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

% **Order reserved on: 09 February 2023**
Order pronounced on: 14 February 2023

\+ O.M.P.(I) 1/2023 & I.A. 2265/2023(for exemption)

ASAD MUEED & ANR. ..... Petitioners

Through: Mr. Rajiv Nayar, Sr. Adv. with Mr. Saket Sikri, Ms. Ekta Sikri, Mr. Vikalp Mudgal, Mr. Ajaypal Singh Khullar, Ms. Priya Singh, Mr. K.V. Sriwas Narayanan, Advs.

versus

HAMMAD AHMED & ORS. ..... Respondents

Through: Mr. Sudhir Nandrajog, Sr. Adv. with Mr. Shreyans Singhvi and Ms. Tanuja Singh, Advs. for R-1 & 3.
Ms. Malvika Trivedi, Sr. Adv. with Mr. Shreyans Singhvi, Ms. Tanuja Singh and Mr. Shailendra Slaria, Advs. for R-2.
Mr. Kailash Vasdev, Sr. Adv. with Ms. Ekta Mehta and Ms. Kanika Sharma, Advs. for R-4.
Mr. Umesh Gupta, Adv. R-5.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

1. This petition under Section 9 of the **Arbitration and Conciliation Act, 1996**[1] has been preferred seeking the following reliefs: -

[1] The Act

> "a) Pass an ex-parte ad-interim order/direction thereby restraining the Respondent No.5 from registering the amended and ratified Memorandum of Association of Jamia Hamdard-Respondent No.4, which has been illegally amended to change the legal status of the HIMSR from a constituent institution to a school:
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> b) Pass an ex-parte ad-interim order/direction to stay the effect of the minutes of meeting of Jamia Hamdard Society dated 24.01.2023 in furtherance of the impugned minutes dated 05.12.2022 till the disposal of the matter by the Ld. Arbitrator:
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> c) Pass an ex-parte ad-interim order/direction thereby restraining Respondents No. 1-4 from taking any precipitative action(s) in furtherance of the subject dispute pending adjudication by the Ld. Arbitral Tribunal."

2. Admittedly, the instant petition is not the first foray of the petitioners before this Court seeking reliefs in respect of a resolution dated 05 December 2022 passed by the **Jamia Hamdard Society**[2] and in terms of which a decision came to be taken for converting the **Hamdard Institute of Medical Sciences and Research**[3] from a 'constituent institution' to a **'school'** of the Jamia Hamdard [deemed University]. For the purposes of rendering a decision on the present petition, the following essential facts may be noticed.

3. The dispute between the heirs and descendants of the Late Hakeem Hafiz Abdul Majeed Sahib came to be resolved in terms of a Family Settlement Deed dated 22 October 2019 and an Amended Family Settlement Deed dated 21 February 2020. Differences appear to have arisen between the parties relating to the implementation of the various stipulations contained in the said Family Settlement Deeds. According to the petitioners, the principal dispute relates to

[2] JHS
[3] HIMSR

the segregation of HIMSR from the Jamia Hamdard [deemed University], the fourth respondent herein, and its transfer to the **Hamdard Education Society**[4] as a going concern. It is the case of the petitioners that it was the action of the respondents acting in breach of the aforesaid prescriptions relating to HIMSR as contained in the Family Settlement Deeds that led to the filing of the first petition under Section 9 of the Act which came to be numbered as OMP (I) No. 7/2022. The said petition was finally disposed of by a learned Judge of the Court in terms of an order dated 20 September 2022 with the following directions: -

> "13. In view of the aforesaid submissions of the parties, the petition is disposed of with the following directions: -
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> a. With the consent of learned counsel for the petitioners and the respondent Nos. 1, 2 and 3, the disputes between them under the FSD are referred to the arbitration of Hon'ble Mr. Justice Badar Durrez Ahmed,, former Chief Justice of the High Court of Jammu and Kashmir [Tel:-7042205786]. At Mr. Vasdev's request, at this stage the University is not made a party to the arbitral proceedings. However, it is open to the parties to make an application before the learned arbitrator in this regard, if so advised.
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> b. It is expected that the parties will cooperate with each other in the spirit of the FSD and the resolution of the University. Although the University is not being referred to the arbitration at this stage, Mr. Vasdev states that the University will facilitate the implementation of the directions given by the learned arbitrator in this regard.
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> c. With this objective, it is further directed as follows: -
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> i. The computation of the amounts due from the petitioners' group to respondent Nos. 1 to 3 in terms of Clause 25 of the FSD, read with Annexure V thereof, will be placed before the learned arbitrator within two weeks. The parties may seek necessary direction in this regard from the learned

[4] HES

arbitrator, including for the amounts to be deposited with him in escrow.

ii. Mr. Vasdev states that the documents required to be issued by the University will be issued simultaneously upon deposit of the amount contemplated by Clause 25 of the FSD read with Annexure V therein by the petitioners.

iii. The petitioners will furnish quarterly accounts as directed in paragraph 12 above.

iv. Mr. Nandrajog states that the respondent Nos. 1 to 3 have not interfered, at any stage, in the independent functioning of HIMSR under the MREC. He assures the Court that they will continue to cooperate with the petitioners in maintaining the independent status of HIMSR under the MREC and will not take any steps inconsistent therein.

d. The parties may make their respective claims under the FSD before the learned arbitrator. It is made clear that the parties may also approach the learned arbitrator for further directions under Section 17 of the Act. The directions given in this order are only intended to hold the field until the learned arbitrator has the opportunity to consider the matter and pass further directions, as may be required from time to time. The parties are at liberty to seek modification, variation, or vacation of the orders passed by this Court before the learned arbitrator.

e. Learned Senior Counsel for the parties state that the learned arbitrator may be requested to fix his own remuneration in accordance with law."

