2021 INSC 385

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOs. 4492-4493 OF 2021

AMAZON.COM NV INVESTMENT HOLDINGS LLC … APPELLANT

VERSUS

FUTURE RETAIL LIMITED & ORS. … RESPONDENTS

WITH

CIVIL APPEAL NOs. 4494-4495 OF 2021

CIVIL APPEAL NOs. 4496-4497 OF 2021

JUDGMENT

R.F. NARIMAN, J.

1. Two important questions arise in these appeals – *first*, as to whether an "award" delivered by an Emergency Arbitrator under the Arbitration Rules of the Singapore International Arbitration Centre ["**SIAC Rules**"] can be said to be an order under Section 17(1) of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"]; and *second*, as to whether an order passed under Section 17(2) of the Arbitration Act in enforcement of

the award of an Emergency Arbitrator by a learned Single Judge of the High Court is appealable.

2. The brief facts necessary to appreciate the context in which these two questions arise are as follows:

2.1. Proceedings were initiated by the Appellant, Amazon.com NV Investment Holdings LLC ["**Amazon**"] before the High Court of Delhi under Section 17(2) of the Arbitration Act to enforce the award/order dated 25th October, 2020 of an Emergency Arbitrator, Mr. V.K. Rajah, SC. This order was passed in arbitration proceedings being SIAC Arbitration No. 960 of 2020 commenced by Amazon against Respondents No. 1 to 13, who are described as under:

(i) Respondent No.1 – Future Retail Limited, India's second-largest offline retailer ["**FRL**"]
(ii) Respondent No.2 – Future Coupons Pvt. Ltd., a company that holds 9.82% shareholding in FRL and is controlled and majority-owned by Respondents No. 3 to 11 ["**FCPL**"]
(iii) Respondent No.3 – Mr. Kishore Biyani, Executive Chairman and Group CEO of FRL
(iv) Respondent No.8 – Mr. Rakesh Biyani, Managing Director of FRL
(v) Respondents No. 4 to 7 and 9 to 11 – other members of the Biyani family, namely, Ms. Ashni Kishore Biyani, Mr. Anil Biyani, Mr. Gopikishan Biyani, Mr. Laxminarayan Biyani, Mr. Sunil Biyani, Mr. Vijay Biyani, and Mr. Vivek Biyani, who are promoters and shareholders of FRL
(vi) Respondents No. 12 and 13 – Future Corporate Resources Pvt. Ltd. and Akar Estate and Finance Pvt. Ltd., group companies of FRL

Respondents No. 1 to 13 are hereinafter collectively referred to as the "**Biyani Group**".

2.2. The seat of the arbitral proceedings is New Delhi, and as per the arbitration clause agreed upon by the parties, SIAC Rules apply.

2.3. Three agreements were entered into between the parties. A Shareholders' Agreement dated 12th August, 2019, was entered into amongst the Biyani Group, i.e., Respondents No. 1 to 13 ["**FRL Shareholders' Agreement**"]. Under this Shareholders' Agreement, FCPL was accorded negative, protective, special, and material rights with regard to FRL including, in particular, FRL's retail stores ["**retail assets**"]. The rights granted to FCPL under this Shareholders' Agreement were to be exercised for Amazon's benefit and thus were mirrored in a Shareholders' Agreement dated 22nd August, 2019 entered into between Amazon, FCPL, and Respondents No. 3 to 13 ["**FCPL Shareholders' Agreement**"]. Amazon agreed to invest a sum of Rs.1431 crore in FCPL based on the rights granted to FCPL under the FRL Shareholders' Agreement and the FCPL Shareholders' Agreement. This investment was recorded in the Share Subscription Agreement dated 22nd August, 2019 entered into between Amazon, FCPL, and Respondents No. 3 to 13 ["**Share**

Subscription Agreement"]. It was expressly stipulated that this investment in FCPL would "flow down" to FRL. It appears that the basic understanding between the parties was that Amazon's investment in the retail assets of FRL would continue to vest in FRL, as a result of which FRL could not transfer its retail assets without FCPL's consent which, in turn, could not be granted unless Amazon had provided its consent. Also, FRL was prohibited from encumbering/transferring/selling/divesting/disposing of its retail assets to "restricted persons", being prohibited entities, with whom FRL, FCPL, and the Biyanis could not deal. A list of such restricted persons was then set out in Schedule III of the FCPL Shareholders' Agreement and also under the FRL Shareholders' Agreement *vide* letter dated 19th December, 2019. There is no doubt that the Mukesh Dhirubhai Ambani group (Reliance Industries group) is a "restricted person" under both these Shareholders' Agreements.

2.4. On 26th December, 2019, Amazon invested the aforesaid sum of Rs.1431 crore in FCPL which "flowed down" to FRL on the very same day. The bone of contention between the parties is that within a few months from the date of this investment, i.e., on 29th August, 2020, Respondents No. 1 to 13 entered into a transaction with the Mukesh Dhirubhai Ambani group which envisages the amalgamation of FRL with the Mukesh

Dhirubhai Ambani group, the consequential cessation of FRL as an entity, and the complete disposal of its retail assets in favour of the said group.

2.5. Amazon initiated arbitration proceedings and filed an application on 5th October, 2020 seeking emergency interim relief under the SIAC Rules, asking for injunctions against the aforesaid transaction. Mr. V.K. Rajah, SC was appointed as the Emergency Arbitrator and heard detailed oral submissions from all parties and then passed an "interim award" dated 25th October, 2020, in which the learned Arbitrator issued the following injunctions/directions:

> "**B. Dispositive Orders/Directions**
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> *285.* In the result, I award, direct, and order as follows:
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> (a) the Respondents are injuncted from taking any steps in furtherance or in aid of the Board Resolution made by the Board of Directors of FRL on 29 August 2020 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;
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> (b) the Respondents are injuncted from taking any steps to complete the Disputed Transaction with entities that are part of the MDA Group;
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> (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
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> (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 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."

2.6. The Biyani Group thereafter went ahead with the impugned transaction, describing the award as a nullity and the Emergency Arbitrator as *coram non judice* in order to press forward for permissions before statutory authorities/regulatory bodies. FRL, consistent with this stand, did not challenge the Emergency Arbitrator's award under Section 37 of the Arbitration Act, but instead chose to file a civil suit before the Delhi High Court being C.S. No. 493 of 2020, in which it sought to interdict the arbitration proceedings and asked for interim relief to restrain Amazon from writing to statutory authorities by relying on the Emergency Arbitrator's order, calling it a "tortious interference" with its civil rights. A learned Single Judge of the Delhi High Court, after finding a *prima facie* case of tortious interference, then refused to grant any interim injunction as follows:

> "*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 plea 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 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 the 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 pre-emptive 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 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.
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> Conclusion
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> *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 the law."

No appeal against this order has been filed by the Biyani Group. On the other hand, Amazon has filed an appeal against certain observations made in the order. This appeal is pending.

2.7. Meanwhile, Amazon went ahead with an application filed under Section 17(2) of the Arbitration Act which was heard and disposed of by a learned Single Judge of the Delhi High Court. On 2nd February, 2021, the learned Single Judge passed a status-quo order in which he restrained the Biyani Group from going ahead with the impugned transaction, stating that reasons and a detailed order will follow. An appeal against this was filed by FRL, in which a Division Bench, *vide* order dated 8th February, 2021, after setting out the facts of this case and after reaching certain *prima facie* findings, stayed the operation, implementation, and execution of the Single Judge order dated 2nd February, 2021 till the next date of hearing, and listed the appeal for further hearing on 26th February, 2021. Meanwhile, on 22nd

February, 2021, the Supreme Court allowed the amalgamation proceedings pending before the National Company Law Tribunal to continue, but not to culminate in any final order of sanction of scheme of amalgamation.

2.8. On 18th March, 2020, the learned Single Judge passed a detailed judgment giving reasons for an order made under Section 17(2) read with Order XXXIX, Rule 2-A of the Code of Civil Procedure, 1908 ["**Code of Civil Procedure**"] in which it was held that an Emergency Arbitrator's award is an order under Section 17(1) of the Arbitration Act. Since breaches of the Agreements aforementioned were admitted, the only plea being raised being that the Emergency Arbitrator's award was a nullity, the learned Single Judge held that such award was enforceable as an order under the Arbitration Act, and further held that the injunctions/directions granted by the said award were deliberately flouted by the Biyani Group. He also found that any so-called violations of Foreign Exchange Management Act, 1999 ["**FEMA**"] did not render the Emergency Arbitrator's award a nullity, and therefore, issued a show-cause notice under Order XXXIX, Rule 2-A of the Code of Civil Procedure, after imposing Rs.20 lakh as costs to be deposited with the Prime Minister Relief Fund for being used for providing COVID vaccinations to the Below Poverty Line category of senior citizens of Delhi. The learned Single Judge then directed as follows:

"Conclusion

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.

189. Respondent No.2 is a proper party to the arbitration proceedings and the Emergency Arbitrator has rightly invoked the Group of Companies doctrine by applying the well settled principles laid down by the Supreme Court in Chloro Controls (supra), Cheran Properties (supra) and MTNL (supra). The respondents have raised a plea contrary to the well settled law relating to Group of Companies doctrine laid down by the Supreme Court.

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 2-A of the Code of Civil Procedure.

194. In exercise of power under Order XXXIX Rule 2-A(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.

195. Show cause notice is hereby issued to respondents No.3 to 13 to show cause why they be not detained in civil prison for a term not exceeding three months under Order XXXIX Rule 2-A(1) of the Code of Civil Procedure for violation of the order dated 25th October, 2020. Reply to the show cause notice be filed within two weeks. Rejoinder within two weeks thereafter.

196. The respondents are directed not to take any further action in violation of the interim order dated 25th October, 2020. The respondents are further directed to approach all the competent authorities for recall of the orders passed on their applications in violation of the interim order dated 25th October, 2020 within two weeks. 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 at least three days before the next date of hearing.

197. Respondents No.3 to 11 shall remain present before this Court on the next date of hearing."

He listed the matter for further directions on 28th April, 2021.

2.9. Against this detailed judgment, FAO No. 51 of 2021 was filed by FRL. By the second impugned judgment in this case dated 22nd March, 2021, a Division Bench of the Delhi High Court referred to its earlier order dated 8th February, 2021 and stayed the learned Single Judge's detailed judgment and order for the same reasons given by the earlier order till the next date of hearing, which was 30th April, 2021. Against the said order, Special

Leave Petitions were filed before this Court, and this Court by its order dated 19th April, 2021 stayed further proceedings before the learned Single Judge as well as the Division Bench of the Delhi High Court, and set the matter down for final disposal before this Court.

3. Mr. Gopal Subramanium, learned Senior Advocate appearing on behalf of Amazon, took us through the record with painstaking detail. He castigated the impugned orders of the Division Bench as suffering from a complete non-application of mind in that the order dated 8th February, 2021 referred to three agreements, the third being between FRL and Reliance Retail Ltd., which is an error apparent on the face of the record. Secondly, it went on to observe that in the aforesaid agreement, Amazon is not a party. It then went on to hold that an appeal against an order under Section 17(2) of the Arbitration Act would be maintainable under the provisions of the Code of Civil Procedure on the basis of the reasoning contained in a Delhi High Court judgment in **South Delhi Municipal Corporation v. Tech Mahindra**, (2019) SCC Online Delhi 11863, relying upon paragraphs 8 to 11 thereof. Mr. Subramanium argued that had the learned Division Bench bothered to refer to paragraphs 12 and 13 of the aforesaid judgment, it would be clear that this authority would be an authority for exactly the opposite proposition, thereby rendering an appeal under Order XLIII, Rule

1(r) of the Code of Civil Procedure non-maintainable when it is read with Section 37 of the Arbitration Act. Further observations that *prima facie*, the agreements are between different parties, and therefore, the group-of-companies doctrine cannot be invoked, without any reasoning, again betrays a complete non-application of mind. Since the second impugned order of the Division Bench relies upon this very order to stay even the detailed judgment of the Single Judge, the learned senior counsel argued that the second order, being a reiteration of the first, suffers from the same malady.

3.1. Mr. Subramanium then referred us to Sections 2(1)(a), 2(1)(c), 2(1)(d), 2(6), 2(8) and 19(2) to argue that the Arbitration Act reflects the *grundnorm* of arbitration as being party autonomy, which is respected by these provisions and delineated in several judgments of this Court. He then referred to Section 37, pointing out that an appeal under Section 37(2)(b) is restricted to granting or refusing to grant an interim measure under Section 17, which would refer to Section 17(1) and not Section 17(2). He went on to argue that the Arbitration Act is a complete code in itself and if an appeal does not fall within the four corners of Section 37, then it is incompetent, as has been held by several judgments of this Court.

3.2. He also referred to various judgments of this Court, arguing that an Emergency Arbitrator's award can never be characterised as a nullity and ignored, and cited a number of judgments to show that until the said award is set aside, it must be obeyed. He also referred to the important fact that the award must be taken as it stands as no appeal was made therefrom by the Biyani Group and that, therefore, it was not permissible to go behind the award.

3.3. He also cited judgments to show that non-signatories to arbitration agreements would nevertheless be bound thereby and on facts, it was admitted that the "Ultimate Controlling Person" behind the entire transaction was Mr. Kishore Biyani, who was defined as such under the three Agreements.

3.4. He also argued that, as has been held in the judgments of this Court, the FEMA is wholly unlike the Foreign Exchange Regulation Act, 1973 ["**FERA**"] and does not contain any provision nullifying an agreement, even assuming that there was a breach thereof.

4. Mr. Aspi Chinoy, learned Senior Advocate also appearing on behalf of Amazon, took us through various parts of the Emergency Arbitrator's award and argued that no equity can possibly be found in favour of the Biyani

Group as the breach of the Emergency Arbitrator's award had been admitted by them. Thus, they have come to the Court with a dishonest and immoral case and if this is appreciated, it will be clear that on facts, after openly flouting the Emergency Arbitrator's award, they would have no case on merits to resist the directions issued by the learned Single Judge under Section 17(2) of the Arbitration Act. Even otherwise, he referred to Section 17(2) and argued that enforcement orders were made under the Arbitration Act and not under the Code of Civil Procedure, as a result of which the appeal filed under Order XLIII, Rule 1(r) would not be maintainable. Mr. Chinoy also referred to a Division Bench judgment of the Bombay High Court in **Kakade Construction Co. Ltd. v. Vistra ITCL**, 2019 SCC OnLine Bom 1521 : (2019) 6 Bom CR 805 ["**Kakade Construction**"] to buttress his submission.

5. Mr. Ranjit Kumar, learned Senior Advocate appearing on behalf of Amazon, referred to Sections 9 and 17 of the Arbitration Act and the Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Amendment Act**"] which brought Section 17 into line with Section 9. He then referred to Section 9(3) to argue that the legislative intent is to obtain interim orders from an arbitral tribunal then constituted so as to decongest courts and free them from the burdens of Section 9 petitions being filed before them. If this

is appreciated, then it would be clear that an Emergency Arbitrator's award would be a step in the right direction under institutional rules, furthering this very objective. He also pointed out that by the very same amendment, a non-obstante clause was added to Section 37(1), thereby making it abundantly clear that unless an appeal falls within the four corners of Section 37, the moment an order is passed under the Arbitration Act, no other appeal could possibly be filed if it was outside the four corners of Section 37.

