REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 859-860 OF 2022
(ARISING OUT OF SLP (C) NOS. 13547-13548 OF 2021)

FUTURE COUPONS PRIVATE LIMITED & ORS. **...APPELLANT (S)**

VERSUS

AMAZON.COM NV INVESTMENT HOLDINGS LLC & ORS. **...RESPONDENT(S)**

WITH

CIVIL APPEAL NOS. 861-862 OF 2022
(ARISING OUT OF SLP (C) NOS.13556-13557 OF 2021)

FUTURE RETAILS LIMITED **...APPELLANT(S)**

VERSUS

AMAZON.COM NV INVESTMENT HOLDINGS LLC & ORS. **...RESPONDENT(S)**

WITH

CIVIL APPEAL NO. 864 OF 2022
(ARISING OUT OF SLP (C) NO. 18089 OF 2021)

FUTURE COUPONS PRIVATE LIMITED & ORS. **...APPELLANT(S)**

VERSUS

AMAZON.COM NV INVESTMENT HOLDINGS LLC & ORS. **...RESPONDENT(S)**

WITH

CIVIL APPEAL NO. 863 OF 2022
(ARISING OUT OF SLP (C) NO. 18080 OF 2021)

FUTURE RETAIL LTD. **...APPELLANT(S)**

VERSUS

AMAZON.COM NV INVESTMENT HOLDINGS LLC & ORS. **...RESPONDENT(S)**

JUDGMENT

N.V. RAMANA, CJI.

1. Leave granted in all matters.

2. These appeals are against various orders of Delhi High Court connected to the Amazon-Future dispute. Civil Appeals arising out of SLP (C) No. 13547-48 of 2021 and SLP (C) No. 13556-57 of 2021, impugns order dated 02.02.2021 and 18.03.2021 passed in OMP (ENF) (Comm) 17 of 2021 and Civil Appeals arising out of SLP (C) Nos. 18089 and 18080 of 2021, are against impugned orders dated 29.10.2021 passed in Arb. A (Comm.) No. 63 of 2021 and I.A. No. 14285 of 2021 in Arb. A (Comm.) No. 64 of 2021 respectively.

3. At the outset, it is necessary for this Court to have a brief background before indulging in analyzing the issue at hand. On 22.08.2019, Amazon entered into Shareholder and Share-Subscription Agreements with Future Coupon Private Limited (FCPL). Through these instruments, Amazon intended to acquire 49% stake in FCPL. The aforesaid agreements contained an arbitration agreement, wherein parties resolved to settle their disputes in accordance with the Arbitration Rules of the Singapore International Arbitration Center (SIAC). The parties had further resolved to have the seats at New Delhi.

4. On 12.08.2019, FCPL and its promoters entered into a Shareholder Agreement with Future Retail Limited (FRL). Through this Agreement, FCPL was granted certain protective rights. One such right is produced as under:

Clause 10 of SHA:

10. TRANSFER OF RETAIL ASSETS

10.1 As of the Execution Date, the Company has set up an aggregate of at least 1,534 (one thousand five hundred and thirty four) retail outlets/formats including without limitation the Small Store formats across India and such retail outlets/stores are an integral part

of the business conducted by the Company representing a significant and substantial part of the business conducted by the Company. The Existing Shareholders and the Company further agree, covenant and undertake to FCL that the Company shall be the sole vehicle for the conduct of such current business comprising of a widespread network of the retail outlets/formats including without limitation the Small Store formats that the Company has established and is operating across India and consequently such business shall continue to be an integral part of the Company's business.

10.2 Accordingly, any sale, divestment, transfer, disposal, etc., of such retail outlets/ formats including without limitation the Small Store Formats shall be in accordance with this Agreement, and the company and the Existing shareholders covenant and undertake that during the subsistence of this Agreement, the company shall not transfer, or dispose off the Retail Assets except as otherwise mutually agreed between the Company, the Existing Shareholders and FCL in writing.

10.3 Notwithstanding anything contained herein, the Company and the Existing Shareholders agree that the Retail Assets shall not be transferred, Encumbered divested, or disposed of, directly or indirectly, in favour of a Restricted Person.

There is no dispute that one of the restricted persons included the Reliance Group.

