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

% **Judgment reserved on: 16 August 2023**
Judgment pronounced on: 09 October 2023

\+ O.M.P.(I) (COMM.) 397/2022, I.A. 22238/2022 & I.A. 1874/2023

DR VIVEK JAIN ..... Petitioner

Through: Mr. Jayant Mehta, Sr. Adv. with Mr. Neil Hildreth, Mr. Rahul Jain and Mr. Kshitiz Arya, Advs.

Versus

PREPLADDER PRIVATE LIMITED ..... Respondent

Through: Mr. Dayan Krishnan, Sr. Adv. with Mr. Aman Nandrajog, Mr. Abhishek Thakur, Mr. Dhruv Wadhwa, Mr. Vishv Vardhan and Mr. Sanjeevi Sheshadri, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

<u>J U D G M E N T</u>

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

> "a. Pass an interim order or measure or direction under Section 9(ii) of the Arbitration and Conciliation Act, 1996 restraining the Respondent from selling, offering or distributing (with or without consideration) the Course content created, authored and owned by the Petitioner for the subject - PSM (under the License Agreement or otherwise),on its Portal pending the arbitration proceedings;

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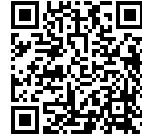
[1] Act



b. Pass an interim order or measure or direction under Section 9(ii) of the Arbitration and Conciliation Act, 1996 restraining the Respondent from interfering with the performance of Petitioner's obligations under the License Agreement dated 03.08.2020 including but not limited to recording of exam videos;

c. Pass an interim order or measure or direction under Section 9(ii) of the Arbitration and Conciliation Act, 1996 appointing a receiver to inspect the sales made by the Respondent of the Course content created, authored and owned by the Petitioner for the subject – PSM (under the License Agreement or otherwise), on its Portal or offline institute - "Neuros" and submit a record of such sales before this Hon'ble Court;

d. Pass an interim order or measure or direction under Section 9(ii) of the Arbitration and Conciliation Act, 1996 directing the Respondent to deposit before this Hon'ble Court unpaid Royalty on sale, offer or distributing (with or without consideration) the Course content created, authored and owned by the Petitioner for the subject – PSM (under the License Agreement or otherwise), along with Special Retention Bonus and the Retainership Fee pending the arbitration proceedings;

e. Pass an interim order or measure or direction under Section 9(ii) of the Arbitration and Conciliation Act, 1996 directing the Respondent to secure the records of sale relating to Course content created, authored and owned by the Petitioner for the subject - PSM (under the License Agreement or otherwise) on its Online Portal or through its offline institute - "Neuros";"

2. Undisputedly, although the present petition came to be filed on 20 December 2022, during the pendency thereof, two significant events occurred. On 16 February 2023, the respondent proceeded to terminate the License Agreement dated 03 August 2020 from which essentially the disputes *inter partes* arose. Secondly, on a separate petition under Section 11 of the Act, an Arbitrator came to be appointed on 27 April 2023. It is in the aforesaid backdrop that the petitioner gave up prayers (a), (b) and (c) and arguments were addressed principally on prayers (d) and (e).

3. The petitioner essentially seeks an interim measure being framed in the form of a mandatory injunction requiring the respondent to deposit the entire amount payable towards License Fee and sale of "*content*" completed up to January 2023 amounting to Rs.1,35,08,077/-. The said prayer is made on the premise that since the aforenoted amount is admitted and cannot possibly be disputed or assailed by the respondent, the Court would be clearly justified in framing such a direction. Additionally, and in the course of oral submissions, a prayer was further made that the Court should issue a direction commanding the respondent to pay the amount which is claimed to be undisputed.

4. For the purposes of evaluating the prayer for the grant of a mandatory injunction, it would be apposite to notice the following salient facts in the backdrop of which the disputes appear to have arisen between the parties.

5. The petitioner is stated to be an educator with more than 17 years of experience and a well-known authority in the field of **Preventive and Social Medicine**[2]. He was engaged in the creation of educational videos covering topics which would form subject matter of the **National Eligibility Entrance Test – Post Graduation**[3], **Foreign Medical Graduate Examination**[4] and **Institute of National Importance Combined Entrance Test**[5]. The educational videos were created by the petitioner to enable and prepare aspirants who were

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[2] PSM
[3] NEET-PG
[4] FMGE
[5] INI CET

proposing to take the competitive medical entrance examinations noticed hereinabove. According to the petitioner, he has been teaching medical, nursing and allied science students since 2004-2005 and has built up an unenviable reputation in the subject of PSM.

6. The respondent company is stated to have been co-founded originally by Dr. Deepanshu and Mr. Sahil Goyal. It was acquired in the year 2020 by Sorting Hat Technologies Private Limited which was providing online educational courses under the brand name "*Unacademy*". The said respondent is also stated to have created an online learning platform under the brand name "*PrepLadder*". The *PrepLadder* portal posts study materials, tutorials, reading content, instructional videos and examinations preparatory material. The respondent also provides a mobile application which can be used by aspirants and subscribers. On 03 August 2020, the petitioner and the respondent entered into a **License Agreement**[6] in terms of which the petitioner was principally required to create and curate *content* in the shape of educational videos which could then be placed on the portal of *PrepLadder*. The Agreement contained the following salient clauses: -

> **"1. DEFINITIONS**
>
> **1.1.3** "Breach" shall mean breach of any obligations of the Second Party, other than for Cause *(defined below),* under (i) this Agreement; or (ii) Statements of Work issued to the Second Party by the First Party.
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> xxx xxx xxx

[6] Agreement

1.1.6 "Content" Shall mean any content developed by the Second Party in relation to the Subject, including educational video content, and shared with the First Party for the purpose of sale to Students on the Platform, in accordance with the terms of this Agreement and Statement of Work.

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1.1.19 "Statement of Work" shall mean the written statements of work, including the First Statement of Work, comprising the deliverables relating to the Content, subtopics under each Subject, timelines and other terms and conditions, issued by the First Party, from time to time, in the form set out in Schedule 1 of this Agreement.

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1.1.21 "Study Material" shall mean the study material, technical expertise and other relevant support provided by the Second Party to the First Party in relation to development of the Notes on the Subject.

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3. GRANT OF LICENSE AND STATEMENT OF WORK.

3.1 Appointment of the Second Party and Grant of License.

3.1.1 Subject to the terms of this Agreement, the First Party hereby appoints the Second Party for the Term of this Agreement, to (i) develop the Content for the Subject; and to (ii) provide Study Material which may be used by the First Party in the development of the Notes, in accordance with the terms of this Agreement and the Statement of Work.

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3.1.2 In consideration of the License Fee *(defined* Mine) and Study Material Consideration *(defined below),* the Second Party hereby grants the First Party an exclusive, sublicensable, worldwide license to (i) edit, alter, market and sell the Content on the Platform; (ii) use the Content and Study Material in the development of Notes by the First Party; and (iii) sell the Notes on the Platform as part of the subscription to the Subject/ Course by the Students (hereinafter collectively referred to as the "License") for the License Period.

3.1.3 Pursuant to clause 3.1.1 above, the Second Party shall be appointed to develop the Content for the Subject on an exclusive basis for the Term of this Agreement.

3.1.4 Notwithstanding the exclusivity granted to the Second Party in Clause 3.1.3 above, the First Party shall have the right to appoint any other Person to develop content on the Subject in the event the (i) Second Party fails to meet the requirements, including in relation to timelines, set out in the Statement of Work; or (ii) the Agreement is terminated for any reason. The Second Party hereby waives his right to exclusivity, in the forgoing circumstances.

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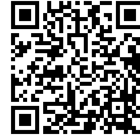
3.2 Statement of Work

3.2.1 The First Party shall issue the Statements of work to the Second Party at least 90 (ninety) days in advance from the date of delivery of the Content or the Study Material, as the case maybe, set out in the Statement of Work. In the event the Second Party wishes to make any modification to the Statement of Work, the Second Party shall respond with such proposed modifications within ten (10) days from the receipt of the Statement of Work. The First Party shall either accept or reject the proposed modification after mutual discussion. In die event the Second Party does not respond to a Statement of Work, it shall be deemed to have been accepted by the Second Party and die Second Party shall be bound to fulfill its obligations within the timelines set out in the Statement of Work.

