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

% **Date of decision: 7th July, 2020**

\+ **FAO(OS) (COMM) 60/2020 & CM No.10461/2020 (for stay).**

HERO WIND ENERGY PRIVATE LTD. ..... Appellant

Through: Mr. Ranjit Kumar and Mr. Abhinav Vasisht, Senior Advocates with Ms. Mumtaz Bhalla and Mr. Sanjeev K. Sharma, Advocates

Versus

INOX RENEWABLES LIMITED & ANR ..... Respondents

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Sudhir Kumar, Mr. Pulkit Srivastava, Mr. Sumit Gaur and Ms. Ashna Abrol, Advocates.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. This appeal (under Section 37 of the Arbitration and Conciliation Act, 1996 (Arbitration Act), impugning the judgment dated 16th March, 2020 of the Single Judge of this Court dismissing OMP (I) (COMM) No.429/2019 for interim measures, preferred by the appellant, as barred by Section 9(3) of the Act), during the hearing, has thrown up an interesting question of law qua interpretation of Section 9(3) of the Act i.e. if an Arbitral Tribunal has already been constituted to adjudicate the disputes which have arisen out of an agreement or set of agreements containing an

arbitration clause, whether the remedy of approaching the Court for interim measures with respect to disputes subsequently arising from the same agreement or set of agreements is barred by Section 9(3) of the Act.

2. It is necessary to detail the facts, to the extent relevant. Though the hearing went on for several hours on 17th & 24th June, 2020, but the jurisdiction we are exercising being only qua interim measures and anything observed/held in exercise of which jurisdiction being necessarily on a *prima facie* view of the matter, with the facts to be thrashed out in arbitration, we do not feel the need to record, as we would do in non-arbitration matters, the contents in entirety of the pleadings, documents or the contentions urged. Considering the jurisdiction being exercised by us, our prima facie understanding of the facts is sufficient and which we detail herein below.

3. Inox Group of Companies and of which Inox Wind Ltd. (IWL), Inox Wind Infrastructure Services Ltd. (IWISL) and Inox Renewables Ltd. (IRL) are a part, developed a wind park at district Jaisalmer in Rajasthan. The said wind park comprises of several wind farms, and each of which wind farm together with land comprised therein and Wind Turbine Generators (WTGs) installed thereon is owned by different person / entity. The wind park, besides having wind farms, has certain common areas comprising of common entrance, internal roads for providing access from the exterior of the wind park to each of the wind farms and also common area where common infrastructure for common services is installed. The power / electricity generated from the WTGs on each wind farm is transmitted

outside the wind park, through the common infrastructure for common services, comprising of internal lines and unit substation, 33 KV line and suitable metering arrangement, 33 KV cooling substation with necessary evacuation capacity, 33 KV common feeder, transmission lines, supporting transmission towers, electrical poles etc. Thereby, each wind farm owner is saved the separate expense of transmitting the power / electricity generated on his/its wind farm to the common grid, for power/electricity to become a saleable commodity. The position is akin to a multi-storied building comprising of several apartments on each floor and / or to a housing / industrial colony comprising of several houses / industrial units.

4. The appellant Hero Wind Energy Pvt. Ltd. (Hero) being desirous of owning one of the wind farms in the wind park aforesaid developed / being developed by Inox Group of Companies, in or about the year 2014, entered into *inter alia* three agreements:

(i) One of the agreements dated 24th July, 2014 was given the nomenclature 'Wrap Agreement' and was between Hero on the one hand and IWL, IRL and IWISL on the other hand. The said agreement reflects the entire transaction between Hero on the one hand with different entities of the Inox Group on the other hand, showing it to be one transaction, split up by the parties, as per their administrative and taxation exigencies, into separate agreements described below. The said agreement records that IWL had arranged for sale of land of the wind farm in favour of Hero and had also agreed to sell, supply,

install and commission WTGs on the said wind farm of Hero. The said agreement also makes IWL overall incharge and responsible for coordination of the other agreements entered into by Hero with separate entities of Inox and makes IWL jointly and severally liable under the others agreements detailed below and though not a party thereto, with the entities of Inox with whom the said agreements were entered.

(ii) Another agreement, also of 24th July, 2014, was between Hero and IRL and was given the name 'Shared Services Contract'. Thereunder IRL, for one time consideration received from Hero agreed**,** to provide the shared infrastructure for the shared services in the wind park, for evacuation of electricity, and a right was created in favour of Hero to use the said shared infrastructure and services.

(iii) The third agreement dated 31st July, 2014 was between Hero and IWISL and was given the nomenclature 'Operation and Maintenance Agreement (O&M Agreement)' and thereunder IWISL, for periodic consideration agreed to be paid by Hero agreed to operate and maintain not only the wind farm of Hero and the WTGs installed thereon but also to operate and maintain the shared infrastructure for providing shared services. Thus, the agreement for O&M between Hero and IWISL had two components; one of O&M of the wind farm of Hero and WTGs installed thereon; the other of O&M of shared

infrastructure for providing shared services. The agreement, insofar as for O&M of the wind farm of Hero and WTGs installed thereon, was terminable. However the agreement, insofar as for O&M of shared infrastructure for providing shared services, was not terminable by Hero, the shared services being not exclusively for Hero. The agreement thus provided that in the event of termination of the O&M arrangement qua the wind farm, Hero and IWISL would mutually arrive at a agreement with respect to the O&M charges payable by Hero to IWISL for the O&M services being rendered by IWISL with respect to shared infrastructure for providing shared services.