6. Mr. Harish Salve, learned Senior Advocate appearing on behalf of FRL, stated that he would not go to the extent of arguing that an Emergency Arbitrator's award would be outside the ken of the Arbitration Act, but that it was sufficient for his purpose to argue that an Emergency Arbitrator's award cannot be said to fall under Section 17(1) of the Act. He placed before us an extract of the 246th Law Commission Report, in which the Law Commission advocated the amendment of Section 2 of the Arbitration Act, to include within sub-section (1)(d) a provision for the appointment of an Emergency Arbitrator. He said that despite this suggestion being made, Parliament did not adopt the same when it amended the Arbitration Act by the 2015 Amendment Act, thereby indicating that such orders would not fall within Section 17(1) of the

Arbitration Act. He then took us through the definition sections in the Arbitration Act and read out Sections 10 to 13, 16, 17, 21, 23, 27, 29A, and 30, in particular, to argue that an arbitral tribunal as defined by Section 2(1)(d) of the Act can only mean a tribunal that is constituted between the parties, which then decides the disputes between the parties finally and cannot, given the scheme of the Act, include an Emergency Arbitrator who is not an "arbitral tribunal" but a person who only decides, at best, an interim dispute between the parties which never culminates in a final award. He argued that Mr. Subramanium was trying to fit a square peg in a round hole as the Arbitration Act only speaks of arbitral tribunals that are constituted between the parties and that can finally decide the disputes between the parties. As an example, if the tribunal rules on its own jurisdiction and rejects a plea stating it has no jurisdiction, it must only continue with the arbitral proceedings and make a final arbitral award, which can never be done by an Emergency Arbitrator. The scheme, therefore, of the entirety of Part I of the Act, would show that an Emergency Arbitrator is a foreigner to the Indian Arbitration Act and cannot fit within its scheme unless an amendment is made by Parliament.

6.1. He further argued, pointing to section 25.2 of the arbitral agreement contained in the FCPL Shareholders' Agreement (which is mirrored in the

FRL Shareholders' Agreement as section 15.2), that in any case, the provisions of the SIAC Rules relating to an Emergency Arbitrator's award, which were agreed to between the parties, were subject to the provisions of the Arbitration Act; and since the Arbitration Act did not provide for Emergency Arbitrators, this part of the SIAC Rules would not apply, making it clear that an Emergency Arbitrator's award cannot fall within Section 17(1) of the Act. He also argued that the scheme of Section 17(1) made it clear that a party may, during arbitral proceedings, apply to the arbitral tribunal. Even under the SIAC Rules, an Emergency Arbitrator is appointed before the arbitral tribunal is constituted, as is clear from Rule 30 read with Schedule 1. This being the case, an Emergency Arbitrator, not being appointed during arbitral proceedings, falls outside Section 17(1).

6.2. He also contrasted the Arbitration Act with provisions contained in the Singapore, New Zealand, Hong Kong, and English statutes which made it clear that under those statutes, an Emergency Arbitrator's awards were expressly included and could thus be enforced under their provisions.

6.3. Mr. Salve made it clear that the appeal that was filed in the present case was not under Section 37 of the Arbitration Act but was under Order XLIII, Rule 1(r) of the Code of Civil Procedure. He then read Section 9

together with Section 37 of the Arbitration Act to stress that orders may be made under Section 9 until enforcement of an award in accordance with Section 36, and then read Section 36 to make it clear that the contours of Section 37 did not go beyond orders and awards made under the Arbitration Act. Since orders made in enforcement proceedings are not under the Arbitration Act but only under the Code of Civil Procedure, therefore, in enforcement proceedings – both under Section 17(2) and under Section 36(1) – appeals can be filed from such orders under the Code of Civil Procedure. He stressed upon the language of Section 36(1), which made it clear that when a final award is made, it shall be enforced in accordance with the provisions of the Code of Civil Procedure in the same manner as if it were a decree of the court, thereby arguing that by a legal fiction, an award is deemed to be a decree for the purposes of enforcement, which would include all purposes, including appeals from orders passed in enforcement proceedings. He also stressed upon the language of Section 17(2) to indicate that an order passed under Section 17(1) is deemed to be an order of the court for all purposes and shall be enforceable under the Code of Civil Procedure in the same manner as if it were an order of the court, making it clear that enforcement is not under the Arbitration Act but only under the Code of Civil Procedure. He stressed the

fact that the order of the learned Single Judge also made it abundantly clear that he was exercising powers only under Order XXXIX, Rule 2-A of the Code of Civil Procedure and not under the Arbitration Act. He then pointed out that there would be various anomalies which cannot be addressed if we were to accept the construction suggested by Mr. Subramanium. As is well known, third-party objectors may object to an order under Section 17(2) or an award. If their rights are affected, it cannot be that they would have no right of appeal, as a perverse order against their interests would certainly be appealable. He also pointed out that, as of today, the application for modification/setting aside of the Emergency Arbitrator's award had been argued before a regularly constituted arbitral tribunal, which would issue its order either agreeing with or rejecting the Emergency Arbitrator's award, from which either his clients or Mr. Subramanium's clients would file appeals, depending upon the orders so passed. He referred to a number of judgments to buttress his submissions.

7. Mr. K.V. Viswanathan, learned Senior Advocate also appearing on behalf of FRL, argued that four rules of interpretation of statutes in this case would necessarily require us to allow these appeals in favour of the Respondents. First, he argued that the words "as if" contained in Section 17(2) of the Act contain a legal fiction which, when taken to its logical

conclusion, would necessarily mean that enforcement proceedings would be outside the pale of the Arbitration Act and within the confines of the Code of Civil Procedure. Further, he argued that the use of the expression "under the Code of Civil Procedure" in Section 17(2) is legislation by reference and not by incorporation, leading to the conclusion that it is the Code of Civil Procedure alone under which enforcement takes place. He then reiterated that the expression "due regard" contained in Section 36(3) is fundamentally different from the expression "under the Code of Civil Procedure", and that Section 36(1) and Section 17(2) are *pari materia* provisions, distinct from Section 36(3), under which a stay of an award may be granted under the Arbitration Act with "due regard to the Code of Civil Procedure". He then added that when different words are used in different provisions, they are meant to be differentiated. He also cited judgments to buttress each one of these submissions. He then went on to discuss various High Court judgments which show that, in practice, appeals that are filed against orders and awards sought to be enforced are filed under the Code of Civil Procedure and not under the Arbitration Act.

7.1. He then referred to Section 17(1) and, in particular, to the expression "*and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before*

it" and argued that the expression "in relation to" refers only to incidental powers given to the tribunal and not to powers of enforcement. He also argued that the expression "arbitral tribunal" in Section 17(1) is to be read as defined by Section 2(1)(d), there being nothing in the context of Section 17(1) to the contrary which would obviate the application of Section 2(1)(d) in the context of Section 17(1). He then referred to the arbitration clause between the parties to argue that the parties contemplated, by virtue of section 25.2 of the FCPL Shareholders' Agreement, that only civil courts could pass interim orders until the arbitral tribunal is properly constituted by the parties. He then referred to a recent judgment of this Court, namely **National Highways Authority of India v. M. Hakeem**, 2021 SCC OnLine SC 473 ["**NHAI**"], arguing that Section 17 was like Section 34(1) of the Arbitration Act in that nothing could be read into Section 17 so as to incorporate awards made by an Emergency Arbitrator.

7.2. He then argued that on a reading of Schedule 1 of the SIAC Rules, an Emergency Arbitrator cannot be said to be like an arbitral tribunal in that, under Rule 3, the President of the SIAC must first accept as to whether or not an Emergency Arbitrator be appointed at all. Also, under Rule 9, an administrative authority alone is given the power to extend time in the circumstances mentioned in the Rule, and under Rule 10, an Emergency

Arbitrator has no power to act after the arbitral tribunal is constituted, the tribunal not being bound by any reasons given by the Emergency Arbitrator. From this, he argued that an Emergency Arbitrator does not fit within the Arbitration Act as such arbitrator is not an independent quasi-judicial body under the Rules.

7.3. He then referred to certain judgments and authorities for the proposition that a proper reading of Exception 1 to Section 28 of the Indian Contract Act, 1872 would show that the civil court's jurisdiction is ousted and that only what is expressly provided for by the ouster provisions can be given effect to as nothing can be implied therein. He then argued that the learned Single Judge was in a great hurry to decide the case and did not even give sufficient time to the Respondents to file objections to the enforcement application, though he did concede that notes of written arguments, including the objection as to an award by an Emergency Arbitrator being a nullity, were raised before the learned Single Judge. He also cited various judgments to show that this was a case in which the Emergency Arbitrator lacked inherent jurisdiction, as a result of which his clients were justified in ignoring the award passed by the Emergency Arbitrator.

8. Mr. Vikram Nankani, learned Senior Advocate appearing on behalf of Respondents No. 1 to 12 in Civil Appeal Nos. 4496-4497 of 2021 and Respondents No. 2 to 13 in Civil Appeal Nos. 4494-4495 of 2021, was at pains to point out that in the enforcement application, on the facts of this case, it was specifically pleaded that the High Court was being approached as a civil court, and that the application was filed only under Order XXXIX, Rule 2-A. He also cited judgments to show that the provisions of Order XXXIX, Rule 2-A, being punitive in nature and requiring a heightened standard of wilful disobedience to be applied cannot be applied routinely or in the cavalier manner in which the learned Single Judge has applied the said provision. He also referred to the fact that only the SIAC Rules pertaining to "arbitration" *stricto sensu* were agreed to between the parties, which would exclude rules relating to awards by an Emergency Arbitrator. He then distinguished the judgment in **Kakade Construction** (supra) relied upon by Mr. Chinoy and the judgment in **Jet Airways (India) Ltd. v. Subrata Roy Sahara**, 2011 SCC OnLine Bom 1379 : 2012 (2) AIR Bom 855 ["**Jet Airways**"], stating that they applied only to Section 36 of the Act and are not authorities qua Section 17, which is the subject matter of argument in the facts of the present case.

9. Having heard learned counsel for the parties, the first question to be determined by this Court is whether an Emergency Arbitrator's award can be said to be within the contemplation of the Arbitration Act, and whether it can further be said to be an order under Section 17(1) of the Act.

10. The relevant provisions of the Arbitration Act, so far as this contention is concerned, are as follows:

> "**2. Definitions**.—(1) In this Part, unless the context otherwise requires,—
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> (*a*) "arbitration" means any arbitration whether or not administered by permanent arbitral institution;
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> * * *
>
> (*c*) "arbitral award" includes an interim award;
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> (*d*) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;"
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> * * *
>
> (6) **Construction of references**.—Where this Part, except Section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue."
>
> * * *
>
> (8) Where this Part—
>
> (*a*) refers to the fact that the parties have agreed or that they may agree, or
>
> (*b*) in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement."
>
> "**19. Determination of rules of procedure**.—
>
> * * *

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings."

"**21. Commencement of arbitral proceedings**.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

11. A reading of these provisions would show that an arbitration proceeding can be administered by a permanent arbitral institution. Importantly, Section 2(6) makes it clear that parties are free to authorise any person including an institution to determine issues that arise between the parties. Also, under Section 2(8), party autonomy goes to the extent of an agreement which includes being governed by arbitration rules referred to in the aforesaid agreements. Likewise, under Section 19(2), parties are free to agree on the procedure to be followed by an arbitral tribunal in conducting its proceedings.

12. Section 21 provides that arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. This Section is expressly subject to agreement by the parties. Rule 3.3 of the SIAC Rules reads as follows:

"**Rule 3: Notice of Arbitration**

* * *

3.3 The date of receipt of the complete Notice of Arbitration by the Registrar shall be deemed to be the date of commencement of the arbitration. For the avoidance of doubt, the Notice of Arbitration is deemed to be complete when all the requirements of Rule 3.1 and Rule 6.1(b) (if applicable) are fulfilled or when the Registrar determines that there has been substantial compliance with such requirements. SIAC shall notify the parties of the commencement of the arbitration."

By agreeing to the application of the SIAC Rules, the arbitral proceedings in the present case can be said to have commenced from the date of receipt of a complete notice of arbitration by the Registrar of the SIAC, which would indicate that arbitral proceedings under the SIAC Rules commence much before the constitution of an arbitral tribunal under the said Rules. This being the case, when Section 17(1) uses the expression "during the arbitral proceedings", the said expression would be elastic enough, when read with the provisions of Section 21 of the Act, to include emergency arbitration proceedings, which only commence after receipt of notice of arbitration by the Registrar under Rule 3.3 of the SIAC Rules as aforesaid.

13. A conjoint reading of these provisions coupled with there being no interdict, either express or by necessary implication, against an Emergency

Arbitrator would show that an Emergency Arbitrator's orders, if provided for under institutional rules, would be covered by the Arbitration Act.

14. As a matter of fact, a number of judgments of this Court have referred to the importance of party autonomy as being one of the pillars of arbitration in the Arbitration Act. Thus, in **Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.**, (2014) 11 SCC 560, this Court held as follows:

> "**35.** In view of the language of Article 20 of the arbitration agreement which provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL, Devas was entitled to invoke the Rules of Arbitration of ICC for the conduct of the arbitration proceedings. Article 19 of the agreement provided that the rights and responsibilities of the parties thereunder would be subject to and construed in accordance with the laws of India. There is, therefore, a clear distinction between the law which was to operate as the governing law of the agreement and the law which was to govern the arbitration proceedings. Once the provisions of the ICC Rules of Arbitration had been invoked by Devas, the proceedings initiated thereunder could not be interfered with in a proceeding under Section 11 of the 1996 Act. The invocation of the ICC Rules would, of course, be subject to challenge in appropriate proceedings but not by way of an application under Section 11(6) of the 1996 Act. Where the parties had agreed that the procedure for the arbitration would be governed by the ICC Rules, the same would necessarily include the appointment of an Arbitral Tribunal in terms of the arbitration agreement and the said Rules. Arbitration Petition No. 20 of 2011 under Section 11(6) of the 1996 Act for the appointment of an arbitrator must, therefore, fail and is rejected, but this will not prevent the petitioner from taking recourse to other provisions of the aforesaid Act for appropriate relief."

Similarly, in **Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.**, (2016) 4 SCC 126 ["**Balco**"], this Court stated thus:

> "**5.** Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract — (*1*) proper law of contract, (*2*) proper law of arbitration agreement, and (*3*) proper law of the conduct of arbitration, which is popularly and in legal parlance known as "curial law". The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.* [*Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.*, (1998) 1 SCC 305], which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent *Reliance Industries Ltd.* v. *Union of India* [*Reliance Industries Ltd.* v. *Union of India*, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737]."
>
> * * *
>
> "**10.** In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and

> intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement."