3.2.2 Notwithstanding the foregoing, the parties agree that the First Statement of Work has been issued by the First Party on the Effective Date and the Second Party hereby accepts the First Statement of Work. The Second Party hereby agrees to deliver the Content as set out in the First Statement of Work, to the First Party within the time-period specified in the First Statement of Work.

3.2.3 Upon delivery of the Content to Prepladder by the Second Party in accordance with this Agreement and Statement of Work, the First Party shall have the right to request the Second Party to make any required modifications to the Content ("Request for Modification"). Upon receipt of the Request for Modification, the Second Party shall consider such request and make necessary modification to the Content in accordance with the Request for Modification and deliver the modified Content within the timelines as specified in the Request for Modification. The First Party shall



also have the right to review, edit or modify the Content, mutually with the Second Party.

4. CONSIDERATION

4.1 During the Term of this Agreement, the (i) Second Party shall be paid the License Fee, Study Material Consideration and Retainer Fee *(defined below);* and (ii) the First Party shall be paid the First Party License Fee, in accordance with this Clause 4.

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4.7 Payment of License Fee, First Party License Fee, Study Material Consideration and Retainer Fee in accordance with this Clause 4 shall be made as follows.

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4.7.6 The Parties shall mutually and amicably resolve the dispute amongst themselves within 15 (Fifteen) days from such Party intimating of the dispute under Clause 4.7.5. In the event such dispute is not mutually resolved between the Parties, the Parties shall submit the dispute to arbitration in accordance with this Agreement.

4.7.7 Notwithstanding anything stated herein, the First Party shall at any point in time, have the right to reconcile, make adjustments against future invoices to be raised by the Second Party or demand a refund with respect to payments made against invoices raised by First Party, to ensure that the (i) Second Part)' receives or has received License Fee not exceeding the License Fee in accordance with this Clause 4; and (ii) to set off any payments due from the Second Party to the First Party pursuant to Clause 4.3 *(First Party License Fee)*and Clause 4.7.2 above.

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5. TERM & TERMINATION

5.1 Unless terminated earlier in accordance with this Agreement, this Agreement shall be valid and binding on the Parties for a period of 36 (thirty six) months from the Effective Date ("Term”) Thereafter, this Agreement may be extended, by way of mutual discussions and agreement between the Parties, whether in a single extension or multiple extensions, for any periods of time, subject to such terms and conditions as may be agreed upon between the Parties.

5.2 Breach of the Agreement and Procedure for Termination for Breach

5.2.1 In the event the First Party wishes to terminate this Agreement on account of Breach of this Agreement by the Second Party, the First Party shall Issue a written notice of termination to the SECOND PARTY specifying the (i) Breach by the Second Party; and (ii) the names of the members of the Committee nominated by the First Party in accordance with Clause 6 of this Agreement ("Notice of Termination"). Other than as specified in Clause 5.3, it is hereby clarified that the First Party shall not have the right to terminate the Agreement for Breach without the determination of Breach by the Committee in accordance with Clause 5.2.3.

5.2.2 Upon receipt of the Notice of Termination, the Second Party shall within ten (10) days from the receipt of the Notice of Termination, intimate the First Party in writing, the names of the members of the Committee nominated by the Second Party in accordance with Clause 6 of this Agreement ("Second Party Nomination Notice"). In the event the Second Party fails to issue the Second Party Nomination Notice in accordance with this Clause, the First Party shall have the right to terminate the Agreement, without determination of Breach by the Committee in accordance with Clause 5.2.3

5.2.3 The Committee shall thereafter convene within 7 (Seven) days from the receipt of the Second Party Nomination Notice and allow both Parties to present their statements along with any documents in support thereof, with respect to the Notice of Termination. The Committee shall deliberate the statements made by the Parties and cast their votes on determination of Breach. The decision of the committee shall be determined on a super majority of 9 (Nine) out of 14 (Fourteen) votes. That is, the Committee shall determine there is an occurrence of Breach only when 9(Nine) members of the Committee vote in favor of determination of Breach by the Second Party. The Committee shall thereafter intimate the decision of the Committee on whether there has been an occurrence of Breach or not to the Parties in writing.

5.2.4 In the event of the Committee determines that there has been a Breach by the Second Party, the Agreement shall stand terminated with immediate effect upon receipt of such decision of the Committee, with no further action required by the Parties. In the event the Committee determines that there has been no Breach

by the Second Party, the Parties shall continue to be bound by this Agreement and the Statements of Work for the Term.

5.3 Termination for Cause. The First Party shall have the right to terminate this Agreement with immediate effect by issuing a written notice for termination of the Agreement for Cause to the Second Party. It is hereby clarified that the First Party shall have the right to terminate this Agreement for Cause without recourse to the Committee.

For the purpose of this Agreement, the term 'Cause' shall mean occurrence of any of the following, as determined by the FIRST PARTY at its sole discretion: (a) fraud, gross negligence, Willful Misconduct or breach of exclusivity obligations on the part of the Second Party during the Term; (b) if a charge sheet is filed against the Second Party by any governmental authority; (c) the Second Party has committed breach of clause 8.2.2, Clause 9, Clause 10 or Clause 11, (whether by one or several acts or omissions) and such breach is not remedied within 30 (thirty) days from the sendee of notice cure of Breach, if it is capable of being remedied.

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5.6 Consequences of Termination

5.6.1 The First Party's right to use the Content and Notes for the License Period shall survive the termination of the Agreement by either Party for any reason.

5.6.2 Obligations of the Second Party under the Statements of Work issued prior to the termination shall survive the termination of the Agreement.

5.6.3 Termination of this Agreement shall not relieve any Party of any obligation or liability accrued prior to the date of termination.

5.6.4 In the event of termination for death or Permanent Incapacity under Clause 5.5 above, the obligation of the First Party to pay the License Fee under this Agreement shall survive and continue to be paid to the heirs (in the event of death) or to the Second Party (in the event of Permanent Incapacity) until the later of (i) 6 (Six) months from such termination or (ii) till the period the Content developed by the Second Party is used on the Platform by the First Party.

5.6.5 In the event of termination of this Agreement for any reason, including Cause, the consequences of termination specified in the Plan shall be applicable to the Parties.

5.6.6 In the event of expiry or termination of this Agreement for any reason, the Second Party shall return or destroy, at the direction of the First Party, all assets, material, data, Confidential Information, First Party Content, or equipment provided by the First Party to the Second Party in relation to this Agreement and/or for the purpose of fulfilling the obligations under this Agreement ("First Party Assets").

5.6.7 The Individual Application License shall expire. Accordingly, the right of the Second Party to collect payments with respect to the Individual Applications in accordance with Clause 4.8 shall cease upon termination of this Agreement. However, the First Party shall continue to host the Content developed by the Second Party until the expiry of all subscriptions sold for the Individual Applications.

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7. RIGHTS AND OBLIGATIONS OF THE FIRST PARTY

7.1 RIGHTS OF FIRST PARTY:

7.1.1 The FIRSTPARTY, at its sole discretion, shall have complete right to make changes/ alterations to the Platform as and when required. Further, sales, marketing and all operations of the Platform shall be at the sole discretion of the First Party. The Second Party acknowledges that he shall not have any rights to participate in any decision making in this regard.

7.1.2 The FIRST PARTY shall have the unfettered right to use the Content and Notes uploaded on the Individual Application to sell a combined package of all 19 Subjects along with of the educational videos/ contents of the other faculty members on the Master Application.

7.1.3 The ownership rights to the Platform, First Party Content or any other IP developed by the First Party shall at all times exclusively vest with the First Party. The SECOND PARTY shall have no claim and hereby waives all Claims with respect to the Platform, First Party Content or any other IP developed by the First Party at any time. Nothing in this Agreement shall be construed as the grant of any rights or license to the Second Party with respect to the Platform, First Party Content or any other IP developed by First Party.

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8. RIGHTS & OBLIGATIONS OF THE SECOND PARTY

8.1 RIGHTS OF SECOND PARTY

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8.1.3 Other than the License given to the First Party under this Agreement, the SECOND PARTY shall have complete ownership over the Intellectual Property rights of the Content and Notes that are hosted, marketed, sold and distributed on the Platform. The FIRST PARTY shall not claim any ownership over the said Contents and Notes created and provided to the FIRST PARTY by the SECOND PARTY, unless otherwise agreed between the parties. Further, the Second Party hereby agrees to not raise any claims or disputes against the First Party, for the use of the Content and Notes by First Party in terms of this Agreement.

