$~

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

Reserved on: 20th July, 2020
Pronounced on: 18th November, 2020

\+ ARB. A. (COMM) 13/2020 & I.A. 4322/2020

EDELWEISS ASSET RECONSTRUCTION COMPANY LIMITED, ACTING IN ITS CAPACITY AS TRUSTEE OF THE EARC TRUSTS SC-338,343,366 AND 389

..... Petitioner

Through: Mr. Sandeep Sethi, Sr. Adv. with Ms. Misha, Ms. Mahima Sareen and Ms. Moulshree Shukla, Advs.

versus

GTL INFRASTRUCTURE LIMITED AND ANR.

..... Respondents

Through: Mr. Parag Tripathi, Sr. Adv. with Mr. D.N. Ray, Mr. Rohan Rajyadhaksha, Mr. Prasad Lotlikar, Mr. Suresh Gadre, Mr. Vinod Bhadang, Mr. Lokesh Choudhary and Ms. Sumita Ray, Advs. for the Respondent No. 1

Mr. Rajiv Nayar, Sr. Adv. with Mr. Saket Sikri, Mr. Amit Mahajan, Mr. Essaji Vahanvati, Mr. Vikalp Mudgal and Mr. Ajay Pal Singh Kullar, Advs. for R-2

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T**

1. Edelweiss Asset Reconstruction Company Ltd. (abbreviated, hereinafter, to "Edelweiss") invokes Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") to challenge order, dated 17th December, 2019, passed by the learned Arbitral Tribunal, which directed M/s. GTL Infrastructure Ltd. (hereinafter referred to as "GIL") to pay ₹ 240 crores to M/s. GTL Ltd. (hereinafter referred to as "GTL") and to deposit ₹ 200 crores in an Escrow account, to be maintained by GIL.

2. GTL and GIL were the claimant and respondent, before the learned Arbitral Tribunal, respectively. The operative paragraphs of the impugned Order, with which Edelweiss claims to be aggrieved, reads thus:

> "37. It is accordingly ordered that:
>
> (i) The Respondent will pay a sum of Rs. 40 crores to the Claimant before or by 27th December, 2019 towards Security Deposit as contemplated under Clause 4.5 of the Suspension Agreement dated 8th March, 2018. (hereinafter referred to as the "Suspension Agreement")
>
> (ii) The Respondent shall pay Rs. 400 crores in accordance with the below mentioned schedule:

80 Crores to be paid directly to the Claimant	Before or by 27th December, 2019
80 Crores to be deposited in an Escrow Account to be maintained by the	Before or by 27th January, 2020

Respondent	
80 Crores to be paid directly to the Claimant	Before of by 27th February, 2020
80 Crores to be deposited in an Escrow Account to be maintained by the Respondent	Before or by 27th March, 2020
40 Crores to be paid to the Claimant directly	Before or by 27th April, 2020
40 Crores to be deposited in an Escrow Account to be maintained by the Respondent	Before or by 27th April, 2020

(iii) The Claimant shall provide uninterrupted services to the Respondent subject to the terms of payment contained in the two foregoing sub-clauses.

38. The Respondent has agreed to furnish the details of the Escrow Account with the Tribunal as well as the Claimant on or before 27th December, 2019. It is made clear that in the eventuality of any default in adhering to the schedule mentioned above, the Respondent shall become immediately liable for payment of the entire sum of Rs. 400 crores less the unpaid/remaining sum to the Claimant.

39. It is clarified that the present order shall await the Final Award and shall be subject to adjustments in order to conform to the Final Award."

3. Edelweiss was not a party before the learned Arbitral Tribunal, but claims to be vitally affected by the impugned directions. In fact, it is claimed, by Edelweiss, that GIL and GTL are in collusion, and that they misled the learned Arbitral Tribunal into passing the impugned Order, suppressing the fact that Edelweiss had a first charge over the monies which GIL has been directed to pay to GTL, or to deposit in the Escrow account.

4. Before appreciating the grievance of Edelweiss, it would be necessary to briefly capitulate the facts and the justification, cited in the impugned Order, for issuing the above directions.

The Impugned Order

5. M/s. Chennai Network Infrastructure Ltd . (hereinafter referred to as "CNIL") and the Aircel group of Companies (hereinafter referred to as "Aircel") entered into an Existing Site Agreement (hereinafter referred to as "ESA") dated 14th January, 2010, whereunder Aircel agreed to provide CNIL sites and land on ownership/tenancy basis, to be developed by CNIL, so as to enable Aircel to set up, on such sites/land, Active Equipment/infrastructure, using which Aircel could provide telecommunication services.

6. Under Clause 6 of the ESA, a tripartite Energy Management Agreement (hereinafter referred to as "EMA") was executed, on 14th January, 2010 itself, between CNIL, Aircel and GTL. Clause 3.1 of the EMA obligated CNIL to oversee the management of electricity and diesel consumption at the above sites, and payment therefor, whereas Clause 3.2 allowed CNIL to outsource these responsibilities to GTL.

7. On the same day, i.e. 14th January, 2010, a third, New Site Agreement (hereinafter referred to as "NSA") was executed between CNIL and Aircel. Clause 2.1 of the NSA required Aircel to grant CNIL the Right of First refusal, in respect of all the requirements for

sites, of Aircel (other than certain excluded sites), by way of a written proposal, for a period of three years. Each such site was required, by Clause 2.5, to be developed by CNIL, for use by Aircel to install and maintain its Active Equipment, for providing telecommunication services. Clause 2.6 obligated Aircel to submit 20,000 proposals, to CNIL, during this three-year proposal period, which was referred to as the "Minimum Commitment". Of these, at least 4000 proposals (the "Annual Commitment") were required to be submitted each year.

8. CNIL, *vide* letter dated 18th January, 2010, requested GTL to be its implementation partner. The request was accepted by GTL, *vide* response dated 22nd January, 2010. CNIL and GTL, thereupon, entered into a TSPI Agreement dated 28th January, 2010, whereunder GTL agreed to procure necessary materials for establishing Passive Telecom Infrastructure on the sites provided by Aircel to CNIL, and to convert them into completely built-up telecom sites, by carrying out requisite civil and electrical work thereon, on behalf of CNIL.

9. On 5th February, 2010, CNIL issued a Purchase Order, to GTL, for ₹ 4350 crores, which was accepted by GTL *vide* letter dated 8th February, 2010. As GTL was incurring huge expenses, towards establishing Passive Telecom Infrastructure on the sites, and converting them to telecom sites, to be used by Aircel for providing telecommunication services to its customers, it became necessary to indemnify GTL, in the event of default, by Aircel, in adhering to the "Minimum Commitment" visualised by Clause 2.6 of the NSA. Accordingly, the TSPI Agreement dated 28th January, 2010 was

modified by an Addendum dated 9th February, 2010, whereby CNIL agreed to indemnify GTL against direct losses, liabilities, damages, demands etc., suffered by it, or by parties indemnified by GTL, on account of default, on the part of Aircel/CNIL to provide the minimum commitment of 20,000 new sites, or on account of any other breach of the terms and conditions of the Purchase Orders. CNIL also undertook and agreed, *vide* the said Addendum, to make all efforts to recover monies from Aircel and make payments to GTL, or to the suppliers of GTL.

10. Predicated on this Addendum, GTL proceeded to source requisite material, as envisaged in the Purchase Order dated 5th February, 2010 issued by CNIL. GTL alleged, before the learned Arbitral Tribunal, that, despite such procurement of materials having been effected by it, CNIL failed to provide details of the sites where the material were to be delivered, resulting in considerable financial prejudice to GTL. This fact was brought, by GTL, to the notice of CNIL, *vide* letter dated 12th February, 2013, in response to which CNIL replied, on 20th May, 2013, informing GTL that, as Aircel had completely stopped site orders, CNIL was not able to provide such orders, or details thereof, to GTL. Expressing chagrin at this development, GTL wrote back, to CNIL, on 10th June, 2013, informing CNIL that, based on the assurances held out by CNIL and Aircel under the TSPI Agreement, GTL had placed bulk orders for material, which was ready for being delivered and commissioned. The failure, on the part of CNIL, in providing site details, it was asserted, had seriously prejudiced GTL, as it had made huge advance

payments to the vendors from whom it had procured the material, for making which it had also availed considerable borrowings from banks.

11. Ultimately, on 24th May, 2014, a Settlement Agreement was executed, between CNIL, Aircel and GTL, whereunder, against the claim, of GTL, of ₹ 2450 crores, ₹ 1800 crores was "settled".

12. The remaining ₹ 650 crores constitutes subject matter of the arbitral proceedings, wherefrom the present appeal emanates.

13. As the efforts of GTL, to recover the remaining ₹ 650 crores, were proving abortive, a learned retired Judge of the High Court of Bombay, Hon'ble Mr. Justice D. G. Deshpande, was requested to act as Conciliator, to resolve the impasse. Before the learned Conciliator, CNIL and GTL agreed – as reflected in Order dated 13th February, 2015 issued by the learned Conciliator – to enter into a long-term Energy Management Agreement and Operations and Maintenance Agreement, to remain alive till 2030, which would guarantee GTL recovery of the amounts claimed by it, as well as generate reasonable revenues to enable GTL to repay its lenders. It was further agreed that breach, by CNIL, of its commitments under the said Agreements, would result in reinstatement of the claim of GTL. Pursuant thereto, on 31st March, 2015, CNIL and GTL executed, inter se, an Energy Management Agreement (EMA) and an Operations and Maintenance Agreement (OMA).

14. At this stage, *vide* order dated 22nd December, 2017 issued under Section 232 of the Companies Act, 2013, the learned National Company Law Tribunal (hereinafter referred to as "the learned NCLT"), transferred all liabilities of CNIL to GIL. GIL, thereby, stepped into the shoes of CNIL, in the dispute with GTL.

15. On 6th January, 2018, 10th January, 2018 and 15th January, 2018, three more communications were addressed by GIL to GTL which resulted, effectively, in the exacerbation of the financial distress of GTL. By these communications, GIL intimated GTL that Aircel had surrendered their Unified Access Services Licences for 6 service areas and had requested CNIL (later GIL) to stop billing of all types of charges to Aircel w.e.f. 1st February, 2018, for the Passive Infrastructure provided at all sites in the said six circles. This, it was stated, had resulted in a loss of 1,994 tenancies for Aircel. In these circumstances, it was stated that it was not possible for GIL to adhere to its obligations under the EMA dated 31st March, 2015.

16. GIL and GTL attempted, as it were, to pour some oil on the troubled waters by entering into yet another agreement, titled the "Suspension Agreement" on 8th March, 2018. By this Agreement, GTL agreed to suspend, without prejudice, various Clauses of the EMA dated 31st March, 2015, and other Agreements, whereunder GTL could otherwise have initiated legal proceedings against GIL, albeit without prejudice, in order to enable GIL to attempt to restructure its debts and stabilise its operations. The suspension

period, which was originally till 31st June, 2018, was extended till 31st March, 2019 and, thereafter, till 31st August, 2019.

17. Alleging that, despite all these efforts, GIL had failed to disgorge the amounts remaining to be paid to GTL, GTL issued a Legal Notice, dated 29th August, 2019, to GIL, calling on GIL to pay, forthwith, to GTL, the amounts outstanding, being ₹ 40 crores as per Clause 4.5 of the Suspension Agreement as a refundable deposit and ₹ 650 crores, being the outstanding amount payable under the TSPI Agreement, along with interest.

18. On receiving this missive, GIL requested for a meeting of the Joint Steering Committee of GTL and GIL which, accordingly, was held on 5th September, 2019. In the said meeting, GIL denied breach of any obligation, towards GTL, on its part, and contended that all obligations stood discharged. The demand for payment of ₹ 40 crores, in terms of Clause 4.5 of the Suspension Agreement, was also refuted, on the ground that the Suspension Agreement had expired.

19. The impasse having thus proved incapable of an amicable resolution, it was decided that the disputes be referred to arbitration. Thus, came to be constituted the learned Arbitral Tribunal, which passed the impugned Order on 17th December, 2019.

20. We are not concerned with the main dispute between GIL and GTL, with which the learned Arbitral Tribunal continues to remain *in seisin*. The impugned Order came to be passed on an application,

dated 24th September, 2019, filed by GTL, containing the following prayers (as reproduced in para 1 of the Impugned Order):

> "(a) Pass an order directing the Respondent to pay to the Applicant/Claimant an admitted sum of Rs 650,00,00,000 (Rupees Six Hundred Fifty Crores Only) and the Rs.40,00,00,000/- (Rupees Forty Crores Only), totalling Rs.690,00,00,000/- (Rupees Six Hundred Ninety Crores Only), along with interest @ 21% p.a. or at such rate as the Hon'ble Tribunal may deem fit and proper from the due date till the date of realization.
>
> (b) In an alternative to prayer clause (a) Pass an order directing the Respondent to furnish security in the sum of Rs Rs 650,00,00,000 (Rupees Six Hundred Fifty Crores Only) and Rs.40,00,00,000/- (Rupees Forty Crores Only) totalling to **Rs.690,00,00,000/- (Rupees Six Hundred Ninety Crores Only)** along with interest @ 21% p.a. or at such rate as the Hon'ble Tribunal may deem fit and proper from the due date till the date of realization, in the form of deposit of the same before this Hon'ble Tribunal to secure the claim in the Claimant in the arbitration proceedings;
>
> (c) Pending the hearing and final disposal of the Claim by this Hon'ble Tribunal, the Respondent be directed to pay to the Claimant a sum of Rs.40,00,00,000/- (Rupees Forty Crores Only) in order to enable the Claimant to keep the network of the Respondent keep going or such other amount as this Hon'ble Tribunal may deem fit and proper;
>
> (d) Pass an order directing that pending the furnishings/deposit of security in terms of prayer (a), Respondent is restrained from proceeding further with the sale of any of its assets including its real estate assets and tower assets as proposed;
>
> (e) Pass an order directing the Respondent from transferring, encumbering, alienating or in any other manner dealing with the shares of Respondent;
>
> (f) Pending furnishing of security in the form of (a) above, pass an order of injunction restraining the Respondent, whether directly or indirectly, from selling, disposing or creating any third party interest in all of any of its movable or

immovable assets including cash reserves in bank accounts and the active infrastructure equipment installed at the sides of the Claimant;

(g) Issue an ad-interim and interim order and/or direction in terms of prayer (a) to (f) above;

(h) Grant costs of this petition; and

(i) Pass such other/further order(s) as this Hon'ble Court deem fit and proper in the facts and circumstances of the case."

21. After arguments were heard and orders were reserved, by the learned Arbitral Tribunal on the application, of GTL, under Section 17, "clarificatory submissions", opposing the application, were tendered by GIL. It was contended, therein, that, as the application of GTL was premised on the advisability of securing the claim amount, so as to obviate the possibility of the eventual award, if any, being rendered a mere paper decree, no direction for payment of any amount, by GIL to GTL, was necessary, and that the apprehension of GTL would be sufficiently allayed if deposit, in an Escrow account, were directed. Any direction, for payment of the claimed amount, by GIL to GTL would, it was submitted, result in the following "irreversible consequences" for GIL (the respondent before the learned Arbitral Tribunal):

"(A) The Respondent's net worth will erode to a point where it will be definitely pushed into insolvency. Whereas, if the moneys are parked in an escrow, till the pendency of the present proceedings, the Respondent will still be able to (at least on paper) lay a potential claim to the funds. This might be all the edge the Respondent requires in its balance sheet to stay afloat which will also be crucial to the Claimant's interests. Therefore also, the balance of convenience lies with a direction for escrow.

> (B) In a situation where outright payment is ordered to be made to the Claimant, they will be every possibility that other creditors of the Respondent will immediately file similar proceedings and pray for similar reliefs, thereby eroding the substratum of the Respondent, which, to say the least, will jeopardize even the Claimant's ability to recover any amount from the Respondent. Further, the Respondent's accounts are in CDR (corporate debt restructuring) with banks who may advise the Respondent or independently challenge the payment direction in appeal. Either way, the balance of convenience lies in a direction to deposit in escrow."

Apropos the claim of ₹ 40 crores, under the Suspension Agreement, GIL assented to a direction to pay the said amount to GTL, but prayed that the payment be made subject to the outcome of the arbitral proceedings.

