Between the lines...

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Key Highlights

I. Supreme Court: The parties to a contract who are Indian nationals or companies incorporated in India can choose a forum for arbitration outside India.

The Hon'ble Supreme Court ("**SC**") has in its judgment dated April 20, 2021 ("**Judgement**"), in the matter of ***PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited [CIVIL APPEAL NO. 1647 OF 2021],*** held that the parties to a contract who are Indian nationals or companies incorporated in India can choose a forum for arbitration outside India.

Facts

PASL Wind Solutions Private Limited ("**Appellant**") and GE Power Conversion India Private Limited ("**Respondent**") were companies incorporated under the Companies Act, 1956. In 2010, the Appellant had issued 3 purchase orders to the Respondent for supply of certain converters. Subsequently, disputes arose between the parties in relation to the expiry of the warranty of the said converters. Therefore, the parties entered into a settlement agreement dated December 23, 2014 ("**Agreement**"). Under the Agreement, it was provided that Zurich will be the seat for the arbitration and the arbitration proceedings shall be conducted by a sole arbitrator. Further, the Respondent agreed to provide certain delta modules along with warranties on these modules for the working of the converter panel. However, disputes arose again between the parties, whereby the Appellant claimed that, warranties for converters were not given. The Respondent argued that the warranties covered only the delta modules. Thus, on July 03, 2017, the Appellant issued a request for arbitration to the International Chamber of Commerce.

On August 18, 2017, the parties agreed to resolve disputes by way of arbitration and for that, the substantive law applicable would be the Indian law. The Respondent filed a preliminary application challenging the jurisdiction of the arbitrator on the ground that two Indian parties could not have chosen a foreign seat of arbitration. The Appellant contended that there was no bar in law. By Procedural Order No. 3 dated February 20, 2018 ("**Order**"), the arbitrator dismissed the Respondent's preliminary application. The Order stated that the seat of arbitration was Zurich. The Respondent suggested Mumbai as a convenient venue to hold arbitration proceedings . At the

Management Conference dated June 28, 2018, the arbitrator decided that even though the seat was Zurich, all hearings would be held in Mumbai.

An award dated April 18, 2019 ("**Award**") was passed, rejecting the Appellant's claim. As the Appellant failed to pay the amounts granted by the Award, the Respondent initiated enforcement proceedings under Sections 47 (*Evidence*) and 49 (*Enforcement of foreign awards*) of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") and an interim application under Section 9 of the 1996 Act before the Gujarat High Court ("**GHC**"), within whose jurisdiction the assets of the Appellant were located. The GHC in the impugned judgment allowed the enforcement proceedings. Further, it was held that the Section 9 (*Interim measures, etc., by Court*) application was not maintainable since it is available for international commercial arbitrations ("**ICA**") as specified in the proviso to Section 2(2) of the Act, and ICA as defined under Section 2(1)(f) of the 1996 Act requires at least one foreign party. This judgement of the GHC was challenged before the SC.

Issue

Whether two Indian companies can choose a neutral forum for arbitration outside India. In doing so, does the public policy of India interdict the party autonomy of such persons.

Arguments

Contentions raised by the Appellant:

1. A seat of arbitration cannot be designated outside India by 2 Indian parties as it would be contrary to Section 23 *(Considerations and objects that are lawful)* of the Indian Contract Act, 1872 ("**Contract Act**"), read with Sections 28 (*Rules applicable to substance of dispute*) and 34 (*Application for setting aside arbitral award*) of the Act. Further, by designating a seat outside India, it will also be open to the Indian parties to opt out of the substantive law of India, which would be contrary to the public policy of India.

2. The foreign awards contemplated under Part II of the 1996 Act arise only from ICA. "ICA", is defined in Section 2(1)(f) of the1996 Act and requires a foreign element when parties arbitrate outside India, that is, at least one of the parties is, *inter alia*, a national of a country other than India, or habitually resident in a country other than India, or a body corporate incorporated outside India. In the instant case, due to lack of a foreign element, the Award cannot be designated as a foreign award.

3. The proviso to Section 2(2) of the 1996 Act was referred to state that, it furnished a bridge that joined Part II to Part I, as a result of which it became clear that Section 44 (*Part II, Chapter I, Definition*) of the 1996 Act refers only to ICA, as is stated in the said proviso. The 1996 Act is a self-contained code. In the absence of a foreign element, the Award cannot be the subject matter of challenge or enforcement either under Part I or Part II of the Act.

4. It was argued that, there is a conflict between Section 10(3) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ("**CCA**") and Section 47 of the Act. Further, by relying upon the non-obstante clause in Section 21 of the CCA, it was mentioned that the CCA must prevail. It was finally submitted that, the impugned judgment made by the GHC was made without jurisdiction because the present was not a case of an ICA but instead fell under the second category of "other than ICA", as a result of which only a 'district court' would have jurisdiction.

Contentions raised by the Respondent:

1. The Respondent first pointed out that the Appellant argued the exact opposite of what it itself sought under the Order, thus, it would now not be open to the Appellant to argue the exact opposite before the SC.

2. Part I and Part II of the 1996 Act have been held to be mutually exclusive.

3. Section 44 of the 1996 Act is modelled on the New York Convention which only requires "persons", both of whom can be Indian, having disputes arising out of commercial legal relationships, which are to be decided in the territory of a State outside India, which State is a signatory to the New York Convention. Any attempt to breach the wall created between Part I and Part II, as held to be mutually exclusive in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. [(2012) 9 SCC 552]*** **("BALCO")**, cannot be approved by the SC.

4. Both in the proviso to Section 2(2) of the 1996 Act and Section 10 of the CCA, the phrase "ICA" is not governed by the definition contained in Section 2(1)(f) of the Act, but would only refer to arbitrations in which the seat is outside India.

5. Unlike the definition of "ICA" in Part I, under Section 44 (Part II) of the Act, nationality, domicile or residence of parties are irrelevant. Further, this is no longer *res integra* as it has been expressly decided under the *pari materia* provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961 ("**FAA**"), in ***Atlas Export Industries v. Kotak & Co. [(1999) 7 SCC 61]***, that 2 Indian parties can enter into an arbitration agreement with a seat outside India, and resultant award would then be enforced as a foreign award.

6. Further, relying upon a commentary on ICA published by the United Nations Conference on Trade and Development in 2005, it was argued that parties from the same State can agree to have their disputes resolved in a State other than the State to which they belong, as a result of which the New York Convention will then apply to enforce the aforesaid foreign award.

7. Neither Section 23 nor Section 28 of the Contract Act condemns the choice of a foreign seat in arbitration. As a matter of fact, the Section 28 of the Contract Act expressly provides an exception for arbitration from the clutches of Section 28 of the Contract Act, that is, an express approval to party autonomy.

