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

% **Order reserved on: 28 March 2023**
Order pronounced on: 11 April 2023

\+ ARB. A. (COMM.) 89/2022, I.A. 20727/2022 (Delay in Re-filing Appeal)

TAHAL CONSULTING ENGINEERS INDIA PVT. LTD. ..... Petitioner

Through: Mr. Arvind Nayar, Sr.Adv. with Ms.Ritwika Nanda, Ms.Akshita Mr. Akshay Joshi, Mr. Shubham Pandey, Advs.

versus

PROMAX POWER LTD. ..... Respondent

Through: Mr. Moazzam Khan, Mr. Vidit Gupta, Ms. Anvita Goel, Mr. Anany Gupta, Mr. Prince Kumar, Mr. Chetan Singh, Advs.

\+ ARB. A. (COMM.) 92/2022

M/S PROMAX POWER LTD. ..... Petitioner

Through: Mr. Moazzam Khan, Mr. Vidit Gupta, Ms. Anvita Goel, Mr. Anany Gupta, Mr. Prince Kumar, Mr. Chetan Singh, Advs.

versus

M/S TAHAL CONSULTING ENGINEERS INDIA PVT. LTD. .... Respondent

Through: Mr. Arvind Nayar, Sr.Adv. with Ms.Ritwika Nanda, Ms.Akshita

Mr. Akshay Joshi, Mr. Shubham Pandey, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

1. These two appeals preferred under Section of the 37(2)(b) of the **Arbitration and Conciliation Act,1996**[1] assail the order of 19 September 2022 passed by the Arbitral Tribunal. The appellant in Arb. A.(COMM) No.92/2022 has additionally questioned the validity of the order dated 14 November 2022. The order of 19 September 2022 has been passed on applications made by respective parties purporting to be under Section 17 of the Act. By the order of 14 November 2022, the Arbitral Tribunal has proceeded to reject an application moved by the appellant in Arb. A. (COMM) No.92/2022 seeking review of the order dated 19 September 2022 and additionally dismissing an application made for an interim Award being rendered. For the sake of convenience, the appellant in Arb. A. (COMM) No.89/2022 shall be referred to as "Tahal" and the appellant in Arb. A. (COMM) No.92/2022 as "Promax".

2. The dispute between the parties emanates from a sub-contract which was awarded by Tahal to Promax in connection with the work awarded to the former by the **Bangalore Water Supply and Sewerage Board**[2] for improvement of the water supply distribution system, reduction in UFW and leakage control in N-2, N-3, C-2 & SE-

[1] Act
[2] BWSSB

2 sub-divisions limits of BWSSB, Bangalore. The principal contract was awarded to Tahal by BWSSB on 23 February 2018. Promax came to be engaged by Tahal as a sub-contractor on 18 December 2022 when a Letter of Intent was issued. This was followed by a formal sub-contract agreement being executed by the parties on 27 January 2021.

3. Prior to proceedings being taken before the Arbitral Tribunal, Promax had approached this Court by way of a petition under Section 9 of the Act. In terms of that petition, Promax had sought release and/or preservation of an amount equivalent to Rs. 3,93,08,407.98/- with the aforesaid sum being asserted to be the amount payable in respect of bills which had been raised by Promax upon Tahal.

4. The aforesaid petition under Section 9 of the Act came to be disposed of on 28 April 2022 in the following terms: -

> "1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation, Act, 1996 (hereafter 'the A&C Act'), *inter alia*, praying that respondent nos. 1 and 3 be directed to release and/or preserve an amount equivalent to ₹3,93.08,407.98/-. According to the petitioner, this amount is payable in respect of bills already raised for the work done by the petitioner.
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> 2. Respondent no.3 had invited bids for execution of the work relating to improvement of water supply distribution system, reduction in UFW and leakage control in N-2, N-3, C-2 & SE-2, Sub-Division limits of BWSSB, Bangalore to be completed on or before 13.03.2021. Respondent no.1 successfully bid for the said work and by a Letter of Acceptance dated 23.02.2018, the aforementioned Contract was awarded to respondent no.1.
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> 3. It is stated that thereafter, the petitioner and respondent no.1 entered into a Sub-Contract Agreement dated 27.01.2021, whereby the petitioner was required to execute a portion of the said work and the proceeds of the same were required to be shared in the ratio of 95% and 5%.

4. The said Sub-Contract Agreement was terminated by respondent no. 1 on 05.01.2022. Essentially, the petitioner seeks protection of its claims for the work done prior to the said date.

5. Mr Nayar, learned senior counsel appearing for respondent no.1, states on instructions that respondent no.1 shall deposit a sum of ₹1,14,00,000/- (Rupees One Crore fourteen lacs) with the Registry of this Court as according to respondent no.1, that is the value which is required to be paid to the petitioner. He states that this is the amount, which is payable to the petitioner, subject to the other claims that respondent nos. 1 and 2 may have against the petitioner. But without prejudice to it rights and contentions, respondent no.1 will deposit that amount with the Registry of this Court.

6. It is also apparent that certain amounts are payable by respondent no.3 for the work executed by the petitioner prior to 05.01.2022. In view of the petitioner's submission that it is not in breach of the Subcontract Agreement and is entitled to receive the amounts, the said claims may be required to be protected

7. Considering that an Arbitral Tribunal has already been constituted, this Court considers it apposite to direct respondent no. 1 to deposit a sum of ₹1,14,00,000/- with the Registry of this Court within a period of two weeks from today. It is so directed. The parties are at liberty to seek such further interim reliefs of protection including as sought for in this petition, from the Arbitral Tribunal. The petitioner would also be at liberty to seek protection of its claim or any further sum that may be payable by respondent no.3 in respect of the work executed by the petitioner prior to 05.01.2022.

8. It is clarified that the respondents are also not precluded from seeking any variation or modification of this order. The disbursal of the amount as deposited by respondent no.1 shall abide by any further directions that may be passed by the Arbitral Tribunal.

9. The petition is disposed of in the aforesaid terms.

10. All rights and contentions of the parties are reserved.

11. The interim order freezing the accounts of respondent no.1, is vacated

12. Order *Dasti* under the signature of Court Master."

5. As would be evident from the aforesaid extracts of the order passed by the Court, it was duly noticed that in terms of the sub-contract agreement, proceeds were to be shared between Promax and Tahal in the ratio of 95% and 5%. The Court had also taken note of

the fact that the sub-contract agreement ultimately came to be terminated by Tahal on 05 January 2022. Promax had petitioned this Court seeking orders of protection with respect to the amount payable to it in connection with the work done prior to the said contract coming to be terminated. In the aforesaid proceedings, Tahal volunteered to deposit a sum of Rs. 1.14 crores, which according to it, was the amount payable to Promax. However, the aforesaid statement was qualified with it being submitted on behalf of Tahal that the aforesaid amount was being offered to be deposited subject to any other claims that it may have against Promax and without prejudice to its rights and contentions. It was in the aforesaid backdrop coupled with the fact that the Arbitral Tribunal itself had come to be constituted during the pendency of that petition that the Court directed Tahal to deposit a sum of Rs. 1.14 crores and left it open for parties to seek further interim reliefs of protection before the Arbitral Tribunal. It was also clarified that it would be open for Tahal to seek variation or modification of the aforesaid order. The Court had also provided that the issue of disbursal of the amount deposited by Tahal with this Court would abide by any further directions that the Arbitral Tribunal may choose to pass.

6. Tahal thereafter moved an application dated 03 June 2022 before the Arbitral Tribunal seeking release of the amount held in deposit with this Court. Promax, on the other hand, moved an application dated 17 June 2022 seeking prayers similar to those which had been made in the Section 9 petition, namely, for securitising the

amounts payable to it. It additionally prayed for the amount of Rs.1.14 crores being released in its favour.

7. Tahal sought release of the amount deposited with this Court asserting that merely because Promax may be said to have a strong prima facie case, there existed no justification for any amounts being retained or it being held liable to make a pre-deposit in relation to the amount claimed by Promax. Tahal contended that the direction for deposit essentially amounted to an order of attachment before judgement and which was clearly unjustified since Promax had failed to establish that it was seeking to obstruct or delay the execution of any Award that may be ultimately rendered or that it was intending to remove the whole or any part of its property so as to defeat the Award which may be ultimately passed. Tahal had contended before the Arbitral Tribunal that it is a solvent entity which has never defaulted in repayment of any credit facilities extended to it by financial institutions. It had also referred to the recently sanctioned working capital facility as extended to it by Hongkong and Shanghai Banking Corporation Limited. A certificate of the said financial institution was also placed before the Arbitral Tribunal in order to establish that Tahal was not undergoing any financial hardship.

8. Promax had opposed the application made by Tahal asserting that the amounts which had been directed to be deposited by this Court by Tahal represented a figure which it had itself conceded was an amount payable as per its own case to Promax for work already completed. Promax also opposed the prayer made by Tahal asserting that it is a 100% subsidiary of M/s Tahal Consulting Engineers, a

company incorporated under the laws of Israel and which parent entity had been providing Performance Bank Guarantees and Advance Bank Guarantees in connection with works and contracts awarded to Tahal. It was further asserted that as per the financial statements of Tahal, it is manifest that its revenue has lowered by 50% and that its profits have plummeted by more than 70% in Financial Year 2020-2021.

9. Promax pressed its application dated 17 June 2022 before the Arbitral Tribunal asserting that the material placed on the record would indicate that Tahal itself failed to obtain extension of the main contract from BWSSB, it did not open an Escrow Account for the purposes of receipt of payments from BWSSB and it has thus retained monies which were liable to be paid to Promax. It also alluded to an asserted failure on the part of Tahal to secure the retention money in fixed deposits as per the terms of the sub-contract agreement. Promax contended that in light of the admission of liability as duly recorded by the Court in its order of 28 April 2022, the amount of Rs.1.14 crores is in any case liable to be released in its favour and Tahal being called upon additionally to secure the amount of Rs.16,68,27,548/- which related to the various claims raised by Promax in respect of work already accomplished.