5. As in March 2020, FRL submitted that there was business downturn due to Covid-19 lockdowns as there were restrictions on retail sale through brick-and-mortar shops. In light of the same, the Board of FRL decided to sell, retail businesses and assets to Reliance, for a consideration in excess of Rs. 25,000 crores. Further, it is contended by FRL that there were outstanding loans of about Rs.20,000 crores with a serious and tangible risk of becoming insolvent. It is submitted that it was in this context that the subsequent transaction was entered into to alleviate its financial position and protect employment of around 25,000 employees of the Future Group.

6. Aggrieved by the aforesaid sale transaction, Amazon initiated arbitration proceedings before the SIAC. Amazon filed an application for emergency relief with the Registrar of the SIAC Court of Arbitration seeking interim prohibitory injunction to prevent FRL and FCPL from taking further steps in the aforesaid transaction with the Reliance Group. Parallelly, FRL filed a suit before the Delhi High Court registered as CS(COMM) No. 493 of 2020, against Amazon for tortious interference in the Scheme for the sale of assets.

7. On 25.10.2020, the Emergency Arbitrator passed an Interim Award in favor of Amazon. It may be noticed that the Emergency Arbitrator and the Single Bench came to diametrically opposite conclusions which are juxtaposed herein below:-

Order of Emergency Arbitrator dated 25.10.2020	**Order of Single Judge Bench in I.A. No. 10376 of 2020 in CS(COMM) No. 493 of 2020 dated 21.12.2020**
285. In the result, I award, direct, and order as follows: (a) the Respondents are injuncted from taking any steps in furtherance or in aid of the Board Resolution made by the Board of Directors or FRL on 29 August 2019 in relation to the Disputed Transaction, including but not limited to filing or pursuing any application before any person, including regulatory bodies or agencies in India, or requesting for approval at any company meeting; (b) the Respondents are injuncted from taking any steps to complete the Disputed Transaction with entities that are part of the MDA	12.3 Thus the trinity of the principles for grant of interim injunction i.e. prima facie case, irreparable loss and balance of convenience are required to be tested in terms of principles as noted above. Since this Court has held that prima facie the representation of Amazon based on the pea that the resolution dated 29th August, 2020 of FRL is void and that on conflation of the FCPL SHA and FRL SHA, the 'control' that is sought to be asserted by Amazon on FRL is not permitted under the FEMA FDI Rules, without the governmental approvals, this Court finds that FRL has made out a prima facie case in its favour for grant of interim injunction. However, the main tests in the present case are in respect of "balance of

Group; (c) without prejudice to the rights of any current Promoter Lenders, the Respondents are injuncted from directly or indirectly taking any steps to transfer/dispose/alienate/encumber FRL's Retail Assets or the shares held in FRL by the Promoters in any manner without the prior written consent of the Claimant; (d) the Respondents are injuncted from issuing securities of FRL or obtaining/securing any financing, directly or indirectly, from any Restricted Person that will be in any manner contrary to Section 13.3.1 of the FCPL SHA; (e) the orders in (a) to (d) above are to take effect immediately and will remain in place until further order from the Tribunal, when constituted; and (f) the Claimant is to provide within 7 days from the date hereof a cross-undertaking in damages to the Respondents. If the Parties are unable to agree on its terms, they	convenience" and "irreparable loss". **Even if a prima facie case is made out by FRL, the balance of convenience lies both in favour of FRL and Amazon.** If the case of FRL is that the representation by Amazon to the statutory authorities/regulators is based on illegal premise, Amazon has also based its representation on alleged breach of FCPL SHA and FRL SHA, as also the directions in the EA order. Hence it cannot be said that the balance of convenience lies in favour of FRL and not in favour of Amazon. It would be a matter of trial after parties have led their evidence or if decided by any other competent forum to determine whether the representation of Amazon that the transaction between FRL and Reliance being in breach of the FCPL SHA and FRL SHA would outweigh the plea of FRL in the present suit. Further in case Amazon is not permitted to represent its case before the statutory authorities/Regulators, it will suffer an irreparable loss as Amazon also claims to have created preemptive rights in its favour in case the Indian law permitted in future. Further there may not be irreparable loss to FRL for the reason even if Amazon makes a

	are to refer their differences to me *qua* EA for resolution; and (g) the costs of this Application be part of the costs of this Arbitration.	representation based on incorrect facts thereby using unlawful means, it will be for the statutory authorities/Regulators to apply their mind to the facts and legal issues therein and come to the right conclusion. **There is yet another aspect as to why no interim injunction can be granted in the present application for the reason both FRL and Amazon have already made their representations and counter representations to the statutory authorities/regulators and now it is for the Statutory Authorities/Regulators to take a decision thereon. Therefore, this Court finds that no case for grant of interim injunction is made out in favour of the FRL and against Amazon.** 13. Consequently, the present application is disposed of, declining the grant of interim injunction as prayed for by FRL, however, the Statutory Authorities/Regulators are directed to take the decision on the applications/objections in accordance with law.