4. The Arbitral Tribunal came to be constituted in terms of the directions issued on that first petition under Section 9 of the Act. It becomes pertinent to note that the Court while disposing of the said petition had also taken on board the assurance tendered by the respondents that the independent functioning of HIMSR would not be interfered with and that parties would continue to cooperate in maintaining the independent status of the said institution. The learned Judge while disposing of the said petition had also pertinently

observed that the directions contained in that order would only hold the field till such time as the Arbitral Tribunal has the opportunity to consider the matter and pass further directions. Parties were also accorded liberty to seek modification, variation or vacation of the orders passed by the Court before the Arbitral Tribunal.

5. Upon the said petition being disposed of, a notice of preliminary hearing is stated to have been issued by the Arbitral Tribunal on 03 October 2022. The petitioners here are thereafter stated to have filed two applications before the Arbitral Tribunal, one for impleadment of the fourth respondent and the second under Section 17 of the Act for directions being framed in the interim requiring the respondents to comply with the terms of the Family Settlement Deeds as well as to maintain the legal status of HIMSR as a constituent institution. When the aforesaid applications were taken up on 12 October 2022 by the Arbitral Tribunal, notices were issued on the said applications and directions for them to be placed for further consideration on 09 November 2022. The interim directions which were granted by the Court and stood comprised in its order of 20 September 2022 were maintained.

6. It is the case of the petitioners that despite the continuance of the interim directions by the Arbitral Tribunal, they came to know that the respondents were proposing to take steps for changing the status of HIMSR in a meeting scheduled to be held on 29 October 2022. This led to the filing of a second petition under Section 17 of the Act before the Arbitral Tribunal. On the said petition, the Arbitral Tribunal by its

order of 27 October 2022 directed that the interim directions passed by this Court on 20 September 2022 shall continue. The said order thus represented a reiteration of the directions issued by the Arbitral Tribunal on 12 October 2022. The petitioners further assert that substantial arguments on the applications which were pending before the Arbitral Tribunal were advanced on 19 November 2022. Thereafter 12 December 2022 was fixed for further proceedings before the Arbitral Tribunal. It is further alleged that the petitioners came to know that the **Board of Management**[5] of respondent No.4 was proposing to hold an emergent meeting on 03 December 2022 and proposed to amend its Memorandum of Association and thus alter the status of HIMSR. This led to the filing of a third application under Section 17 of the Act before the Arbitral Tribunal on 02 December 2022. Taking cognisance of the apprehension expressed by the petitioners, the Arbitral Tribunal proceeded to pass the following order: -

> "This Tribunal has already continued the Interim Orders passed by the Hon'ble High Court of Delhi. No precipitative action be taken by any of the parties till the next date of hearing.
>
> Justice Badar Durrez Ahmed (retd)
> Sole Arbitrator"

7. On 05 December 2022, the BoM of the fourth respondent in an emergent meeting is shown to have taken up the issue of the various directives issued by the University Grants Commission calling upon the Jamia Hamdard [deemed University] to convert HIMSR from a 'Constituent Institution' to a 'School'. The BoM is shown to have

[5] BoM

unanimously agreed to comply with the directives and regulations as issued by the UGC and resolved as follows: -

> "a) Jamia Hamdard (Deemed to be University) should follow and comply with all the Rules and Regulations of UGC (Institutions Deemed to be Universities) Regulations - 2019 in totality.
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> b) Hamdard Institute of Medical Sciences and Research (HIMSR), as per the directive of the UGC be converted from a 'Constituent Institution' into a 'School' of Jamia Hamdard, the same be incorporated in the Memorandum of Association (MoA) of Jamia Hamdard made in accordance with UGC (Institutions Deemed to be Universities) Regulations - 2019. MoA to be modified accordingly.
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> c) Jamia Hamdard to implement the directives of the UGC as suggested / recommended in the UGC-FFC report."

8. The aforesaid facts and the passing of the resolution aforenoted are stated to have been brought to the attention of the sole arbitrator who on 12 December 2022 directed the respondents to place on the record the minutes of the meeting of the BoM held on 05 December 2022. Parallelly, the petitioner No.1 is also stated to have made a representation to the Registrar of Societies requesting it to not register the amendments as were proposed by the BoM.