8. Further, in Section 23 of the Contract Act, mention of "public policy" must be confined to clear and incontestable cases of harm to the public. Reliance was placed on paragraph 118 of BALCO (supra) to argue that Section 28(1) of the 1996 Act would apply only when the arbitration takes place in India and not when the seat is outside India.

Observations of the Supreme Court

Parts of the 1996 Act are mutually exclusive, Scope of Section 9 application and Scope of ICA:

The SC noted the relevant provisions of the1996 Act and also relied on the case of BALCO (supra) to conclude that, Part I and Part II of the 1996 Act are mutually exclusive. The SC analysed that, Part I deals with arbitrations where seat is in India and has no application to a foreign-seated arbitration. Further that, Part I is a complete code governing various aspects of arbitration proceedings and that a recourse to a court against an arbitral award may be

made by an application for setting aside such an award, *inter alia*, under Section 34(2A) of the Act. On the other hand, Part II is not concerned with the arbitral proceedings but with enforcement of foreign awards in India. Therein, Chapter I deals with the enforcements of awards to which the New York Convention applies. Only exception being Section 45 of the Act, that deals with referring the parties to arbitration in the circumstances mentioned therein. Therefore, the SC also concluded that, Part II does not apply to arbitral proceedings once commenced in a country outside India.

Further, Section 2(2) of the1996 Act specifically states that Part I applies only where the place of arbitration is in India. It is a settled law that a proviso cannot travel beyond the main enacting provision as held in a number of cases**.** Therefore, the argument of the Appellant that the proviso to Section 2(2) of the 1996 Act was a bridge which connected the two parts of the Act, was rejected.

The SC noted that, the Respondent, by way of cross objection, had challenged the finding of the GHC that, an application under Section 9 of the 1996 Act would not be maintainable. The SC further observed that, the judgment in ***Bhatia International v. Bulk Trading S.A. [(2002) 4 SCC 105]*** **("Bhatia")** had incorrectly held that Section 9 of the 1996 Act would apply to arbitrations which take place outside India without any express provision to that effect. It was noted that the judgment of Bhatia (supra) had been expressly overruled in BALCO (supra) and pursuant thereto, a proviso to Section 2(2) of the 1996 Act was inserted to clarify that, in an arbitration which takes place outside India, assets of one of the parties are situated in India and interim orders are required *qua* such assets, the courts in India may pass such orders. Consequently, this part of the impugned judgment of the GHC was set aside.

The SC noted that, the four sub-clauses contained in the definition of "ICA" in Section 2(1)(f) of the 1996 Act clarify that the expression "ICA" contained therein is party-centric in the sense that at least one of the parties should, *inter alia*, be a person who is a national/habitual resident in any country other than India. However, on the other hand, the expression "ICA" is specifically spoken of in the context of a place of arbitration being between two parties in a territory outside India, as provided by Section 44 of the Act. The New York Convention applying to such territory, thus makes it an ICA. The SC noted that, under Section 44 of the Act, for an award to be designated as a foreign award, the following criteria are required to be fulfilled:

a. the dispute must be considered to be a commercial dispute under the law in force in India;

b. it must be made in pursuance of an agreement in writing for arbitration;

c. it must be a dispute that arises between "persons" (without regard to their nationality, residence, or domicile); and

d. the arbitration must be conducted in a country which is a signatory to the New York Convention.

The SC observed that, all conditions mentioned above were satisfied in the facts of this case. Further, the context of Section 44 of the 1996 Act was party-neutral, having reference to the place at which the award was made. Therefore, the argument that the very basis of Section 44 of the 1996 Act should be altered when two Indians have their disputes resolved in a country outside India was rejected. The SC also noted that, the argument of the Appellant would involve bodily importing the expression "ICA" into Section 44 of the Act, which cannot be done because of the opening words of the said section, "*In this Chapter*", that is, Chapter I of Part II, and then applying the definition contained in Section 2(1)(f) (Part I) of the 1996 Act, must now be applied to Part II. The SC observed that, no canon of interpretation would permit acceptance of such an argument.

Public Policy and Party Autonomy:

The SC referred to the judgment of Atlas (supra) wherein it was held that, "*Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement*". Therefore, the SC categorically held that a foreign award cannot be refused to be enforced merely because it was made between two Indian parties, under *pari materia* provisions of the FAA. The SC therefore, was unable to accede to the contention that Atlas (supra) cannot be regarded as an authority for the proposition that Sections 23 and 28 of the Contract Act are out of harm's way when it comes to enforcing a foreign award under the FAA, where both parties are Indian companies.

The SC noted that the expression "public policy" appearing in Section 23 of the Contract Act is a relative concept capable of modification. The freedom of contract needs to be balanced with clear and undeniable harm to the public, even if the facts of a particular case do not fall within the crystallised principles enumerated in well-established 'heads' of public policy. The SC noted that, exception 1 to Section 28 of the Contract Act specifically saves the arbitration of disputes between two persons without reference to the nationality of persons who may resort to arbitration. It was noted that, the SC in Atlas (supra), referred to the said exception to Section 28 of the Contract Act and found that there is nothing in Sections 23 and 28 of the Contract Act which interdicts two Indian parties from getting their disputes arbitrated at a neutral forum outside India. The SC observed that, the principle of party autonomy has been held to be the guiding spirit of arbitration and that nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals.

The SC in ***TDM Infrastructure Private Limited v. UE Development India Private Limited [(2008) 14 SCC 271]*** had held contrary to the ratio of Atlas (supra) that arbitrations between Indian parties was not ICA and, therefore, could not be allowed to choose a foreign seat in derogation of Indian laws. The SC by this Judgement overruled TDM (supra) having not appreciated the law in its correct perspective. The judgements that relied on TDM (supra) to arrive at a similar conclusion were also over-ruled by this Judgement. The SC rejected the argument of the Appellant, with specific reference to Sections 28(1)(a) and 34(2A) of the 1996 Act, that, since two Indian parties cannot opt out of the substantive law of India and, therefore, ought to be confined to arbitrations in India, Indian public policy, as reflected in these two sections, ought to prevail. The SC noted that, Section 28(1)(a) of the 1996 Act, read with Sections 2(2), 2(6) and 4 of the 1996 Act, clarifies that where the place of arbitration is situated in India, in an arbitration other than an ICA (that is, an arbitration where none of the parties, *inter alia,* happen to be a foreign national or habitually resident in a foreign country), the arbitral tribunal shall decide the dispute in accordance with the substantive law for the time being in force in India. The SC observed that, Section 28(1)(a) of the 1996 Act makes no reference to an arbitration being conducted between two Indian parties in a country other than India, and cannot be held, by any process of reasoning, to interdict two Indian parties from resolving their disputes at a neutral forum in a country other than India. The SC noted that, even otherwise, BALCO (supra) specifically indicated that Section 28(1)(a) of the 1996 Act will not apply where the seat is outside India, as, in that event, the conflict of law rules of the country in which the arbitration takes place would have to be applied.