10. The aforesaid application was opposed by Tahal which contended that Promax had breached various timelines under the sub-contract agreement and which was the cause of immense delay having occurred in the execution of works. Tahal alleged that the aforesaid conduct of Promax had not only led to financial losses being suffered by it, but also led to a loss of goodwill and reputation. It was

additionally contended that the money held in deposit with this Court is not liable to be released bearing in mind the counter claims which stand raised by Tahal and which are far greater than the entirety of the claim as raised by Promax before the Arbitral Tribunal. It was further asserted that Tahal is a going concern and that the contention of Promax that it would be unable to fulfil the terms of any Award that may come to be rendered against it was devoid of substance.

11. The Arbitral Tribunal while dealing with the prayer made by Tahal for release of Rs.1.14 crores took into consideration the decisions rendered by this Court with respect to the interplay between the principles underlying Order XXXVIII Rule 5 of the **Code of Civil Procedure, 1908**[3] and Section 17 of the Act. It came to hold that Promax had failed to make out a case which would warrant an order of attachment before judgement being made. The Arbitral Tribunal also took into consideration the fact that various targets and milestones as specified in the sub-contract agreement had not been adhered to. It also took note of the contention of Promax that Tahal had failed to open the Escrow Cum No-Lien Account. However, bearing in mind the seriously disputed issues which arose, it observed that presently it could not be said that Promax had made out a case warranting an attachment before judgment being ordered.

12. Placing reliance on the principles which govern the invocation of Order XXXVIII Rule 5 of the Code and the decision of this Court in **BMW India Private Ltd. v. Libra Automotives Private Limited**

[3] Code

&Ors[4] the Arbitral Tribunal came to conclude that there existed no justification for Tahal being called upon to secure the entire amount as claimed by Promax. Insofar as the prayer for release of Rs.1.14 crores is concerned, the Arbitral Tribunal took into consideration the affidavit which was tendered by Tahal in the Section 9 proceedings and the purported admission of liability as appearing therein. However, the Arbitral Tribunal observed that while Promax may be recognised to have a good prima facie case insofar as the aforesaid sum is concerned, it would be inappropriate to order the release thereof in favour of Promax bearing in mind that its application had been made under Section 17 as opposed to Section 31(6) of the Act. The Arbitral Tribunal thus came to conclude that till a final adjudication is undertaken, the interest of both sides would be protected if the amount already deposited by Tahal is preserved. On an overall consideration of the aforesaid facts, it proceeded to dispose of the Section 17 applications made by Tahal and Promax respectively.

13. Promax thereafter moved an application for review as well as for an interim Arbitral Award being rendered insofar as the sum of Rs.1.14 crores is concerned. Insofar as the issue of review is concerned, the Arbitral Tribunal held that it did not stand conferred with the authority to undertake a substantive review under the Act. It noted that the review application moved by Promax essentially sought the Arbitral Tribunal to undertake a merit review.

14. However, and notwithstanding its conclusion that a power to review the order of 19 September 2022, on merits did not stand

[4] 2019 SCC Online Del 9079

conferred upon it by the Act, it proceeded to re-examine the various assertions made by Promax and ultimately came to conclude that the review petition lacked merit. It reiterated its earlier findings that Promax had been unable to establish that Tahal was likely to dispose of its properties and assets and thus frustrate any Award that may ultimately come to be pronounced. Insofar as the application under Section 31(6) is concerned, the Arbitral Tribunal noted that as against the amount already held in deposit and in respect of which an interim Award was sought, Tahal had raised substantial counter claims and also questioned the claims raised by Promax in light of Clause 50.1 of the General Conditions of Contract read with Clauses 1.4 and 1.8 of the sub-contract agreement.

15. The Arbitral Tribunal came to conclude that the aforesaid rival submissions gave rise to various contentious issues which would warrant a fuller consideration. It also appears to have borne in mind the principles enunciated by the Supreme Court in **Indian Farmer Fertilisers Co-operative Ltd. vs. Bhadra Products**[5] which, while dealing with the circumstances in which an interim Award may be rendered, had held that the Tribunals must desist from deciding a dispute in a piecemeal manner and weigh whether circumstances would warrant an interim Award being rendered rather than proceedings being expedited so that the entire dispute itself may be rendered a quietus. Bearing in mind the aforesaid principles as laid down in *Indian Farmer Fertilisers*, the Arbitral Tribunal came to

[5] (2018) 2 SCC 534

conclude that circumstances did not justify the making of an interim Award.

16. Before proceeding further to notice the rival submissions, the Court deems it apposite to note and observe that Mr. Khan, learned counsel representing Promax chose not to question the order of 14 November 2022 and categorically submitted that its challenge was aimed at the order dated 19 September 2022 solely. Promax, thus failed to either question or assail the correctness of the views expressed by the Arbitral Tribunal in respect of the review petition as well as the application for interim Award as made in terms of Section 31(6).

17. Mr. Nayar, learned Senior Counsel appearing for Tahal submitted that once the Arbitral Tribunal had come to the conclusion that Promax had failed to establish the tests underlying Order XXXVIII Rule 5 of the Code or principles analogous thereto, there existed no justification for the Arbitral Tribunal having refused the prayer made by Tahal for release of Rs.1.14 crores. It was submitted that the deposit as required to be made clearly amounted to the application of attachment before judgement principles which flow from the Order XXXVIII Rule 5. Mr. Nayar placed reliance upon the following observations as appearing in the decision of the Supreme Court in **Raman Tech. & Process Engg. Co. vs. Solanki Traders** in this regard: -[6]

> "**4.** The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and

[6] (2008) 2 SCC 302

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

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

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the

> whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment. (See *Premraj Mundra* v. *Md. Manech Gazi* [AIR 1951 Cal 156] for a clear summary of the principles.)"

18. Reliance was also placed on the judgement rendered by this Court in **Natrip Implementation Society vs. IVRCL Limited**[7] and **Manish Aggarwal v. RCI Industries & Technologies Ltd.**[8] The Court deems it apposite to extract the following passages from the decision in *Natrip*:-

> "**17.** It is also clear from the opening sentence of section 9(1)(ii) of the Act that the measures that can be ordered are "interim measures of protection". It, plainly, follows that the principles that would be applicable for grant of orders under section 9(1)(ii) of the Act would be the principles that may be applicable to grant of such orders as are applicable to proceedings before the Court. An order for securing the amount claimed prior to an arbitral award is essentially in the nature of attachment before judgement and thus, the principles as applicable for grant of such orders in proceedings before the Court - that is, as applicable under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (hereafter 'the CPC') - would be equally applicable for grant of relief under Sections 9(1)(ii)(b) or 17(1)(ii)(b) of the Act (as amended by Act 3 of 2016) prior to the publishing of the arbitral award. In *Rite Approach Group Ltd.* v. *Rosoboronexport*: 111 (2004) DLT 816, *Global Company* v. *National Fertilizers Ltd.*: AIR 1998 Delhi 397 and *Gatx India Pvt Ld.* (supra), this Court held that it would take guidance from the principles given in Order XXXVIII Rule 5 of the CPC for grant of orders under Section 9 of the Act.
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> **18.** It is also well settled that the granting of orders under section 9 of the Act are discretionary in nature and equitable considerations would apply for grant of such orders. Thus, orders as prayed under section 9(1) of the Act would be granted only if it is necessary and equitable.

[7] 2016 SCC OnLine Del 5023
[8] 2022 SCC OnLine Del 1285

> **20.** In order for the court to exercise its powers under Order XXXVIII Rule 5 of the CPC, it is necessary that twin conditions be satisfied. First, that the plaintiff establishes a reasonably strong *prima facie* case for succeeding in the suit; and second, that the court is *prima facie* satisfied that the defendant is acting in a manner so as to defeat the realisation of the decree that ultimately may be passed. The object of Sections 9(1)(ii)(b) and 17(1)(ii)(b) of the Act is similar to the object of order XXXVIII Rule 5 of the CPC. The Arbitral Tribunal while exercising powers under Section 17(1)(ii)(b) of the Act or the Court while exercising power under Section 9(1)(ii)(b) of the Act must be satisfied that it is necessary to pass order to secure the amount in dispute. Such orders cannot be passed mechanically. Further, the object of the order would be to prevent the party against whom the claim has been made from dispersing its assets or from acting in a manner to so as to frustrate the award that may be passed.
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> **24.** The contention that financial distress of a party can be a sole ground for directing that party to secure a claim of unadjudicated damages as claimed by the other party is, in my view, bereft of any merit.
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> **25.** The reliance placed by Mr. Jain in the case of *Gatx India Pvt Ld.* (supra) is misplaced. In that case, the petitioner had made a claim for lease rent of rakes as well as for liquidated damages. Since in that case, the quantum of lease rent was ascertained and the petitioner had established the case for lease rent, the Court granted an order directing furnishing of security for the lease rent. However, as far as liquidated damages were concerned, the Court denied the same because the liability on account of the liquidated damages had not been ascertained. The said decision cannot be read as an authority to mean that financial distress of a party would be sufficient to require the said party to furnish a security.
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> **26.** In the present case, the arbitral proceedings are at the stage of final arguments and considering the stage of the proceedings, the Tribunal has declined to exercise its powers to pass an interim order. Orders under section 17 of the Act are discretionary and the Tribunal has exercised its discretion to not consider passing interim orders at the stage of final hearing. I find no infirmity with the aforesaid view."