9. Asserting that the passing of the aforesaid resolution clearly amounted to contempt of court, the petitioners came to file Cont. Case (C) No. 1379/2022 on which on 16 December 2022, the following order came to be passed: -

> "7. I have heard the learned senior counsel, perused the paper book and considered the relevant provisions of the relevant provisions of the Act of 1996. The Petitioner has filed three Section 17 applications before the Ld. Sole Arbitrator, namely on, 01st October, 2022, 22nd October, 2022 and 2nd December, 2022 and the same are pending consideration before the Ld. Sole Arbitrator. In my considered opinion, as the entire conspectus of facts is before the Ld. Sole Arbitrator who is seized of the disputes in their

> entirety, it will only be appropriate that in the first instance the Ld. Sole Arbitrator should decide as to whether there has been any violation of the orders passed in the arbitral proceedings. The ramifications and consequences of the resolutions dated 31st October, 2022 and dated 05th December, 2022 on the Petitioner's claims in the arbitral proceedings should also, in the first instance be examined and opined upon by the Ld. Sole Arbitrator. Further proceedings before this Court shall be subject to the representation, if any, made in terms of Section 27 (5) of the Act of 1996 by the Ld. Sole Arbitrator. The Petitioner may, if so advised, approach the Ld. Sole Arbitrator in terms of the observations made above.
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> 8. The learned senior counsel for the Petitioner also states that the Petitioner has intimated the Registrar of Societies about the filing of the present contempt petition and the challenge laid to the resolution dated 05th December, 2022. The said statement of the learned counsel for the Petitioner is taken on record."

10. During the pendency of the application under Section 17 before the Arbitral Tribunal, the petitioners came to institute a second petition under Section 9 of the Act which came to be numbered as O.M.P (I) No. 14/2022. The said petition came to be disposed of by an order of 23 December 2022 with the Court noting the statement made by learned counsel representing the Registrar of Societies that it was yet to receive a copy of the resolution passed by the respondent University and that in any case as and when such a resolution is placed for the consideration of the Registrar, the same shall be considered in accordance with law. The Court had while disposing of the said petition also taken note of the contention addressed on behalf of the respondent University that the Resolution of 05 December 2022 had come to be passed bearing in mind the peremptory directives issued by the UGC and which had essentially left it with no option but to take further steps for hiving of the medical institution HIMSR in accordance with its directives. However, this Court refused to issue

any interim directions on the said petition taking into account the fact that the Arbitral Tribunal had already taken cognisance of the disputes which had arisen in light of the Resolution of 05 December 2022.

11. It becomes pertinent to note that the Court while passing orders on the contempt petition which had been filed, had also left it open to the Tribunal to frame a representation referable to Section 27(5) of the Act if circumstances so warranted. As per the petitioners own showing such a representation has been duly made and is presently pending consideration of the Arbitral Tribunal. It is as things stood thus when the present petition representing the third instance of the petitioners invoking Section 9 came to be filed.

12. The immediate cause for the filing of the present petition appears to be certain resolutions which are stated to have been passed in a meeting of the BoM of the respondent University held on 24 January 2023. In terms of Agenda Item 3(3), the BoM is stated to have confirmed the resolutions passed by JHS on 19 December 2022 and the minutes of the adopted resolution dated 20 September 2022. Those resolutions purport to adopt and approve the decisions taken by the BoM in its emergent meeting held on 05 December 2022. It becomes pertinent to note that even before the passing of the aforesaid Resolution of 24 January 2023, the petitioners appear to have approached the Arbitral Tribunal by way of a fourth application under Section 17 of the Act seeking an injunction restraining the respondents from holding any meeting of JHS in which the proposed change in respect of the status of HIMSR may arise for discussion. A further

direction was sought for the respondents being restrained from undertaking any discussion in respect of HIMSR or giving effect to, approving or ratifying the Resolutions of 05 December 2022 and 24 January 2023. On the said application, the Arbitral Tribunal proceeded to pass the following order: -

> "The Claimants have filed an application (4th) under Section 17 of the Arbitration and Conciliation Act, 1996. The application was filed on the apprehension that the meeting of Jamia Hamdard Society, proposed to be held on 24.01.2023, would, inter-alia, be in respect of the status of HIMSR. However, Mr Nandrajog, learned senior counsel, appearing for the Respondents states, on instructions, that the issue concerning the status of HIMSR is not going to be discussed as, in any event, that is the subject of concern of the Jamia Hamdard (deemed be university). That being the case, no orders are necessary on this application and the same is disposed off."

13. As would be evident from the prayers which are made in the present application under Section 9, the petitioners have yet again approached the Court seeking emergent interim directions being framed restraining the fifth respondent from registering the amended and ratified MoA of the respondent University.

14. Addressing submissions on behalf of the petitioners, Mr. Nayar, learned Senior Counsel, principally argued that since the fifth respondent as well as the respondent No.4 University do not stand arrayed as parties before the Arbitral Tribunal, the petitioners have no other efficacious remedy and are compelled to invoke the Court's jurisdiction as conferred by Section 9. Mr. Nayar submitted that since the Arbitral Tribunal does not stand empowered in law to issue orders of restraint against non-parties, the petitioners have no alternative but to approach the Court for emergent directions being issued restraining

respondent No.5 from registering and taking on board the amendments as introduced in the MoA pursuant to the Resolution passed on 05 December 2022. Mr. Nayar submitted that unless emergent interim directions are issued, the change in status of HIMSR shall attain finality and leave the petitioners with a *fait accompli*. Mr. Nayar has taken the Court through the various orders passed by the Arbitral Tribunal to contend that despite the sole arbitrator having repeatedly reiterated and reaffirmed the interim directions issued by the Court on 20 September 2022, the respondents have clearly and with impunity proceeded to act in violation thereof. Mr. Nayar highlighted the fact that even the assurances proffered by counsels appearing before the Arbitral Tribunal have been belied.