8. In the meanwhile, CCI and SEBI approved the composite Scheme proposed by FRL-Reliance. Thereafter, FRL filed for sanction of the composite Scheme of arrangement under the provisions of Sections 230 to 232 of the Companies Act, 2013 before National Company Law Tribunal (NCLT).

9. Amazon filed a Petition for enforcement of the Emergency Arbitrator Award, under Section 17(2) of the Arbitration and Conciliation Act, 1996, before the Delhi High Court on 25.01.2021 and the same was heard for the first time on 28.01.2021. As the appellants herein challenge the impugned order on the ground of failure to adhere to the principles of natural justice, it is apt to reproduce certain procedural orders passed by the learned Single Judge, Justice Midha, in OMP (ENF) (COMM) No.17 of 2021. On 28.01.2021, the following order was passed:

> "1. The hearing has been conducted through video conference.
> 2. Arguments partly heard.
> 3. List for continuation of the arguments on 29th January, 2021 at the end of the Board.
> 4. The order be uploaded on the website of this Court forthwith."

On 29.01.2021, the following order was passed:

"1. The hearing has been conducted through video conference.
2. Issue notice. Learned counsels for respondents accept notice.
3. Further arguments heard from 02:45 PM to 04:30 PM.
4. List for continuation of the arguments on 01st February, 2021.
5. Both the parties have submitted brief note of submissions.
6. Learned senior counsel for the respondent No.2 submits that he shall file additional note of submissions on the factual aspect by tomorrow afternoon with advance copy to the counsel for the petitioner by tomorrow evening. Respondent No.2 shall also respond to the brief note of submissions of the petitioner relating to the facts.
7. The order be uploaded on the website of this Court forthwith."

On 01.02.2021, the following order was passed:

"1. Respondent No.2 has filed additional submissions to which the petitioner has filed the response.
2. Learned senior counsels for the respondents have concluded the oral arguments.
3. List for rejoinder submissions of the petitioner on 02nd February, 2021.
4. It is clarified that no further written submissions shall be filed by any of the parties."

10. On 02.02.2021, the first substantive order [**1st impugned Order**] was passed in the following manner:

"8. This Court is of the prima facie view that the Emergency Arbitrator is an Arbitrator; the Emergency Arbitrator has rightly proceeded against the respondent No.2; the order dated 25th October, 2020 is not a nullity; the order dated 25th October, 2020 is an order under Section 17(1) of the Arbitration and Conciliation Act. This Court is of the view that the order dated 25th October, 2020 is appealable under Section 37 of the Arbitration and Conciliation Act. This Court is of the clear view that the order dated 25th October, 2020 is enforceable as an order of this Court under Section 17(2) of the Arbitration and Conciliation Act. The detailed reasons shall be given in the reserved order.

9. This Court is satisfied that immediate orders are necessary to protect the rights of the petitioner till the pronouncement of the reserved order. In that view of the matter, the respondents are directed to maintain status quo as on today at 04.50 P.M. till the pronouncement of the reserved order. The respondents are directed to file an affidavit to place on record the actions taken by them after 25th October, 2020 and the present status of all those actions, within 10 days. All the concerned authorities are directed to maintain status quo with respect to all matters in violation of the order dated 25th October, 2020 and shall file the status report with respect to the present status within 10 days of the receipt of this order. The other prayers of the petitioner shall be considered in the reserved order.

10. Copy of this order be given dasti under signatures of the Court Master to counsels for the parties. Copy of this order be also given dasti under signatures of the Court Master to Mr. Kirtiman Singh, learned Central Government Standing Counsel who shall send the same to all the concerned authorities dealing with the actions initiated by the respondents in violation of the order dated 25th October, 2020. The

> petitioner shall send the list of all the authorities to Mr. Kirtiman Singh, learned Central Government Standing Counsel within three days."