The importance of party autonomy in arbitration and commercial contracts was further delineated in the judgment of **Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.**, (2017) 2 SCC 228 ["**Centrotrade**"] as follows:

> "**38.** Party autonomy is virtually the backbone of arbitrations. This Court has expressed this view in quite a few decisions. In two significant passages in *Balco* [*Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126] this Court dealt with party autonomy from the point of view of the contracting parties and its importance in commercial contracts. In para 5 of the Report, it was observed: (SCC p. 130)
>
> > "*5*. *Party autonomy being the brooding and guiding spirit in arbitration*, the parties are free to agree on application of three different laws governing their entire contract— (*1*) proper law of contract, (*2*) proper law of arbitration agreement, and (*3*) proper law of the conduct of arbitration, which is popularly and in legal parlance known as "curial law". The interplay and application of these different laws to an arbitration has been succinctly explained by this Court in *Sumitomo* [*Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd.*, (1998) 1 SCC 305] which is one of the earliest decisions in that direction and which has been consistently followed in all the subsequent decisions including the recent *Reliance Industries Ltd.* v. *Union of India* [*Reliance Industries Ltd.* v. *Union of India*, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737]."
>
> (emphasis in original)

Later in para 10 of the Report, it was held: (SCC pp. 131-32)

> "*10*. In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. *In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grund norm*, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement."
>
> (emphasis in original)

* * *

"**42.** Be that as it may, the legal position as we understand it is that the parties to an arbitration agreement have the autonomy to decide not only on the procedural law to be followed but also the substantive law. The choice of jurisdiction is left to the contracting parties. In the present case, the parties have agreed on a two-tier arbitration system through Clause 14 of

the agreement and Clause 16 of the agreement provides for the construction of the contract as a contract made in accordance with the laws of India. We see nothing wrong in either of the two clauses mutually agreed upon by the parties."

* * *

"**46.** For the present we are concerned only with the fundamental or public policy of India. Even assuming the broad delineation of the fundamental policy of India as stated in *Associate Builders* [*Associate Builders* v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] we do not find anything fundamentally objectionable in the parties preferring and accepting the two-tier arbitration system. The parties to the contract have not by-passed any mandatory provision of the A&C Act and were aware, or at least ought to have been aware that they could have agreed upon the finality of an award given by the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. Yet they voluntarily and deliberately chose to agree upon a second or appellate arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. There is nothing in the A&C Act that prohibits the contracting parties from agreeing upon a second instance or appellate arbitration — either explicitly or implicitly. No such prohibition or mandate can be read into the A&C Act except by an unreasonable and awkward misconstruction and by straining its language to a vanishing point. We are not concerned with the reason why the parties (including HCL) agreed to a second instance arbitration — the fact is that they did and are bound by the agreement entered into by them. HCL cannot wriggle out of a solemn commitment made by it voluntarily, deliberately and with eyes wide open."

(emphasis supplied)

The principle of party autonomy, as delineated in **Balco** (supra) and **Centrotrade** (supra), has recently been quoted with approval by this Court

in **PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.**, 2021 SCC OnLine SC 331 (*see* paragraphs 101 and 102).

15. A recent judgment in **NHAI v. M. Hakeem** (supra) dealt with certain provisions of the National Highways Act, 1956, which laid down a scheme of acquisition different from that contained in the Land Acquisition Act, 1984. As part of the said scheme, arbitral awards passed under the National Highways Act were challengeable only under Section 34 of the Arbitration Act. The question squarely raised before this Court was as to whether, when a court was empowered to "set aside" awards under Section 34 of the Act, would this power include the power to modify an award.

16. In answering this question, this Court referred to Article 34 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**Model Law**"], and came to the conclusion that given the fact that Section 34 is a verbatim reproduction of Article 34 of the Model Law, it would not contain any power to modify an arbitral award. In this case, since the parliamentary intention was crystal clear, and there was no play in the joints to apply purposive or creative interpretation, this Court came to the conclusion that only an amendment of the Arbitration Act could set right the position as otherwise, the Court would be guilty of altering the material of

which the Act was woven and not merely ironing out creases which were found in the statute.

17. By way of contrast, the present is a case akin to **Centrotrade** (supra). As has been pointed out in **Centrotrade** (supra), the parties to the contract, in the present case, by agreeing to the SIAC Rules and the award of the Emergency Arbitrator, have not bypassed any mandatory provision of the Arbitration Act. There is nothing in the Arbitration Act that prohibits contracting parties from agreeing to a provision providing for an award being made by an Emergency Arbitrator. On the contrary, when properly read, various Sections of the Act which speak of party autonomy in choosing to be governed by institutional rules would make it clear that the said rules would apply to govern the rights between the parties, a position which, far from being prohibited by the Arbitration Act, is specifically endorsed by it. This judgment is, therefore, entirely distinguishable from the fact situation in the present case.

18. However, Mr. Salve argued, relying strongly upon the provisions of Sections 10 to 13, 16, 17, 21, 23, 27, 29A, and 30 of the Arbitration Act, in particular, that the “arbitral tribunal” spoken of in these provisions, and referable to Section 2(1)(d) of the Act, is exhaustively defined, which means

a sole arbitrator or a panel of arbitrators, which, when read with these provisions, would only include an arbitral tribunal which can not only pass interim orders, but which is constituted between the parties so that interim and/or final awards can be passed by this very tribunal. He also argued, contrasting the language of Section 9(1) with the language of Section 17(1), that Section 17(1) would only apply where a party, during arbitral proceedings, applies to an arbitral tribunal (as defined) for interim relief, which cannot possibly apply to an Emergency Arbitrator who is admittedly appointed only before an arbitral tribunal is properly constituted. By way of contrast, he argued that under Section 9(1), an interim measure by the courts may be availed by a party even before arbitral proceedings commence, up to the stage of enforcement in accordance with Section 36.

19. There can be no doubt that the “arbitral tribunal” as defined in Section 2(1)(d) speaks only of an arbitral tribunal that is constituted between the parties and which can give interim and final relief, “given the scheme of the Act”, as Mr. Salve puts it, as contained in the aforementioned Sections. However, like every other definition section, the definition contained in Section 2(1)(d) only applies “unless the context otherwise requires”. Given that the definition of “arbitration” in Section 2(1)(a) means <u>any</u> arbitration, whether or not administered by a permanent arbitral institution, when read

with Sections 2(6) and 2(8), would make it clear that even interim orders that are passed by Emergency Arbitrators under the rules of a permanent arbitral institution would, on a proper reading of Section 17(1), be included within its ambit. It is significant to note that the words “arbitral proceedings” are not limited by any definition and thus encompass proceedings before an Emergency Arbitrator, as has been held hereinabove with reference to Section 21 of the Act read with the SIAC Rules. The short point is as to whether the definition of “arbitral tribunal” contained in Section 2(1)(d) should so constrict Section 17(1), making it apply only to an arbitral tribunal that can give final reliefs by way of an interim or final award.

20. The heart of Section 17(1) is the application by a party for interim reliefs. There is nothing in Section 17(1), when read with the other provisions of the Act, to interdict the application of rules of arbitral institutions that the parties may have agreed to. This being the position, at least insofar as Section 17(1) is concerned, the “arbitral tribunal” would, when institutional rules apply, include an Emergency Arbitrator, the context of Section 17 “otherwise requiring” – the context being interim measures that are ordered by arbitrators. The same object and context would apply even to Section 9(3) which makes it clear that the court shall not entertain an application for interim relief once an arbitral tribunal is constituted unless

the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious. Since Section 9(3) and Section 17 form part of one scheme, it is clear that an "arbitral tribunal" as defined under Section 2(1)(d) would not apply and the arbitral tribunal spoken of in Section 9(3) would be like the "arbitral tribunal" spoken of in Section 17(1) which, as has been held above, would include an Emergency Arbitrator appointed under institutional rules.

21. However, Mr. Salve relied upon **Firm Ashok Traders v. Gurumukh Das Saluja**, (2004) 3 SCC 155 and, in particular, the following passage:

> "**18.** Under the A&C Act, 1996, unlike the predecessor Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that Section 17 would operate only during the existence of the Arbitral Tribunal and its being functional. During that period, the power conferred on the Arbitral Tribunal under Section 17 and the power conferred on the court under Section 9 may overlap to some extent but so far as the period pre- and post- the arbitral proceedings is concerned, the party requiring an interim measure of protection shall have to approach only the court. …"

This judgment also does not carry the Respondents' case any further as the question for decision in this case is whether the Emergency Arbitrator's award can be said to be by an "arbitral tribunal" as defined, and does not have any reference to when a party may approach a court under Section 9.

22. Mr. Salve then argued that in any case, the arbitration agreement between the parties, contained in section 25.2 of the FCPL Shareholders' Agreement (*pari materia* with section 15.2 of the FRL Shareholders' Agreement), makes it clear that the SIAC Rules would be subject to the Indian Arbitration Act, and being so subject, the provisions governing an award made by an Emergency Arbitrator under the SIAC Rules would not be applicable between the parties. Sections 25.1 and 25.2 of the FCPL Shareholders' Agreement (*pari materia* with sections 15.1 and 15.2 of the FRL Shareholders' Agreement) read as follows:

> "25.1. Governing Law
>
> This Agreement shall be governed by and construed in accordance with the Laws of India. Subject to the provisions of Section 25.2 (Dispute Resolution), the courts at New Delhi, India shall have exclusive jurisdiction over any matters or Dispute (hereinafter defined) relating or arising out of this Agreement.
>
> "25.2. Dispute Resolution
>
> 25.2.1. Arbitration
>
> Any dispute, controversy, claim or disagreement of any kind whatsoever between or among the Parties in connection with or arising out of this Agreement or the breach, termination or invalidity thereof (hereinafter referred to as a "Dispute"), failing amicable resolution through negotiations, shall be referred to and finally resolved by arbitration irrespective of the amount in Dispute or whether such Dispute would otherwise be considered justifiable or ripe for resolution by any court. The parties agree that they shall attempt to resolve through good faith consultation, any such Dispute between any of the Parties and such consultation shall begin promptly after a Party has delivered to another Party a written request for such

> consultation. In the event the Dispute is not resolved by means of negotiation within a period of 30 (thirty) days or such different period mutually agreed between the Parties, such Dispute shall be referred to and finally resolved by Arbitration in accordance with the arbitration rules of the Singapore International Arbitration Centre ("SIAC"), and such rules (the "Rules") as may be modified by the provisions of this Section 25 (Governing Law and Dispute Resolution). This Agreement and the rights and obligations of the Parties shall remain in full force and effect pending the award in such arbitration providing, which award, if appropriate, shall determine whether and when any termination shall become effective."

As has been held by us above, it is wholly incorrect to say that Section 17(1) of the Act would exclude an Emergency Arbitrator's orders. This being the case, even if section 25.2 of the FCPL Shareholders' Agreement (*pari materia* with section 15.2 of the FRL Shareholders' Agreement) makes the SIAC Rules subject to the Arbitration Act, the said Act, properly construed, would include an Emergency Arbitrator's awards/orders, there being nothing inconsistent in the SIAC Rules when read with the Act.

23. Also, Mr. Nankani's argument that the arbitration agreement contained in section 25.2 of the FCPL Shareholders' Agreement referred to hereinabove would indicate that the SIAC Rules were only agreed upon insofar as arbitration alone is concerned is wholly incorrect. Rule 1.3 of the SIAC Rules indicates that an award of an Emergency Arbitrator is included within the ambit of these Rules, and that an Emergency Arbitrator, as

defined, means an arbitrator appointed in accordance with paragraph 3 of Schedule 1. This makes it clear beyond doubt that “arbitration” mentioned in section 25.2 of the FCPL Shareholders’ Agreement would include an arbitrator appointed in accordance with the SIAC Rules which, in turn, would include an Emergency Arbitrator.

24. The SIAC Rules, with which we are immediately concerned, deal with the concept of an Emergency Arbitrator as follows:

> “**Rule 1: Scope of Application and Interpretation**
>
> * * *
>
> **1.3** In these Rules:
>
> “Award” includes a partial, interim or final award and an award of an Emergency Arbitrator;
>
> * * *
>
> “Emergency Arbitrator” means an arbitrator appointed in accordance with paragraph 3 of Schedule 1;”
>
> “**Rule 30: Interim and Emergency Relief**
>
> **30.1** The Tribunal may, at the request of a party, issue an order or an Award granting an injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.
>
> **30.2** A party that wishes to seek emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.
>
> **30.3** A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules.”

“**SCHEDULE 1**

EMERGENCY ARBITRATOR

1. A party that wishes to seek emergency interim relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, file an application for emergency interim relief with the Registrar. The party shall, at the same time as it files the application for emergency interim relief, send a copy of the application to all other parties. The application for emergency interim relief shall include:

a. the nature of the relief sought;

b. the reasons why the party is entitled to such relief; and

c. a statement certifying that all other parties have been provided with a copy of the application or, if not, an explanation of the steps taken in good faith to provide a copy or notification to all other parties.

* * *

3. The President shall, if he determines that SIAC should accept the application for emergency interim relief, seek to appoint an Emergency Arbitrator within one day of receipt by the Registrar of such application and payment of the administration fee and deposits.

4. If the parties have agreed on the seat of the arbitration, such seat shall be the seat of the proceedings for emergency interim relief. Failing such an agreement, the seat of the proceedings for emergency interim relief shall be Singapore, without prejudice to the Tribunal’s determination of the seat of the arbitration under Rule 21.1.

5. Prior to accepting appointment, a prospective Emergency Arbitrator shall disclose to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence. Any challenge to the appointment of the Emergency Arbitrator must be made within two days of the communication by the Registrar to the parties of the appointment of the Emergency Arbitrator and the circumstances disclosed.

6. An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless otherwise agreed by the parties.

* * *

8. The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary, including preliminary orders that may be made pending any hearing, telephone or video conference or written submissions by the parties. The Emergency Arbitrator shall give summary reasons for his decision in writing. The Emergency Arbitrator may modify or vacate the preliminary order, the interim order or Award for good cause.

9. The Emergency Arbitrator shall make his interim order or Award within 14 days from the date of his appointment unless, in exceptional circumstances, the Registrar extends the time. No interim order or Award shall be made by the Emergency Arbitrator until it has been approved by the Registrar as to its form.

10. The Emergency Arbitrator shall have no power to act after the Tribunal is constituted. The Tribunal may reconsider, modify or vacate any interim order or Award issued by the Emergency Arbitrator, including a ruling on his own jurisdiction. The Tribunal is not bound by the reasons given by the Emergency Arbitrator. Any interim order or Award issued by the Emergency Arbitrator shall, in any event, cease to be binding if the Tribunal is not constituted within 90 days of such order or Award or when the Tribunal makes a final Award or if the claim is withdrawn.

* * *

12. The parties agree that an order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made, and undertake to carry out the interim order or Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made."

25. A reading of the aforesaid Rules indicates that even before an arbitral Tribunal is constituted under the Rules, urgent interim reliefs can be

granted by what is termed as an “Emergency Arbitrator”. An “Emergency Arbitrator” is defined by Rule 1.3 of these Rules as meaning an arbitrator appointed in accordance with paragraph 3 of Schedule 1. Under paragraph 7 of Schedule 1, the Emergency Arbitrator has all the powers vested in the arbitral tribunal pursuant to SIAC Rules, including the authority to rule on his own jurisdiction. Importantly, under paragraph 8 of Schedule 1 to the SIAC Rules, the Emergency Arbitrator shall have the power to order such interim relief that he deems necessary, and is to give summary reasons for his decision in writing. Under paragraph 9, the interim order is to be made within 14 days of his appointment, unless time is extended. Importantly, once the arbitral tribunal is constituted under paragraph 10, the tribunal may reconsider, modify, or vacate any such interim order. Such interim order or award issued by the Emergency Arbitrator will continue to bind the parties unless it is modified or vacated by the arbitral tribunal, once it is constituted, until the tribunal makes a final award or until the claim is withdrawn. Paragraph 10 of Schedule 1 also provides that any interim order or award made by the Emergency Arbitrator shall cease to be binding only if the tribunal is not constituted within 90 days of such order or award. Under paragraph 12, the parties agree that such orders shall be binding on

the parties from the date it is made and undertake to carry out the interim order immediately and without delay.