5. All the three agreements aforesaid contain identical arbitration clause as under:-

> ***"20 DISPUTE RESOLUTION***
>
> *20.1. If a Party considers that the other Party ('Defaulting Party') is in breach of any provision of this Agreement including by reason of bankruptcy and insolvency, corrupt or fraudulent practices, it may, without prejudice to any right of action or remedy that it may have under this Agreement, provide the Defaulting Party with a notice specifying the nature of the breach ('Notice of Default') and calling upon the Defaulting Party to cure such breach within 10 (ten) days ('Cure Period') from the date of receipt of the Notice of Default.*
>
> *20.2 Any dispute, controversy, disagreement or disputed claim arising out of, in connection with or under this Agreement or the breach, termination, interpretation or invalidity thereof or in relation to any matters contained in or relating to this*

Agreement raised by any Party ('Dispute') shall be attempted to be resolved by the Parties by good faith negotiations in the best interest of the subject-matter of this Agreement within 5 (five) days from the Cure Period, failing which, such Dispute shall be referred to arbitration under the Arbitration and Conciliation Act, 1996. An arbitration tribunal will be formed in accordance with the Arbitration and Conciliation Act, 1996, which shall consist of 3 (three) arbitrators. Each party shall have the right to appoint 1 (one) arbitrator each. The appointed arbitrators shall appoint the 3rd (third) neutral arbitrator who will preside over the arbitration tribunal.

20.3 The venue of arbitration shall be Delhi. The language of such arbitration shall be English.

20.4 Subject to Clause 20.1 and 20.2 above, the courts at Delhi shall have exclusive jurisdiction over any matter in respect of this Agreement.

21 GOVERNING LAW AND JURISDICTION

21.1 The governing law of this Agreement shall be the Laws of the Republic of India.

21.2 Courts situated in Delhi shall have exclusive jurisdiction to hear any, dispute arising out of/in relation to this Agreement."

6. Hero sent a notice dated 17th January, 2018 to IWL and IWISL, averring default by "Inox" of its obligations under the O&M Agreement, resulting in stoppage of WTGs on the wind farm of Hero, leading to revenue loss, and calling upon IWL and IWISL to cure the breaches and make payment of compensation of Rs.4,65,00,791/- to Hero. On 9th February, 2018, Hero sent another notice to IWL and IWISL invoking Clause 20.2 aforesaid of the O&M Agreement, for amicable settlement / good faith negotiations of the disputes which were claimed to have arisen

due to non-performance by IWL and IWISL of the obligations and further notifying that if the amicable settlement was not concluded, Hero shall be constrained to take appropriate legal steps as per the agreement. Vide yet another notice dated 28th February, 2018 to IWL and IWISL, Hero invoked arbitration and called upon IWL and IWISL to nominate their arbitrator within 30 days.

7. In or about May, 2018, Hero filed a petition for interim measures, being OMP (I) (COMM) No.260/2018 in this Court, impleading IWISL and IWL as respondents thereto. Hero, in the pleadings in the said petition, admitted (i) having entered into series of agreements for development of a wind power project comprising *inter alia* of 20 WTGs within the wind park aforesaid; (ii) that under the said agreements, IWL and its affiliates were responsible for land acquisition, site infrastructure development, power evacuation, statutory approvals, supply of WTG, erection and commissioning; (iii) having in addition entered into O&M Agreement with IWISL, an affiliate of IWL, with IWL being vicariously responsible for actions and inactions of all its affiliates including IWISL, with respect to all agreements including O&M Agreement; and, (iv) having handed over complete control of the project to IWL, for commencement of operation and maintenance services of the project. The aforesaid amounts to admission of Hero, of transaction with Inox Group of Companies being single transaction and not independent agreements with each entity of Inox Group. After detailing the disputes which had arisen, Hero in the said petition claimed interim measures, of (a) directing IWISL to hand over

control over the O&M of the project to Hero or its agents; and, (b) restraining IWISL from interfering in Hero or its agents carrying on the O&M of the project or from accessing project premises and shared infrastructure. During the pendency of the said petition, the Arbitral Tribunal, to adjudicate the disputes as had then arisen, having been constituted, Hero on 10th October, 2018 withdrew the said petition with liberty to approach the Arbitral Tribunal under Section 17 of the Arbitration Act. During the hearing, we were informed that the said arbitral proceedings are pending at the stage of completion of pleadings, with Hero having made a monetary claim jointly and severally against IWISL and IWL and IWL and IWISL yet to file their pleadings.