Conflict between CCA and the Act:

The Appellant had relied upon Section 10 read with Section 21 of the CCA to argue that in all cases between Indian nationals which result in awards delivered in a country outside India, Section 10(3) of the CCA would apply, as a result of which the impugned judgment having been made by the GHC, is made without jurisdiction. However, the SC observed that, when the Award was sought to be enforced, the explanation to Section 47 of the 1996 Act, clarified that it is the jurisdiction of the GHC alone.

This was rebutted by the Appellant by stating that since the explanation to Section 47 of the 1996 Act is in direct collision with provisions of the CCA, therefore, by virtue of Section 21, Section 10(3) of the CCA would prevail over the explanation to Section 47 of the 1996 Act. Therefore, the SC analysed further and noted that, Section 10(1) of the CCA applies to ICA, and applications or appeals arising therefrom, under both Parts I and II of the Act. When applications or appeals arise out of such arbitrations under Part I, where the place of arbitration is in India, undoubtedly, the definition of "ICA" in Section 2(1)(f) 1996 Act will govern. However, when applied to Part II, "ICA" has reference to a place of arbitration taking place outside India. The SC thus construed that there is no clash at all between Section 10 of the CCA and the explanation to Section 47 of the 1996 Act, as an arbitration resulting in a foreign award, as defined under Section 44 of the Act, will be enforceable only in a 'High Court' under Section 10(1) of the CCA, and not in a district court under Section 10(2) or Section 10(3) of the CCA. The SC further noted that, the 1996 Act is a special act *vis-à-vis* the CCA which is general and that it applies to the procedure governing appeals and applications in cases other than arbitrations as well. The SC observed that, in ***R.S. Raghunath v. State of Karnataka, [(1992) 1 SCC 335],*** it was held that even a general law enacted late which contains a non-obstante clause does not override a special law. Therefore, the SC rejected the argument of the Appellant.

Decision of the Supreme Court

In conclusion, while answering the multiple issues in the observation, the SC held that there is no clear and undeniable harm caused to the public in permitting Indian parties/entities from designating a foreign seat of arbitration. Thus, parties to a contract who are Indian nationals or companies incorporated in India can choose a forum for arbitration outside India. The SC also upheld the impugned judgment of the GHC, except for the finding on the Section 9 application. The SC held that the application under Section 9 of the 1996 Act would be maintainable in the present case and disposed of the appeal accordingly.

VA View:

The SC in this Judgement noted that, terms of the contract have to be understood in the way the parties intended them to be, particularly in agreements of arbitration, where party autonomy is the *grundnorm*. The SC in this Judgement rightly observed that, the balancing act between freedom of contract and clear and undeniable harm to the public must be resolved in favour of freedom of contract as there is no clear and undeniable harm caused to the public in permitting two Indian companies/nationals, to avail of a challenge procedure of a foreign country when, after a foreign award passes muster under that procedure, its enforcement can be resisted in India on the grounds contained in Section 48 of the 1996 Act, which includes the ground of the foreign award being held contrary to the public policy of India.

The SC observed that, in agreeing to a neutral forum outside India, parties agree that instead of one opportunity under Section 34 of the 1996 Act [*with the grounds for setting aside the award being available under Section 34(2A)*], the parties also have a recourse to challenge the award in a court/tribunal of foreign seat for setting aside the arbitral award. Further, the parties also have an opportunity to resist enforcement in India under the grounds mentioned in Section 48 of the 1996 Act. However, the SC cautioned that, if it was found that two Indian companies/nationals have circumvented a law which pertains to the fundamental policy of India, such foreign award may then not be enforced under Section 48(2)(b) of the 1996 Act.

II. Supreme Court: An application seeking reference to arbitration under Section 8 of the Arbitration and Conciliation Act is not maintainable, if filed after admission of an insolvency resolution petition under Section 7 of the Insolvency and Bankruptcy Code

The Hon'ble Supreme Court ("**SC**") has in its judgment dated March 26, 2021 ("**Judgement**"), in the matter of ***Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund and Others [Arbitration Petition No.48 of 2019 with Civil Appeal No.1070/2021 arising out of SLP (C) NO. 8120 OF 2020],*** held that an application seeking reference to arbitration under Section 8 (*Power to refer parties to arbitration where there is an arbitration agreement*) of the Arbitration and Conciliation Act, 1996 ("**Act**") is not maintainable if it is filed after admission of insolvency resolution petition under Section 7 (*Initiation of corporate insolvency resolution process by financial creditor)* of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

The arbitration petition was filed by Indus Biotech Private Limited ("**Petitioner**") under Section 11 (*Appointment of arbitrators*) of the Act, for appointment of an arbitrator on behalf of the respondents (*defined below*) so as to constitute an arbitral tribunal to adjudicate upon the disputes that arose between the parties. The petition was filed before the SC as the ambit of the dispute qualified as international arbitration, since the respondent no.1, Kotak India Venture (Offshore) Fund, was based in Mauritius. The respondents no. 2 to 4 were Indian entities and sister ventures of respondent no.1 (respondents no. 1 to 4 are collectively referred to as "**Respondents**"). The said petition seeking constitution of the arbitral tribunal emanated from the share subscription and shareholders agreements dated July 20, 2007, July 12, 2007, January 09, 2008 and the supplemental agreements dated March 22, 2013 and July 19, 2017 ("**Agreements**"). The Agreements undisputedly provided for an arbitration clause to settle any dispute that arose between the parties. Further, the Petitioner stated that since the subject matter involved was the same under the Agreements, therefore, the arbitration could be conducted by a single arbitral tribunal even in respect of similar disputes that arose with the abovementioned respondents no. 2 to 4. Hence a common petition was filed before the SC.

The Respondents, through the Agreements, had subscribed to equity shares and optionally convertible redeemable preference shares ("**OCRPS**") of the Petitioner. During the business operations, a decision was taken to make a qualified initial public offering ("**QIPO**") by the Petitioner. However, under Regulation 5(2) of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("**ICDR Regulations**"), a company was not entitled to make QIPO, if it had any outstanding convertible securities or any other right which would entitle any person with an option to receive equity shares of the issuer. Therefore, it was necessary for the Respondents to convert their OCRPS into equity shares. In the process of negotiations, as per the formula applied by the Respondents, it was claimed that they would be entitled to 30% of the total paid-up share capital in equity shares. The Petitioner relied on the reports of the auditors and valuer to state that the Respondents would be entitled only to 10% of the total paid-up share capital paid by the Respondents as per their conversion formula. Therefore, there was a dispute on the formula that had to be applied for the conversion of the OCRPS.