11. Aggrieved by the stay order granted by the learned Single Judge, while reserving the matter, FRL filed an intra-court appeal before the Division Bench in FAO OS (Comm.) No. 21 of 2021. The Division Bench vide Order dated 08.02.2021, passed the following order:

> "12. It is made clear that the observations made in this order are only a prima facie view for the purpose of grant of interim relief and shall not come in the way of the learned Single Judge in passing the final order in OMP(ENF)(Comm) No.17/2021 and needless to state that the order shall be passed uninfluenced by any observations made hereinabove."

12. Amazon appealed against this Order before the Supreme Court in SLP (C) No. 2856-57 of 2021. *Vide* order dated 22.02.2021, this Court *inter-alia* held as under:

> "**In the meantime, the NCLT proceedings will be allowed to go on but will not culminate in any final order of sanction of scheme."**
>
> **(Emphasis supplied)**

13. Again on 18.03.2021, the learned Single Judge in OMP (ENF) (COMM) No.17 of 2021, passed the **2nd impugned order** with aforesaid directions:

> "188. The Emergency Arbitrator is an Arbitrator for all intents and purposes; order of the Emergency Arbitrator is an order under Section 17(1) and enforceable as an order of this Court under Section 17(2) of the Arbitration and Conciliation Act.
> .....
> 190. The respondents have raised a vague plea of *Nullity* without substantiating the same. The interim order of the Emergency Arbitrator is not a *Nullity* as alleged by respondent No.2.
> 191. Combining/treating all the agreements as a single integrated transaction does not amount to control of the petitioner over FRL and therefore, the petitioner's investment does not violate any law.
> 192. All the objections raised by the respondents are hereby rejected with cost of Rs.20,00,000/- to be deposited by the respondents with the Prime Minister Relief Fund for being used for providing COVID vaccination to the *Below Poverty Line* (BPL) category - senior citizens of Delhi. The cost be deposited within a period of two weeks and the receipt be placed on record within one week of the deposit.
> 193. The respondents have deliberately and wilfully violated the interim order dated 25th October, 2020 and are liable for the consequences enumerated in Order XXXIX Rule 2A of the Code of Civil Procedure.
> 194. In exercise of power under Order XXXIX Rule 2A(1) of the Code of Civil Procedure, the assets of respondents No.1 to 13 are hereby attached. Respondents No.1 to 13 are directed to file an affidavit of their assets as on today in

> Form 16A, Appendix E under Order XXI Rule 41(2) of the Code of Civil Procedure within 30 days. Respondent No.1, 2, 12 and 13 are directed to file an additional affidavit in the format of Annexure B-1 and respondents No.3 to 11 are directed to file an additional affidavit in the format of *Annexure A-1* to the judgment of ***M/s Bhandari Engineers & Builders Pvt. Ltd. v. M/s Maharia Raj Joint Venture***, (supra) along with the documents mentioned therein within 30 days."

14. In the *interregnum*, the FCPL and FRL approached the Division Bench of the Delhi High Court in FAO (OS) (COM) No.50 and 51 of 2021 respectively against the **2nd impugned order** passed by the learned Single Judge which was stayed *vide* Order dated 22.03.2021.

15. Subsequently, Amazon filed SLP (C) Nos. 6113-6114 of 2021 before this Court against the order dated 22.03.2021 passed by the Division Bench of the High Court.

16. This Court consolidated all the appeals filed by Amazon before this Court, heard the matters together and passed a final judgment dated 06.08.2021, answering only the following two legal questions:

i. Whether an Emergency Arbitrator's Award can be said to be within the contemplation of the Arbitration Act?

ii. Whether an order passed under Section 17(2) of the Arbitration Act, in enforcement proceedings, is appealable under Section 37 of the Arbitration Act?

17. This Court answered the first question in the following manner:

> "41. We, therefore, answer the first question by declaring that full party autonomy is given by the Arbitration Act to have a dispute decided in accordance with institutional rules which can include Emergency Arbitrators delivering interim orders, described as "awards". Such orders are an important step in aid of decongesting the civil courts and affording expeditious interim relief to the parties. Such orders are referable to and are made under Section 17(1) of the Arbitration Act."

The second question was answered thus:

> "76. The second question posed is thus answered declaring that no appeal lies under Section 37 of the Arbitration Act against an order of enforcement of an Emergency Arbitrator's order made under Section 17(2) of the Act. As a result, all interim orders of this Court stand vacated. The impugned judgments of the Division Bench, dated 8th February, 2021 and 22nd March, 2021, are set aside. The appeals are disposed of accordingly."