26. No doubt, as has been submitted, the 246th Law Commission Report did provide for the insertion of an Emergency Arbitrator's orders into Section 2(1)(d) of the Arbitration Act as follows:

> "Amendment of Section 2
>
> 1. In section 2 of the Arbitration and Conciliation Act, 1996,–
>
> (i) In sub-section (1), clause (d), after the words "…panel of arbitrators" add "and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator;"
>
> [**NOTE**: This amendment is to ensure that institutional rules such as the SIAC Arbitration Rules which provide for an emergency arbitrator are given statutory recognition in India.]"

27. As has been held in **Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd.**, (2021) 4 SCC 713, the mere fact that a recommendation of a Law Commission Report is not followed by Parliament, would not necessarily lead to the conclusion that what has been suggested by the Law Commission cannot form part of the statute as properly interpreted. This Court held:

> "**27.** Mr Saurabh Kirpal took exception to Sikri, J.'s judgment in that Sikri, J. did not refer to Para 52 of the 246th Law Commission Report and its aftermath. Para 52 of the 246th Law Commission Report reads as follows:

> "*52*. The Commission believes that it is important to set this entire controversy to a rest and make issues of fraud expressly arbitrable and to this end has proposed amendments to Section 16."

The Law Commission then added, by way of amendment, a proposed Section 16(7) as follows:

> "*Amendment of Section 16*
>
> *10*. In Section 16,
>
> After sub-section (6), insert sub-section "(7) The Arbitral Tribunal shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption, etc."
>
> [**Note**: This amendment is proposed in the light of the Supreme Court decisions (e.g. *N. Radhakrishnan* v. *Maestro Engineers* [*N. Radhakrishnan* v. *Maestro Engineers*, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12]) which appear to denude an Arbitral Tribunal of the power to decide on issues of fraud, etc.]"

28. Mr Saurabh Kirpal then referred to the fact that the aforesaid sub-section was not inserted by Parliament by the 2015 Amendment Act, which largely incorporated other amendments proposed by the Law Commission. His argument therefore was that *N. Radhakrishnan* [*N. Radhakrishnan* v. *Maestro Engineers*, (2010) 1 SCC 72] not having been legislatively overruled, cannot now be said to be in any way deprived of its precedential value, as Parliament has taken note of the proposed Section 16(7) in the 246th Law Commission Report, and has expressly chosen not to enact it. For this proposition, he referred to *La Pintada* [*President of India* v. *La Pintada Compania Navigacion SA*, 1985 AC 104 : (1984) 3 WLR 10 (HL)]. This judgment related to a challenge to an award granting compound interest, inter alia, in a case where a debt is paid late, but before any proceedings for its recovery had begun.

28. He then referred to the fact that the aforesaid sub-section was not inserted by Parliament by the 2015 Amendment Act, which largely incorporated other amendments proposed by the

Law Commission. His argument therefore was that *N. Radhakrishnan* [*N. Radhakrishnan* v. *Maestro Engineers*, (2010) 1 SCC 72] not having been legislatively overruled, cannot now be said to be in any way deprived of its precedential value, as Parliament has taken note of the proposed section 16(7) in the 246th Law Commission Report, and has expressly chosen not to enact it. For this proposition, he referred to *La Pintada* (supra). This judgment related to a challenge to an award granting compound interest, *inter alia*, in a case where a debt is paid late, but before any proceedings for its recovery had begun.

29. Lord Brandon of Oakbrook, who wrote the main judgment in this case, stated: (*La Pintada case* [*President of India* v. *La Pintada Compania Navigacion SA*, 1985 AC 104 : (1984) 3 WLR 10 (HL)] , AC p. 122)

> "There are three cases in which the absence of any common law remedy for damage or loss caused by the late payment of a debt may arise, cases which I shall in what follows describe for convenience as Case 1, Case 2 and Case 3. Case 1 is where a debt is paid late, before any proceedings for its recovery have been begun. Case 2 is where a debt is paid late, after proceedings for its recovery have been begun, but before they have been concluded. Case 3 is where a debt remains unpaid until as a result of proceedings for its recovery being brought and prosecuted to a conclusion, a money judgment is given in which the original debt becomes merged."

* * *

"**32.** It is a little difficult to apply this case to resurrect the ratio of *N. Radhakrishnan* [*N. Radhakrishnan* v. *Maestro Engineers*, (2010) 1 SCC 72] as a binding precedent given the advance made in the law by this Court since *N. Radhakrishnan* was decided. Quite apart from what has been stated by us in paras 17 to 21 above, as to how *N. Radhakrishnan* cannot be considered to be a binding precedent for the reasons given in the said paragraph, we are of the view that the development of the law by this Court cannot be thwarted merely because a certain provision recommended in a Law Commission Report is not enacted by Parliament. Parliament may have felt, as was

mentioned by Lord Reid in *British Railways Board* v. *Herrington* [*British Railways Board* v. *Herrington*, 1972 AC 877 : 1972 2 WLR 537 (HL)] , that it was unable to make up its mind and instead, leave it to the courts to continue, case by case, deciding upon what should constitute the fraud exception. [This case is referred to in Lord Brandon's judgment in *La Pintada*, 1985 AC 104 : (1984) 3 WLR 10 (HL) and distinguished at AC p. 130 of his judgment.] Parliament may also have thought that Section 16(7), proposed by the Law Commission, is clumsily worded as it speaks of "a serious question of law, complicated questions of fact, or allegations of fraud, corruption, etc." *N. Radhakrishnan* did not lay down that serious questions of law or complicated questions of fact are non-arbitrable. Further, "allegations of fraud, corruption, *etc*." is vague. For this reason also, Parliament may have left it to the courts to work out the fraud exception. In any case, we have pointed out that dehors any such provision, the ratio in *N. Radhakrishnan*, being based upon a judgment under the 1940 Act, and without considering Sections 5, 8 and 16 of the 1996 Act in their proper perspective, would all show that the law laid down in this case cannot now be applied as a precedent for application of the fraud mantra to negate arbitral proceedings. For the reasons given in this judgment, the House of Lords' decision would have no application inasmuch as *N. Radhakrishnan* has been tackled on the judicial side and has been found to be wanting."

28. It is pertinent to note that the High-Level Committee constituted by the Government of India under the chairmanship of Justice B.N. Srikrishna (Retd.) to review the institutionalisation of arbitration mechanism in India and look into the provisions of the Arbitration Act after the 2015 Amendment Act, submitted a report on 30th July, 2017 ["**Srikrishna Committee Report**"], in which it is stated as follows:

"**16. Enforcement of emergency awards**

There is significant uncertainty in the law regarding the enforceability of emergency awards in arbitrations seated in India. The LCI in its 246th Report had recommended recognising the concept of emergency arbitrator by widening the definition of arbitral tribunal under section 2(d) of the ACA to include emergency arbitrator. However, this recommendation was not incorporated in the 2015 Amendment Act.

While one could possibly rely on section 17(2) of the ACA to enforce emergency awards for arbitrations seated in India, the Delhi High Court decision in *Raffles Design International India Pvt. Ltd.& Anr. v. Educomp Professional Education Ltd. & Ors.*, (2016) 234 DLT 349 held that an emergency award in an arbitration seated outside India is not enforceable in India.

India's approach differs from that of developed arbitration jurisdictions such as Singapore and Hong Kong which have recognised the enforceability of orders given by an emergency arbitrator. Singapore amended the IAA in 2012 to broaden the definition of 'arbitral tribunal' in section 2(1) to include emergency arbitrator(s). Hong Kong amended the AO in 2013 to include Part 3A which deals with the enforcement of emergency relief. Section 22B provides that emergency relief granted by an emergency arbitrator shall with the leave of the Court of First Instance of the High Court be enforceable in the same manner as an order or direction of the Court.

Given that international practice is in favour of enforcing emergency awards (Singapore, Hong Kong and the United Kingdom all permit enforcement of emergency awards), it is time that India permitted the enforcement of emergency awards in all arbitral proceedings. This would also provide legislative support to rules of arbitral institutions that presently provide for emergency arbitrators (*See* Dennis Nolan and Roger Abrams, 'Arbitral Immunity', Berkeley Journal of Employment and Labour Law, Vol. 11 Issue 2 (1989), pp.228–266). For this purpose, the recommendation made by the LCI in its 246th Report may be adopted."

29. The Delhi High Court judgment in **Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd.**, 2016 SCC OnLine Del 5521 : (2016) 234 DLT 349 dealt with an award by an Emergency Arbitrator in an arbitration seated outside India (as was mentioned in Srikrishna Committee Report). What is of significance is that the said Report laid down that it is possible to interpret Section 17(2) of the Act to enforce emergency awards for arbitrations seated in India, and recommended that the Act be amended only so that it comes in line with international practice in favour of recognising and enforcing an emergency award.

30. It is relevant to note that the 246th Law Commission Report also recommended the insertion of Section 9(2) and 9(3) as follows:

> "Amendment of Section 9
>
> **6.** In section 9,
>
> (i) before the words "A party may, before" add sub-section "(1)"
>
> (ii) after the words "any proceedings before it" add sub-section "(2) Where, before the arbitral proceedings, a Court grants any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within 60 days from the date of such grant or within such shorter or further time as indicated by the Court, failing which the interim measure of protection shall cease to operate.
>
> [**NOTE**: This amendment is to ensure the timely initiation of arbitration proceedings by a party who is granted an interim measure of protection.]

(iii) Add sub-section "(3) Once the Arbitral Tribunal has been constituted, the Court shall, ordinarily, not entertain an Application under this provision unless circumstances exist owing to which the remedy under section 17 is not efficacious."

[**NOTE**: This amendment seeks to reduce the role of the Court in relation to grant of interim measures once the Arbitral Tribunal has been constituted. After all, once the Tribunal is seized of the matter it is most appropriate for the Tribunal to hear all interim applications. This also appears to be the spirit of the UNCITRAL Model Law as amended in 2006.

Accordingly, section 17 has been amended to provide the Arbitral Tribunal the same powers as a Court would have under section 9]"

31. The 2015 Amendment Act, therefore, introduced sub-sections (2) and (3) to Section 9, which read as follows:

"**9. Interim measures, etc. by Court**.—

* * *

(2) Where, before the commencement of the arbitral proceedings, a court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the court may determine.

(3) Once the arbitral tribunal has been constituted, the court shall not entertain an application under sub-section (1), unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious."

32. In essence, what is provided by the SIAC Rules and the other institutional rules, is reflected in Sections 9(2) and 9(3) so far as interim orders passed by courts are concerned. The introduction of Sections 9(2)

and 9(3) would show that the objective was to avoid courts being flooded with Section 9 petitions when an arbitral tribunal is constituted for two good reasons – (i) that the clogged court system ought to be decongested, and (ii) that an arbitral tribunal, once constituted, would be able to grant interim relief in a timely and efficacious manner.

33. Similarly, the 246th Law Commission Report recommended the amendment of Section 17 as follows:

> "Amendment of Section 17
>
> **11.** In section 17
>
> * * *
>
> (vi) In sub-section (1), after sub-clause "(d)", insert sub-clause "(e) such other interim measure of protection as may appear to the Arbitral Tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders as the Court has for the purpose of, and in relation to, any proceedings before it."
>
> [**NOTE**: This is to provide the arbitral tribunal the same powers as a civil court in relation to grant of interim measures. When this provision is read in conjunction with section 9(2), parties will by default be forced to approach the Arbitral Tribunal for interim relief once the Tribunal has been constituted. The Arbitral Tribunal would continue to have powers to grant interim relief post-award. This regime would decrease the burden on Courts. Further, this would also be in tune with the spirit of the UNCITRAL Model Law as amended in 2006.]
>
> (vii) delete words in sub-section (2) and add the words "(2) Subject to any orders passed in appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an Order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an Order of the Court."

[**NOTE**: This is to ensure the effective enforcement of interim measures that may be ordered by an arbitral tribunal.]"

34. Section 17 was then amended by the very same 2015 Amendment Act (which brought in sub-sections (2) and (3) to Section 9) to substitute Section 17 so that Section 17(1) would be a mirror image of Section 9(1), making it clear that an arbitral tribunal is fully clothed with the same power as a court to provide for interim relief. Also, Section 17(2) was added so as to provide for enforceability of such orders, again, as if they were orders passed by a court, thereby bringing Section 17 on par with Section 9.

35. An Emergency Arbitrator's "award", i.e., order, would undoubtedly be an order which furthers these very objectives, i.e., to decongest the court system and to give the parties urgent interim relief in cases which deserve such relief. Given the fact that party autonomy is respected by the Act and that there is otherwise no interdict against an Emergency Arbitrator being appointed, as has been held by us hereinabove, it is clear that an Emergency Arbitrator's order, which is exactly like an order of an arbitral tribunal once properly constituted, in that parties have to be heard and reasons are to be given, would fall within the institutional rules to which the parties have agreed, and would consequently be covered by Section 17(1), when read with the other provisions of the Act, as delineated above.

36. A party cannot be heard to say, after it participates in an Emergency Award proceeding, having agreed to institutional rules made in that regard, that thereafter it will not be bound by an Emergency Arbitrator's ruling. As we have seen hereinabove, having agreed to paragraph 12 of Schedule 1 to the SIAC Rules, it cannot lie in the mouth of a party to ignore an Emergency Arbitrator's award by stating that it is a nullity when such party expressly agrees to the binding nature of such award from the date it is made and further undertakes to carry out the said interim order immediately and without delay.

37. However, Mr. Viswanathan argued that an Emergency Arbitrator under the SIAC Rules is not an independent judicial body like an arbitral tribunal constituted under the very Rules, and referred to and relied upon Rules 3, 9, and 10 to buttress this proposition. Rule 3 merely states that the President may appoint an Emergency Arbitrator if he determines that the SIAC should accept the application for emergency interim relief. Once the Emergency Arbitrator enters upon the reference, he is given all the powers of an arbitral tribunal under Rule 7 and is to decide completely independently of any other administrative authority under the SIAC Rules. Equally, Rule 9 does not, in any manner, impinge upon the independence of the Emergency Arbitrator as it only lays down the timeframe within which

an interim order or award is to be made, which time is extendable by the Registrar. The interim order or award that is finally made by the Emergency Arbitrator has only to be approved by the Registrar as to its "form" and not on merits. Further, Rule 10 also does not, in any manner, interfere with the independence of the decision of the Emergency Arbitrator. This argument is, therefore, rejected.