19. The Court also deems it appropriate to note the following passages from the decision in *Manish Aggarwal*, and which dealt with

the scope of the powers of the appellate court under Section 37(2)(b) of the Act:-

> "**11.** A brief overview of the judicial perspective on the scope of interference by a court under Section 37(2)(*b*) with a decision taken by an arbitrator under Section 17, is found in the following precedents :
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> *Dinesh Gupta* v. *Anand Gupta* [*Dinesh Gupta* v. *Anand Gupta*, 2020 SCC OnLine Del 2099] :
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> "64. There can be no gainsaying the proposition, therefore, that, *while exercising any kind of jurisdiction, over arbitral orders, or arbitral awards, whether interim or final, or with the arbitral process itself, the court is required to maintain an extremely circumspect approach*. It is always required to be borne, in mind, that arbitration is intended to be an avenue for 'alternative dispute resolution', and not a means to multiply, or foster, further disputes. Where, therefore, the arbitrator resolves the dispute, that resolution is entitled to due respect and, save and except for the reasons explicitly set out in the body of the 1996 Act, is, ordinarily, immune from judicial interference.
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> '65. Interestingly, while examining, in *Snehadeep Structures (P) Ltd.* v. *Maharashtra Small-Scale Industries Development Corpn. Ltd.* [*Snehadeep Structures (P) Ltd.* v. *Maharashtra Small Scale Industries Development Corporation Ltd.*, (2010) 3 SCC 34 : (2010) 1 SCC (Civ) 603] , the scope of the expression "appeal" as employed in Section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993, the Supreme Court held that, "*if ... the meaning of "appeal" is ambiguous, the interpretation that advances the object and purpose of the legislation, shall be accepted*". Purposive interpretation, as has been noticed in *Shailesh Dhairyawan* v. *Mohan Balkrishna Lulla* [*Shailesh Dhairyawan* v. *Mohan Balkrishna Lulla*, (2016) 3 SCC 619 : (2016) 2 SCC (Civ) 426] and *Richa Mishra* v. *State of Chhattisgarh* [*Richa Mishra* v. *State of Chhattisgarh*, (2016) 4 SCC 179 : (2016) 1 SCC (L&S) 583] , has, over time, replaced the principle of "plain reading" as the golden rule, for interpreting statutory instruments.
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> '*66.* In my opinion, this principle has to guide, strongly, the approach of this Court, while dealing with a challenge such as the present, which is directed against an order which, at an interlocutory stage, merely directing furnishing of

security, by one of the parties to the dispute. The power, of the learned sole arbitrator, to direct furnishing of security, is not under question; indeed, in view of sub-clause (*b*) of Section 17(1)(*ii*) of the 1996 Act, it cannot. The arbitrator is, under the said sub-clause, entirely within his jurisdiction in securing the amount in dispute in the arbitration. *Whether, in exercising such jurisdiction, the arbitrator has acted in accordance with law, or not, can, of course, always be questioned. While examining such a challenge, however, the court has to be mindful of its limitations, in interfering with the decision of the arbitrator, especially a decision taken at the discretionary level, and at an interlocutory stage*.'

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Section 17(1), and applicability of Order 39, CPC, thereto

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

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75. The scope and ambit of Section 9, especially in the light of this concluding caveat, was examined by the Supreme Court in *Arvind Constructions Co. (P) Ltd.* v. *Kalinga Mining Corpn.* [*Arvind Constructions Co. (P) Ltd.* v. *Kalinga Mining Corpn.*, (2007) 6 SCC 798] and *Adhunik Steels Ltd.* v. *Orissa Manganese and Minerals (P) Ltd.* [*Adhunik Steels Ltd.* v. *Orissa Manganese and Minerals (P) Ltd.*, (2007) 7 SCC 125] In *Arvind Constructions Co. (P) Ltd.*, it was held thus (in para 15 of the report) :

> "The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot prima facie be accepted. … *It is also clarified that the court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general*

rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. … we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well-recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver'".

(emphasis supplied)

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'*77*. The principles governing Order 39 CPC have, therefore, also to guide the court, while granting interim protection under Section 9(1), or the arbitrator, while granting such protection under Section 17(1), of the 1996 Act.'

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'83. The resultant legal position is that, while the applicability of Order 38 Rule 5, CPC, to the amended Section 17(1)(*ii*)(*b*) of the 1996 Act, may be seriously questionable, even under the pre-amended Section 17, the provisions of Order 38 Rule 5CPC cannot, bodily, be incorporated into the provision, though the principles governing the exercise of jurisdiction under Order 38 Rule 5 are required to inform such exercise of jurisdiction. Either which way, therefore, while exercising jurisdiction under Section 17(1)(*ii*)(*b*), the arbitrator is not strictly bound by the confines of Order 38 Rule 5CPC, but is also proscribed from acting in a manner completely opposed thereto. A middling approach is, therefore, required, without treating Order 38 Rule 5 as entirely inapplicable to Section 17(1)(*ii*)(*b*) (as Mr Nandrajog would contend), or as applicable with all its vigour and vitality (as Mr Nayar would contend).'

'84. Having said that, *it is indisputable that the exercise of jurisdiction, by the arbitrator, under Section 17, is fundamentally discretionary in nature* as contrasted with Sections 16(2) and (3). *Judicial interference, with the exercise of discretionary power, is, classically, limited, and is even more circumscribed, where the authority exercising discretion is itself a judicial authority as opposed to a purely administrative or executive functionary*. (One uses the expression "judicial authority", here, to denote the nature rather than the status of the jurisdiction exercised by the arbitrator, it having been settled, by the Supreme Court in *Army Welfare Housing Organisation* v. *Sumangal Services (P) Ltd.* [*M.D., Army Welfare Housing*

Organisation v. *Sumangal Services (P) Ltd.*, (2004) 9 SCC 619] , that an arbitrator is not a "Court", and does not exercises judicial functions). Discretionary orders passed by Arbitral Tribunals have, therefore, to be handled with kid gloves, and protected from injury by any overzealous administration, by the court, of the law as it perceives it to be. *If anything, therefore, the jurisdiction of the court, under Section 37(2)(b), is even more limited than the jurisdiction that it exercises under Section 37(2)(a) or, for that matter, under Section 34. The discretionary jurisdiction, as exercised by the arbitrator, merits interference, under Section 37(2)(b), therefore, only where such exercise is palpably arbitrary or unconscionable*'.

'85. This position is additionally underscored, where the order of the arbitrator is relatable to Section 17(1)(*ii*)(*b*) or (*e*), and directs furnishing of security. Direction, to litigating parties, to furnish security, is a purely discretionary exercise, intended to balance the equities. The scope of interference, in appeal, with a discretionary order passed by a judicial forum, stands authoritatively delineated in the following passages, from *Wander Ltd.* v. *Antox India (P) Ltd.* [*Wander Ltd.* v. *Antox India (P) Ltd.*, 1990 Supp SCC 727] :

> "13. ….
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> '14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. *In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions*. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. *The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion*. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court

> would have taken a different view may not justify interference with the trial court's exercise of discretion…"'.
>
> (emphasis supplied)

Raman Tech. & Process Engg. Co. v. *Solanki Traders* [*Raman Tech. & Process Engg. Co.* v. *Solanki Traders*, (2008) 2 SCC 302 : (2008) 1 SCC (Civ) 539] :

> '5. The *power under Order 38 Rule 5CPC is a drastic and extraordinary power*. Such power should not be exercised mechanically or merely for the asking. *It should be used sparingly and strictly in accordance with the rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt*. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment.'
>
> '6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. *A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5CPC*. Courts should also keep in view the principles relating to grant of attachment before judgment. (See *Premraj Mundra* v. *Mohd. Manech Gazi* [*Premraj Mundra* v. *Md. Manech Gazi*, 1957 SCC OnLine Cal 20 : AIR 1951 Cal 156]) for a clear summary of the principles.')"
>
> (emphasis supplied)

12. In the present case, quite clearly, the learned sole arbitrator has declined to grant the interlocutory order sought by the appellants in exercise of his discretionary power under Section 17 of the A&C Act. Has this discretionary power been exercised in a manner that is palpably arbitrary, capricious, irrational or perverse? In the

> opinion of this Court, the answer to that question is an emphatic "No". The interlocutory relief sought was to secure the counterclaims made by the appellants, which counterclaims are evidently disputed and the determination of which is yet to be made. In fact the learned sole arbitrator was in the process of hearing the appellants on their counterclaims. Interlocutory orders were sought on the ground that the respondent's financial position was weak and would render any award granted on the counterclaims, a mere "paper-award". This ground was premised solely on the fact that the respondent's net worth was in the "negative". However, the learned sole arbitrator proceeded objectively on the basis that the "negative" net worth had reduced over the period March 2017 to March 2021, partly for the reason that the respondent had discharged the dues owed by DMT i.e. the unit purchased from the appellants, to third party creditors. In any case, grant of the interlocutory relief sought, would have amounted to converting the indeterminate and unsecured counterclaims preferred by the appellants, into secure claims, which is ordinarily frowned upon in law.
>
> **13.** Viewed from the settled perspective of guarded and sparing use of the powers under Section 37(2)(*b*) of the A&C Act in only exceptional circumstances; and even more so when the exercise of discretion by the arbitrator is not seen to be arbitrary, capricious, irrational or perverse, this Court finds no reason to interfere in the order made by the learned sole arbitrator in this case."