15. Insofar as the issue of an Arbitral Tribunal being empowered to issue injunctions against non-parties is concerned, Mr. Nayar, drew the attention of the Court to the judgment rendered in **Blue Coast Infrastructure Development Pvt. Ltd. vs. Blue Coast Hotels Ltd. and Another**[6] where the following observations came to be made: -

> "**23.** Learned Senior Counsel relies on the judgment of this Court in *Value Advisory Services* v. *ZTE Corporation*, 2009 SCC OnLine Del 1961, where the Court has held that no general principal of maintainability or non-maintainability of a petition under Section 9 of the Act against a third party can be laid down. It is also held by the Court that if as a general Rule, it is laid down that in exercise of power under Section 9 of the Act, no direction can be issued to non-parties to an Agreement containing the Arbitration Clause or non-parties to Arbitration Proceedings, the same will hamper the efficacy of the said provision. Attention is specifically drawn to para 16 of the judgment where the Court while dealing with the provisions of CPC, at pre-decretal stage held that the attachment under Order 38 Rule 6 CPC can also be of the property of the

[6] 2020 SCC OnLine Del 1897

Defendant, not in possession of the Defendant, but belonging to it and is for the present in possession of another person in trust for or on behalf of the Judgment Debtor. Such attachment of property is permissible under Section 60 CPC. The Court further held that there is no reason for holding that if the Claimant, in an Arbitration, had been a Plaintiff in a Suit and could have obtained Attachment before Judgment of the property of the defendants, in the hands of a third party then merely because he is before an Arbitrator, he is not entitled to such an order.

25. Respondent No. 1, as noticed above, did not file its reply and has more or less taken a neutral stand. The question posed by Respondent No. 2 is the scope and sweep of Section 9 Proceedings qua a non-party and a non-signatory to an Arbitration Agreement. Bombay High Court in the case of *Girish Mulchand Mehta* (supra), relied upon by Respondent No. 2 itself, held as under:—

> *"12. The next question is whether order of formulating the interim measures can be passed by the Court in exercise of powers under Section 9 of the Act only against a party to an Arbitration Agreement or Arbitration Proceedings. As is noticed earlier, the jurisdiction under Section 9 can be invoked only by a party to the Arbitration Agreement. Section 9, however, does not limit the jurisdiction of the Court to pass order of interim measures only against party to an Arbitration Agreement or Arbitration Proceedings; whereas the Court is free to exercise same power for making appropriate order against the party to the Petition under Section 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the Arbitration Agreement or Arbitration Proceedings does not affect the jurisdiction of the Court under Section 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the Arbitration Agreement."*

26. In *Gatx India Pvt. Ltd.* v. *Arshiya Rail Infrastructure Limited*, 2015 VAD (Delhi) 190, this Court again examined the legal position regarding the power of a Court under Section 9 of the Act to issue interim orders against third parties to the Arbitration. The Court clearly drew a distinction between Section 9 of the Act and Section 17 of the Act and the powers of the Court and an Arbitral Tribunal thereunder respectively. It was held that unlike Section 17 of the Act which specifically allows for measures to be directed only against parties to the Arbitration, there is nothing in Section 9 of the Act which restricts the power of a Court from passing orders against non-signatories to the Arbitration Agreement. The Court

did notice that there was a divergence of opinion of this Court on the maintainability of a petition under Section 9 of the Act against the third party and referred to a few of those judgments in which divergent views were taken. The Court then referred to another judgment of this Court in the case of *Value Advisory* (supra), which has been relied upon by the Petitioner in this case and has been noticed in the earlier part of this judgment. Relevant paras of the judgment in *Gatx India* (supra) are as under:—

> *"66. While the section explicitly provides that only a party to the arbitration agreement can apply to the court for interim measures, it does not say against whom any such relief can be claimed. Unlike section 17 which specifically allows for measures to be directed only against parties to arbitration, there is nothing in section 9 which expressly restricts a court from passing orders against non-signatories to arbitration agreement. Pertinently, there has been a divergence of opinion in this Court on the aspect of maintainability of a petition under section 9 of the Act against a third party. On one hand, there are cases where the learned single judges of this court have endorsed the view that section 9 of the Act is applicable only inter se/between the parties to the arbitration agreement…."*
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> *67. In* Value Advisory Services *v.* ZTE Corporation, *OMP no. 65/2008 decided on 15.07.2009, learned single judge after considering numerous conflicting judgments of single-judge benches of the High Court, inter-alia, concluded that:*
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> > *"13. A conspectus of the judgments aforesaid on Section 9 would show that the court in each case has made the observation with regard to maintainability/applicability of Section 9 qua third parties depending upon facts of each case and depending upon feasibility of the order sought/required therein.* ***In my view, no general principle of maintainability/applicability or non-maintainability/ non-applicability can be laid down. It will have to be determined by the court in the facts of each case whether for the purpose of interim measure of protection, preservation, sale of any goods, securing the amount in dispute, an order affecting a third party can be made or not.***
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> > *14. In my view, if as a general rule it is laid down that in exercise of power under Section 9, no direction can be issued to parties not parties to agreement containing an*

arbitration clause or not parties to arbitration proceedings, the same will hamper the efficacy of the said provision. Under Clause (i) thereof, the guardian to be appointed may not be such a party; similarly the goods under Clause (ii)(a) may be or may be required to be in custody of or delivered to or sold to such third parties-further orders against such third parties may also be required in connection with such sale; under Clause (ii)(b) the amount to be secured may be in the form of money payable or property in hands of such third party - the scope cannot/ought not to be restricted to securing possible with orders against parties to arbitration only. Similar examples can be given with respect to other clauses also."