8. Though Hero, in the earlier petition aforesaid for interim measures had already sought the relief of directing IWISL, with which Hero had the O&M Agreement, to hand over control of O&M of the project to Hero or its agent and which could only be after termination of O&M Agreement with IWISL and which as aforesaid had two components but Hero, after withdrawing the earlier Section 9 petition, got issued a notice dated 22nd October, 2019 to IWISL, of termination of the O&M Agreement and calling upon IWISL to hand over the possession of project site to Hero with full control of all software etc.

9. As aforesaid, on such termination of O&M Agreement, O&M of shared infrastructure for shared services was to still remain with IWISL and Hero and IWISL were required to mutually arrive at an agreement qua the O&M charges payable by Hero to IWISL for O&M of shared infrastructure

for shared services. During the hearing, we were informed that several meetings were held in this regard and in which IWISL demanded the said O&M charges at the rate of Rs.8 lacs per WTG per annum, though in negotiations brought down their claim to Rs.5 lacs per WTG per annum; per contra, Hero offered the said O&M charges at the rate of Rs.3 lacs per WTG per annum, contending that its subsidiary owning another wind farm was paying O&M charges for shared infrastructure for shared services at the said rate of Rs.3 lacs per WTG per annum. We were further informed that IWISL, in the said negotiations also demanded payment by Hero of arrears claimed of about Rs.4.31 crores of O&M charges for the period prior to termination of the O&M contract by Hero; per contra, Hero contended that the same had been adjusted in the monetary claim made by it against IWISL in the pending arbitration.

10. Hero and IWISL having not been able to arrive at a mutual agreement, as agreed, of the quantum of O&M charges payable by Hero to IWISL for providing O&M of shared infrastructure for shared services, on 11th November, 2019, Feeder No.14 from the Cooling Sub-station which was connected to 16 WTGs on the wind farm of Hero, was stopped / switched off and as a result whereof, the 16 WTGs on the wind farm of Hero connected to Feeder No.14, stopped.

11. The petition under Section 9 of the Arbitration Act, from which this appeal arises, was filed by Hero, impleading IRL and IWL as respondents thereto, for the interim measure, of directing IRL and IWL to allow Hero to use all shared services and to restart Feeder No.14.

12. IRL and IWL contested the aforesaid petition *inter alia* on the ground of the same being barred by Section 9(3) of the Arbitration Act, as Arbitral Tribunal as aforesaid had already been constituted.

13. The learned Single Judge held the petition to be barred by Section 9(3), reasoning that (i) under the agreements, Hero was to pay to IRL, for providing shared services, an amount of Rs.7 crores - this was a one-time payment; (ii) there is no dispute, that separately O&M Agreement was executed between Hero and IWISL, for operation and maintenance of WTGs on the wind farm of Hero as well as the shared services, by making certain payments; (iii) there was no dispute that the O&M Agreement had been terminated by Hero vide Termination Notice dated 22nd October, 2019; (iv) Hero was also within its right to make alternate arrangement, on the expiry of term of 10 years or on failure to negotiate with IWISL; (v) after termination of O&M Agreement, Hero did not enter into negotiations with IWISL and IWISL had sent a draft of the requisite O&M Agreement to Hero for its approval; (vi) however it appears that Hero did not proceed further; (vii) it is clear from conjoint reading of the Shared Services Agreement and the O&M Agreement, that Hero has made one-time payment to IRL for setting up the shared services to be used by Hero, which along with WTGs need to be operationalised and maintained by IWISL and for which a separate O&M Agreement was entered into by Hero; (viii) the said O&M was at certain price which had not been paid by Hero and which is also a subject matter of dispute before the Arbitral Tribunal; (ix) it is for

non-payment of O&M charges and non-execution of subsequent/requisite O&M Agreement that Feeder no.14 had been disconnected and prayer for reconnection whereof was made in Section 9 petition; (x) though the contention of Hero that it has a right to use said shared services is appealing on first blush but on a deeper consideration it is clear that the Shared Services Agreement is for providing the shared infrastructure to all the owners of the WTGs in the wind park; in that sense all the owners of WTGs including Hero have a right to use the shared infrastructure; (xi) however O&M Agreement has a purpose and for which payment has to be made; (xii) Hero, vide notice dated 19th September, 2018 had invoked arbitration clause in the O&M Agreement including for the revenue loss being caused to it for failure to operate and manage all shared infrastructure and which shows that the grievance of Hero while invoking arbitration to be with respect to failure on the part of IWISL to discharge its obligations in respect of operating and maintaining the shared services as envisaged in the O&M Agreement; (xiii) however Hero, in the petition under Section 9, without making IWISL a party thereto, was seeking to invoke the Shared Services Agreement for operation and maintenance of shared services; however operation and maintenance of shared services was to be carried out by IWISL and not by IRL or by IWL; (xiv) the action of disconnection of Feeder no.14 related to operation and maintenance of shared services; (xv) thus the subject matter of the dispute with respect to disconnection of Feeder no.14 was relatable to O&M Agreement and a dispute connected therewith was also pending before the Arbitral Tribunal; (xvi) disconnection was by IWISL which was operating and maintaining the