20. Mr. Nayar contended that a direction for securing the amount prior to a decree is a drastic measure and for the exercise of which the factors which are contemplated by Order XXXVIII Rule 5 must be established to exist. It was submitted that for the purposes of seeking such a relief, it was incumbent upon Promax not only to establish that it had a strong prima facie case but Tahal was taking steps to obstruct and frustrate any Award that may be ultimately rendered. Mr. Nayar referred to the following observations as appearing in the decision of the Court in *BMW India*:-

"**27.** A careful analysis of the judgment in *Ajay Singh* (supra), reveals that in the said case, the Division Bench has held that Section 9 of the Act grants wide powers to the Court in fashioning an appropriate interim order. It has also been held that Court should not find itself unduly bound by the text of those provisions and should rather follow the underlying principles. Essentially, the Division Bench has held that the discretion should be exercised appropriately while granting an interim order and such discretion must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection. Even in *Huawei Technologies* (supra), the Court has recognized that all the requisite conditions of Order 38 Rule 5, CPC are required to be satisfied for considering the prayer of securing the amount and the Court should exercise its discretion very carefully. It was also held that where it appears that there are exceptional circumstances, it has ample power to secure the amount, if it is just and convenient. However, the aforenoted judgments do not seem to suggest that while exercising power under Section 9 the necessary conditions and ingredients under Order 38 Rule 5 CPC, are not required to be insisted upon. The judgments relied upon by the Petitioner only stress that the power should be principled and premised on some known guidelines and hence the analogy of Order 38 and 39, CPC is certainly applicable. At this stage, the judgments relied upon by the learned counsel for the Respondents also need to be mentioned. Respondents have relied upon *C.V. Rao* v. *Strategic Port Investment*, (2015) 218 DLT 200, *Lanco Infratech Ltd.* v. *HCC Ltd.* (2016) 234 DLT 175, *Intertoll ICS Cecons O&M* v. *NHAI*, ILR (2013) II Delhi 1018, *Raman Tech* v. *Solanki Traders*, (2008) 2 SCC 302 and *Kopastin Holding Ltd.* v. *Uday Bahadur*, 2018 SCC OnLine Del 10541.

28. Besides the aforenoted judgments, there are several other judgments that deal with this issue. In *Nimbus Communication Ltd.* v. *Board of Control for Cricket in India*, 2012 SCC OnLine Bom 287, the Bombay High Court held as under:—

> "The judgment of the Supreme Court in *Adhunik Steels* has noted the earlier decision in *Arvind Constructions* which holds that since section 9 is a power which is conferred under a special statute, but which is exercisable by an ordinary Court without laying down a special condition for the exercise of the power or a special procedure, the general rules of procedure of the Court would apply. Consequently, **where an injunction is sought under section 9 the power of the Court to grant**

that injunction cannot be exercised independent of the principles which have been laid down to govern the grant of interim injunctions particularly in the context of the Specific Relief Act, 1963. The Court, consequently would be obligated to consider as to whether there exists a prima facie case, the balance of convenience and irreparable injury in deciding whether it would be just and convenient to grant an order of injunction. Section 9, specifically provides in sub-clause (d) of clause (ii) for the grant of an interim injunction or the appointment of a receiver. As regards sub-clause (b) of clause (ii) the interim measure of protection is to secure the amount in dispute in the arbitration. **The underlying object of Order 38 Rule 5 is to confer upon the Court an enabling power to require a defendant to provide security of an extent and value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should be furnished is, however, preconditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be passed against him. In view of the decisions of the Supreme Court both in *Arvind Constructions* and *Adhunik Steels*, it would not be possible to subscribe to the position that the power to grant an interim measure of protection under section 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure 1908 or that the exercise of that power is untrammelled by the Code**. The basic principle which emerges from both the judgments of the Supreme Court is that though the Arbitration and Conciliation Act, 1996 is a special statute, section 9 does not either attach a special condition for the exercise of the power nor does it embody a special form of procedure for the exercise of the power by the Court. The second aspect of the provision which has been noted by the Supreme Court is the concluding part of section 9 under which it has been specified that the Court shall have the same power for making orders as it has for the purpose of and in

relation to any proceedings before it. This has been interpreted in both the judgments to mean that the normal rules that govern the Court in the grant of an interlocutory order are not jettisoned by the provision. The judgment of the Division Bench of this Court in *National Shipping Company* (supra) notes that though the power by section 9(ii)(b) is wide, it has to be governed by the paramount consideration that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award. The Division Bench noted that the power being of a drastic nature, a direction to secure the amount claimed in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave injustice to the party seeking a protective order. The obstructive conduct of the party against whom such a direction is sought was regarded as being a material consideration. However, the view of the Division Bench of this Court that the exercise of power under section 9(ii)(b) is not controlled by the provisions of the Code of Civil Procedure 1908 cannot stand in view of the decision of the Supreme Court in *Adhunik Steels"*

(emphasis supplied)

29. All the above noted judgments listed above invariably echo the same principles. The imperative that emerges is that the court should not ignore the principles or the well known guidelines, but at the same time it should be unduly bound by the text. There is thus no perceptible difference in the views expressed by the Division Bench as sought to be highlighted by Mr. Krishnan. An order for securing the amount claimed prior to an arbitral award is certainly comparable to the nature of relief provided for under Order 38 Rule 5, CPC. Keeping the well known principles in mind, I am of the view that it is necessary that Petitioner No. 1 satisfies the Court that (a) Petitioners have a reasonably strong prima facie case for succeeding in the arbitration proceedings and (b) that the Respondent is acting in a manner so as to defeat the realization of the future award that may ultimately be passed. Such orders cannot be passed mechanically as the exercise of power in the nature of Order 38 Rule 5, CPC is a drastic and extraordinary power. There is no doubt in my mind that the underlying basis of Order 38 Rule

5, CPC has to be borne in mind while deciding an application under Section 9(ii)(b) of the Act.

30. The other thrust of the argument of Petitioners has been that the Respondents are in financial distress and would not be able to honour the award. However, the Court is of the view that this cannot be the sole ground for directing the Respondents to secure the claim of an amount which is highly disputed. It is well settled in law that while exercising power under Section 9 of the Act, the Court does not have the jurisdiction to decide disputed questions of fact. The disputed questions of fact would have to be considered by the Arbitrator after giving an opportunity to lead evidence. On this question, the judgment of the Supreme Court, in *Modi Rubber Ltd.* v. *Guardian International Corp.*, 2007 SCC OnLine Del 502 is worth mentioning. The Court therein has held as under:—

> "This Court while considering the petition under Section 9 of the Arbitration and Conciliation Act, 1996, does not have the jurisdiction to return a finding on the merits of a claim made or a dispute raised by the parties before the arbitrator. However, there can be no dispute that this Court is required to examine the existence of a *prima facie* case on the assertions of the petitioner with regard to the termination of the agreement in the facts and law applicable and as to strength in the petitioner's case as to the bindingness and subsistence of the SHA."

21. It was also contended that Promax had woefully failed to establish that Tahal was seeking to dispose of its assets or that it was going through a phase of financial difficulty. It was Mr. Nayar's submission that the Tribunal has thus clearly erred in failing to release the amount held in deposit.

22. Mr. Nayar also highlighted the fact that the allegation that Advance Bank Guarantees and/or Performance Bank Guarantees were being provided by the parent company of Tahal is factually incorrect since the parent entity had fronted Advance Bank Guarantees and Performance Bank Guarantees only in respect of one project and which too had not been invoked. It was also submitted that none of the

loan accounts of Tahal have been classified as Non-Performing Assets and nor had it defaulted in repayment of any credit facilities. Mr. Nayar also pointed out that Tahal was presently executing five projects in India and consequently, not only was the prayer made by Promax for it being called upon to securitize its entire claim wholly unjustified, the failure on the part of the Arbitral Tribunal to direct release of amounts to be a patent illegality.

23. Appearing for Promax, Mr. Khan, learned counsel addressed the following submissions. It was firstly submitted that Promax in its application under Section 17 had principally sought the following reliefs:-

> "i. Modify / vary the order dated 28.04.2022 of Hon'ble Delhi High Court to the extent that it directs that the amount of Rs. 1,14,00,000/- submitted by the Respondent vide the DD Nos. 738777, 738778 and 738816 with the Registry of the Hon'ble High Court be released to the Claimant, as the Claimant, in terms of the sub-contract agreement dated 27.01.2021, is entitled for this amount on the prima facie basis;
>
> ii. Direct the Respondent to deposit the amount with Registry of Hon'ble Delhi High Court, in respect of Claimant's claim No. 2 of Retention money of Rs 45,35,748/-as the amount has already been received by Respondent in compliance of the sub-contract agreement dated 27.01.2021;
>
> iii. Direct the Respondent to deposit the amount with Registry of Hon'ble Delhi High Court, in respect of Claimant's claim No. 2 of Defence Land Deposit of Rs 23,95,195/- as sub-contract agreement dated 27.01.2021 has been terminated;
>
> iv. Direct the Respondent to deposit the amount with Registry of Hon'ble Delhi High Court, in respect of Claimant's claim No.5 towards cost of Materials lying in the custody of the Respondent to the tune of Rs. 39,26,358/- as the Respondent is already using this material for its own purpose and Claimant cannot utilized this material for any other project;

v. Secure the amount by way Bank Guarantee, in respect of Claimant's claim No. 1 toward Balance Payment receivable against work done by Claimant of Rs 3,40,96,339/-;

vi. Secure the amount, preferably by Bank Guarantee or any other security that this Hon'ble Tribunal deems appropriate, in respect of Claimant's total claim of Rs 16,68,27,548/-, as if the Claimant's claim succeeds after the Arbitration proceedings are completed, it will be nearly impossible to recover this money from the Respondent, given the Respondent's financial health is poor;