71. Undoubtedly, section 9 provides that the court shall have the same powers for making interim orders under section 9 as a civil court has for the purpose of, and in relation to, any proceedings before it, and the powers of a civil court in this regard are very wide. The civil courts as and when required, and deemed appropriate in the facts and circumstances of a particular case have been making interim orders in respect of third parties, such as : interim injunction restraining third party-banks from honouring bank guarantees; attaching defendant's monies/property in hands of third party trustee, debtor, agent etc; restraining third party-subsequent transferee/person claiming rights in suit property from disposing of the same, and the like. As a corollary, the power of the court to issue interim orders under section 9 cannot be confined only to the parties to arbitration agreement. However, a significant parameter inherent in section 9, for exercise of this power against a non-signatory to arbitration agreement, is that the purpose of section 9 is to aid arbitration between the parties thereto, and the interim orders there under have to be with regard to subject matter of arbitration/in connection with the arbitral proceedings. In this context, it is relevant to draw a distinction between orders granting interim relief against a party to the arbitration agreement which incidentally affects a third party, on one hand, and orders granting relief directed against a third party, on the other. While the former is ordinarily acceptable as being within the scope of section 9, the power with respect to the latter should be exercised sparingly. For instance, an order appointing a third party as a receiver or guardian of a minor/person of unsound mind is not an order against the third party, or detrimental to its rights as such. Rather, it is a relief granted to the petitioner in support of the arbitral proceedings and affects the party to the arbitration

agreement. Similarly, when a subsequent transferee, or a person claiming title under a party to arbitration is ordered to maintain status quo, or not to dispose of property which is subject matter of arbitration, it is again ancillary to arbitral proceedings in as much, as, it is for protection of the subject matter of arbitration that the order is passed. An injunction, or order of attachment with respect to the properties belonging to/monies owed to a party to arbitration, but in hands of a third party for/on behalf of the said party, is effectively a relief against the said party, which incidentally affects the third party. Pertinently, it is expressly provided in the C.P.C. that attachment before judgment shall not affect the prior existing rights of third parties in the property of the defendant sought to be attached. Injunction against a third party bank from honouring a bank guarantee is consequential to interim relief of restraining a party from encashing the same against the petitioner. To sum up, the court may issue interim orders against the third parties to arbitration only in exceptional circumstances which are such that denial thereof might frustrate the petitioner's rights in arbitration; defeat the very object of arbitration between the parties thereto; render the arbitration proceedings infructuous; lead to gross injustice; and/or, leave the petitioner remediless, depending on facts of each case"

27. Reading of Section 9 of the Act as well as the judgments in *Value Advisory* (supra) and *Gatx India* (supra) makes it clear that the scope of power of a Court under Section 9 of the Act is not limited to parties to an Arbitration Agreement and the Court can issue interim directions even against a third party. The distinction between the powers under Section 9 of the Act and Section 17 of the Act has a clear rationale. An Arbitrator is a creature of the contract between the parties and therefore cannot venture outside the contract to issue directions to parties who are non-parties to the Arbitration Agreement. This limitation is not applicable to a Court exercising power under Section 9 of the Act."

16. Mr. Nayar further submitted that the learned Judge in **Blue Coast Infrastructure** had an occasion to extensively review the precedents rendered on the question which arises including the judgment rendered by this Court in **Value Advisory Services vs. ZTE**

Corporation[7], **Gatx India Pvt. Ltd. vs. Arshiya Rail Infrastructure Limited**[8] as well as the judgment rendered by the Bombay High Court all of which had consistently found and held that while the scope of the power conferred on a court under Section 9 was not limited to parties to an arbitration agreement, the powers conferred on an Arbitral Tribunal by virtue of Section 17 was not of the same plenitude. According to Mr. Nayar, it is this distinction between the Section 9 and Section 17 power which is liable to be borne in mind while considering the reliefs which are sought in the present petition.

17. Mr. Nayar also referred to the principles laid down by the Supreme Court in **Arcelormittal Nippon Steel (India) Ltd. vs. Essar Bulk Terminal Ltd.**[9] to submit that Section 9(3) of the Act does not bar the jurisdiction of a court to entertain an application under Section 9 notwithstanding arbitration proceedings having commenced before a Tribunal duly constituted by parties. Mr. Nayar laid emphasis on the following passages of the aforenoted decision of the Supreme Court:-

> **62.** Sub-section (3) of Section 9 has two limbs. The first limb prohibits an application under sub-section (1) from being entertained once an Arbitral Tribunal has been constituted. The second limb carves out an exception to that prohibition, if the Court finds that circumstances exist, which may not render the remedy provided under Section 17 efficacious.
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> **63.** To discourage the filing of applications for interim measures in courts under Section 9(1) of the Arbitration Act, Section 17 has also been amended to clothe the Arbitral Tribunal with the same powers to grant interim measures, as the Court under Section 9(1). The 2015 Amendment also introduces a deeming fiction, whereby an order passed by the Arbitral Tribunal under Section 17 is

[7] 2009 SCC OnLine Del 1961
[8] 2015 VAD (Delhi) 190
[9] (2022) 1 SCC 712

deemed to be an order of court for all purposes and is enforceable as an order of court.