22. While opposing, on principle, the aforesaid "Clarificatory Submissions" tendered by GIL on the ground, *inter alia*, that the liability of ₹ 400 crores, as payable to GTL, had been admitted by GIL since long, GTL, in its response to the said submissions of GIL, tentatively agreed to the deposit of the said amount of ₹ 400 crores in an escrow account, to be maintained by GTL or any other mutually agreed Escrow Agent.

23. During arguments before the learned Arbitral Tribunal, GTL contended that there was no dispute, by GIL, to its liability to pay ₹ 650 crores to GTL, in its Statement of Defence. Accordingly, it was submitted that GIL was liable to suffer an Interim Award/Partial Decree, for the said amount, even at that stage. In opposition, GIL argued that an amount of ₹ 200 to 250 crores, in terms of the EMA

and OMA dated 31st March, 2015, already stood recovered by GTL and that, therefore, GTL could no longer lay a claim to ₹ 650 crores. Had the interim arrangements, as contemplated by the EMA and OMA been allowed to continue, it was submitted that GIL would have been able to liquidate the entire ₹ 650 crores. There was no justification, it was contended, for the Interim Arrangements, contemplated by the said Agreements, not being allowed to continue.

24. During arguments before the learned Tribunal, GIL, while reasserting the fact that ₹ 250 crores already stood recovered, by GTL, in terms of the EMA and OMA, was unable to dispute the remaining claim of ₹ 400 crores, or to establish that the said amount stood liquidated. All that was submitted, in this regard, was that, had the EMA and OMA been allowed to continue, the entire debt of ₹ 650 crores would stand liquidated.

Reasoning and Findings of the learned Arbitral Tribunal

25. The learned Tribunal, on these facts, held that there was no denial, by GIL, of its liability to pay ₹ 400 crores to GTL which, therefore, was "not a sum presently in dispute" within the meaning of Order VIII Rules 3, 4 and 5 of the Code of Civil Procedure, 1908 (CPC). Qua the remaining ₹ 250 crores, the learned Tribunal recorded the fair statement, of GTL, that adjudication, of the liability of GIL, was necessary.

26. After referring to the judgement of the Supreme Court in ***Uttam Singh Duggal v. United Bank of India Ltd***[1] and of the Division Bench of this Court in ***Numero Uno International Ltd v. Prasar Bharti***[2], the impugned Order concludes thus (before issuing the impugned directions in para 37):

> "33. On 22nd October, 2019, Mr. Ray, Learned Counsel Ld. for the Respondent on instructions received from the Authorised representatives present before the Tribunal stated, by way of an Interim arrangement, the Respondent would make payment of Rs 400 crores in five tranches of Rs 80 crores each, along with a Security Deposit of the Rs 40 crores, in terms of Clause 4.5 of the Suspension Agreement. This arrangement was not opposed by Ld. Counsel for the Claimant.
>
> 34. However, as noted in paragraph 19 above, the Respondent thereafter pressed for depositing the aforesaid amount in escrow, which prayer was not resisted by the Claimant in its response thereto. However, Ld Counsel for the Claimant may have vehemently opposed this proposed arrangement during the oral arguments on 26th November, 2019 and indeed pressed for the passing of an Interim Award.
>
> 35. In these circumstances, though the Claimant has moved its Application under Section 17, Mr. Wadhwa has urged the Tribunal to treated under Section 31(6) of the A & C Act and pass an Interim Award/Partial Decree against the Respondent and in favour of the Claimant qua the undisputed sum of Rs 400 crores. In the SOC there is a claim of over Rs 890 crores. In reply to which the Respondent has pleaded in the SOD that approximately Rs 200-250 crores has been recovered from adjustments made by inter party transactions from 2015 to 2019. The Tribunal finds that the Claimant is justified in its contention that there being no categorical denial to the Respondent's liability for the sum of Rs 400

[1] **(2000) 7 SCC 120**
[2] **150 (2008) DLT 688**

> crores, the Tribunal must deduce that there is a tacit admission by the Respondent.
>
> 36. The Tribunal is further mindful of the financial situation of the parties herein, as submitted by Ld Counsel on both sides. Ld Senior Counsel for the Claimant has emphasized that it has continued till date to perform its contractual obligations for maintenance of the Passive Telecom Infrastructure even in the absence of payment of 10-15% towards 'Interim Service Fee' as postulated in the Suspension Agreement. On the other hand, Learned Counsel for the Respondent had stated that it is in the interest of both the parties that inter-se agreements should run their course and tenure till 2030 to enable the recoupment of the Respondent's dues to the Claimant."

The impugned directions, as reproduced in para 2 *supra*, follow.

Subsequent proceedings

27. The impugned Order has formed subject matter of three judicial proceedings, prior to the institution of the present appeal, viz. (i) Arb.A. (COMM) 7/2020 (***GTL Infrastructure Ltd v. GTL Ltd***), filed by GIL under Section 37(2)(b) of the 1996 Act before this Court, (ii) OMP (ENF) (COMM) 23/2020 (***GTL Ltd v. GTL Infrastructure Ltd***), preferred by GTL under Section 36 of the 1996 Act, before this Court and (iii) Suit LD-VC No 55/2020 (***Edelweiss Asset Reconstruction Co. Ltd v. GTL Infrastructure Ltd & ors.***), filed by the appellant Edelweiss against GIL and GTL before the High Court of Bombay. Edelweiss was not a party, either in Arb.A. (COMM) 7/2020 or in OMP (ENF) (COMM) 23/2020.

28. Arb.A. (COMM) 7/2020

28.1 By this appeal, under Section 37(2)(b) of the 1996 Act, GIL challenged the presently impugned Order dated 17th December, 2019.

28.2 Holding the reliance, by the learned Arbitral Tribunal, on ***Uttam Singh Duggal***[1] and ***Numero Uno International Ltd***[2] to be justified, a learned Single Judge of this Court, *vide* judgement dated 4th March, 2020, dismissed Arb A (COMM) 7/2020, observing and finding, in paras 31 and 34 of the judgement, thus:

> "31. This Court finds no error or infirmity in this finding of the Tribunal. Once any part of the liability is admitted, law does not envisage that the admitted payments should be postponed till the disputed amounts are adjudicated and finalized. Even today before this Court while learned counsel for the appellant has argued that there was no tacit admission of liability, but the fact of the matter is that on being confronted with the observations of the Tribunal, regarding the admission of liability, it could not be pointed out that these findings were incorrect. Learned counsel has also not been able to point out any material or document from which it could be gathered that the finding of the Tribunal of admitted liability is erroneous. In fact, the admission of liability by the appellant is further fortified by the fact that the appellant itself on 22.10.2019 had agreed to an interim arrangement whereby it undertook to make the payments in five tranches of Rs 80 crores each. Relevant para of the Order is extracted in the earlier part of the judgement. Since the appellant itself offered to clear the outstanding liability in five tranches, the Tribunal accepted the offer and directed accordingly. The Schedule that has been drawn out by the Tribunal regarding the modalities of payment in para 37 of its Order is only in terms of the offer, voluntarily made by the appellant. Learned senior counsel for the respondent is thus right in its contention that having offered to clear the liability in instalments, the appellant cannot even assail the impugned order.
>
> *****

> 34. Thus in my view, on account of the admission and offer of the appellant to clear its liability and the law that if an amount is admitted by a party, the same should be released to the opposite party in the earliest, without waiting for adjudication of the remaining disputes, no infirmity can be found with the impugned order, calling for any interference by this Court in the present proceedings. The appeal has no merits and is accordingly dismissed."

29. OMP (ENF.) (COMM) 23/2020

29.1 These proceedings have been initiated by GTL, for enforcement of the impugned Order. Notice stands issued thereon. Edelweiss has applied for impleadment therein.

30. Suit LD-VC No 55/2020

30.1 Alleging that the payments made by GIL to GTL, including the amounts paid as a consequence of the impugned Order, amounted to illegal diversion of monies secured in favour of Edelweiss, this suit, filed before the High Court of Bombay, prayed, *inter alia*, for a permanent injunction, restraining GIL "from transferring, alienating and/or conveying the amount of ₹ 440 crores (the amount of the Arbitral Order) or any other amount in favour of (GTL) including ₹ 320 crores, prior to fully discharging the outstanding dues of (Edelweiss)". In the event any such transfer had already taken place, the suit prayed for a decree of mandatory injunction, directing GIL to reconvey the amounts. *Ad interim ex parte* injunction, against GIL, "restraining it from transferring, alienating and/or conveying the

amount of ₹ 440 crores (the amount of the Arbitral Order) or any other amount in favour of (GTL)" was also sought.

30.2 This suit came up for hearing before the High Court of Bombay on 5th May, 2020. On the said date, GIL submitted, the High Court, that the Demand Drafts for ₹ 320 crores, drawn in favour of GTL, had been returned to GIL, and stood deposited in the TRA (Trust and Retention Agreement) Account of GIL. The statement was accepted as an undertaking given to the High Court. In view thereof, the High Court opined that it was not necessary to grant the urgent *ad interim* relief sought by Edelweiss. Apropos the interim prayer for restraining the amounts covered by the impugned Order of the learned Arbitral Tribunal being transferred by GIL to GTL, Edelweiss did not press the said relief at that stage. Liberty was granted, by the High Court, to Edelweiss to apply for this relief at a later stage, when the merits of the matter would be examined.

The appellant's case

31. The case set up by the appellant may be best understood by paraphrasing it, thus:

(i) The appellant is an asset reconstruction company, in terms of Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Financial Securities Interests (SARFAESI) Act, 2002.

(ii) In 2007-2008, CNIL and GTL availed loans from various banks and financial institutions, for financing of installation of telecom towers. Default, in liquidating the loans, however, occurred, resulting in GTL and CNIL requesting the consortium of lenders for corporate debt restructuring (CDR). Accordingly, the case of GTL and CNIL were referred to the CDR Cell on 1st July, 2011, and the existing loans were restructured.

(iii) On 31st December, 2011, two separate Master Restructuring Agreements (MRAs) was executed between the CDR lenders and GIL, and between the CDR lenders and CNIL, containing the terms for restructuring of the debt.

(iv) On 25th June, 2013, a Trust and Retention Account (TRA) Agreement was executed between the Union Bank of India (which acted as the Monitoring Institution as well as the Account Bank for the MRA) and the IDBI Trusteeship Services Ltd (acting as a Security Trustee) and GIL, whereunder, consequent to the agreement of the CDR Lenders to restructure the debts of GIL, all receivables of GIL from its operations and businesses, duly charged to its secured financial creditors, were to flow to various accounts set up in the 'Account Bank'. Any outflow, from the said account, could be made only in the manner envisaged by the TRA Agreement.

(v) As the account of GIL was performing unsatisfactorily, it was declared a Non-Performing Asset (NPA), w.e.f. 31st June, 2000. Consequent thereupon, the CDR Lenders, in a meeting

held on 26th September, 2016, invoked the Strategic Debt Restructuring Scheme (SDR Scheme), in accordance with the guidelines of the Reserve Bank of India (RBI), agreeing, *inter alia*, to conversion of part of the debt into equity, and to the merger of CNIL with GIL. As a result of conversion of part of the debt of GIL into equity, the CDR Lenders came to hold about 63.16% of the share capital of GIL.

(vi) The SDR Scheme, however, also failed to take off. The account of GIL was again declared NPA w.e.f. 1st July 2011.

(vii) As a result, the CDR Lenders decided to sell the financial assets of GIL to an asset reconstruction company. Edelweiss, along with Bank of America Merrill Lynch, bid for acquisition of the entire financial asset sale of GIL. The offer of Edelweiss, for ₹ 2400 crores, was accepted by the Monitoring Institution, i.e. the Union Bank of India, on 13th July, 2018. Thereafter, a majority of the CDR Lenders assigned their loans, advanced to GIL, in favour of Edelweiss, by way of various Assignment Agreements. As a result, Edelweiss stepped into the shoes of the Assignor Banks of GIL. Under one such Assignment Agreement dated 28 August, 2018, Edelweiss was also assigned the role of 'Monitoring Institution', in place of Union Bank of India, under the TRA Agreement. As such, Edelweiss controlled and supervised the TRA capital, which, naturally, would include all outgos therefrom. Resultantly, Edelweiss has acquired 79.36% of the secured rupee debt of GIL. The Assignor Banks also assigned their rights, title and interest

under the MRA and TRA Agreement in favour of Edelweiss, and all covenants of the said agreements, therefore, constitute binding obligations between Edelweiss and GIL.

(viii) Under the MRA,

(a) GIL was prohibited from creating, or allowing the subsistence of, any security interest, or any type of preferential arrangement, on any of its assets, as well as from creating an escrow on its future cash flows or any charge, lien or interest thereon,

(b) GIL was to provide full disclosure, to the CDR Lenders, including Edelweiss, at the first instance, as to initiation, or threatened initiation, of any litigation, investigation or proceedings, judicial, quasi-judicial or administrative, before any arbitrator or government entity or other legal proceedings, which would result in a material adverse effect on the ability, of GIL, to discharge its obligations under the financing documents, including its obligation to repay the debts,

(c) GIL was also required to apprise Edelweiss of the occurrence of any event which had a material adverse effect on its business or financial condition or upon discharge of its obligations under the financing agreements,

(d) GIL was also required to notify the CDR Lenders, including Edelweiss, of any event which had a material impact on the debt servicing capacity of GIL, and

(e) GIL was required to establish a trust and retention account (TRA) with the Account Bank in terms of the TRA Agreement, close all its other accounts and transfer the amounts contained in such other accounts to the TRA.

(ix) Under the TRA Agreement,

(a) GIL was required to open a series of accounts with the Account Bank, debits from, and credits into, which, could only be carried out under the supervision of the Monitoring Institution, i.e. Edelweiss,

(b) all business proceeds of GIL were to flow into the said accounts, under Clause 2.9 of the TRA Agreement,

(c) GIL was obligated to provide monthly reports and details of proposed debits from the said accounts, and

(d) in the event of default, the Account Bank was required, in accordance with the instructions of Edelweiss and taking over of the operation of the TRA Account by Edelweiss.

(x) The MRA and TRA secured the loans and facilities granted by Edelweiss to GIL by hypothecation over all the movable assets of GIL and a charge on the TRA, which included reserves and bank accounts, present and future, of GIL, wherever maintained.

(xi) *The joint effect of the aforesaid agreements was, therefore, that GIL could not have paid any amount to anyone, including GTL, in priority to Edelweiss and its other secured financial creditors.*

(xii) As there was consistent default, of GIL, in servicing its debt obligations, under the MRA and TRA, Edelweiss issued a formal notice of default, to GIL on 24th January, 2020.

(xiii) In this scenario, GIL and GTL instituted collusive arbitration proceedings, solely with a view to divert the funds of GIL, secured in favour of Edelweiss and other secured creditors, to GTL, which was a related entity, in violation of the superior priority rights of Edelweiss and other secured creditors.

(xiv) Edelweiss was never made aware of the said proceedings. It was only *vide* letter dated 8th January, 2020, received by Edelweiss on 9th January, 2020, that GIL informed Edelweiss of the impugned Order.

(xv) In the backdrop of the aforesaid facts, GIL could not have proposed a schedule of payments to be made to GTL, which led to the passing of the impugned Order. Any such payment could have been made only after all outstanding dues of Edelweiss and other secured financial creditors of GIL, had been liquidated. Prior thereto, creation of such a liability, without prior consent and approval of Edelweiss and other

secured financial creditors was illegal and wrongful. GIL had, thereby, committed culpable breach of the terms of the MRA and the TRA, by defeating the superior priority rights of its secured financial lenders. The impugned Order, which results in according a seal of approval to the said breach is also, therefore, unsustainable in law.

(xvi) Had the learned Arbitral Tribunal been apprised of the MRA and the TRA, and the covenants thereof, the impugned Order would not have been passed. The learned Arbitral Tribunal would, thereupon, have become aware of the fact that the amounts, which GIL consented to pay to GTL, were not GIL's, to fritter away. It is also pointed out, in this context, that, till the conversion of the debt of GIL into equity, under the SDR Scheme, GTL was the controlling and holding company of GIL.