The Respondents stated that, on redemption of OCRPS, approximately INR 367 crores was due and payable by the Petitioner. Therefore, the Respondents had demanded the said amount, and since the same had not been paid by the Petitioner, it was stated that it constituted default. Therefore, respondent no. 2 had filed a petition under Section 7 of the IBC before the National Company Law Tribunal, Mumbai ("**NCLT**"). In the said petition, the Petitioner filed a miscellaneous application under Section 8 of the Act, seeking a direction to refer the parties to arbitration. The NCLT, by its order dated June 09, 2020 ("**Impugned Order**"), allowed the application filed under

Section 8 of the Act by the Petitioner. Consequently, the petition filed by the Respondent under Section 7 of the IBC was dismissed. This appeal before the SC was filed against the Impugned Order along with the arbitration petition.

Issue

1. Whether an application seeking reference to arbitration under Section 8 of the Act is maintainable, if it is filed after admission of an insolvency resolution petition under Section 7 of the IBC.

Arguments

Contentions raised by the Petitioner:

The Petitioner submitted that the dispute in question was with regard to the appropriate formula to be adopted to arrive at the actual percentage for the conversion of the OCRPS into equity. The Petitioners referred to the board meetings held on March 14, 2018, April 06, 2018 and April 10, 2018, wherein matters related to QIPO and the conversion of the OCRPS were discussed. It was noted that the nominee director representing the Respondents also attended the meeting. It was submitted that, the said events *prima facie* indicated that the process of converting the OCRPS into equity shares and the allotment thereof was an issue which had already commenced a while before the redemption date agreed upon, that is, December 31, 2018, had arrived.

The Petitioner submitted that, until an amicable decision was taken, there arose no liability to repay the amount. Hence, there was no 'debt' nor 'default' on part of the Petitioner. It was further submitted that, it was not a case that the Petitioner was unable to pay, rather, the Petitioner was a profit-making company. Therefore, the Petitioner contended that the said dispute was to be resolved through arbitration by the arbitral tribunal.

Contentions raised by the Respondents:

It was submitted that, the fact that the Respondents had subscribed to the OCRPS was not in dispute and a sum of approximately INR 367 crores constituted a debt that was due and payable by the Petitioner. The Respondents had demanded the said amount and since the same had not been paid by the Petitioner, it constituted default. The Petitioner having defaulted, a cause of action arose for the Respondents to invoke the jurisdiction of the NCLT for initiation of corporate insolvency resolution process ("**CIRP**") under Section 7 of the IBC.

The NCLT should have proceeded strictly in accordance with the procedure contemplated under Section 7 of the IBC. A serious error had been committed by the NCLT, that is, the consideration of an application filed under Section 8 of the Act, as it was without jurisdiction. The dispute sought to be raised was not arbitrable after the insolvency proceeding had commenced. The Respondents contended that, when it was shown that the debt was due and the same has not been paid, the NCLT should have recorded default and admitted the petition. Further that, even in such a situation, the interest of the Petitioner was not jeopardised inasmuch as the admission order of the NCLT was appealable to the National Company Law Appellate Tribunal and thereafter to the SC, where the correctness of the order in any case would be tested.

The ratio as laid down in ***Swiss Ribbons Private Limited and Another v. Union of India and Others [(2019) 4 SCC 17]*** was referred, to contend that when the petition under Section 7 of the IBC was triggered, it becomes a proceeding *in rem* and even the creditor who had triggered the process would lose control of the proceedings as CIRP was required to be considered through the mechanism provided under the IBC and that the insolvency and winding up

matters are non-arbitrable.

Observations of the Supreme Court

The SC took note of the scope of proceedings provided under Section 7 of the IBC and referred to the observations made in the case of ***Innoventive Industries Limited v. ICICI Bank and Another [(2018) 1 SCC 407]*** and observed that, the provision contemplated that, in order to trigger an application, four factors should be in existence: (i) there should be a 'debt' (ii) 'default' should have occurred (iii) debt should be due to 'financial creditor' and (iv) such default which has occurred should be by a corporate debtor. The SC noted that a duty was cast on the NCLT to ascertain the existence of a default, if shown from the records/evidence furnished by the financial creditor.

The SC noted that, even if there was a debt in strict sense of the term, the facts in a particular case must be taken into consideration by the NCLT before arriving at a conclusion as to whether a default had occurred. The SC noted that the Petitioner was entitled to point out that the default had not occurred and that the debt was not due. Resultantly, if there was no default proven and if the NCLT was satisfied that the Petitioner was a profit-making company, the NCLT consequently had to reject the application as provided under Section 7(5)(b) of the IBC. However, if it was found that there was default, the NCLT had to admit the application under Section 7(5)(a) of the IBC and the CIRP would commence. The SC observed that in such an event, it would become a proceeding *in rem* on the date of admission of the application and from that point onwards the matter would not be arbitrable. The SC noted that the only course to be followed thereafter would be the resolution process under the IBC. Therefore, the trigger point for a proceeding to become a proceeding *in rem,* would not be the filing of an application under Section 7 of the IBC, but admission of the same on determination of default. The SC observed that it could not be said that by the procedure prescribed under the IBC it meant that the claim of the creditor, if made before the NCLT, more particularly under Section 7 of the IBC, was sacrosanct and the Petitioner was denuded of putting forth defence contending that the default had not occurred.

The SC noted that, in the present case when the process of conversion had commenced and certain steps were taken in that direction, and a clause in the Agreements provided that the redemption value shall constitute a debt outstanding, however, certain aspects of the transactions were still being negotiated between the parties. The SC specifically noted that, the parties had not concluded which formula had to be applied for the conversion of OCRPS, that is, whether conversion percentage was 30% or 10% of the equity shares. The SC noted that it would not have been appropriate to hold that there was default and to admit the petition merely because a claim was made and a petition was filed by the Respondents. The SC cautioned that, if in every case where there was debt, if default was also assumed and the process became automatic, a company which was running its administration and discharging its debts in planned manner could be pushed into CIRP and entangled in a proceeding with no point of return.

As contended by the Respondents, the SC noted that, the order of the NCLT to admit or reject the application filed under Section 7 of the IBC was appealable. The issue to be analysed was, whether a grave error was committed by the NCLT in the Impugned Order. The SC observed that, if the case had reached the status/stage of a proceeding *in rem*, only then an observation to allow parties to invoke arbitration would not be justified and sustainable. In the instant case, the SC noted that, the petition under Section 7 of the IBC was yet to be admitted and, therefore, had not assumed the status of a proceeding *in rem*. For purposes of understanding the tests to be applied to determine as to when the subject matter was not arbitrable, that is, the actions *in rem* was not arbitrable, the SC referred to the exhaustive consideration and the ratio laid down in the case of ***Vidya Drolia and Others v. Durga Trading Corporation [2021 2 SCC 1]*** wherein it clarified that a dispute will be non-arbitrable when a proceeding is

in rem. A proceeding under the IBC is to be considered *in rem* only after it was admitted. On admission, third-party right will be created in all creditors of a corporate debtor and will have *erga omnes* effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement. The SC observed that in the instant case the position was otherwise.

