IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI

&

HON'BLE SHRI JUSTICE HIRDESH

ARBITRATION APPEAL No. 16 of 2023

BETWEEN:-

MP ENTERTAINMENT AND DEVELOPERS PVT LTD THROUGH ITS DIRECTOR SHRI GURJEET SINGH CHHABRA S/O LATE SHRI BHAGATSINGH CHHABRA, AGED ABOUT 55 YEARS, 1-AD SCHEME NO. 74-C INDORE (MADHYA PRADESH)

.....APPELLANT

(SHRI VIJAY KUMAR ASUDANI, ADVOCATE)

AND

CARNIVAL FILMS ENTERTAINMENT PVT LTD THROUGH ITS AUTHORIZED SIGNATORY CARNIVAL HOUSE, GENERAL A.K. VAIDYA MARG OPPOSITE WESTERN EXPRESS HIGHWAY DINDOSEE MALAD EAST MUMBAI (MAHARASHTRA)

.....RESPONDENT

(MS. GUNJAN CHOWKSEY, ADVOCATE)

This petition coming on for admission this day, ***JUSTICE SUSHRUT ARVIND DHARMADHIKARI*** *passed the following:*

Reserved on:- 20.06.2023
Pronounced on:- 06.07.2023

ORDER

1- The instant appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter shall be referred as 'Act') has been preferred by the appellant being aggrieved by the impugned order dated 19.01.2023 passed by the learned Commercial Court, Indore in Case No. MJC AV No. 98/2022, whereby the application of respondent filed under Section 9 of the Act was partially allowed and the appellant was restrained from alienating rights in respect of Cinema/multiplex (disputed premises), pending the commencement of and during the arbitration proceeding and making of the final award therein and enforcement thereof.

2. The facts in nutshell are, that the respondent is involved in the operation and management of multiplexes under the brand name "Kulraj Broadway Cinemas" whereas the appellant is a company involved in the business of Real Estate Development and is the owner of Cineplex in Malhar Mall at Indore. The appellant (in capacity of the lessor) and the Company HDIL Entertainment Pvt. Ltd (in capacity of the lessee) had entered into an agreement dated 28.07.2011 for leasing out the premises situated at 2nd 3rd and 4th Floor at Malhar Mall, Indore.

3. That in year 2020, some disagreements between the parties led to the disputes between them, which led to the commencement of multiple litigation between the parties. On 09.11.2022, appellant along with the personal guards entered in the leased out premises of the respondent and illegally locked the premises and refused the access of the cinema for the representative of the respondent. Against the said act, the respondent had filed a criminal complaint for illegally trespassing the property and obstructing the access in cinema hall. Due to the said act the

respondent on 03.12.2022 sent a letter to the appellant for appointing arbitrator to settle their dispute. The appellant in his reply dated 19.12.2022 has stated that as per possession document dated 09.05.2022, it is settled that all disputes between both the parties shall be resolved by sole arbitrator Mr. (Arpit Oswal) and by the same reply the respondent also corresponded with the arbitrator to resolve their dispute. The sole arbitrator upon the appellant's reply dated 19.12.2022 issued notice dated 28.12.2022 informing the respondent that on the basis of possession document dated 09.05.2022, the arbitral proceedings shall commence w.e.f. 03.01.2023. However, the respondent disputed the appointment of arbitrator by challenging such proceedings before this Court.

4. Being aggrieved by the appellant's act of 09.11.2022 (trespassing in property) the respondent filed an application under Section 9 of the Act before the learned trial Court to remove the obstruction to the access of the appellant in the cinema hall and to pass an order of mandatory injunction for restraining the appellant and/or its agents from interfering with the respondent's sole and exclusive possession, occupation and usage of the multiplexes, to allow the operation and management of the multiplexes, restrain the appellant from alienating rights in respect of cinema/multiplexes and other reliefs. The learned trial Court by impugned order dated 19.01.2022 partially allowed the respondent's application and has restrained the appellant from alienating rights in respect of cinema/multiplexes, pending the commencement of and during the arbitration proceedings and making of the final award therein and enforcement thereof, rest of the reliefs were declined. Being aggrieved by the impugned order the appellant has filed the present appeal before this

Court.

5. Learned counsel for the appellant submits that both the parties had invoked the arbitration clause of the said agreement and in consequence of the said proceedings, the Arbitrator Mr. Arpit Oswal had duly been appointed before whom both the parties were present and have initiated legal proceedings to carve out the differences between them. It is indisputed that arbitration proceedings has already been going on and while the proceedings of Arbitrator were in continuance, the respondent had filed an application under Section 9 of the Act before the learned trial Court and the learned trial Court without taking into consideration the fact that arbitral proceedings were initiated has passed the impugned order, which is full of adversity and is contrary to the existing provisions of the Act.

6. Learned counsel for the appellant laid special emphasis on Section 9(3) of the Act, which provides that once the arbitral tribunal has been constituted, the Court shall not entertain an application under Section 9 Sub-clause 1 and to buttress his contention, he placed reliance on the judgment of the Apex Court in **(Arcelor Mittal Nippon Steel India Ltd. vs. Essar Bulk Terminal Ltd.)** reported in **2022 (1) SCC 712.**

7. Per contra, learned counsel for the respondent submits that though arbitration proceedings have been initiated before the Arbitrator Mr. Arpit Oswal, the respondent has challenged the appointment of said Arbitrator under Section 11(5) of the Act before this Court. The counsel for the respondent further submits that the Arbitrator was appointed after the order dated 09.12.2022 passed by the learned trial Court, whereby the *status quo* was ordered to be maintained. The counsel for the respondent

further submits that the Arbitrator has been appointed on the basis of a non-notarized possession document dated 09.05.2023, which is contrary to the provisions of law. In such circumstances the respondent only had an efficacious remedy under Section 9 to approach the learned Trial Court for seeking interim relief. Therefore, the learned trial Court has rightly passed the impugned order which does not contain any infirmity or adversity and in light of the said fact the respondent prays for dismissal of the appeal.