18. It may be noted that this Court, in the aforesaid judgment of 06.08.2021, did not adjudicate upon the merits of the case

and limited its reasoning only to answer the legal questions which arose therein. On a reading of this judgment, the contention of the learned Senior Advocate Mr. Gopal Subramanium, that this Court has upheld the Emergency Arbitrator Award and did not interfere with the enforcement orders in OMP (ENF)(Comm.) No. 17 of 2021, on merits, is not correct. Although, the judgment narrates the facts leading up to the appeal, the Court neither returned any findings on facts, nor adjudicated on merits of the Order passed by Justice Midha in the enforcement proceedings. It is this gap which has led to the current round of litigation on merits of the case for the second time before this Court.

19. In the meanwhile, FRL filed an application under Para 10 of Schedule 1 of the SIAC Rules for vacating the Award of the Emergency Arbitrator before the Arbitral Tribunal. The oral submissions on the vacate petitions were heard between 12th-16th of July 2021 and orders were reserved.

20. Contemporaneously, aggrieved by the merits of the orders of the Single Judge dated 02.02.2021 and 18.03.2021, FCPL and FRL preferred appeals directly before this Court in SLP (C) No. 13547-48 of 2021 and SLP (C) No. 13556-57 of 2021,

respectively. On 09.09.2021 the following interim order was passed by this Court:-

> "Heard learned senior counsel for the parties at length and carefully perused the material placed on record.
>
> Issue notice.
>
> **Taking into consideration the submissions advanced by the learned senior counsel for the parties and particularly the fact that the parties have approached the Singapore International Arbitration Centre for vacating the Emergency Award passed by the Emergency Arbitrator and the arguments in the said matter have been ssconcluded and the order is going to be pronounced shortly,** we think it fit to balance the interest of both the parties by staying all further proceedings before the Delhi High Court for the time being. Ordered accordingly. **We further direct to all the authorities i.e. NCLT, CCI and SEBI not to pass any final order for a period of four weeks from today. This order has been passed with the consent of both the parties.**
>
> List these matters after four weeks."
>
> (**Emphasis supplied**)

21. Thereafter, the applications filed by FRL and FCPL for vacating the award of the Emergency Arbitrator was dismissed by the Arbitral Tribunal by Order dated 21.10.2021.

22. The aforesaid order of the Arbitral Tribunal, rejecting the vacate petition, was challenged by FCPL and FRL before the Delhi High Court in Arb. Pet. No. 63 of 2021 and Arb. Pet. No.

64 of 2021. In Arb. Pet. No. 64 of 2021, FRL had filed IA No. 14285/2021, seeking the following prayers:

a. Stay the operation of the impugned Order dated 21.10.2021 passed by the Hon'ble Arbitral Tribunal.
b. Alternatively, pass an order allowing the Appellant to take steps pursuing the scheme, subject to the condition that it shall not invite the passing of any final orders of approval of the scheme by the NCLT.

23. While issuing notice in both matters, by orders dated 29.10.2021 (**3rd impugned Order**), the Delhi High Court (Justice Suresh Kumar Kait) refused any immediate relief to FRL in the following words:

> "15. During the course of hearing, this Court time and again referred that when the subject matter of this appeal is pending *sub-judice* before the Hon'ble Supreme Court in Special Leave Petition (Civil) No. 13547- 48/2021 and infact, by virtue of order dated 09.09.2021 proceedings before this Court have been stayed and also directions have been passed to NCLT, CCI, SEBI to not pass any final order, then how interim relief, that too without there-being any hearing or any reply from side opposite on record, application for interim stay can be heard and orders be passed. Upon this, Mr. Harish Salve, learned senior counsel submitted in such eventuality, this Court may dismiss the application.
> 16. In view of the above, the application seeking interim stay being IA No. 14285/2021 (u/S 151 CPC) is accordingly dismissed."

24. Aggrieved by the aforesaid order, FCPL and FRL have approached this Court in SLP (C) Nos. 18089 and 18080 of 2021 respectively.