The SC observed that the underlying principle, as noted in Swiss Ribbons (supra) was that, for a petition under Section 7 of the IBC to be considered as proceedings *in rem*, it was necessary that the NCLT ought to have applied its mind, recorded a finding of default and admitted the petition. The SC observed that the admission of the petition and commencement of the CIRP was the relevant stage which would decide the trigger of a proceeding *in rem*. The SC with regards to the instant case, noted that, the issue for consideration arose in a petition filed under Section 7 of the IBC, before it was admitted. Therefore, it was not yet an action *in rem*. The SC noted that in such an application, the course to be adopted by the NCLT, if an application under Section 8 of the Act was filed seeking reference to arbitration, required consideration. The SC noted that, the position of law that the IBC shall override all other laws as provided under Section 238 of the IBC needed no elaboration. In that view, notwithstanding the fact that the Petitioner filed an application under Section 8 of the Act, the independent consideration of the same *dehors* the application filed under Section 7 of the IBC and materials produced therewith would not arise. The NCLT was duty bound to advert to the material available to indicate default. This is for the reason that, keeping in perspective the scope of the proceedings under the IBC and there being a timeline for the consideration to be made by the NCLT, the process cannot be defeated by a corporate debtor by raising moonshine defence only to delay the process.

The SC observed that, even if an application under Section 8 of the Act was filed, the NCLT had a duty to advert to the contentions raised to determine if there is substance in the defence in the application filed under Section 7 of the IBC, and further to examine the material placed before it by the financial creditor so as to arrive at the conclusion whether default existed or not. If the irresistible conclusion by the NCLT was that there was default and the debt was payable, due to which the NCLT proceeded to pass an order to admit the application, the proceedings would then get itself transformed into a proceeding *in rem* having *erga omnes* effect, due to which the question of arbitrability of the *inter se* dispute sought to be put forth would not arise and thereby the bogey of arbitration to delay the process would not arise. The SC further observed that, on the other hand, on such consideration made by the NCLT if the conclusion was that there was no default committed, the petition would stand rejected. Consequently, the parties could secure appointment of the arbitral tribunal in an appropriate proceeding as per applicable law and the need for the NCLT to pass any order on such application under Section 8 of the Act would not arise.

The SC reverted to the fact situation in this case, and perused the Impugned Order. The SC noted that, the NCLT though had taken up the application filed under Section 8 of the Act, as the lead consideration, the petition filed under Section 7 of the IBC was also taken alongside and made a part of the consideration. A further perusal of the Impugned Order disclosed that, the NCLT was conscious of the fact that consideration of the matter before it, any further, would arise only if there was default and the debt was payable by the Petitioner. The Impugned Order of the NCLT could not be faulted, since a reference was made to the documents produced along with the application and it was concluded that the allotment of equity shares against the OCRPS, in view of the QIPO, was still a matter of negotiation between the parties and no conclusion had been arrived at so as to term it as default. The SC further noted that, in paragraphs 5.14 and 5.15 of the Impugned Order, the NCLT categorically recorded that, from the material available on record, they were not satisfied that a default had occurred and had rightly, in that context, held that the claim of the company by invoking the arbitration clause was justified and had left it for further consideration of the SC.

The SC noted that, in a letter dated November 21, 2018, addressed by the Petitioner to the Respondents, it was mentioned that the fundamental issue that had to be considered was conversion of OCRPS into equity shares, since the process of QIPO initiated could not move forward without such conversion. The letter dated December 17, 2018, addressed to the Petitioner by the Respondents referred to the stake in conversion and the dispute being as to whether it should be 10% of the share capital as offered by the Petitioner or 30% as claimed by the Respondents. It was that aspect of the matter, contended to be in dispute between the parties, regarding which the arbitration was sought by the Petitioner.

In such a situation, the SC opined that it would be premature at this point to arrive at a conclusion that there was default in payment of any debt until the said issue was resolved and the amount repayable by the Petitioner to the Respondents with reference to equity shares was determined. The SC observed that subsequently in the process, if such determined amount was not paid, it would amount to default at that stage. The SC therefore observed that, the prayer made by the Petitioner for constitution of the arbitral tribunal as made in the instant petition filed under Section 11 of the Act, was justified.

Decision of the Supreme Court

The SC held that though in the operative portion of the Impugned Order the application filed under Section 8 of the Act was allowed and as a corollary the petition under Section 7 of the IBC was dismissed, in the facts and circumstances of the present case, it should be construed in the reverse. Hence, the SC upheld the conclusion arrived at by the NCLT that there was no default, hence the dismissal of the petition under Section 7 of the IBC at that stage was justified. Though the application under Section 8 of the Act was allowed, the same in any event would be subject to the consideration of the petition filed under Section 11 of the Act, before the SC. The SC then proceeded to allow the instant arbitration petition filed by the Petitioner.

VA View:

The SC through this Judgement has rightly observed that in any proceeding which was pending before the NCLT under Section 7 of the IBC, if such petition is admitted by the NCLT, then any application under Section 8 of the Act made thereafter will not be maintainable, since the proceedings would be *in rem* and would create third party rights.

In a situation where the petition under Section 7 of the IBC was yet to be admitted and, in such proceedings, if an application under Section 8 of the Act was filed, the NCLT was duty bound to first decide the application under Section 7 of the IBC, even if the application under Section 8 of Act is kept along for consideration. Therefore, in such an event, the natural consequence of the consideration made therein on the Section 7 application would befall on the application under Section 8 of the Act.

III. Supreme Court: Insolvency process maintainable against Corporate Guarantor even if principal borrower is not a 'Corporate Person'

The Supreme Court ("**SC**") has in its judgment dated March 26, 2021, in the matter of ***Laxmi Pat Surana v. Union Bank of India and Another [Civil Appeal No. 2734 of 2020],*** held that a principal borrower need not be a 'corporate person' where insolvency proceedings are initiated against a company which acted as the corporate guarantor of the principal borrower.

Facts

The Union Bank of India ("**Respondent**") had extended credit facilities to M/s. Mahaveer Construction ("**Principal Borrower**"), a proprietary firm belonging to Mr. Laxmi Pat Surana ("**Appellant**"), through two loan agreements entered into in the years 2007 and 2008 for term loans of INR 9.6 crores and INR 2.45 crores respectively.