shared services and which had not been impleaded as party to Section 9 petition; (xvii) it is not the case of Hero that it had appointed a third party as a contractor for operating and maintaining the shared services; (xviii) per ***Chloro Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc.*** (2013) 1 SCC 641, where various agreements constitute a composite transaction, the Court can refer the disputes to Arbitration between the signatory and non-signatory, if all ancillary agreements are relatable to principal agreement and if performance of one agreement is so intrinsically interlinked with other agreements that they are incapable of beneficially being performed without performance of others or severed from the rest; (xix) in the facts of the present case also, the right to use the shared services under the Shared Services Agreement and payment of operation and maintenance charges under O&M Agreement were interlinked and this issue needs to be adjudicated by the Tribunal which was seized of the disputes under the O&M Agreement; (xx) reliance placed on behalf of Hero on ***Duro Felguera S.A. Vs. Gangavaram Port Limited*** AIR 2017 SC 5070 holding that for multiple agreements containing provisions for arbitration, different Arbitral Tribunal should be set up for adjudication of disputes arising out of each agreement was misplaced, as ***Chloro Controls India Pvt. Ltd.*** supra was distinguished therein; and, (xxi) thus, without going into merits, the petition under Section 9, for the prayers made, was not maintainable. Liberty was however granted to Hero, to file appropriate application before the Arbitral Tribunal already in place.

14. As would be obvious from above, the arguments before the learned Single Judge turned on, whether the disputes which have now arisen subsequent to termination of O&M Agreement on 22nd October, 2019 and qua which interim measures were sought, arose out of the O&M Agreement, as contended by IRL and IWL or out of the Shared Services Contract, as contended by Hero. The learned Single Judge held in favour of IRL and IWL in this respect and held that the disputes indeed had arisen out of O&M Agreement and having held so, proceeded to hold that since an Arbitral Tribunal had already been constituted with respect to disputes arising from O&M Agreement, Section 9(3) of the Arbitration Act came into play. The question, that even if the disputes had arisen out of O&M Agreement, whether the Arbitral Tribunal constituted to adjudicate the disputes which had earlier arisen from the O&M Agreement, would be Arbitral Tribunal within the meaning of Section 9(3) of the Act, seems to have been not addressed before the learned Single Judge.

15. On interpretation of the transaction between the parties, we are in tandem with the learned Single Judge. The Shared Services Contract and the consideration paid by Hero thereunder, was only for creating right in Hero to shared services from shared infrastructure to be provided by IRL. However the said shared infrastructure also was required to be operated and maintained. IRL, under the Shared Services Contract, did not have any obligation to operate and maintain the shared infrastructure to be provided by it under the Shared Services Contract. The operation and maintenance of

shared infrastructure under the O&M Agreement, was to be done by IWISL. Thus, though Hero has a right to use shared infrastructure, under the Shared Services Contract, but for Hero to so use the said shared infrastructure, the said shared infrastructure is to be operated and maintained and responsibility wherefor is of IWISL and not IRL. Hero, by filing Section 9 petition impleading IRL and IWL only, is indeed found wanting to exercise its right to use shared infrastructure under the Shared Services Contract, without however wanting to pay for operation and maintenance of shared infrastructure and which liability was undertaken by IWISL under the O&M Agreement, for periodic consideration to be paid by Hero. The O&M Agreement did not separately provide rates for operation and maintenance of wind farm with WTGs of Hero and for operation and maintenance of shared infrastructure. It however provided that on the termination of O&M Agreement, the parties will mutually agree on O&M charges for shared infrastructure for shared services. Hero, though has a right under the Shared Services Contract to use of shared infrastructure and benefit of shared services but no right to access the same for operation and maintenance. The reason is obvious. The said infrastructure is for the benefit of all farms in the wind park and IWISL has been entrusted by all wind farm owners with operation and maintenance thereof. Operation and maintenance of shared infrastructure for shared services cannot be by each wind farm owner or its agent.

16. We enquired from the senior counsels for the appellant that even if the plea of Hero that the disputes which have now arisen have arisen out of

Shared Services Contract of Hero with IRL, were to be accepted,

(a) whether not the disputes which have now arisen were also required to be referred to the same Arbitral Tribunal which had already been constituted; and,

(b) if it was so, once the Arbitral Tribunal was in place, whether not it was expedient that the interim measures with respect to the new disputes also, are ordered by the Arbitral Tribunal and not by the Court, as appeared to be the spirit of Section 9(3) of the Act, brought into force by way of amendment of the Arbitration Act of the year 2016.

