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

Judgment reserved on: 23.07.2026

Judgment pronounced on:18.08.2026

\+ ARB. A. (COMM.) 53/2026, I.A. 19081/2026 & I.A. 19082/2026

ORBIT IN-TE-RIO .....Petitioner

Through: Mr. Deepender Banger and Mr. Sakshi Rastogi, Mr. Shashwat Prateek Panda, Mr. Apartim Animesh Thakur, Mr. Suryansh, Advs.

versus

AMERICAN EPAY SERVICES PVT. LTD. .....Respondent

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE OM PRAKASH SHUKLA

JUDGMENT

% **18.08.2026**

1. The present appeal is filed under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996[1] assailing the order[2] dated 27.03.2026 passed by the Learned Sole Arbitrator in disputes arising between the parties out of a Fit-Out agreement dated 28.11.2023.

2. As per the Fit-Out agreement dated 28.11.2023, Appellant was required to supply and install fit-outs, fixtures and related works at Respondent's commercial premises against payment of monthly fit-out lease charges, while retaining the ownership of the installed fit-outs.

3. Disputes arose regarding performance of the works, including modifications and additional works sought by Respondent, eventually

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[1] "the Act", hereinafter

[2] "impugned order", alternatively

resulting in termination of the aforesaid Agreement on 15.02.2024 by the Respondent.

4. Thereafter, Respondent issued a legal notice dated 21.02.2024 claiming approximately ₹15 crores towards reimbursement and damages, while Appellant disputed the allegations and asserted that substantial work had been completed and that its fit-outs continued to remain at and be used in the premises without payment.

5. Respondent approached this Court under Section 9 of the Arbitration and Conciliation Act, 1996, pursuant to which Local Commissioners were appointed on 01.03.2024 to inspect the premises, prepare an inventory and assess the status, quantity & quality of fit-out works.

6. Arbitration was invoked on 20.03.2024 and, by order dated 02.09.2024, a Sole Arbitrator was appointed. Appellant also approached this Court under Section 9 seeking deposit of alleged fit-out rent arrears or, alternatively, seeking removal of its fixtures from the Respondent's premises, which application was directed on 04.09.2024 to be considered by the Tribunal under Section 17.

7. The Appellant subsequently filed two Section 17 applications before the Tribunal. The first seeks disclosure and protection of their assets and the second pertains to deposit of rent arrears. Additionally, the Appellant also raised a counterclaim of approximately ₹16.78 crore, while Respondent had raised claims of approximately ₹11.71 crore.

8. It is the Appellant's case that by order dated 25.09.2025, the Tribunal directed the Appellant to deposit its entire share of the arbitral fee before its Section 17 applications and counterclaim would be heard.

9. Appellant deposited ₹14 lakhs out of an assessed amount of approximately ₹39.03 lakh but did not deposit the entire amount.

10. Consequently, by order dated 27.03.2026, the Tribunal closed Appellant's right to pursue its two Section 17 applications and its counterclaim on account of non-payment of the requisite arbitral fee.

11. Appellant has challenged that order under Section 37(2)(b) of the Act, principally contending that non-payment of arbitral fees could not justify refusal to entertain its independent applications for interim protection under Section 17.

12. On 23.07.2026, this Court queried about the maintainability of the present appeal, as an alternative remedy seeking recall/modification of the order dated 27.03.2026 was available. Thus, arguments with respect to maintainability were heard.

13. Learned Counsel for the Appellant submits that review which he is seeking falls outside of the scope of review/recall available with the Arbitrator.

14. He relies on the judgment of ***SREI Infrastructure Finance Ltd. v. Tuff Drilling Pvt. Ltd.***[3], and submits that the Hon'ble Supreme Court

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[3] (2018) 11 SCC 470

has expressly distinguished between an inherent procedural review and a review on merits.

15. According to learned Counsel for the Appellant, while a Tribunal may recall an order where the proceeding itself stands vitiated by a procedural illegality, mistake or misapprehension, it possesses no inherent jurisdiction to reconsider the correctness of its decision on a question of law.

16. The learned Counsel for the Appellant submits that since the Tribunal itself cannot review the legal error and the consequence of the order is that the Appellant has been finally denied consideration of its Section 17 reliefs, the order operates as a refusal of interim measures and is appealable under Section 37(2)(b).

17. The learned Counsel for the Appellant relies on Rule 33.5 of the DIAC Rules, 2013 and Rule 7.1 of the DIAC (Administrative Cost & Arbitrators' Fees) Rules, 2018 to contend that the DIAC framework itself limits the consequence of non-payment of arbitral deposits to termination of the relevant claim or counterclaim and does not contemplate closure of a pending Section 17 application.