M/s. Surana Metals Limited ("**Corporate Debtor**"), of which the Appellant was a Promoter/Director, had issued guarantees with respect to the aforementioned loan facilities of the Principal Borrower. Subsequently, on January 30, 2010, the said loan accounts were declared as being non-performing assets ("**NPA**"). Consequent to this, the Respondent issued a recall notice to the Principal Borrower on February 19, 2010, as well as the Corporate Debtor demanding repayment of the outstanding loan amount of INR 12,35,11,548/-. The Respondent also filed an application under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("**RDB**"), against the Principal Borrower before the Debt Recovery Tribunal at Kolkata.

During the pendency of the above, the Principal Borrower repeatedly assured the Respondent of payment of the outstanding amount, but failed to do so, consequent to which, the Respondent issued a notice of payment dated December 3, 2018, to the Corporate Debtor under Section 4(1) of the Insolvency and Bankruptcy Code, 2016 ("**Code**"). In reply to the said notice dated December 3, 2018, the Corporate Debtor addressed a letter dated December 8, 2018, to the Respondent stating that it was neither the Principal Borrower nor did it owe any financial debt to the Respondent nor had it committed any default in repayment of the stated outstanding amount.

Pursuant to the above, the Respondent proceeded to file an application under Section 7 of the Code on February 13, 2019, towards initiating corporate insolvency resolution proceedings against the Corporate Debtor before the National Company Law Tribunal, Kolkata ("**Adjudicating Authority**"). The said application was resisted by the Corporate Debtor on several counts including on the preliminary ground that it was not maintainable as the Principal Borrower was not a "corporate person". This ground was however rejected by the Adjudicating Authority by its judgment and order dated December 6, 2019, where under it held that the aforesaid application under Section 7 of the Code had been initiated against the Corporate Debtor as it was coextensively liable to repay the debt of the Principal Borrower and upon it having failed to do so despite the recall notice, the Corporate Debtor became liable to be proceeded against under Section 7 of the Code. The Appellant thereafter preferred an appeal before the National Company Law Appellate Tribunal, New Delhi ("**Appellate Tribunal**") which, by the impugned judgment and order dated March 19, 2020, dismissed the appeal and affirmed the conclusion reached by the Adjudicating Authority under its judgment and order dated December 6, 2019. Aggrieved by the above, the Appellant approached the SC in the present appeal.

Issue

1. Whether insolvency process is maintainable against a corporate guarantor even if the principal borrower is not a 'corporate person'.

Arguments

Contentions raised by the Appellant:

The Appellant, *inter alia*, contended that Section 7 of the Code plainly ordains that an application can be filed by a financial creditor only against the corporate debtor. A corporate debtor can either be a corporate person who had borrowed money or a corporate person, who gives guarantee regarding repayment of money borrowed by another corporate person. In other words, the Code cannot apply in respect of "debts" of an entity who is not a "corporate person". The Appellant further contended that this position is further reinforced by the fact that initiation of insolvency of firms and/or individuals in terms of Part III of the Code has still not been notified. Also, Section 2 of the Code came to be amended to clarify that partnership firms and proprietorship firms would fall within Part III of the Code on the basis of the differentiation made in the report of the Insolvency Law Committee in February, 2020. It was argued by the Appellant that any other view would inevitably result in indirectly enforcing the Code even against entities, such as partnership firms and proprietorship firms and/or individuals, who are governed by Part III of the Code, without notification thereof. It was further argued by the Appellant that a corporate guarantee extended in respect of a loan given to a "corporate person", comes within the purview of Part II of the Code. This was reinforced by the insertion of the definition of "corporate guarantor" in the Code by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, which came into effect from June 6, 2018 ("**Amendment Act**"). The Appellant contended that since an application under Section 7 of the Code could not be maintained against the Principal Borrower itself, who was not a "corporate person", it should follow that in respect of such transaction, no action under Section 7 of the Code could be maintained against a company or corporate person, merely because it had extended guarantee thereto.

Contentions raised by the Respondent:

The Respondent on the other hand contended that the liability of the Principal Borrower and of the Corporate Debtor was coextensive and coterminous, as predicated in Section 128 of the Indian Contract Act, 1872. Section 7 of the Code enabled the financial creditor to initiate corporate insolvency resolution process against a principal borrower if it was a corporate person, including against the corporate person being a guarantor in respect of loans obtained by an entity not being a corporate person. Aside from placing reliance on Section 7 of the Code, the Respondent also relied on the definitions of "corporate debtor" in Section 3(8), "debt" in Section 3(11), "financial creditor" in Section 5(7), and "financial debt" in Section 5(8) of the Code. The Respondent argued that upon conjoint reading of these provisions, it was crystal clear that a "financial debt" includes the amount of any liability in respect of any guarantee or indemnity for any money borrowed against interest. Consequently, the money borrowed by the sole proprietorship of the Appellant against payment of interest for which the Corporate Debtor stood guarantor, was also a "financial debt" of the Corporate Debtor and for that reason, the Respondent could proceed under Section 7 of the Code. It was further argued that the definition of "corporate guarantor" introduced by way of the Amendment Act was to define a corporate guarantor in relation to a corporate debtor against whom any corporate insolvency resolution process was to be initiated. The objection regarding maintainability of the application against a corporate guarantor was therefore devoid of merit.

Observations of the Supreme Court

The SC observed that Section 7 of the Code propounded the manner in which corporate insolvency resolution process may be initiated by the "financial creditor" against a "corporate person being the corporate debtor". The expression "default" is expounded in Section 3(12) of the Code to mean non-payment of debt which had become due and payable and was not paid by the debtor or the corporate debtor, as the case may be. Section 7 of the Code is an enabling provision, which permits the financial creditor to initiate corporate insolvency resolution process against a corporate debtor. The corporate debtor could be the principal borrower and it could also be a corporate person assuming the status of corporate debtor, having offered guarantee, if and when the principal borrower/debtor (be it a corporate person or otherwise) committed default in payment of its debt.

The SC further observed that, the term "financial creditor" had been defined in Section 5(7) of the Code, which read with the expression "creditor" in Section 3(10) of the Code would include a person to whom a financial debt was owed and thereby comprise a person to whom such debt has been legally assigned or transferred to. This means that the applicant should be a person to whom a financial debt is owed. The SC noted that the expression "financial debt" has been defined in Section 5(8) of the Code. Amongst other categories specified therein, it could be a debt along with interest, which was disbursed against the consideration for the time value of money and would include the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub clauses (a) to (h) of the same clause. It has been provided in sub clause (i) of Section 5(8) of the Code to take within its ambit a liability in relation to a guarantee offered by the corporate person as a result of the default committed by the principal borrower. Further, the expression "debt" has been defined separately in Section 3(11) of the Code to mean a liability or obligation in respect of "a claim" which is due from any person including a financial debt and operational debt. The SC also observed that the expression "claim" would certainly cover the right of the financial creditor to proceed against the corporate person being a guarantor, due to the default committed by the principal borrower. It noted that the expression "claim" has been defined in Section 3(6) of the Code, to mean a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured. It also means a right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment in respect of specified matters. Undoubtedly, a right or cause of action would enable to the lender (financial creditor) to proceed against the principal borrower, as well as the guarantor, in equal measure in case they commit default in repayment of the amount of debt acting jointly and severally. The SC noted that it would still be a case of default committed by the guarantor itself, if and when the principal borrower fails to discharge his obligation in respect of the amount of debt.