8. We have heard learned counsel for both the parties and perused the record.

> The moot questions which arise for consideration in this appeal are as under:-
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> *(1)"Whether the respondent had efficacious remedy to approach the arbitrator for seeking interim relief under section 17 of the Act prior to filing application under section 9 of the Act before the Learned Trial Court ?*
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> *(2) "whether the learned trial Court was entitled to pass the impugned order and entertain the respondent's application filed under Section 9 of the Act, in light of the fact that the Arbitrator was appointed by the parties and arbitral proceedings had been initiated to settle their disputes?"*

09. Before proceeding further for examining the facts of the case to answer the above-mentioned questions, it is pertinent to reproduce Section 9 of the Act, which is as follows:-

> **9. Interim measures, etc. by Court.**—A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

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

10. It is trite that as per Section 9(3) of the Act, once the arbitral tribunal has been constituted, the Court shall not entertain an application under Section 9(1) of the Act, unless the Court finds that the circumstances exist which may not render the remedy provided under Section 17 of the Act efficacious. Recently, the Supreme Court in the case of (**Arcelor Mittal**) (supra) has dealt with the quandary over interplay of Section 9 and Section 17 of the Act and has answered this question whether the Court can entertain an application for interim measure after arbitral tribunal has been constituted. The Apex Court while dealing with the said case has held that Section 9(3) of the Act has two limbs, the first limb prohibits an application under Section 9(1) from being entertained once an arbitral tribunal has been constituted. The second limb carves out an exception to

that prohibition, if the Court finds that circumstances exist, which may not render the remedy provided under Section 17 of the Act efficacious.

11. As per Section 17 of the Act, the arbitral tribunal has the same power to grant interim relief as the Court and thus, remedy under Section 17 is as efficacious as the remedy under Section 9(1) of the Act.

12. In the present case, it is apparent from the record that the respondent had approached the learned trial Court on 09.12.2022, by filing an application under Section 9 of the Act praying for the interim relief along with an application under Section 151 for maintaining the status quo. Taking cognizance upon the said application filed under Section 151, the learned trial Court by its application of mind and by considering the facts of the case has ordered to maintain the status quo till the next date of hearing. This fact clearly shows that the learned trial Court had applied its mind and had entertained the application filed by the respondent.

13. As per the records, it is also apparent that the arbitrator was appointed and had initiated the arbitral proceedings on 03.01.2023 which is under challenge before this Court. Howsoever, the respondent has filed an application under Section 9 on 09.12.2022 and the said application was entertained by the learned trial Court which passed an ex-parte interim order of status quo till the next date of hearing. This fact shows that the learned trial Court before constitution of arbitral tribunal had entertained the respondent's application, had it been the case where the parties have summoned only it could not have been observed that the learned trial Court had applied its mind therefore, this Court is of the view that the respondent did not had any efficacious remedy before the constitution of the arbitral tribunal and had rightly approached the learned trial Court for seeking an

interim relief by filing an application under Section 9 of the Act.

14. This Court is also of the opinion that the learned trial Court has rightly exercised its jurisdiction under Section 9 of the Act because on 09.12.2022 neither arbitral tribunal proceedings were initiated nor arbitrator was appointed or approached to settle the dispute, howsoever it is also apparent from the record that the appointment of arbitrator is also challenged before this Court. The Hon'ble Apex Court in the case of **Arcelor Mittal** (supra) in paragraph No. 84, 90 and 91 has held that:

> "*84. It is now well settled that the expression "**entertain"** means to consider by application of mind to the issues raised. The Court entertains a case when it takes a matter up for consideration. The process of consideration could continue till the pronouncement of judgment as argued by Khambata. Once an Arbitral Tribunal is constituted the Court cannot take up an application under Section 9 for consideration, unless the remedy under Section 17 is inefficacious. However, once an application is entertained in the sense it is taken up for consideration, and the Court has applied its mind to the Court can certainly proceed to adjudicate the application.*
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> ***90. It could, therefore, never have been the legislative intent that even after an application under Section 9 is finally heard relief would have to be declined and the parties be remitted to their remedy under Section 17.***
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> *91. When an application has already been taken up for consideration and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not would not arise. The requirement to conduct the exercise arises only when the application is being entertained and/or taken up for consideration. As observed above, there could be numerous reasons which render the remedy under Section 17 inefficacious. To cite an example, the different Arbitrators constituting an Arbitral Tribunal could be located at far away places and not in a position to assemble immediately. In such a case an application for urgent interim relief may have to be entertained by the Court under Section 9(1)"*

15. In light of the aforesaid facts and law laid down by the Hon'ble Supreme Court, this Court is of the view that the learned trial Court was right in exercising its jurisdiction under Section 9 of the Act, considering the fact that the sole arbitrator was appointed and arbitral tribunal was constituted after the learned trial Court had applied its mind and had entertained the application filed under Section 9 and at that time, the respondent did not had any other efficacious remedy. Similarly redirecting the respondent to file an interim application for seeking the same relief as sought under Section 9 before the arbitrator under Section 17 would defeat the cause of justice.

16. Accordingly, this appeal being bereft of merits and substance is hereby, **dismissed**.

(S.A. DHARMADHIKARI)
JUDGE

(HIRDESH)
JUDGE

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