38. Mr. Viswanathan also went on to argue, relying upon Section 28 of the Contract Act, Justice R.S. Bachawat's *Law of Arbitration and Conciliation* (Sixth Ed., LexisNexis), and the Chancery Division judgment of *In Re Franklin and Swathling's Arbitration*, [1929] 1 Ch. 238, for the proposition that arbitration, conceptually, is an ouster of the civil court's jurisdiction and that, therefore, only what is expressly provided in the ouster provisions can be followed – there is no room for any implication here. This argument may have found favour with a court if it were dealing with Arbitration Act, 1940. As has been held in several decisions of this Court, the Arbitration and Conciliation Act, 1996 is a complete break with the past and is no longer to be viewed as an ouster statute but as a statute which favours the remedy of arbitration so as to de-clog civil courts which are, in today's milieu, extremely burdened. As a matter of fact, Section 5 of the Arbitration Act puts paid to the submission when it overrides all other laws

for the time being in force and goes on to state that in matters governed by Part I of the Act, no judicial authority shall intervene except where so provided in that Part. The Arbitration Act, therefore, turns the principle of ouster on its head when it comes to arbitration as a favoured means of resolving civil disputes. This argument also, therefore, stands rejected.

39. Even otherwise, as has been correctly pointed out by Mr. Subramanium, no order bears the stamp of invalidity on its forehead and has to be set aside in regular court proceedings as being illegal. This is felicitously stated in several judgments – *See* **Krishnadevi Malchand Kamathia v. Bombay Environmental Action Group**, (2011) 3 SCC 363 (at paragraphs 16 to 19), and **Anita International v. Tungabadra Sugar Works Mazdoor Sangh**, (2016) 9 SCC 44 (at paragraphs 54 and 55). As a matter of fact, in **Tayabbhai M. Bagasarwalla v. Hind Rubber Industries (P) Ltd.**, (1997) 3 SCC 443, this Court has unequivocally held that even if an order is later set aside as having been passed without jurisdiction, for the period of its subsistence, it is an order that must be obeyed. This Court held:

> "**15.** The next thing to be noticed is that certain interim orders were asked for and were granted by the Civil Court during this period. Would it be right to say that violation of and disobedience to the said orders of injunction is not punishable because it has been found later that the Civil Court had no

jurisdiction to entertain the suit. Mr Sorabjee suggests that saying so would be subversive of the Rule of Law and would seriously erode the majesty and dignity of the courts. It would mean, suggests the learned counsel, that it would be open to the defendants-respondents to decide for themselves whether the order was with or without jurisdiction and act upon that belief. This can never be, says the learned counsel. He further suggests that if any party thinks that an order made by the Civil Court is without jurisdiction or is contrary to law, the appropriate course open to him is to approach that court with that plea and ask for vacating the order. But it is not open to him to flout the said order assuming that the order is without jurisdiction. It is this principle which has been recognised and incorporated in Section 9-A of Civil Procedure Code (inserted by Maharashtra Amendment Act No. 65 of 1977), says Mr Sorabjee. Section 9-A reads as follows:

> "9-A. *Where at the hearing of an application relating to interim relief in suit, objection to jurisdiction is taken, such issue to be decided by the Court as a preliminary issue.*— (1) Notwithstanding anything contained in this Code or any other law for the time being in force, if, at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the Court to entertain such suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of suit.
>
> (2) Notwithstanding anything contained in sub-section (1), at the hearing of any such application, the Court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction."

16. According to this section, if an objection is raised to the jurisdiction of the court at the hearing of an application for grant of, or for vacating, interim relief, the court should determine that issue in the first instance as a preliminary issue before granting or setting aside the relief already granted. An application raising objection to the jurisdiction to the court is directed to be heard with all expedition. Sub-rule (2), however, says that the command in sub-rule (1) does not preclude the court from granting such interim relief as it may consider necessary pending the decision on the question of jurisdiction. In our opinion, the provision merely states the obvious. It makes explicit what is implicit in law. Just because an objection to the jurisdiction is raised, the court does not become helpless forthwith — nor does it become incompetent to grant the interim relief. It can. At the same time, it should also decide the objection to jurisdiction at the earliest possible moment. This is the general principle and this is what Section 9-A reiterates. Take this very case. The plaintiff asked for temporary injunction. An ad interim injunction was granted. Then the defendants came forward objecting to the grant of injunction and also raising an objection to the jurisdiction of the court. The court overruled the objection as to jurisdiction and made the interim injunction absolute. The defendants filed an appeal against the decision on the question of jurisdiction. While that appeal was pending, several other interim orders were passed both by the Civil Court as well as by the High Court. Ultimately, no doubt, the High Court has found that the Civil Court had no jurisdiction to entertain the suit but all this took about six years. Can it be said that orders passed by the Civil Court and the High Court during this period of six years were all non est and that it is open to the defendants to flout them merrily, without fear of any consequence. Admittedly, this could not be done until the High Court's decision on the question of jurisdiction. The question is whether the said decision of the High Court means that no person can be punished for flouting or disobeying the interim/interlocutory orders while they were in force, i.e., for violations and disobedience committed prior to the decision of the High Court on the question of jurisdiction. Holding that by virtue of the said decision of the High Court (on the question of jurisdiction), no one can be punished thereafter for

disobedience or violation of the interim orders committed prior to the said decision of the High Court, would indeed be subversive of the Rule of Law and would seriously erode the dignity and the authority of the courts. We must repeat that this is not even a case where a suit was filed in the wrong court knowingly or only with a view to snatch an interim order. As pointed out hereinabove, the suit was filed in the Civil Court bona fide. We are of the opinion that in such a case the defendants cannot escape the consequences of their disobedience and violation of the interim injunction committed by them prior to the High Court's decision on the question of jurisdiction.

* * *

"**27.** The learned counsel for Defendants 1 and 2 submitted that this is not a proceeding for contempt but a proceeding under Rule 2-A of Order 39 of the Civil Procedure Code. The learned counsel submitted that proceedings under Order 39 Rule 2-A are a part of the coercive process to secure obedience to its injunction and that once it is found that the Court has no jurisdiction, question of securing obedience to its orders any further does not arise. The learned counsel also submitted that enforcing the interim order *after* it is found that the Court had no jurisdiction to try the said suit would not only be unjust and illegal but would also reflect adversely upon the dignity and authority of the Court. It is also suggested that the plaintiff had instituted the present suit in the Civil Court knowing fully well that it had no jurisdiction to try it. It is not possible to agree with any of these submissions not only on principle but also in the light of the specific provision contained in Section 9-A of the Code of Civil Procedure (Maharashtra Amendment). In the light of the said provision, it would not be right to say that the Civil Court had no jurisdiction to pass interim orders or interim injunction, as the case may be, pending decision on the question of jurisdiction. The orders made were within the jurisdiction of the Court and once this is so, they have to be obeyed and implemented. It is not as if the defendants are being sought to be punished for violations committed *after* the decision of the High Court on the question of jurisdiction of the Civil Court. Here the defendants are sought to be punished for the disobedience and violation of the order of injunction

> committed *before* the decision of the High Court in *Vishanji Virji Mepani* [AIR 1996 Bom 366]. According to Section 9-A, the Civil Court and the High Court did have the power to pass interim orders until that decision. If they had that power, they must also have the power to enforce them. In the light of the said provision, it cannot also be held that those orders could be enforced only till the said decision but not thereafter. The said decision does not render them (the interim orders passed meanwhile) either non est or without jurisdiction. Punishing the defendants for violation of the said orders committed before the said decision (*Vishanji Virji Mepani* [AIR 1996 Bom 366]) does not amount, in any event, to enforcing them after the said decision. Only the orders are being passed now. The violations are those committed before the said decision."

40. However, learned counsel for the Respondents referred to and relied upon the classic passage in **Kiran Singh v. Chaman Paswan**, (1955) 1 SCR 117 (at page 122) and various other judgments following it to contend that in cases of inherent lack of jurisdiction, it would be open to a party to ignore an award by an Emergency Arbitrator. They also referred to the judgment in **CIT v. Pearl Mechanical Engineering & Foundry Works (P) Ltd.**, (2004) 4 SCC 597, where this Court spoke of the jurisdiction of a court or tribunal by stating that such jurisdiction only subsists when a court or tribunal exercises such jurisdiction from the law. It is a power which nobody on whom the law is not conferred can exercise. None of these judgments are applicable in the fact situation of the present case. On the contrary, we have pointed out that no party, after agreeing to be governed

by institutional rules, can participate in a proceeding before an Emergency Arbitrator and, after losing, turn around and say that the award is a nullity or *coram non judice* when there is nothing in the Arbitration Act which interdicts an Emergency Arbitrator's order from being made. As has been pointed out, Section 17, as construed in the light of the other provisions of the Act, clearly leads to the position that such emergency award is made under the provisions of Section 17(1) and can be enforced under the provisions of Section 17(2).

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.

42. We now come to the question as to the maintainability of the appeal that has been filed under Order XLIII, Rule 1(r). Order XLIII, Rule 1(r) reads as under:

"**ORDER XLIII – Appeals from Orders**

1. Appeals from orders.—An appeal shall lie from the following orders under the provisions of Section 104, namely:—

* * *

(*r*) an order under Rule 1, Rule 2, Rule 2-A, Rule 4 or Rule 10 of Order XXXIX;"

43. In order to answer this question, it is important to advert to Sections 9, 17, and 37 of the Arbitration Act. Section 9(1) reads as follows:

"**9. Interim measures, etc. by Court**.—(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:—

(*i*) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(*ii*) for an interim measure of protection in respect of any of the following matters, namely:—

(*a*) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(*b*) securing the amount in dispute in the arbitration;

(*c*) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(*d*) interim injunction or the appointment of a receiver;

(*e*) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

After the 2015 Amendment Act, Section 17(1), which, as has been stated hereinabove, is now a mirror image of Section 9(1), reads as follows:

"**17. Interim measures ordered by arbitral tribunal**.—(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal—

(*i*) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(*ii*) for an interim measure of protection in respect of any of the following matters, namely—

(*a*) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(*b*) securing the amount in dispute in the arbitration;

(*c*) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(*d*) interim injunction or the appointment of a receiver;

(*e*) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it."

Section 17(2), which was also introduced by the same Amendment Act, reads:

> "**17. Interim measures ordered by arbitral tribunal**.—
>
> * * *
>
> (2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the court."

Section 37, within the four corners of which appeals against orders are to be made under the Arbitration Act, reads as follows:

> "**37. Appealable orders**.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—
>
> (*a*) refusing to refer the parties to arbitration under Section 8;
>
> (*b*) granting or refusing to grant any measure under Section 9;
>
> (*c*) setting aside or refusing to set aside an arbitral award under Section 34.
>
> (2) An appeal shall also lie to a court from an order of the arbitral tribunal—
>
> (*a*) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or
>
> (*b*) granting or refusing to grant an interim measure under Section 17.
>
> (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

44. As has been pointed out hereinabove, the Law Commission recommended an amendment to Section 17 to provide the arbitral tribunal the same powers as a court would have under Section 9.

45. Section 9(1), after setting out in clauses (i) and (ii) what interim measures or protection could be granted, then goes on to add, "*and the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it*".

46. The italicised words arose for interpretation in **Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.**, (2007) 7 SCC 125. In paragraph 11 of the judgment, this Court held:

> "**11.** It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought

to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."

47. Quite apart from the above, the language of the last part of Section 9(1) clearly refers to Section 94 of the Code of Civil Procedure read with Order XXXIX thereof. Section 94 of the Code of Civil Procedure reads as follows:

> "**94. Supplemental proceedings**.—In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—
>
> (*a*) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;
>
> (*b*) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;
>
> (*c*) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;
>
> (*d*) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
>
> (*e*) make such other interlocutory orders as may appear to the Court to be just and convenient."

Order XXXIX, Rules 1, 2, and 2-A read as follows:

"**ORDER XXXIX**

Temporary injunctions

1. Cases in which temporary injunction may be granted.—Where in any suit it is proved by affidavit or otherwise—

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(*b*) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(*c*) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.

2. Injunction to restrain repetition or continuance of breach.—(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

> **2-A. Consequence of disobedience or breach of injunction**.—(1) In the case of disobedience of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, of the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.
>
> (2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto."

Prior to the Code of Civil Procedure (Amendment) Act, 1976 ["**1976 Amendment Act**"], disobedience of an injunction or breach of any of its terms was enforced under sub-rules (3) and (4) of Order XXXIX, Rule 2 as follows:

> "**2. Injunction to restrain repetition or continuance of breach**.—
>
> * * *
>
> (3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release."
>
> (4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it

> thinks fit, and shall pay the balance, if any, to the party entitled thereto."

A controversy arose as to whether sub-rules (3) and (4) to Rule 2 applied to breach of injunctions that were granted under Rule 1 of Order XXXIX. This controversy was set at rest by omitting sub-rules (3) and (4) from Order XXXIX, Rule 2 and introducing a new Rule 2-A to Order XXXIX. The Statement of Objects and Reasons for this provision read as follows:

> "**Clause 89 – Sub-rule (iii) –** New Rule 2-A is being inserted to provide for the consequences of a breach of an injunction issued under Rule 1 which is, at present, not covered. The amendment is intended to seek the application of the provisions for breach, which are, at present, available under an injunction granted under Rule 2, to the said class of cases as well. There is a controversy as to whether under the existing provision, a court to which a suit is transferred can punish disobedience of an injunction issued by the predecessor court. New Rule 2-A provides that the transferee court can also exercise that power." (*See* Gazette of Ind., 8th April 1974, Pt. II, S. 2. Ext. p. 335)

48. A reading of Order XXXIX, Rule 2(3) and 2(4) as it originally stood, and Order XXXIX, Rule 2-A as it stands after the 1976 Amendment Act is to "prescribe" under Section 94 of the Code of Civil Procedure as to what is the consequence when a temporary injunction order and/or an order appointing a receiver of property is flouted. The consequences are mentioned in Sections 94(c) and (d) itself and fleshed out by Order XXXIX as aforesaid.

49. Mr. Nankani cited the judgment of **Food Corporation of India v. Sukh Deo Prasad**, (2009) 5 SCC 665, in which he relied upon the following observations of this Court:

> "**38.** The power exercised by a court under Order 39 Rule 2-A of the Code is punitive in nature, akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. The person who complains of disobedience or breach has to clearly make out beyond any doubt that there was an injunction or order directing the person against whom the application is made, to do or desist from doing some specific thing or act and that there was disobedience or breach of such order. While considering an application under Order 39 Rule 2-A, the court cannot construe the order in regard to which disobedience/breach is alleged, as creating an obligation to do something which is not mentioned in the "order", on surmises, suspicions and inferences. The power under Rule 2-A should be exercised with great caution and responsibility."

He also relied upon the judgment of **U.C. Surendranath v. Mambally's Bakery**, (2019) 20 SCC 666, and paragraph 7 in particular, which states:

> "**7.** For finding a person guilty of wilful disobedience of the order under Order 39 Rule 2-A CPC there has to be not mere "disobedience" but it should be a "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 a "wilful disobedience". As pointed out earlier, during the second visit of the Commissioner to the appellant's shop, tea cakes and masala cakes were being sold without any wrappers/labels. The only thing which the Commissioner has noted is that "non-removal of the hoarding" displayed in front of the appellant's shop for which the appellant has offered an explanation which, in our considered view, is acceptable one."