The SC also observed that the obligation of the guarantor was coextensive and coterminous with that of the principal borrower to defray the debt, as laid down in Section 128 of the Indian Contract Act, 1872. As a consequence of such default, the status of the guarantor metamorphosed into a debtor or a corporate debtor, if it happened to be a corporate person. If the guarantor was a corporate person (as defined in Section 3(7) of the Code), it would come within the purview of the expression "corporate debtor", within the meaning of Section 3(8) of the Code. Further, the generic provision contained in Section 3(37) of the Code postulates that the words and expressions used and not defined in the Code, but defined in enactments referred to therein, shall have the meanings respectively assigned to them in those acts. Drawing support from this provision, it would follow that the lender would be a financial creditor within the meaning of the Code. The SC further observed that the principal borrower may or may not be a corporate person, but if a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of the expression "corporate debtor" under Section 3(8) of the Code. Thus, it was not possible to

countenance the argument of the Appellant that as the Principal Borrower was not a corporate person, the Respondent could not have invoked the remedy under Section 7 of the Code against the Corporate Debtor who had merely offered guarantee for such loan account. The action could still be proceeded against the guarantor being a corporate debtor consequent to the default committed by the Principal Borrower.

The SC observed that Section 5(5A) of the Code, which defines the expression "corporate guarantor" to mean a corporate person, who is the surety in a contract of guarantee to a corporate debtor, was inserted by way of the Amendment Act to empower the national company law tribunals to deal with the insolvency resolution or liquidation processes of the corporate debtor and its corporate guarantor in the same tribunal pertaining to the same transaction. That, however, does not mean that proceedings under Section 7 of the Code cannot be initiated against a corporate person in respect of guarantee to the loan amount secured by a person not being a corporate person in case of default in payment of such a debt. Accepting the aforementioned argument of the Appellant would therefore result in diluting or constricting the expression "corporate debtor" occurring in Section 7 of the Code.

The SC also observed that the expression "corporate debtor" is defined in Section 3(8) of the Code which applies to the Code as a whole. Whereas, the expression "corporate guarantor" in Section 5(5A) of the Code, applies only to Part II of the Code. Upon harmonious and purposive construction of the governing provisions, it is not possible to extricate the corporate person from the liability (of being a corporate debtor) arising on account of the guarantee given by it in respect of a loan given to a person other than a corporate person. The liability of the guarantor is therefore coextensive with that of the principal borrower.

Decision of the Supreme Court

Dismissing the appeal, the SC found no substance in the argument advanced that since the loan was offered to a proprietary firm (not a corporate person), action under Section 7 of the Code could not be initiated against the corporate person even though it had offered guarantee in respect of that transaction. Accordingly, the present appeal was disposed of.

VA View:

The SC has, in arriving at its judgment in the instant matter, aptly interpreted the applicable provisions/sections of the Code and the Indian Contract Act, 1872, to determine that obligations of guarantors are coextensive and coterminous with those of principal borrowers to repay a debt. Accordingly, default on repayment of money loaned would change the position of a guarantor to that of the principal debtor within the meaning of Section 3(8) of the Code, if it happens to be a corporate person.

As has been rightly upheld by the SC, if credence is given to the argument that where the principal borrower is not a corporate person, then the financial creditor cannot invoke its remedy under Section 7 of the Code against the guarantor, it would lead to limitation of the intended width and application of Section 7 of the Code, which permits the initiation of corporate insolvency resolution process against the corporate guarantor, if and when default is committed by the principal borrower.

IV. Supreme Court: Refusal to condone delay under Section 34(3) of the Arbitration and Conciliation Act, 1996, is appealable under Section 37 of the said Act

The Hon'ble Supreme Court ("**SC**") by its judgment in ***Chintels India Limited v. Bhayana Builders Private Limited [Civil Appeal No. 4028 of 2020]***, on February 11, 2021, held that refusal to condone delay under Section 34(3) of the Arbitration and Conciliation Act, 1996 (*"***1996 Act***"*) was appealable under Section 37 of the 1996 Act.

Facts

Chintels India Limited ("**Appellant**") had filed an application for condonation of delay before the Delhi High Court ("**DHC**") under Section 34 (*application for setting aside arbitral award)* of the 1996 Act. The said application was filed after the limitation period prescribed under the 1996 Act. The application related to an award passed on May 3, 2019, and the DHC had dismissed the application by its judgment dated June 4, 2020 (Single Judge). The DHC thereafter issued a certificate under Article 133 (*Appellate jurisdiction of Supreme Court in appeals from High Courts in regard to civil matters*) read with Article 134A (*certificate for appeal to the Supreme Court*) of the Constitution of India by its judgment dated December 04, 2020 (Division Bench). The present appeal has been filed in respect thereof.

Issue

1. Whether order passed by single judge refusing to condone Appellant's delay in filing an application under Section 34 of the 1996 Act is appealable under Section 37(1)(c) of the 1996 Act.

Contentions of the Appellant

The Appellant cited the SC's judgment in ***Essar Constructions v. N.P. Rama Krishna Reddy (2000) 6 SCC 94) ("Essar Constructions").*** Essar Constructions was passed in respect of Section 39 (*appealable orders*) of the Arbitration Act, 1940 ("**1940 Act**"). It was argued that Section 39 of the 1940 Act is in *pari materia* with Section 37 (*appealable orders*) of the 1996 Act, in that an appeal lies when a single judge refuses to condone delay, resulting in an order refusing to set aside an arbitral award. Therefore, the ratio of Essar Constructions would apply to Section 37 of the 1996 Act. It was contended that refusal to condone delay would result in a refusal to set aside an award. Therefore, an appeal against such order was maintainable under Section 37 of the 1996 Act. Judgments of various high courts were relied upon to argue that an order refusing to condone delay stands on a completely different footing from an order which condones delay, as the latter order cannot be said to impart any finality to the proceeding. This is because when an order condones delay, the merits of the award are yet to be adjudicated.