24. It was his submission that the Arbitral Tribunal has abjectly failed to deal with prayers (ii) to (vi) as set out above. It was his submission that the Arbitral Tribunal has committed a manifest illegality in failing to bear in mind the well-settled principles that the payment of an admitted liability is not contingent on the adjudication of counter claims. Learned counsel in support of the aforesaid submission drew the attention of the Court to the following decisions:-

(i) **Numero Uno International Ltd versus Prasar Bharti**[9]

(ii) **Union of India versus Madhu Transport Company Pvt. Ltd.**[10]

25. The Court deems it apposite to extract the follows passages from the decision in *Numero Uno* which were relied upon by Mr. Khan: -

> **"6.** What then remains to be examined is whether the pendency of a counter claim made by the appellant before the arbitrator was

[9] 2008 SCC OnLine Del 175

[10] Order dated 17.10.2022 passed by the High Court of Delhi in OMP (COMM) 425/2022

sufficient to dis-entitle the respondent Prasar Bharti from claiming even the admitted amount due from the appellant by way of an interim award in its favour. According to Mr. Jaitley, since the claim made by the respondent and the counter claim of the appellant were eventually to result in a net amount which one or the other party would be required to pay, the payment of any amount which the appellant may have admitted to be due and payable out of the claim made by the respondent would not meet the ends of justice nor was any such payment otherwise necessary. We do not however think so. The legal position as regards the nature of a set off and counter claim was examined in *Canara Bank's case* (supra) and summarised thus:

> "34. The following things are in common in set off and counter claim:
>
> (1) None should exceed the pecuniary limits of the jurisdiction of the Court;
>
> (2) Both are pleaded in the written statement, if the law governing the Court permits such plea being raised by the defendant in the written statement;
>
> (3) The plaintiff is expected to file a written statement in answer to a claim for set off or to a counter claim;
>
> (4) Even if permitted to be raised, the Court may in appropriate cases direct for set off or counter claim being tried separately;
>
> (5) A defendant cannot be compelled to plead a set off nor a counter claim; he may as well maintain an independent action for enforcing the claim forming subject matter f set off or counter claim.
>
> (6) Both are liable to payment of court fee under Sch. 1 Art. 1 of Court-fees Act, 1870.
>
> (7) Dismissal of suit or its withdrawal would not debar a set off or counter claim being tried, may be followed by a decree against the plaintiff."

7. In the light of the above, there is no gainsaying that the making of a counter claim is tantamounting to institution of an independent suit for adjudication of the claim of the defendant. Not only court fee is payable on the counter claim but the counter claim remains unaffected by the withdrawal of the original suit evidently on the principle that the counter claim is a suit in itself. So also the court has always the power to direct a set off or counter claim being tried separately from the original suit. Such being the legal nature and character of a counter claim, its pendency does not denude the arbitrator of the power to make an interim award in the original suit/claim if such an interim

> award is otherwise justified. What is significant is that the legality of an interim award may be tested by reference to the material on which it is based rather than the areas of dispute that may still call for adjudication between the parties. If an interim award on the basis of material available on record is not justified, the Court may set aside the same under Section 34 of the Act. No interference with an interim award would, however, be permissible only because the defendant has made a counter claim or because some areas of dispute independent of the area covered by the interim award remains to be resolved.
>
> **8.** The issue can be viewed from yet another angle. The making of the interim award ensures to the party in whose favour the same is made the payment of an amount which is an admitted position payable to it. There is no reason why the payment of what is admittedly due should await the determination of other disputes which may take years before they are finally resolved. If at the conclusion of the arbitral proceedings, the defendant were to succeed in his claim, either wholly or partially, and if after adjustment of the amounts found payable to the plaintiff, any amount is eventually held payable to one or the other party, the arbitrator can undoubtedly make such an adjustment and direct payment of the amount to one or the other party, as the case may be. The final award would in any such case also take into consideration the payments, if any, made under the interim award. Suffice it to say that the making of the interim award in no way prevents the arbitrator from making adjustments of the amount in the final award and doing complete justice between the parties. By that logic even if we assume that the Prasar Bharti was to fail in substantiating its further claims which are disputed and the appellant were to succeed wholly in the counter claim that it has made, all that it would result in is an award in favour of the appellant. There is, therefore, no inherent illegality or perversity in the making of the interim award by the arbitrator so as to call for interference by this Court under Section 34 of the Act.

26. The Court also deems it apposite to note the following paragraphs in *Madhu Transport* which were relied upon by the learned counsel:-

> **3.** The only ground on which the said admitted claim was resisted by the petitioner herein is that it has a counter claim for ₹582.18 crore being the alleged loss suffered on account of alleged under-utilization of the rakes resulting in loss of freight revenue. Suffice to state, the

contract as executed between the parties was terminated by the respondent herein. The termination was the subject matter of a writ petition before this Court being W.P.(C) 5124/2014 which was decided by the learned Single Judge of this Court on June 29, 2015 issuing a mandamus to the respondent to either return the wagons to the respondent herein within a period of one month or alternatively purchase the wagons at an agreed price. For the purpose of determination of the price, the Court had appointed an Arbitrator to adjudicate the same.

8. While referring to the judgments in the cases of Union of India v. Raman Foundaries, (1974) 2 SCC 231, Numero Uno International Ltd v. Prasar Bharti, 2008 (101) DRJ 479 (DB), and Nimbus Communications v. Prasar Bharti, 2015 SCC Online Del 8583, he has in paragraph 20 held as under:

> "20. In view of the settled position in law, since the value of the said rakes of wagons as assessed by the Respondents is admittedly due to the Claimant, this amount need not await the determination of the other disputes. Accordingly, the Claimant is entitled to an interim award in the sum of Rs 13,14,69,178.08 for the value of rakes as admittedly assessed by the Respondents and payable by them. It is awarded accordingly. This interim award shall be taken into consideration at the time of making the final award after determination of the other claims of the Claimant, including the claim for interest."

9. The submission of Mr. Vineet Dhanda, learned CGSC appearing for the Union of India / petitioner is with regard to; (i) the termination of contract having been effected by the respondent; and (ii) the petitioner also had a counter claim before the learned Arbitrator and as such the said amount could not have been awarded by the learned Arbitrator.

10. I am not in agreement with both the submissions made by Mr. Dhanda. Firstly, the learned Arbitrator in paragraph 16 of the impugned award has rightly held, that the validity of termination has attained the finality, with the dismissal of the Special Leave Petition.

11. Secondly, on the other issue which arose for consideration before the learned Arbitrator on the value of the four rakes which the respondent is entitled to, the document dated February 23, 2018, which is a communication issued by the South Eastern Railway and cannot be disputed by the petitioner, the last paragraph of the same reads as under, as the said Railway has assessed the value of rakes as ₹13,14,69,178.08/-:

> "As the residual value of the WIS rake i.e. Rs. 13,14,69,178.08 (as per calculation table at Page 2) has been surpassed by the loss of revenue caused to the Railway by you, the Railway will be constrained to file claim for the said loss after adjustment of Rs.13,14,69,178.08."

> **12.** If that be so, the learned Arbitrator was right, i.e., insofar as the counter claim of the petitioner for an amount of ₹582.18 crore is concerned, the same has to await determination by the learned Arbitrator as against the admitted dues of the respondent herein, which it is entitled to.

27. Mr. Khan further submitted that the Arbitral Tribunal clearly erred in refusing to direct a conditional release of the amount held in deposit even though it had come to recognise the existence of a strong prima facie case in favour of Promax. It was his submission that in the event Tahal were to go into liquidation even the amount held in deposit with this Court would not stand protected and would fall in the hands of a Resolution Professional or the Liquidator as the case may be.

28. Insofar as prayer (ii) to (vi) as made in the application moved by Promax is concerned, Mr. Khan submitted that the Arbitral Tribunal clearly erred in coming to hold that Promax had failed to establish a prima facie case. It was his submission that it would be manifest from a reading of para 33 of the Statement of Defence that Tahal admitted that Promax had only performed 10% of the total work. It was highlighted that undisputedly the contract was valued at Rs.76 crores and thus 10% of the same would come to Rs.7.6 crores. Mr. Khan submitted that Promax had only been paid a sum of Rs.3.9 crores. It was his submission that this Court in its order of 28 April 2022, had itself found that a prima facie case existed in favour of

Promax. Learned counsel also laid emphasis on the fact that Promax's claim itself was in respect of Running Account bills, all of which had been raised prior to the termination of the sub-contract agreement. In view of the above, it was his contention that the Arbitral Tribunal committed a manifest illegality in failing to direct release of the amount held in deposit.

29. Turning then to the issue of the existence of circumstances which would warrant a direction for attachment before judgement being made, Mr. Khan sought to draw sustenance from various Financial Reports which were placed along with the convenience compilation. From the aforesaid material, it was contended that the revenue and profit of Tahal has decreased by 50% and 70% respectively between Financial Years 2020-2021. It was also contended that the Financial Reports of the parent and group companies which have been placed along with convenience compilation would itself establish that tangible and intangible assets have reduced by 60% and that cash and cash equivalents has also witnessed an identical decline. Mr. Khan also referred to the Annual Report 2021 of Kardan N.V. and which alluded to the group companies contemplating the sale of all Indian projects. It was also contended that the market value of Kardan's shares had fallen by 99.8% and thus all of the above clearly established a strong possibility of diminution of assets.

30. According to Mr. Khan in light of the judgement rendered by the Supreme Court in **Essar House Private Limited vs. Arcellor**

Mittal Nippon Steel India Limited[11] it was not incumbent upon Promax to establish or prove an actual attempt made by Tahal to dispose of its properties. Learned counsel submitted that as was pertinently observed by the Supreme Court in *Essar House*, even a strong possibility of *"diminution of assets"* would be sufficient and justify an order of attachment before judgement being passed. Mr. Khan also alluded to the past conduct of Tahal and the various directions and coercive measures adopted by the Court on account of a failure on its part to comply with its interim directions leading to costs being imposed, directions framed for the personal presence of its directors and the matter being ultimately closed upon an apology being tendered.