(xvii) Edelweiss was a stranger to Arb. A. (COMM) 7/2020. The judgement, dated 4th March, 2020, had come to be passed, by the coordinate Bench of this Court, in the said appeal, owing to any lack of a serious challenge, on the part of GTL, or substantive contest by GIL.

(xviii) OMP (ENF.) (COMM) 23/2020, too, had not resulted in any direction to GIL to remit any amounts to GTL. Edelweiss had moved an application, seeking intervention in the said proceedings.

(xix) Edelweiss addressed a number of communications to GIL, directing it not to make any unilateral payments to GTL without prior consent of Edelweiss. Despite such communications, on 13th and 14th March, 2020, GIL and GTL issued disclosures under Regulation 30 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, affirming the fact of payments having to be made in terms of the impugned Order of the learned Arbitral Tribunal.

(xx) On 26th March, 2020, Edelweiss addressed an email, to GIL, precluding GIL from making any payments, towards the impugned Order without its prior consent, enforcing, thereby, Clauses 2.12 and Clause 5 of the TRA Agreement, as GIL had failed to cure its default for more than 30 days after notice of event of default, issued to GIL, by Edelweiss, on 24th January, 2020.

(xxi) In a Joint Lenders' Meeting held on 23rd April, 2020, GIL intimated the fact that, pursuant to a settlement between GIL and GTL, consequent on the passing of the impugned Order, ₹ 320 crores had been paid by GIL to GTL. This was done without any prior intimation to Edelweiss. It was sought to be submitted, by GIL, that the said amount had been paid, to GTL, by way of Demand Drafts, which were yet to be encashed. Edelweiss, therefore, directed GIL, *vide* return email dated 24th April, 2020, to obtain a return of the said Demand Drafts and

deposit the said amount in the TRA Account, as per the covenants of the MRA and TRA Agreements, on or before 27th April, 2020.

(xxii) It was in these circumstances that Edelweiss moved the High Court of Bombay, *vide* Suit LD-VC No 55 of 2020. In view of the order, dated 5th May, 2020, passed by the High Court of Bombay (to which I have already alluded, hereinabove), the amount of ₹ 320 crores, sought to be paid by GIL to GTL in compliance with the impugned Order of the learned Arbitral Tribunal, was required to be retained in the TRA. In fact, in its counter-affidavit, filed before the High Court of Bombay, GIL had admitted the preferential priority rights of Edelweiss, over the said amount.

32. Premised on the above facts and contentions, Edelweiss has sought, by the present appeal, quashing of the impugned Order dated 17th December, 2019, passed by the learned Arbitral Tribunal.

Rival submissions

33. Detailed arguments were advanced at the bar, by Mr. Sandeep Sethi, learned Senior Counsel appearing on behalf of Edelweiss, Mr. Rajiv Nayar, learned Senior Counsel on behalf of GTL and Mr. Mukul Rohatgi, learned Senior Counsel on behalf of GIL. Written submissions were also filed, both during and after the conclusion of proceedings, and learned Counsel consented, at the Bar, to disposal of

the present petition, on the basis of the oral arguments advanced in written submissions filed, without requiring exchange of pleadings.

34. I proceed to deal with the issues arising for consideration, seriatim.

35. Re. Preliminary objection to maintainability of the appeal, under Section 37, on the ground that it is an "interim award":

35.1 GTL contends that the present appeal is not maintainable, as the impugned Order is an "interim award" within the meaning of Section 31(6) of the 1996 Act, read with the judgement of the Supreme Court in ***Indian Farmers Fertiliser Cooperative Ltd v. Bhadra Products***[3] and of this Court in ***ONGC Petro Additions Ltd v. Tecnimont S.P.A.***[4] Before proceeding to the contentions of GTL, in this regard, it would be appropriate, first, to examine these decisions.

35.2 Before that, however, it is necessary to reproduce Section 37, thus:

> "**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;

[3] **(2018) 2 SCC 534**
[4] **2019 SCC OnLine Del 8976**

> (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."

Quite obviously, appeals from orders passed by arbitral tribunals would be confined to sub-section (2) of Section 37, as sub-section (1) refers to appeals against orders passed by the Court. Mr. Nayar has, while opposing the maintainability of the present appeal, emphasised the words "and from no others", figuring in Section 37. This emphasis is, however, misguided, as these words occur in Section 37 (1), and not in Section 37 (2). In any event, these words appear to be a legislative superfluity – a rare aberration from the sanctified principle that the legislature does not indulge in tautology – as, even if the words were absent, once the categories of cases, in which appeals would lie, stand specifically enumerated in the provision providing for appeal, the obvious corollary is that appeals would not lie in any other case.

35.3 Appeals, therefore, lie, under Section 37 (2), from orders of the arbitral tribunal, passed either under sub-sections (2) or (3) of Section 16, or under Section 17.

35.4 It is nobody's case that the impugned Order has been passed by the learned Arbitral Tribunal under Section 16. Mr. Sethi, for the appellant, would contend that the Order has been passed under Section 17. Mr. Nayar, for the respondent would, *per contra*, asserted that the order has been passed under Section 31(6).

35.5 Section 31(6) reads thus:

> "**31. Form and contents of arbitral award. –**
>
> (1) – (5) *****
>
> (6) The arbitral Tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award."

As against this, Section 17 reads as under:

> "**17. Interim measures ordered by arbitral tribunal. –**
>
> (1) A party may during the 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 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 a 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.

(2) Subject to any orders passed in appeal under section 37, any the 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."

35.6 There is no gainsaying the position, apparent from the statute, that appeals lie, only against the orders passed by the arbitral tribunal under Section 17. By implication, therefore, "interim awards", rendered by the arbitral Tribunal under Section 31(6), are not amenable to appeal under Section 37.[5]

35.7 "Interim award" is not, however, defined in the 1996 Act. Consequently, the exact scope of Section 37(2)(b), and whether the order under challenge was actually relatable to Section 17, or was an "interim award" under Section 31(6), was never really examined, till ***IFFCO***[3]. The actual dispute in that case need not concern us. Suffice it to state that a plea of limitation, advanced by the respondent IFFCO before the learned sole arbitrator in that case, was taken up initially, and was decided in favour of the claimant Bhadra Products, This decision was challenged, by IFFCO, by way of a petition under Section 34, before the learned District Judge. The learned District Judge dismissed the Section 34 petition, stating that the decision of the learned Sole Arbitrator could not be regarded as an "interim award" and could not, therefore, be assailed under Section 34. IFFCO appealed, against the decision of the learned District Judge, to the High Court, which dismissed the appeal. IFFCO appealed, further, to the Supreme Court.

35.8 IFFCO contended, before the Supreme Court, that, as the learned Sole arbitrator had, by his order dated 23rd July, 2015, finally

[5] Refer the maxim *expressio unius est exclusio alterius*, of especial application while construing jurisdiction clauses – Ref. **Swastik Gases (P) Ltd v. Indian Oil Corporation Ltd, (2013) 9 SCC 32; EXL Careers v. Frankfinn Aviation Services Pvt Ltd, AIR 2020 SC 3670**

adjudicated the issue of limitation against IFFCO, the order was an "interim award" within the meaning of Section 31(6) and was, therefore, amenable to challenge under Section 34, of the 1996 Act. As against this, Bhadra contended that the order, dated 23rd July, 2015, was passed under Section 16 of the 1996 Act (which empowered the arbitral tribunal to rule on its own jurisdiction) and could not, therefore, be related to Section 31(6). Pointing out that an appeal against an order passed under Section 16 lay, under Section 37(2)(a), only where the order accepted the plea of limitation, and not where it rejected the plea, it was submitted, by Bhadra, that, as the order dated 23rd July, 2015 rejected the plea of limitation advanced by IFFCO, the order was not appealable either.

35.9 The Supreme Court, therefore, delineated the issues arising before it for consideration as "whether an award on the issue of limitation can first be said to be an interim award and, second, as to whether a decision on a point of limitation would go to jurisdiction and, therefore, be covered by Section 16 of the Act". Relying on its earlier decision in ***McDermott International Inc. v. Burn Standard Co Ltd***[6], it was held that "an interim award or partial award *is a final award on matters covered therein made at any intermediate stage of the arbitral proceedings*". Tested on this principle, it was held that the order dated 23rd July, 2015, of the learned Sole arbitrator in that case, was an 'interim award', as the learned Sole arbitrator had, by the said award, disposed of the issue of limitation finally.

[6] **(2006) 11 SCC 181**

35.10 The two indicia which distinguish interim awards, as postulated in ***IFFCO***[3] are, therefore, that (i) the award, or order, is made at an intermediate stage of the arbitral proceedings, and (ii) the award *finally disposes of the matter covered therein.*

35.11 Mr. Nayar also chose to place reliance on the judgement, of a coordinate Single Bench of this Court in ***ONGC Petro Additions Ltd***[4], and drew particular attention to para 13 of the said decision. The reliance is, in my view, misdirected. Para 13 observed, *inter alia*, thus:

> "In order to ascertain whether an order is an interim award or partial award, the two most important factors that would weigh upon the Court are the concept of "finality" and "issue". If the nature of the order is "final" *in a sense that it conclusively decides an issue in the arbitration proceedings*, the order would qualify to be an interim award."
>
> (Emphasis supplied)

35.12 I am entirely in agreement with the above enunciation of the law, as contained in ***ONGC Petro Additions Ltd***[4]. I also agree with Mr. Nayar that, in deciding whether an order, by the arbitral tribunal, is an "interim award", or not, the essential test is whether the order decides an issue conclusively and finally. How, then, is one to ascertain whether the order, under challenge, decides an issue conclusively and finally? In my view, the decision, in this regard, has either to flow from an overall reading of the order itself, giving due – but not undue – importance to the words used therein. I say "due, but not undue" because there may, conceivably, be cases in which the order itself may claim to be an "interim award" order and to determine, finally, the issue between the parties, but such a recital

cannot be treated as the end of the matter. The Court would have to take an informed decision as to whether, in fact, the order conclusively and finally decides the issue between the parties. In other words, to borrow the felicitous expression used in ***IFFCO***[3], there must be a "final determination" of an issue "at the interim stage". Whether there is, or is not, such a "final determination" has to be essentially gleaned from the order itself, seen in the backdrop of the circumstances and considerations that governed its passing.

35.13 The circumstances, which Mr. Nayar stresses, to impress, on the Court, that the impugned order is, in fact, in the nature of an "interim award", within the meaning of Section 31(6), may be examined thus:

(i) Mr. Nayar points out that, in para 22 of the Impugned Order, the learned Arbitral Tribunal notes the contention, of GTL, that GIL was liable to suffer an interim award/partial decree at that stage itself. For ready reference, para 22 may be reproduced thus:

> "Mr. Wadhwa, Ld. Senior Counsel on behalf of the Claimant has urged before us, that the Respondent has all throughout admitted its liability of Rs.650 crores towards the Claimant. Ld. Senior Counsel has drawn the attention of the Tribunal to several clauses of the Suspension Agreement (reproduced above) to contend that it was only an Interim Arrangement arrived at by the parties to enable the Respondent, to restructure its debt to enable it to perform its obligations under the EMA dated 31st March, 2015 and other agreements entered into between the parties. *Mr. Wadhwa has further submitted that the Respondent has not disputed the claim of* Rs.*650 crores in its Statement of Defence*

> *and thus the Respondent is liable to suffer an Interim Award/Partial Decree at this stage itself.* Furthermore, it has been urged that the Respondent had failed to deposit Rs.40 crores in terms of Clause 4.5 of the Suspension Agreement towards Refundable Deposit."
>
> (Emphasis supplied)

This passage, in my view, cannot help Mr. Nayar. The reference to the liability, of GIL, to suffer an Interim Award/Partial Decree, at that stage itself, is merely in the nature of a recording of the submission advanced, before the learned Arbitral Tribunal, by learned Senior Counsel appearing on behalf of GTL. Mr. Sethi, learned Senior Counsel for the petitioner, has pointed out, correctly, that there is, beyond this, no finding or observation, of the learned Arbitral Tribunal, evincing its acceptance of the aforesaid submission advanced by Mr. Wadhwa. The recording, by the learned Arbitral Tribunal, of the submission of Mr. Wadhwa cannot, therefore, assist in determining whether the impugned order is, or is not, in the nature of an "interim award".

(ii) It is next contended, by Mr. Nayar, that the reliance, by the learned Arbitral Tribunal, on Order VIII Rules 3 to 5 of the Code of Civil Procedure, 1908 (CPC), in para 28 of the impugned Order, and the accompanying observations of the learned Arbitral Tribunal, "*ex facie* show that the Tribunal was undertaking a final adjudication to the extent of ₹ 400 crores on the basis that liability could not be denied by Respondent No. 1". Here, again, para 28 of the impugned Order would, if

properly read, militates against the submission of Mr. Nayar. The para reads thus:

> "A holistic reading of Order VIII and Rules 3, 4 and 5 thereof, of the CPC make it clear that if every allegation stated in the Plaint is not denied specifically or by necessary implication, the said allegation or assertion shall be taken to have been admitted. In this conspectus, it is held *at this stage of the proceedings* that the sum of Rs.400 crores is not a sum *presently in dispute* but is a liability not specifically denied *at this stage* by the Respondent. As regards the remaining sum of Rs. 250 crores, Ld. Counsel for the Claimant has fairly stated that the same would require adjudication by this Arbitral Tribunal."
>
> (Emphasis supplied)

It would be a complete misadventure for a Court to interpret an Order, or an Award, passed by an Arbitral Tribunal, in a manner different from the clear intent emanating from the order or award, as is apparent from the words used therein. The learned Arbitral Tribunal has, in a single sentence in para 28 of the impugned Order, used the expressions "at this stage of the proceedings", "presently in dispute" and "at this stage". The intent is apparent. It is clear that the learned Arbitral Tribunal is not conclusively determining the liability of GIL, or the corresponding entitlement of GTL, even to the extent of ₹ 400 crores. The findings that follow are, clearly, therefore, *ad hoc* in nature, entered *at that stage* of the proceedings, based on the non-denial, by GIL, of its liability, *at that stage*. The reliance, by the learned Arbitral Tribunal, on Order VIII Rules 3 to 5 of the CPC, is totally irrelevant, in my view, as these provisions deal with the requirement of denial, by the defendant in a suit, of the pleadings of the plaintiff, to be specific, and the

consequences that follow in the alternative. They cannot, therefore, seriously impact the issue of whether the impugned Order is in the nature of an "interim award", or is merely interlocutory in nature.

(iii) Mr. Nayar draws attention, next, to the reference, by the learned Arbitral Tribunal, in para 31 of the impugned Order, to the judgement of the Supreme Court in ***Uttam Singh Duggal***[1]. It is emphasised that the said decision concerns Order XII Rule 6 of the CPC, which provides for judgement on admissions. It is not necessary to extract para 31, as a bare reading thereof makes it clear that the learned Arbitral Tribunal has merely relied on a passage from ***Uttam Singh Duggal***[1], to observe that, where the claim is admitted, a Court has jurisdiction to enter a judgement for the plaintiff and pass a decree on the admitted claim. The rationale, reflected in the said para has been relied upon, by the learned Arbitral Tribunal as "fortifying" its decision. This, by itself, in my view, cannot convert the impugned Order into an "interim award", contrary to all that is reflected from the express wordings contained in other paras thereof.

(iv) For the same reason, the reliance, by Mr. Nayar, on the reference, by the learned Arbitral Tribunal, on the judgement of this Court in ***Numero Uno International Ltd***[2], fails to impress. The passage, in ***Numero Uno International Ltd***[2], on which the learned Arbitral Tribunal placed reliance, reads thus:

> "8. The issue can be viewed from yet another angle. The making of the interim award ensures to the party in whose favour the same is made the payment of an amount which is an admitted position payable to it. There is no reason why the payment of what is admittedly due should await the determination of other disputes which may take years before they are finally resolved. If at the conclusion of the arbitral proceedings, the defendant were to succeed in his claim, either wholly or partially, and if after adjustment of the amounts found payable to the plaintiff, any amount is eventually held payable to one or the other party, the arbitrator can undoubtedly make such an adjustment and direct payment of the amount to one or the other party, as the case may be. The final award would in any such case also take into consideration the payments, if any, made under the interim award. Suffice it to say that the making of the interim award in no way prevents the arbitrator from making adjustments of the amount in the final award and doing complete justice between the parties. By that logic even if we assume that the Prasar Bharti was to fail in substantiating its further claims which are disputed and the appellant were to succeed wholly in the counter claim that it has made, all that it would result in is an award in favour of the appellant. There is, therefore, no inherent illegality or perversity in the making of the interim award by the arbitrator so as to call for interference by this Court under Section 34 of the Act."