17. The senior counsels for the appellant, though on the first date of hearing contended that the disputes which have now arisen are disputes independent of the disputes which had earlier arisen and have already been referred to arbitration and there is no requirement of the Arbitral Tribunal required to be constituted therefor to have the same composition as the Arbitral Tribunal already constituted, but on our repeatedly during the hearing drawing the attention of the senior counsels for the appellant to the inconsistent findings of facts likely to arise, if the disputes which had earlier arisen and the disputes which have now arisen are referred to separate Arbitral Tribunal having different composition than the existing Arbitral Tribunal, after taking instructions, during the hearing on 24th June, 2020, stated that the appellant had no objection to the composition of the Arbitral Tribunal to be constituted now being the same as of the Arbitral Tribunal already in place. The senior counsel for the two respondents viz.

IRL and IWL, earlier also during the hearing was pressing for the same Arbitral Tribunal. Thus now there is consensus to the extent that the constitution of the Arbitral Tribunal, if at all to be constituted afresh for adjudication of disputes which have now arisen, has to be the same as of the Arbitral Tribunal already in place.

18. It was also the contention of the senior counsel for the respondents that the disputes qua which Section 9 application is filed, were barred by Order II Rule 2 of the CPC. Accordingly, in the order dated 17th June, 2020, the counsels were requested to, on 24th June, 2020, address also on (i) applicability of Order II, Rule 2 of the Code of Civil Procedure, 1908 to arbitration proceedings; attention was invited to ***Delhi Development Authority Vs. Alkarma*** AIR 1985 Del 132; (ii) even if it were to apply, whether the said plea is available in the facts of the present case and; (iii) if out of the agreement containing an arbitration clause, subsequent to the date when an arbitral tribunal with respect to an earlier cause of action is constituted, another cause of action arises, whether with respect to interim measures qua this second cause of action, bar of Section 9(3) of the Arbitration and Conciliation Act, 1996 would apply.

19. The senior counsel for the respondents, on 24th June, 2020 referred to ***Parsvnath Developers Limited Vs. Rail Land Development Authority*** (2018) SCC OnLine Del 12399 [SLP(C) No.32815/2018 preferred whereagainst was dismissed on 31st January, 2019] and ***K.V. George Vs. Secretary to Government Water and Power Department, Trivandrum*** (1989) 4 SCC 595, to contend that Order II Rule 2 of the CPC or principles

thereof are applicable to arbitration proceedings and took us through the correspondence leading to the disputes for adjudication whereof Arbitral Tribunal has already been constituted and the earlier Section 9 petition preferred by Hero, to contend that the cause of action for the disputes qua which Section 9 petition has been filed now had indeed arisen at the same time when the cause of action for the disputes for adjudication of which Arbitral Tribunal has already been constituted, had arisen. Per contra, the senior counsels for the appellants referred us to various judgments to contend, when Order II Rule 2 of the CPC applies or does not apply. It was of course their contention that in the facts, it is not attracted.

20. However on further consideration, we are of the view that while exercising jurisdiction under Section 9 of the Act, we ought not to embroil ourselves with the pleas of Order II Rule 2 of the CPC. Such a plea would be for the Arbitral Tribunal to adjudicate, if raised before it. Suffice it is to state that the interim measures now claimed, cannot be denied on the ground of the dispute in the context whereof interim measures are sought, being barred by Order II Rule 2 of the CPC, because it is not as if there is an arbitral award in existence with respect to disputes earlier raised and on the basis whereof the plea of Order II Rule 2 of the CPC is urged. Suffice it is to state that the disputes in the context whereof interim measures are now sought arise out of inability of the parties to mutually arrive at an agreement of quantum of O&M charges with respect to shared infrastructure for shared services; the occasion to so mutually arrive at an agreement was to arise under the agreements and arose, only on termination of the O&M

Agreement and which was terminated on 22nd October, 2019 i.e. after the constitution of Arbitral Tribunal on account of constitution whereof Section 9(3) has been invoked by IRL and IWL and which plea has been accepted by the Single Judge. The cause of action for the said disputes definitely arose after the constitution of the Arbitral Tribunal. To the said extent, we do not concur with the learned Single Judge. Though the reason given by Inox for disconnection of Feeder No.14 is non-payment of arrears of O&M charges and non-execution of O&M Agreement for shared infrastructure for shared services and Hero in its claim petition before Arbitral Tribunal already constituted has claimed adjustment of arrears of O&M charges but, till the O&M Agreement was terminated and which was after the constitution of the Arbitral Tribunal in existence, there was no occasion or cause of action for execution of fresh O&M Agreement for shared infrastructure for shared services.

21. It may however be recorded that the senior counsels for the appellant in response to the query raised on them referred to ***Duro Felguera S.A.*** supra. However again, while exercising Section 9 Arbitration Act jurisdiction, we are not required to adjudicate the said aspect. In our *prima facie* view, the agreements before us are more akin to those in ***Chloro Controls India Pvt. Ltd.*** supra as well as those in ***Ameet Lalchand Shah Vs. Rishabh Enterprises*** (2018) 15 SCC 678. The several agreements constitute a composite transaction; the Shared Services Contract and O&M Agreement are relatable to the Wrap Agreement, being the principal agreement; the performance of Shared Services Contract is intrinsically

interlinked with O&M Agreement and the two are incapable of being performed beneficially without performance of the other. The fact, that each agreement has its own arbitration clause, does not change the said position. Supreme Court in ***P.R. Shah, Shares & Stock Brokers Pvt. Ltd. Vs. B.H.H. Securities Pvt. Ltd.*** (2012) 1 SCC 594 held that even where there were two separate agreements, each with arbitration clause, the benefit of single arbitration could not be denied as multiplicity of proceedings and conflicting decisions would cause injustice.