50. It is one thing to say that the power exercised by a court under Order XXXIX, Rule 2-A is punitive in nature and akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. It is quite another thing to say that Order XXXIX, Rule 2-A requires not "mere disobedience" but "wilful disobedience". We are *prima facie* of the view that the latter judgment in adding the word "wilful" into Order XXXIX, Rule 2-A is not quite correct and may require to be reviewed by a larger Bench. Suffice it to say that there is a vast difference between enforcement of orders passed under Order XXXIX, Rules 1 and 2 and orders made in contempt of court. Orders which are in contempt of court are made primarily to punish the offender by imposing a fine or a jail sentence or both. On the other hand, Order XXXIX, Rule 2-A is primarily intended to enforce orders passed under Order XXXIX, Rules 1 and 2, and for that purpose, civil courts are given vast powers which include the power to attach property, apart from passing orders of imprisonment, which are punitive in nature.[1] Orders passed under Section 17(2) of the Arbitration Act, using the power contained in Order XXXIX, Rule 2-A are, therefore, properly referable only to the Arbitration

1 When an order for permanent injunction is to be enforced, Order XXI, Rule 32 provides for attachment and/or detention in a civil prison. Orders that are passed under Order XXI, Rule 32 are primarily intended to enforce injunction decrees by methods similar to those contained in Order XXXIX, Rule 2-A. This also shows the object of Order XXXIX, Rule 2-A is primarily to enforce orders of interim injunction.

Act. Neither of the aforesaid judgments are an authority for any proposition of law to the contrary.

51. It is well settled that the expression “in relation to”, which occurs in both Section 9(1) and Section 17(1), is an expression which is comprehensive in nature, having both a direct as well as an indirect significance. Thus, in **Bandekar Brothers Pvt. Ltd. v. Prasad Vassudev Keni**, 2020 SCC OnLine SC 707 this Court held:

> “**20.** The words “in relation to” have been the subject matter of judicial discussion in many judgments. Suffice it to say that for the present, two such judgments need to be noticed. In *State Wakf Board, Madras* v. *Abdul Azeez Sahib*, AIR 1968 Mad. 79, the expression “relating to” contained in Section 57(1) of the Wakf Act, 1954 fell for consideration before the Madras High Court. The High Court held:
>
> > “*8.* We have no doubt whatever that the learned Judge, (Kailasam, J.), was correct in his view that even the second suit has to be interpreted as within the scope of the words employed in S. 57(1) namely, “In every suit or proceeding relating to title to Wakf property”. There is ample judicial authority for the view that such words as “relating to” or “in relation to” are words of comprehensiveness which might both have a direct significance as well as an indirect significance, depending on the context. They are not words of restrictive content and ought not to be so construed. The matter has come up for judicial determination in more than one instance. The case in *Compagnie Financiec Dae Pacifique* v. *Peruvian Guano Co*, is of great interest, on this particular aspect and the judgment of Brett, L.J., expounds the interpretation of O. 31, R. 12 of the Rules of the Supreme Court, 1875, in the context of the phrase “material to any matter in question in the action”. Brett, L.J., observed that this could both be direct as well as indirect in

consequences and according to the learned Judge the test was this (at page 63):

> "…a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of inquiry, which may have either of these consequences.""

21. Likewise, in *Mansukhlal Dhanraj Jain* v. *Eknath Vithal Ogale*, (1995) 2 SCC 665, the expression "Suits and proceedings between a licensor and licensee…relating to the recovery of possession" under Section 41(1) of the Presidency Small Cause Courts Act, 1882 came up for consideration before this Court. The Court held:

> "*14.* …The words 'relating to' are of wide import and can take in their sweep any suit in which the grievance is made that the defendant is threatening to illegally recover possession from the plaintiff-licensee. Suits for protecting such possession of immovable property against the alleged illegal attempts on the part of the defendant to forcibly recover such possession from the plaintiff, can clearly get covered by the wide sweep of the words "relating to recovery of possession" as employed by Section 41(1)."
>
> * * *
>
> "*16.* It is, therefore, obvious that the phrase "relating to recovery of possession" as found in Section 41(1) of the Small Cause Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase. Consequently, in the light of the averments in the plaints under consideration and the prayers sought for therein, on the clear language of Section 41(1), the conclusion is inevitable that these suits could lie within the exclusive jurisdiction of Small Cause

Court, Bombay and the City Civil Court would have no jurisdiction to entertain such suits."

52. As a matter of fact, the judgment of this Court in **Thyssen Stahlunion Gmbh v. Steel Authority of India Ltd.**, (1999) 9 SCC 334, set out Section 85 of the Arbitration Act in paragraph 2 as follows:

"**2.** This Section 85 of the new Act we reproduce at the outset:

"85. *Repeal and savings*.—(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal,—

(*a*) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(*b*) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

The expression "in relation to" appears in Section 85(2)(a). The question which arose before the Court, and which was answered by the Court, was whether enforcement proceedings would be included within the ambit of Section 85(2)(a). Holding that they did, this Court opined:

"**32.** …… We are, therefore, of the opinion that it would be the provisions of the old Act that would apply to the enforcement of

> the award in the case of Civil Appeal No. 6036 of 1998. Any other construction on Section 85(2)(*a*) would only lead to confusion and hardship. This construction put by us is consistent with the wording of Section 85(2)(*a*) using the terms "provision" and "in relation to arbitral proceedings" which would mean that once the arbitral proceedings commenced under the old Act it would be the old Act which would apply for enforcing the award as well."

This passage was referred to by this Court in **BCCI v. Kochi Cricket (P) Ltd.**, (2018) 6 SCC 287, in paragraph 69, as follows:

> "**69.** However, Shri Viswanathan strongly relied upon the observations made in para 32 in *Thyssen* [*Thyssen Stahlunion GmbH* v. *SAIL*, (1999) 9 SCC 334] and the judgment in *Hameed Joharan* v. *Abdul Salam* [*Hameed Joharan* v. *Abdul Salam*, (2001) 7 SCC 573]. It is no doubt true that para 32 in *Thyssen* [*Thyssen Stahlunion GmbH* v. *SAIL*, (1999) 9 SCC 334] does, at first blush, support Shri Viswanathan's stand. However, this was stated in the context of the machinery for enforcement under Section 17 of the 1940 Act which, as we have seen, differs from Section 36 of the 1996 Act, because of the expression "in relation to arbitral proceedings", which took in the entire gamut, starting from the arbitral proceedings before the Arbitral Tribunal and ending up with enforcement of the award. It was also in the context of the structure of the 1940 Act being completely different from the structure of the 1996 Act, which repealed the 1940 Act. ……"

Finally, however, this Court held that Section 36, as amended by the 2015 Amendment Act, should apply to Section 34 applications filed even before the commencement of the 2015 Amendment Act.

53. Coupled with this, the expression “any proceedings”, occurring in Section 9(1) and Section 17(1), would also be an expression comprehensive enough to take in enforcement proceedings. The expression “any” has been construed by some of the judgments of this Court. Thus, in **Shri Balaganesan Metals v. M.N. Shanmugham Chetty**, (1987) 2 SCC 707, in context of Section 10(3)(c) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, this Court held as follows:

> “**18.** In construing Section 10(3)(c) it is pertinent to note that the words used are “any tenant” and not “a tenant” who can be called upon to vacate the portion in his occupation. The word “any” has the following meaning:
>
> > “some; one of many; an indefinite number. One indiscriminately or whatever kind or quantity.
> >
> > Word ‘any’ has a diversity of meaning and may be employed to indicate ‘all’ or ‘every’ as well as ‘some’ or ‘one’ and its meaning in a given statute depends upon the context and the subject-matter of the statute.
> >
> > It is often synonymous with ‘either’, ‘every’ or ‘all’. Its generality may be restricted by the context;” (*Black’s Law Dictionary*, 5th Ed.)
>
> **19.** Unless the legislature had intended that both classes of tenants can be asked to vacate by the Rent Controller for providing the landlord additional accommodation, be it for residential or non-residential purposes, it would not have used the word “any” instead of using the letter “a” to denote a tenant.”

Similarly, in **Lucknow Development Authority v. M.K. Gupta**, (1994) 1 SCC 243, this Court, while construing the word "service" under the Consumer Protection Act, 1986, held as follows:

> "**4.** What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of such property. The answer to all this shall depend on understanding of the word 'service'. The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. The concept of service thus is very wide. How it should be understood and what it means depends on the context in which it has been used in an enactment. Clause (*o*) of the definition section defines it as under:
>
> > "'service' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"
>
> It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionarily means 'one or some or all'. In *Black's Law Dictionary* it is explained thus, "word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject-matter of the statute". The use of the word 'any' in the context it has been

used in clause (*o*) indicates that it has been used in wider sense extending from one to all. …"

In **Union of India v. A.B. Shah**, (1996) 8 SCC 540, this Court, while examining the purport of the expression "at any time" contained in one of the conditions set by the Director General of Coal Mines in exercise of his powers under the Coal Mines Regulations, 1957 read with the Mines Act, 1952, held as follows:

"**12.** If we look into Conditions 3 and 6 with the object and purpose of the Act in mind, it has to be held that these conditions are not only relatable to what was required at the commencement of depillaring process, but the unstowing for the required length must exist always. The expression "at any time" finding place in Condition 6 has to mean, in the context in which it has been used, "at any point of time", the effect of which is that the required length must be maintained all the time. The accomplishment of object of the Act, one of which is safety in the mines, requires taking of such a view, especially in the backdrop of repeated mine disasters which have been taking, off and on, heavy toll of lives of the miners. It may be pointed out that the word 'any' has a diversity of meaning and in *Black's Law Dictionary* it has been stated that this word may be employed to indicate 'all' or 'every', and its meaning will depend "upon the context and subject-matter of the statute". A reference to what has been stated in *Stroud's Judicial Dictionary* Vol. I, is revealing inasmuch as the import of the word 'any' has been explained from pp. 145 to 153 of the 4th Edn., a perusal of which shows it has different connotations depending primarily on the subject-matter of the statute and the context of its use. A Bench of this Court in *Lucknow Development Authority* v. *M.K. Gupta* [(1994) 1 SCC 243], gave a very wide meaning to this word finding place in Section 2(*o*) of the Consumer Protection Act, 1986 defining 'service'. (*See* para 4)"

54. Properly so read, the expressions “in relation to” and “any proceedings” would include the power to enforce orders that are made under Section 9(1), and are not limited to incidental powers to make interim orders, as was suggested by Mr. Viswanathan. Thus, if an order under Section 9(1) is flouted by any party, proceedings for enforcement of the same are available to the court making such orders under Section 9(1). These powers are, therefore, traceable directly to Section 9(1) of the Act – which then takes us to the Code of Civil Procedure. Thus, an order made under Order XXXIX Rule 2-A, in enforcement of an order made under Section 9, would also be referable to Section 9(1) of the Arbitration Act.

55. Given the fact that the 2015 Amendment Act has provided in Section 17(1) the same powers to an arbitral tribunal as are given to a court, it would be anomalous to hold that if an interim order was passed by the tribunal and then enforced by the court with reference to Order XXXIX Rule 2-A of the Code of Civil Procedure, such order would not be referable to Section 17. Section 17(2) was necessitated because the earlier law on enforcement of an arbitral tribunal’s interim orders was found to be too cumbersome. Thus, in **Alka Chandewar v. Shamshul Ishrar Khan**, (2017) 16 SCC 119, this Court referred to the earlier position as follows:

"**8.** Coming to Shri Rana Mukherjee's submission that sub-section (2) of Section 17 introduced by the 2015 Amendment Act now provides for the necessary remedy against infraction of interim orders by the Tribunal, suffice it to state that the Law Commission itself, in its 246th Report, found the need to go one step further than what was provided in Section 27(5) as construed by the Delhi High Court [*Sri Krishan* v. *Anand*, 2009 SCC OnLine Del 2472 : (2009) 112 DRJ 657 : (2009) 3 Arb LR 447]. The Commission, in its Report, had this to say:

"*Powers of Tribunal to order interim measures*

46. Under Section 17, the Arbitral Tribunal has the power to order interim measures of protection, unless the parties have excluded such power by agreement. Section 17 is an important provision, which is crucial to the working of the arbitration system, since it ensures that even for the purposes of interim measures, the parties can approach the Arbitral Tribunal rather than await orders from a court. The efficacy of Section 17 is however, seriously compromised given the lack of any suitable statutory mechanism for the enforcement of such interim orders of the Arbitral Tribunal.

47. In *Sundaram Finance Ltd.* [*Sundaram Finance Ltd.* v. *NEPC India Ltd.*, (1999) 2 SCC 479], the Supreme Court observed that though Section 17 gives the Arbitral Tribunal the power to pass orders, the same cannot be enforced as orders of a court and it is for this reason only that Section 9 gives the court power to pass interim orders during the arbitration proceedings. Subsequently, in *Army Welfare Housing Organisation* v. *Sumangal Services (P) Ltd.*, (2004) 9 SCC 619, the Court had held that under Section 17 of the Act no power is conferred on the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof.

48. In the face of such categorical judicial opinion, the Delhi High Court attempted to find a suitable legislative basis for enforcing the orders of the Arbitral Tribunal under Section 17 in *Sri Krishan* v. *Anand,* 2009 SCC OnLine Del 2472 : (2009) 112 DRJ 657 : (2009) 3 Arb LR 447 [followed in *Indiabulls Financial Services Ltd.* v.

Jubilee Plots & Housing (P) Ltd., 2009 SCC OnLine Del 2458]. The Delhi High Court held that any person failing to comply with the order of the Arbitral Tribunal under Section 17 would be deemed to be "making any other default" or "guilty of any contempt to the Arbitral Tribunal during the conduct of the proceedings" under Section 27(5) of Act. The remedy of the aggrieved party would then be to apply to the Arbitral Tribunal for making a representation to the court to mete out appropriate punishment. Once such a representation is received by the court from the Arbitral Tribunal, the court would be competent to deal with such party in default as if it is in contempt of an order of the court i.e., either under the provisions of the Contempt of Courts Act or under the provisions of Order 39 Rule 2-A of the Code of Civil Procedure, 1908.

49. The Commission believes that while it is important to provide teeth to the interim orders of the Arbitral Tribunal as well as to provide for their enforcement, *the judgment of the Delhi High Court in Sri Krishan* v. *Anand*, 2009 SCC OnLine Del 2472 : (2009) 112 DRJ 657 : (2009) 3 Arb LR 447 *is not a complete solution*. The Commission has, therefore, recommended amendments to Section 17 of the Act which would give teeth to the orders of the Arbitral Tribunal and the same would be statutorily enforceable in the same manner as the orders of a court. In this respect, the views of the Commission are consistent with (though do not go as far as) the 2006 amendments to Article 17 of the UNCITRAL Model Law."

(emphasis in original)

9. Pursuant to this 246th Report, sub-section (2) to Section 17 was added by the 2015 Amendment Act, so that the cumbersome procedure of an Arbitral Tribunal having to apply every time to the High Court for contempt of its orders would no longer be necessary. Such orders would now be deemed to be orders of the court for all purposes and would be enforced under the Civil Procedure Code, 1908 in the same manner as if they were orders of the court. Thus, we do not find Shri Rana Mukherjee's submission to be of any substance in view of the

> fact that Section 17(2) was enacted for the purpose of providing a "complete solution" to the problem."