There is no denying the fact that the afore-extracted passage, from ***Numero Uno***[2], does refer to the passing of an "interim award". This passage was, however, a full decade prior to the enunciation of the law in ***IFFCO***[3]. The legal position, regarding the ingredients and indicia of an "interim award", within the meaning of Section 31(6), can no longer be regarded as in a state of flux, after ***IFFCO***[3]. Moreover, a proper reading

of the passage, from ***Numero Uno International Ltd***[2], on which the learned Arbitral Tribunal relies, discloses that it essentially underscores the authority, of the Arbitral Tribunal, to direct payment of admitted amounts at the interlocutory stage in arbitral proceedings, and does not, expressly or by necessary implication, delineate the scope and contours of the expression "interim award". In the present case, para 28 of the impugned Order is clear and categorical in observing that the direction for payment of ₹ 400 crores was being made only because, *at that stage of the proceedings*, there was no denial, by GIL, of its liability. The learned Arbitral Tribunal has, in the said para, left the field wide open for contest, even at any later, or the final, stage, of the liability of GTL in that regard. In view of the said para, the submission, specifically so made in the written submissions tendered by GTL, that the learned Arbitral Tribunal was, by the impugned Order, "undertaking a final adjudication to the extent of Rs. 400 crores", cannot be accepted, being directly contrary to para 28 thereof.

(v) Attention has also been invited, by Mr. Nayar, to the recording, in para 35 of the impugned Order, of the request, advanced by Mr. Wadhwa, learned Senior Counsel before the learned arbitral Tribunal, to treat the Section 17 application of GTL as having been preferred under Section 31(6), and to pass an interim award thereon. As Mr. Sethi has correctly pointed out, this submission is, no doubt, recorded; there is, however, no acceptance, by the learned Arbitral Tribunal, thereof.

> Indeed, one is unable to find, in the entire impugned Order, any specific observation, by the learned Arbitral Tribunal, that the impugned Order was in the nature of an interim award, finally adjudicating the liability of GTL, to GIL, to the extent of ₹ 400 crores, or, for that matter, any other amount. The recording of the submission of Mr. Wadhwa, by the learned Arbitral Tribunal cannot, therefore, suffice to constitute an acknowledgement, to the effect that the impugned Order was in the nature of an interim award.

35.14 As against this, Mr. Sethi has pointed out, correctly, that the concluding para of the impugned Order clearly states that "the present order shall await the Final Award and shall be subject to adjustments in order to conform to the Final Award". This caveat, obviously consciously entered, seen in juxtaposition with para 28 of the impugned Order, completely defeats the submission, of Mr. Nayar, that the impugned Order is in the nature of an "interim award" and is, therefore, not amenable to challenge under Section 37.

35.15 Reference may once again be made, in this context, to para 14 of the judgment in ***IFFCO***[3], which reproduces paras 68 to 70 of the earlier decision of the Supreme Court in ***McDermott International***[6]. Para 68 of ***McDermott International***[6] reads thus:

> **"68.** The 1996 Act does not use the expression "partial award". It uses interim award or final award. An award has been defined under Section 2(c) to include an interim award. Sub-section (6) of Section 31 contemplates an interim award. An interim award in terms of the said provision is not one in respect of which a final award can be made, but *it may be a*

> *final award on the matters covered thereby, but made at an interim stage*."
>
> (Emphasis supplied)

An interim award, for the purpose of Section 31(6) has, therefore, to be a final award on the matters covered thereby made at an interim stage. Even while directing GIL to pay ₹ 400 crore to GTL, the impugned order makes it clear that the direction was *ad hoc* in nature, made at that of point of time in view of the situation emanating from the pleadings till then. In my view, it cannot be said that the learned Arbitral Tribunal has finally pronounced on the liability of GIL, to pay ₹ 400 crores to GTL, so as to render the present appeal incompetent.

35.16 Interestingly, Arb. A. (COMM) 7/2020 was preferred, by GIL, before this Court, under Section 37(2)(b) of the 1996 Act, as is noted in the very first sentence of the judgement, dated 4th March, 2020, rendered thereon. Having itself chosen to invoke Section 37(2)(b), to challenge the impugned Order, I am in agreement with Mr. Sethi that it cannot lie in the mouth of GIL to oppose the maintainability of the appeal of Edelweiss, on the ground that Section 37(2)(b) would not apply. What is sauce for the goose, axiomatically, is sauce for the gander. The only response of GIL, to this submission of Edelweiss, is that this aspect escaped scrutiny, as no such objection was raised, to challenge the maintainability of the appeal preferred by it. To say the very least, such an argument is completely unconscionable, and does not even merit a cursory consideration. Having itself chosen to avail the remedy of appeal, under Section 37(2)(b) of the 1996 Act, to challenge the impugned Order dated 17th December, 2019, of the

learned Arbitral Tribunal, GIL cannot, in my view, legitimately seek to contest the right of Edelweiss to do so.

35.17 There is yet another, and more empirical, reason why this submission, of Mr. Nayar, cannot succeed. Admittedly, the impugned Order was passed on an application, preferred by GTL under Section 17 of the 1996 Act. The suggestion, of Mr. Wadhwa, that the application could be treated as one under Section 31(6), though noted, cannot be said to have been accepted by the learned Arbitral Tribunal, either expressly or by necessary implication. The impugned Order does not state that the application, preferred by GTL under Section 17, was being converted into one under Section 31(6), or being treated as an application under the said sub-section. The directions contained in the impugned Order do not purport to have been issued under Section 31(6). They have, therefore, necessarily to be regarded as having been issued under Section 17, while adjudicating an application preferred under that provision. I have already opined, hereinabove, that a holistic appreciation of the impugned Order, particularly para 28 thereof, indicates that the direction for the payment of ₹ 400 crores, by GIL to GTL, was merely being issued "at that stage of the proceedings", and by way of an interim arrangement. There was, therefore, no final adjudication of the entitlement, of GTL, to the said amount. The said direction was modifiable, by adjustment, at the stage of passing of the Final Award. Any order, granting an interim measure under Section 17 is, statutorily, appealable under Section 37(2)(b). Even on this ground, therefore, the appeal of Edelweiss is maintainable.

35.18 I am, therefore, of the view that the submission, of Mr. Nayar, that the impugned Order is an "interim award" and is, therefore, not amenable to appeal under Section 37 of the 1996 Act, is misconceived. It is accordingly rejected.

36. Re. Preliminary objection to maintainability of the appeal, under Section 37, on the ground that the impugned order has merged with the judgement, dated 4th March, 2020, in Arb. A (COMM) 7/2020

36.1 Mr. Nayar predicates his submission, regarding the merger of the impugned order, with the judgment, dated 4th March, 2020 in Arb. A. (COMM) 7/2020 on the well known decision in ***Kunhayammed v. State of Kerala***[7]. Juxtaposed therewith, Mr. Nayar also relies on the acknowledgement, in para 31 of the appeal, that GIL had filed Arb. A. (COMM) 7/2020, at the instance of Edelweiss. It is sought to be contended that, having thus taken a chance at challenging the impugned order, dated 17th December, 2019, of the learned Arbitral Tribunal, by way of Arb. A. (COMM) 7/2020, though by proxy, and failed, the appellant could not now seek challenge the same order by its own substantive appeal.

36.2 In response Mr. Sethi submits that the order, dated 4th March, 2020, of this Court in Arb. A. (COMM) 7/2020, was obtained by fraud, as this Court as well as the learned Arbitral Tribunal, were kept in the dark, again regarding the prior charge of Edelweiss, over the

[7] **(2000) 6 SCC 359**

funds and assets of GIL. Relying on the judgments of the Supreme Court in ***A.V. Papayya Sastry v. Government of A.P.***[8]**,** and ***U.O.I. India v. Ramesh Gandhi***[9], it is contended that judgment obtained by fraud is a nullity and that, therefore, such a judgment cannot restrain Edelweiss from prosecuting the present appeal.

36.3 Before examining the applicability of the decision in ***Kunhayammed***[7] to the facts of the present case, it merits mention that ***Kunhayammed***[7] was explained, subsequently, by R.C. Lahoti, J. (as the then was) – who had authored ***Kunhayammed***[7] – in ***S. Shanmugavel Nadar v. State of Tamil Nadu***[10], to which reference would be made, in somewhat greater detail, hereinafter.

36.4 ***Kunhayammed***[7] related to a dispute, initiated by a family, in respect of 1020 acres of land, before the Forest Tribunal, Kozhikode. The Forest Tribunal held that the land did not vest in the Government. The appeal preferred by the State of Kerala was dismissed by the High Court on 17th December, 1982, by a detailed judgment. SLP (C) 8098/1983 was preferred, thereagainst, by the State of Kerala, before the Supreme Court. By order, dated 18th July, 1983, the SLP was "dismissed on merits", without stating anything more.

36.5 In January, 1984, the State of Kerala filed an application, for review of the judgment, dated 17th December, 1982, before the High Court. Kunhayammed opposed the maintainability of the review

[8] 2007 (4) SSC 221
[9] (2012) 1 SCC 476
[10] 2002 (8) SCC 361

petition on the ground of dismissal of SLP (C) 8098/1983. The High Court overruled the objection and directed that the review petition be listed for hearing on merits. Aggrieved thereby, Kunhaymmed approached the Supreme Court.

36.6 Before the Supreme Court, the State of Kerala contended that the order, dated 17th December, 1982, of the High Court had merged with the order, dated 18th July, 1983, whereby the SLP, against the said order, was dismissed by the Supreme Court. No application for review, it was contended, could lie before the High Court thereafter. Another ground, which was interlinked with the first, was that the order, dated 18th July, 1983, of the Supreme Court, affirmed the order, dated 17th December, 1982, of the High Court, thereby disabling the High Court from reviewing its order. In para 12 of its judgment, the Supreme Court observed thus:-

> "12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

36.7 The Supreme Court went on to notice that its earlier decision in ***Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat***[11]**,** had emphasized three pre-conditions for the doctrine of merger to be attracted, *viz* that (i) the jurisdiction exercised by the higher court should have been appellate or revisional in nature, (ii) the jurisdiction should have been exercised after issuance of notice and (iii) the judgment should have been rendered after a full hearing had been granted to the parties. Satisfaction of these three criteria, it was held, resulted in merger of the judgment of the lower court with that of the higher court. These principles, it was held, were useful in resolving the issue before the Supreme Court.

36.8 Though the decision, in ***Kunhayammed***[7], centrally dealt with the question of merger in the case of dismissal of an SLP, with which we are not concerned, the Supreme Court summed up its conclusion in para 44 of the report, thus:

> "(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.
>
> (ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

[11] **(1969) 2 SCC 74**

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

> (vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC."

36.9 A holistic reading of ***Kunhayammed***[7] reveals that the doctrine of merger cannot be blindly applied, wherever a higher court decides a challenge to the decision of a lower court. It depends on the nature of jurisdiction exercised by the superior court and the content of the subject matter of challenge laid or capable of being laid before the superior court. Additionally, the decision of the superior court would have to be a decision rendered after issuance of notice to, and after fully hearing, the parties. Fundamentally, therefore, the decision of the superior court can never operate as merger, so as to non-suit a party who was not heard by the superior court, before the judgment was passed. Much less can it operate to non-suit a non-party before the superior court.

36.10 Applying this principle to the present case, it would be seen that Edelweiss was not a party before this Court in Arb. A. (COMM) 7/2020, that judgment, therefore, proceeded without any intimation to Edelweiss, without issuance of notice to it and without granting any hearing to it. It is not possible, therefore, to apply ***Kunhayammed***[7], to hold that Edelweiss is proscribed from prosecuting the appeal because of the judgment, dated 4th March, 2020, passed by the coordinate Single Bench in Arb. A. (COMM) 7/2020.

36.11 The same position would emanate, from the well settled principle that a litigant cannot, ordinarily, be bound by a judgment to which it is not a party.[12]

36.12 A third reason, for rejecting the submission, of Mr. Nayar, regarding merger of the impugned order of the learned Arbitral Tribunal, with the judgment, dated 4th March, 2020 of this Court in Arb. A. (COMM) 7/2020, also exists. That appeal was preferred by GIL, challenging the impugned order. A reading of the judgment reveals that there is not a whisper of an averment, far less any discussion, regarding the prior charge, over the assets of GIL, by Edelweiss and other secured creditors. There is, therefore, substance in the contention, of Mr. Sethi, that this Court was not made aware, at the time of deciding the said appeal, regarding the claims of prior secured creditors, such as Edelweiss. A reading of the judgment reveals that this Court proceeded on the premise that, once GIL had admitted its liability to pay ₹ 400 crores to GTL, no fault could be found with the learned Arbitral Tribunal, in directing such payment. In these circumstances, this Court found the reliance by the learned Arbitral Tribunal, on the judgments of the Supreme Court, in ***Uttam Singh Duggal***[1] and of this Court in and ***Numero Uno International Ltd***[2] to be apt and well taken. Even applying the well known principle of issue estoppel, as well as the ratio of ***Kunhayammed***[7] that the applicability of the doctrine of merger has to be examined with respect to the challenge before the superior court, the claims of Edelweiss – or, indeed, of any other secured creditors – not having

[12] **Sneh Gupta v. Devi Sarup, (2009) 6 SCC 194**

constituted any part of the challenge before this Court in Arb. A. (COMM) 7/2020, the judgment rendered in that case cannot operate as a bar to any secured creditor, including Edelweiss, maintaining its own substantive appeal. In fact, the concluding para of the judgment, dated 4th March, 2020, in Arb. A. (COMM) 7/2020 reveals that this Court has clearly held that it was passing its judgment "on account of the admission and offer of the appellant to clear its liability and the law that if that amount is admitted by a party, the same should be released to the opposite party at the earliest, without waiting for adjudication of the remaining disputes". In my view, it would be contrary to the basic principles of common sense, let alone justice and fair play, to refuse to adjudicate a challenge, by the appellant as a secure creditor of GIL, to the transfer of moneys from the account of GIL – over which it claimed prior security rights – to GTL, thereby substantially reducing the corpus of the amounts, over which it held security. The judgment of this Court, in Arb. A. (COMM) 7/2020, clearly, cannot justify the lending, by this Court, of its imprimatur to any such inference or conclusion.

36.13 There is, yet another, fourth reason, why the argument of merger, based by Mr. Nayar, cannot succeed. As I have noted hereinabove, ***Kunhayammed***[7] was, subsequently, explained in ***S. Shanmugavel Nadar***[10]. In that case, the State Legislature of Tamil Nadu amended certain provisions of the Madras City Tenants Protection Act, 1991, by the Madras City Tenants Protection (Amendment) Act, 1960 (hereinafter referred to as "the 1960 Amendment Act"). The constitutional validity of the 1960

Amendment Act was challenged before the High Court of Madras in a batch of writ petitions, which was dismissed by a judgment, which came to be reported, subsequently, as ***Varadaraja Pillai v. Salem Municipal Council***[13]. SLPs were preferred, thereagainst, which were also dismissed by the Supreme Court, *vide* order, dated 10th September, 1986, which reads thus:

> "The constitutional validity of Act 13 of 1960 amending the Madras City Tenants Protection Act, 1921 is under challenge in these appeals. The State of Tamil Nadu was not made a party before the trial court. However, the State was impleaded as a supplemental respondent in appeal as per orders of the High Court. When the appellants lost the appeal, they sought leave to appeal to this Court. The State of Tamil Nadu was not made a party in the said leave petition. In the SLP before this Court also the State of Tamil Nadu was not made a party. A challenge to the constitutional validity of the Act cannot be considered or determined, in the absence of the State concerned. The learned counsel now prays for time to implead the State of Tamil Nadu. This appeal is of the year 1973. In our view it is neither necessary nor proper to allow this prayer at this distance of time. No other point survives in these appeals. Therefore, we dismiss these appeals, but without any order as to costs."