18. Further, the Appellant relies on Sections 38 and 39 of the Act to contend that the said provisions itself exhaustively regulates non-payment of arbitral costs and has vehemently argued that the Appellant are left with no legal remedy, except to approach this Court.

19. Thus, in sum and substance the case of the Appellant is that the present dispute is purely legal in nature and there is no scope of recall/review available before the Arbitral tribunal and as such, having left with no legal remedy, they have approached this Court under Section 37(2)(b) of the Act and therefore the present appeal is maintainable.

20. I have heard learned Counsel for the Appellant on the aspect of maintainability and perused the record.

21. The relevant portion of the order where right of the Appellant to pursue its Section 17 application and counterclaim was closed is reproduced below:

> *"Vide order dated 25.09.2025, the undersigned directed the Respondent to deposit their entire share of the arbitral fee till December 2025 and only after the deposit the two applications undern Section 17 of the Arbitration and Conciliation Act, 1996 and the Counter Claim filed by the Respondent shall be heard and adjudicated upon.* ***However, the Respondent has failed to do the same, till date. In view of the admitted non-payment/ deposit of the requisite arbitral fee despite sufficient opportunity, the right of the Respondent to pursue the said applications and the Counter Claim stands closed."***
>
> ***(Emphasis supplied)***

22. Upon perusal of the aforesaid, it can be made out that the learned Sole Arbitrator did not adjudicate Appellant's Section 17 applications on its merits.

23. The learned Sole Arbitrator merely mentioned its earlier order dated 25.09.2025, where it had directed Appellant to deposit its entire

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share of the arbitral fees and stated that only thereafter would the two Section 17 applications and the counterclaim shall be heard.

24. In the impugned order dated 27.03.2026, the Tribunal recorded Appellant's failure to make the deposit despite opportunities and on that basis, closed Appellant's right to pursue its Section 17 application and the counterclaim.

25. Thus, according to this Court, it can be made out that the impugned order is not an adjudicatory order under Section 17 rather it is a procedural order, as is apparent from a bare reading of the aforesaid impugned order. This Court says so for the following reasons.

26. Apparently, the Tribunal had no opportunity to examine through the prism of trinity test as to whether it was a fit case for grant of interim relief or whether the Appellant had made out a case for securing the amount in dispute, or any other requirement for interim protection. As a matter of fact, the aforesaid opportunity of examination came to be aborted, even before it could gather germination.

27. In substance, the learned Sole Arbitrator neither granted nor rejected the interim measures. It merely closed Appellant's right to pursue the applications and counterclaim because of non-compliance with the direction to deposit arbitral fees.

28. Therefore, the character of the order is essentially procedural and fee-related and cannot be termed to be an order passed with the

precincts of exercise of jurisdiction under Section 17 by the Arbitral Tribunal.

29. In the judgment of ***H.S NAG and Ors. v. Asian Hotel (North)***[4]**,** this Court has expressly held that even if an order affects a valuable right of the parties or has serious consequences, it remains procedural unless it finally determines a substantive component of the reference. The relevant para of the judgment is reproduced:

> *"75. The common thread running through the aforesaid decisions is that the twin pillars of „finality' and substantive issue determination' form the bedrock of the test. An order that merely regulates procedure, even if it affects a valuable right, does not cross the statutory threshold unless it conclusively determines a substantive component of the arbitral reference.*
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> *100. In Punita Bhardwaj (supra), the arbitral tribunal had rejected an application for amendment of the leadings solely on the ground of delay. The Court noted that the learned arbitrator had expressly clarified that no opinion was being expressed on the merits of the case, and that the order did not determine any claim or defence with finality. The rejection was thus procedural in character and did not clothe the order with the attributes of an interim award.*
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> *101. Significantly, the Court emphasised that while the Act vests discretion in the arbitral tribunal under Section 23(3) to disallow belated amendments, such exercise of discretion does not, ipso facto, translate into an adjudication of substantive rights. The distinction drawn was clear that where rejection of an amendment results in final determination of a claim or defence, the order may assume the character of an interim award, however, where it merely regulates the conduct of proceedings without foreclosing adjudication on merits, it remains procedural."*

[4] **2026:DHC:1396**

30. It is clear from the above that this Court expressly recognised that an order may affect a valuable right and yet remain procedural if it merely regulates the conduct of the proceedings without deciding the underlying claim, defence or entitlement on merits.