56. It was to remedy this situation that Section 17(2) was introduced. There is no doubt that the arbitral tribunal cannot itself enforce its orders, which can only be done by a court with reference to the Code of Civil Procedure. But the court, when it acts under Section 17(2), acts in the same manner as it acts to enforce a court order made under Section 9(1). If this is so, then what is clear is that the arbitral tribunal's order gets enforced under Section 17(2) read with the Code of Civil Procedure.

57. There is no doubt that Section 17(2) creates a legal fiction. This fiction is created only for the purpose of enforceability of interim orders made by the arbitral tribunal. To extend it to appeals being filed under the Code of Civil Procedure would be a big leap not envisaged by the legislature at all in enacting the said fiction. As a matter of fact, this Court, in **Paramjeet Singh Patheja v. ICDS Ltd.**, (2006) 13 SCC 322, dealt with Section 36 of the Arbitration Act as it stood immediately before the 2015 Amendment Act (Section 36 as it then stood is the mirror image of Section 36(1) post amendment). In answering the question raised before it – as to whether an arbitration award can be said to be a decree for the purpose of Section 9 of the Presidency Towns Insolvency Act, 1909, this Court held:

"**39.** Section 15 of the Arbitration Act, 1899 provides for "enforcing" the award as if it were a decree. Thus, a final award, without actually being followed by a decree (as was later provided by Section 17 of the Arbitration Act of 1940), could be enforced i.e., executed in the same manner as a decree. For this limited purpose of enforcement, the provisions of CPC were made available for realising the money awarded. However, the award remained an award and did not become a decree either as defined in CPC and much less so far the purposes of an entirely different statute such as the Insolvency Act are concerned.

40. Section 36 of the Arbitration and Conciliation Act of 1996 brings back the same situation as it existed from 1899 to 1940. Only under the Arbitration Act, 1940, was the award required to be made a rule of court i.e., required a judgment followed by a decree of court.

41. Issuance of a notice under the Insolvency Act is fraught with serious consequences: it is intended to bring about a drastic change in the status of the person against whom a notice is issued viz. to declare him an insolvent with all the attendant disabilities. Therefore, firstly, such a notice was intended to be issued only after a regularly constituted court, a component of the judicial organ established for the dispensation of justice, has passed a decree or order for the payment of money. Secondly, a notice under the Insolvency Act is not a mode of enforcing a debt; enforcement is done by taking steps for execution available under CPC for realising monies.

42. The words "*as if*" demonstrate that award and decree or order are two different things. <u>The legal fiction created is for the limited purpose of enforcement as a decree.</u> The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central."

(emphasis supplied)

58. Mr. Viswanathan cited the judgment **Rajasthan State Industrial Development & Investment Corporation v. Diamond & Gem Development Corporation Ltd.**, (2013) 5 SCC 470. Far from supporting

his contention that the legal fiction contained in Section 17(2) extends to the filing of an appeal under the Code of Civil Procedure as enforcement proceedings are different from interim orders, paragraph 26 states as follows:

> "**VI. *"As if"—Meaning of***
>
> **26.** The expression "as if" is used to make one applicable in respect of the other. The words "as if" create a legal fiction. By it, when a person is "deemed to be" something, the only meaning possible is that, while in reality he is not that something, but for the purposes of the Act of legislature he is required to be treated that something, and not otherwise. It is a well-settled rule of interpretation that, in construing the scope of a legal fiction, it would be proper and even necessary to assume all those facts on the basis of which alone such fiction can operate. The words "as if" in fact show the distinction between two things and, such words must be used only for a limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created. [Vide *Radhakissen Chamria* v. *Durga Prosad Chamria* [(1939-40) 67 IA 360 : (1940) 52 LW 647 : AIR 1940 PC 167], *CIT* v. *S. Teja Singh* [AIR 1959 SC 352], *Ram Kishore Sen* v. *Union of India* [AIR 1966 SC 644], *Sher Singh* v. *Union of India* [(1984) 1 SCC 107 : AIR 1984 SC 200], *State of Maharashtra* v. *Laljit Rajshi Shah* [(2000) 2 SCC 699 : 2000 SCC (Cri) 533 : AIR 2000 SC 937], *Paramjeet Singh Patheja* v. *ICDS Ltd.* [(2006) 13 SCC 322 at p. 341, para 28] and *CIT* v. *Willamson Financial Services* [(2008) 2 SCC 202].]"
>
> (emphasis supplied)

The celebrated judgment in **East End Dwellings Co. Ltd. v. Finsbury Borough Council**, 1952 AC 109 : (1951) 2 All ER 587 (HL) then follows in

paragraph 27, followed by another judgment of this Court in paragraph 28, as follows:

> "**27.** In *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council* [1952 AC 109 : (1951) 2 All ER 587 (HL)] this Court approved the approach which stood adopted and followed persistently. It set out as under: (AC p. 133)
>
> > "… The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."
>
> **28.** In *Industrial Supplies (P) Ltd.* v. *Union of India* [(1980) 4 SCC 341] this Court observed as follows: (SCC p.351, para 25)
>
> > "*25.* It is now axiomatic that when a legal fiction is incorporated in a statute, the court has to ascertain for what purpose the fiction is created. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried to its logical conclusion. The court has to assume all the facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. The legal effect of the words 'as if he were' in the definition of 'owner' in Section 3(*n*) of the Nationalisation Act read with Section 2(1) of the Mines Act is that although the petitioners were not the owners, they being the contractors for the working of the mine in question, were to be treated as such though, in fact, they were not so."
>
> (emphasis supplied)

59. There can be no doubt that the legal fiction created under Section 17(2) for enforcement of interim orders is created only for the limited purpose of enforcement as a decree of the court. To extend this fiction to encompass appeals from such orders is to go beyond the clear intention of the legislature. Mr. Salve's argument in stressing the words "under the

Code of Civil Procedure" in Section 17(2), thus holds no water as a limited fiction for the purpose of enforcement cannot be elevated to the level of a genie which has been released from a statutory provision and which would encompass matters never in the contemplation of the legislature.

60. In a recent judgment of this Court in **Union of India v. Vedanta Ltd.**, (2020) 10 SCC 1, this Court held that a petition to enforce a foreign award, made under Section 49 of the Arbitration Act, is governed by Article 137 of the Limitation Act, 1963 and not by Article 136 of the said Act. This conclusion was arrived at as follows:

> "**69.** Section 36 of the Arbitration Act, 1996 creates a statutory fiction for the limited purpose of enforcement of a "domestic award" as a decree of the court, even though it is otherwise an award in an arbitral proceeding [*Umesh Goel* v. *H.P. Coop. Group Housing Society Ltd.*, (2016) 11 SCC 313 : (2016) 3 SCC (Civ) 795]. By this deeming fiction, a domestic award is deemed to be a decree of the court [*Sundaram Finance Ltd.* v. *Abdul Samad*, (2018) 3 SCC 622 : (2018) 2 SCC (Civ) 593], even though it is as such not a decree passed by a civil court. The Arbitral Tribunal cannot be considered to be a "court", and the arbitral proceedings are not civil proceedings. The deeming fiction is restricted to treat the award as a decree of the court for the purposes of execution, even though it is, as a matter of fact, only an award in an arbitral proceeding. In *Paramjeet Singh Patheja* v. *ICDS Ltd.*, (2006) 13 SCC 322, this Court in the context of a domestic award, held that the fiction is not intended to make an award a decree for all purposes, or under all statutes, whether State or Central. It is a legal fiction which must be limited to the purpose for which it was created. Paras 39 and 42 of the judgment in *Paramjeet Singh Patheja* v. *ICDS Ltd.*, (2006) 13 SCC 322] read as: (SCC pp. 345-46)

"*39*. Section 15 of the Arbitration Act, 1899 provides for "enforcing" the award as if it were a decree. Thus *a final award, without actually being followed by a decree* (as was later provided by Section 17 of the Arbitration Act of 1940), *could be enforced i.e. executed in the same manner as a decree. For this limited purpose of enforcement, the provisions of CPC were made available for realising the money awarded. However, the award remained an award and did not become a decree either as defined in CPC and much less so far the purposes of an entirely different statute such as the Insolvency Act are concerned*.

* * *

42. *The words "as if" demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central*."

(emphasis in original)

* * *

"**72.** Foreign awards are not decrees of an Indian civil court. By a legal fiction, Section 49 provides that a foreign award, after it is granted recognition and enforcement under Section 48, would be deemed to be a decree of "that court" for the limited purpose of enforcement. The phrase "that court" refers to the court which has adjudicated upon the petition filed under Sections 47 and 49 for enforcement of the foreign award. In our view, Article 136 of the Limitation Act would not be applicable for the enforcement/execution of a foreign award, since it is not a decree of a civil court in India.

73. The enforcement of a foreign award as a deemed decree of the High Court concerned [as per the amended Explanation to Section 47 by Act 3 of 2016 confers exclusive jurisdiction on the High Court for execution of foreign awards] would be covered by the residuary provision i.e. Article 137 of the Limitation Act. A three-Judge Bench of this Court in *Kerala SEB* v. *T.P. Kunhaliumma* [*Kerala SEB* v. *T.P. Kunhaliumma*, (1976) 4 SCC 634] held that the phrase "any other application" in Article 137 cannot be interpreted on the principle of *ejusdem generis* to be

applications under the Civil Procedure Code. The phrase "any other application" used in Article 137 would include petitions within the word "applications", filed under any special enactment. This would be evident from the definition of "application" under Section 2(*b*) of the Limitation Act, which includes a petition. Article 137 stands in isolation from all other Articles in Part I of the Third Division of the Limitation Act, 1963."

* * *

"**77.** The application under Sections 47 and 49 for enforcement of the foreign award, is a substantive petition filed under the Arbitration Act, 1996. It is a well-settled position that the Arbitration Act is a self-contained code. [*Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178; *Kandla Export Corpn.* v. *OCI Corpn.*, (2018) 14 SCC 715 : (2018) 4 SCC (Civ) 664; *Shivnath Rai Harnarain (India) Co.* v. *Glencore Grain Rotterdam*, 2009 SCC OnLine Del 3564 : (2009) 164 DLT 197; *Usha Drager (P) Ltd.* v. *Dragerwerk AG*, 2009 SCC OnLine Del 2975 : (2010) 170 DLT 628; *Sumitomo Corpn.* v. *CDC Financial Services (Mauritius) Ltd.*, (2008) 4 SCC 91; *Conros Steels (P) Ltd.* v. *Lu Qin (Hong Kong) Co. Ltd.*, 2014 SCC OnLine Bom 2305 : (2015) 1 Arb LR 463 : (2015) 2 Bom CR 1] The application under Section 47 is not an application filed under any of the provisions of Order 21 CPC, 1908. The application is filed before the appropriate High Court for enforcement, which would take recourse to the provisions of Order 21 CPC only for the purposes of execution of the foreign award as a deemed decree. The bar contained in Section 5, which excludes an application filed under any of the provisions of Order 21 CPC, would not be applicable to a substantive petition filed under the Arbitration Act, 1996. Consequently, a party may file an application under Section 5 for condonation of delay, if required in the facts and circumstances of the case."

This judgment is, therefore, authority for the proposition that the fiction created by Section 49 of the Arbitration Act is limited to enforcement of a foreign award, with the important corollary that an application to enforce an

award is an application under the Arbitration Act and not an application under Order XXI of the Code of Civil Procedure (in which case, such application would have been governed by Article 136 of the Limitation Act as an execution application under Order XXI, and not an application under the residuary Article 137 of the Limitation Act). Mr. Salve's attempt to distinguish this judgment on the ground that Section 49 lays down an entirely different procedure from the procedure to be followed for a domestic award qua enforceability does not, in any manner, distinguish the ratio of this judgment which is that an application to enforce a foreign award is not under Order XXI of the Code of Civil Procedure but under the Arbitration Act. Also, the deeming provision in Section 49, having reference to a decree of "that Court", which refers to the court which is satisfied that the foreign award is enforceable, again, makes no difference to the aforesaid ratio of the judgment.

61. Mr. Salve then painted a lurid picture of third parties being affected in enforcement proceedings. No such third party is before us. As to a third party, i.e., a party who is not a party to the arbitration agreement and to the subject matter covered by the award and who is affected by an order made in enforcement, we say nothing, leaving the question open to be argued on the facts of a future case.

62. Mr. Salve then read the provisions of the New Zealand Arbitration Act, 1996, the Hong Kong Arbitration Ordinance (Cap. 209), the Singapore Arbitration Act, 2001 as well as the Singapore International Arbitration Act, 1994, and the English Arbitration Act, 1996 to argue that in all the aforesaid legislations, awards passed by an Emergency Arbitrator were expressly included with varying provisions as to their enforcement. A contrast of these legislations with the provisions of the Indian Arbitration Act, again, does not take us very far, given the fact that we have, on a proper interpretation of the said Act, held that an award/order by an Emergency Arbitrator would be covered by Section 17 of the Arbitration Act, when properly read with other provisions of the Act.

63. Mr. Salve and Mr. Viswanathan then argued that Section 36(1), which is a *pari materia* provision with Section 17(2), must be contrasted with the provisions of Section 36(3). They argued that there is a basic difference between having "due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure" and enforcement of an award "in accordance with the provisions of the Code of Civil Procedure". According to them, it is clear that the court granting a stay under sub-sections (2) and (3) of Section 36 does so under the Arbitration Act only having due regard to the provisions regarding grant of stay of a

money decree under the Code of Civil Procedure. By way of contrast, an award is enforced in accordance with the provisions of the Code of Civil Procedure and not under the Arbitration Act. It was also argued that Section 17(2) and Section 36(1) are instances of legislation by reference and not legislation by incorporation.

64. The interpretation of Section 36 is not before us – the interpretation of Section 17 read with Section 9 is. As far as Section 17 is concerned, as has been pointed out by us hereinabove, the scheme qua interim orders passed by an arbitral tribunal mirrors the scheme qua interim orders passed by civil courts under Section 9. This vital difference between the provisions of Section 17 read with Section 9 and as contrasted with Section 36 puts paid to this argument.

65. We will now deal with some of the judgments of this Court cited by the learned counsel for the Respondents. They strongly relied upon the judgment of the Delhi High Court in **Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.**, 2009 SCC OnLine Del 511 : (2009) 159 DLT 579 [“**Daelim Industrial Co.**”] for the proposition that enforcement applications under Section 36 of the Arbitration Act are independent of arbitral proceedings which culminate in an award. The Delhi High Court

held that since execution applications would be governed by Sections 38 and 39 of the Code of Civil Procedure, Section 42 of the Arbitration Act cannot be held to apply and as a result, the courts mentioned in Sections 38 and 39 of the Code of Civil Procedure would have jurisdiction to execute arbitral awards.

66. In **Sundaram Finance Ltd. v. Abdul Samad**, (2018) 3 SCC 622, this Court, in paragraph 18, referred to **Daelim Industrial Co.** (supra) with approval. The question which arose before this Court was posed thus:

> "The divergence of legal opinion of different High Courts on the question as to whether an award under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act") is required to be first filed in the court having jurisdiction over the arbitration proceedings for execution and then to obtain transfer of the decree or whether the award can be straightaway filed and executed in the Court where the assets are located is required to be settled in the present appeal."