36.14 Subsequently, the Madras City Tenants Protection Act, 1921 was again amended by the Madras City Tenants Protection (Amendment) Act, 1994 (hereinafter referred to as "1994 Amendment Act"). The constitutional validity of this Act was also challenged in a batch of writ petitions filed in the High Court. Before the High Court, reliance was placed by the State of Tamil Nadu, on the earlier decision in ***Varadaraja Pillai***[13]. The Division Bench expressed some doubt regarding the correctness of its earlier decision in ***Varadaraja***

[13] **1972 (85) L.W.760**

Pillai[13], but as the SLP preferred against the said decision, had been dismissed by the Supreme Court, followed the decision and dismissed the appeals, before it, challenging the validity of 1994 Amendment Act.

36.15 Aggrieved, the petitioners, before the High Court, appealed to the Supreme Court.

36.16 The Supreme Court commenced its discussion with the following prescient observations, regarding the doctrine of merger :

> "**10.** Firstly, the doctrine of merger. Though loosely an expression merger of judgment, order or decision of a court or forum into the judgment, order or decision of a superior forum is often employed, as a general rule the judgment or order having been dealt with by a superior forum and having resulted in confirmation, reversal or modification, what merges is the operative part i.e. the mandate or decree issued by the court which may have been expressed in a positive or negative form. For example, take a case where the subordinate forum passes an order and the same, having been dealt with by a superior forum, is confirmed for reasons different from the one assigned by the subordinate forum, what would merge in the order of the superior forum is the operative part of the order and not the reasoning of the subordinate forum; otherwise there would be an apparent contradiction. However, in certain cases, the reasons for decision can also be said to have merged in the order of the superior court if the superior court has, while formulating its own judgment or order, either adopted or reiterated the reasoning, or recorded an express approval of the reasoning, incorporated in the judgment or order of the subordinate forum."

36.17 It was also observed, in para 11 of the report, that the doctrine of merger was a doctrine of limited application. The Supreme Court went on to hold, in paras 12 to 16 and 20 of the report thus:

> "**12.** Thirdly, as we have already indicated, in the present round of litigation, the decision in ***M. Varadaraja Pillai case [85 LW 760]*** was cited only as a precedent and not as res judicata. The issue ought to have been examined by the Full Bench in the light of Article 141 of the Constitution and not by applying the doctrine of merger. Article 141 speaks of declaration of law by the Supreme Court. For a declaration of law there should be a speech i.e. a speaking order. In ***Krishena Kumar v. Union of India, (1990) 4 SCC 207 : 1991 SCC (L&S) 112,*** this Court has held that the doctrine of precedents, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. In ***State of U.P. v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139***, R.M. Sahai, J. (vide para 41) dealt with the issue in the light of the rule of *sub silentio*. The question posed was: can the decision of an appellate court be treated as a binding decision of the appellate court on a conclusion of law which was neither raised nor preceded by any consideration or in other words can such conclusions be considered as declaration of law? His Lordship held that the rule of *sub silentio* is an exception to the rule of precedents. "A decision passes *sub silentio*, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." A court is not bound by an earlier decision if it was rendered "without any argument, without reference to the crucial words of the rule and without any citation of the authority". A decision which is not express and is not founded on reasons, nor which proceeds on consideration of the issues, cannot be deemed to be a law declared, to have a binding effect as is contemplated by Article 141. His Lordship quoted the observation ***from B. Shama Rao v. Union Territory of Pondicherry,AIR 1967 SC 1480 : (1967) 2 SCR 650***, "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". His Lordship tendered an advice of wisdom — "Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond

reasonable limits is inimical to the growth of law." (SCC p. 163, para 41)

13. ***Rup Diamonds v. Union of India [(1989) 2 SCC 356 : AIR 1989 SC 674]*** is an authority for the proposition that apart altogether from the merits of the grounds for rejection, the mere rejection by a superior forum, resulting in refusal of exercise of its jurisdiction which was invoked, could not by itself be construed as the imprimatur of the superior forum on the correctness of the decisions sought to be appealed against. In ***Supreme Court Employees' Welfare Assn. v. Union of India [(1989) 4 SCC 187 : 1989 SCC (L&S) 569 : AIR 1990 SC 334]*** this Court observed that a summary dismissal, without laying down any law, is not a declaration of law envisaged by Article 141 of the Constitution. When reasons are given, the decision of the Supreme Court becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India. When no reasons are given, a dismissal simpliciter is not a declaration of law by the Supreme Court under Article 141 of the Constitution. In ***Indian Oil Corpn. Ltd. v. State of Bihar [(1986) 4 SCC 146 : 1986 SCC (L&S) 740 : AIR 1986 SC 1780]*** this Court observed that the questions which can be said to have been decided by this Court expressly, implicitly or even constructively, cannot be reopened in subsequent proceedings; but neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court bar the trial of identical issue in separate proceedings merely on the basis of an uncertain assumption that the issues must have been decided by this Court at least by implication.

14. It follows from a review of several decisions of this Court that it is the speech, express or necessarily implied, which only is the declaration of law by this Court within the meaning of Article 141 of the Constitution.

15. A situation, near similar to the one posed before us, has been dealt in Salmond's Jurisprudence (12th Edn., at pp. 149-50) under the caption — "Circumstances destroying or weakening the binding force of precedent: (perhaps) affirmation or reversal on a different ground." It sometimes happens that a decision is affirmed or reversed on appeal on a

different point. As an example, suppose that a case is decided in the Court of Appeal on ground A, and then goes on appeal to the House of Lords, which decides it on ground B, nothing being said upon A. What, in such circumstances, is the authority of the decision on ground A in the Court of Appeal? Is the decision binding on the High Court, and on the Court of Appeal itself in subsequent cases? The learned author notes the difficulty in the question being positively answered and then states: (i) The High Court may, for example, shift the ground of its decision because it thinks that this is the easiest way to decide the case, the point decided in the court below being of some complexity. It is certainly possible to find cases in the reports where judgments affirmed on a different point have been regarded as authoritative for what they decided. (ii) The true view is that a decision either affirmed or reversed on another point is deprived of any absolute binding force it might otherwise have had; but it remains an authority which may be followed by a court that thinks that particular point to have been rightly decided.

16. In the present case, the order dated 10-9-1986 passed by this Court can be said to be a declaration of law limited only to two points — (i) that in a petition putting in issue the constitutional validity of any State legislation the State is a necessary party and in its absence the issue cannot be gone into, and (ii) that a belated prayer for impleading a necessary party may be declined by this Court exercising its jurisdiction under Article 136 of the Constitution if the granting of the prayer is considered by the Court neither necessary nor proper to allow at the given distance of time. By no stretch of imagination can it be said that the reasoning or view of the law contained in the decision of the Division Bench of the High Court in ***M. Varadaraja Pillai case [85 LW 760]*** had stood merged in the order of this Court dated 10-9-1986 in such sense as to amount to declaration of law under Article 141 by this Court or that the order of this Court had affirmed the statement of law contained in the decision of the High Court.

*****

20. Inasmuch as in the impugned judgment, the Full Bench has not adjudicated upon the issues arising for decision before it, we do not deem it proper to enter into the merits of the

> controversy for the first time in exercise of the jurisdiction of this Court under Article 136 of the Constitution. We must have the benefit of the opinion of the Full Bench of the High Court as to the vires of the State legislation involved."

36.18 The law enunciated, in the afore-extracted passages from ***S. Shanmugavel Nadar***[10] also goes to indicate that issues, to which the superior court deciding the appeal, deciding the appeal was not even alive, passed *sub silentio* and can never be prevented, from being agitated subsequently, by applying the doctrine of merger. As has been held in ***S. Shanmugavel Nadar***[10] what merges is the operative part of the judgment.

36.19 The consequence of application of the doctrine of merger is that the parties before the court would be proscribed from re-agitating the issues, *which were raised before the "inferior court" earlier and decided by the decision which was upheld in appeal*. The doctrine cannot operate, in any event, to non-suit a third party, who was never before the appellate court, from raising a challenge, to which the appellate court was not even made aware. Any such view would be clearly contrary to the enunciation of law in ***Kunhayammed***[7] and, more particularly, in ***S. Shanmugavel Nadar***[10]**.**

36.20 For all these reasons, I am of the view that the contention, of Mr. Nayar, that the impugned order dated 17th December, 2019, of the learned Arbitral Tribunal, has merged with the judgment dated 4th March, 2020, of the co-ordinate Single Bench of this Court in Arb.A (COMM) 7/2020 and that, therefore, the Edelweiss is proscribed from maintaining the present appeal, has, necessarily, to fail.

36.21 Mr. Nayar also sought to contend that, were this Court to allow the present appeal, it would result in setting, at naught, the judgment, dated 4th March, 2020 (*supra*), passed in Arb. A. (COMM) 7/2020. I am unable to agree. The judgment, dated 4th March, 2020, did not adjudicate, at all, on the challenge raised in the present appeal. The impugned order, dated 17th December, 2019, directed GIL to pay certain amount to GTL. GIL challenged that order by way of Arb. A. (COMM) 7/2020. The judgment, dated 4th March, 2020, finds the challenge to be without merit, "on account of the admission and offer of the appellant to clear its liability and the law that if that amount is admitted by a party, the same should be released to the opposite party at the earliest, without waiting for adjudication of the remaining disputes" (as is expressly stated in concluding para of the judgment). Ergo, in view of the admission of liability, by GIL to GTL, this Court found that the challenge, by GIL, to the consequent direction for payment, as made by the learned Arbitral Tribunal, was bereft of merit. In my view, the said finding cannot, by any stretch of imagination, foreclose secured creditors from opposing the impugned direction of the learned Arbitral Tribunal, and compromising their rightful interests.

36.22 Whether such compromise has, or has not, taken place, would, of course, be a matter of contest. Even so, accepting the submission, as advanced by Mr. Nayar, could lead to deleterious consequences. Let us pare down the issue to its rudiments. A and B are locked in arbitration. A claims a certain amount from B. The arbitrator is not

made aware of the fact that all assets of B stand secured in favour of a secured creditor X. A moves an application, under Section 17, for a direction to B, to pay forthwith to A, the claimed amount. B admits its liability. Unaware of the fact that the assets of B stand secured with X, the Arbitral Tribunal allows the prayer in the Section 17 application of A, and directs B to pay the amounts to A, subject to final orders to be passed in the arbitral proceedings. B, thereafter, challenges the direction, of the Arbitral Tribunal, before the High Court. The High Court is also not made alive to the fact that assets of B stand secured with X. Observing that the direction of learned Arbitral Tribunal proceeded on admission, by B, of its liability towards A, the High Court dismisses the petition of B. Can it be said, in such circumstances, that X stands foreclosed from challenging the arbitral order, on the ground that the directions contained therein stands merged with the judgment of this Court? The answer, in my opinion, has most definitively, to be in the negative. Else, it would provide a *carte blanche* for crafty litigants to collude, circumvent the legal process by subterfuge and obtained orders, to the prejudice of legitimate secured creditors. (I make this observation only *ex hypothesi*, to test the merits of the reliance, by Mr. Nayar, on the principle of merger, and not by way of affirmation of the allegation of collusion, as levelled by Edelweiss in the present case.) The plea of merger, as advanced by Mr. Nayar, has, therefore, to fail even on this ground.

36.23 I may observe, here, that I have not chosen to enter into the allegation, of Edelweiss, that the judgment of the Coordinate Single

Bench in Arb.A (COMM) 7/2020 was obtained by perpetuating fraud on this Court. "Fraud" is an extremely strong expression, and has serious repercussions. It is not to be lightly alleged. Inasmuch as it is not necessary, to decide the contention, of Mr. Nayar, regarding merger of the impugned order of the learned Arbitral Tribunal with the judgment dated 4th March, 2020 of the learned Single Judge in Arb.A(Comm) 7/2020, to traverse the fraud ground, I refrain from doing so.

37. Re: the challenge to maintainability of present appeal on the ground of pendency, before the High Court of Bombay, of suit LD-VC 55/20.

37.1 The third ground, on which the maintainability of the present appeal is sought to be assailed, is the filing, by Edelweiss, of Suit LD-VC 55/20 before the High Court of Bombay.

37.2 Considerable efforts were expended in pointing out, to me, the identity of cause of action, and the averments of the prayers, in the said suit, vis-à-vis the present appeal.

37.3 Following thereupon, it was asserted that Edelweiss, having elected to seek restraint from enforcement of the impugned order, dated 17th December, 2019, of the learned Arbitral Tribunal, by way of original proceedings before the High Court of Bombay, was estopped from maintaining the present appeal.

37.4 I am unable to agree with this submission, either. A remedy of appeal, available under the statute, can never be denied to an eligible

appellant, merely because the appellant has, earlier in point of time, chosen similar reliefs by way of other proceedings. Alternative remedy can operate as a proscription only against invocation of extra-ordinary jurisdiction, not against ordinary jurisdiction, or jurisdiction conferred by statute. The right to maintain an appeal, in accordance with a statutory provision, can be curtailed or, indeed, restricted, only by constraints to be found in the provision conferring the right of appeal itself, and on no other count. An appellate court, equally, cannot refuse to exercise appellate jurisdiction, on the ground that the appellant has also availed another remedy, in law. The availability of statutory appeal may take the character of an efficacious alternative remedy; there cannot, however, be an alternate remedy to a remedy of statutory appeal.

37.5 On the other hand, if the appeal, under Section 37 of the 1996 Act, could validly be maintained by Edelweiss, despite being a third party and the stranger to the arbitration agreement, one may well visualise an argument, *before the High Court of Bombay*, to the effect that an effective alternate remedy was available to Edelweiss. Of course, it is not in my place to hazard any validity of such objection, if at all raised; I merely visualize it, for the purpose of dealing with the objection raised by Mr. Nayar.

37.6 There can, however, be no legitimate objection to Edelweiss maintaining and prosecuting its own appeal against the impugned order, dated 17th December, 2019, of the learned Arbitral Tribunal,

provided such appeal is available to it under Section 37 of the 1996 Act.

37.7 To reiterate, the maintainability of the Edelweiss, of other proceedings, may be affected by the existence of an alternative efficacious appellate remedy; the law can never, however, work *vice-versa*.

37.8 Which brings us to the issue of whether, Edelweiss as a third party can maintain an appeal under Section 37 of the 1996 Act.

37.9 The only judgment, which pronounces on the maintainability of an appeal, by a third party, under Section 37 of the 1996 Act, has been rendered by a learned Single Judge of the High Court of Bombay in ***Prabhat Steel Traders Private Ltd. v. Excel Metal Processes Pvt. Ltd.***[14].

37.10 In the said decision, the High Court of Bombay noted that the interim measures, which could be awarded by an Arbitral Tribunal in exercise of its power under Section 17, could, very conceivably, affect third parties, who were not privy to the arbitration agreements. In conjunction therewith, it was noticed that, though the expression "party" was defined in Section 2(1)(h), Section 37 did not stipulate that an appeal, thereunder, could be filed only by a party in the agreement. The High Court of Bombay also placed reliance on the judgment of Supreme Court in ***Chloro Controls India Pvt. Ltd. v.***

[14] **2018 SCC OnLine Bom 2347**

Severn Trent Water Purification Inc.[15]**,** which recognises the permissibility of adding parties, who were strangers to the arbitration agreement, in arbitral proceedings, albeit in exceptional cases. The High Court observed and held, in paras 38 to 42, 47, 49, 50, 54, 59 to 61, 66 to 68, 73 and 102 of the report, thus:

> "38. Section 2(1)(h) defines "party" means a party to an arbitration agreement. Sections 2(1)(h) to 36 refers the "party" for different purposes. However, section 37 does not provide that an appeal under the said provision can be filed only by the parties to the arbitration agreement. By virtue of the amendment inserted by the Act 2 of 2016 with effect from 23rd October, 2015 thereby amending section 17 of the Arbitration & Conciliation Act, 1996, powers which are available with the Court under section 9 for grant of interim measures, identical powers are now also granted to the arbitral tribunal.
>
> 39. A perusal of section 17(1)(ii) clearly indicates that though such interim measures under section 17 can be applied only by a party to the arbitral tribunal and more particularly specified in section 17(1)(ii)(a) to (e), such reliefs may in some of the cases affect even third parties.
>
> 40. The said provision clearly indicates that a party to the arbitration agreement who is permitted to apply for interim measures to the arbitral tribunal under the said provision and seek interim measures of protection in respect of any goods which are subject matter of the arbitration agreement or even to enter upon any land or building in possession of any party. Under section 17(1)(d) such party to the arbitration agreement can even apply for interim measures for appointment of a Court Receiver or for such interim measures or protection as may be appeared to the arbitral tribunal to be just and convenient. There may be a situation that a property or goods may belong to a third party who is not a party to the arbitration agreement but still a relief may be applied in respect of such goods or properties belonging to a third party

[15] **2013(1) SCC 641**

and more particularly if a party to the arbitration agreement is either in possession or custody thereof claiming any right therein in any manner whatsoever.