31. Applying the aforesaid principle to the facts of this case, since the learned Sole Arbitrator never examined or decided whether any interim measure ought to be granted or refused, the impugned order does not fall within Section 37(2)(b).

32. The order therefore bears the character of a procedural direction rather than an order of "granting or refusing to grant an interim measure" within the meaning of Section 37(2)(b).

33. The proper course, therefore, was to first seek recall or restoration before the Tribunal, rather than invoking this Court's jurisdiction under Section 37 by erroneously treating a procedural closure as a substantive refusal of Section 17 relief.

34. In the judgment of Hon'ble Supreme Court in ***Harshbir Singh Pannu & Anr. v. Jaswinder Singh***,[5] non-payment of fees led to termination of the claim/counterclaim and the Supreme Court held that the appropriate first remedy was to seek recall before the Tribunal. The relevant paras of the judgment are reproduced as follows:

> *"310. What emerges from the aforesaid is that where an arbitral tribunal passes an order for terminating the proceedings under the Act, 1996,* ***<u>the appropriate remedy available to the parties would be</u>***

[5] **2025 INSC 1400**

<u>to first file an application for recall of such order before the arbitral tribunal itself.</u>

311. It is no more res-integra that there is a clear distinction between a procedural review and a review on merits as held in Hindustan Construction Company (supra). When applied to the Act, 1996, the irresistible conclusion that can be reached is that the power of review is available to an arbitral tribunal to the limited extent of curing a patent or procedural error. Thus, an arbitral tribunal has the power to entertain an application for recall of an order terminating the proceedings passed by it.

312. Upon such application being preferred, the arbitral tribunal, as held in Bharat Heavy Electricals (supra), would then be required to examine whether the order does or does not deserve to be recalled.

313. If a favourable order is passed for recommencing arbitration proceedings, the only option available to a party aggrieved therefrom, would be to participate in the proceedings and thereafter challenge the final award under Section 34 of the Act, 1996.

314. If, however, the recall application were to be dismissed, as held in Lalitkumar V. Sanghvi (supra), the party aggrieved therefrom, would be empowered to approach the court under Section 14(2) of the Act, 1996.

315. The court would then in turn examine whether the mandate of the arbitrator stood legally terminated or not. If it finds that the proceedings were not terminated in accordance with the law, it would be empowered to either set-aside the order of termination of proceedings and remit the matter back to the arbitral tribunal, or, if the circumstances so require, proceed to appoint a substitute arbitrator in terms of Section 15 of the Act, 1996.

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415. A conspectus of our legal discussion is as under: -

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(VII) There is a clear distinction between a procedural review and a review on merits. ***<u>The arbitral tribunal possesses the inherent procedural power to recall an order terminating the proceedings as such power is merely to correct an error apparent on the face of the record or to address a material fact that was overlooked. It does not tantamount to revisiting the findings of law or reappreciating the substantive issues already decided.”</u>***

<u>(Emphasis supplied)</u>

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35. Thus, the Hon'ble Supreme Court has in clear words held that where an arbitral order results from a procedural default and does not adjudicate the substantive entitlement of the party, the arbitral process should ordinarily be permitted to correct that procedural consequence internally through recall before judicial intervention is invoked.

36. In ***Harshbir*** *(supra),* non-payment of fees led to termination of the claim/counterclaim and the Supreme Court held that the appropriate first remedy was recall before the Tribunal.

37. In the present case, non-payment of fees has similarly resulted in procedural closure of the Section 17 applications and counterclaim without any adjudication of the interim reliefs sought.

38. The learned Sole Arbitrator has closed the arbitral proceedings merely as the adequate payment or rather the procedural requirement of deposit of adequate fees was not followed.

39. Admittedly, the reason of closing the procedures is depositing of the arbitral fees. The Supreme Court treated depositing such kind of fees in ***Harshbir*** *(supra)* as a procedural default capable, in an appropriate case, of being addressed through procedural recall. Accordingly, this Court does not find any good reason for taking a different view or to draw any other inference in the given facts and circumstances.