22. The aforesaid completes the setting for adjudicating the question of law as has arisen.

23. Sub-Section (3) of Section 9 of the Act is as under:

> *"9 (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."*

The question, we repeat, is that once the Arbitral Tribunal to adjudicate the disputes which have arisen from an agreement or a set of agreements containing an arbitration clause, has been constituted, whether the jurisdiction of the Court to consider the grant / non-grant of interim measures with respect to subsequent disputes arising from the same agreement / set of agreements, even if to be adjudicated by Arbitral Tribunal having same composition as Arbitral Tribunal already constituted, is barred under Section 9(3) of the Act.

24. The senior counsel for the respondents contended, on the basis of 243rd Report of the Law Commission leading to the amendment of the year 2016 to the Arbitration Act and the Objects and Reasons of the said Amendment Act, that Sub-Section (3) of Section 9 was introduced into the Act to minimise judicial intervention in Arbitration, in the spirit of Section 5 of the Act. Per contra, the senior counsels for the appellant contended that successive disputes arising from the same agreement / set of agreements, with separate causes of action, are akin to independent suits and if it were to be held that the Arbitral Tribunal constituted for disputes first arisen has to also decide the disputes which have subsequently arisen and all the said disputes have to be decided together, the time lines for the arbitration prescribed in the Act can never be followed. It was thus argued that even though the appellant has agreed to the Arbitral Tribunal to be now constituted having the same composition but it would be a different Arbitral Tribunal and would not be a 'Arbitral Tribunal already constituted' within the meaning of Section 9(3) of the Act.

25. Though we found the argument of the senior counsel for the respondents, of the requirement to interpret Section 9(3) of the Act in consonance with the mandate of Section 5 of the Act, to be attractive but on deeper consideration of all the provisions of the Act, agree with the senior counsels for the appellant, on the question of law as has arisen.

26. Per Section 7 of the Arbitration Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined

legal relationship, whether contractual or not. The identical arbitration clause in all the agreements between the parties to the present proceedings, as set out hereinabove, provides for "any dispute, controversy, disagreement or disputed claim arising out of, in connection with or under this Agreement or the breach, termination, interpretation or invalidity thereof or in relation to any matter contained in or relating to this Agreement raised by any Party" to be "referred to arbitration". The parties thus agreed to submit to arbitration, all disputes which may arise. Supreme Court, in ***Dolphin Drilling Ltd. Vs. Oil & Natural Gas Corporation Ltd.*** (2010) 3 SCC 267 held that the words "all disputes" in arbitration clause can only mean "all disputes that may be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other"; it cannot be held that once the arbitration clause is invoked, the remedy of arbitration is no longer available in regard to other disputes that might arise in future. We may add, that depending on nature of the agreement or obligations to be performed thereunder, it is not necessary that all disputes between parties arise at one point of time. This Court in ***National Highways Authority of India Vs. ITD Cementation India Ltd.*** 197 (2013) DLT 650 held that in large scale projects, it is not unheard that different facets of the project constitute subject matter of separate references and in the context of large scale works contracts, there cannot be any rigid application of the principles of Order II Rule 2 of the CPC unless it is demonstrated that prejudice has been caused to either party as a result of such non-adherence. We may further add that even if commencement of arbitration with respect to disputes which have arisen,

can await culmination of full performance of the agreement, to commence arbitration at one time only, also with respect to other dispute which may arise, the claim earliest arising may by then become barred by time. Order II Rule 2 of the CPC also envisages successive causes of action.

27. Section 11(2) of the Act grants freedom to the parties to agree on a procedure for appointing the arbitrator. The arbitration clause in all the agreements provides for "An arbitration tribunal to be formed..... which shall consist of 3 (three) arbitrators. Each party shall have the right to appoint 1 (one) arbitrator each. The appointed arbitrators shall appoint the 3rd (third) neutral arbitrator who will preside over the arbitration tribunal." Hero and Inox, under the freedom conferred on them vide Section 11(2) of the Act, agreed on a procedure of appointing the arbitrators, with Hero on the one hand and Inox Group of Companies on the other hand appointing one arbitrator each and the two appointed arbitrators appointing the third arbitrator.

28. Section 21 of the Act provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. There is no agreement to the contrary in the arbitration clause in the present case. It is on record that Hero, vide communication dated 28th February, 2018 invoked arbitration, of disputes which had then arisen between the parties and pursuant whereto the Arbitral Tribunal was constituted.