A Division Bench of this Court, after setting out the relevant provisions of the Code of Civil Procedure and the Arbitration Act, then held:

> "**14.** …… The aforesaid provision would show that an award is to be enforced in accordance with the provisions of the said Code in the same manner as if it were a decree. It is, thus, the enforcement mechanism, which is akin to the enforcement of a decree but the award itself is not a decree of the civil court as no decree whatsoever is passed by the civil court. It is the Arbitral Tribunal, which renders an award and the tribunal does not have the power of execution of a decree. For the purposes

> of execution of a decree the award is to be enforced in the same manner as if it was a decree under the said Code."

The judgment ultimately turned on Section 32 of the Arbitration Act, which made it clear that after arbitral proceedings had been terminated, Section 42 of the Act would not apply. This being so, the question posed before the Court was answered thus:

> "**20.** We are, thus, unhesitatingly of the view that the enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the court, which would have jurisdiction over the arbitral proceedings."

This judgment does not, in any manner, take the matter any further as it does not advert to Section 17 of the Act at all and is on a completely different point as to whether execution of an award can only be in the first court which is approached under Section 42 of the Act or can be a proceeding which can be filed and pursued in any court.

67. The learned counsel for the Respondents then relied upon the Full Bench judgment of the Bombay High Court in **Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd.**, 2018 SCC OnLine Bom 216 : AIR 2018 Bom 89 (FB) ["**Gemini Bay**"] which dealt with the same question and decided that Section 42 of the Act would not apply to enforcement

applications under the Act, which have to follow the drill of Sections 38 and 39 of the Code of Civil Procedure. The learned counsel for Amazon, however, strongly relied upon judgments of the Bombay High Court in **Jet Airways** (supra), **Kakade Construction** (supra), and **Global Asia Venture Co. v. Arup Parimal Deb**, 2018 SCC OnLine Bom 13061. Since these judgments deal with enforcement proceedings filed under Section 36 of the Arbitration Act, we do not express any opinion on their correctness.

68. Mr. Salve then relied upon **Punjab State Civil Supplies Corporation Ltd. v. Atwal Rice & General Mills**, (2017) 8 SCC 116. This judgment dealt with objections to the enforcement of an arbitral award in execution. In the course of dealing with the aforesaid objections, the Court observed:

> "**18.** In other words, the arbitral award has been given the status of a decree of the civil court and, therefore, it is enforced like a decree of the civil court by applying the provisions of Order 21 of the Code and all other provisions, which deal with the execution of the decree of the civil court."

This judgment again does not take the matter very much further. It does not deal with Section 17 of the Act at all but deals with Section 36 which, as has been pointed out by us, contains a scheme different from that contained for enforcement of interim orders under Section 17.

69. We now come to the appeal provision in the Arbitration Act. There can be no doubt that Section 37 is a complete code so far as appeals from orders and awards made under the Arbitration Act are concerned. This has further been strengthened by the addition of the non-obstante clause by the Arbitration and Conciliation (Amendment) Act, 2019.

70. This Court, in **Kandla Export Corporation v. OCI Corporation**, (2018) 14 SCC 715 ["**Kandla Export**"], held in the context of a Section 50 appeal as follows:

> "**20.** Given the judgment of this Court in *Fuerst Day Lawson* [*Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] , which Parliament is presumed to know when it enacted the Arbitration Amendment Act, 2015, and given the fact that no change was made in Section 50 of the Arbitration Act when the Commercial Courts Act was brought into force, it is clear that Section 50 is a provision contained in a self-contained code on matters pertaining to arbitration, and which is exhaustive in nature. It carries the negative import mentioned in para 89 of *Fuerst Day Lawson* [*Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] that appeals which are not mentioned therein, are not permissible. This being the case, it is clear that Section 13(1) of the Commercial Courts Act, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would obviously not apply to cases covered by Section 50 of the Arbitration Act.
>
> **21.** However, the question still arises as to why Section 37 of the Arbitration Act was expressly included in the proviso to Section 13(1) of the Commercial Courts Act, which is equally a special provision of appeal contained in a self-contained code, which in any case would be outside Section 13(1) of the Commercial Courts Act. One answer is that this was done *ex*

abundanti cautela. Another answer may be that as Section 37 itself was amended by the Arbitration Amendment Act, 2015, which came into force on the same day as the Commercial Courts Act, Parliament thought, in its wisdom, that it was necessary to emphasise that the amended Section 37 would have precedence over the general provision contained in Section 13(1) of the Commercial Courts Act. Incidentally, the amendment of 2015 introduced one more category into the category of appealable orders in the Arbitration Act, namely, a category where an order is made under Section 8 refusing to refer parties to arbitration. Parliament may have found it necessary to emphasise the fact that an order referring parties to arbitration under Section 8 is not appealable under Section 37(1)(*a*) and would, therefore, not be appealable under Section 13(1) of the Commercial Courts Act. Whatever may be the ultimate reason for including Section 37 of the Arbitration Act in the proviso to Section 13(1), the *ratio decidendi* of the judgment in *Fuerst Day Lawson* [*Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] would apply, and this being so, appeals filed under Section 50 of the Arbitration Act would have to follow the drill of Section 50 alone.

22. This, in fact, follows from the language of Section 50 itself. In all arbitration cases of enforcement of foreign awards, it is Section 50 alone that provides an appeal. Having provided for an appeal, the forum of appeal is left "to the Court authorised by law to hear appeals from such orders". Section 50 properly read would, therefore, mean that if an appeal lies under the said provision, then alone would Section 13(1) of the Commercial Courts Act be attracted as laying down the forum which will hear and decide such an appeal.

23. In fact, in *Sumitomo Corpn.* v. *CDC Financial Services (Mauritius) Ltd.* [*Sumitomo Corpn.* v. *CDC Financial Services (Mauritius) Ltd.*, (2008) 4 SCC 91], this Court adverted to Section 50 of the Arbitration Act and to Sections 10(1)(*a*) and 10-F of the Companies Act, 1956, to hold that once an appeal is provided for in Section 50, the Court authorised by law to hear such appeals would then be found in Sections 10(1)(*a*) and 10-F of the Companies Act. The present case is a parallel instance

> of Section 50 of the Arbitration Act providing for an appeal, and Section 13(1) of the Commercial Courts Act providing the forum for such appeal. Only, in the present case, as no appeal lies under Section 50 of the Arbitration Act, no forum can be provided for."
>
> * * *
>
> "**25.** What is important to note is that it is Section 50 that provides for an appeal, and not the letters patent, given the subject-matter of appeal. Also, the appeal has to be adjudicated within the parameters of Section 50 alone. Concomitantly, where Section 50 excludes an appeal, no such appeal will lie."

This judgment is, therefore, an authority for the proposition that the Arbitration Act is a self-contained code on matters pertaining to arbitration, which is exhaustive in nature. The appeal provision in that case (Section 50) was held to carry a negative import that only such matters as are mentioned in the Section are permissible, and matters not mentioned therein cannot be brought in. It was further held that what follows from this is that the substantive provision of appeal is contained in Section 50 of the Act, which alone must be read, Section 13(1) of the Commercial Courts Act, 2015 being a general provision, which must give way to the specific provision contained in Section 50.

71. Likewise, in **Deep Industries Ltd. v. ONGC**, (2020) 15 SCC 706, this Court opined:

> "**15.** Given the aforesaid statutory provision and given the fact that the 1996 Act repealed three previous enactments in order

that there be speedy disposal of all matters covered by it, it is clear that the statutory policy of the Act is that not only are time-limits set down for disposal of the arbitral proceedings themselves but time-limits have also been set down for Section 34 references to be decided. Equally, in *Union of India* v. *Varindera Constructions Ltd.* (2020) 2 SCC 111 : (2020) 1 SCC (Civ) 277, dated 17-9-2018, disposing of SLP (C) No. 23155 of 2013, this Court has imposed the selfsame limitation on first appeals under Section 37 so that there be a timely resolution of all matters which are covered by arbitration awards.

16. Most significant of all is the non obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed [*see* Section 37(2) of the Act]."

72. In **BGS SGS SOMA JV v. NHPC**, (2020) 4 SCC 234, this time, the Court dealt with the maintainability of an appeal under Section 37 of the Act in a case in which an application under Section 34 of the Act was ordered to be transferred from a court which had no jurisdiction to a court which had jurisdiction. In deciding this question, this Court referred copiously to **Kandla Export** (supra) in paragraph 12. It then went on to decide:

"**13.** Given the fact that there is no independent right of appeal under Section 13(1) of the Commercial Courts Act, 2015, which merely provides the forum of filing appeals, it is the parameters of Section 37 of the Arbitration Act, 1996 alone which have to be looked at in order to determine whether the present appeals were maintainable. Section 37(1) makes it clear that appeals shall only lie from the orders set out in sub-clauses (*a*), (*b*) and

(*c*) *and from no others*. The pigeonhole that the High Court in the impugned judgment [*NHPC Ltd.* v. *Jaiparkash Associates Ltd.*, 2018 SCC OnLine P&H 1304 : (2019) 193 AIC 839] has chosen to say that the appeals in the present cases were maintainable is sub-clause (*c*). According to the High Court, even where a Section 34 application is ordered to be returned to the appropriate court, such order would amount to an order "refusing to set aside an arbitral award under Section 34".

14. Interestingly, under the proviso to Section 13(1-A) of the Commercial Courts Act, 2015, Order 43 CPC is also mentioned. Order 43 Rule 1(*a*) reads as follows:

> "**1. *Appeals from orders***.— An appeal shall lie from the following orders under the provisions of Section 104, namely—
>
> (*a*) an order under Rule 10 of Order 7 returning a plaint to be presented to the proper court except where the procedure specified in Rule 10-A of Order 7 has been followed;"

This provision is conspicuous by its absence in Section 37 of the Arbitration Act, 1996, which alone can be looked at for the purpose of filing appeals against orders setting aside, or refusing to set aside awards under Section 34. Also, what is missed by the impugned judgment [*NHPC Ltd.* v. *Jaiparkash Associates Ltd.*, 2018 SCC OnLine P&H 1304 : (2019) 193 AIC 839] is the words "under Section 34". Thus, the refusal to set aside an arbitral award must be under Section 34 i.e. after the grounds set out in Section 34 have been applied to the arbitral award in question, and after the Court has turned down such grounds. Admittedly, on the facts of these cases, there was no adjudication under Section 34 of the Arbitration Act, 1996 — all that was done was that the Special Commercial Court at Gurugram allowed an application filed under Section 151 read with Order 7 Rule 10 CPC, determining that the Special Commercial Court at Gurugram had no jurisdiction to proceed further with the Section 34 application, and therefore, such application would have to be returned to the competent court situate at New Delhi."

This judgment is determinative of the issue before us as it specifically ruled out appeals under Order XLIII Rule 1 of the Code of Civil Procedure when it comes to orders being made under the Arbitration Act.

73. At this juncture, it is important to notice that Section 37 did not remain untouched by the 2015 Amendment Act. As a matter of fact, a new category of appeals was infused into the said provision by adding a new sub-section (1)(a), which reads as follows:

> "**37. Appealable orders**.—(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—
>
> (*a*) refusing to refer the parties to arbitration under Section 8;"
>
> * * *

74. Despite Section 17 being amended by the same Amendment Act, by making Section 17(1) the mirror image of Section 9(1) as to the interim measures that can be made, and by adding Section 17(2) as a consequence thereof, significantly, no change was made in Section 37(2)(b) to bring it in line with Order XLIII, Rule 1(r). The said Section continued to provide appeals only from an order granting or refusing to grant any interim measure under Section 17. There can be no doubt that granting or refusing to grant any interim measure under Section 17 would only refer to

the grant or non-grant of interim measures under Section 17(1)(i) and 17(1)(ii). In fact, the opening words of Section 17(2), namely, "*subject to any orders passed in appeal under Section 37…*" also demonstrates the legislature's understanding that orders that are passed in an appeal under Section 37 are relatable only to Section 17(1). For example, an appeal against an order refusing an injunction may be allowed, in which case sub-section (2) of Section 17 then kicks in to enforce the order passed in appeal. Also, the legislature made no amendment to the granting or refusing to grant any measure under Section 9 to bring it in line with Order XLIII, Rule 1(r), under Section 37(1)(b). What is clear from this is that enforcement proceedings are not covered by the appeal provision.

75. However, learned counsel appearing on behalf of the Respondents pressed into service a recent judgment of this Court in **Chintels (India) Ltd. v. Bhayana Builders (P) Ltd.**, (2021) 4 SCC 602. The precise question that arose before this Court was as to when an application seeking condonation of delay in filing an appeal is dismissed, whether this would amount to "refusal to set aside an arbitral award" under Section 34 and thus be appealable under Section 37(1)(c) of the Act. In answering this question, this Court referred to Section 37(1) of the Act and stressed the fact that an application for setting aside an award must be in accordance

with sub-sections (2) and (3) of Section 34 – *See* paragraph 9. The Court then set out Section 34(3) and opined:

> **11.** A reading of Section 34(1) would make it clear that an application made to set aside an award has to be in accordance with both sub-sections (2) and (3). This would mean that such application would not only have to be within the limitation period prescribed by sub-section (3), but would then have to set out grounds under sub-sections (2) and/or (2-A) for setting aside such award. What follows from this is that the application itself must be within time, and if not within a period of three months, must be accompanied with an application for condonation of delay, provided it is within a further period of 30 days, this Court having made it clear that Section 5 of the Limitation Act, 1963 does not apply and that any delay beyond 120 days cannot be condoned — see *State of H.P.* v. *Himachal Techno Engineers* [*State of H.P.* v. *Himachal Techno Engineers*, (2010) 12 SCC 210 : (2010) 4 SCC (Civ) 605] at para 5."

Coming to Section 37(1)(c), the Court then held:

> "**12.** We now come to Section 37(1)(*c*). It is important to note that the expression "setting aside or refusing to set aside an arbitral award" does not stand by itself. The expression has to be read with the expression that follows— "under Section 34". Section 34 is not limited to grounds being made out under Section 34(2). Obviously, therefore, a literal reading of the provision would show that a refusal to set aside an arbitral award as delay has not been condoned under sub-section (3) of Section 34 would certainly fall within Section 37(1)(*c*). The aforesaid reasoning is strengthened by the fact that under Section 37(2)(*a*), an appeal lies when a plea referred to in sub-section (2) or (3) of Section 16 is accepted. This would show that the legislature, when it wished to refer to part of a section, as opposed to the entire section, did so. Contrasted with the

> language of Section 37(1)(*c*), where the expression "under Section 34" refers to the entire section and not to Section 34(2) only, the fact that an arbitral award can be refused to be set aside for refusal to condone delay under Section 34(3) gets further strengthened."

Unlike the language of Section 34, a literal reading of Section 17 would show that the grant or non-grant of interim measures under Section 37(2)(b) refers only to Section 17(1) of the Act. Also, in the context of Section 37(2)(b), the entirety of Section 17 was referred to when Sections 17 and 37 were first enacted in 1996. It is only by the 2015 Amendment Act that Section 17 was bifurcated into two sub-sections. What is significant in this context is that no corresponding amendment was made to Section 37(2)(b) to include within its scope the amended Section 17, as has been pointed out hereinabove. This judgment is also distinguishable and, therefore, does not carry the Respondents' argument any further.

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.

……..J.
(R.F. Nariman)

……..J.
(B.R. Gavai)

New Delhi.
August 06, 2021