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8.2 OBLIGATIONS OF SECOND PARTY

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8.2.2 During the License Period, other than as disclosed in Schedule 3 of this Agreement, the Second Party shall not enter into any arrangement in relation the Content or part thereof with any third party and shall not use, license, sub-license, modify, amend or reproduce the Content on any other internet based online platform (mobile, applications or otherwise) or on public domain through any online media (mobile, applications or otherwise)) or by way of an arrangement with any other Person with respect to any internet based online platform (mobile, applications or otherwise). Notwithstanding the foregoing, the Second Party shall have the right to use the Content for any non-commercial purposes or for the purposes of promotion of First Party and the Second Party.

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8.2.7 The Second Party agrees not to interact with any media, press or with any social media platforms, discussion sites or websites, regarding the First Party, without the Consent of the First Party.

8.2.8 The Second Party shall not, directly or indirectly, make or cause to be made any disparaging, denigrating, derogatory or oilier negative, misleading or false statement orally or in writing to any Person or any platform or any medium, about the First Party and its Affiliates, their respective members, officers or employees, or business strategy or plans, policies, practices or operations of the

First Party or its Affiliates. The Second Party acknowledges and agrees that any written or oral contacts/or other correspondence with Students, other consultants or service providers or advisors of the First Party shall be made by the Second Party in good faith in accordance with the terms of this clause and in the best interest of the First Party and its Affiliates.

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"**13. GOVERNING LAW AND DISPUTE RESOLUTION**

13.1 This Agreement shall be subject to the sole jurisdiction of the Courts of Law at Delhi. All the matters of dispute or differences shall be submitted to the sole jurisdiction of the Courts of Law at Delhi and no other Court of Law in any other part of the country shall have the jurisdiction to entertain any matter either touching or arising out of the present Agreement.

13.2 That all disputes, differences, claims and questions, whatsoever, which shall arise either during the subsistence of this Agreement or afterwards between the parties and/or their respective representatives touching these presents or any clause herein, contained or otherwise in any way relating to or arising from these presents shall be referred to arbitration by a single Arbitrator, who shall be appointed mutually by both the parties and such arbitration shall be in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made thereunder, for the time being in force. The Arbitration proceedings shall be held at Delhi and the Courts at Delhi alone shall have the exclusive jurisdiction to entertain any matter arising out of or touching upon the matters relating to the arbitration proceedings between the parties to the present Agreement."

7. According to the petitioner, the respondent started raising various disputes on or about May 2022 when the petitioner refused to extend the Agreement and a dispute arising between parties with respect to a shift to a revenue sharing model as opposed to a fixed fee. The petitioner asserts that it rejected the proposed revenue sharing model and thus parties were conscious that the Agreement would expire on 31 March 2023. In the meanwhile, it is alleged that the

petitioner along with other educators launched "*Cerebellum Academy*" which constituted an offline mode of education for students proposing to take Post Graduate medical entrance examinations. It is alleged that in October 2022, the respondents refused to pay the Special Retention Bonus which led to a further breakdown in the relationship between the parties. Disputes appear to have further arisen with respect to the demand of the respondents to revise the **Statement of Work**[7] and the petitioner questioning the same and asserting that the *content* submitted was in accordance with the terms of the Agreement.

8. On 08 November 2022, a legal notice came to be issued by the respondent seeking commencement of dispute resolution by way of conciliation under Section 62 of the Act. Responding to the same, the petitioner vide its communication of 11 November 2022 asserted that the Agreement between the parties nowhere envisaged third party conciliation. On 12 November 2022, the respondent addressed an e-mail alleging that the petitioner had breached its contractual obligations by launching an offline and online platform on lines similar to that provided by *PrepLadder*. The petitioner denied those allegations contending that he had only launched an offline institute named *Cerebellum Academy* and the same did not constitute a breach of the Agreement. It was further asserted that the various allegations of breach as alleged by the respondent were incorrect and unfounded. The respondent vide another e-mail dated 16 November 2022 again reiterated the request for commencement of conciliation and also

[7] SoW

proposed the name of individuals to act as conciliators. The petitioner on the other hand alleged that royalty amounts payable had not been released and consequently called upon the respondents to attend to the aforesaid issue.

9. On 26 November 2022, the respondent issued a Cease-and-Desist Notice seeking the following: -

> "6. Notwithstanding these repeated requests over the past two months, you have still failed to provide the content as per the SOW and also failed to comply with the terms of the Agreement, *inter alia,* on the following counts by:
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> a) breaching your exclusivity obligations and competing with PrepLadder through your own YouTube channel 'Cerebellum'.
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> b) disseminating the content on the subject matter of the Agreement through your own YouTube channel 'Cerebellum'.
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> c) interacting with media and social media by putting posts regarding PrepLadder without its consent.
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> d) making disparaging, misleading and false averments regarding PrepLadder.
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> e) Disclosing confidential information pertaining to the Agreement and your engagement with PrepLadder in media.
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> 7. The Agreement was carefully constructed to safeguard the interest of both parties and to ensure that there is no conflict of interest between you and PrepLadder, however, You have failed and refused to comply with your contractual obligations. You are, therefore, *inter alia* in breach of Clauses 8.2.2, 8.2.7 and 8.2.8 of the License Agreement. Clause 8.2.2 sets out your exclusivity obligations *inter alia* by restricting you from entering into any arrangement in relation to content or part. Clause 8.2.7 states that you shall not interact with any media, press or with any social media platforms, discussion sites or websites, regarding PrepLadder, without the consent of PrepLadder. Clause 8.2.8 states that you shall not, directly or indirectly, make or cause to be made any disparaging, denigrating, derogatory or other negative, misleading or false statements orally or in writing to any Person or any platform or any medium, about the First Party (PrepLadder) and its Affiliates, their respective members, officers or employees,

> or business strategy or plans, policies, practices or operations of the First Party or its Affiliates.
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> Accordingly, this instant Legal Notice for Cease and Desist is served upon you wherein demand is made upon you to immediately cease and desist and correct your abovementioned acts which are causing reparable damage to our Client.
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> Specifically, through the present legal notice, we hereby demand that You immediately: (1) cease and desist the abovementioned breaches of the License Agreement; (2) cease and desist from making any defamatory, derogatory, disparaging statements about PrepLadder on any platform and cease and desist from tortious interference, and unfair business practices; (3) provide written confirmation of your compliance with this demand; (4) retract and correct, publicly, the previously made false and misleading statements; and (5) issue a public apology for your actions.
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> Failure to comply with all of the above cease and desist demands by 30.11.2022 will result in our Client pursuing all available legal remedies including the filing of lawsuits to protect our Client's interests.
>
> Please note that this notice is being issued without prejudice to the rights and contentions of our Client available under the relevant contract and applicable laws and nothing stated herein is to be construed as a waiver of any rights as may be available under the relevant applicable laws.
>
> A copy of this Legal Notice is retained in my office for future purposes."

10. A notice under Section 21 of the Act came to be issued on 28 November 2022 and the instant petition came to be filed soon thereafter in December 2022. By a letter of 16 February 2023, the respondent proceeded to terminate the Agreement dated 03 August 2020. The respondent alleged that the petitioner had continually and intentionally breached its obligations as flowing from the Agreement and failing to develop and deliver *content* in accordance with the stipulated SoW and as per the timelines specified by them. It was also

alleged that the petitioner had uploaded various posts across numerous social media platforms seeking to promote *Cerebellum Academy* in direct competition with *PrepLadder*, conducting live sessions and uploading videos in respect of matters which formed part of the Agreement. Apart from the various other allegations contained in the termination notice, it was also alleged that the petitioner was selling subscriptions and inviting registrants to *Cerebellum Academy* and all of those acts constituted a fundamental breach warranting termination.

11. As was noticed in the introductory parts of this judgment, by the time the Section 9 petition was put down for final hearing, not only had the Agreement been terminated, an **Arbitral Tribunal**[8] had also come to be constituted. It was in the aforesaid backdrop that Mr. Jayant Mehta, learned senior counsel appearing for the petitioner and Mr. Dayan Krishnan, learned senior counsel appearing for the respondent had principally addressed submissions revolving upon reliefs (d) and (e).