40. Additionally, the Supreme Court in the matter of ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV***[6]**,** while interpreting Section 38, held that the purpose of requiring a deposit is only to secure anticipated arbitral expenses and that the deposit is provisional in nature. The Hon'ble Supreme Court then expressly held that an order concerning such deposits and arbitrator fees is not a binding determination as to costs and is a procedural order issued for the purpose of securing payment of future expenses. The Hon'ble Apex Court, extensively quoted Gary Born on Arbitration, in the following words:

> *"95 Gary Born on Arbitration (supra) explains the concept of an advance on costs or deposits in the following terms:*
>
> *Once the arbitral tribunal is in place, the parties are generally required to provide security for the fees and costs of the arbitrators. Most institutional arbitration rules contain express provisions for payment by the parties of an advance on costs (or deposit), and arbitrators often have the power under national law to require payment of an advance even absent express provision to that effect in either the arbitration agreement or institutional rules.*
>
> *The amount of the advance on costs is based upon the expected total amount of fees and expenses of the arbitrators and institutional administrative costs. If the parties do not pay the advance, the arbitration will not go forward; if one party fails to make payment, the other may do so on its behalf, so that the arbitration will proceed, hopefully to conclude with a decision in its favor, in which the prevailing party will be awarded (among other things) reimbursement of the amounts it advanced on behalf of its counter-party.*
>
> *The above extract and Section 38of the Arbitration Act indicate that the purpose of demanding a deposit is to simply secure the future expenses or the "costs" relating to the arbitration, including arbitrators'fees. The arbitrator(s) may resign or cease their work until such payment is made. This principle cannot be extended to establish that the arbitrator(s) have a unilateral power to fix their own fees while demanding a deposit. The arbitral tribunal can also*

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[6] **2022 INSC 884**

> *ask for a supplementary deposit, which indicates that the amount fixed in the deposit is provisional in nature. Upon the termination of the mandate of the arbitral tribunal, it is required to provide an account of the deposits and if the deposits exceed the total amount of costs, the tribunal is required to return the balance. This indicates that the order on deposits is not a binding determination as to costs (including arbitrators' fees).* ***It is a procedural order issued for the purpose of securing payment of future expenses."***

41. Therefore, following ***Harshbir*** (*supra*) and ***Afcons Gunanusa JV*** *(supra),* it is a settled law that direction requiring Appellant to deposit its share of arbitral fees is therefore procedural. As a corollary, it has to be construed that the subsequent closure of the Section 17 application and counterclaim arose solely from noncompliance of the direction of fees deposit and is also a procedural order only.

42. There is another aspect of the matter, in as much as Section 37(2) of the Act, stipulates that an appeal shall lie to the Court from two categories of orders passed by an arbitral tribunal. First, an order accepting a plea under Section 16(2) or Section 16(3). Second, an order granting or refusing to grant an interim measure under Section 17. The provision therefore does not confer a general appellate remedy against every order passed during arbitration.

43. Applying the same to the present case, Section 37(2)(b) is not attracted because the learned Sole Arbitrator has neither granted nor refused any interim measure under Section 17.

44. The learned Sole Arbitrator did not examine the Section 17 prayers, it merely closed the Appellant's right to pursue the Section 17 applications as a consequence of non-payment of arbitral fees.

45. Therefore, the learned Sole Arbitrator decided the Appellant's procedural entitlement to continue prosecuting those applications, and clearly not its substantive entitlement to an interim measure under Section 17.

46. It is clear from the above that the impugned order is procedural in nature and consequently, appropriate remedy was to seek re-call of the impugned order since, the impugned direction does not fall within the express language of Section 37(2)(b), which permits an appeal from an order "granting or refusing to grant an interim measure under Section 17".

47. Further, the grounds relating to reliance on Sections 38 and 39 of the Act and the DIAC Rules to argue that the Arbitral Tribunal has no power to close the proceedings under Section 17 of the Act for non-payment of the counterclaim fee are argument on merits of the case and in a way is a self-defeating argument of the Appellant. The said grounds can very well be taken in the recall Application before the Arbitral Tribunal. However, it still does not by itself make the order one "granting or refusing to grant an interim measure under Section 17" within Section 37(2)(b) of the Act.

48. As a sequel to above, it is established that the fee direction itself was procedural, in any case a procedural order even if virtually

affecting a valuable right does not acquire substantive character unless it actually determines a substantive issue.

49. Thus, in view thereof, the present appeal is not maintainable and is accordingly dismissed.

50. It goes without saying that the closure of Appellant's counterclaim and its own Section 17 applications do not exclude the Appellant from participating in the arbitration itself.

51. It is clarified that the Tribunal therefore continues to exercise jurisdiction over appellant as a party and has not become *functus officio* generally. The impugned order has merely prevented Appellant from prosecuting its own affirmative counterclaim and its pending affirmative Section 17 applications because of the fee default.

52. Thus, the present appeal is dismissed in aforesaid terms, with liberty to the Appellant to file an appropriate application seeking recall of the impugned order and/or to seek appropriate relief in accordance with law.

53. Pending application(s), if any, also stand disposed of.

OM PRAKASH SHUKLA, J.

AUGUST 18, 2026/*ss/gunn*