31. Insofar as the additional material which has been placed on the record and was noticed hereinabove, Mr. Nayar firstly took strong objection to the various material which came to be included in that compilation contending that the majority of the reports which were sought to be relied upon had never been placed before the Arbitral Tribunal. Mr. Nayar also referred to the following chart and from which a comparison was sought to be drawn between the financials of Tahal and Promax. The aforesaid chart is extracted hereinbelow: -

"**Comparison of Financials of both Companies (TCEIPL vs Promax)**

		As per Audited BS as on 31.03.2022	**As per Audited BS as on 31.03.2022**
A	**Particulars**	**TCEIPL**	**Promax**

[11] 2022 SCC OnLine SC 1219

1)	Revenue (In crores)	87.65 [@pg.159]	39.75[@pg. 115]
2)	Net profit (In crores)	1.48 [@pg. 159]	0.20 [@pg. 115]
	Net profit % to revenue	1.69	0.50
3)	Net worth (in crores)	30.63 [@pg. 158]	6.69 [@pg. 114]
	Earning per share	5.22 [@pg. 159]	0.39 [@pg. 115]
4)	Cash and cash equivalent (In crores)	11.94 [@pg. 158]	3.68 [@pg. 114]

"

32. Mr. Nayar submitted that against the total revenues of Rs.87.65 crores which was earned by Tahal, the revenue of Promax stood at only Rs.39.75 crores. The net profit of Tahal was stated to be in the range of Rs. 1.48 crores as against that of Promax which was asserted to be Rs. 0.20 crores. Mr. Nayar also referred to the fact that the net worth of Tahal stood at Rs.30.63 crores as against that of Promax which was only Rs.6.69 crores**.** The status of Promax and its financial health was also questioned with the aid of various charts and tables which were placed on the record by Tahal in response to the convenience compilation filed by Promax.

33. It may only be clarified at this juncture that the response which had been submitted by Tahal in respect of the financials of the two appellants was essentially in response to what had been placed on the record by Promax. However, and undisputedly, most of the material which was sought to be relied upon and pressed into aid by respective sides had not even been placed before the Arbitral Tribunal for its consideration or evaluation.

34. Having noticed the submissions which were addressed on behalf of respective parties, the Court deems it necessary to briefly articulate the extent of the jurisdiction that an appellate court is called upon to exercise under Section 37(2)(b) of the Act as well as the powers of attachment as flowing from Order XXXVIII Rule 5 of the Code. Undisputedly, the appellate court under Section 37(2)(b) is essentially called upon to evaluate the merits of an order passed by the Arbitral Tribunal in exercise of its discretionary powers. Clause (b) falling in Section 37(2) relates to an appeal which comes to be instituted against an order of the Arbitral Tribunal granting or refusing to grant an interim measure under Section 17. The classic exposition on the width of the power that vests in an appellate court while dealing with an appeal preferred against an order passed in exercise of discretionary powers was expounded in **Wander Ltd. v. Antox India (P) Ltd**.[12] by the Supreme Court as under:-

> "13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.
>
> 14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of

[12] 1990 Supp SCC 727

> interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd.* v. *Pothan Joseph* [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)
>
> > "... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co.* v. *Jhanaton* [1942 AC 130] '...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."
>
> The appellate judgment does not seem to defer to this principle."

35. *Wander Ltd.* formulates the test to be of the appellate court considering whether the exercise of discretion is found, on the facts of the particular case, to be capricious, perverse or arbitrarily exercised. It also significantly explains the extent of the appellate power to be an appeal on principle. Following *Wander Ltd.* the scope of Section 37(2)(b) was lucidly explained by a learned Judge of the Court in **L & T Finance Limited v. DM South India Hospitality Private Limited and Others**[13] in the following terms: -

> "**46.** It is necessary, in my view, for any court, exercising appellate jurisdiction under Section 37(2)(b) over an interlocutory order of

[13] 2021 SCC OnLine Del 5571

an arbitral tribunal, especially one rendered under Section 17, to be conscious of the peripheries of the jurisdiction of the arbitral tribunal, as well as of the appellate court under Section 37(2)(b).

47. An arbitral tribunal, while adjudicating an application for interim protection under Section 17, does not determine the *lis* between the parties. It is not required, or even expected, to embark on a detailed analysis of the clauses of the contract, or their true construction and import. It acts, essentially, on equity. While doing so, of course, the arbitral tribunal - as in the case of a Court exercising Section 9 jurisdiction - would not pass directions inimical to the contractual covenants, or which would hinder their compliance or enforcement at a later stage. If, however, while protecting the rights and claims of the parties as urged on the basis of the terms of the contract, the arbitral tribunal, in order to balance the equities, ensure placement of the parties before it on an even ground, and preserve the sanctity of the arbitral process, grants interim protection, the sustainability of the grant cannot be tested on a strict construction of the covenants of the contract.

48. *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.*, recently rendered by the Supreme Court, definitively settles the position that the scope of Section 17 jurisdiction of the arbitral tribunal is akin to that of the court under Section 9.

49. The following passages, from a recent decision of a Division Bench of this Court in *DLF Ltd. v. Leighton India Contractors P. Ltd.*, neatly encapsulate the legal position regarding the approach of the Section 9 Court, or the Section 17 Tribunal, to the contractual convenants and their interpretation:

> "48. There is another aspect that needs to be discussed. While passing interim orders, relief that would amount to grant of a final relief must be eschewed. Also, while it is true that what would be the nature of an interim measure of protection that would appear to the court to be "just and convenient" would certainly vary from case to case. But, *while deciding on the relief, the court ought not to venture into determination of liabilities and the interpretation of clauses.…*
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> *****
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> 49. In the instant case, *both sides have extensively referred to communications between them, pertaining to extension of time to complete the project, the issuance of C.C, the defaults found in the work and the Clauses of the C.A.,*

> *detailing the mutual rights and obligations. Clearly, therefore, these are matters that cannot be considered by the court in an application under Section 9.* But the learned Single Judge has clearly dealt with the question of illegality and had laid the fault at the door of DLF. This it did on the basis of an assessment of the facts and the Clauses of the C.A. and concluded that while DLF could have encashed the RBGs, it was not proper to have encashed the PBGs and therefore, found it "just and proper" to direct DLF to furnish FDRs of the value of Rs. 143,87,22,708/-. The court has, thus, accepted the stand of Leighton, preferring it over the stand of DLF."
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> (Emphasis supplied)

50. It is hazardous, therefore, for an arbitral tribunal exercising jurisdiction under Section 17, to embark on a detailed analysis of the clauses of the contract. This would amount to a pre-trial determination of the issues in controversy and would also be inimical to the concept of a dispassionate arbitral process. So long as the Arbitral Tribunal appreciates the contentions and protects the rights of the parties which would result, were their contentions to be accepted at the final stage, the Arbitral Tribunal would be entirely within its authority in issuing interlocutory protective directions. To reiterate, the two main factors which are required to weigh with the Arbitral Tribunal at that stage are (i) protection of the arbitral corpus and preservation of the arbitral process, and (ii) balancing of equities between the parties. While doing so, of course, the arbitral tribunal is required to bear, in mind, the considerations of the existence of a *prima face* case, balance of convenience, and the possibility of irreparable loss or prejudice to one or the other party, were interim protection to be, or not to be, granted.

51. Acute awareness of this legal position is expected, of the appellate court exercising jurisdiction under Section 37(2)(b) of the 1996 Act. It cannot proceed to interfere with interlocutory protective orders, passed by the arbitral tribunal under Section 17, by sifting through the contract and its covenants with a toothcomb. While, in the matter of the extent of its jurisdiction, with respect to the nature of order which it would pass, the Section 37(2)(b) court enjoys all the latitude which any appellate court would enjoy, it remains, however, subject to the constraints which would apply to any court, seized with a challenge to an arbitral award. Discretionary orders, passed by the arbitral tribunal under Section 17, are not easily to be trifled with. So long as the arbitral tribunal adheres to the broad principles of equity and protects the claims of

the parties, predicated on the covenants of the contract and their respective contentions, the discretion enjoyed by the arbitral tribunal under Section 17 is required to be respected. On this aspect, I have had occasion to observe thus, recently, in *Augmont Gold (P) Ltd. v. One97 Communication Ltd.*:

> "68. On the scope of interference with the exercise of discretion by the Arbitral Tribunal under Section 17(1)(ii)(b), I have had occasion to observe thus, in *Dinesh Gupta v. Anand Gupta*:
>
> > "60. This position is additionally underscored, where the order of the arbitrator is relatable to Section 17(1)(ii)(b) or (e), and directs furnishing of security. Direction, to litigating parties, to furnish security, is a purely discretionary exercise, intended to balance the equities. The scope of interference, in appeal, with a discretionary order passed by a judicial forum, stands authoritatively delineated in the following passages, from *Wander Ltd. v. Antox India P Ltd.*:
> >
> > > "13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.
> >
> > > *14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of*

interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph:

> "… These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton7, '…the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."*

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

That this principle applies to exercise of appellate jurisdiction, over discretionary interlocutory orders, passed by arbitrators, under Section 17 of the 1996 Act, has been reiterated, by this Court, in several decisions, including *Bakshi Speedways v. Hindustan Petroleum Corporation, EMAAR MGF Land Ltd. v. Kakade British Realities Pvt. Ltd., Reliance Communications Ltd. v. Bharti Infratel Ltd., Ascot Hotels and Resorts Pvt. Ltd. v. Connaught Plaza Restaurants Pvt. Ltd. and Green*

Infra Wind Energy Ltd. v. Regen Powertech Pvt. Ltd."