25. Mr. Harish Salve, learned Senior Counsel appearing for FRL submitted that the orders in the enforcement proceedings have been rendered while completely disregarding the order dated 21.12.2020 passed by the learned Single Judge of the Delhi High Court in CS(Comm) No. 493 of 2020, particularly, the finding that FRL does not have any arbitration agreement with the respondent. He further submitted that although an appeal has been filed against the aforesaid order of the learned Single Judge, there is no stay operating against the said order.

26. The learned Senior counsel also submitted that the impugned orders passed in the enforcement proceedings merit setting aside as the said proceedings have been conducted contrary to the principles of natural justice. He submitted that the procedure adopted has caused serious prejudice to the appellants as, after denying them an opportunity to file a reply affidavit, the impugned orders in the Enforcement proceedings

recorded that FRL had not made any plea on the issue as to why were the orders of the Emergency Arbitrator a nullity.

27. Thirdly, the learned Senior counsel contended that the impugned orders passed in the Enforcement proceedings extended beyond the scope of the Emergency Arbitrator's interim Award, by directing recall of the approvals granted by the Statutory Authorities.

28. Lastly, while relying upon the Singapore Arbitration Rules, learned Senior counsel submitted that the Tribunal's interim order dated 21.10.2021, overrides the Emergency Arbitrator's interim Award which are the subject matter of the impugned enforcement proceedings. As a result, the enforcement proceedings and the impugned order have lost their relevance due to the subsequent events.

29. Mr. Mukul Rohatgi, learned Senior Counsel appearing for FCPL and their promoters, while supplementing the submissions of Mr. Salve, specifically contended that the impugned order merits setting aside due to grave injustice caused to the appellants due to the principles of natural justice being given a go-by. No opportunity was granted for

filing of any response which has resulted in various factual and legal errors creeping in the impugned order. He further submitted that considering the procedure followed by it, the penal orders passed by the High Court in the impugned order, merit a reconsideration.

30. Learned Senior counsel further submitted that no prejudice would be caused to Amazon by setting aside the impugned order passed in the enforcement proceedings or by the passing of an interim measure allowing continuation of the proceedings before the NCLT. In fact, this Court, *vide* order dated 22.02.2021, has already created an interim arrangement by allowing the NCLT proceedings to continue with a direction to the NCLT not to pass any final order. On the other hand, the impugned order dated 18.03.2021, directed recall of the approvals granted by the statutory authorities.

31. Mr. Gopal Subramanium, learned Senior Counsel appearing for Amazon, submitted that the appellants, by their conduct have demonstrated willful and intentional disobedience of the Emergency Arbitrator's interim Award, after agreeing for the Emergency Arbitrator. While he fairly stated that Amazon is

not interested in pursuing the punitive directions imposed on FCPL and others, he submitted that the Emergency Arbitrator's interim Award stands confirmed by the Arbitral Tribunal, which must be abided by the appellants. Learned Counsel argued that when no stay has been granted against the interim protection afforded to them by the Arbitral Tribunal, the appellants cannot operate in contravention of the same and proceed to effectuate the scheme before the NCLT. He lastly submitted that pending any challenge, the interim orders passed by the Tribunal needs to be maintained and given effect to, so as to uphold the effectiveness and sanctity of the arbitration process.

32. Mr. Aspi Chinoy, learned Senior Counsel appearing for Amazon contended that the appellants' reliance on the order dated 21.12.20, passed by the learned Single Judge of the Delhi High Court in the suit proceeding is misplaced. He submitted that, in the first instance, the suit instituted by FRL before the Delhi High Court was of the nature of an anti-arbitration suit and a collateral challenge to the arbitration proceedings which is in contravention to Section 5 of the

Arbitration Act. He further submitted that the observations being relied upon by the appellants were made in an order declining the relief sought by them before the Delhi High Court. Finally, the learned Senior counsel submitted that no relief should be granted to the appellants by this Court as they have not approached this Court with clean hands having failed to comply with any judicial order that has been passed.

33. Having heard learned counsel for both the parties and on perusing voluminous documents submitted before the Court, the following questions arise for our consideration :

I. Whether the orders dated 02.02.2021 and 18.03.2021, passed by the learned Single Judge in OMP (ENF) (COM) No.17 of 2021, are valid in law?

II. Whether the orders dated 29.10.2021, passed by the learned Single Judge in Arb. A (Comm.) No. 64 and 63 of 2021, is valid in law?