64. With the law as it stands today, the Arbitral Tribunal has the same power to grant interim relief as the Court and the remedy under Section 17 is as efficacious as the remedy under Section 9(1). There is, therefore, no reason why the Court should continue to take up applications for interim relief, once the Arbitral Tribunal is constituted and is in seisin of the dispute between the parties, unless there is some impediment in approaching the Arbitral Tribunal, or the interim relief sought cannot expeditiously be obtained from the Arbitral Tribunal.

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74. Even after enforcement of the 2015 Amendment Act, an application for interim relief may be filed in court under Section 9 of the 1996 Act, before the commencement of arbitration proceedings, during arbitration proceedings or at any time after an award is made, but before such award is enforced in accordance with Section 36 of the 1996 Act. The Court has to examine whether the remedy available to the applicant under Section 17 is efficacious. In *Energo Engg. Projects Ltd.* v. *TRF Ltd.* [*Energo Engg. Projects Ltd.* v. *TRF Ltd.*, 2016 SCC OnLine Del 6560] , the remedy of interim relief under Section 17 was found to be inefficacious in view of an interim order passed by this Court in a special leave petition.

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

> **87.** Even after an Arbitral Tribunal is constituted, there may be myriads of reasons why the Arbitral Tribunal may not be an efficacious alternative to Section 9(1). This could even be by reason of temporary unavailability of any one of the arbitrators of an Arbitral Tribunal by reason of illness, travel, etc.
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> **xxx xxx xxx**
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> **98.** It is reiterated that Section 9(1) enables the parties to an arbitration agreement to approach the appropriate court for interim measures before the commencement of arbitral proceedings, during arbitral proceedings or at any time after the making of an arbitral award but before it is enforced and in accordance with Section 36 of the Arbitration Act. The bar of Section 9(3) operates where the application under Section 9(1) had not been entertained till the constitution of the Arbitral Tribunal. Of course it hardly need be mentioned that even if an application under Section 9 had been entertained before the constitution of the Tribunal, the Court always has the discretion to direct the parties to approach the Arbitral Tribunal, if necessary, by passing a limited order of interim protection, particularly when there has been a long time gap between hearings and the application has for all practical purposes, to be heard afresh, or the hearing has just commenced and is likely to consume a lot of time. In this case, the High Court has rightly directed the Commercial Court to proceed to complete the adjudication."

18. Controverting the aforenoted submissions, Mr. Nandrajog and Mr. Vasdev, learned Senior Counsels appearing for the respondents, submitted that the present petition clearly amounts to an abuse of the process of Court since undisputedly all aspects arising out of or relating to the resolution of 05 December 2022, have been duly taken cognizance of and are pending consideration of the Arbitral Tribunal. It was submitted that the petitioners cannot be permitted to agitate identical issues before two forums. Mr. Nandrajog submitted that the Arbitral Tribunal is also bound by the directions which were issued by the Court on the contempt petition and thus obliged to examine all aspects relating to the Resolution of 05 December 2022. According to

learned Senior Counsel, the issue of whether that resolution amounts to a violation of an injunction or a restraint granted is directly engaging the attention of the Arbitral Tribunal and there is thus no justification for the petitioners having invoked the jurisdiction of the Court yet again seeking similar restraints against the Registrar.

19. Mr. Nandrajog, learned Senior Counsel, further submitted that post Section 17 having been amended by virtue of Act 03 of 2016, an Arbitral Tribunal stands conferred with powers which are similar and identical to those conferred upon a court by Section 9. It was submitted that Section 17(2), in unambiguous terms, places an interim order passed by an Arbitral Tribunal on the same pedestal as an order of the court and is enforceable in the same manner as if it were an order passed under Section 9. It was in the aforesaid backdrop that Mr. Nandrajog submitted that the instant foray is thoroughly misconceived.

20. It was lastly submitted that while Section 9(3) may not divest this Court from invoking its powers under Section 9 notwithstanding an Arbitral Tribunal having been duly constituted, that power is liable to be invoked only upon the Court finding that the Section 17 remedy is inefficacious. According to Mr. Nandrajog in the entire petition, the petitioners have woefully failed to lay any foundation in support of an assertion that the Section 17 remedy is inefficacious. In view of the aforesaid, learned Senior Counsels contended that the instant petition is liable to be dismissed.

21. In order to appreciate the rival submissions which have been addressed on this petition, it would firstly be apposite to notice the provisions of Section 17 as it existed originally and post its amendment in 2016. The significant changes which have come to be introduced in Section 17 by way of the amending Act stand highlighted from the following table:-

Section 17 Prior to Act 3 of 2016	**Section 17** Subsequent to Act 3 of 2016
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)	17.Interim measures ordered by arbitral tribunal.— (1) A party may, during the arbitral proceedings , apply to the arbitral tribunal— (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely:— (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as

	to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it. (2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure,1908 (5 of 1908), in the same manner as if it were an order of the Court.

