Cost.
c) VARAHA for the execution of the Project shall be entitled to receive 94% of the total of all payment received by the Joint Venture from Authority. This 94% payment shall include all the payments made by JV account towards project execution, balance amount will be paid to VARAHA from JV account after deducting all the payments made by the JV account towards project execution invoices submitted by vendors thru VARAHA.
d) Irrespective of the mode of account to be opened, the Parties agree that fee payable to JCEG shall be given priority above any payment to be made. Further; VARAHA ensures that fee payable to JCEG shall have the highest priority.
e) Regardless of the reason for the extension of construction period, JCEG shall get an additional compensation of 0.5% (zero point five percent) per annum of the amount of PBG, due to the lock in of the performance bank guarantee and further expenditure thereon.
f) VARAHA shall be entitled to raise working capital facility or facility of any nature for the purposes of funding & financing the Project. JCEG hereby conveys its no-objection to such facility being availed by VARAHA. However, availment of such facility shall be at sole risk and costs of VARAHA, JCEG or the JV shall not be obligated to provide any corporate guarantee/ personal guarantee for seeking any such credit facility. VARAHA shall ensure that any borrowing shall be with written approval from JCEG in the name of JV.
g) All of penalty by Client due to delay of submission of PBG borne by the

project cost will be shared equally by both the parties.

Notwithstanding anything contrary water in this Agreement or elsewhere the parties will never change the mechanism mentioned under this clause unless and un both the parties agree to do it is writing."

18. The specific case of the Respondent before the learned Arbitrator is that they provided technical inputs and are entitled to fee for the same. On the contrary, the Appellant strongly disputes and fervently denies Respondent's entitlement to alleged amount towards technical inputs. In fact, it has been specifically asserted that the Respondent has not raised any invoice or filed any document before the learned Arbitrator in support of its claim for the fee. In this regard, it would be apposite to highlight the submissions made by the Appellant in its written submissions dated 14th August, 2021 before the learned Arbitrator wherein it is averred as under:

"B…..
(i) ……..The Respondent has pointed out that the entitlement under clause 3.12 is for fee for providing technical services and in fact no technical services were provided by the Claimant and therefore, it is not entitled to the fee.
xxxx
xxxx
C…..
(i) Clause 3.12 explicitly refers to fee being payable to the Claimant for providing technical services and bills being raised by the Claimant for such services. Not even one such bill has been placed on record by the Claimant, nor has it been able to specify the technical services allegedly rendered by it, for which it claims a huge amount of more than Rs. 14 Crores."

19. However, the learned Arbitrator at paras 30 and 33 of the impugned order proceeds to issue the impugned directions for the reasons extracted hereinbelow:

"30. In addition to above, with regard to the dispute of drawings to be supplied by the Respondent, there is a correspondence between the parties by email in the month of October 2020 which would show that the Claimant was complaining that it has not received the details and drawings of subject work. On the other hand, the Respondent in its response stated that such

details were provided. No final conclusion can be drawn about providing the technical inputs as there is no notice or reminder on behalf of Respondent that in case technical input is not provided, the share of the Claimant will not be given. The question of raising the bill will arise only when technical input as per the satisfaction of the respondent is fulfilled. However, being leading the entire project in question, the Respondent is supposed to ask the Claimant to supply the details of technical inputs, if so required. None of the materials is available on record in this regard. Prima facie, it appears that the share of the Claimant agreed in the agreement indirectly akin to the consideration against the BG furnished by the Claimant. Counsel for the Claimant has already submitted that the Claimant has always been willing to supply the details, technical inputs or any assistance to the Respondent to complete the project. It is stated that the Respondent is even not allowing the Claimant to the site.

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33. In the present case, the Claimant has furnished the Bank Guarantee to the tune of Rs 77.80 crores with the Authority. Prima facie, it appears that there is a force in the submission of learned Senior Counsel appearing on behalf of Claimant that 6 percent is just share to be received by the Claimant of the net amount received from the Authority of the value of the project and providing of technical inputs is merely a formality which is never denied / refused by the claimant. Counsel states that for such a huge amount, no-one will furnish the BG unless little bit consideration is involved and the Respondent in the present case is bent upon not to have any share by the Claimant."

20. These afore-noted findings at the interim stage, without examining the respective claims, can only be considered as assumptions, that are *ex-facie* contrary to the contractual terms, extracted above. The learned Arbitrator has formed only a *prima facie* view, as is evident from the above extracted portion, yet he has proceeded to determine Respondent's entitlement to the fee, when there is evidently a disputed factual issue regarding the same. Since the nature of disputes had not been fully presented to the learned Arbitrator, he has visibly erred in concluding that *"providing of technical inputs is merely a formality*", or that "*share of the Claimant agreed in the agreement indirectly akin to consideration against the BG"* and "*if the*

Respondent does not need any input and consultancy, it does not mean that the claimant would not receive any share at all as per the Agreement". Respondent's entitlement of dues in terms of the JVA is in serious dispute and has to be adjudicated after affording the parties an opportunity to put forth their case. The Appellant's case is that the amounts under Clauses 3.13 and 7.1, which deals with sharing of the revenue is *"subject to the fulfillment of roles, responsibilities and obligations under the Agreement by JCEG"*. These contentions pertaining to breach of contractual terms have to be determined on the basis of pleadings and evidence. Whether indeed the roles, responsibilities and obligations have been fulfilled is the fundamental subject matter of adjudication before the learned Arbitrator. Therefore, the impugned directions cannot be countenanced.

21. Further, the Court also finds merit in the contention of Mr. Sethi that the impugned directions are not premised on any admission on part of the Appellant. In absence thereof, it becomes a contested issue and the relief granted goes to the root of the matter and is thus beyond the ambit of Section 17 of the Act. The Appellant has to be afforded an opportunity to defend itself against the claims of the Respondent.

22. In the opinion of the Court there is another reason why the impugned orders are not sustainable. The power of the Arbitral Tribunal under Section 17 of the Act to pass orders of interim protection are to be in the aid of arbitration proceedings. Here the learned Arbitrator has erred in failing to notice that the disputed amounts are already withheld in the joint venture account which is jointly operated by the Appellant and Respondent. Therefore, to that extent, the interest of the Respondent is already secured.

23. The conclusion is that impugned directions were not called for and

beyond the scope of the provision invoked. The relief granted is "final" in nature and could not have been premised on a *prima facie* interpretation of Clauses 3.12 and 3.13 of the JVA especially in light of the fact that there were no pleadings in the form of SoC, Statement of Defence, etc. before the learned Arbitrator. In fact, in para 37 of the impugned order, the learned Arbitrator makes an observation that the clauses referred to by both the parties have to be interpreted at the final stage and for this reason, the learned Arbitrator has declined to grant other reliefs at the interim stage. That being the position, the impugned directions akin to conclusions drawn on a tentative view, are not sustainable.

24. In view of the above, the Court allows the present appeal and sets aside the impugned directions contained in para 4(b) of the impugned order dated 9th August, 2021.

25. It is made clear that the observations made by this Court are only for the purpose of deciding the present appeal. The learned Arbitrator shall proceed to decide the subject matter of the arbitration proceedings uninfluenced by any of the above observations made hereinabove.

26. Accordingly, the appeal is allowed and disposed of in the above terms. The pending applications also stand disposed of.

SANJEEV NARULA, J

SEPTEMBER 1, 2021
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(corrected and released on 27th September, 2021)