Question No. I

34. The orders of the learned Single Judge [Justice Midha] in OMP (ENF) (COMM) No.17 of 2021, is impugned on the grounds of lack of an opportunity granted to FCPL and FRL to file a

counter to establish their defense. Mr. Rohatgi, learned Senior Advocate appearing on behalf of FCPL and its promoters has submitted that no time was granted by the learned Single Judge to respond. He added that a 200-page order has been passed without any reply being filed on record and holding everyone guilty of contempt of court. He has further submitted that punitive directions could not have been passed even in contempt jurisdiction without affording the party a proper opportunity of filing a reply.

35. In this context, our attention has been drawn to a catena of procedural orders passed by the High Court in OMP (ENF) (COMM) No.17 of 2021. From the record, we observe that FRL and FCPL were not provided sufficient time or opportunity to file their counter or raise their defense. On 29.01.2021, they were allowed to file a brief note of submission within twenty-four hours, before orders were passed on 02.02.2021.

36. On a perusal of the orders, we find that serious procedural errors were committed by the learned Single Judge. Natural justice is an important facet of a judicial review. Providing effective natural justice to affected parties, before a decision is taken, is necessary to maintain the Rule of law. Natural justice

is usually discussed in the context of administrative actions, wherein procedural requirement of a fair hearing is read in to ensure that no injustice is caused. When it comes to judicial review, the natural justice principle is built into the rules and procedures of the Court, which are expected to be followed meticulously to ensure that highest standards of fairness are afforded to the parties.

37. It is well known that natural justice is the sworn enemy of unfairness. It is expected of the Courts to be cautious and afford a reasonable opportunity to parties, especially in commercial matters having a serious impact on the economy and employment of thousands of people. Coming to the facts herein, the opportunity provided to the appellants herein was insufficient, and cannot be upheld in the eyes of law.

38. Whenever an order is struck down as invalid being in violation of the principles of natural justice, there is no final decision of the case and fresh proceedings are left open. All that is done is to vacate the order assailed by virtue of its inherent defect. Such proceedings are not terminated and are usually remitted back. [*See* ***Canara Bank v. Debasis Das***, (2003) 4 SCC 557] However, in this case, much water has flown under the bridge,

since the passing of the order by the learned Single Judge, which has now been rendered redundant, for the following reasons :

- Initially, this Court by order dated 22.02.2021, had allowed proceedings to continue before the NCLT without finalization of the scheme.
- Thereafter, learned Single Judge passed the 2nd impugned order on 18.03.2021, without considering the order of this Court dated 22.02.2021.
- Subsequently, the Division Bench in FAO (OS)(COM) No. 50 and 51 of 2021, had stayed the aforesaid order of the Single Judge, which was taken in appeal again before this Court.
- This Court finally disposed of the case, answering only two legal questions, without adjudicating on the merits of the matter.
- In the meanwhile, FRL and FCPL had moved the Arbitral Tribunal, for vacating the interim injunction granted by the Emergency Arbitrator.
- In view of the pendency of the aforesaid application before the Arbitral Tribunal, this Court again through

interim order dated 09.09.2021, allowed continuation of proceedings before the NCLT, without final authorization on the scheme.

39. One aspect which may be highlighted is the punitive directions ordered by the learned Single Judge in the order dated 18.03.2021, which are extracted below:

> "192. All the objections raised by the respondents are hereby rejected with cost of Rs.20,00,000/- to be deposited by the respondents with the Prime Minister Relief Fund for being used for providing COVID vaccination to the *Below Poverty Line* (BPL) category - senior citizens of Delhi. The cost be deposited within a period of two weeks and the receipt be placed on record within one week of the deposit.
> 193. The respondents have deliberately and wilfully violated the interim order dated 25th October, 2020 and are liable for the consequences enumerated in Order XXXIX Rule 2A of the Code of Civil Procedure.
> 194. In exercise of power under Order XXXIX Rule 2A(1) of the Code, the assets of the respondents No.1 to 13 are hereby attached. Respondents No. 1 to 13 are directed to file an affidavit of their assets as on today in Form 16A, Appendix E under Order XXI Rule 41(2) of the Code of Civil Procedure within 30 days. Respondent No. 1, 2, 12 and 13 are directed to file an additional affidavit in the format of Annexure B-1 and respondents no. 3 to 11 are directed to file an additional affidavit in the format of Annexure A-1 to the judgment of ***M/s. Bhandari Engineers & Builders Pvt. Ltd. v. M/s. Maharia Raj***

Joint Venture, (supra) along with the documents mentioned therein within 30 days."