12. Mr. Mehta argued that in terms of the provisions made in the Agreement, the *content* which is developed by the petitioner under its umbrella remains under the ownership of the petitioner. Mr. Mehta highlighted the fact that in terms of the aforenoted Agreement, the petitioner only grants an exclusive license to the respondent to utilize the said *content*. The said license, it was pointed out by Mr. Mehta, is subject to the payment of a License Fee liable to be calculated @ 4.5% of the revenue received by the respondent from subscription sale

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[8] AT

or Rs.1575/- per subscription whichever is higher. In addition to the above, the petitioner also asserts a right to receive 0.85% of the revenue generated from the sale of notes or Rs.60/- per sale whichever be higher. Mr. Mehta pointed out that a total of 61.7 hours of *content* continued to be used by the respondent till 16 February 2023 without any License Fee being paid in respect thereof. The petitioner also claims a right to be paid Retainership Fee over and above the License Fee and the monies liable to be paid in respect of the study material.

13. Mr. Mehta submitted that till May 2022, no dispute existed between the parties and the respondent started raising issues only after the petitioner had conveyed his intent not to renew the Agreement after its expiry on 31 March 2023. Mr. Mehta pointed out that since the petitioner had already decided not to continue his arrangement with *PrepLadder*, it had merely taken certain preparatory steps to start its offline institute named *Cerebellum Academy*.

14. It was submitted that *Cerebellum Academy* commenced commercial operations only on 01 April 2023 and thus after the tenure of the Agreement had come to an end. It was in the aforesaid backdrop that learned senior counsel submitted that the acts of the petitioner could not be viewed as being in breach of exclusivity obligations. Mr. Mehta also argued that the videos which had been posted by the petitioner on the You-Tube channel of *Cerebellum Academy* merely constituted promotional content and were not monetized. It was in light of the aforesaid that Mr. Mehta contended that the admitted dues towards License Fee were liable to be deposited by the respondent

with the Court.

15. For the purposes of buttressing his submission that such a direction could be formulated by the Court under Section 9 of the Act, Mr. Mehta firstly drew our attention to the passages as appearing in the celebrated decision of the Supreme Court in **Dorab Cawasji Warden v. Coomi Sorab Warden**[9] where the Supreme Court formulated the classic exposition on the principles which must govern the grant of mandatory injunction. The Court deems it apposite to extract the following passages from that decision: -

> "**16.** The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:
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> (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
>
> (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
>
> (3) The balance of convenience is in favour of the one seeking such relief.
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> **17.** Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above

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[9] (1990) 2 SCC 117

guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

16. Mr. Mehta also placed reliance on the judgment rendered in **Amit Sinha v. Sumit Mittal & Ors.**[10] where the Division Bench of the Court reiterated the principles that would govern the grant of mandatory injunction under Section 9 of the Act in the following terms: -

> "**12.** With regard to the second submission made on behalf of the Appellant, we proceed to consider the-law governing grant of relief under Section 9 of the said Act. In a recent decision by a co-ordinate Division Bench of this Court in FAO (OS) 200/2010 titled *Simples Infrastructures Ltd.* v. *NHAI* rendered on 14th January, 2011 the Division Bench of this Court had occasion to consider this issue. The Division Bench had observed that "*Ashok Traders* v. *Gurumukh Das Saluja*, (2004) 3 SCC 155, however, also touches upon the wider amplitude of powers available to the Court under the A&C Act in contradistinction to those that had been bestowed on the Court under the 1940 Act." The decision went on to consider the decision of the Supreme Court in *Adhunik Steels Ltd.* (supra) and *Arvind Constructions Co. (P) Ltd.* (supra) and came to the following conclusion:—
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> > "15. It appears to us, therefore, that the Learned Single Judge was not correct in declining to grant the injunction prayed for before him viz. restraining the Respondent from implementing and/or enforcing its letter Nos. NHAI/40020/Tech-III/EW-III/2006/WB-4/735 and NHAI/PIU/Araria/escalation/2009 dated July 20, 2009 and July 29, 2009 respectively, erroneously feeling bound by Kamaluddin Ansari. In *Adhunik Steels Ltd.* v. *Orissa Manganese & Minerals Pvt. Ltd.*, (2007) 7 SCC 125 : AIR 2007 SC 2563, it has been opined that "it would not be correct to say that the power under Section 9 is totally independent of the well known principles governing the grant of interim injunction that generally govern the Courts in this

[10] 2011 SCC OnLine Del 591

connection". Their Lordships have also extracted portions from International Commercial Arbitration in UN-CITRAL Model Law Jurisdictions by Dr. Peter Binder. Several other treatise have been referred to, and we cannot do better than commend the reading of this detailed Judgment. The following paragraph justifies reproduction:—

> 11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, 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. On that basis also, it is not possible to keep out the concept 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.

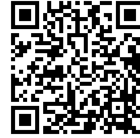
16. This is also the view preferred in *Arvind Construction Co. Ltd.* v. *Kalinga Mining Corporation*, (2007) 6 SCC 798 : AIR 2007 SC 2144. This position of the law would become obvious because of the introduction of Section 9(e) into the A&C Act. Under the erstwhile jural regime, postulated in Section 41 of the 1940 Act, the dictates of justice and

> convenience as conceptualized by the Court, has not been envisioned. The learned single Judge ought to have pursued the path traversed in Transmission Corp. and Adhunik Steels Ltd. and should have applied the principles of estoppel or the expediency of continuing the status quo albeit with protection. Russell on Arbitration, 21st Edition, in Chapter 7-128 opined that the power to grant a Mareva injunction or a mandatory injunction is available to the Court in light of Section 44 of the English Arbitration Act, 1996. It seems to us that there is a general consensus of opinion on this legal point."
>
> **13.** In *Dorab Cawasji Warden* (supra) the Supreme Court reviewed the law of mandatory injunction in England and India and observed that the High Court was competent to issue an interim injunction in a mandatory form. While laying down the guidelines for the exercise of grant of a mandatory injunction it reiterated that the grant or refusal would ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case.
>
> **14.** From the above, it is observed that the power to grant a mandatory injunction is available to the Court and that there is a general consensus of opinion on this legal point. Further, it is clear that where the case is one in which withholding a mandatory interlocutory injunction would be in fact carrying a greater risk of injustice than granting it, there cannot be any rational basis for withholding the injunction."

17. In support of his submission of the Court being well within its jurisdiction in framing a direction requiring the respondent to deposit the amount which is described to be admitted, reliance was also placed on the following passages as appearing in the judgment handed down by a Division Bench of the Court in **M/s Value Source Mercantile Ltd. v. M/s. Span Mechnotronix Ltd.**[11]:

> "**13.** Section 9 of the Arbitration Act uses the expression "interim measure of protection" as distinct from the expression "temporary injunction" used in Order XXXIX Rules 1&2 of the CPC. Rather, "interim injunction" in Section 9(ii)(d) is only one of the matters

[11] 2014 SCC OnLine Del 3313



prescribed in Section 9(ii)(a) to (e) qua which a party to an Arbitration Agreement is entitled to apply for "interim measure of protection". Section 9(ii)(e) is a residuary power empowering the Court to issue/direct other interim measures of protection as may appear to the Court to be just & convenient. Section 9 further clarifies that the Court, when its jurisdiction is invoked thereunder "shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it".

14. The question which thus arises is that if the dispute as aforesaid had been brought before this Court by way of a suit, whether this Court could have, during the pendency of the suit, granted the relief as has been granted in the impugned order. Order XXXIX Rule 10 of the CPC empowers the Court to direct deposit/payment of admitted amounts. The appellant, as aforesaid does not controvert that it continued to be the tenant of office unit B-1 and had not terminated the tenancy with respect thereto. There is thus an admission by the appellant of the liability for rent at least of office unit B-1. The appellant, if had been a defendant in a suit, could have thus been directed by an interim order in the suit to make such payment to the respondent. Order XV-A added to the CPC as applicable to Delhi and which was added, as held by us in judgment dated 15th May, 2014 in FAO (OS)597/2013 titled *Raghubir Rai* v. *Prem Lata*, to empower the Court to direct payment during the pendency of the suit at a rate other than admitted rate also, empowers the Civil Court to direct payment which is apparently wrongfully disputed. The denial by the appellant of the entire rent as agreed, on the ground of having determined the tenancy of one of the two office units taken on rent, is clearly vexatious, as in law the appellant as a tenant could not determine tenancy of part of the premises taken on rent. It is not the case of the appellant that it was entitled to do so as part of terms of its tenancy. In that view of the matter, the appellant could under Order XV-A of the CPC have been directed to pay the rent of the entire premises notwithstanding having given notice of termination of tenancy of part thereof. We are therefore satisfied that the impugned order satisfies the test of being in exercise of the same power for making orders as the Court has for the purpose of a Civil Suit and is thus within the ambit of Section 9 of the Arbitration Act.