29. The use in Section 21 of the Act, while defining the date of "commencement of arbitral proceedings", of the words "arbitral proceedings in respect of a particular dispute", is clearly indicative of the Act envisaging a separate Arbitral Tribunal with respect to successive disputes which may arise between the same parties out of the same agreement or set of agreements. All these provisions show that there can be multiple claims and multiple references at multiple stages. This Court in ***Messrs Krishna Construction Company Vs. Engineer Member, D.D.A.*** 2005 (122) DLT 54, relying upon ***Purser & Co. Vs. Jackson*** (1977) Q.B. 166 held that in arbitration proceeding, it is the terms of reference of the arbitration which determine the issue which the Arbitrator has to decide; accordingly, if a particular issue is included in the terms of reference, parties would be estopped by the doctrine of *res judicata* from raising that issue in subsequent arbitration proceedings even though the Arbitrator had made no award in relation to that issue. The senior counsels for the appellant are also correct in contending that this becomes further evident from Section 29A read with Section 23 of the Arbitration Act prescribing a period of six months, from the date the Arbitrator or all the Arbitrators have received notice of appointment, for completion of pleadings and period of 12 months therefrom for making the arbitral award.

30. That brings us to Section 9 of the Act. Sub-Section (1) thereof entitles a party to apply to Court for interim measures "before or during arbitral proceedings....." The reference to arbitral proceedings, as aforesaid, has to be to the arbitral proceedings for adjudication of a

"particular dispute". The particular dispute which has now arisen between Hero and Inox is of right of Hero to use shared infrastructure and which dispute has arisen, as aforesaid, after termination of the O&M Agreement and failure to mutually agree on O&M charges for shared services. The arbitral proceedings with respect thereto will commence on the date when request for this dispute to be referred to arbitration is made by either party on other. There is no request by either of the parties to the other for arbitration of the disputes which have arisen from termination by Hero of the O&M Agreement and failure of the parties to arrive at a mutually acceptable rate payable by Hero for O&M charges for shared infrastructure for shared services. So the arbitral proceedings with respect to this dispute have not commenced.

31. In our opinion, the words 'Arbitral Tribunal' in Section 9(3) of the Act have to take colour from all the said provisions and thus have to be interpreted as Arbitral Tribunal constituted to adjudicate the disputes which have arisen and been referred to arbitration and with respect whereto Arbitrators have been appointed and notified of their appointment. Much prior to the incorporation of Sub-Section (3) in Section 9, Supreme Court in ***Firm Ashok Traders Vs. Gurumukh Das Saluja*** (2004) 3 SCC 155 held, that under the 1996 Arbitration Act, unlike the predecessor Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures; the need for Section 9 of the Act, inspite of Section 17 having been enacted, is that Section 17 of the Act would operate only during the existence of the Arbitral Tribunal and its being functional;

during that period, the power conferred on the Arbitral Tribunal under Section 17 of the Act and the power conferred on the Court under Section 9 of the Court may overlap to some extent but so far as the period pre and post the arbitral proceedings is concerned, the party requiring an interim measure shall have to approach only the Court. Seen in this light, the Arbitral Tribunal constituted with reference to the disputes which had earlier arisen, even though from the same agreement, cannot be the Arbitral Tribunal within the meaning of Section 9(3) of the Act even if were to be of the same composition. Section 9(3) of the Act does away with the jurisdiction of the Court with respect to interim measures also, once the Arbitral Tribunal is constituted. However, if a separate Arbitral Tribunal even if of same composition is to be constituted for disputes arising out of successive causes of action, Arbitral Tribunal constituted for adjudication of disputes arisen from a earlier cause of action cannot be the Arbitral Tribunal constituted for the disputes arising from a subsequent cause of action and qua which interim measures are sought.

32. We are thus unable to agree with the view taken by the learned Single Judge, of the petition of Hero being barred by Section 9(3) of the Act.

33. Having held so, the question arose, whether the matter should be remanded to the Single Judge for decision of the Section 9 petition on merits and which the learned Single Judge in the impugned order has expressly recorded, has not been done. While the senior counsel for the respondents contended that the matter should be remanded, the senior

counsels for the appellant contended that this Court having heard the parties on merits also, should proceed to decide on merits as well.

34. A proceeding under Section 9 of the Act has a sense of urgency about it. Considering the same, it is not deemed appropriate by us to shuttle the parties to and fro the Benches of this Court. The principle of Order XLI Rules 24 & 33 read with Order XLIII Rule 2 of the CPC also permits the appellate Court to proceed to decide the merits even if have not been decided by the trial Court. We may record that being of the view that electricity is a scarce national resource, essential for the country, we from the very first day i.e. 28th April, 2020 when the appeal came up before us, were perturbed that the electricity capable of being generated by the WTGs of the appellant is being wasted and being not made available to those in need of the same. We thus, on each and every date, had been suggesting to the parties to arrive at an amicable solution for utilization of electricity but the parties were unable to. Having not agreed with the Single Judge on non-maintainability, we choose to decide the entitlement of Hero to interim measures.