40. Our attention is drawn to the fact that the learned Single Judge had relied on ***M/s. Bhandari Engineers & Builders Pvt. Ltd. v. M/s. Maharia Raj Joint Venture***, 2019 SCC Online Del. 11879, which has been overruled by a Division Bench order in ***Delhi Chemical and Pharmaceutical Works Pvt. Ltd. & Anr. v. Himgiri Realtors Pvt. Ltd. & Anr.,*** EFA (OS) (Comm.) No. 4 of 2021.

41. Viewed differently, contempt of a civil nature can be made out under Order XXXIX Rule 2-A CPC not when there has been mere "disobedience", but only when there has been "wilful disobedience". The allegation of wilful disobedience being in the nature of criminal liability, the same has to be proved to the satisfaction of the court that the disobedience was not mere "disobedience" but "wilful" and "conscious". This Court in the case of ***Ram Kishan v. Tarun Bajaj,*** (2014) 16 SCC 204, considering the implication of exercise of contempt jurisdiction, held that the power must be exercised with caution rather than on mere probabilities. While delineating

the conduct which can be held to be "wilful disobedience", this Court held that:

> **"12.** Thus, in order to punish a contemnor, it has to be established that disobedience of the order is "wilful". The word "wilful" introduces a mental element and hence, requires looking into the mind of a person/contemnor by gauging his actions, which is an indication of one's state of mind. "Wilful" means knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bona fide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a "bad purpose or without justifiable excuse or stubbornly, obstinately or perversely". Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. **Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished**. "Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct."
>
> **(Emphasis supplied)**

42. Considering the fact that in the suit instituted by FRL, the learned Single Judge had earlier allowed FRL and Amazon to continue their pursuit before various regulatory authorities, and in view of the interim orders of this Court dated 22.02.2021 and 09.09.2021, and the Courts below, we are inclined to set-aside aforesaid directions as the pre-condition of 'sufficient mental element for wilful disobedience' is not satisfied. Moreover, Mr. Gopal Subramanium, learned Senior Advocate appearing for Amazon, has fairly stated that Amazon is not interested in proceeding with the punitive directions. Taking note of the aforesaid submission, we set aside the punitive directions issued in the impugned orders of learned Single Judge dated 02.02.2021 and 18.03.2021.

43. Coming to the merits of the case, we would like to mention a disconcerting aspect wherein the interim order enforcing the Emergency Award has adopted a standard beyond '*prima facie view*', as required under law. It is expected of Courts to be cautious while making observations on the merits of the case, which would inevitably influence the Arbitral Tribunals hearing the matters on merit.

44. Therefore, we set aside the order of the learned Single Judge dated 02.02.2021 and 18.03.2021 passed in OMP (ENF) (COMM.) No.17 of 2021.

Question No. II

45. At the outset, it is agreed by learned advocates appearing on both side that the impugned order dated 29.10.2021 in IA No. 14285/2021 moved in Arb. A (Comm.) No. 64 of 2021, needs to be set aside for non-consideration of the orders of this Court in the proper perspective. Our order dated 09.09.2021, imposed no bar on the High Court to adjudicate the issue concerning legality of the vacate application order by the Arbitral Tribunal. In our opinion, adjudication of the applications under Section 37(2), Arbitration Act filed by the appellants before the Delhi High Court are distinct from the earlier appeals filed before this Court.

46. Further, certain important questions of law concerning the effect of the award of an Emergency Arbitrator and the jurisdiction of an Arbitral Tribunal *qua* such awards arise in the present matter. Therefore, these matters need to be remitted back for adjudication on its own merits.

47. In view of the above, we order:

I. Setting aside of impugned orders dated 02.02.2021 (1st impugned Order) and 18.03.2021 (2nd impugned order) in OMP (ENF)(Comm.) No. 17 of 2021.

II. Setting aside of 3rd impugned order dated 29.10.2021 in Arb. A. (Comm.) No. 64 and 63 of 2021.The learned Single Judge shall reconsider the issues and pass appropriate orders on its own merits, uninfluenced by any observation made herein.

.....CJI.
(N.V. RAMANA)

.....J.
(A.S. BOPANNA)

.....J.
(HIMA KOHLI)

NEW DELHI;
FEBRUARY 01, 2022