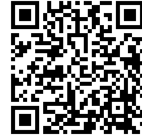
15. Mention may however be made of the judgment of the Division Bench of this Court in *Ratnagiri Gas and Power Pvt. Ltd.* v. *Joint Venture Of Whessoe Oil & Gas Ltd.* 199 (2013) DLT 212 where in appeal, the directions given by the learned Single Judge in exercise

of powers under Section 9 of the Arbitration Act for some payments, were set aside and while doing so it was *inter alia* observed that Order XXXIX Rule 10 specifically clothes the Court with the power to direct a litigant to deposit the amounts and no such power is conferred upon the Court under Section 9 of the Arbitration Act. Reference was also made to Section 19 of the Arbitration Act to hold that the provisions of the CPC are not applicable. The said observations however came to be made after the Court held that the direction issued by the Single Judge for payment was not only beyond the ambit of the reliefs claimed in the petition under Section 9 but also beyond the disputes between the parties. Also, it was not noticed that Section 9 expressly provides that the Court while exercising power thereunder shall have the same power as it has in relation to any proceedings before it and which in our opinion as aforesaid would include the powers under Order XXXIX Rule 10 and under Order XV-A of the CPC. Moreover, Section 19, to which reference was made is with respect to the powers of the Arbitral Tribunal and not of the Court exercising jurisdiction under Section 9. We are therefore of the view that the said observations are obiter. We may also mention that SLP (Civil) No. 5757/2013 preferred thereagainst is pending consideration. In fact another Division Bench of this Court in *Simplex Infrastructures Ltd.* v. *National Highways Authority of India* 177 (2011) DLT 248, in exercise of powers under Section 9, passed an order directing payment of certain monies, the payment whereof was considered to be just and due."

18. Mr. Mehta further invited our attention to the judgment rendered by the Bombay High Court in **Valentine Maritime Ltd. v. Kreuz Subsea Pte Limited & Anr.**[12] where the following observations came to be made: -

"**104.** The Division Bench of this court in case of *Deccan Chronicle Holdings Limited* v. *L & T Finance Ltd.*, 2013 SCC OnLine Bom 1005 after adverting to the judgment of Supreme Court in case of *Adhunik Steel Ltd.* (supra), judgment of the Division Bench of this court in case of *Nimbus Communications Ltd.* (supra) held that the rigors of every procedural provision of the Code of Civil Procedure cannot be put into place to defeat the grant of relief which would sub-serve the paramount interests of

[12] 2021 SSC OnLine Bom 75



the justice. The object of preserving the efficacy of arbitration as an effective form of dispute resolution must be duly fulfilled. This would necessarily mean that in deciding an application under Section 9, the Court would while bearing in mind the fundamental principles underlying the provisions of the Code of Civil Procedure, at the same time, have the discretion to mould the relief in appropriate cases to secure the ends of justice and to preserve the sanctity of the arbitral process. The Division Bench of this Court in the said judgment did not interfere with the order passed by the learned Single Judge directing the parties to furnish security so as to secure the claim of the original petitioner in arbitration by applying principles of Order 38 Rule 5 of the Code of Civil Procedure. The principles laid down by the Division Bench of this court in the said judgment would apply to the facts of this case.

105. Learned Single Judge in the impugned order has dealt with the pleadings filed by the parties and also the judgment relied upon by the parties in great detail. The learned Single Judge has rightly made *prima facie* observation that the invoices for the month of May 2020 submitted by the KSS were backed with the ONGC signed completion certificate and were not disputed by the VML within the five days period allowed for raising such dispute. The learned Single Judge also rightly made *prima facie* observation that the VML was unable to demonstrate as to how or why VML was within its contractual rights to not issue the full Letter of Credit or to issue one for only part of the amount, or to add to it conditions apparently beyond the contract. There was no complaint made by the VML in respect of the invoice issued in the month of May 2020 by KSS. Similarly no dispute was raised within the period of 5 days also in respect of invoice for the month of April 2020.

106. Learned Single Judge has rightly made *prima facie* observation that the invoices thus issued by the KSS were deemed to have been accepted in full. All the invoices issued by the KSS were backed by ONGC certifications of work actually done. KSS has made no claim for compensation for damages. This is a claim purely on invoices and nothing else. In our *prima facie view*, learned Single Judge is right in observing that the VML could not refuse to pay the invoices in these circumstances abruptly invoking liquidated damages and the failure to furnish the performance bank guarantee notwithstanding its own default in not issuing the full Letter of Credit.

107. The learned Single Judge has not granted the entire relief as prayed for by KSS in the petition filed under section 9 but has

passed the balance and equitable order. The learned Single Judge has directed the VML only to deposit amount of US$ 2, 403, 073 or the rupee equivalent at the then prevailing exchange rate, being the value of the invoices dated 2nd June 2020 in the month of May 2020. The learned Single Judge has not permitted the KSS to withdraw the said amount in the impugned order but has granted liberty to KSS to apply to the arbitral tribunal for relief in respect of the said deposit making it clear that if any such application would be made, the same would be decided on its own merits uninfluenced by the said order. The learned Single Judge made it clear in paragraph (44) of the impugned order that all the observations were *prima facie*, and only for the purposes of the said order.

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112. Insofar as submission of Mr. Cama, learned senior counsel for the ONGC regarding the order directing the ONGC to deposit the said sum as demanded by the KSS against VML under invoices for the month of may, 2020 is concerned, learned senior counsel made a suggestion before this court that the said amount to the tune of US $ 2.4 million dollars directed to be deposited by the learned Single Judge would be retained by the ONGC till arbitral award is made and would not part with the said amount to the VML. In our view under section 9(i)(ii)(b), the court is empowered to pass interim measures to secure amount in dispute in arbitration which may be in the form of the bank guarantee or deposit of the money in Court. The said power of the court under section 9(i)(ii)(b) can be exercised not only in the hands of the parties to the arbitration agreement but also in the hands of the third party who has to admittedly pay any amount to the party to the arbitration agreement by directing the said third party to deposit the amount on behalf of the party to arbitration agreement in Court or by way of an injunction against such third party not to part with that amount in favour of the party to the arbitration agreement. ONGC has not raised any dispute that the said amount was not payable to VML.

113. The Court while passing such order against third party does not adjudicate the dispute between the third party and the party to the arbitration agreement but is empowered to pass such order only to secure the claim of the parties to the arbitration agreement. There is thus no merit in the submission of Mr. Cama, learned senior counsel for the ONGC that no such order could be passed by the learned Single Judge directing the ONGC to deposit the amount due and payable by the ONGC to VML under the agreement

entered into between those two parties. The learned Single Judge has made it clear in the impugned order that the ONGC will deposit the said amount without prejudice to the rights of the ONGC vis-a-vis VML and the making of that deposit by ONGC and a consequent reduction in the payment or payments by ONGC to VML will not, by virtue of compliance of that order by ONGC, be claimed by VML in any forum or any proceeding to be breach of the PRP-VI Contract. ONGC in the affidavit in reply in these proceedings has admitted that a large sum of amount is due and payable by the ONGC to the VML under PRP-VI Contract between them.

114. Insofar as judgment of Madras High Court in case of *Kris Heavy Engineering* (supra) relied upon by the learned senior counsel for the ONGC is concerned, it is held by the Madras High Court that the reading of Order 21 Rules 46A, 46B and 46C of the Code of Civil Procedure shows that the words used is 'judgment debtor' and not a party to the litigation. The provisions for invoking the relief against garnishee therefore can only be after passing of the decree and not during the pendency of the proceedings. The security pending proceedings can be ordered under the provisions of Order 38 Rule 5 of the Code of Civil Procedure. In our view, the said judgment of Madras High Court would not assist the case of the ONGC.

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121. We, therefore, pass the following Order:—

(a) Time to comply with the order passed by the learned Single Judge to Valentine Maritime Ltd. is extended till 15th February, 2021. It is made clear that if the Valentine Maritime Ltd. does not deposit the said amount of US $ 2, 403, 073 or the rupee equivalent at the then prevailing exchange rate, i.e. on the day of deposit i.e. the value of the invoices dated 2nd June, 2020 within the time prescribed in this order, the ONGC shall deposit the sum of US $ 2, 403, 073 or the rupee equivalent at the prevailing exchange rate, i.e. on the day of deposit on or before 31st March, 2021 in this Court without fail.