41. In such a situation, where third party who is the owner of such goods or properties or claiming any right, title or interest in respect of such goods or properties but may not be in physical possession thereof and such goods or properties being in possession of one of the party to the arbitration agreement, such a third party is obviously going to be affected if any order is passed by the arbitral tribunal for interim measures under section 17 of the Act. There is no dispute about the proposition of law that a third party cannot appear before the arbitral tribunal and seek any interim measures under section 17 of the Arbitration & Conciliation Act, 1996 or seek any modification or variation of the interim measures if granted by the arbitral tribunal against such third party though he may be aggrieved by such interim measures granted by the arbitral tribunal.

42. The question therefore arises for consideration of this Court is whether a third party who is aggrieved by any such order of interim measures granted by the arbitral tribunal can file an appeal under section 37 of the Arbitration & Conciliation Act, 1996 after obtaining the leave of the Court or otherwise and whether can impugn such order of the arbitral tribunal in respect of any goods or properties in respect of any such right, title or interest claimed by such third party or in any other manner affected by such interim measures or not.

*****

47. The question thus arises for consideration of this Court is that whether the remedy of an appeal under section 37 of the Arbitration & Conciliation Act, 1996 can be availed off by such a third party who is affected by an order of interim measures granted by the arbitral tribunal under section 17 of the Arbitration & Conciliation Act, 1996. Learned counsel for the respondents did not dispute the proposition that if a third party is impleaded in the proceedings under section 9 of the Arbitration & Conciliation Act, 1996 filed by a party to the arbitration agreement or the rights of any third party is affected by an order passed by a Court in an application under section 9 of the Arbitration & Conciliation Act, 1996 filed by a party to the arbitration agreement, such third party can apply

for impleadment or intervention in such proceedings and to apply for modification and/or for variation of such order. If such third party does not succeed in such application for modification or variation of the order passed by a Court in favour of a party to the arbitration agreement affecting the right, title and interest of such third party, such third party can file an appeal under section 37 of the Arbitration & Conciliation Act, 1996 before the Court under section 2(1)(e) of the Act.

*****

49. The Division bench construed Rule 803E of the Bombay High Court (Original Side) Rules and has held that section 9 is distinct from Section 17 in as much as Petition under section 17 is moved before the Arbitrator for an order against a party to the proceedings, whereas section 9 vests remedy in a party to arbitration proceedings to seek interim measure of protection against a person who need not be either party to the arbitration agreement or to the arbitration proceedings. In the said proceedings under section 9, third party was also impleaded since the grant of the proposed relief was to incidentally affect those third parties. This Court entertained an appeal under section 37 of the Arbitration Act filed by such third party who was affected by the order passed by the learned Single Judge under section 9 though dismissed the said appeal on merit.

50. In view of the fact that powers of Court under section 9 to grant interim measures and powers of the arbitral tribunal under section 17 of the Arbitration Act are identical in view of the amendment to section 17 with effect from 23rd October 2015, in my view, even a third party who is directly or indirectly affected by interim measures granted by the arbitral tribunal will have a remedy of an appeal under section 37 of the Arbitration Act. The principles of law laid down by the Division bench of this Court in the case of Girish Mulchand Mehta and Durga Jaishankar Mehta v. Mahesh S. Mehta and Harini Cooperative Housing Society Ltd. (supra) can be extended to this situation.

*****

54. Though a stranger to an agreement cannot be allowed to be impleaded as party to the arbitral proceedings before the arbitral tribunal and more particularly under section 17 of the Arbitration Act nor can such third party seek impleadment to the proceedings before the arbitral tribunal, he is however not

precluded from challenging the said order before the arbitral tribunal under section 17 if he so aggrieved by such order by invoking the remedy of an appeal under section 37 of the Arbitration Act.

*****

59. In order to invoke jurisdiction of the Court under Section 45, the applicant should satisfy the pre-requisites stated in Section 44 of the 1996 Act.

60. Chapter I, Part II deals with enforcement of certain foreign awards in accordance with the New York Convention, annexed as Schedule I to the 1996 Act. As per Section 44, there has to be an arbitration agreement in writing. To such arbitration agreement the conditions stated in Schedule I would apply. In other words, it must satisfy the requirements of Article II of Schedule I. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration their disputes in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The arbitration agreement shall include an arbitration clause in a contract or an arbitration agreement signed by the parties or entered in any of the specified modes. Subject to the exceptions stated therein, the reference shall be made.

61. The language of Section 45 read with Schedule I of the 1996 Act is worded in favour of making a reference to arbitration when a party or any person claiming through or under him approaches the Court and the Court is satisfied that the agreement is valid, enforceable and operative. Because of the legislative intent, the mandate and purpose of the provisions of Section 45 being in favour of arbitration, the relevant provisions would have to be construed liberally to achieve that object. The question that immediately follows is as to what are the aspects which the Court should consider while dealing with an application for reference to arbitration under this provision.

*****

66. Mr. Nariman, learned senior counsel appearing on behalf of the appellant, contended that in terms of Section 45 of the 1996 Act, parties to the agreement shall essentially

be the parties to the suit. A stranger or a third party cannot ask for arbitration. They have to be essentially the same. Further, the parties should have a clear intention, at the time of the contract, to submit any disputes or differences as may arise, to arbitration and then alone the reference contemplated under Section 45 can be enforced.

*****

67. To the contra, Mr. Salve, the learned senior counsel appearing for respondent No. 1, submitted that the phrase "at the request of one of the parties or any person claiming through or under him" is capable of liberal construction primarily for the reason that under the 1996 Act, there is a greater obligation to refer the matters to arbitration. In fact, the 1996 Act is the recognition of an indefeasible Right to Arbitration. Even a party which is not a signatory to the arbitration agreement can claim through the main party. Particularly, in cases of composite transactions, the approach of the Courts should be to hold the parties to the bargain of arbitration rather than permitting them to escape the reference on such pleas.

68. At this stage itself, we would make it clear that we are primarily discussing these submissions purely on a legal basis and not with regard to the merits of the case, which we shall shortly revert to.

*****

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even

non-signatory parties would fall within the exception afore-discussed.

*****

102. Joinder of non signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons."

37.11 I concur, respectfully, with the exposition of the law, in the passages from ***Prabhat Steel Traders Private Ltd.***[14], extracted hereinabove.

37.12 The principles enunciated in these paragraphs would also draw sustenance from the judgment of the Supreme Court in ***State Bank of India v. Ericsson India Ltd.***[16]**,** in which it is clearly held thus:

"**5.** *There can be no dispute that the Arbitral Tribunal has no jurisdiction to affect the rights and remedies of the third party-secured creditors in the course of determining disputes pending before it…*"

(Emphasis supplied)

37.13 If, therefore, the order of Arbitral Tribunal operates to the prejudice of interests of secured creditors, such an order would be amenable to interference in view of the law laid down in ***SBI v. Ericsson***[16].

[16] (2018) 16 SCC 617

37.14 It stands to reason, therefore, that, as a person aggrieved, and affected, by such an order, the secured creditor has necessarily to be allowed to maintain an appeal, thereagainst, under Section 37 of the 1996 Act, rather than driven to filing a civil suit. Indeed, as was observed in para 73 of ***Prabhat Steel Traders Private Ltd.***[14], the very maintainability of a civil suit may be questionable.

37.15 Inasmuch as, therefore, (i) an appeal, against an order passed passed by the Arbitral Tribunal under Section 17, would lie only under Section 37 of the 1996 Act and (ii) the remedy is also available under Section 37 to third parties, who are not signatories to the agreement, this Court cannot refuse to entertain the present appeal, at the instance of Edelweiss. The mere filing of a prior suit, by Edelweiss, before the High Court of Bombay, cannot, in my view, extinguish the right of appellate remedy statutorily conferred by Section 2(1)(b) of the 1996 Act.

37.16 The submission, of Mr. Nayar that Edelweiss, having elected to file Suit LD-VC No. 55/20 before the High Court of Bombay, which is pending as on date, cannot maintain the present appeal before this Court, is also bereft of merit and is, accordingly, rejected.

38. Re. The objection to maintainability of the present appeal, on the ground that Edelweiss has applied for impleadment/intervention in OMP (ENF.) (COMM) 23/2020.

38.1 It is obvious that this argument has no substance. By applying for impleadment in OMP (ENF.) (COMM) 23/2020, filed by GTL for enforcement of the impugned order, dated 17th December, 2019, of the learned Arbitral Tribunal, it cannot be said that GIL has forfeited its right to challenge the impugned order. Indeed, it was only necessary for Edelweiss to oppose the impugned order, both way of the present appeal, as well as by way of impleadment in OMP (ENF.) (COMM) 23/2020.

38.2 This submission of Mr. Nayar is, therefore, also rejected.

39. Resultantly, this Court finds no ground to hold that the present appeal is not maintainable at the instance of Edelweiss. The challenge to the maintainability of the present appeal, as raised by the respondents, is, therefore, dismissed.

On merits:

40. The position, in law, that an Arbitral Tribunal cannot pass an order, which affects the rights and remedies of third party secured creditors, while determining the disputes pending before it, stands authoritatively exposited, in para 5 of the report in ***SBI vs. Ericsson***[16], in so many words, thus:

> "**5.** *There can be no dispute that the Arbitral Tribunal has no jurisdiction to affect the rights and remedies of the third party-secured creditors in the course of determining disputes pending before it…*"
>
> (Emphasis supplied)

41. If, therefore, Edelweiss, in fact, is a secured creditor of GIL, and the direction contained in the impugned order, affect the assets of GIL, secured with Edelweiss and other secured creditors, the direction, *ex facie*, cannot sustain.

42. The clauses of the MRA and the TRA, on which Edelweiss relies, may be reproduced, for ready reference, thus:

> Clauses of MRA
>
> **"3.1 SECURITY FOR THE FACILITIES**
>
> 3.1.1 The Facilities together with all Interest, liquidated damages, fees, premia on prepayment or on redemption, costs, expenses and other all other fees, costs, charges, expenses and/or other monies whatsoever stipulated or payable to the CDR Lenders and their trustees and agents under this Agreement and the other CDR Documents shall be secured by:
>
> (i) A charge and mortgage on all of Borrower's immovable properties, present and future, except for land related to the tower sites, being small pieces of existing land having aggregate book value of less than or equal to Rs. 5.78 crores (Rupees Five Crores and Seventy Eight Lakhs only) situated at various places where mortgage are not perfected;
>
> (ii) A charge by way of hypothecation over all the Borrower's movable assets, present and future, including movable plant and machinery, machinery spares, tools, towers, accessories, operating cashflows, book debts, receivables, commissions, revenues of whatsoever nature, furniture, fixtures, vehicles and all other movable assets, present and future, intangible and tangible, goodwill, uncalled capital;
>
> (iii) A charge on the Trust and Retention Account and other reserves and any other bank accounts,

present and future, of the Borrower wherever maintained;

*****

4.1 Representations and Warranties

*****

(vi) No Litigation. Except as disclosed in ***Schedule XVI*** hereof, no litigation, investigation or proceeding, whether judicial, quasi-judicial, administrative or otherwise, of or before any arbitrator or Governmental Entity or any other Legal Proceedings, whether in India or any other jurisdiction, which may result in a Material Adverse Effect, is:

(a) pending or threatened against the Borrower and/or the other Obligors, their business and/or any of the assets of the Borrower and the other Obligors; or

*****

5.1 INFORMATION COVENANTS

The Borrower shall furnish promptly after request of the Monitoring Institution such information and data as is reasonably requested about the Borrower, the Borrower's business, the Borrower's assets and the compliance by the Borrower with the terms of the CDR Documents or any Clearance and other related matters, including without limitation, information and data (i) to monitor the conduct of the business, (ii) to evaluate transactions with Affiliates, and (iii) in relation to goods and services financed with the proceeds of the Facilities.

Without prejudice to the above, the Borrower shall promptly:

(i) Representations and Warranties

Notify the Finance Parties promptly, in any case not later than 3 (three) Business Days upon becoming aware of the occurrence of any event or the existence of any circumstances which constitutes or results in any representation, warranty, covenant or condition under the CDR Documents being or becoming untrue or incorrect in any respect.

*****

(vi) Winding-Up/ Revocation/ Dissolution and Legal Process

Notify the Finance Parties promptly, in any case not later than 3 (three) Business Days upon becoming aware of any such event occurring, of any action or steps taken or legal proceedings started by or against it and/or any other Obligors in any court of law for their respective winding-up, insolvency, dissolution, revocation, administration or re-organisation or for the appointment of a receiver, administrator, administrative receiver, trustee or similar officer of the Borrower, or of the other Obligors, or of any or all of their respective assets or the outcome of which proceedings would have a material impact on the debt servicing capability of the Borrower; the Borrower shall also keep the Finance Parties informed of any legal proceedings, including but not limited to (A) the legal proceedings commenced by ICICI Bank Limited for invocation of pledge of shares of GTL, in relation to its objection against the merger of CNIL and the Borrower in the High Court of Judicature at Madras and for filing a case against admittance of CNIL into the CDR scheme and (B) any actions (whether amounting to a legal proceeding or otherwise) taken by IFCI Limited in respect of shares of the Borrower held by GTL offered as security to IFCI Limited and any subsequent actions taken by any of the Obligors in this regard, the outcome of which would have a material impact on the debt servicing capacity of the Borrower and/or the CDR Package and/or the ability of the Borrower to avail and comply with the terms of the CDR Package offered by the CDR Lenders. The Borrower shall, in consultation with the Monitoring Institution, take such remedial actions as may be required in relation to such legal proceedings in the best interest of the Borrower and the Lenders.

(vii) Events affecting the Borrower/its business

Notify the Finance Parties of any litigation, arbitration, administrative or other proceedings initiated or threatened against the Borrower, or to the best of the knowledge of the

Borrower, of the other Obligors, and/or their respective assets, or any material events/occurrences in the business sectors to which the Borrower and/or any of the Obligors cater, including the telecom sector, impacting the business of the Borrower and/or the other Obligors, and which may have a Material Adverse Effect.

The Borrower shall promptly, but in any case not later than 3 (three Business Days) upon becoming aware of any such events/circumstances, inform the CDR Lenders of the circumstances and conditions which are likely to disable the Borrower from reviving the business/its operations or which are likely to delay its completion or compel the Borrower to abandon the same.

*****

5.2 AFFIRMATIVE COVENANTS

*****

(iv) Trust and Retention Accounts

The Borrower shall establish a Trust and Retention Accounts, with the Account Bank and all sub-accounts thereunder as required under the Trust and Retention Account Agreement, to the satisfaction of the CDR Lenders/Monitoring Committee and close all other accounts (save and except such accounts that are required by the Borrower for operational convenience and the same has been agreed by the Monitoring Institution) of the Borrower and transfer all amounts deposited therein to the Trust and Retention Account. The Borrower shall deposit all its cash inflows/receivables related to its operations and business, including the proceeds of any disbursements, its repayment/recoveries, income and receipts and all other cash inflows in the appropriate account as specified in the Trust and Retention Account Agreement and utilise such proceeds in a manner and priority as specified in the Trust and Retention Account Agreement. The Borrower shall comply with all provisions of the Trust and Retention Account Agreement, including maintaining all reserves required to be maintained. The Borrower shall furnish to the CDR Lenders a report from the Concurrent Auditor auditing all withdrawals from the Trust and Retention Account every fifteen (15) days

or such other period as may be specified by the CDR Lenders / Monitoring Committee in this regard. The Borrower shall provide information, on a monthly basis, and in such detail as may be required by the CDR Lenders / Monitoring Committee in respect of all its other bank accounts and shall comply with all directions of the CDR Lenders/Monitoring Committee in this regard. The Borrower further agrees and undertakes that all payments in relation to One Time Settlement, if any, shall be made out of the Trust and Retention Account;

*****

5.3 NEGATIVE COVENANTS

*****

(ix) One Time Settlements

Without prior written approval of the Monitoring Committee/CDR EG, the Borrower shall not enter into any one time settlement or any other settlement with any of the lenders other than Existing Lenders (i.e., non CDR members).