When a right of appeal is provided under a statute, dismissing the appeal on a preliminary ground is a dismissal of the appeal itself, as no opportunity of hearing on the merits is afforded post dismissal. Further, right of appeal once provided should not be limited by statutory interpretation when the words used in the provision are capable of a wider construction. In terms of the language of Section 37(1)(c) of the 1996 Act, there must be refusal to set aside an arbitral award "*under Section 34*", which includes Section 34(3) of the 1996 Act, under which a court may refuse to condone delay in filing an application. The Appellant argued upon the relevancy of the DHC, in passing its judgement whilst relying on ***BGS SGS Soma JV. v. NHPC Limited (2020) 4 SCC 234 ("Soma JV") and State of Maharashtra and Another v. M/s Ramdas Construction Co. and Another [C.A. Nos. 5247- 5248 of 2007*** ***("Ramdas Construction")***. It was argued that in Soma JV, the SC had considered a very different question. The question was whether an application to set aside an award under Section 34 of the 1996 Act should be returned

to the proper court dependent upon where the seat of arbitration was located. It was only in the course of discussion relatable to this question that the DHC had approved certain observations made in its decision in ***Harmanprit Singh Sidhu v. Arcadia Shares and Stock Brokers Private Limited 2016 SCC OnLine Del 5383,*** in which the single judge had allowed an application for condonation of delay, and the division bench thereafter held that an appeal against such an order was not maintainable under Section 37 of the 1996 Act. It cannot be said that the court has refused to set aside the award under Section 34 of the 1996 Act, as it may yet do so on the merits of the challenge to the award.

Contentions of Bhayana Builders Private Limited ("Respondent")

The counsels for the Respondent argued that it could not be said that Section 37 of the 1996 Act was *pari materia* with Section 39 of the 1940 Act. Section 39 of the 1940 Act was materially different and concerns itself with grounds made under Section 30 of the 1940 Act. The grounds thereunder are different from the grounds under Section 34(2) and (2A) of the 1996 Act. Section 37 of the 1996 Act therefore must be interpreted in its own terms and Essar Constructions could not be made applicable in this instance. As per Section 5 of the 1996 Act and the 'Statement of Objects and Reasons', it was clear that judicial intervention is to be minimal in the arbitration process. As far as Section 37 of the 1996 Act was concerned, the above object of minimal intervention was reinforced, firstly, by way of the non-obstante clause contained in Section 37(1) of the 1996 Act, secondly, the grounds of appeal provided herein are exhaustive and clarify that appeal shall lie from no other grounds. Upon reading of Section 37 (1)(c) of the 1996 Act it was clear that the refusal to set aside the award could only be on merits and not on some preliminary ground which would then lead to a refusal to set aside the award. Relying on judgement passed by the SC in ***Union of India v. Simplex Infrastructures Limited (2017) 14 SCC 225 ("Simplex Infrastructures")*** it could not be said that by condoning or refusing to condone delay, an arbitral award either gets or does not get set aside. Moreover, the judgement in Ramdas Construction was the correct enunciation of the law, and judgments of the other High Courts should be overruled.

Observations of the Supreme Court

Reading of Section 34 of the 1996 Act made it clear that an application for setting aside the award must be as per the grounds set out under Section 34(2) or Section 34(2A) of the 1996 Act and also would have to be filed within the limitation period provided under Section 34(3) of the 1996 Act. As such it is settled that Section 5 (*extension of prescribed period in certain cases)* of the Limitation Act, 1963, would not apply herein and any delay beyond 120 days could not be condoned.

Reading of Section 37(1)(c) of the 1996 Act which provides appeal from original decrees of a court passing the order for "*setting aside or refusing to set aside an arbitral award under section 34*" would go to show that refusal to set aside an award as delay not been condoned under Section 34(3) of the 1996 Act would certainly fall within Section 37(1)(c) of the 1996 Act. The expression, "*under section 34*" would refer to the entire section and not simply restricted to Section 34(2) of the 1996 Act. The fact that an award can be refused to be set aside for refusal to condone delay under Section 34(3) of the 1996 Act reinforces the contention.

The judgement in Simplex Infrastructures was referred, to hold that the said judgement was not contradicting the SC's observations. In the said case, in answer to the question as to whether a single judge's judgment condoning delay in filing an application under Section 34 of the 1996 Act was without jurisdiction, the SC had correctly held that such an order is in exercise of jurisdiction conferred by the statute. This judgment therefore cannot be said to be an authority for the proposition that, as the converse position to the facts contained in the present appeal had

been held to be not appealable, it must follow that even where delay is not condoned, the position remains the same.

As far as Soma JV was concerned, the question herein was entirely different as argued by the Appellant. The judgements are not to be construed like Euclid's theorems, but the observations made therein must relate to the context. In Soma JV, the context was where an application under Section 34 of the 1996 Act would have to be returned to the court which had jurisdiction to decide a Section 34 application, dependent upon where the seat of the arbitral tribunal was located. In this context, it was held that a preliminary step, which did not lead to the application being rejected, could not be characterized as an order which would result in the application's fate being sealed. The focus therein was neither on the language of Section 37(1)(c) of the 1996 Act, nor were any arguments made as to its correct interpretation. As far as Ramdas Construction was concerned, it could not be said that it had stated the law correctly as it is not in compliance with Essar Constructions and was contrary to the interpretation drawn for Section 37(1)(c) of the 1996 Act so far. As far as the Respondent's argument was concerned regarding the extent of judicial intervention under Section 5 of the 1996 Act, and the proposition that Section 37 of the 1996 Act was enacted to give limited right of appeal, the SC held that Section 5 of the 1996 Act did not take Respondent's argument any further. This is because after the non-obstante clause, the section states that no judicial authority shall intervene "*except where so provided in this Part*". What is "*provided in this part*" is Section 37 of the 1996 Act, which therefore brings the argument back to square one. A limited right of appeal is given under Section 37 of the 1996 Act, but it is not the province or duty of the SC to further limit such right by excluding appeals which are in fact provided for, given the language of the provision as interpreted in this judgement.

Decision of the Supreme Court

An appeal under Section 37(1)(c) of the 1996 Act would be maintainable against an order refusing to condone delay in filing an application under Section 34 of the 1996 Act to set aside an award. The matter was thereafter remitted to a division bench of the DHC to decide whether the single judge's refusal to condone delay was correct.

VA View:

By drawing a literal interpretation of Section 37 of the 1996 Act, the SC has put forth its position on broadening the scope of the said section. As per the SC, the language of Section 37 of the 1996 Act would make clear that it was the legislature's intention to include the entirety of Section 34 of the 1996 Act within the framework of Section 37 of the 1996 Act.

The implication is that now a Section 34 application dismissed due to delay has a remedy under Section 37 of the 1996 Act. This adds a further strain on the system and recourse for an individual avoiding an arbitral award and possibly result in lengthy proceedings.

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