(b) It is made clear that all the observations made by the learned Single Judge in the impugned order and made by this Court against VML are *prima facie* and are made only for the passing the impugned order passed by the learned Single Judge and by this Court in this appeal respectively.

(c) Commercial Appeal (L) No. 7013 of 2020 filed by the Valentine Maritime Ltd. against Kreuz Subsea Pte Limited and Oil and Natural Gas Corporation and Commercial Appeal (L) No. 8386 of 2020 filed by the Oil and Natural Gas Corporation against Kreuz Subsea Pte Limited and Valentine Maritime Ltd. are dismissed. All pending Interim Applications are also dismissed.

(d) There shall be no order as to costs."

19. Reliance was also placed on the decision rendered by a learned Single Judge of the Court in **Huawei Technologies Co. Ltd. v. Sterlite Technologies Ltd.**[13] and more particularly to the following paragraphs as appearing in the report:-

"**41.** In the present case, admittedly, the goods have been supplied by the petitioner to the respondent in terms of the supply contract and respondent has further supplied the same to MTNL. The said goods are being used and enjoyed by the MTNL. The respondent after supplying the goods to MTNL has collected substantial payment and has not paid to the petitioner for supply of the goods and the payment has been retained by the respondent.

42. No doubt, the claim(s) and counter-claim(s) of the parties would be adjudicated in arbitral proceedings. However, there is no reason why the petitioner's claim be not secured by requiring the respondent to furnish appropriate security, especially in the light of the contractual framework and particularly when the dues are admitted and the party has received the amount due from the employer.

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58. No doubt, in a normal case, the requirement of all conditions of Order XXXVIII Rule 5 CPC are to be satisfied before Court while considering the prayer of securing the amount and the Court should exercise its discretion very carefully in order to secure the amount. However, if the petitioner has been able to make out a strong case against the respondent, particularly, when the respondent has received the amount from the employer and it is avoiding to clear the due amount and is raising flimsy reasons and when it appears to the Court to be just and convenient, then the Court has ample power to exercise its discretion to secure the amount even when the

[13] 2016 SCC OnLine Del 604

> condition of the company is solvent, under Sections 9(1)(ii)(b) and (e) of the Arbitration and Conciliation Act, 1996. The amount, under these circumstances, should be secured, once the dispute is of commercial in nature. The present case of the petitioner falls within the range of exceptional one where the amount is liable to be protected."

We were informed that the aforesaid order was upheld by the Division Bench in terms of its judgment rendered in FAO (OS) 61 of 2016 dated 25 February 2016.

20. Mr. Mehta lastly submitted that the Court, while framing a mandatory injunction and requiring a deposit to be made in the course of consideration of a petition instituted in terms of Section 9 of the Act, is not bound by the strict contours which have been recognized to exist insofar as Order XXXVIII Rule 5 of the **Code of Civil Procedure, 1908**[14] is concerned. He drew our attention to the following passages as appearing in **Essar House Pvt. Ltd. v. Arcellor Mittal Nippon Steel India Limited**[15].

> "**48.** Section 9 of the Arbitration Act confers wide power on the Court to pass orders securing the amount in dispute in arbitration, whether before the commencement of the arbitral proceedings, during the arbitral proceedings or at any time after making of the arbitral award, but before its enforcement in accordance with Section 36 of the Arbitration Act. All that the Court is required to see is, whether the applicant for interim measure has a good *prima facie* case, whether the balance of convenience is in favour of interim relief as prayed for being granted and whether the applicant has approached the court with reasonable expedition.
>
> **49.** If a strong *prima facie* case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments,

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[14] Code
[15] 2022 SCC OnLine SC 1219

> incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC.
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> **50.** Proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending Arbitral Award is not imperative for grant of relief under Section 9 of the Arbitration Act. A strong possibility of diminution of assets would suffice. To assess the balance of convenience, the Court is required to examine and weigh the consequences of refusal of interim relief to the applicant for interim relief in case of success in the proceedings, against the consequence of grant of the interim relief to the opponent in case the proceedings should ultimately fail."

21. Notwithstanding the relief in the petition and as embodied in Clauses (d) and (e) thereof, it was further submitted by Mr. Mehta that since the amount is one which is not disputed, the Court would be justified in framing directions for the payment thereof to the petitioner. It was his submission that since, undisputedly, the *content* was continually used and monetized by the respondent, it would be wholly unjust and inequitable for the petitioner being denied the License Fee payable in connection therewith.

22. Appearing for the respondents, Mr. Krishnan, learned senior counsel contended that the prayer for the respondent being commanded to make payments or to effect a deposit goes beyond the pleadings and the prayers as made in the petition itself. Mr. Krishnan submitted that as a bare reading of prayers (d) and (e) would establish, although the petition seeks the respondent to deposit what is claimed to be an admitted amount, all of the oral submissions which were addressed centered upon the prayer of the petitioner for the alleged admitted amount being released in its favour. It was submitted by Mr. Krishnan that the petition does not even carry a prayer for an interim

payout.

23. Quite apart from the above, it was the submission of Mr. Krishnan that the petition constructs no ground which may be read as supporting the prayer for mandatory injunction as made or for principles analogous to Order XXXVIII Rule 5 of the Code being invoked. Mr. Krishnan submitted that not only was the premise of the amount being admitted wholly incorrect, the petitioner has not made out a case of existence of exceptional circumstances which may warrant the grant of a mandatory injunction directing payment. It was further submitted that the act of termination has neither been questioned in the present petition nor can any such issue be validly raised since the AT is already seized of the aforesaid dispute. It is in the aforesaid context that it was submitted by Mr. Krishnan that the petitioner had rightly conceded that the amounts relating to Special Retention Bonus and Retention Fee cannot be said to be due. This since, according to Mr. Krishnan, those would clearly be dependent on the outcome of any challenge that may be mounted in respect of the termination action and even otherwise since both those payments could be said to have crystallized only after 31 March 2023.

24. Questioning the correctness of the contention that the amount of which release was sought was undisputed, Mr. Krishnan submitted that the Agreement clearly contemplated a continuing requirement of the petitioner updating *content* periodically in order to ensure that it retains its commercial viability. According to Mr. Krishnan, the petitioner had clearly failed to act in terms of the aforesaid obligation

as flowing from the Agreement. It was further contended that the *content* which was ultimately provided by the petitioner was found to be not conforming with the SoW and it was therefore open for the respondent to call upon the petitioner to take appropriate corrective measures.

25. It was submitted that since the petitioner failed to revise the *content* periodically and also failed to take appropriate steps to bring the same in accord with the SoW, it would be wholly unjust for the respondent to be held liable to accept outdated *content* and be called upon to pay License Fee in connection therewith. It was submitted that the petitioner had also woefully failed to maintain standard and quality of the *content* in accordance with the provisions of the Agreement. Reference in this regard was also drawn to the detailed communication dated 08 January 2023 which appears at Page 146 of our digital record.

26. The grant of an interim payout was also opposed on the ground of breach of exclusivity. Mr. Krishnan, taking the Court through the various posts and the material uploaded on social media platforms submitted that it was evident that the petitioner in the guise of offering "*free content*" was seeking to generate interest for a competing entity. It was further submitted that the apprehensions which were harbored by the respondent were ultimately found to be correct as would be evident from the launch of *Cerebellum Academy* close on the heels of the various posts which were put up by the petitioner. The respondent also placed strong reliance on the social media posts which were

collectively placed at Page 172 of the record.