*****

(xvi) Security Interest

(a) Create or permit to subsist any Security Interest (save and except for Permitted Security Interest) or any type of preferential arrangement (including retention arrangements or escrow arrangements having the effect of granting security), in any form whatsoever on any of its assets (including over its undertaking, either in whole or part, Intellectual Property and Intellectual Property Rights), in favour of any bank, financial institution, bank, company, firm or Persons.

(b) Escrow its future cash flows or create any charge or lien or interest of whatsoever nature on such cash flows except as provided in the CDR Package without prior approval of the CDR EG.

*****

Clauses of TRA

1. DEFINITIONS AND CONSTRUCTION

1.1 Definitions

In this Agreement, unless there is anything repugnant to the subject or context thereof, capitalized terms used but not defined shall have the meaning as specified to such term in the Master Restructuring Agreement and the expressions listed below shall have the following meanings viz.:

"Business Proceeds" means all monies due and payable to/received by the Borrower from any source including without limitation any monies received in relation to its business, all rents/service receipts in relation thereto, proceeds from any disbursements, all amounts brought in as Promoter Contribution, all funding from the Sponsors or other shareholders/investors, including realisation of any current assets and monetisation of assets, realizations from CN1L, any funds brought into the Borrower as per the terms of the Sponsor Support Agreement, monies received/receivable pursuant to the terms of (or in respect of any termination or breach of) any of the Project Documents (including any guarantee/s, bond/s, letters of credit or other security in respect of any of it) and any amounts envisaged to be received by the Borrower as per the terms of the Base Case Business Plan, the CDR Package, the CDR LOA and/or the CDR Documents.

*****

2.9 Deposit of Business Proceeds

Subject to the terms and conditions of the Master Restructuring Agreement, on and from the opening of the Trust and Retention Account, all Business Proceeds (other than as provided in Section 3.2 hereof) shall be deposited by the Borrower into the Account(s) and withdrawn by the Account Bank to and from the relevant Accounts at the time and in the manner required by this Agreement. Other than (a) the Accounts, and (b) the Site Accounts, the Borrower further

agrees and undertakes that prior to such date that may be stipulated by the Monitoring Institution ("Closure Date"), it shall close all other accounts maintained by it whether with a bank or other institution, and transfer all funds lying to the credit of such other accounts to the Accounts, unless otherwise permitted by the Monitoring institution.

*****

2.11 Monthly Plan

The Borrower shall at least 5 (five) Business Days prior to every Monthly Distribution Date, provide to the Account Bank, with a copy to the Monitoring Institution, a monthly plan (the "Monthly Plan") setting out the amounts which are required to be maintained as balances in each of the Accounts (other than the Debt Service Accounts, which is to be guided by the Notice of Debt Service or as otherwise provided for herein) on such Monthly Distribution Date which amounts shall be equal to the monies required to be expended from each of the Accounts till the next Monthly Distribution Date. The Borrower agrees that the Monthly Plan will not specify any amounts in excess of the amounts agreed in the Annual Plan, except with the prior written consent of the Monitoring Institution. Provided that the amounts specified in any Monthly Plan may exceed the amounts agreed in the Annual Plan by a maximum margin of 20% (twenty percent) so long as the cumulatively for the entire Fiscal Year the amounts do not exceed the levels agreed to in the Annual Plan. However, the said 20% (twenty percent) restriction will not be applicable for any tax or statutory payments from the Tax and Statutory Dues Account.

The Account Bank shall make the withdrawals (or enable the Borrower to make withdrawals) into/from the relevant Account, other than as expressly provided for in this Agreement or for the purposes of making Permitted Investments, in accordance with the Monthly Plan.

The Account Bank shall not be under any duty to verify the Monthly Plan and shall act on the Monthly Plan as provided by the Borrower. The Borrower further agrees that if the Monitoring Institution disagrees with any Monthly Plan and/or if the Monthly Plan has not been prepared for any particular period, then any transaction in the Accounts shall only be with the prior permission of the Monitoring

Institution. Without prejudice to the aforesaid, the Monitoring institution may refer any such disagreement in relation to any Monthly Plan to the Monitoring Committee and the Borrower hereby agrees that any decision of the Monitoring Committee in this regard will be final and binding on the Borrower.

The Monitoring Institution may, in consultation with the Borrower, change any Monthly Plan issued (or amended) by the Borrower. Any such changes to the Monthly Plan, shall be binding on the Borrower and the Account Bank and the Monthly Plan shall be amended to the extent of such changes intimated by the Monitoring Institution.

*****

2.12 Default

If an Event of Default or Potential Event of Default has occurred and is continuing the Finance Parties, or the Monitoring Institution (on their behalf) may, without prejudice to any other rights that they have and by written notice of 30 (thirty) days to the Borrower and the Account Bank, direct the Account Bank that the Account Bank shall thereafter (till further notice) act only in accordance with Section 5 hereof. The Monitoring Institution shall be entitled to instruct the Account Bank to realise the Permitted Investments, whether such investments have matured or not, and deposit the proceeds in the Enforcement Proceeds Account.

*****

5. WITHDRAWALS FOLLOWING DEFAULT

*****

5.3 Upon the occurrence and during the subsistence of an Event of Default or Potential Event of Default, the Borrower undertakes not to issue any payment instructions to the Account Bank without the prior written consent of the Monitoring Institution and the Account Bank shall not be entitled to honour such instructions."

43. By referring to the aforesaid Clauses, it has been contended in paras 11 and 12 of the written submissions, filed by Edelweiss, thus:

> "11. The MRA executed *inter alia* between R-1 and its lenders, record the terms of the restructuring of the debt of R-1 . (*Ref: Document 2 at Pg 11 – 194 of Folder-IV*). The following terms of MRA records the rights the Appellant:
>
> a. The debts owed to the Appellant are secured by: (i) a first charge over all the movable assets of the R-1 (including operating cash flows, book debts, receivables, revenue, etc.), (ii) a charge on the trust and retention account; and other reserves and bank accounts, present and future of the Respondent No.1, wherever maintained. (*Clause 3.1 @ Pg. 66 of Folder-IV*).
>
> b. R-1 has been specifically prohibited from creating or permitting to subsist any security interest or any type of preferential arrangement on any of its assets. The said clause further prohibits R-1 from creating an escrow on its future cash flows or creating any charge or lien or interest on such cash flows. (*Clause 5.3 (xvi) @ Pg. 94 of Folder-IV/*).
>
> c. R-1 has been specifically prohibited from entering into any one-time settlement without the approval of its lenders, including the appellant. (*Clause 5.3 (ix) @ Pg. 94 of Folder-IV*).
>
> d. R-1 was to give a full disclosure to the lenders, including the Appellant, at the first instance, as to initiation or threatened initiation of any litigation, investigation, or proceedings or any other legal proceedings whether in India or any other jurisdiction which may result in a material adverse effect upon the R-1's ability to discharge its obligations under the financing documents, which includes its obligation to repay the debts. (*Clause 4.1(vi)(a) @Pg. 71 of Folder-IV, Clause 5.1 (i) @ Pg. 79 of Folder-IV and Clause 5.1(vii) @Pg. 81 of Folder-IV*) .

e. R-1 was to apprise the Appellant in case of occurrence of any event including any legal proceedings which has a material adverse effect upon discharge of its obligations including debt servicing capacity under the financing agreements (*Clause 5.1 (i) and (vi) of the MRA @ Pg. 79 of Folder-IV and @ Pg. 80 of Folder-IV*) Further, in terms of Clause 5.1(vi) of the MRA (*@Pg. 80-81 of Folder-IV*), R-1was obliged to take remedial steps with respect to any adverse legal proceedings in consultation with the Appellant in its capacity as the Monitoring Institution.

f. R-1 and its lenders subsequently, entered into a Trust and Retention Account Agreement on 25 June 2013 ("TRA Agreement") (*Ref: Document 4 at Pg 345 - of Folder - IV*), as per which all of the receivables of R-1 from all its operations and business were to flow into a trust and retention account and its sub-accounts, opened with a designated bank (the "**Account Bank**") and outflows could only have been made in the manner as determined under the terms of the TRA Agreement (*Clause 5.2 (iv) @ Pg.83 of Folder IV*) .

12. Under the terms of the TRA Agreement, all the cash and proceeds of R-1 is to route through the TRA Account, with full supervision and control of the Appellant in its capacity as a Monitoring Institution:

a. As per Clause 2.9 of the TRA, R-1 was to open a Trust and Retention Account, whose permissible debits and credits could only be carried out under the supervision and permission of the Monitoring Institution (i.e. the Appellant). All the "business proceeds" of R-1 were to flow into the said accounts, as per Clause 2.9 of the TRA Agreement (*@Pg. 359 of folder IV),* read with the definition of "business proceeds" provided within Clause 1.1 of the TRA agreement (*@Pg. 350 of Folder IV*).

b. Pertinently, all of the debits and credits, envisaged within Clauses 3.2 ad 3.3 of the TRA Agreement, into the TRA Accounts were under the supervision and permission of the Monitoring

> Institution/Appellant. R-1 was obligated to provide monthly reports and details of proposed debits and had various other reporting obligations to the Appellant, as per Clause 2.11 of the TRA Agreement (*@Pg. 361 of Folder IV*).
>
> c. In case of any default or potential default (defined within the MRA, whose definition is incorporated by reference within the TRA and includes any payment default), Clause 2.12 (*@Pg. 262 of Folder IV*), read with Clause 5 of the TRA Agreement *(@Pg. 377 of Folder IV*), requires the Account Bank, to act solely in accordance with the instructions of the Monitoring Institution/Appellant. More specifically, Clause 5.3 of the TRA *(@Pg. 377 of Folder-IV*) specifically barred R-1 from issuing any payment instructions to the Account Bank without prior written consent of the Monitoring Institution, i.e. the Appellant. "

44. A juxtaposed reading of these submissions, with a reading of the Clauses of the MRA and the TRA, cited therein, reveals that the submissions of Edelweiss, *ex facie*, merit acceptance.

45. Significantly, GIL has not chosen to traverse the aforesaid submissions of Edelweiss. GTL, in its written submissions, however, contended thus:

> "13. As set out above, the essence of the Appellant's case as argued before this Court is that Respondent No. 1 suppressed from the Tribunal that under the MRA and the TRA, the Appellant (and other lenders) have a charge over all of Respondent No. 1's assets, bank account and receivables. The Appellant has argued that this suppression from the Tribunal was collusive between Respondent No. 1 and Respondent No. 2 and intended to defeat and violate the provisions of the MRA and the TRA. The Appellant contends that if the terms of the MRA and TRA had been pointed out to the Tribunal, then the Tribunal would not have passed the S.

31(6) The award. This is a totally misconceived contention for the following reasons:

a. The Tribunal was called upon to decide whether the Respondent No. 1 had denied liability to the extent of Rs. 400 crore to Respondent No. 2.

b. In answering this question, the Tribunal analysed Respondent No. 1's pleadings and on the test of Order VIII Rules 3-5 of the CPC, came to the conclusion that Respondent No. 1 had failed to establish that it had denied liability to the extent of ₹ 400 crore.

c. In view of the Tribunal's finding that Respondent No. 1 had failed to dispute liability to the extent of ₹ 400 crore, relying on Order XII Rule 6 of the CPC, ***Uttam Singh Duggal*** *(supra)* and ***Numero Uno*** *(supra)*, the Tribunal observes that Respondent No. 2 was entitled to payment of the undisputed sum of Rs. 400 crore at this stage itself.

d. *To the aforesaid question of whether Respondent No. 1 had disputed its liability to Respondent No. 2 the extent of Rs. 400 crore, the terms of the MRA and the TRA between Respondent No. 1 and its lenders (including the Appellant) were totally and utterly irrelevant.*

e. To put it another way, even if the terms of the MRA and TRA had been pointed out by Respondent No. 1 to the Tribunal, it would have had no bearing whatsoever (and correctly so) on the Tribunal's analysis. Even on the terms of the MRA in the TRA, the Tribunal would not have come to any different conclusion on the analysis of Respondent No. 1's pleadings as to whether Respondent No. 1 had disputed its liability to Respondent No. 2 to the extent of Rs. 400 crore. *On a bare reading of Order VIII Rule 3-4 and Order XII Rule 6 of the CPC and the law laid down in* ***Uttam Singh Duggal*** *(supra) and* ***Numero Uno*** *(supra), when a Court is called upon to consider whether a plaintiff is entitled to a decree based on admission, it is utterly and totally irrelevant that the*

assets of the defendant are charged in favour of another party. Therefore, the argument that the award is fraudulent on account of charge on assets in favour of the Appellant is totally misconceived.

f. *The Appellants argument amounts to saying that if a defendant's assets have been charged in favour of a lender, then a decree based on admission can never be passed against such a defendant, effectively meaning that such a defendant is exempt from Order VIII Rule 3-5 of the CPC and Order XII Rule 6 of the CPC. Such an argument is clearly misconceived.*

g. At the very highest, *the effect of the Appellant's so-called charge over Respondent No. 1's assets, bank accounts and receivables would be that during the process of execution of the S. 31(6) Award by Respondent No. 2, Respondent No. 2 may have some difficulty in executing the S. 31(6) Award against assets over which the Appellants hold a so-called charge*. However, this is entirely a question which must be left to the Court seized with proceedings for execution of the S. 31(6) Award. In the present case, on 06.02.2020, Respondent No. 2 has already initiated proceedings under Section 36 of the Act being before the Delhi High Court (being OMP (Enf.) (Comm.) No. 23/2020) for execution of the S. 31(6) Award. By way of an Order dated February 6, 2020, the Delhi High Court issued notice to Respondent No. 1 and directed Respondent No. 1 to file an affidavit in reply within 3 weeks reflecting the position of its assets as they stood on the date on which the cause of action arose, on the date of the S. 31(6) Award as well as the date of the said Order. The Execution Petition is pending as on date. However, for reasons best known to Respondent No. 1, it has failed to comply with the Order dated February 6, 2020 and disclose its assets. Furthermore, para-32 of the appeal states that the Appellant has allegedly filed an intervention application in such execution petition, therefore indicating knowledge of such proceedings on the part of the Appellant."

(Emphasis supplied)

46. In my view, the submissions of GTL are no answer to the enunciation of the law by the Supreme Court in ***SBI v. Ericsson***[16]. In fact, in ***SBI v. Ericsson***[16], there was no transfer of the secured assets. Rather, the Supreme Court was dealing with the challenge to an order passed, under Section 17 of the 1996 Act, at the instance of certain unsecured creditors. The learned Arbitral Tribunal restrained the transfer of the assets of the debtors, of such unsecured creditors, without obtaining its prior permission. This decision of the Arbitral Tribunal was confirmed by the High Court of Bombay, in an appeal, under Section 37 of the 1996 Act. The creditors moved the Supreme Court pointing out that they were not parties before the arbitrator, and complaining that the directions issued by the Arbitral Tribunal deprived them of their statutory rights, against the assets of the debtors.

47. The Supreme Court, as noted more than once hereinabove, went out to state that the Arbitral Tribunal could not have affected the rights and liabilities of third party secured creditors in the course of determining the disputes pending before it.

48. Mr. Sandeep Sethi, learned Senior Counsel points out, correctly, that the present case stands on the better footing than the case of ***SBI v. Ericsson*** [16] before the Supreme Court. In the present case, the learned Arbitral Tribunal has actually directed transfer of the amounts, secured in favour of the Edelweiss, from the accounts of GIL to GTL. Any such transfer, contends Edelweiss, would be

completely impermissible in law, being directly in the teeth of the afore-extracted covenants of the MRA and the TRA.