22. Section 17 came to be bodily substituted by virtue of Act 03 of 2016 and was ordained to come into effect retroactively with effect from 23 October 2015. In order to underline the similarity of the powers conferred upon a court under Section 9 and the powers

exercisable by an Arbitral Tribunal under Section 17, it would also be relevant to reproduce Section 9 hereunder: -

> "**9. Interim measures, etc. by Court**.— [(1)] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:—
>
> (*i*) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
>
> (*ii*) for an interim measure of protection in respect of any of the following matters, namely:—
>
> (*a*) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
>
> (*b*) securing the amount in dispute in the arbitration;
>
> (*c*) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
>
> (*d*) interim injunction or the appointment of a receiver;
>
> (*e*) such other interim measure of protection as may appear to the Court to be just and convenient,
>
> and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.
>
> (2) Where, before the commencement of the arbitral proceedings, a court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the court may determine.
>
> (3) Once the arbitral tribunal has been constituted, the court shall not entertain an application under sub-section (1), unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious."

23. It must at the outset be noted that **Blue Coast Infrastructure** itself recognizes the power of a court to issue an injunction even against a non-party in exercise of powers under Section 9 of the Act. It becomes pertinent to note that the view expressed in that decision of a distinction existing between the extent of the power conferred by Sections 9 and 17 of the Act essentially rests on certain decisions which were noticed and which were undisputedly examining the scope of the power enshrined in Section 17 as it stood prior to its amendment. However, a comparison between the powers that now stand enshrined in Sections 9 and 17 would establish that apart from the interim measures of protection that stand enumerated in clauses (a) to (d), the Tribunal by virtue of clause (e) stands conferred the jurisdiction and authority to frame such interim measures as may appear to be "just and convenient". The conferral of authority upon the Tribunal on lines identical to those of a court under Section 9 is further fortified with the provision now and in unambiguous terms providing that the "*…….the Arbitral Tribunal shall have the same power for making orders as the Court has for the purpose of and in relation to any proceedings before it*". The aforesaid position is additionally fortified by Section 17(2) which places an order passed by the Tribunal on terms equivalent to that of a court and makes it enforceable under the relevant provisions of the **Code of Civil Procedure, 1908**[10]. It would, therefore, be incorrect to recognize or understand the extent of the power conferred on the Arbitral Tribunal by virtue of Section 17 as being inferior to the powers of a court under

[10] Code

Section 9. The amended Section 17 is an embodiment of the legislative intent to arm the Tribunal with powers similar and akin to those conferred upon a court. This aspect also stands duly highlighted in the decision of the Supreme Court in **Arcelor Mittal** noticed above. The provision as it now stands thus enables the Tribunal to frame injunctions and orders of protection in terms identical to those conferred upon a court exercising powers under Section 9. These aspects were also noticed by this Court in a recent decision rendered in **Pacific Development Corporation vs. Delhi Metro Rail Corporation Ltd.**[11] as would be evident from the following extracts of that decision: -

> **13.** In order to appreciate the backdrop in which **Arcelor Mittal** came to be rendered by the Supreme Court the following salient facts would merit notice. Undisputedly, in the facts of that case, petitions under Section 9 came to be preferred by both sides before the parties moved the competent High Court for appointment of an arbitrator in terms of Section 11 of the Act. Arguments on the petition under Section 9 of the appellant before the Supreme Court are stated to have been concluded and orders reserved upon the same by the Commercial Court on 07 June 2021. The petition under Section 11 which came to be filed subsequently was disposed of on 09 July 2021 and in terms of which a three-member Arbitral Tribunal came to be constituted. On or about 16th July 2021, the Appellant filed an application praying for reference of both the applications, filed by the Appellant and the Respondent respectively under Section 9 of the Act, to the Tribunal. This application came to be rejected by the Commercial Court. The aforesaid order came to be assailed before the Gujarat High Court by way of a petition under Article 227 of the Constitution. The said petition was ultimately disposed of with the High Court providing that the Commercial Court should be called upon to pronounce orders on the pending applications under Section 9.

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

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

> "82. In *Energo Engineering Projects Ltd.* v. *TRF Limited* (supra) authored by one of us (Indira Banerjee, J.), a Division Bench of Delhi High Court held:—
>
> > "27. A harmonious reading of Section 9(1) with Section 9(3) of the 1996 Act, as amended by the 2015 Amendment Act, makes it amply clear that, even after the amendment of the 1996 Act by incorporation of Section 9(3), the Court is not denuded of power to grant interim relief, once an Arbitral Tribunal is constituted.
> >
> > 28. When there is an application for interim relief under Section 9, the Court is required to examine if the applicant has an efficacious remedy under Section 17 of getting immediate interim relief from the Arbitral Tribunal. Once the court finds that circumstances exist, which may not render the remedy provided under Section 17 of the 1996 Act efficacious, the Court has the discretion to entertain an application for interim relief. Even if an Arbitral Tribunal is non functional for a brief period of time, an application for urgent interim relief has to be entertained by the Court under Section 9 of the 1996 Act.
> >
> > 29. It is a well settled proposition that if the facts and circumstances of a case warrant exercise of discretion to act in a particular manner, discretion should be so exercised. An application for interim relief under Section 9 of the 1996 Act, must be entertained and examined on merits, once the Court finds that circumstances exist, which may not render the remedy provided under Section 17 of the said Act efficacious.