27. Turning then to the principal relief of deposit of payment as made, Mr. Krishnan drew our attention to the following pertinent observations made by the Supreme Court in **Sanghi Industries Limited vs. Ravin Cables Ltd. & Anr.**[16] and which reiterates the extent and degree of evidence which must be shown to exist before an order akin to an attachment before judgment could be made: -

> "**4.** Having heard learned counsel appearing on behalf of the respective parties and in the facts and circumstances of the case, more particularly, when the bank guarantees were already invoked and the amounts under the respective bank guarantees were already paid by the bank much prior to the Commercial Court passed the order under Section 9 of the Arbitration Act, 1996 and looking to the tenor of the order passed by the Commercial Court, it appears that the Commercial Court had passed the order under Section 9(ii)(e) of the Arbitration Act, 1996 to secure the amount in dispute, we are of the opinion that unless and until the pre-conditions under Order XXXVIII Rule 5 of the CPC are satisfied and unless there are specific allegations with cogent material and unless prima-facie the Court is satisfied that the appellant is likely to defeat the decree/award that may be passed by the arbitrator by disposing of the properties and/or in any other manner, the Commercial Court could not have passed such an order in exercise of powers under Section 9 of the Arbitration Act, 1996. At this stage, it is required to be noted that even otherwise there are very serious disputes on the amount claimed by the rival parties, which are to be adjudicated upon in the proceedings before the arbitral tribunal.
>
> **5.** The order(s) which may be passed by the Commercial Court in an application under Section 9 of the Arbitration Act, 1996 is basically and mainly by way of interim measure. It may be true that in a given case if all the conditions of Order XXXVIII Rule 5 of the CPC are satisfied and the Commercial Court is satisfied on the conduct of opposite/opponent party that the opponent party is trying to sell its properties to defeat the award that may be passed and/or any other conduct on the part of the opposite/opponent party

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[16] 2022 SCC OnLine SC 1329

which may tantamount to any attempt on the part of the opponent/opposite party to defeat the award that may be passed in the arbitral proceedings, the Commercial Court may pass an appropriate order including the restrain order and/or any other appropriate order to secure the interest of the parties. However, unless and until the conditions mentioned in Order XXXVIII Rule 5 of the CPC are satisfied such an order could not have been passed by the Commercial Court which has been passed by the Commercial Court in the present case, which has been affirmed by the High Court."

28. Mr. Krishnan also relied upon the decision rendered in **Tahal Consulting Engineers India Pvt Ltd. vs. Promax Power Ltd.**[17] where the decision of the Supreme Court in *Essar House* was explained in the following terms: -

> "**39.** Turning then to the powers of the Arbitral Tribunal to pass an order of attachment before the Award is rendered or framing directions for securitising the claim that may be laid before it, the Court notes that it is now well settled that while the Arbitral Tribunal may not be strictly bound by the principles which inform Order XXXVIII Rule 5 of the Code, it could adopt principles analogous to those comprised in that provision. Courts have repeatedly held that while the power to attach before Award may not have been specifically set out in Sections 9 and 17 of the Act, such an order could be made if circumstances so warrant. Indubitably, while the Arbitral Tribunal or for that matter the Court under Section 9 may not be strictly bound by the rigidity of the discretion vested upon a court by the Code, at the same time when it does choose to exercise that power it must do so guided by the principles accepted as relevant and germane for that power being wielded.
>
> **40.** The power of attachment before judgment has always been understood and described to be one which is harsh and severe in character. That power, as has been repeatedly held, is not liable to be invoked merely upon a claimant being found upon a prima facie evaluation to have a just or valid claim. Apart from establishing the existence of a strong prima facie case, it would also be obligatory upon the claimant to establish that the defendant before the Tribunal is indulging in activities aimed at dissipation of assets or

[17] 2023 SCC OnLine Del 2069

seeking to remove assets with an intent to defeat the Award that may ultimately be rendered. It has been pertinently observed that the power of attachment before judgment is not liable to be exercised to secure a debt which is yet to be established before the Tribunal. The power of attachment before judgment would thus be liable to be exercised where the Tribunal is convinced that the claimant has made out a strong prima facie case, is likely to ultimately succeed and that in case emergent steps were not to be taken, the respondent would be able to remove its assets from the control of the Tribunal and thus deny the claimant the fruits of the award that may ultimately be pronounced. It is the aforenoted twin tests which must be satisfied before such an order being justifiably made.

41. The Court deems it necessary to underscore the fact that the utilisation of assets in the ordinary course of business, deployment of resources in connection with a running business or operating losses would not be sufficient to invoke that power. The power to attach even before judgment is rendered would have to be founded upon material which would establish or indicate the party taking steps to disperse or dispose of its assets with an intent to defeat any judgment that may be ultimately passed. This could be exhibited by transfers and disposal of assets in bad faith and with an intent to deceive or even where the position of a party is found to be so financially precarious that emergency measures are warranted.

42. Mr. Khan, learned counsel appearing for Promax, had laid strong reliance upon the judgment rendered by the Supreme Court in *Essar House* to contend that it was not incumbent upon the claimant to prove any actual attempt having been made by Tahal to remove or dispose of its assets. Strong reliance was placed upon the Supreme Court having observed in that decision that a strong possibility of "*diminution of assets*" would suffice.

43. On a holistic reading of the aforesaid observations as rendered by the Supreme Court in *Essar House*, it would be evident that the said decision does not enunciate a test in relation to attachment before judgment which may either be said to be novel or distinct from what has been consistently held by courts while ruling upon the scope and ambit of Order XXXVIII Rule 5 of the Code. Firstly, the phrase '*possibility of diminution of assets*' cannot be read out of context or in a disjointed fashion. In fact, the aforesaid expression came to be employed by the Supreme Court in light of the fact that it had been found that the refundable security deposit by way of a series of internal arrangements between the group

> companies was being utilised for the purposes of liquidation of the dues of Essar Steel owed to third parties.
>
> **44.** It was thus found on facts that the security deposit which was otherwise refundable to the appellant was being utilised to liquidate liabilities owed to third parties. Secondly, *Essar House* is an authority for the proposition that it is not necessary that an actual attempt to fritter away assets be discovered or proven. If a steady fall in assets over a period of time is established or if it be found that assets are steadily shrinking, those situations could also possibly constitute a circumstance where the power may be justifiably invoked.
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> **45.** However, it must be remembered that *Essar House* had spoken of diminution of *"assets"* as opposed to a fall in revenue or profits. This Court finds itself unable to read *Essar House* as propounding that a reduction in revenues or a fall in turnover would as a general rule constitute a diminution of assets. A business may face a cyclical downtrend or a fall in its profit margins for a variety of reasons. Unless those are established to constitute a drastic or alarming reduction impacting the very viability or existence of an entity, it would not constitute a sufficient ground to attach assets before judgment. In fact, the adoption of such a draconian measure may itself have an adverse effect on that entity. In any case, Promax had failed to establish before the Tribunal that Tahal did face such a spectre. The Tribunal has upon due consideration of the material placed before it come to conclude that there existed no justification for an order of attachment being framed. Promax has failed to establish the aforesaid finding to be either perverse or manifestly erroneous."

29. Mr. Krishnan submitted that the petitioner quite apart from having failed to establish a reasonably strong prima facie case has not even alleged or asserted that the respondent was making an attempt to defeat any Award that may be ultimately rendered in favour of the petitioner. According to Mr. Krishnan, the petition lays no foundation nor does it set up a case that the respondent would be unable to honour any Award that may be ultimately rendered. In view of the aforesaid, it was his submission that no ground for the grant of an ad interim

mandatory injunction had been made out. It is the aforesaid rival submissions which fall for consideration.

30. The recordal of submissions hereinbefore would evidence that the petitioner has firstly sought the framing of a direction requiring the respondent to deposit the amount which it asserts to be undisputed. In the course of submissions, however, Mr. Mehta had further urged the Court to frame a positive direction requiring the respondent to disburse the amounts which are claimed to be admitted. The Court would thus be required to consider the submissions aforenoted bearing in mind the dual prayers which are addressed on behalf of the petitioner.

31. Undisputedly, the power of a Court under Section 9 of the Act to frame orders for attachment or require deposits being made have drawn sustenance broadly from the principles which have been enunciated by Courts while dealing with the scope and extent of Order XXXVIII Rule 5 of the Code. The aforesaid position stands reiterated by the Supreme Court in *Essar House. Essar House,* while dealing with the aforesaid subject had held that an order securing the amount in dispute could be made where the petitioner is found to have a good prima facie case, the balance of convenience operates in its favour and the petitioner has approached the concerned court with reasonable dispatch. It was pertinently observed that while considering the framing of a direction for securing the amount in dispute, the Section 9 court would not withhold relief on the mere technicality of absence of averments or grounds akin to those which must be made when a

prayer for attachment before judgment in terms of Order XXXVIII Rule 5 of the Code comes to be made. *Essar House* further extends the scope of the Section 9 power by observing that the petitioner need not prove actual attempts to deal with, remove or dispose of property. The Supreme Court observed that even a strong possibility of diminution of assets would suffice.