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

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

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

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

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

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

73. *It is only in rare and extreme cases, therefore, that, in exercise of its appellate jurisdiction under Section 37, a Court would interfere with a discretionary order passed under Section 17.* An order for deposit, under Section 17(1)(ii)(b), is, fundamentally and at all times, an order passed in exercise of its jurisdiction. *Discretionary orders,*

by their very nature, are amenable to judicial interference to a far lesser degree than others."

(Emphasis supplied)

> **52.** The scope of judicial review by Court exercising Section 37(2)(b) jurisdiction cannot not, therefore, be likened to appellate jurisdiction in the classical sense. It remains, at all times, circumscribed by the pre-eminent consideration that the order under challenge is interlocutory, discretionary and one rendered by an arbitral tribunal, entitled to all the proscriptive protections which attach to the arbitral process in general"

36. *L & T Finance* lays emphasis on the need of the appellate court to bear in mind the basic and foundational principles of the Act and that being of judicial intervention being kept at the minimal. It also correctly finds that the power conferred by Section 37(2)(b) is not to be understood as being at par with the appellate jurisdiction which may otherwise be exercised by courts in exercise of their ordinary civil jurisdiction. This clearly flows from the foundational construct of the Act which proscribes intervention by courts in the arbitral process being kept at bay except in situations clearly contemplated under the Act or where the orders passed by the Arbitral Tribunal may be found to suffer from an evident perversity or patent illegality.

37. The position as expounded in *L & T Finance* has been reiterated by yet another learned Judge of the Court in a recent decision rendered in **Supreme Panvel Indapur Tollways Private Limited v. National Highways Authority of India**[14]. The Court deems it appropriate to notice the following exposition of the legal position as appearing in that decision: -

[14] 2022 SCC OnLine Del 4491

"***VI. Analysis:***

A. Scope of jurisdiction under Section 37(2)(b) of the Act

29. The first question to be considered in the light of these submissions is with regard to the scope of this Court's jurisdiction under Section 37(2)(b) of the Act. Mr. Tripathi submitted that the appellate power under Section 37(2)(b) of the Act is to be exercised in limited circumstances, relying upon four decisions of this Court. Although the aforesaid judgments have been rendered upon a consideration of the limitations on judicial interference in arbitration proceedings, reliance has been placed upon the judgment of the Supreme Court in *Wander*, which is not a decision emanating from arbitration proceedings, but qualifies the extent of the general appellate power available under the Civil Procedure Code, 1908. The Supreme Court held, relying upon its earlier decision in *Printers (Mysore) Pvt. Ltd.*, as follows:

> *"13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.*
>
> *14.* ***The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had Ignored the settled principles of law regulating grant or refusal of interlocutory injunctions*** *An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been*

exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. *v.* Pothan Joseph : *(SCR 721)*

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

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

30. The first of the judgments of this Court, cited by Mr. Tripathi, dealing with the power under Section 37(2)(b) of the Act is *Green Infra Wind Energy Ltd.* wherein a coordinate bench of this Court relied upon *Wander* to hold that appellate power cannot be exercised in the absence of a finding that the discretionary order of the tribunal was perverse or contrary to law. The Court also noticed the decisions of this Court in *Ascot Hotels and Resorts Pvt. Ltd.* v. *Connaught Plaza Restaurants Pvt. Ltd.* and *Bakshi Speedways* v. *Hindustan Petroleum Corporation.* The aforesaid decision was followed by another coordinate bench in *Sona Corporation India Pvt. Ltd.*

31. In *Dinesh Gupta* v. *Anand Gupta*, this Court considered the matter with reference to Section 5 of the Act and the generally limited nature of the Court's power in arbitration proceedings, to conclude as follows:

> *"60. In the opinion of this Court, another important, and peculiar, feature of the 1996 Act, which must necessarily inform the approach of the High Court, is that the 1996 Act provides for an appeal against interlocutory orders, whereas the final award is not amenable to any appeal, but only to objections under Section 34. If the submission of Mr. Nayar, as advanced, were to be accepted, it would imply that the jurisdiction of the Court, over the interlocutory decision of the arbitrator, would be much wider than the jurisdiction against the final award. Though, jurisprudential, perhaps, such a position may not*

be objectionable, it does appear incongruous, and opposed to the well settled principle that the scope of interference with interim orders, is, ordinarily much more restricted than the scope of interference with the final judgment.

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64. ***There can be no gainsaying the proposition, therefore, that, while exercising any kind of jurisdiction, over arbitral orders, or arbitral awards, whether interim or final, or with the arbitral process itself, the Court is required to maintain an extremely circumspect approach.*** *It is always required to be borne, in mind, that arbitration is intended to be an avenue for "alternative dispute resolution", and not a means to multiply, or foster, further disputes. Where, therefore, the arbitrator resolves the dispute, that resolution is entitled to due respect and, save and except for the reasons explicitly set out in the body of the 1996 Act, is, ordinarily immune from judicial interference.*

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66. In my opinion, this principle has to guide, strongly, the approach of this Court, while dealing with a challenge such as the present, which is directed against an order which, at an interlocutory stage, merely directing furnishing of security, by one of the parties to the dispute. The power, of the learned Sole Arbitrator, to direct furnishing of security, is not under question; indeed, in view of sub-clause (b) of Section 17(1)(ii) of the 1996 Act, it cannot. The arbitrator is, under the said sub-clause, entirely within his jurisdiction in securing the amount in dispute in the arbitration. Whether, in exercising such jurisdiction, the arbitrator has acted in accordance with law, or not, can, of course, always be questioned. While examining such a challenge, however, the Court has to be mindful of its limitations, in interfering with the decision of the arbitrator, especially a decision taken at the discretionary level, and at an interlocutory stage."

32. The aforesaid approach has also been taken in *Augmont Gold Pvt. Ltd.* v. *One97 Communication Ltd.* and in *Sanjay Arora.* In the latter case, the Court went on to hold as follows:

"19. This Court has already opined, in Dinesh Gupta *v.* Anand Gupta *and* Augmont Gold (P)

> Ltd. *v.* One97 Communication Ltd. *that the* ***considerations guiding exercise of appellate jurisdiction under Section 37(2)(b) are, fundamentally, not really different from those which govern exercise of jurisdiction under Section 34 of the 1996 Act.***
>
> *20.* ***It is only, therefore, where the order suffers from patent illegality or perversity that the court would interfere with the order of the learned Arbitral Tribunal, under Section 37(2)(b)****. This is because, unlike appeals under other statutes or under the CPC, appeals against orders of Arbitral Tribunal are subject to the overarching limitations contained in Section 5 of the 1996 Act, read with the Preamble thereto, which proscribes interference, by courts, with the arbitral process, or with orders passed by learned Arbitral Tribunal, save and except on the limited grounds envisaged in the 1996 Act itself."*

33. In *Manish,* the Court relied upon Section 5 of the Act and the decision in *Dinesh Gupta* to hold as follows:

> *"13. Viewed from the settled perspective of* ***guarded and sparing use of the powers under Section 37(2)(b)*** *of the A & C Act in only* ***exceptional circumstances; and even more so when the exercise of discrition by the arbitrator is not seen to be arbitrary, capricious, irrational or perverse****, this Court finds no reason to interfere in the order made by the learned sole arbitrator in this case.""*

38. It would thus appear to be well settled that the powers under Section 37(2)(b) is to be exercised and wielded with due circumspection and restraint. An appellate court would clearly be transgressing its jurisdiction if it were to interfere with a discretionary order made by the Arbitral Tribunal merely on the ground of another possible view being tenable or upon a wholesome review of the facts the appellate court substituting its own independent opinion in place of the one expressed by the Arbitral Tribunal. The order of the Arbitral Tribunal would thus be liable to be tested on the limited grounds of perversity, arbitrariness and a manifest illegality only.

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 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. In order to appreciate the correctness of this submission, it would be necessary to advert to the following paragraphs of that decision: -

> "**45.** In *Jagdish Ahuja* v. *Cupino Limited*, the Bombay High Court correctly summarised the law in Paragraph 6 extracted hereinbelow:—
>
> > *"6. As far as Section 9 of the Act is concerned, it cannot be said that this court, while considering a relief thereunder, is strictly bound by the provisions of Order 38 Rule 5. As held by our Courts, the scope of Section 9 of the Act is very broad; the court has a discretion to grant thereunder a wide range of interim measures of protection "as may appear to the court to be just and convenient", though such discretion has to be exercised judiciously and not arbitrarily. The court is, no doubt, guided by the principles which civil courts ordinarily employ for considering interim relief, particularly, Order 39 Rules 1 and 2 and Order 38 Rule 5; the court, however, is not unduly bound by their texts. As this court held in* Nimbus Communications Limited *v.* Board of Control for Cricket in India *(Per D.Y. Chandrachud J, as the learned Judge then was), the court, whilst exercising power under Section 9, "must have due regard to the underlying purpose of the conferment of the power under the court which is to promote the efficacy of arbitration as a form of dispute resolution." The learned Judge further observed as follows:*
> >
> > > *"Just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Code of Civil Procedure 1908, the rigors of every procedural provision in the Code of Civil Procedure 1908 cannot be put into place to defeat the grant of relief which would subserve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case."*
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> **46.** In *Valentine Maritime Ltd.* v. *Kreuz Subsea Pte. Ltd.*[7], the High Court held:—

"88. ...It is now a well settled legal position, that at least with respect to Chartered High Courts, the power to grant temporary injunctions are not confined to the statutory provisions alone. The Chartered High Courts had an inherent power under the general equity jurisdiction to grant temporary injunctions independently of the provisions of the Civil Procedure Code, 1908…"