> 30. In our view, the Learned Single Bench patently erred in holding "there is no impediment or situation where the remedy under Section 17 of the Act is not efficacious". The Learned Single Bench failed to appreciate that the pendency of a Special Leave Petition in which the constitution of the Arbitral Tribunal was under challenge, was in itself, a circumstance which rendered the remedy of the parties under Section 17 uncertain and not efficacious.
>
> xxx xxx xxx
>
> 34. An application for interim relief should ordinarily be decided by the Arbitral Tribunal, once an arbitral tribunal is constituted. However, if circumstances exist which may not render the remedy under Section 17 of the 1996 act efficacious, the Court has to consider the prayer for interim relief on merits, and pass such order, as the Court may deem appropriate.
>
> 35. The Learned Single Bench has not at all considered whether any interim protection was at all necessary in this case. The bank guarantee was apparently unconditional. In effect, the appellants have been restrained from invoking an unconditional guarantee. The application cannot be heard out until the special leave petition is disposed of."

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

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

> Tribunal had been constituted, the Court cannot deal with an application under sub-section (1) of Section 9 of the said Act. Section 9(3)itself provides that the Court can entertain an application under Section 9(1) if it finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.
>
> 25. We may also note that there is no provision under the said Act which, even as a transitory measure, requires the Court to relegate or transfer a pending Section 9(1) application to the Arbitral Tribunal, the moment an Arbitral Tribunal has been constituted.""

> **21.** It becomes relevant to observe that the provisions of Section 9(3) of the Act would come into play only in a situation where a court is approached for the grant of interim measures after the Arbitral Tribunal has been constituted. The said provision, in fact, requires courts to be circumspect in entertaining an application under Section 9(1) after an Arbitral Tribunal has been constituted and to invoke its powers only if it finds that circumstances exist which may render the remedy under Section 17 inefficacious."

24. Undisputedly, Section 9 empowers a court to grant an injunction before, during or even after arbitral proceedings have come to an end or stand terminated. However, Section 9(3) bids courts to exercise restraint and caution in this regard and to step in only in situations where it finds that the Section 17 remedy is inefficacious. This aspect was duly emphasised by the Supreme Court in **Arcelor Mittal** as also by this Court in **Pacific Development**. While Section 9(3) may not be an ouster clause, it still bids the court to consider whether its intervention is warranted notwithstanding the Tribunal having been constituted and being *in seisin* of the entire dispute. The mere existence of the power invested in a court by Section 9 would thus not be sufficient to justify a petition under the said provision being entertained. The court would also have to be convinced that its emergent intervention is warranted since the remedy provided by

Section 17 would not be efficacious. Where such questions are raised, the Court would have to come to the definitive conclusion that the Tribunal would not be an effective remedy and that it would be unjust to relegate parties to follow that route. There would have to be compelling reasons which may persuade a court to arrive at the conclusion that the Tribunal would be unable to either grant effective and emergent relief or for various other reasons it would constitute an inefficacious forum for the purposes of the prayers that may be made. The petitioners in the facts of the instant case have woefully failed to meet that test.

25. The argument of an injunction not being liable to be granted against a person who is not a party to the arbitral proceedings also fails to move this Court since the facts of the present case would establish that the restraint in any case operates upon parties from taking steps which may amount to a change of status of HIMSR. This would clearly operate upon parties before the Tribunal. In any case, it would be premature for this Court to return or record any finding with respect to the alleged violation of the injunction which operates since the Tribunal is presently considering the very same issue. As was noticed in the preceding paragraphs of this decision, the Tribunal is presently dealing with the issue whether a representation under Section 27(5) is liable to be made.

26. In any case, a Tribunal, by virtue of the powers conferred upon it under the Act would, in the considered opinion of this Court, have the requisite authority and jurisdiction to formulate such interim

measures as may be warranted to preserve and protect the subject matter and corpus of the arbitration. The perception of the petitioners that the Tribunal does not stand vested with the authority and the power to preserve and protect the subject matter of the arbitration or for such injunctions not obliging third parties to take those restraints into consideration, is clearly misconceived. This more so in light of Section 17(2) which now ordains that the order of the Tribunal is comparable to and commensurate with that of a court and is enforceable under the Code in like manner.

27. This Court while refraining from invoking its Section 9 powers also bears in mind the order passed on the contempt petition and in terms of which also the parties were granted the liberty to raise all issues arising from the resolution of 05 December 2022 before the Tribunal as also to seek the framing of a representation under Section 27(5) of the Act.

28. Accordingly, and for all the aforesaid reasons, the instant petition shall stand dismissed. This order, however, shall not preclude the petitioner from pursuing its applications under Section 17 pending before the Arbitral Tribunal or the application for framing a representation in terms envisaged by Section 27(5) of the Act. All rights and contentions of respective parties in respect of those applications are kept open to be addressed before the Tribunal.

YASHWANT VARMA, J.

FEBRUARY 14, 2023/*bh*