32. This Court however notes that in the subsequent decision which was rendered by the Supreme Court in *Sanghi Industries,* the Supreme Court has taken a view which may not be completely in accord with what was expressed by it in *Essar House*. The Court enters the aforesaid observation in light of the Supreme Court in *Sanghi Industries* having held that in the absence of specific allegations duly supported by cogent material and the Court being satisfied on the basis of the above that a respondent is likely to defeat the Award, no order akin to attachment before judgment should be passed in exercise of powers under Section 9 of the Act. In *Sanghi Industries,* the Supreme Court further observed that the Section 9 power is mainly concerned with the grant of interim measures. It further went on to hold that unless and until conditions which inform and guide the exercise of power under Order XXXVIII Rule 5 of the Code are found to be satisfied, no such interim measure should be formulated.

33. It is significant to note that both *Essar House* as well as *Sanghi Industries* are judgments rendered by Benches comprising of an equal coram. It would thus be the latter view as enunciated in *Sanghi Industries* which the Court would be obliged to follow. *Sanghi*

Industries urges us to bear in mind the classical exposition of an attachment before judgment and that direction being guided and informed by factors such as a clear foundation in the pleadings of parties supported by cogent evidence, the existence of a strong prima facie case and most importantly the court being convinced that a party was actively engaging in activities such as removal or dissipation of assets or where it is found that it is seeking to defeat any judgment or award that may be ultimately rendered. The Court finds that the petitioner has not built any such edifice in the entire petition.

34. The Court further notes that the decision in *Essar House* itself was considered in some detail in *Tahal*. In *Tahal*, the Court while noticing the exceptional character of the power of attachment before judgment had held that apart from establishing the existence of a strong prima facie case, it would be obligatory upon the petitioner to establish that the respondent was undertaking activities aimed either at dissipation of assets or attempting to remove assets with an intent to defeat the Award that may be ultimately rendered. The Court had further found that the power of attachment before judgment is not liable to be exercised to secure a debt which is yet to be established before the AT. The observations appearing in *Essar House* and when the Supreme Court had alluded to the possibility of "*diminution of assets*" was explained with the Court in *Tahal* noticing the factual backdrop in which those observations came to be made.

35. In *Essar House*, the Supreme Court had on facts found that the refundable security deposit was being utilized for the purposes of

liquidating the dues of Essar Steel owed to third parties by way of a series of internal arrangements. Since the Supreme Court had found on facts that the security deposit was otherwise refundable to the appellant there, it had frowned upon the course as adopted and was thus constrained to render the observations noticed hereinabove.

36. In *Tahal,* while expounding upon the width of the power to attach before judgment, the Court had further observed that factors such as a steady fall in assets or where assets are continually shrinking, the Court could be considered as germane and relevant and thus constituting a valid circumstance for the purpose of ordering attachment before judgment. However, that is neither the pleaded nor the established case of the petitioner here.

37. The Court notes that the facts as they obtained in *Valentine Maritime* and *Huawei Technologies* are clearly distinguishable. In *Valentine Maritime,* the Bombay High Court had found that despite payment having been duly received by the appellant, the same was unjustifiably retained. It noticed that the appellant there had duly received the payments due in respect of work which was carried out by the respondent and that those payments in terms of the contract could not have been withheld after expiry of five days from the date of receipt. It was in the aforesaid backdrop that it proceeded to uphold the view expressed by the learned Single Judge and which had required the appellant before the Bombay High Court to effect deposits. *Valentine Maritime* thus, turned on facts which are clearly distinguishable from those which form the subject matter of the

present petition.

38. Turning then to the decision in *Huawei Technologies*, the Court finds that in the said decision and similar to the facts which were noticed by the Bombay High Court in *Valentine Maritime*, the learned Single Judge had found on facts that not only was the supply of goods undisputed, the respondent had collected substantial payments which were liable to be released in favour of the petitioner. It was also found that the fact that those payments were liable to be released by the respondent was admitted. It was in the aforesaid backdrop that a direction came to be framed requiring the respondent to secure the amount claimed by the petitioner by furnishing a Bank Guarantee. In *Huawei Technologies*, the direction for the amount in dispute being secured was ultimately framed in light of the admitted obligations flowing from the contract.

39. If one were to revert to the facts of the present case, it would be manifest that there is a serious dispute which stands raised with respect to the claim of the petitioner for the respondent being required to deposit what is described to be the "*admitted liability*". The respondent questions the aforesaid assumption based on the deficiency of work, the *content* being non-compliant with the SoW as well as the breach of exclusivity obligations forming part of the Agreement. The Court also takes note of Clauses 4.7.6 and 4.7.7 of the Agreement which enables the respondent to make adjustments and reconciliation from amounts that may be raised in terms of invoices raised by the petitioner. The Court notes that the respondent assert a right to not

only to withhold but also to deduct amounts as may be claimed by the petitioner if the *content* be found to be not in accordance with the SoW or on the ground of a failure on the part of the petitioner to update *content* periodically in terms of the Agreement.

40. These and other issues which are raised by the respondent clearly go beyond the realm of an admitted or undisputed position. More fundamentally, the petitioner has woefully failed to either aver or establish that the respondent is likely to dissipate its assets or is in the process of removing them so as to avoid any liability that may ultimately came to be raised upon it once an Award is rendered. The Court would have been obliged to require the respondent to affect such a deposit provided it had established that factors akin to those which inform the exercise of a power to attach before judgment existed. Mr. Krishnan, clearly appears to be correct in his submission when he contended that no such foundation has been laid by the petitioner.

41. Having considered the various decisions which were cited in this respect, the Court finds no principle which may warrant the issuance of a direction for attachment before judgment notwithstanding the absence of factors that are recognised to be germane and relevant to the exercise of that power and as have been enumerated by Courts in various decisions rendered in the context of Order XXXVIII Rule 5 of the Code. While the Section 9 Court may not be strictly bound by the requirements of Order XXXVIII Rule 5 of the Code, the same would in itself not justify the framing of such a

direction even if the case were tested on principles analogous to those which guide the power conferred by Order XXXVIII Rule 5 of the Code and those are found to be totally absent.

42. This Court additionally finds that the power to frame an interim measure in terms of Section 9 of the Act is principally concerned with securing the subject matter of arbitration. As would be manifest from a reading of that provision, an interim measure would be justifiably granted where the Court is called upon to preserve goods or take possession of goods which form subject matter of arbitration. The provisions of Section 9(1)(ii)(b) of the Act and which speak of an interim order securing the amount in dispute would necessarily have to be considered on principles similar to those which guide the exercise of power under Order XXXVIII of the Code. Notwithstanding, the Section 9 Court not being confined by the technicalities which imbue the provisions of the Code, it would not lead to the Court jettisoning or ignoring the fundamental principles which must guide and inform an order for attachment before judgment. Even the residual clause of Section 9 of the Act and which empowers a Court to frame such interim measure of protection as may be considered just and convenient cannot be read as justifying the framing of an order for attachment before judgment even though the foundational grounds for the issuance of such directions be found to be totally absent. The Court thus finds no justification to require the respondent to deposit or secure the amount which is claimed by the petitioner.

43. Insofar as the submission of Mr. Mehta of the Court requiring the respondent to release the amount which is claimed to be admitted, the Court deems it apposite to observe that for reasons aforenoted the petitioner appears to be clearly unjustified when it asserts that the amount which is claimed is undisputed. The Court in the preceding paragraphs of this decision has already found that a serious challenge has been laid not only to the amount which is claimed by the petitioner but its asserted right to withhold or even adjust amounts which are claimed by the petitioner to be due and payable to it. These and the other issues which are raised by the respondent are matters of contestation and cannot be brushed aside as mere moon shine.

44. Notwithstanding the above and in the considered opinion of this Court, the interim payout which is sought would clearly go far beyond the contours of the power that has been conferred by Section 9 of the Act. The prayer for a mandatory injunction requiring the respondent to pay certain sums to the petitioner travels far beyond the obligation of the Court to secure the amount in dispute and forming subject matter of arbitration. The issuance of a direction for release would entail not only a conclusive and final adjudication on the right of the petitioner to receive such a sum but also perhaps amount to the framing of an interim Award itself. That cannot possibly be said to fall within the ambit of the Section 9 power that the Court is called upon to exercise.

45. Accordingly, and for all the aforesaid reasons, the instant petition shall stand dismissed. However, and since the AT has already

been constituted, the Court leaves it open to parties to proceed before the AT and address such prayers as may be chosen and advised. All rights and contentions of parties in that respect are kept open.

YASHWANT VARMA, J.

OCTOBER 09, 2023/ RW/SU