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93. Insofar as judgment of Supreme Court in case of Raman Tech. & Process Engg. Co. *(supra) relied upon by Mr. Narichania, learned senior counsel for the VML is concerned, it is held by the Hon'ble Supreme Court that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. The Hon'ble Supreme Court has further held that the purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. The said judgment of the Hon'ble Supreme Court was not in respect of the powers of court under section 9 of the Arbitration and Conciliation Act, 1996 but was in respect of power under Order 38 Rule 5 of the Civil Procedure Code, 1908 in a suit. Even otherwise, the said judgment is distinguishable in the facts of this case.*

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95. Insofar as judgment of this Court delivered by the Division Bench of this court in case of Nimbus Communications Limited *v.* Board of Control for Cricket in India *(supra) relied upon by the learned senior counsel for the VML is concerned, this Court adverted to the judgment of Hon'ble Supreme Court in case of* Adhunik Steels Ltd. *v.* Orissa Manganese and Minerals (P) Ltd., *(2007) 7 SCC 125 and held that in view of the decision of the Supreme Court in case of* Adhunik Steels Ltd., *(supra) the view of the Division Bench in case of* National Shipping Company of Saudi Arabia *(supra) that the exercise of power under section 9(ii)(b) is not controlled by the provisions of the Civil Procedure Code, 1908 cannot stand. This court in the said judgment of* Nimbus Communications Limited *(supra) held that the exercise of the power under section 9 of the Arbitration Act cannot be totally independent of the basic principles governing grant of*

interim injunction by the civil Court, at the same time, the Court when it decides the petition under section 9, must have due regard to the underlying purpose of the conferment of the power upon the Court which is to promote the efficacy of arbitration as a form of dispute resolution.

96. This court held that just as on the one hand the exercise of the power under Section 9 cannot be carried out in an uncharted territory ignoring the basic principles of procedural law contained in the Civil Procedure Code, 1908, the rigors of every procedural provision in the Civil Procedure Code, 1908 cannot be put into place to defeat the grant of relief which would sub-serve the paramount interests of justice. A balance has to be drawn between the two considerations in the facts of each case. The principles laid down in the Civil Procedure Code, 1908 for the grant of interlocutory remedies must furnish a guide to the Court when it determines an application under Section 9 of the Arbitration and Conciliation Act, 1996. The underlying basis of Order 38 Rule 5 therefore has to be borne in mind while deciding an application under Section 9(ii)(b) of the Arbitration Act.

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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 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. …"*

47. In *Srei Infrastructure Finance Limited* v. *Ravi Udyog Pvt. Ltd.*, the Calcutta High Court, speaking through one of us (Indira Banerjee, J.), as Judge of that Court, said:—

> "An application under section 9 of the Arbitration & Conciliation Act, 1996 for interim relief is not to be judged as per the standards of a plaint in a suit. If the relevant facts pleaded, read with the documents annexed to the petition, warrant the grant of interim relief, interim relief ought not to be refused by recourse to technicalities…"

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, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC.

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."

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. This is clearly evident from paragraph 51 of the report which reads thus: -

> "**51.** It is not in dispute that a sum of about Rs. 35 crores odd was paid by Essar Steel to Essar House Private and Rs. 47 crores odd to Essar Services, being the appellants in the respective appeals, by way of security deposit which is a refundable security deposit. Prima facie, the refundable security deposit is not being released to Arcellor on the purported ground of a convoluted series of internal arrangements between group companies for diversion of the security deposits towards liquidation of alleged dues of Essar Steel 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.

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.

46. While Promax had asserted that Tahal had seen a drastic reduction in cash reserves and revenues from operations as well as that its tangible assets were decreasing, those assertions were stoutly denied by Tahal. Tahal in terms of its convenience compilation which was filed in the present proceedings asserted that its revenues, net profit, cash equivalents and net worth as per the audited Balance Sheet for the financial period ending on 31 March 2022 would establish that it was clearly in a position to deal with the contingency of any Award that may ultimately come to be rendered in favour of Promax. Tahal had also placed various charts depicting a comparative position

between its revenues, net worth and earnings per share as compared to those of Promax. From that material it was sought to be contended that from a financial stand point, Tahal was in a far stronger position than Promax.

47. As was noticed hereinabove, an asserted fall in cash or cash equivalents or revenues from operations cannot possibly be construed as diminution of assets. In any case and in light of the competing versions which have been placed before the Court in the present proceedings, this Court finds itself unable to hold that the assets of Tahal are depleting so drastically that it may ultimately be placed in a position where it would be unable to meet any obligations that may come to be placed upon it if an Award were to be rendered against it. The Court also bears in mind its uncontroverted stand that it had not defaulted in meeting any statutory liabilities or those owed to banks and financial institutions. It has also placed on the record evidence of fresh funding extended by a financial institution.

48. It must also be reiterated that the submissions which were addressed by Promax rested on its own interpretation of the financial statements of Tahal and were principally based on documents and material which had not even been pressed in aid before the Arbitral Tribunal. The Court further notes that while some of the additional material was also placed along with the review petition, the same would also not justify the Court taking those evidences into consideration since Promax chose not to assail or question the order passed by the Tribunal in review.

49. More fundamentally, the additional material which is relied upon by Promax and since the same was never placed before the Arbitral Tribunal would itself be sufficient to reject the challenge to the discretionary exercise of power by the Tribunal. The Tribunal has returned categorical findings that Promax had woefully failed to establish that Tahal was attempting to remove its assets from the reach of the Arbitral Tribunal or as part of a design to avoid any award that may be pronounced after due contest. Promax has also failed to establish before this Court that the aforesaid conclusions as ultimately returned and recorded by the Arbitral Tribunal could be said to suffer from a manifest illegality or be one which no reasonable person could have arrived at on the basis of the material which stood placed on the record.

50. The Court notes that the twin prayers addressed by Promax, namely, for its claims in their entirety being securitised and for the amount held in deposit being released was fundamentally addressed on an application made in terms of Section 17 of the Act. The Arbitral Tribunal has found that since the claims and counter claims as laid before it would warrant further consideration, there existed no justification for a securitisation order being passed. The aforesaid conclusion does not warrant interference at all.

51. This Court also takes note of the finding returned by the Arbitral Tribunal which had noticed and held that the prayers for Tahal being commanded to secure its claims had not been made on lines as contemplated under Section 31(6) of the Act. While Promax did subsequently move such an application and seek the rendering of

an interim Award, the same came to be refused by the Arbitral Tribunal in terms of its order of 14 November 2022. The aforesaid order, as was noted hereinabove, was not questioned at all and in fact Promax had categorically conceded that it was not questioning the validity of the order of 14 November 2022 and its challenge should be recognised as being confined to the order of 19 September 2022. Consequently and for all the aforesaid reasons, the Court finds itself unable to sustain the challenge which stands raised by Promax to the order passed by the Tribunal.

52. Turning then to evaluate the appeal preferred by Tahal, the Court notes that it was Mr. Nayar's principal submission that the deposit of Rs.1.14 crores was made at an interlocutory stage and without prejudice to its rights and contentions. Mr. Nayar had also asserted that the order of 28 April 2022 had itself conferred a right on Tahal to seek variation or modification of that order and thus consequently pray for release. It was the submission of Mr. Nayar that once the Arbitral Tribunal had found that Promax was not entitled to a direction akin to one that could have been made under Order XXXVIII Rule 5 of the Code, there existed no justification for the Tribunal refusing to release the amount held in deposit in its favour.

53. The Tribunal, while dealing with the aforesaid question has observed that notwithstanding the purported admission of Tahal before this Court in the proceedings under Section 9 of the Act, bearing in mind the nature of the competing claims and rival contentions which merited a fuller consideration, the interest of justice

would warrant the amount being continued to be held in deposit till the final disposal of the case.

54. The Court notes that in the proceedings under Section 9 and more particularly the order of 28 April 2022 passed therein, it had clearly been recorded that the aforesaid sum of Rs.1.14 crores was conceded by Tahal to represent the monies payable by it to Promax for work already done. However, in the very same order the Court had noted that the aforesaid admission in respect of the amount payable to Promax was subject to other claims that Tahal may have against it. Thus, the question of offsetting of the respective liabilities and / or adjustment of claims was an issue which was not conclusively decided by the Court while disposing of the petition preferred under Section 9 of the Act. The Arbitral Tribunal appears to have borne in mind the fact that apart from the claims that stood raised by Promax with respect to work duly accomplished, it had also to consider the counter claims of Tahal as well as the liability of Promax which according to the former stood raised consequent to the termination of the contract itself. It is these factors which appear to have weighed with the Arbitral Tribunal to desist from ordering the release of the amount held in deposit till those competing claims were considered.

55. It becomes pertinent to note that the admission of liability as made before this Court was not disputed by Tahal. The amount held in deposit was indicated by Tahal itself as the moneys payable for the work performed by Promax. The prayer for release appears to have been addressed solely on the basis of Tahal's asserted liabilities flowing from the termination of the contract as well as its counter

claims. Those clearly were issues which the Arbitral Tribunal was yet to consider. The Tribunal was ultimately called upon to consider the aforenoted claims and assertions of respective parties. It has thus essentially attempted to balance the competing claims laid before it and found that no further attachment is necessitated and the deposit made by Tahal should be retained till the dispute is considered in greater detail. The aforesaid view and course of action as adopted by the Tribunal cannot possibly be recognised as being palpably arbitrary or perverse.

56. On an overall conspectus of the aforesaid, the Court finds no merit in the respective appeals. They shall consequently stand dismissed.

YASHWANT VARMA, J.

APRIL 11, 2023
Neha/bh