35. As would be obvious from the contentions of the counsels on merits recorded above, the defence of the respondents to the interim measure of re-connection to Feeder No.14 sought by Hero is twofold. Firstly, that Hero owes about Rs.4.31 crores towards O&M charges for the period prior to the termination of the O&M Agreement and secondly that Hero though liable to pay O&M charges for the shared infrastructure for shared services (after the termination of the O&M Agreement) is not paying the same.

36. It goes without saying that provision of operation and maintenance services entails expense and without operation and maintenance services neither the WTGs nor the shared infrastructure for shared services are capable to earning. Hero is thus not entitled to interim measure of re-connection to feeder (and which re-connection is to be done and which feeder and other shared infrastructure is to be operated and maintained by the provider of operation and maintenance services) without paying for the O&M charges for shared infrastructure including the feeder, for shared services. Hero, in its agreements aforesaid has agreed to pay such operation and maintenance charges, with operation and maintenance charges for shared infrastructure for shared services to be mutually agreed. However, failure to arrive at an agreement does not vest right in Hero to still enjoy the shared services from shared infrastructure, without paying operation and maintenance charges therefor. Hero thus is liable to pay for operation and maintenance services already enjoyed and to be enjoyed in future, from Inox.

37. The senior counsels for the appellant, during the hearing offered to furnish a bank guarantee for the said amount of Rs.4.31 crores and showed willingness to pay O&M charges for shared infrastructure for shared services at the rate of Rs.3 lacs per WTG per annum. On enquiry, it was informed that out of about Rs.4.31 crores, Hero admitted Rs.2,74,17,222/- only. The senior counsel for the respondents on enquiry, whether there was any admission of Hero of liability for about Rs.4.31 crores, replied in the negative. The demand of respondents for O&M charges for shared

infrastructure for shared services is at the rate of Rs.5 lacs per WTG per annum.

38. Once Hero admits dues of O&M charges of Rs.2,74,17,222/-, furnishing a bank guarantee therefor will not put the money in pocket of Inox. Though Hero claims to have adjusted the same against compensation claimed in pending arbitration but on enquiry, whether there was / is any agreement entitling Hero to so adjust, the answer was in the negative. Hero thus is not entitled to interim measure sought, without paying at least the admitted amount; as far as balance out of about Rs.4.31 crores is concerned, Inox can make claim therefor.

39. Qua O&M charges for shared infrastructure for shared services, Hero has contended that the said charges cannot be different for different wind farm owners and since its subsidiary is paying at rate of Rs.3 lacs per WTG per annum, it is not liable for more. Inox says, it has some years back entered into agreement with another wind farm owner having 100 WTGs at the rate of Rs.3.75 lacs per WTG per annum. Hero contends, the charges ought not to be dependent on number of WTGs since operation and maintenance is for all WTGs spread over different farms in the wind park.

40. Again, the said O&M Charges are to be determined in arbitration. Having heard the counsels, we are of the opinion that grant of interim measure sought subject to payment of O&M charges for shared infraustrucre for shared services at Rs.4 lacs per WTG per annum, without prejudice to rights and contentions of the parties, would be equitable.

41. The senior counsels for Hero stated that they are seeking the order only for 16 WTGs on their wind farm, as other four WTGs are connected to another feeder. The senior counsel for Inox stated that Hero is liable for payment of O&M charges for shared infrastructure for shared services for all the 20 WTGs on its wind farm. However, since Hero is seeking interim measure for 16 WTGs only, there is no need for us to deal with other four WTGs which are connected to separate feeder.

42. It is also the claim of Inox that it is entitled to O&M charges for shared infrastructure for shared services from the date of termination by Hero of the O&M Agreement. We are of the opinion that the O&M charges subject to payment of which interim measure is being granted, be for one year from the date of re-connection and it will be open to Inox to claim for prior period in arbitration.

43. The question however still remains, that IWISL is not a party to the present proceedings. It is however obvious that the interest of IRL and IWL, who are a party, is the same as that of IWISL. To avoid any technical defect, we implead IWISL as respondent no.3 to the present proceedings.

44. The appeal is thus disposed of, by directing IWISL, IWL and IRL to within seven working days of (i) Hero paying a sum of Rs.2,74,17,222/- to IWISL, and, (ii) Hero paying O&M charges at the rate of Rs.4 lacs per WTG per annum, in advance for 16 WTGs, to IWISL, restart Feeder no.14 to which 16 WTGs on the wind farm of Hero were connected and to render shared services under the O&M Agreement read with Shared Services Contract to the said 16 WTGs on the wind farm of Hero. The aforesaid

payments would be without prejudice to the rights and contentions of the parties and it would be open to the parties to, in the arbitral proceedings, whether already pending or to be commenced, make their respective claims and defences with respect thereto. If it is found that any amount paid in pursuant to this order was not due to IWISL, it will be open to the parties to in the arbitration proceedings, seek adjustment or appropriate orders with respect thereto.

45. The appeal is disposed of.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

JULY 07, 2020
'pp/gsr'..