49. The response "on merits", as contained in the submissions filed by GTL, does not answer this issue. There is no contest to the fact that the monies, which the impugned order, dated 17th December, 2019, of the learned Arbitral Tribunal directs transfer, from the account of GIL to that of GTL, actually stood secured in favour of Edelweiss. What GTL seeks to submit is that, once GIL had admitted its liability towards GTL, applying the principle is analogous to those contained in Order XII Rule 6, read with the decision in ***Uttam Singh Duggal***[1], the learned Arbitral Tribunal was perfectly justified in issuing the impugned directions to GIL, to make payment to GTL. It is sought to be contended that, in considering whether a case for granting a decree based on admissions existed, the Court was not required to consider whether the assets, in respect of which the decree was being passed, were charged in favour of any other party. On the other hand, GTL contends that accepting the arguments of the Edelweiss would amount to holding that, merely because, the assets of GIL stood charged in favour of other secured creditors, a decree on admission could never be passed against GIL. GIL contends, therefore, that in determining "the aforesaid question" of whether "(GIL) had disputed its liability to (GTL) to the extent of ₹ 400 crore, the terms of the MRA and TRA between (GIL) and its lenders (including the appellant), were totally and utterly irrelevant".

49.1 The enunciation of the law in ***SBI***[16] clearly forecloses the availability of such an argument, to GTL.

49.2 Specifically dealing with the jurisdiction of arbitral tribunals, the Supreme Court has held, in clear and unmistakable terms, that an Arbitral Tribunal cannot, in determining the issues before it, pass directions which prejudice the legitimate rights of secured creditors. This proposition, as enunciated by the Supreme Court, is not hedged in by any caveat.

49.3 GTL cannot, therefore, seek to advance any submission which would do violation with this proposition, which constitutes "law declared", within the meaning of Article 141 of the Constitution of India.

49.4 The contention that, in assessing whether monies were ought to be directed to be transferred from the account of GIL to GTL, the issue of whether the said monies stood secured with any other secured creditor was "totally and utterly irrelevant" flies directly in the face of the said enunciation of the law and is, therefore, summarily rejected.

49.5 As a matter of fact, this somewhat empirically worded proposition, as put forth by the appellant, essentially misses the wood for the trees. The present case is not one of a simple instance in which there is an admission of liability by the defendant, qua the plaintiff, and the amounts, in respect of which liabilities admitted, stands charged in favour of a third party. While, even in such a case, the question of whether the Court, after having been made aware of the

existence of such a charge by the third-party, could, nevertheless, ignore the submission and proceed to decree the suit on the basis of the admission made by the defendant, may itself be highly debatable. In the present case, the situation is exacerbated by the fact that the MRA and the TRA contain, *inter alia*, covenants conveying an absolute first charge, on the secured creditors of GIL – principally Edelweiss – over the very monies which the Impugned Order conveys to the account of GTL. Further, the MRA and the TRA prohibit GIL from transferring the said monies, or even in depositing the monies in an escrow account, without the prior permission of Edelweiss. I am not prepared to countenance the submission that, even if all these facts were made known to the learned Arbitral Tribunal, it would have proceeded, nevertheless, to direct payment of ₹ 400 crore to GTL, in stark violation of the covenants of the MRA and the TRA.

49.6 Interestingly, in its written submissions, GTL has acknowledged, albeit by a side wind, that the consequence of the implementation of the impugned directions of the learned Arbitral Tribunal "would be that … *Respondent No. 2 may have difficulty in executing the Section 31(6) award against assets over which the appellant holds a so-called charge*." It is, at the same time, sought to be contended that this is an issue which has to be left to the court seized with the proceedings for execution of the impugned directions.

49.7 Again, this submission has merely to be stated to be rejected. It is trite that an executing court cannot go behind the decree being executed by it. Any challenge, to the impugned directions of the learned Arbitral Tribunal has, therefore, to be examined in substantive

proceedings, wherein such challenge is raised, whether by way of an appeal under Section 37 or objections under Section 34. The shoulders of the executing court cannot be made to bear this responsibility.

49.8 GTL has sought to query that "if a defendant's assets have been charged in favour of a lender, can a decree of admission never be passed against defendant, effectively meaning that such a defendant is exempt from Order VIII Rules 3 to 5 of the CPC and Order XII Rule 6 of the CPC". Such a position, contends GTL, is "clearly misconceived" in law. This submission fails to notice the qualitative difference between proceedings before a Civil Court and before an Arbitral Tribunal. It would not be permissible, even for a civil court seized with an application under Order XII Rule 6 CPC, to directly order payment of any amount, by the defendant, to the plaintiff, on the ground that the defendant has admitted its liability to pay the said amount, once the court has been made aware of the fact that the amount has been charged in favour of a third party. In such a situation, the court would, at very least, have to implead the third party, in whose favour the amount is charged, before directing payment of the amount under Order XII Rule 6.

49.9 The issue, therefore, is not of the defendant becoming exempt from Order XII Rule 6, but of the necessity to ensure that the rights of an unheard party are not prejudiced by a decree under Order XII Rule 6.

49.10 In arbitral proceedings, normally, the parties before the Arbitral Tribunal are the parties to the arbitration agreement. A third party secured creditor would, therefore, normally, not be heard by the Arbitral Tribunal though, with the development of law in ***Chloro Controls***[15] and ***Cheran Properties Ltd. v. Kasturi*** & ***Sons***[17], which had been followed by this Court in ***Nirmala Jain v. Jasbir Singh***[18], third parties, whose rights are affected by the Arbitral proceedings, may in exceptional cases, be impleaded therein.

49.11 For the time being, I am refraining from expressing any opinion, regarding the necessity of the appellant-Edelweiss being heard by the learned Arbitral Tribunal, leaving that issue open for decision by learned Arbitral Tribunal, in the event of any such request being made before it. Suffice it to state that, the impugned order dated 17th December, 2019 does not indicate that the attention of the learned Arbitral Tribunal was invited to the existence of the MRA and TRA, or of the securing of the assets, of GIL, in favour of the appellant-Edelweiss, thereunder.

49.12 In this context, GIL has referred, in its written submissions, to averments in its Statement of Defence filed before the learned Arbitral Tribunal, to the fact that the debts, owed by GIL, stood referred to Corporate Debt Restructuring and Strategic Debt Restructuring, as well as the fact of sale of its debts to Edelweiss. The impugned order does not, however, disclose that the attention of the learned Arbitral Tribunal was invited to these passages. Merely including, in the

[17] (2018) 16 SCC 413
[18] 256(2019) DLT 186

pleadings before the learned Arbitral Tribunal, reference to certain facts, without drawing the attention of the learned Arbitral Tribunal to the said facts, especially during the course of argument in a Section 17 Application, cannot amount to full disclosure of the factual position to the learned Arbitral Tribunal, even if it may stop short of fraud as Edelweiss would allege. The learned Arbitral Tribunal cannot be expected, while deciding a Section 17 application, to peruse, cover-to-cover, every document placed before it, without its attention being invited to such documents, or the contents thereof.

49.13 In the e-mail, dated 24th October, 2019, addressed by the lawyer for GIL to the learned Arbitral Tribunal, an oblique reference to the fact that the accounts of GIL were in CDR with lenders, who might choose to challenge any decision, of the learned Arbitral Tribunal, in appeal, is certainly to be found. The particulars of the "lenders" are conspicuously absent, and there is no reference either to the MRA or the TRA, or to the obligations cast on GIL by the covenants thereof. It cannot, therefore, be said that GIL, or GTL, disclosed, to the learned Arbitral Tribunal the fact of securing of the assets of GIL with various secured creditors, a majority being secured in favour of Edelweiss.

49.14 Edelweiss has also sought to allege fraud, and collusion, between GIL and GTL, which are interrelated corporate undertakings. Mr. Mukul Rohatgi, appearing on behalf of GIL, restricted his submissions to disputing the said stand of Edelweiss. Mr. Rohatgi submitted that, in any case, his client was required, by the impugned Order, to disgorge ₹ 440 crores, and it hardly mattered, to his client, whether the payment was required to be made to GTL, or to

Edelweiss. Mr. Rohatgi, however, seriously contests the allegation of fraud and collusion, and submits that there is no justifiable basis for such allegations. On the material on record, I, too, am unwilling to hold that there is any evidence of collusion, between GIL and GTL. GIL and GTL were independent corporate undertakings. The debts, which constituted subject matter of the dispute between them, and, consequently, subject matter of the proceedings before the learned Arbitral Tribunal, date back to a time when GIL was nowhere in the picture. It was only subsequently that GIL stepped into the shoes of CNIL. No case of collusion, between GIL and GTL can, therefore, in my view, be said to have been made out. The submission of Mr. Rohatgi, in this regard, therefore, merits acceptance.

Relief – Can the directions of the learned Arbitral Tribunal be modified, under Section 37 of the 1996 Act?

50. While, in view of the aforesaid discussion, the direction, by the learned Arbitral Tribunal, to GIL, to pay the allegedly acknowledged debt, to GTL, may not be sustainable, the power of the learned Arbitral Tribunal to secure the amount in dispute in the arbitral proceedings, under Section 17(1)(b)(ii) of the 1996 Act, cannot be gainsaid. In view of the fact that the assets of GIL stands secured with its secured creditors, including, principally, Edelweiss, it may not be possible to direct the amounts to be paid to GTL, or be deposited in an Escrow account to be operated by GTL. The question that arises is, therefore, whether, in view of this position, this Court would necessarily have to set aside the directions contained in the impugned Order and, perhaps, remand the matter to the learned Arbitral Tribunal

for a reconsideration, or whether this Court could modify the directions, to the extent of securing the amounts in question otherwise than by way of payment to GIL or deposited in an account to be operated by GIL.

51. That, however, would require this Court to, in exercise of its powers under Section 37(2)(b) of the 1996 Act, modify the directions issued by the learned Arbitral Tribunal. Can it do so?

52. I have not been able to come across any direct authority, on the issue of whether, in exercise of its powers under Section 37, the Court can modify the order, of the learned Arbitral Tribunal, under challenge. The generally accepted position, in law, under Section 34, appears to be that, unlike the situation as it existed under the earlier Arbitration Act, 1940, Section 34 of the 1996 Act does not empower the Court, adjudicating on objections to an arbitral award, to modify the award, though there are some decisions – including ***Prabhat Steel Traders Private Ltd.***[14] – which doubt this proposition. I am not, however, exercising Section 34 jurisdiction. Section 37, unlike Section 34, confers appellate power on the Court. The power of an Appellate Court, classically, includes the power to modify the order appealed against. In the context of the scope of appellate jurisdiction, albeit under sections 99 and 100 of the CPC, the Supreme Court, in ***Tirupati Balaji Developers (P) Ltd. v. State of Bihar***[19], held as under:

[19] **(2004) 5 SCC 1**

"9. In a unified hierarchical judicial system which India has accepted under its Constitution, vertically the Supreme Court is placed over the High Courts. The very fact that the Constitution confers an appellate power on the Supreme Court over the High Courts, certain consequences naturally flow and follow.

Appeal implies in its natural and ordinary meaning the removal of a cause from any inferior court or tribunal to a superior one for the purpose of testing the soundness of decision and proceedings of the inferior court or tribunal. *The superior forum shall have jurisdiction to reverse, confirm, annul or modify the decree or order of the forum appealed against* and in the event of a remand the lower forum shall have to rehear the matter and comply with such directions as may accompany the order of remand.

The appellate jurisdiction inherently carries with it a power to issue corrective directions binding on the forum below and failure on the part of the latter to carry out such directions or show disrespect to or to question the propriety of such directions would — it is obvious —be destructive of the hierarchical system in administration of justice. The seekers of justice and the society would lose faith in both.

****

11. *The very conferral of appellate jurisdiction carries with it certain consequences. Conferral of a principal substantive jurisdiction carries with it, as a necessary concomitant of that power, the power to exercise such other incidental and ancillary powers without which the conferral of the principal power shall be rendered redundant.* As held by their Lordships of the Privy Council in ***Nagendra Nath Dey* v. *Suresh Chandra Dey*** **[AIR 1932 PC 165 : 59 IA 283]** (Sir Dinshaw Mulla speaking for the Bench of five), an appeal is an application by a party to an appellate court asking it to set aside or revise a decision of a subordinate Court. The appeal does not cease to be an appeal though irregular or incompetent. Placing on record his opinion, Subramania Ayyar, J. as a member of the Full Bench (of five Judges) in ***Chappan* v. *Moidin Kutti*** **[ILR (1899) 22 Mad 68 : 8 MLJ 231]** (at ILR p. 80) stated inter alia that appeal is "the removal of a cause or a suit from an inferior to a superior judge or court for re-examination or review". According to *Wharton's Law Lexicon* such removal of a cause or suit is for the purpose of testing the soundness of the decision of the

> inferior court. In consonance with this particular meaning of appeal, "appellate jurisdiction" means "the power of a superior court to review the decision of an inferior court". "Here the two things which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior court and the power on the part of the former to review decisions of the latter. This has been well put by Story: 'The essential criterion of appellate jurisdiction is, that *it revises and corrects the proceedings* in a cause already instituted and does not create that cause. In reference to judicial tribunals an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted and acted upon, by some other court, whose judgment or proceedings are to be revised,' (Section 1761, *Commentaries on the Constitution of the United States*)." (ILR p. 80)"
>
> (Emphasis supplied)

53. Once the legislature has consciously conferred appellate powers, to the High Court, against orders of Arbitral Tribunals, rendered under Section 17 of the 1996 Act, I see no reason, absent any statutory or precedential proscription to the contrary, for not allowing such appellate jurisdiction its full play and effect. No doubt, while exercising jurisdiction, even as an appellate court under Section 37, the High Court would be required to maintain the discipline of the 1996 Act, which requires minimal interference with the decision of the learned Arbitral Tribunal. Where, however, the directions contained in the impugned Order of the learned Arbitral Tribunal are found to be unsustainable on account of the prior rights of the appellant before this Court, to which the attention of the learned Arbitral Tribunal was never invited, interference, in order to protect the legitimate interests of the appellant, is justified. Once a case for interference is found to exist, the appellate jurisdiction of the Court,

under Section 37 would, in my view, also extend to modifying the order of the learned Arbitral Tribunal, in view of the inalienable indicia of appellate jurisdiction, as identified and delineated in ***Tirupati Balaji Developers (P) Ltd.***[19].

Conclusion

54. As a result of the aforesaid discussion, I hold that the present appeal, at the instance of Edelweiss, is maintainable. The objection to maintainability, as advanced by the respondents, is rejected.

55. I do not find any ground to hold that GIL and GTL acted in collusion or that they perpetrated fraud either on the learned Arbitral Tribunal or on this Court. At the same time, I agree with Mr. Sandeep Sethi, learned Senior Counsel, that the learned Arbitral Tribunal was never made specifically aware of the covenants of MRA and the TRA, or the obligations cast on GIL *vis a vis* Edelweiss and other secured creditors, thereunder. In view of the position of law enunciated in ***SBI v. Ericsson***[16], it would not be permissible for the learned Arbitral Tribunal to issue any such direction as would prejudice the rights of such secured creditors, over the assets of GIL.

56. The order, dated 5th May, 2020, passed by the High Court of Bombay in the Suit LD-VC No. 55/20, discloses that, consequent to the issuance of the impugned directions, by the learned Arbitral Tribunal, a settlement had been arrived at, between GIL and GTL, consequent to which ₹ 320 crores had been transferred by GIL to GTL. The order also discloses that this amount was, subsequently,

transferred back by GTL and stands deposited in the TRA, maintained in accordance with the TRA agreement. **The impugned directions of the learned Arbitral Tribunal would, therefore, stand modified to the extent that all payments directed thereunder, would be deposited, not with GIL or in an Escrow account to be maintained by GIL, but in the TRA, created and maintained in accordance with the TRA agreement. The said deposit shall remain subject to further orders to be passed by the learned Arbitral Tribunal.**

57. In passing the above directions, I am exercising my jurisdiction as an appellate court under Section 37(2) of the 1996 Act, as, in my view, appellate jurisdiction would also include, within its fold, the power to modify the directions of the learned Arbitral Tribunal.

58. The present appeal, therefore, stands allowed to the aforesaid extent, with no orders as to costs.

59. In light of the above, I.A. 4322/2020 does not survive for consideration.

C. HARI SHANKAR, J.

NOVEMBER 18, 2020
dsn/r.bararia